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Negotiating the review of the WTO Dispute Settlement Understanding

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NEGOTIATING THE REVIEW OF THE WTO
DISPUTE SETTLEMENT UNDERSTANDING

*To my Parents
Liselotte and Fritz Zimmermann*

NEGOTIATING THE REVIEW OF THE WTO
DISPUTE SETTLEMENT UNDERSTANDING

by
Thomas A. Zimmermann

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Thomas A. Zimmermann

ABSTRACT

On 1 January 1995, the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) entered into force. Since 1998, negotiations to review and reform the DSU have taken place ('DSU review'), without however yielding any result so far. This study proposes to analyse the DSU review negotiations and the proposals submitted so far.

In a first step, the foundations for the discussion are laid with a brief account of the economic, legal and political aspects of the dispute settlement mechanism, its evolution and its working in practice.

In a second step, the study offers an overview and analysis of the negotiating process in its broader context. Additionally, negotiating proposals on stage-specific and horizontal issues of the dispute settlement mechanism are presented and analysed in depth with regard to their background, their contents and their potential implications.

In a third step, the difficulties faced by negotiators in completing the DSU review are explored. Policy recommendations for further negotiations are made and the chances of a future agreement are evaluated.

Finally, the study is also intended to offer a one-stop point of departure for other researchers who wish to explore further specific aspects of the DSU review. To this end, references available on the DSU review exercise have been comprehensively documented.

JEL Classification: F02, F13, K33, K41

Keywords: WTO, Dispute Settlement, DSU Review Negotiations

ACRONYMS

AB	Appellate Body
ABA	American Bar Association
ACP	African, Caribbean and Pacific Group of States
ACTPN	Advisory Committee for Trade Policy & Negotiations
ACWL	Advisory Centre on WTO Law
AD	Anti-Dumping
AER	American Economic Review
AJIL	American Journal of International Law
ASIL	The American Society of International Law
ATC	Agreement on Textiles and Clothing
BCI	Business Confidential Information
bn	billion
BOP	Balance of Payment
CAP	Common Agricultural Policy
CCBE	Council of the Bars and Law Societies of the European Community
CEO	Chief Executive Officer
CMLR	Common Market Law Review
COMTD	Committee on Trade and Development
CRS	Congressional Research Service
DC	Developing Country
DG	Director General

DISC	Domestic International Sales Corporations
DRAMS	Dynamic Random Access Memory Semi-conductors
DS	Dispute Settlement
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EC	European Communities
EEC	European Economic Community
EJIL	European Journal of International Law
ESI	Economic Strategy Institute
ETI	Extraterritorial Income Exclusion Act
EU	European Union
EWG	Europäische Wirtschaftsgemeinschaft
FDI	Foreign Direct Investment
FSC	Foreign Sales Corporations
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GC	General Council
GMO	Genetically Modified Organism
GPA	Agreement on Government Procurement
GSP	Generalised System of Preferences
GULC	Georgetown University Law Centre
ICC	International Chamber of Commerce
ICJ	International Court of Justice
IPR	Intellectual Property Right

Acronyms

ITO	International Trade Organisation
JIEL	Journal of International Economic Law
JWT	Journal of World Trade
LDC	Least-Developed Country
LPIB	Law and Policy in International Business
MAS	Mutually Acceptable Solution / Mutually Agreed Solution
MFN	Most Favoured Nation
MIN	Ministerial Conference
mn	million
MTN	Multilateral Trade Negotiations
NAFTA	North American Free Trade Agreement
NBER	National Bureau of Economic Research
NCPI	New Commercial Policy Instrument
NGO	Non-Governmental Organisation
No	Number
NTB	Non-Tariff Barrier
NTM	Non-Tariff Measure
NYU	New York University
ODA	Official Development Assistance
OECD	Organisation for Economic Co-operation and Development
PPA	Protocol of Provisional Application
PPB	Permanent Panel Body

QR	Quantitative Restriction
RPT	Reasonable Period of Time
SCM	(Agreement on) Subsidies and Countervailing Measures
SCOO	Suspension of Concessions or Other Obligations (noun)
SCOO	Suspend Concessions or Other Obligations (verb)
S&D	Special and Differential Treatment
SPS	(Agreement on the Application of) Sanitary and Phytosanitary Measures
TABD	Trans-Atlantic Business Dialogue
TBR	Trade Barriers Regulation
TN	Trade Negotiations
TNC	Trade Negotiations Committee
TPA	Trade Promotion Authority
TPR	Trade Policy Review
TRIMs	(Agreement on) Trade-Related Investment Measures
TRIPS	(Agreement on) Trade-Related Aspects of Intellectual Property Rights
UCLA	University of California, Los Angeles
UK	United Kingdom
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNICE	Union of Industrial and Employers' Confederations of Europe
UR	Uruguay Round (of Multilateral Trade Negotiations)

Acronyms

US/USA	United States of America
USD	United States Dollar
vol	volume
WTO	World Trade Organisation

1. INTRODUCTION

On 1 January 1995, the Understanding on Rules and Procedures Governing the Settlement of Disputes ('Dispute Settlement Understanding; DSU') entered into force. Since 1998, negotiations to review and reform the DSU have taken place ('DSU review'), without however yielding any result so far. This study is proposed to present the negotiations and the individual reform proposals in their broader context. Moreover, it is aimed at offering an analysis of the DSU review, including the reasons for its lack of success and the prospects of an agreement in the future. By thoroughly documenting the negotiations, the study is also intended to provide a one-stop point of departure for researchers who wish to explore further specific aspects of the DSU review.

1.1 The DSU: Relevance, Evolution, Procedure and Practice

Trade agreements on the basis of reciprocity such as the WTO agreement are instruments used by governments to achieve trade liberalisation. Such international co-operation helps governments to overcome the protectionist bias of trade policy which is rooted in its political economy context. This international exchange of (domestic) political support between governments rests on the idea of a balance of rights and obligations. In order to protect this balance from eroding – eg by trade restrictions in violation of the trade agreement which one government may use to enhance its political support from import-competing interests – trade agreements usually include dispute settlement mechanisms based on diplomatic and/or adjudicative procedures.

The multilateral trade system contains such a dispute settlement mechanism. Since the establishment of the General Agreement on Tariffs and Trade (GATT) of 1947, it has evolved from a barely-codified, largely diplomatic mechanism into a codified procedure combining elements of consultation and adjudication. Since the entry into force of the WTO agreement after the Uruguay Round, the Dispute Settlement Understanding governs the settlement of disputes between WTO members under the agreements which are covered.

In short, its terms provide for a procedure that starts with mandatory consultations as a negotiatory element. If the parties cannot agree to a

settlement during these consultations within a certain period, the complainant may request a panel to review the matter. Panels engage in fact-finding and apply the relevant WTO provisions. Their findings and recommendations are published in a report which either of the parties or both may appeal. The Appellate Body is then to review the issues of law and legal interpretation in the panel report. It can uphold, modify or reverse the panel's findings. Subsequently, the reports are adopted in a quasi-automatic adoption procedure by the Dispute Settlement Body (DSB) where all WTO members are represented by a delegate. 'Quasi-automatic' adoption means that the reports are adopted unless the parties decide by consensus (ie including the party that has prevailed) not to adopt the report. If it has been found that a trade measure is in violation of WTO law, the defendant must bring this measure into compliance with the covered agreements within a reasonable period of time, normally not exceeding 15 months.

If the defendant refuses to comply, the complainant may ask the defendant to enter into negotiations on compensation, or it may seek authorisation from the DSB to suspend concessions or other obligations (SCOO) *vis-à-vis* the defendant in an amount equivalent to the injury suffered. If the adequacy of implementation is disputed, the implementation measures are subject to further review under the DSU. The suspension of concessions or other obligations (SCOO), if authorised, normally takes the form of punitive tariffs on a defined value of the complainant's imports from the defendant.

The DSU has often been praised enthusiastically as the 'crown jewel' of the Uruguay Round Agreements, particularly in its early years. Key innovations with regard to the dispute settlement practice which had evolved under the GATT 1947 are the introduction of an appellate review for panel decisions, strict time-frames for each procedural step and the abolition of the former consensus requirement for the adoption of a panel report which had allowed defendants to block the adoption of adverse rulings. Between 1 January 1995 and 31 December 2004, its provisions have been applied to 324 complaints brought by a variety of members on a wide range of topics. Many observers have interpreted the frequent use of the system as proof of its viability and effectiveness.

1.2 The DSU Review

In 1994, even before the DSU had entered into force, a separate 'Ministerial Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of

Disputes' was adopted. It called upon ministers to 'complete a full review of dispute settlement rules and procedures' within four years after the entry into force of the WTO agreement, and 'to take a decision on the occasion of its first meeting after the completion of the review, whether to continue, modify or terminate such dispute settlement rules and procedures'.

This review, commonly referred to as the 'DSU review', should accordingly have been completed by 1 January 1999, and a decision whether to continue, modify or terminate the procedure should have been taken at the Seattle Ministerial in December 1999. However, negotiators did not complete the DSU review in time. A deadline extension until 31 July 1999 brought no results either, and the subsequent Seattle Ministerial Conference was equally unable to take the required decision. Despite efforts by some delegations to move the DSU review forward in 2000 and 2001, it essentially remained in limbo between the Third Ministerial Conference in Seattle in December 1999 and the Fourth Ministerial Conference in Doha in November 2001.

It was only at the Doha Ministerial that the DSU review came back on to the agenda. The Doha Ministerial Declaration contains an agreement to negotiate on improvements and clarifications of the Dispute Settlement Understanding. An agreement on improvements and clarifications should have been reached not later than May 2003. Negotiations under the Doha mandate took place on a very broad set of issues, based on a variety of proposals with regard to the individual steps in the dispute settlement procedure and horizontal issues such as transparency, third party rights and special and differential treatment of developing countries. Once again, however, negotiators were unable to agree by the May 2003 deadline on the so-called Balás text, a compromise proposal that had been worked out by the chairman of the DSU negotiations, Hungarian Ambassador Péter Balás. A subsequent deadline extension to May 2004 brought no conclusion of the DSU review negotiations either. Currently, the negotiations continue, however, without a new target date.

1.3 Contribution of this Study

Literature on the WTO in general, and its dispute settlement system in particular, has virtually exploded over the last few years. Whereas academic interest was largely limited to the legal discipline during the first years of research in the mid 1990s, scholars from economic and political sciences have increasingly discovered WTO dispute settlement as a rewarding research area in recent years.

Authors from the field of jurisprudence have focused their efforts of analysis mainly on selected jurisprudence developed by panels and (much more so) by the Appellate Body. They have vividly commented on panel and Appellate Body decisions and discussed the consequences of rulings for the WTO, its legal system, and for national policies. Given the enthusiastic welcome which the dispute settlement system under the DSU enjoyed, particularly in its first years, one branch of legal literature also discusses the model character of the DSU for other international organisations. Similarly, the new system has been a key element in the emerging discussion about the constitutionalisation of international (trade) law.

Political scientists and economists have shown increasing interest in the system as well. Empirical literature offers rich insights on the patterns of dispute settlement such as dispute initiation, dispute escalation or dispute outcomes. The findings are increasingly derived from large data sets which become available as usage of the system increases. Often, the studies also include data of dispute settlement under the GATT 1947 and contrast the two systems. Theoretical literature is more interested in exploring the concepts of political economy which underlie the WTO in general and its dispute settlement system in particular. Often, the methodology developed in game theory or the economic analysis of the law is applied in the analysis of the WTO dispute settlement system. Finally, research on the dispute settlement system has become more and more interdisciplinary. Recent years have seen a surge in publications that have been jointly written by authors from the legal field and authors with a background in economics or political science.

Despite the rich literature on the DSU from various disciplinary backgrounds, the DSU review exercise as such is a fairly new research topic.¹ This relative lack of interest in members' proposals and negotiations is rather surprising. This holds in particular if it is judged in the light of the general explosion of literature on the DSU and in the light of the vivid interest that even single adjudicating decisions have attracted – eg the rulings in the *Shrimp-Turtle* or the *Bananas* cases, each of which has become the subject of countless contributions. This over-emphasis on rulings and recommendations, and the lack of interest in the political discussions, is dangerous from both an analytical and a practical perspective. From the analytical point of view, it creates a general perception in which the role of the adjudicating bodies is

¹ One of the first contributions is Van der Borgh (1999). More recent analyses include Petersmann (ed) (2003); Ortino and Petersmann (eds) (2003; see in particular) the first part of the volume); Hauser and Zimmermann (2003).

chronically overstated and where the intergovernmental, member-driven character of the Organisation is largely overlooked. Practically, such a distorted assessment may lead to policy recommendations or actions which are out of tune with political realities and which may endanger the sustainability of the system at large and, by consequence, the stability of the international trade order.

The DSU review exercise, although it has been unsuccessful so far, has brought forth a variety of proposals in the last six years that are supposed to contribute to improvements and clarifications of the mechanism. Not only are these negotiations and proposals of interest in their own right, but they also offer a reflection of the experience that WTO members have gathered in nine years of dispute settlement practice. The discussions are revealing with regard to the general degree of satisfaction of members with the system and they can serve as an indicator for problems or tensions in the mechanism. And finally, the discussions of the DSU review assist us in establishing some hypotheses on the future evolution of the dispute settlement system.

This study pursues the following research objectives:

- Overview and analysis of the negotiating process in its context (Chapter 5);
- In-depth presentation and analysis of the negotiating proposals and their background (Chapters 6 and 7);
- Analysis of the reasons why the negotiations have failed so far (Chapter 8);
- Policy recommendations for future negotiations and an assessment of the chances of a possible agreement (Chapter 9);
- Concluding remarks: Evaluation of the general importance of an agreement on the DSU review (Chapter 10);
- Provision of a one-stop point of departure for other researchers wishing to explore further aspects of the DSU review (References and Chapters 11–15)

The background for the discussions – ie the political, economic, legal and historical context of the DSU – is established in Chapters 2, 3 and 4.

1.4 Research Approach and Plan of the Study

The research approach and the structure of this study have been chosen in the light of the aforementioned purposes. Part I introduces the reader to the concept of multilateral trade dispute settlement and provides the foundations for the discussion of the DSU review. Specifically, Chapter 2 briefly explains the political economy rationale of trade agreements and their enforcement. It subsequently traces the evolution of multilateral trade dispute settlement from the early days of the Havana Charter negotiations through the nearly five-decade-long experience under GATT 1947 up to the entry into force of the DSU. This outline also shows the evolution of a system that has been torn between diverging orientations that still underlie much of the DSU review discussion today: political realism, diplomatic traditions, negotiatory elements and power-orientation on the one hand, and the (often idealistic) endeavour for a rules-based trading-system and the actual role of the existing legal provisions on the other. This historical account thus offers a basis for a more finely-tuned evaluation of the current discussion. It provides yardsticks that help to distinguish between erratic noise and fundamental trends in the current debate. Chapter 2 is based largely on the study of secondary literature.

The historical account ends with the Uruguay Round of multilateral trade negotiations that brought forth the current Dispute Settlement Understanding (DSU) which is presented in detail in Chapter 3. It starts with a brief account of national dispute initiation procedures (eg US Section 301). Although these procedures are, strictly speaking, not part of the multilateral process, both are interlinked in several ways and should be seen in context for a proper understanding. Afterwards, the multilateral elements in the technique of WTO dispute settlement are explained in a stage-oriented approach: consultations, panel stage, appellate review and implementation. 'Horizontal topics' such as third party rights, or special and differential treatment are also presented to the extent necessary for the understanding of the remainder of the study. Chapter 3 is largely based on the study of the treaty text, as well as on pertinent secondary literature and case law.

Chapter 4 completes the first part by summarising the first 10 years of dispute settlement practice in the WTO. Basic statistical data on the use of WTO dispute settlement is presented. It is complemented by a brief discussion of the reception of the dispute settlement mechanism in legal, theoretic and empirical literature.

Now that the stage has been set, Part II offers an in-depth discussion of the review and reform efforts for the DSU that have been undertaken since 1998. Chapter 5 starts by giving an overview of the different stages of the review exercise. For each of the five negotiating periods since 1998, the course of negotiations is laid down, and the main proposals as well as their context (chiefly consisting of high-profile cases undergoing the dispute settlement procedure) are introduced. Due to a lack of secondary sources on this negotiating process, Chapter 5 is based on the study of (i) formal negotiating proposals and protocols, (ii) informal negotiating proposals (where available) and (iii) on extensive use of specialised news sources. Particularly with the earliest (1998–1999) and the most recent (2003–2004) stage of the negotiations, specialised news sources often constitute the only source of publicly available information as negotiations during these stages were mostly informal. Chapter 5 shows how the evolving dispute settlement practice and national experiences increasingly shaped controversial country positions that became more and more difficult to bridge in the course of the negotiating process. It also shows to what extent pending cases repeatedly brought up new issues and prevented members from entering into an agreement.

Chapters 6 and 7 present the individual negotiating proposals. The focus lies on the formal proposals that were submitted during the 2002–2003 negotiations under the Doha mandate. Specifically, Chapter 6 analyses those proposals that are linked to a specific stage of the procedure, ie consultations, the panel stage, appellate review and implementation. To this end, all national submissions have been screened and their elements have been regrouped in stage-specific and issue-specific paragraphs. This allows readers to gain a broad picture of the differing approaches and controversies with regard to specific problems. Chapter 7, in turn, deals with ‘horizontal’ issues that often cannot easily be assigned to a specific stage. These issues include transparency, the treatment of confidential information, third party rights and special and differential treatment of developing countries. For each proposal discussed in these two chapters, information is provided on whether it found sufficient support among the membership to be considered in the Balás text, which should have been the basis for an agreement at the end of May 2003.

In exploring the DSU review proposals, Chapters 6 and 7 are not limited to a discussion of the contents of the country submissions. Rather, both chapters seek to explore the background of major proposals where pertinent information has been available. Such background information may relate to specific national experience with the use of a provision, to a specific motivation or to domestic policy pressures. It also helps us to

identify linkages between issues that are otherwise discussed in isolation. Often, these driving forces behind specific proposals are not discernible on the basis of the diplomatic negotiating documents alone. It is therefore helpful to 'decode' the 'cryptic' official diplomatic documents in order to evaluate and properly understand the proposals. For this purpose, Chapters 6 and 7 also rely on related case law such as panel or Appellate Body reports, scholarly contributions and press reports.

Part III offers conclusions and recommendations based on the preceding analysis. The major reasons for the failure of the negotiations are the subject of Chapter 8. First, the consensus requirement for any amendment to the DSU sets high hurdles and underlines the 'constitutional' character of the DSU. Secondly, major issue-specific divides are identified, particularly those running between the US and the EC, and those running between developed and developing countries. Thirdly, a more fundamental divide seems to emerge. Whereas some proposals would further strengthen the rules-based, adjudication-oriented approach to dispute settlement, other proposals seek to strengthen the diplomatic, negotiatory element. Fourthly, reforming a system in use is subject to several systemic difficulties which are also explained in Chapter 8. Fifthly, there is a general sense of satisfaction with the functioning of the system. Finally, the ability of members to adapt the system in practice to changing circumstances without modifications to the DSU text have reduced the pressure towards a fast conclusion of the DSU review negotiations.

Chapter 9 seeks to draw some policy recommendations from the study. Based on the difficulties and problems that have been identified in Chapter 8, a more modest approach to the DSU review is proposed. A focus on technical improvements appears to be the only way susceptible of consensus. Secondly, the participation of developing countries in the system will have to be improved if their consent to any change is to be secured. Thirdly, and on a more general level, a new balance between the often inefficient political decision-making processes and the relatively efficient adjudication system will have to be found, if tensions in DSU practice are to be reduced and chances for an agreement on the DSU review increased. Fourthly, the insertion of generous transition periods appears to be an essential element to overcome the systemic difficulties in the negotiation process. In addition to these policy recommendations, Chapter 9 also offers a brief outlook on the future course of the discussion. Whereas a conclusion of the negotiations in the short run seems to be unlikely, the conclusion of the DSU review negotiations as part of the Doha final package appears to be a politically feasible option. Chapter 10 offers some final conclusions.

Throughout the study, much space is dedicated to thorough referencing to further sources on the DSU review. These references are intended to enable readers and researchers to use this study as a point of departure for further research efforts. To this end, Chapter 11 in the Annex (Part IV) contains a full synopsis of all the country proposals that have been submitted during the Doha-mandated DSU review. The tabular overview allows readers to locate proposals on any specific issue, and briefly to review an entire country submission. In addition, Part V contains the bibliography of scholarly literature (Chapter 12), a listing of official WTO documents (Chapter 13), press reports (Chapter 14) and other sources (Chapter 15) that were used in this study.

The work on Chapters 2, 3, 4.2, 5.1–5.5, 6, 7, 13 and 15 has been concluded in January 2004. Other chapters and sections have been revised and updated in January 2005.

PART I

**WTO DISPUTE SETTLEMENT:
ECONOMIC RATIONALE, EVOLUTION,
PROCEDURE AND PRACTICE**

2. ECONOMIC RATIONALE AND HISTORICAL EVOLUTION OF GATT/WTO DISPUTE SETTLEMENT

2.1 Economic Considerations

The purpose of this section is to give a condensed overview of the economic rationale of international trade agreements and their enforcement. It is not intended to cover the entire body of literature on the political economy of international trade relations but rather to embed the discussion on the DSU and its review into the underlying political and economic context. A survey of the reception of the DSU in legal, theoretical and empirical literature on the DSU is included in Section 4.2.

2.1.1 The Rationale of International Trade Agreements

It has been argued that one of the few principles on which most economists can agree is the supremacy of free trade over any other international economic regime. Since the early days of Adam Smith and David Ricardo,¹ it is a well-established view that trade liberalisation, even unilateral liberalisation, is to the benefit of the liberalising country. The freedom to transact internationally promotes efficiency in factor allocation and in the economic choices of individuals – be they consumers, workers or investors. Although theoretically plausible doubts have been voiced with regard to the assumptions underlying classical trade theory and its normative interpretation in favour of free trade, the basic recommendation of economists in favour of free trade has not been altered fundamentally.² Despite popular perception to the contrary, gains from trade accrue to an economy regardless of whether

¹ So-called absolute (Adam Smith) or comparative (David Ricardo) advantage; for an introduction into the two concepts, see Dixit and Norman (1980). Extracts from the original sources are available in Overbeek (1999).

² Most economic objections against free trade stem from the consideration of imperfect competition and external effects. One such argument is the infant industry argument which goes back to List (see List (1841) for the original contribution or Kemp (1964) for a more recent analytical approach. A seminal critique of the concept is included in Baldwin (1964)). With regard to imperfect competition, strategic trade theory has questioned the supremacy of the free trade argument for sectors with oligopolistic structures such as high technology. Major contributions include Brander (1995), Brander and Spencer (1985), Krugman (1987), Krugman (1986) and Krugman (1984). For an overview and criticism of the concept, see Kantzenbach, Molitor and Mayer (1994).

or not other economies liberalise their trade as well.³ Given the economic supremacy of open trade, the question emerges why trade is then so often restricted by tariffs and a myriad of non-tariff barriers, and why the opening of markets only occurs on a reciprocal basis.

In the first place, the question arises why trade restrictions are *permissible* at all in 'liberal' economic systems. As a closer analysis reveals, the contractual freedom of citizens is relatively well-protected from government interventions in most constitutional systems if the transaction partner resides within the national boundaries or is a co-national. By contrast, interventions into transactions with non-residents and foreigners do not need to conform to the same standards. This 'dual standard', which could be explained with the embedding of international trade into the larger context of foreign relations and foreign policy, has a long-standing tradition in most major constitutional orders, including in the US and in the (relatively new) European Union legal system.⁴

The mere existence of a dual standard does, however, not yet explain why policy-makers *should* engage in restricting trade. Literature from the field of political economy offers an answer to this question. It is based on the understanding that political actors are utility-maximising individuals, aiming to maximise political support.⁵ In this line of reasoning, interventionist trade policies are a reflection of the distributive character of trade policy, particularly within countries. Whereas trade liberalisation benefits consumers and importers, it harms owners of production factors of import-competing industries, as the goods and services which they produce are under threat of replacement by more competitive imports. The harmful effect can consist of lower factor remuneration or, in the case of factor price rigidity, in unemployment. Problems arise in particular if the production factors concerned are not sufficiently mobile for use in other, more competitive sectors (eg unskilled labour or invested capital).⁶

The distributive dimension of trade policy leads the owners of production factors in import-competing sectors to oppose any market

³ On trade theory, see Dixit and Norman (1980).

⁴ For a critical analysis of the dual standards in the protection of the freedom of transaction, see also Petersmann (1992).

⁵ Important initial contributions to this literature have been made by James M. Buchanan, Gordon Tullock and Geoffrey Brennan. Not surprisingly, this approach has also been applied to international trade relations; see Krueger (1974) for an early contribution.

⁶ The identification of winners and losers of liberalisation goes back to the 'specific factor model' of Jones (1971) and Samuelson (1971).

opening on a political level. Such lobbying is likely to unfold its intended effects as there are few constitutional restraints on politicians with regard to interventions into the international economic freedom of their citizens, as has been pointed out above.⁷ Politicians, in turn, view trade policy as a valuable instrument to increase political support.⁸

Although one might *prima facie* argue that protectionist interests are balanced by the free-trade interests of consumers as well as importers, and that trade has a positive 'net balance' according to welfare theory, some drawbacks of the political market give an advantage to protectionist interests. These include, to name only a few, the uneven distribution of gains and losses from trade and the impact of interest groups;⁹ the frequent political over-representation of protectionist interests, often combined with 'log rolling';¹⁰ and the political attractiveness of redistribution by trade policy due to its intransparency.¹¹ Other major factors are administrative interests in protection and the time-lag between the occurrence of gains and adjustment costs, combined with short political cycles.¹²

One way of overcoming the bias of trade policy decisions in favour of protection, despite the economic benefits of free trade, consists of internationally agreed market access concessions that are based on reciprocity. The producers of country A gain access to the market of country B, whereas the producers of country B, in turn, obtain access to the market of country A. In other words, the exporters of country A can only gain access to the market of country B if the government of country A opens up its own market. Such mutual liberalisation changes the national parallelogram of forces which influence the government's trade policy. Whereas before only importers and the poorly organised consumers had a preference for free trade in the absence of international co-operation, additional lobbying for an open national trade regime comes now from a well-organised export industry that is interested in access to foreign markets. Trade liberalisation therefore usually occurs based on reciprocity. By consequence, reciprocity is first of all a political

⁷ For analyses of trade policies from this perspective, see Bhagwati (1988) Tumlrir (1983), Tumlrir (1984) and Tumlrir (1985).

⁸ See, for instance, the contribution by Grossman and Helpman (1994).

⁹ This problem was first identified by Olson (1965).

¹⁰ See, for instance, Irwin and Kroszner (1996).

¹¹ See, for instance, Tumlrir (1984). See also Roessler (1986), p 472 for an example.

¹² See, for instance, Thomas and Nash (1991), pp 80ff.

concept, because it implies an international exchange of (domestic) political support between governments.¹³

International negotiations with a view to mutual market access improvements can take place bilaterally (ie between two countries), regionally (ie between a limited number of countries only in a regional integration area such as the EC) or globally in a multilateral framework such as the WTO. The WTO system aims at the reduction of trade barriers within reciprocal, mutually advantageous arrangements. It supplies a framework for national trade policy, a forum for multilateral negotiations, and it is in charge of administration, surveillance and dispute resolution. Core substantive elements of the GATT/WTO multilateral trade order are the prohibition of quantitative restrictions (as they are particularly damaging in their economic effects) and the principle of non-discrimination. Non-discrimination basically means that all products should be treated equally regardless of their origin. The non-discrimination principle can further be divided into two 'sub principles': national treatment (ie equal treatment by the importing country of national products and imported products, eg Article III GATT) and most-favoured nation treatment (ie equal treatment by the importing country of goods that originate in different export countries; eg Article I GATT). Although important systemic exceptions apply,¹⁴ the basic rationale of the WTO system is to promote freer trade on the basis of these principles. In so doing, the system also serves a domestic policy function by contributing to a certain restoration of the freedom of contract that is undermined by the dual standard of protection.¹⁵

¹³ For an introduction into the political economy of the world trading system, see Hoekman and Kostecki (2001). There are numerous other contributions such as Bagwell and Staiger (2002), Bagwell, Mavroidis and Staiger (2002), Bagwell and Staiger (2000) and Bagwell and Staiger (1997) focusing on the role of reciprocity and non-discrimination to safeguard terms-of-trade as the key concern of international trade agreements. The role of reciprocity in international trade relations has also been debated in Keohane (1986). On the domestic policy function of international trade agreements, see, for instance, Hauser (1988).

¹⁴ For instance, countries may levy tariffs on imported products despite the national treatment obligation. Further on, MFN treatment is not required for additional concessions granted to partners in regional integration areas or to developing countries. Moreover, the extent to which these principles materialise varies across sectors and countries. Usually, disciplines are less tight with regard to 'sensitive sectors' such as agriculture or with regard to trade in services that was only integrated into the multilateral framework in the Uruguay Round. Finally, multilateral disciplines do not apply to the same extent for developing countries. Senti (2001) offers a comprehensive overview of the WTO system.

¹⁵ Tumlrir (1983, p 80) called international economic treaties the 'second line of national constitutional entrenchment', whereas Roessler (1986) sees the principles of the GATT as 'substitutes for constitutional norms'. The discussion on the domestic policy function of international trade rules was particularly vivid in the mid 1980s. For an overview, see the special edition of *Aussenwirtschaft* (vol 41 (1986), nos 2 and 3) to the memory of Jan Tumlrir, including the contributions of Petersmann (1986) and Roessler (1986). See also the contributions of Tumlrir (1983), Tumlrir (1984), Tumlrir (1985) and Hauser (1988).

2.1.2 The Enforcement of Obligations Under the Multilateral Trade Agreements

Despite the enhanced political feasibility of trade liberalisation in the multilateral, reciprocity-based WTO environment, incentives for support-maximising politicians to circumvent the WTO principles continue to exist. As Roessler (1986, p 474) notes: '(i)t is generally assumed that international obligations are burdens which States accept for the sole purpose of obtaining the corresponding rights and that States play games in which each attempts to assume a minimum of obligations and obtain a maximum of rights.' We can therefore expect governments to wish to keep other markets open in order to maximise political support from their export industry, while they will do their best to spurn WTO disciplines where this is opportune to accommodate the interests of politically influential import-competing sectors. Enforcement tools are therefore required to protect what Bagwell, Mavroidis and Staiger (2000, p 61) call governments' 'property rights over market access commitments'. The need for such an enforcement device is particularly important from the vantage point of small or medium-sized countries that cannot enforce the obligations on larger trading partners by means of unilateral punishment, given their limited political or economic weight.

Such enforcement tools therefore serve different purposes:

- to provide a system of incentives to deter governments from taking measures which are inconsistent with their internationally agreed obligations;
- to offer governments an instrument to challenge actions by other members that nullify or impair the benefits which accrue to them under the negotiated trade agreements, whether due to a violation of WTO rules or not;
- to provide for an orderly management of trade disputes by preventing the escalation or spread of uncontrolled 'trade wars' which would emerge from unilateral action or arbitrary retaliation.

Since WTO law belongs to the realm of public international law, there are limits on enforcement. As Bello (1996) notes, the WTO has 'no jailhouse, no bail bondsmen, no blue helmets, no truncheons, no tear gas'. In other words, compliance is voluntary and depends upon the

acceptance of the rules and sufficient political will of members. In such a setting, several enforcement options are generally thinkable.

One alternative is the so-called diplomatic protection mechanism as laid down in the Dispute Settlement Understanding (see Chapter 3 for a detailed description) which is the topic of this study. An economic actor (typically an exporter of country C) who holds that country D violates its obligations under WTO law, needs to inform its government about the trade barrier and convince it that action is necessary.¹⁶ The government of the exporting country C then decides on whether or not to avail itself of the dispute settlement mechanism provided under the DSU.

Alternatively, WTO rules could also be anchored in national constitutional systems and enforced domestically.¹⁷ One such mode of enforcement would consist of granting WTO principles direct effect. It would allow private economic actors to directly refer to WTO provisions in national courts when challenging national trade barriers. This would contribute to grassroots enforcement, usually by the importers in their home country. So far, however, only a few isolated provisions, for instance in the TRIPS agreement or in the Plurilateral Agreement on Government Procurement, grant economic actors such a right to domestic enforcement. The US and the EC explicitly excluded direct effect through their domestic legislation when they implemented the WTO agreements. Although the legal value of this exclusion is unclear, it shows the reluctance of countries to grant direct effect.¹⁸ Since the unilateral granting of direct effect to WTO provisions would create political problems of reciprocity (as enforcement could be more rigid in some countries than in others), it has been suggested that major players in the world trade system should conclude a reciprocal agreement to this effect.¹⁹ Even in this case, however, difficulties from a reciprocity point of view might emerge out of differences in the application or interpretation of the rules between the members.

Another option which is in principle based on the idea of direct effect is thinkable. A producer, an exporter, a consumer or an importer would be directly entitled to lodge a complaint against national trade measures at the WTO which would then investigate the case. Compared with complaints before national courts, this option, however, still has the

¹⁶ Theoretically, such an initiative could also emanate from an importer or consumer in the defendant country.

¹⁷ See, for instance, Petersmann (1986) who made such calls.

¹⁸ An excellent overview of the discussion on direct effect is Cottier and Schefer (1998).

¹⁹ This idea was brought up by Tumlrir (1985a).

shortcoming that implementation would continue to depend on a country's good will, because national courts would not be involved. Again, many governments have strong feelings against granting private parties standing at the WTO.²⁰

Finally, the WTO could pursue violations 'ex officio' through an official prosecutor. Efforts by Uruguay in the 1960s to make the organisation the prosecutor of its own law have, however, failed.²¹

As this overview of enforcement options shows, the DSU is currently the only mechanism available to secure compliance with WTO provisions. Given the role of the WTO for establishing open trade on the one hand, and the importance of having an enforcement mechanism to protect the market access commitments under the WTO on the other, the DSU assumes a crucial role in the international economic system.

2.2 Historical Evolution

2.2.1 Dispute Settlement Under the Havana Charter

2.2.1.1 Dispute Settlement Provisions

The fathers of the post-war international economic architecture originally planned to entrust the International Trade Organisation (ITO) with the regulation of world trade. This organisation would have been established based on the 'Havana Charter for the International Trade Organisation' of 1947.²² It never entered into force, mainly due to resistance from the US Congress. Chapter VIII of the ITO Charter contained specific provisions governing the 'settlement of differences'. As the core concepts discussed during ITO negotiations on dispute settlement were to impact the coming evolution of dispute settlement under the GATT and later under the WTO, they provide a useful background for the understanding of dispute settlement in international trade matters and shall therefore briefly be introduced at this stage.

Members undertake in the Havana Charter not to have recourse, in relation to other members and to the ITO, to other procedures than those

²⁰ This issue is discussed in Mavroidis et al (1998). On the multilateral level, standing of private parties already exists for international investment disputes before the International Centre for Settlement of Investment Disputes (ICSID) which provides individual legal protection.

²¹ See Section 2.2.2.4.

²² The Havana Charter is contained in the Appendix to Wilcox (1949), pp 227–327. Chapter VIII on the 'Settlement of Differences' is available at pp 305–08.

laid down in the Charter or to unilateral economic measures.²³ Members are called upon to 'give sympathetic consideration' to 'written representations or proposals' by other members who consider that benefits accruing to them are nullified or impaired, be it as a consequence of (a) a breach of an obligation under the Charter; (b) the application of measures not in conflict with the Charter; or (c) the existence of any other situation. According to the Charter, members can resolve such disputes either between themselves or through arbitration which would only be binding on the parties to the dispute but not to other Members or the ITO. Disputing parties shall inform the ITO of the outcome.²⁴

In case such consultations are unsuccessful, any member may refer the matter to the Executive Board²⁵ of the ITO which shall investigate the matter promptly. The executive board shall then take one of the following steps: (a) decide that the matter does not call for any action; (b) recommend further consultation to the Members; (c) refer the matter to arbitration upon terms to be agreed between the executive board and the members concerned; (d) in the case of a breach of rules, request the Member concerned to take the necessary action to conform to the Charter; (e) for other instances of nullification or impairment to make recommendations that assist the members concerned and contribute to a satisfactory adjustment. If the Executive Board considers that action under (d) and (e) is not likely to be effective in time to prevent serious injury, it may: 'release the Member or Members affected from obligations or the grant of concessions ... to the extent and upon such conditions ... as it considers appropriate and compensatory, having regard to the benefit which has been nullified or impaired.'

The Executive Board has the authority to bring any matter referred to it before the Conference at any time during the consideration of the matter.²⁶ The Executive Board is even obliged to refer actions, decisions or recommendations it has made to the Conference for a review if it is requested to do so by a member. As a kind of 'political appellate review mechanism', the Conference's task is then to confirm, modify or reverse such action, decision or recommendation. The investigations and further actions to be carried out by the conference are the same as those available to the Executive Board. It may also release the member concerned from

²³ Article 92 Havana Charter.

²⁴ Article 93 Havana Charter.

²⁵ Provisions on the Executive Board are included in Articles 78–81 Havana Charter.

²⁶ Article 94 Havana Charter; provisions on the Conference are included in Articles 74–77 Havana Charter.

obligations or concessions to other members to an appropriate and compensatory extent in view of the benefits that have been nullified or impaired.²⁷

The legal aspects of conference decisions which prejudice the interests of any member (including those regarding the suspension of concessions or obligations) are subject to review by the International Court of Justice (ICJ) upon request from a member. The ITO is bound by the opinion of the ICJ and shall modify its decision if required.²⁸ Ultimately, a member to whom the application of obligations or concessions has been suspended is free to withdraw from the ITO.²⁹

Summarising the dispute settlement provisions of the ITO, a procedure of several steps was foreseen. Based on the obligation to abstain from unilateral action, each member that considered its benefits nullified or impaired would first have had to seek a solution through bilateral consultations or bilaterally agreed arbitration. If this first step did not yield satisfactory results, complaints would have been investigated by the Executive Board. In a third step, such rulings could then be 'appealed' to the plenary Conference. As a fourth step, they could be appealed to the ICJ as far as issues of law were concerned. Remedies included the suspension of concessions or obligations and, ultimately, a withdrawal from the ITO. The statute thus contains a combination of instruments, starting with negotiatory and political elements at the beginning of the procedure and gradually moving towards more judicial procedures, including the review of legal issues before the ICJ.

As the negotiating history of the Havana Charter reveals, this procedure was rather controversial, in particular with regard to the appeal before the ICJ. First drafts favoured by powerful countries such as the US and the United Kingdom (UK) would have allowed appeals only 'if the Conference consents', whereas smaller traders such as the Netherlands, Belgium and France objected. They feared that the legal rulings by the Executive Board and the Conference might well be political rather than objective. The final solution – ITO requests to the ICJ for *advisory opinions on legal questions only* – was therefore a compromise between the two positions.³⁰

²⁷ Article 95 Havana Charter.

²⁸ Article 96 Havana Charter.

²⁹ Article 95.4 Havana Charter.

³⁰ See Hudec (1990), Chapter 3.

2.2.1.2 *Core Concept: Balance of Rights and Obligations*

The Havana Charter's language on the settlement of differences makes it clear that the core concept is the preservation of the balance of rights (or benefits) and obligations. Commonly referred to as 'reciprocity', this concept was central to US trade treaties concluded during the inter-war period. (The importance of reciprocity from a political economy perspective is explained in Section 2.1 above.) The rationale is that tariff concessions, even combined with legal commitments such as a prohibition of quantitative restrictions, cannot guarantee that commercial opportunities are not nullified by other (for instance domestic) measures. As it would be impossible to prohibit all potential restrictions, and as governments would not be prepared to circumscribe their freedom in all related policy areas, the broad notion of nullification or impairment was established as a legitimate ground for requesting consultations. The potential instances of nullification or impairment of benefits were defined in a very broad manner, stretching beyond outright violations and including also other situations (eg economic depression). Combined with a termination clause that would allow a party to withdraw from the agreement, this instrument was considered sufficiently protective of reciprocity. To fit within this framework, legal obligations had to be treated as flexible commitments, pliable enough to lead to mutually acceptable solutions. Moreover, acceptance of these provisions was, to a large extent, supported by confidence in the organisation and a strong sense of community among the draftsmen.³¹

The dispute settlement rules contained in Chapter VIII of the Havana Charter never became effective, as the ITO never entered into force.³²

2.2.2 Dispute Settlement Under the GATT 1947

Although the ITO was never implemented, the General Agreement on Tariffs and Trade (GATT, now GATT 1947) was put into force by the 'Protocol of Provisional Application' (PPA) on 1 January 1948. It was a temporary trade agreement that had been negotiated in parallel with

³¹ See Hudec (1990), pp 23ff and pp 45ff.

³² See Hudec (1990), pp 59–61. Chapters 1–6 of Hudec (1990) offer a comprehensive insight into the background and negotiating history of the ITO as well as on the nature and central elements of the ITO legal system. For shorter overviews on dispute settlement provisions and the Havana Charter, see also Wilcox (1949), pp 159ff, Jackson (1990), pp 9–17, Jackson (1997), pp 35ff, Hudec (1998), pp 102–03.

the ITO Charter as an interim agreement. The GATT contained most of the ITO's trade policy rules and a preliminary version of the nullification and impairment clause. However, the GATT did not contain any reference to arbitration or review by the ICJ. The GATT was also very limited in terms of legal and organisational structure. Institutionally, reference was made only to the CONTRACTING PARTIES that, if spelled in capital letters, designated the collective group of contracting parties when performing official decision-making functions. These features made the GATT a mere 'trade agreement'. Put into force by a Protocol of *Provisional Application*, and along with an agreement that countries would bind themselves only 'to the fullest extent not inconsistent with existing legislation', these characteristics were meant to facilitate respectively help evade the process of ratification in the signatory countries.

The rudimentary dispute settlement provisions were contained in its Articles XXII and XXIII (current version):

Article XXII

Consultation

1. Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement.
2. The CONTRACTING PARTIES may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.

Article XXIII

Nullification or Impairment

1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any

objective of the Agreement is being impeded as the result of

- (a) the failure of another contracting party to carry out its obligations under this Agreement, or
- (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
- (c) the existence of any other situation,

the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1 (c) of this Article, the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. The CONTRACTING PARTIES may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate inter-governmental organization in cases where they consider such consultation necessary. If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may

authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary³ to the CONTRACTING PARTIES of its intention to withdraw from this Agreement and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him.

³ By the decision of 23 March 1965, the Contracting Parties changed the title of the head of the GATT secretariat from 'Executive Secretary' to 'Director General'.

Similarly to the provisions contained in the ITO Charter, the rules provided for a combination of a general system of negotiation and dispute settlement. Again, the core concept was the 'nullification or impairment' of benefits, as the headline of Article XXIII confirms. We now turn to how these provisions worked and developed in practice.³³

2.2.2.1 *Chairman Rulings in 1948*

Dispute settlement activity began early and on a relatively tentative and provisional basis. When the first dispute arose over a Benelux complaint against Cuban consular taxes, and consultations yielded no results, the Dutch delegation requested a ruling from the chair on whether the Most Favoured Nation (MFN) obligation laid down in Article I GATT applied to consular taxes. The chairman ruled 'yes' without any further discussion, and Cuba later reported that it had removed the discriminatory tax. The chairman's personal prestige had served as a source of collective authority. Yet, the practice of chairmen's rulings was

³³ On the basic design of Articles XXII and XXIII, their position in the GATT architecture, and the Protocol of Provisional Application, see also Jackson (2001), pp 181ff, Jackson (1997), pp 35–41, Petersmann (1997), pp 70ff, Jackson (1990), pp 9–17 and, more specifically on dispute settlement, pp 59ff, as well as Hudec (1990), pp 49–58.

short-lived. From the second session on, which was also held in 1948, legal complaints were referred to subsidiary Working Groups.³⁴

2.2.2.2 Use of Working Parties Between 1949 and 1951

Working groups (or working parties) are negotiating bodies that are appointed to do work which cannot be done efficiently in the formal setting of a plenary meeting. They offer the advantage of a limited number of participants, sufficient time to consider an issue in depth, and informal face-to-face bargaining where possibilities can be explored without formal commitments to a position. This model was now also used in dispute settlement.

Initially, working parties were composed of the complainant, the defendant and neutral members. In a first case on Brazilian taxes, disagreement on some issues was resolved, whereas it persisted on others. On these, the report simply catalogued the opposing arguments. A later case involving working parties had already a stronger orientation towards adjudication. In a Chilean complaint about an Australian subsidy, the working party was formed of the main parties and three neutral members. The neutral members concluded that Chile's complaint was valid and the secretariat prepared a draft report in the name of the Working Party which stated and explained the majority's conclusions. Australia later filed a separate memorandum stating its own position, whereas the report of the three neutral members contained a decision on a legal issue. Whereas the Australian delegation began to lobby among the Contracting Parties for the rejection of the report, others started a counter-lobby stressing the importance of not subjecting such decisions to political review. The report was subsequently approved. This procedure constituted some middle ground. It was factually third party adjudication but the formal structure was still a working party with full membership of the principal parties.³⁵

2.2.2.3 Use of Panels After 1952

Dispute settlement activity continued to increase. In 1952, the chairman of the Contracting Parties suggested dealing with several disputes within a "single working group". A few days later, the term 'panel' appeared for the first time to designate this working group. Two characteristics in particular differentiated it from prior working groups. First, none of

³⁴ See Hudec (1998), pp 104–05 and, in more detail, Hudec (1990), pp 75ff for a summary of the earliest dispute experience in the GATT.

³⁵ See Hudec (1990), pp 78ff.

the parties to the various disputes were panel members, and none of the major powers (whose presence was usually required to assure political acceptance of the outcome) sat on the panel. Secondly, the use of the term 'panel' in GATT parlance was reminiscent of the term 'panel of experts' which usually designated impartial and non-political decisions by individuals acting in their own capacity. Whereas the panel chair was named individually, the remaining panel members were named by country. Along with this change went a modification of the working procedures. Disputing parties would be heard by the panel, but the panel would draft its report in their absence. The draft report would be discussed with the parties and a final report would be prepared for submission to the Contracting Parties. The decision-making process lay clearly with the panels. As the new procedures were established, the secretariat influence in the process increased.³⁶

The practice remained largely the same in 1953 and 1954, except that all panel members were now named as individuals (and not as representatives of their countries), ie acting in their own capacity. The success of the panel system motivated the Danish delegation in 1955 to request the extension of the panel procedure to other areas such as balance-of-payments restrictions. Most members, however, opposed such extension. As Hudec (1990, p 92) states: 'The rejection of the Danish proposal ... proved ... that the panel procedure itself could never really escape the basic political constraints which had dictated GATT's limited legal design in the first place. Now that the panel procedure had proved itself effective, its own range of operations would have to be controlled in turn.'

From 1948 to 1959, GATT dealt with 53 legal complaints. Hudec (1990, p 200) identified the larger lines in the first 10 years of GATT dispute settlement as the result of a general desire to create more effective international regulation of national trade policies on the one hand and the absence of effective political support for meaningful international regulation on the other. As a consequence, the system relied mainly on the force of organised normative pressures and the use of law as a diplomatic instrument. The fact that the GATT had remained a fairly small and cohesive organisation contributed to this success. Members shared the same basic trade policy goals of lowering trade barriers and were often represented by the same 'veterans' who had negotiated the Agreement, making the GATT of this decade resemble a 'club'.³⁷

³⁶ See Hudec (1998), pp 107ff and, in more detail, Hudec (1990), pp 85–90. This initial period of GATT dispute settlement is also briefly discussed in Jackson (1990), p 61, and Jackson (1997), p 115. See also Stewart (1993), p 2676 (with further references) on the establishment of the panel practice.

³⁷ See Hudec (1993), p 11.

2.2.2.4 *Breakdown of Dispute Settlement Activity
in the 1960s*

Other amendments to the dispute settlement provisions included the permission of third party participation in 1958,³⁸ and the adoption of differential procedures for disputes involving developing countries in 1966, the so-called '1966 Procedures'.³⁹ Despite these procedural changes, the use of GATT dispute settlement plummeted shortly after the panel procedure had established itself in practice as a successful instrument for the management of trade disputes. Not a single formal legal complaint was filed from mid-1963 until 1969.

This drop in popularity has been explained with an increased use of sophisticated non-tariff trade barriers difficult to tackle under the GATT, the unequal bargaining position of developing as opposed to developed countries and the increasing recourse to unilateral retaliation – particularly in transatlantic trade disputes – which highlighted both material and procedural shortcomings of the mechanism.⁴⁰ The decline in dispute activity went along with a change in the attitude of governments. Basically, they challenged the fairness of the procedure, arguing that there was no longer reciprocity of legal obligation. In this climate, complaints were regarded as unfriendly confrontations poisoning the atmosphere. Of the six disputes between the Dillon Round (1960–1962) and the Kennedy Round (1963–1967), two became larger confrontations: a US complaint against the EC (known as the 'Chicken War') where the US was finally authorised to retaliate against the EC, and a Uruguayan complaint against 15 developed countries.⁴¹

The Uruguayan complaint consisted of 15 separate complaints that listed almost all of the defendants' non-tariff barriers against Uruguayan exports without distinguishing between illegal and legal measures (in total, 562 restrictions). The legal basis was an assertion of non-violation nullification and impairment with Uruguay presumably getting less than it was giving. With this dispute that was not specifically targeted at a particular measure, Uruguay wished to highlight the problems of developing countries' eroding trade position. Uruguay prosecuted it very passively, and its broad scope (being directed against 15 countries) avoided a confrontation with any specific developed country. Overall

³⁸ See Stewart (1993), pp 2676–77, with further references.

³⁹ GATT, Procedures Under Article XXIII, Decision of 5 April 1966, reprinted in GATT, BISD, 14th Supplement; for details, see Stewart (1993), pp 2678–79.

⁴⁰ See Stewart (1993), pp 2679–80, with further references.

⁴¹ See Hudec (1990), pp 235ff.

three decisions were issued in a case which was intended to make GATT become the prosecutor of its own law: In the first, the panel declined to entertain any theory of non-violation nullification and impairment, as Uruguay did not support its claim with precise information and arguments. However, the panel issued recommendations with regard to those claims that the defendants conceded were illegal. Although there was some compliance, Uruguay asked the panel to meet again and study whether retaliation should be authorised in particular cases and, if so, how much. Again, the panel refused and argued that it was up to Uruguay to decide whether it was satisfied, and to propose specific retaliation if it was not. Uruguay declined, and the second panel only reviewed the progress made. In 1964, Uruguay returned again and asked the panel to press for compliance. It asked for legal rulings on all items (even those not covered in the recommendations of the first panel) and tabled a new list of restrictions which should have been treated as well. Again, the panel declined to follow the request and merely reviewed, once more, the progress to date. The effort to make GATT assume the prosecutor's role had failed.⁴² Yet, the *Uruguayan Recourse* made a significant contribution to GATT dispute settlement. It established the practice of regarding breaches of obligations (ie violations) as *prima facie* instances of nullification or impairment, unless the defendant can prove the opposite.⁴³

After the case had been concluded, Uruguay and Brazil submitted proposals for a renegotiation of Article XXIII. They sought three major reforms: 1) improved technical assistance by the Secretariat; 2) third-party prosecution of developing country complaints; 3) improved remedies for cases of non-compliance (financial compensation, collective retaliation). The only outcome of this effort was a 1966 decision of the Contracting Parties setting out new mediation procedures and other minor modifications and clarifications.⁴⁴ As Hudec (1990, p 243) argues, both the Uruguayan complaints and the efforts to renegotiate Article XXIII: 'tended to identify the disputes procedure with radical developing country demands, and with a level of vigorous prosecution and enforcement that was simply out of keeping with traditional "flexibility" of GATT law. The dangers of this rampant legalism brought forth an equally excessive counterreaction from the developed country leadership in the form of a concerted effort to defend and rationalise a policy of avoiding GATT's legal machinery.'

⁴² See Hudec (1990), pp 240–42.

⁴³ *Uruguayan Recourse to Article XXIII*; BISD 11S/95. See also Jackson (2001), pp 182ff and Jackson (1998c), p 67.

⁴⁴ BISD, 14th Supplement (1966), p 18.

The 'Chicken war' and the Uruguayan Recourse to Article XXIII are also symptomatic for two more fundamental developments that had changed the GATT during the decade and were responsible to a large extent for the climate change which had occurred. One development was the consolidation of the European Community which took over the GATT chairs of its six smaller and generally law-abiding nation states and which claimed the right to major deviations from the multilateral trade order in the area of agriculture and trade preferences with former colonies, preferring a more negotiated, diplomatic approach to dispute settlement while pushing GATT law into the background. The second development was a more than three-fold increase in the number of developing country members which completely shifted the balance between developed and developing countries. Developing countries sought an increase in legal obligations of GATT's developed Members by making enforcement stricter while at the same time intensifying their demands for greater freedom from GATT obligations for themselves. With support from the US for the EC position, 'anti-legalism' was on the rise in the GATT and the system relied largely on negotiations.⁴⁵

2.2.2.5 Re-establishment of the GATT Legal System in the 1970s

At the beginning of the 1970s, the United States left its anti-legalist approach and sought a stronger enforcement of its rights under the trade agreements. As the 'club' atmosphere with shared objectives such as a general propensity towards free trade was gone, new legal rules had become necessary for trade relations between over 80 contentious Members.

The major element in this rebuilding effort was the conclusion of the Tokyo-Round 'NTM Codes' dealing with non-tariff measures. The perceived need for reform also included dispute settlement. The discussions, however, proved to be difficult: While Japan and the EC were strongly opposed to any substantive change, the US advocated reforms, supported by Switzerland and the Nordic countries. Some of these reforms already foreshadowed later discussions. For instance, the US called for an automatic right to a panel, while other countries warned that: 'if panel rulings declaring violations became routinely available, regardless of the nature of the violation, there would be a large number of instances in which governments would not comply with panel rulings.' Other issues discussed were, *inter alia*, notification requirements for trade measures, a codification of the 'customary practice' of dispute settlement,

⁴⁵ On GATT dispute settlement in the 1960s, see Hudec (1998), pp 109ff, Hudec (1993), pp 12ff and, in more detail, Hudec (1990), pp 235–50.

the role of the Director-General, the submission of the descriptive part of panel reports to disputing parties with a view of furthering mutually acceptable solutions, and surveillance issues.⁴⁶

As a result of these negotiations, the 'Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance' was adopted on 28 November 1979.⁴⁷ It also included an annex with the 'Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement (Article XXIII:2)'. This new understanding primarily aimed at the codification of prior practices and at improvements of the panel process, setting forth procedures for panel composition and timetables. In addition to the understanding, further provisions on dispute settlement were laid down in the so-called 'Non-Tariff Measure Codes' (NTM Codes) that the Tokyo Round brought about.⁴⁸ The Tokyo Round result received a mixed welcome.⁴⁹ Whereas the legal basis for settlements had been strengthened, the system would continue to rely very heavily on the ability of Contracting Parties to reach political solutions. Developing countries were also disappointed as their concerns had not been taken fully into account. Generally, the improvements were regarded as steps towards the still unfinished business of legal reform. Yet, dispute settlement activities awoke again.⁵⁰

2.2.2.6 Increased Dispute Activity in the 1980s

As dispute settlement activity increased, the GATT secretariat created a legal office in order to give more attention to legal issues in dispute settlement.⁵¹ Given the success of the system, more legally difficult and politically sensitive lawsuits were brought to Geneva, establishing a basis for the development of a GATT case law. The increasing number of sensitive disputes also led to an increasing number of 'legal failures'. In sensitive issues, governments made use of their powers to veto the establishment of panels, the adoption of reports, and the authorisation of countermeasures. Later, implementation in several high-profile cases was held hostage to the outcome of the Uruguay Round negotiations.

⁴⁶ See Stewart (ed) (1993), pp 2687–95, with further references.

⁴⁷ GATT Document no L/4907, reprinted in GATT, BISD, 26th Supplement (1979), pp 210ff.

⁴⁸ For an overview, see Stewart (ed) (1993), pp 2699–703, with further references.

⁴⁹ On the Tokyo Round and its results in general, see Winham (1986) or Jackson, Louis and Matsushita (1984).

⁵⁰ For a brief summary on dispute settlement activity in the 1970s, see Hudec (1998), pp 110–13, Hudec (1993), p 13 and Hudec (1999), pp 6ff and pp 29–57. On the political and economic background, see pp 19–28. See also Stewart (1993), p 2706, with further references.

⁵¹ Hudec (1999), p 7.

The emerging enforcement problems led the US (which suffered from a massive trade deficit) to seek unilateral solutions, leading to a reinforcement of Section 301 of its trade legislation. Given the success that these unilateral policies brought for the US, complaints about the inadequacy of GATT law muted, and fears were mounting that the US who used to support the GATT legal system would reverse its policy and oppose reform.⁵²

2.2.2.7 Uruguay Round Negotiations (I): The 1989 Improvements

Deepening economic problems towards the beginning of the 1980s such as the debt crisis, a worsening recession and a high US trade deficit put the GATT system under considerable stress, with protectionist pressures on the rise.⁵³ In order to overcome the paralysis of the GATT system, Secretary General Arthur Dunkel asked a group of non-governmental experts – the so-called ‘Leutwiler Group’ named after its chairman – ‘to identify the fundamental causes of the problems afflicting the international trading system and to consider how these may be overcome during the remainder of the 1980s’.⁵⁴ The report also dealt with dispute settlement. The members of the group were particularly concerned about delays in the procedure, the lack of legal expertise in the system, the lack of third party intervention against bilateral ‘cartel-like’ schemes and the weak implementation. Its proposition no 12 on dispute settlement stated:⁵⁵

In support of improved and strengthened rules, GATT’s dispute settlement procedures should be reinforced by building up a permanent roster of non-governmental experts to examine disputes, and by improving the implementation of panel recommendations. Third parties should use their rights to complain when bilateral agreements break the rules.

⁵² For a brief summary on dispute settlement activity in the 1980s, see Hudec (1993), pp 14ff. A more detailed account is available on pp 129–77 (1980–1985) and on pp 199–269 (1985–1989). The political and economic background is set out on pp 103–16.

⁵³ For details, see Croome (1999), pp 1–14.

⁵⁴ The report was published under the title ‘Trade Policies for a Better Future’ (Dunkel (1987)).

⁵⁵ See Dunkel (1987), pp 14ff. (Recommendation no 12 of the Leutwiler Group).

Dispute settlement accordingly also became a topic in the run-up for the Punta del Este Ministerial Meeting. The relevant passage of the Ministerial Declaration reads as follows:⁵⁶

Dispute Settlement

In order to ensure prompt and effective resolution of disputes to the benefit of all contracting parties, negotiations shall aim to improve and strengthen the rules and the procedures of the dispute settlement process, while recognizing the contribution that would be made by more effective and enforceable GATT rules and disciplines. Negotiations shall include the development of adequate arrangements for overseeing and monitoring of the procedures that would facilitate compliance with adopted recommendations.

The Ministerial Declaration thus recognised two avenues of improvement. One was the improvement of the dispute settlement process as such. The second avenue, which was much wider in scope, was the elaboration of clearer rules in the substantive agreements.

The first meeting of the Negotiation Group on Dispute Settlement on 6 April 1987⁵⁷ made it clear that there were conflicting views between groups of countries regarding the nature of the dispute settlement system. Some countries such as the EC and Japan emphasised that GATT did not provide for judicial settlements of international trade disputes. They perceived the dispute settlement process as being primarily of a conciliatory nature, calling for negotiated settlements and compromises. However, a second group of countries pointed to the: 'contractual nature of GATT law, to the ambiguous meaning of many general GATT provisions, and to the law-creating element in any interpretative choice of one among other possible interpretations of GATT rules by a competent GATT dispute settlement body.' These countries did not view a rule-oriented approach enabling legally binding interpretations as a hindrance to conciliatory settlements. This point of view was promoted mainly by the US, but support also came from Canada and some other countries. An intermediate position was taken by a third group of

⁵⁶ Ministerial Declaration of 20 September 1986, Part I, Section D, Subsection entitled 'Dispute Settlement'; Document MIN(86)/6 of 20 September 1986.

⁵⁷ See Document MTN.GNG/NG13/1 of 10 April 1987, no 9.

countries which favoured a 'sequential approach' that would make use of various techniques including consultations, mediation, conciliation and arbitration, which were not mutually exclusive.⁵⁸

When the Trade Negotiations Committee convened in Montreal for the Mid-Term Review of the Uruguay Round (UR) of multilateral trade negotiations (MTN) in December 1988, the negotiations group had progressed well enough that trade ministers recommended approval of the proposed procedural reforms. These included a notification requirement for mutually agreed solutions, time-lines for consultations, alternative dispute settlement procedures (good offices, conciliation, mediation, arbitration), panel and working party procedures (including establishment of a panel, terms of references, panel composition, multiple complaints, third party rights, time-lines for panel work), adoption of panel reports, technical assistance and surveillance of implementation. The text was later adopted and implemented on a trial basis from 1 May 1989.⁵⁹

This relatively fast progress may be attributed to two factors. First, divergences of opinion on procedural issues were relatively limited. Secondly, and probably more importantly, the negotiations were likely spurred by parallel developments in the United States where Congress had enacted the Omnibus Trade and Competitiveness Act of 1988 which included significant amendments to Section 301 of the Trade Act of 1974. Through the introduction of 'Special 301' and 'Super 301', the protection of US intellectual property rights and market access for US exports respectively were considerably enhanced. The move was widely criticised as a US departure away from multilateralism towards aggressive unilateralism. Consequently, 'Section 301' and its relationship with multilateral dispute settlement also became a discussion topic in the multilateral forum and in academic literature.⁶⁰ The EC, however, did not manage to insert a provision into the 1989 Improvements according to which domestic legislation and actions to settle disputes should be in full conformity with GATT and the dispute settlement procedures. Furthermore, the adoption of panel reports remained subject to consensus.⁶¹

⁵⁸ See Document MTN.GNG/NG13/1 of 10 April 1987, no 6. See also the comments by Stewart (1993), pp 272ff and Croome (1999), p 125.

⁵⁹ See Stewart (ed) (1993), pp 2754–59.

⁶⁰ See, for instance, Shaffer (2001), Blázquez Navarro (2000), Chang (2000), Hudec (2000), Bhala and Kennedy (1998), Lash (1998), Schaefer (1998), O'Neal Taylor (1997), Puckett and Reynolds (1996), Schede (1996), Bayard and Elliott (1994), Mavroidis (1993), Sykes (1992), as well as Bhagwati and Patrick (1990).

⁶¹ See Stewart (ed) (1993), pp 2760ff and 2777ff; see also Croome (1999), pp 127ff and pp 224ff.

2.2.2.8 Uruguay Round Negotiations (II): The DSU

In the subsequent negotiations from 1989 to 1990, discussions focused on the following topics: the adoption and implementation of panel reports, the introduction of an interim review stage during panel procedures and an appellate review mechanism, provisions for compensation and retaliation in case of non-compliance, treatment of non-violation complaints, arbitration, involvement of least-developed countries in disputes, third party rights, the selection of panellists and negotiations on dispute settlement provisions in other negotiating groups.⁶² Of these issues, the blockage of panel reports (due to the consensus requirement) was the most important issue, with the US favouring automatic adoption and the EC wishing to maintain the consensus rule. Of similar importance was the EC's insistence (backed by many other countries) that parties bring their trade legislation into line with multilateral obligations, and that they refrain from unilateral measures incompatible with the multilateral approach to dispute settlement. These voices were directed at the US 'Section 301' legislation.⁶³

While negotiations went on, new problems arose due to the non-implementation of five adopted panel reports by the members of the so-called 'Quad'. These governments had linked implementation of the reports with the results of the Round.⁶⁴ Whereas only one panel had been active in late 1990, there were 11 active panels in November 1991. Still, the commitment to refrain from unilateral actions and the automaticity of the procedure were among the most important issues, being linked to one another. Agreement was ultimately reached on 19 December 1991 by the negotiations group. The consensus rule was turned upside down for consensus was now required *not* to establish a panel and *not* to adopt a report. This went hand in hand with the provision sought by the EC and many others which obliged countries to refrain from unilateral action. However, in order to secure the agreement of the US, the requirement that domestic legislation be brought into line with the proposed new rules was left out. Members also agreed on the establishment of a single 'Dispute Settlement Body'.⁶⁵

⁶² See Stewart (ed) (1993), pp 2764ff and Croome (1999), p 126 and pp 225ff.

⁶³ See Croome (1999), p 227.

⁶⁴ These are the EC (oilseeds (US); anti-dumping duties on products assembled in the EC from imported parts and components (Japan)), the US (Section 337 of US Tariff Act (EC)), Japan (agricultural imports (US)) and Canada (ice cream and yoghurt (US)). See Stewart (ed) (1993), pp 2788ff, and in particular footnote 878.

⁶⁵ See Croome (1999), pp 277ff and Stewart (1993), pp 2788ff.

2.3 Summary: The Evolution of GATT/WTO Dispute Settlement

Summarising the evolution of multilateral trade dispute settlement between the earliest days of the GATT and ITO drafts on the one hand and the new DSU procedure under the WTO on the other, one finds a gradual and very cautious evolution of the dispute settlement system from a rather diplomacy-oriented towards a more adjudication-oriented mechanism. That evolution, however, has not been free of setbacks.

Initially, the failure of the ambitious ITO with its ultimately legal procedures highlighted an unwillingness of governments fully to subordinate their trade policies to an international organisation in general and to third party adjudication in particular as both remained outside their control. Sovereignty concerns and power considerations stood in the way of the establishment of a powerful organisation with strong and explicit adjudicating powers. Consequently, parties chose a cautious, pragmatic and rather gradual evolution from political negotiations towards third party adjudication. The strong prevalence of negotiatory and diplomatic instruments with characteristic vagueness and rather implicit than explicit statements in earlier stages needs, however, not be interpreted as a sign of weakness. At least initially, the early GATT was more like a 'club' of like-minded nations and country representatives that basically followed common goals of freer trade. The system lived from normative pressures and strong political will. Moreover, one may assume that all parties were aware of the crucial role that safeguarding reciprocity in trade relations would have for the stability of the system and that, therefore, negotiated outcomes might be closer to the objective of safeguarding a 'balance of rights and obligations' than the outcome of pure adjudication.

The foundations of the system were shaken with the consolidation of the EC that was anxious to build a politically coherent block and a counterweight to the so-far dominant US, as well as with the entry of many developing countries in the 1960s. The latter believed more in political interventionism and import-substitution policies than in the benefits of free trade. As the objectives of the multilateral trading system had become less obvious, an erosion of GATT discipline took place which also affected dispute settlement activity that consequently broke down. It was only restored by the addition of new treaty text, first (albeit incompletely and on a fragmented basis) in the Tokyo Round and later (in a consolidated, single-package approach) in the Uruguay Round.

Throughout this evolution, one constant feature seems to be that WTO dispute settlement evolved positively whenever there was political

convergence between members on the substance of the multilateral trade provisions and their mutually beneficial nature. It was blocked, however, whenever members pursued strongly diverging views on what the world trade order should look like, or when important countries or country groups were dissatisfied with the outcome achieved by the mechanism. This finding is in line with the basic rationale of reciprocity that underlies the logic of international trade agreements and (through the nullification and impairment clause) dispute settlement practice.

A second common denominator seems to be a certain pendulous movement. Periods of law-abidance and legal enthusiasm alternated with periods of resignation and a dominance of political power-play. Efforts to reform or further develop the mechanism were the answer of members to the latter, sometimes with certain delays. Strong rules on dispute settlement in the ITO had raised fears of sovereignty loss in the US and contributed to the demise of the ITO. Later on, the rapid and positive evolution of the dispute settlement system in the 1950s caused an anti-legalist backlash in the 1960s with governments growing tired of having their hands tied by a too rigid system as they wished to adapt to new political realities. However, whenever the system threatened to degenerate into insignificance, members reunited their efforts to bring it back on track. Yet, more radical efforts to strengthen the system (such as those undertaken by Denmark in the 1950s or that by Uruguay in the 1960s) never materialised. Clearly, governments always wished to keep their hands on the system.

In sum, the evolution reflects the concerns of a membership that is torn between its desire for an effective, rules-based dispute settlement system and its desire for trade policy flexibility. We will see that many of these elements are still present today in the DSU review discussions.

3. THE TECHNIQUE OF WTO DISPUTE SETTLEMENT UNDER THE DSU

According to Article III.3 WTO agreement, dispute settlement is one of the key functions of the WTO.¹ The rules are laid down in the Dispute Settlement Understanding (DSU).² In this chapter, the various stages in the technique of WTO Dispute Settlement will be presented to the extent that is necessary to allow readers to understand the nature and scope of the reform proposals discussed in Part II. As a detailed discussion of the procedure and its reception in literature is beyond the scope of this study, readers are invited to consult the rich body of literature on this topic.³ Certain aspects will also be considered more deeply in the context of the proposals on the DSU review in Chapters 6 and 7.

3.1 The (National) Dispute Initiation Stage

The initiation stage of WTO dispute settlement is governed by national law. Although it is not part of the DSU, the question of dispute initiation is useful for the overall positioning and understanding of the procedure in a larger trade policy context.

One feature of WTO dispute settlement is that only governments have access to WTO dispute settlement in terms of dispute initiation. Private

¹ The legal texts which resulted from the Uruguay Round are available at http://www.wto.org/english/docs_e/legal_e/legal_e.htm and in WTO (ed) (1999). For general presentations of and comments on the Uruguay Round and its results, see, for instance, Senti (2001), Senti (2000), Senti and Conlan (1998), Trebilcock and Howse (1999), Krueger (ed) (1998), McDonald (1998), Thürer and Kux (1996), Cottier (ed) (1995), Hauser and Schanz (1995), Schott (1994) and Senti (1994).

² Annex 2 to the Marrakesh Agreement Establishing the World Trade Organisation ('WTO agreement').

³ The text of the WTO Dispute Settlement Understanding (as laid down in Annex 2 to the Marrakesh Agreement Establishing the World Trade Organisation) is available via the internet (http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf) as well as in WTO (ed) (2002b) and WTO (ed) (1999). For an introduction and a discussion of the system, see, for instance, Pescatore, Stewart, Dwyer and Prado (looseleaf), Gallagher (2002) (for a detailed guide to the procedure), Jackson (2001) (for an introduction), Davey (2002b), Goh and Witbreuk (2001), Feliciano and van den Bossche (2001), Hoekman and Kostecki (2001) (Chapter 3), Palmetier and Mavroidis (1999), Trachtman (1999), Trebilcock and Howse (1999) (Chapter 3 for an introductory overview), Cameron and Campbell (1998), Jackson (1998a), Jackson (1997), Chapter 4 (pp 107–37), Petersmann (1997) and Petersmann (1997a).

economic actors such as exporters, importers and consumers do not have the right to bring complaints. More generally, private parties do not have standing at the WTO as has been pointed out above.⁴ Although this is a common feature of intergovernmental organisations, it is nevertheless worth noting, because these private actors are those mostly affected by trade measures. The initiation of a dispute under the DSU therefore still requires a government decision.⁵

Probably the best-known national trade policy instrument is Section 301 of the Trade Act of 1974 in the United States which does also include the initiation procedure for US complainants. It has been the topic of much research.⁶ The EC established its own procedure with the so-called New Commercial Policy Instrument (NCPI)⁷ in 1984 which was replaced by the Trade Barriers Regulation (TBR) in 1994 and which co-exists with other procedures for government-initiated disputes.⁸ These national initiation instruments differ in many aspects, including the type of contestable foreign actions, admitted categories of complainants, the effects of foreign trade barriers required to make action necessary, allocation of the authority for decision on whether to lodge a complaint and the availability of judicial review.

Given the importance of this stage in the mechanism, it comes as a surprise, at least at first sight, that only a few countries have published procedures that allow companies or industries to request their governments to initiate a dispute settlement procedure. Many countries do not have publicly known rules, and the question on whether to initiate

⁴ On the role and position of private parties in the WTO system in general and in its dispute settlement mechanism in particular, see, for instance, Charnovitz (2001) (focusing on the individual rights perspective), Esty (1998) (with a focus on NGOs), Schleyer (1998) (on allowing private parties to raise claims before the WTO), Charnovitz (1996), Shell (1996), Lukas (1995) and Abbott (1992).

⁵ For a brief introduction into the concept of national dispute initiation, see, for instance, Jackson (1998), pp 127ff.

⁶ On Section 301 and its relationship to the WTO system, see Shaffer (2001) (including reference to the EC's TBR), Blázquez Navarro (2000), Chang (2000) (focusing on the panel decision on US Section 301), Hudec (1999), Bhala and Kennedy (1998) (Chapter 10), Lash (1998), Jackson (1997), pp 127–133 (briefly), Schaefer (1998), O'Neal Taylor (1997), Puckett and Reynolds (1996), Schede (1996) (focusing on the relationship with Article 23 DSU concerning the priority of the multilateral dispute settlement procedure), Bayard and Elliott (1994), Mavroidis (1993), Sykes (1992), as well as Bhagwati and Patrick (1990).

⁷ Council Regulation no 2641/84; OJ L252 of 20 September 1984. For an analysis of the NCPI, see Mavroidis (1993).

⁸ OJ L349 of 31 December 1994, last modified by Council Regulation no 356/95; OJ L41 of 23 February 1995. The Trade Barriers Regulation and its operation have been analysed in Shaffer (2001) (including reference to US Section 301), Bronckers and McNelis (2001), Sundberg and Vermulst (2001), MacLean (1999), McNelis (1999), Van Eeckhaute (1999), Mavroidis and Zdouc (1998), Shaffer (1998), McNelis (1998) and Bronckers (1997).

a dispute rests primarily in the hands of the government which has considerable discretion to decide. At a second glance, however, this fact may be interpreted as a clear sign that governments are unwilling to have their trade policy flexibility reduced by laying their trade policy agenda into the hands of the private sector. Moreover, it may underline the foreign policy context in which trade policy takes place.

3.2 The Consultation Stage

Once the government of the complainant country 'C' has decided to bring a trade dispute to the WTO, the provisions of the Dispute Settlement Understanding (DSU; Annex 2 to the WTO Agreement) govern the proceedings.

The first stage of any dispute settlement procedure consists of mandatory consultations between the complainant (C) and the defendant (D). C who alleges that D has violated WTO provisions, thereby nullifying or impairing C's benefits under the agreements, has the right to ask D to enter into consultations in order to find a mutually acceptable solution to the problem.⁹ Such consultation requests shall be made in writing. They shall contain the reasons for the request, and identify the measures and the legal basis for the complaint.¹⁰ Consultation requests shall be notified to the Dispute Settlement Body.¹¹

D is normally obliged to answer within 10 days after receipt of the consultation requests, and it shall enter into such consultations within 30 days.¹² The consultations are confidential.¹³ However, a third party which considers that it has a 'substantial trade interest' in the consultations may notify the consulting Members and the DSB of its interest. It shall be joined in the consultations if the other parties agree to the claim of substantial interest. If the third party is not allowed to join the consultations, it may request its own consultations.¹⁴

⁹ For the area of trade in goods, see Article XXII GATT. The other annexes to the WTO agreement contain similar provisions regarding consultation requests.

¹⁰ Article 4.4 DSU.

¹¹ In principle, the Dispute Settlement Body is identical with the General Council; Article IV.3 of the WTO agreement: 'The General Council shall convene as appropriate to discharge the responsibilities of the Dispute Settlement Body provided for in the Dispute Settlement Understanding. The Dispute Settlement Body may have its own chairman and shall establish such rules of procedure as it deems necessary for the fulfilment of those responsibilities.'

¹² Article 4.3 DSU. Shorter time-frames apply in the case of perishable goods; see Article 4.8 and Article 4.9 DSU.

¹³ Article 3.6 DSU.

¹⁴ Article 4.11 DSU.

If a mutually acceptable solution for the dispute has been found, it shall be notified to the DSB.¹⁵ The DSU has a clear preference for mutually acceptable solutions over the solution of disputes through panel procedures.¹⁶ It prescribes, however, that such mutually agreed solutions shall be consistent with the multilateral trade agreements, and that they shall not nullify or impair the benefits accruing to any member under these agreements.¹⁷

If D refuses to enter into consultations, or if no mutually acceptable solution can be found within 60 days, C has the right to ask the DSB to establish a panel.¹⁸

3.3 The Panel Stage

Panel requests must be formulated in writing. They must contain details on whether consultations have been held, which measures are the subject of the complaint and which rules of the multilateral trade regime are concerned.¹⁹ Following a request a panel is usually established at the second meeting of the DSB where the panel request appears on the DSB's agenda, unless the DSB decides by consensus not to establish the panel.²⁰ In other words, the time between the first and the second DSB meeting with the request on the agenda may be used for further consultations. By the time of the second meeting, agenda control shifts to the complainant as the latter would have to consent not to establish a panel. The reverse consensus rule for the establishment of panels is a new feature of dispute settlement in the WTO, as has been pointed out in the preceding chapter.²¹

Panels typically consist of three panellists, unless the parties agree to a panel composed of five panellists.²² Panellists are usually governmental or non-governmental trade experts, including officials, diplomats or

¹⁵ Article 3.6 DSU.

¹⁶ '... The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. ...' (Article 3.7 DSU).

¹⁷ Article 3.5 DSU.

¹⁸ Article 4.3 and 4.7 DSU. Exceptionally, longer time-frames may apply in cases involving developing country defendants; see Article 12.10 DSU.

¹⁹ Article 6.2 DSU.

²⁰ Article 6.1 DSU.

²¹ The reversed consensus is one of the main innovations of the new Dispute Settlement Regime compared to its predecessor. Under the old GATT, panels were established only by consensus, ie if the member which was the subject of the complaint agreed to the establishment of a panel.

²² Article 8.5 DSU.

academics. They are appointed *ad hoc*, although the WTO maintains a roster from which panellists can be chosen.²³ Citizens of members whose governments are involved in a specific dispute shall not serve on that panel.²⁴ The secretariat shall propose nominations for the panel which shall be accepted by the parties. Such nominations shall not be opposed by Members, except for 'compelling reasons'. If the parties cannot agree on the panellists, the Director General of the WTO is called upon to determine the composition of the panel.²⁵ When acting on a panel, panellists shall serve in their individual capacities and independent from instructions of their governments.²⁶ Further rules for observance by panellists are contained in specific rules of conduct.²⁷ In disputes involving developing countries, at least one panellist from a developing country shall be included if the developing country members so request.²⁸

The panel's task is to assist the DSB in making rulings and recommendations under the covered agreements. In practice, this usually means the establishment of a report on whether or not a trade measure constitutes a violation of multilateral trade rules.²⁹ To this purpose, a panel shall make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.

Panel procedures include written submissions³⁰ of the parties to the disputes and panel hearings. Two so-called 'substantive meetings' normally take place before the interim report (see below) is issued, and another meeting takes place after the interim report is issued. If necessary, more meetings can be arranged.³¹ The panel enjoys a right to seek

²³ Article 8.4 DSU.

²⁴ Article 8.2 DSU. For details on the composition of panels, see Article 8 DSU and Leier (1999), p 205 and p 208, with further references. As far as the panellists are concerned, additional rules are laid down in the 'Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes' of 11 December 1996; WT/DSB/RC/1.

²⁵ Article 8.7 DSU.

²⁶ Article 8.9 DSU.

²⁷ Annex II (Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes) to the Working Procedures for Appellate Review, most recent version of 1 May 2003; WT/AB/WP/7.

²⁸ Article 8.10 DSU.

²⁹ Article 7 DSU on the 'terms of reference' of the panel reads as follows: 'Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel: "To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)."'

³⁰ Article 12.6 DSU.

information and technical advice from anyone it deems appropriate.³² Panels may also request advisory reports from expert review groups.³³ Parties' submissions to the panel shall be treated as confidential but shall be made available to the parties to the dispute. Disputing parties have a right to disclose statements of their own to the public. Members may also ask disputing parties to provide a non-confidential summary of the information contained in written submissions which may be disclosed to the public. However, there is no time frame for the fulfilment of this obligation.³⁴

Even during the panel stage, both parties are encouraged to continue their search for a mutually acceptable solution. To this end, panels should also consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.³⁵ Moreover, the panel has the authority to suspend its procedures for a maximum of 12 months upon the complainant's request in order to allow for further bilateral negotiations. If the work of a panel has been suspended for more than 12 months, its authority lapses.³⁶

As during consultations, third parties enjoy specific rights during the panel stage. Having notified their substantial interest in a matter to the DSB, they shall be heard by panel and their submissions shall be reflected in the panel report. They also receive the submissions of the disputing parties to the first meeting of the panel and they may request their own panel under the DSU.³⁷ Specific rules apply for cases involving multiple complainants.³⁸

If no mutually acceptable solution can be agreed upon during the panel stage, the panel shall issue its final report within six or, under exceptional circumstances, within nine months.³⁹ The deliberations of the panel are confidential, and the reports are drafted without the presence of the parties. Opinions expressed by individual panellists in the report are anonymous.⁴⁰ Before the final report, the panel issues an interim report which is circulated to the parties to the dispute.⁴¹ If this interim report is

³¹ See Article 12 DSU and the Working Procedures laid down in Appendix 3 of the DSU for an overview of the panel procedure.

³² Article 13.1 DSU.

³³ Article 13.2 DSU and Appendix 4 of the DSU.

³⁴ Article 18.2 DSU.

³⁵ Article 11 DSU.

³⁶ Article 12.12 DSU.

³⁷ Article 10 DSU.

³⁸ Article 9 DSU.

³⁹ Articles 12.7 –12.9 DSU.

⁴⁰ Article 14 DSU.

not commented by the parties, it constitutes at the same time the final report to the DSB.

Where the panel has found a trade measure to be in violation of WTO law, it recommends that the party concerned bring its trade regime into conformity with its WTO obligations. The panel may also suggest possible ways of implementation. This, however, is rarely done. Panel findings and recommendations may not add to the rights and obligations of members.⁴² Where no party notifies its intention to appeal findings of the panel report, the DSB adopts the panel report, unless it decides by consensus – ie with the vote of the prevailing party – not to adopt the report (reversed consensus).⁴³

3.4 The Appellate Review Stage

Both the complainant and the defendant have the right to appeal a panel report. Third parties do not have the right to appeal a report but they may make written submissions to and be heard by the Appellate Body in the course of an appeal if they had previously notified the DSB of their substantial interest during the panel stage.⁴⁴

The responsibility for the appeal lies with a permanent organ, the Appellate Body. It consists of seven persons, three of whom (ie a division⁴⁵) work on any case.⁴⁶ Appellate Body members shall have demonstrated expertise in law, international trade and the subject matter of the multilateral trade agreements. They are appointed for a four-year term which is renewable once.⁴⁷ They shall be unaffiliated with any government.⁴⁸ In contrast to the panel stage, there is nothing in the DSU which would prevent an Appellate Body member from serving on a case involving his home country. Further rules for observance by Appellate Body members are contained in the rules of conduct.⁴⁹

⁴¹ Article 15 DSU.

⁴² Article 19 DSU.

⁴³ Article 16.4 DSU. Again, the reversed consensus rule constitutes a major change from the old GATT, where the losing party had to agree to the panel's judgment before it could become legally binding.

⁴⁴ Article 17.4 DSU. See also Rules 24 and 27 of the Working Procedures for Appellate Review (Document WT/AB/WP/7) for further provisions on third party participation.

⁴⁵ Rules 6 and 7 of the Working Procedures for Appellate Review, Document WT/AB/WP/7.

⁴⁶ Article 17.1 DSU.

⁴⁷ Article 17.2 DSU.

⁴⁸ Article 17.3 DSU.

⁴⁹ Annex II (Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes) to the Working Procedures for Appellate Review, most recent version of 1 May 2003, Document WT/AB/WP/7.

An appeal is limited to issues of law and legal interpretations in the panel report.⁵⁰ This stage of dispute settlement does not include another fact-finding process, nor does the DSU currently grant the Appellate Body the authority to remand an issue to the panel for further fact-finding. In order to appeal a panel report, a country notifies its intention to appeal to the DSB before adoption of the panel report⁵¹ and submits a notice of appeal. It shall include, *inter alia*, a brief statement on the nature of the appeal including the alleged errors in the issues of law covered in the panel report and the legal interpretations adopted by the panel.⁵² Within 10 days after filing the notice of appeal, the appellant has to file its appellant's submission with more specific information.⁵³ Within 25 days after the notice of appeal has been filed, the appellee may present its submission.⁵⁴ Thirty days after the filing of the notice of appeal, an oral hearing shall take place.⁵⁵ Parties' submissions to the Appellate Body shall be treated as confidential but shall be made available to the parties to the dispute. Disputing parties have a right to disclose statements of their own to the public. Members may also ask a disputing party to provide a non-confidential summary of the information contained in its written submission which may be disclosed to the public. However, there is no time-frame for the fulfilment of this obligation.⁵⁶ Further rules for appellate review are included in the Working Procedures for Appellate Review.⁵⁷

The Appellate Body has 60 days (following the appellant's notification of its decision to appeal a panel report) to finish its report for the DSB.⁵⁸ In its report, the Appellate Body can uphold, modify or reverse the panel's findings.⁵⁹ As is the case with panel reports, the deliberations of the Appellate Body shall be confidential and the reports shall be drafted without the presence of the parties.⁶⁰ Opinions expressed in the Appellate

⁵⁰ Article 17.6 DSU.

⁵¹ Article 17.4 DSU.

⁵² Rule 20 of the Working Procedures for Appellate Review, Document WT/AB/WP/7.

⁵³ Rule 21 of the Working Procedures for Appellate Review, Document WT/AB/WP/7.

⁵⁴ Rule 22 of the Working Procedures for Appellate Review, Document WT/AB/WP/7.

⁵⁵ Rule 27 of the Working Procedures for Appellate Review, Document WT/AB/WP/7.

⁵⁶ Article 18.2 DSU.

⁵⁷ Most recent version of 1 May 2003, Document WT/AB/WP/7.

⁵⁸ Under exceptional circumstances, the Appellate Body has 90 days to finish its report. In cases involving perishable goods, it should aim at accelerating the proceedings; see Article 17.5 DSU in connection with Article 4.9 DSU; see also Annex I to the Working Procedures for Appellate Review, Document WT/AB/WP/7.

⁵⁹ Article 17.13 DSU.

⁶⁰ Article 17.10 DSU.

Body report shall be anonymous.⁶¹ Appellate Body decisions shall be taken by consensus wherever possible; otherwise, decisions shall be made by majority votes.⁶² Collegiality plays a vital role in the work of the Appellate Body.⁶³

Once the report has been finished and circulated to the members, it shall be adopted by the DSB and unconditionally accepted by the parties within 30 days from the date of circulation unless the DSB decides by consensus (ie with the agreement of the prevailing party) not to adopt it.⁶⁴ Like panel reports, Appellate Body reports may not add to or diminish the rights and obligations of members.⁶⁵

Overall, the total duration from the date of the establishment of the panel until the date when the Appellate Body report is considered for adoption shall not exceed nine months in cases where no appeal is made, or 12 months in cases with appeal.⁶⁶

3.5 The Implementation Stage

Where a panel and/or the Appellate Body have reached the conclusion that a trade measure of a country is not compatible with its obligations under any of the multilateral trade agreements, it recommends that the member state shall bring its measure into conformity with the WTO agreement. Although the panel or Appellate Body are free to make suggestions on how this conformity can be reached,⁶⁷ they have used this authority only rarely as they obviously do not wish to interfere in member governments' policies.⁶⁸

The member whose trade measure has been found to be in violation of WTO obligations shall communicate to the DSB how it plans to

⁶¹ Article 17.11 DSU.

⁶² Rule 3 of the Working Procedures for Appellate Review, Document WT/AB/WP/7.

⁶³ Rule 4 of the Working Procedures for Appellate Review, Document WT/AB/WP/7.

⁶⁴ Article 17.14 DSU.

⁶⁵ Article 19.2 DSU.

⁶⁶ Article 20 DSU.

⁶⁷ Article 19 DSU.

⁶⁸ A noteworthy exception is the compliance panel report (on compliance panels, see below) in the *Bananas* case (WT/DS27). It had found that the EC did not sufficiently implement the DSB recommendations from the first panel and Appellate Body reports. In this report, the panel made use of its right to make suggestions on how a banana import regime in compliance with WTO rules could look '... after one implementation attempt has proven to be at least partly unsuccessful ...'; see WT/DS27/RW/ECU at para 6.154.

implement the DSB recommendations. As a general rule, the recommendations and rulings should be implemented immediately, or within a 'reasonable period of time' (RPT). If the parties to the dispute cannot agree on a RPT, it will be determined by binding arbitration within 90 days after the adoption of the recommendations and rulings. It should not exceed 15 months, but it can be adjusted upwards or downwards in exceptional circumstances.⁶⁹ The DSU requires that the DSB keeps the implementation of adopted recommendations under surveillance and that the implementation of rulings is placed on the DSB agenda after six months following the determination of the reasonable period of time, unless the DSB decides otherwise. The dispute remains on the agenda until it is resolved. During this time, the defendant party is required to submit written status reports to the DSB 10 days prior to each meeting with information on the progress in the implementation of the recommendations and rulings.⁷⁰

If a dispute arises between the parties on whether implementation has been sufficient, or whether it has taken place at all, 'such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel'. In the practice of this 'Recourse to Article 21.5 DSU', the so-called 'sequencing problem' has emerged, as the rules of the DSU on the implementation stage are not perfectly clear, giving rise to different interpretations: Whereas the 'compliance panel' provided for in Article 21.5 DSU shall have 90 days to issue a decision on the existence or consistency of the measures taken by the defendant to comply with a ruling, Article 22.2 DSU gives the complainant a right to request an authorisation from the DSB to suspend the application to the defendant of concessions or other obligations (SCOO). The DSB shall grant this authorisation within 30 days of the expiry of the RPT or decide by consensus to reject this request according to Article 22.6 DSU. The incompatibility between the time-frames in Article 21.5 and Article 22.2/22.6 DSU has led to disagreements on whether a compliance panel procedure is needed at all, and on whether the complainant foregoes its right to SCOO if he awaits a panel ruling (which will likely be available only after the 30-day time-frame in Article 22.6 has expired). This issue will be subject to further discussion in Section 6.4.3 on the DSU Review.

Where no implementation occurs, the DSU provides for compensation or for the suspension of concessions or other obligations (SCOO) as vehicles of temporary relief in case of non-compliance. However, neither

⁶⁹ Article 21.3 DSU.

⁷⁰ Article 21.6 DSU.

compensation nor the SCOO is preferred to full implementation.⁷¹ Upon request from the complainant(s), the defendant shall enter into negotiations with a view to developing mutually acceptable compensation. Where no satisfactory compensation has been agreed within twenty days after the date of expiry of the RPT, the complainant(s) may request authorisation from the DSB to SCOO *vis-à-vis* the defendant.⁷²

According to the rules on 'cross-retaliation' as laid down in Article 22.3 DSU, the general principle is that such suspension should occur in the same sector(s) as that where the violation has occurred. If this is not deemed practicable or effective by the complainant, the complainant may seek redress in other sectors of the same agreement, or even under other agreements, provided that the circumstances are serious enough.⁷³ The level of the SCOO shall be equivalent to the level of nullification or impairment suffered by the complainant.⁷⁴ If the defendant objects to the level of suspension proposed, or if it claims that the rules on cross-retaliation have not been followed, the matter shall be referred to binding arbitration. This arbitration shall be completed within 60 days after the RPT has lapsed. Where available, the original panel shall act as arbitrator. Concessions may not be suspended while the arbitration is in course.⁷⁵ Once the SCOO is in place, it shall be applied only until the defendant has removed the WTO-inconsistent measures or until a mutually satisfactory solution is reached.

Findings of non-compliance with regard to implementation cannot be made unilaterally by the complainant. They must be made using the multilateral rules and procedures, as Article 23 DSU stresses. The objective of this provision is to avoid unilateral determinations of non-compliance (such as those under US Section 301) which lead to unilateral trade measures by individual member countries and which would seriously undermine the credibility of the multilateral trade regime and its 'monopoly of power' with regard to determinations of compliance and non-compliance under the covered agreements.

⁷¹ Article 22.1 DSU.

⁷² Article 22.2 DSU.

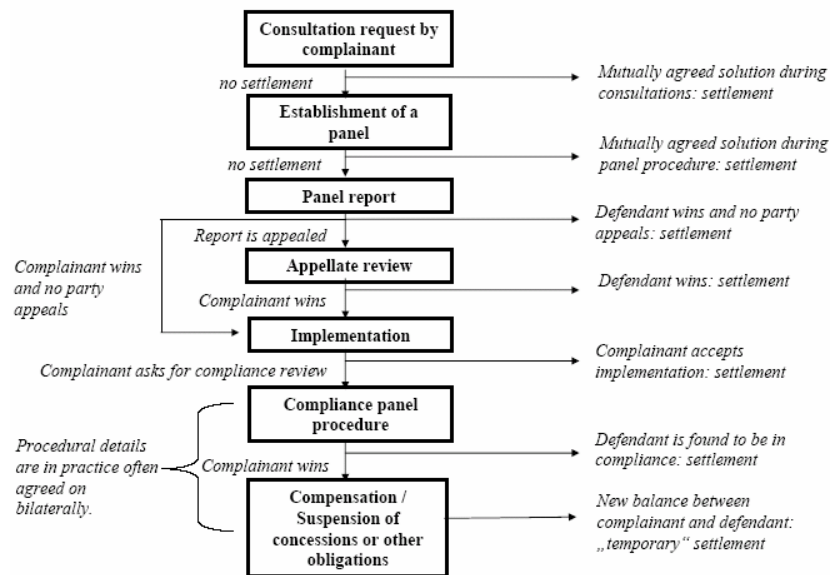
⁷³ Article 22.3 DSU.

⁷⁴ Article 22.4 DSU.

⁷⁵ Articles 22.6 and 22.7 DSU.

Table 3.1 graphically summarises the main elements of the dispute settlement procedure.

Table 3.1: Simplified Overview of the Dispute Settlement Procedure under the DSU



3.6 Alternative Ways of Dispute Settlement

Besides the procedures laid down in Section 3.3, the DSU provides rules for alternative means of dispute settlement. These are good offices, conciliation and mediation (Article 5 DSU), or arbitration (Article 25 DSU). As they have neither been frequently used in DSU practice nor been among the central topics of the DSU review, we will abstain from offering a detailed account on these procedures.

3.7 Summarising the DSU Procedure: A 'Middle Ground' Between Negotiation and Adjudication

Having reviewed the dispute settlement procedure as it is laid down in the Dispute Settlement Understanding (and the preceding national initialisation procedures), it becomes clear that the dispute settlement rules of today combine both political and legal elements and that they constitute something of a 'middle ground' between political/diplomatic negotiations and third party adjudication. The DSU thus combines both

the rule-oriented and the diplomatic, negotiation-oriented traditions of its evolution.

The political, negotiation-oriented elements include, *inter alia*, government filters in dispute initiation, the lack of any multilateral *ex-officio* prosecution, mandatory confidential consultations, negotiating elements during the panel stage (establishment of panels at second meeting, suspension of panel procedures, interim review), and the subordination of the entire procedure to the DSB as a 'political' body (although the reverse consensus rules greatly reduce possibilities of political influence as regards the acceptance of reports). Moreover, the scope of panel and Appellate Body recommendations has been clearly limited as they may not add to or diminish the rights and obligations of Members. Finally, the nature of countermeasures in the case of non-implementation of recommendations (SCOO) is exclusively based on the political concept of reciprocity. The SCOO can hardly be seen as serving legal security in international economic relations (see discussion in Section 6.4.5).

Rule-oriented elements include the conformity and notification requirements with regard to mutually agreed solutions, the prohibition of unilateral action, the panel and (in particular) the Appellate Body stage where reports are established on the basis of the relevant provisions in WTO law. Other features of the system such as third party rights support rule-orientation as well.

Both the political and the legal perspective are also reflected in the 'General Provisions' laid down in Article 3 DSU. Article 3.2 includes much rule-oriented language, affirming that dispute settlement is 'a central element in providing security and predictability to the multilateral trading system' and that 'it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law'. Moreover, '(a)ll solutions to matters formally raised under the consultation and dispute settlement provisions ... shall be consistent with those agreements...', as Article 3.5 stipulates. Article 3.8 DSU equally establishes a clear link between the (political) concept of reciprocity and legal aspects of the multilateral trading system: 'In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment.'

Yet, the general provisions do not release Members from their duty to exercise political judgment and to seek negotiated solutions. Article 3.7

holds that: '(b)efore bringing a case, a Member shall exercise its judgment as to whether action under these procedures would be *fruitful*. The *aim* of the dispute settlement mechanism is to secure a *positive solution* to a dispute. A solution *mutually acceptable* to the parties to a dispute and consistent with the covered agreements is clearly to be *preferred*.' The prominent role of a negotiated solution is even more highlighted in the context of the next sentence of Article 3.7: '*In the absence of a mutually agreed solution, the first objective* of the dispute settlement mechanism is usually to secure the *withdrawal of the measures* concerned if these are found to be inconsistent with the provisions of any of the covered agreements' (emphases added). Article 3.2 also limits the powers of the panel and the Appellate Body by holding that: '(r)ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.' Clearly, the right to seek an authoritative interpretation of provisions of a covered agreement rests with members.⁷⁶

In sum, whereas the method of dispute resolution is partly legal (ie during the panel and the Appellate Body stage), the core underlying concept remains a political one, namely the maintenance of the balance of rights and obligations, ie reciprocity.

⁷⁶ Article 3.9 DSU. Yet, although the rulings are only relevant for the cases at hand and although they cannot add to the rights and obligations of members (Article 3.2 DSU and Article 19.2 DSU), there is a long tradition of building case law and of establishing interpretations which are used in future cases as well; see, for instance, Bhala (2001), Bhala (1999) and Bhala (1999a).

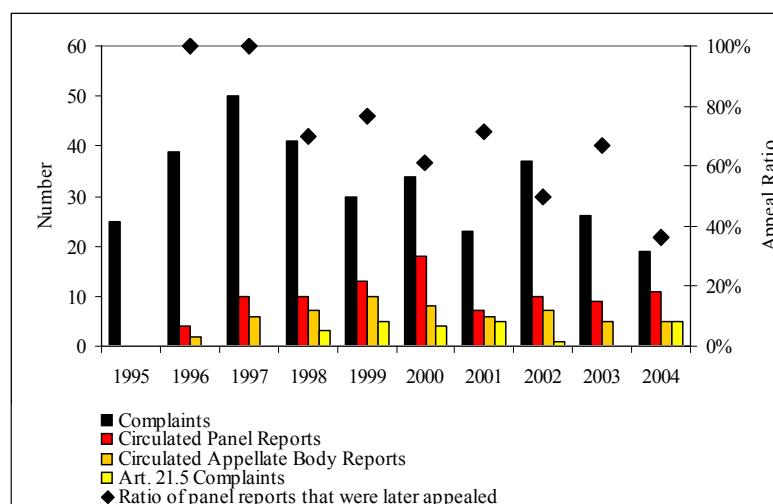
4. EXPERIENCE WITH THE DSU

To conclude Part I and to complete the foundation for a discussion of the DSU review, some basic information on the use of the WTO dispute settlement mechanism in its first 10 years and on its reception in literature is offered in Chapter 4.

4.1 Basic Data on the Use of the System

The DSU entered into force on 1 January 1995. Until the end of 2004, a total of 324 consultation requests were notified to the WTO.¹ This number shows that the new system is more widely used than the dispute settlement mechanism under the old GATT (less than 300 cases in 47 years). However, such comparisons are not necessarily adequate. The old GATT had less members than the WTO, and it covered far fewer agreements and sectors of economic activity than the WTO.

Graph 4.1: Use of the Dispute Settlement System (1995–2004)



Graph by the author; based on data from worldtradelaw.net (downloaded on 15 January 2005)

Notes: (i) Numbers refer to standard DSU complaints. (ii) Some of the panel reports circulated in 2004 may still become the subject of an appeal in 2005. The low ratio of panel reports appealed in 2004 should therefore be interpreted cautiously.

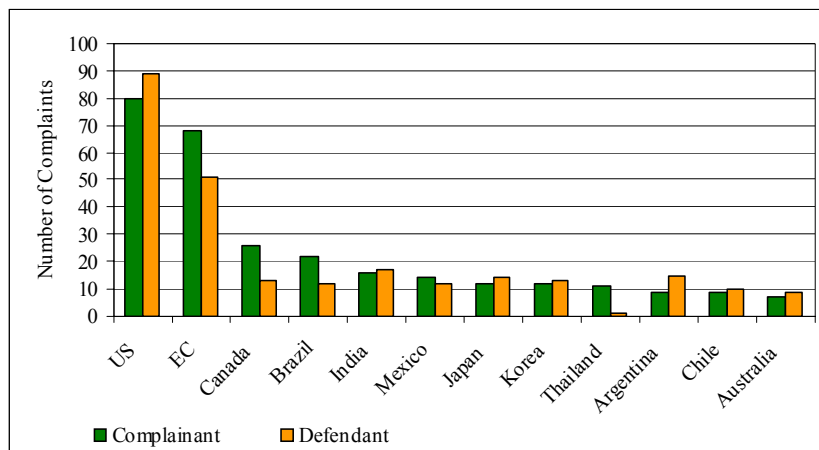
¹ See WTO Document WT/DS/OV/22, and internet: http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm.

Graph 4.1 shows the intensity in the use of the dispute settlement mechanism in its first 10 years for which complete data is available, ie until 31 December 2004. The number of complaints increased sharply in the first three years after the mechanism had come into force, and it peaked in 1997 with 50 new consultation requests in one single year. Thereafter, the number of consultation requests dropped to an annual average of roughly 28 in the period from 2000 to 2004, with the lowest figure (19 consultation requests) recorded in 2004. The evolution of the number of circulated panel reports displays a similar pattern, yet with a certain time lag and a peak in 2000. This time lag is obvious, given the time required between the notification of a consultation request and the circulation of a panel report. Overall, the number of panel reports is much lower than the number of consultation requests. This difference is due to the settlement of a considerable number of disputes in the stages preceding the circulation of the panel report (consultation or panel stage; see also Section 4.2.3.2). Moreover, several separate consultation requests were in some cases dealt with subsequently by one single panel.

The number of Appellate Body reports peaked in 1999. While every panel report circulated in 1996 and 1997 had been subject to an appeal, this ratio dropped to an average of 62 per cent for panel reports circulated between 2000 and 2003. Overall, there have been relatively few complaints under Article 21.5 regarding alleged non-compliance of defendants with panel rulings. The fairly small number is in stark contrast to the public perception of these 'trade wars' as they concern 'high profile' cases, including *Bananas*, *Hormone Beef* and *Foreign Sales Corporations*.

In terms of usage, we find that both the United States and the EC are among the DSU's most frequent users. Together, they account for nearly half the cases brought before the WTO (see Graph 4.2). Moreover, a substantial number of cases concern bilateral trade disputes directly between these two parties. Among developing countries, Brazil and India are the most important users of the system.

Graph 4.2: Main Users of the WTO Dispute Settlement System (1995-2004)

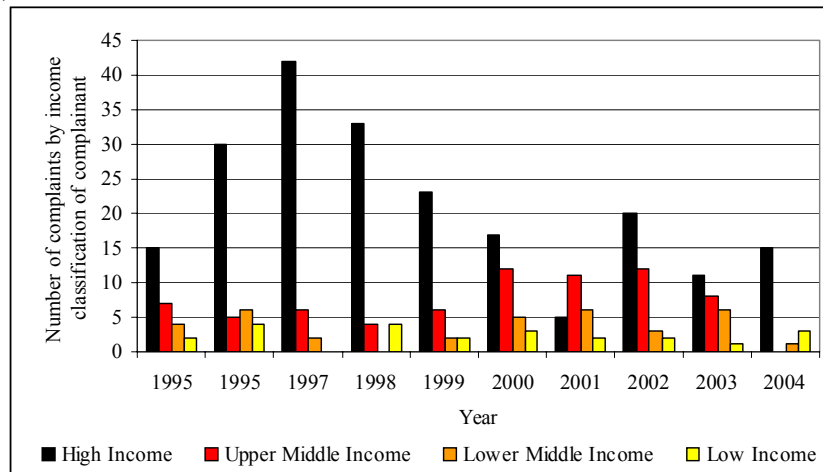


Graph by the author; based on data from worldtradelaw.net (downloaded on 15 January 2005)

Note: The figure for cases with the EC as a respondent neither includes DS numbers of complaints against individual EC Member States (15 DS numbers) nor DS numbers of complaints brought against Central and Eastern European countries prior to their entry into the European Union (8 DS numbers).

Developing countries' participation in dispute settlement is generally increasing, but is still on a fairly modest level, given the high number of developing countries in the WTO. After high-income countries had dominated dispute settlement practice as complainants in initial years, upper middle income countries have more recently become more active (exception: 2004). High income countries are also actively participating as respondents in trade disputes (see Graphs 4.3 and 4.4). The weak participation of LDCs in dispute settlement activities is another salient feature. The first LDC to initiate a DSU proceeding was Bangladesh in 2004, more than nine years after the DSU has come into force.

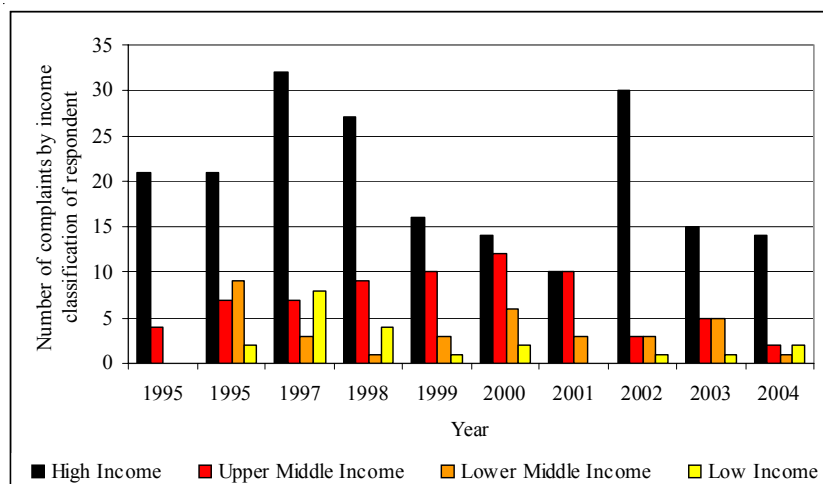
Graph 4.3: Income classification of Complainants in WTO Dispute Settlement



Graph by the author; based on data from worldtradelaw.net (downloaded on 15 January 2005)

Note: Income classification is based on the World Bank classification for the country in the year in which a complaint is being brought. Only standard DSU complaints are counted (DS numbers; Art. 21.5 complaints are not counted). In case of multiple complaints by countries in different income categories, the complaint has been counted in each income category in which at least one complainant falls.

Graph 4.4: Income Classification of Respondents in WTO Dispute Settlement



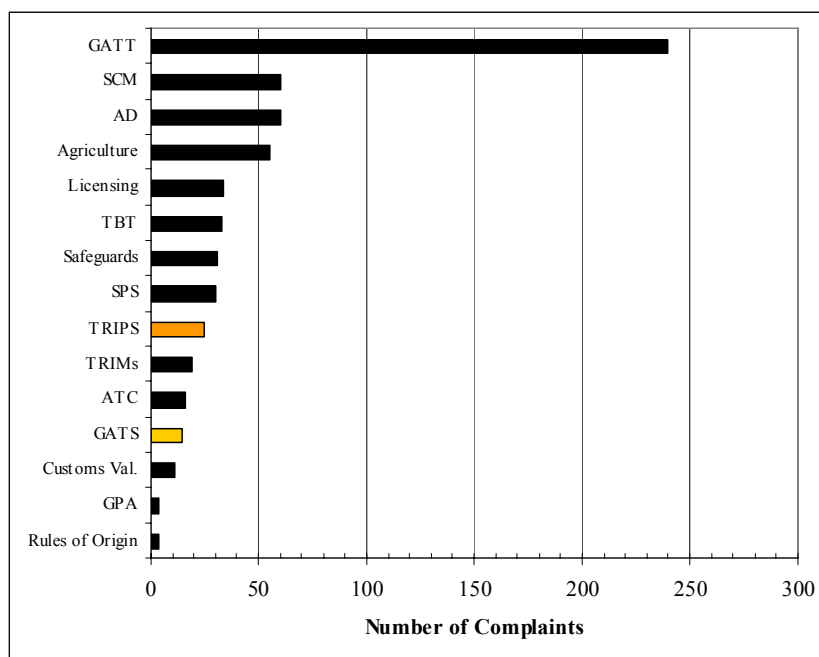
Graph by the author; based on data from worldtradelaw.net (downloaded on 15 January 2005)

Note: Income classification is based on the World Bank classification for the country in the year in which a complaint is being brought. Only standard DSU complaints are counted (DS numbers; Art. 21.5 complaints are not counted).



With regard to the provisions subject to disputes, we find that by far the most disputes concern provisions of the General Agreement on Tariffs and Trade (GATT; see Graph 4.5).

Graph 4.5: Agreements Whose Provisions Were Subject to Litigation (1995–2004)



Graph by the author; based on data from worldtradelaw.net (downloaded on 15 January 2005)

Notes: GATT = General Agreement on Tariffs and Trade; SCM = Agreement on Subsidies and Countervailing Measures; AD = Agreement on Implementation of Article VI of the GATT 1994 (Anti-dumping); TBT = Agreement on Technical Barriers to Trade; SPS = Agreement on the Application of Sanitary and Phytosanitary Measures; TRIPS = Agreement on Trade-Related Aspects of Intellectual Property Rights; TRIMs = Agreement on Trade-Related Investment Measures; ATC = Agreement on Textiles and Clothing; GATS = General Agreement on Trade in Services; GPA = Agreement on Government Procurement.

This dominance of goods trade in WTO dispute settlement becomes even more apparent if the complaints relating to the special agreements in the goods sector (such as the Agreement on Subsidies and Countervailing Measures, the Agreement on Anti-dumping, or the Agreement on Agriculture) are taken into account. By comparison to this traditional realm of GATT law, the ‘new topics’, trade in services and trade-related intellectual property rights, have not yet been frequent subjects of WTO disputes, and their importance in dispute settlement seems to decrease even further. A modest 25 complaints have been brought under the TRIPS, only five of which have been brought in the five-year period

2000–2004. Nevertheless, it should be noted that one particularly ‘high-profiled’ case – a dispute between the US and the EC on the one hand and India on the other regarding patent protection for pharmaceutical and agricultural chemical products – ranges among the TRIPS disputes.² Similarly, there have not been frequent disputes under the GATS: of the 14 complaints that have been brought under this agreement, only five were lodged in the five-year period 2000–2004.³ Here as well, however, politically and economically important cases are included such as *Mexico – Telecommunications*⁴ and *United States – Gambling Services*.⁵

4.2 General Reception in Literature⁶

4.2.1 Legal Literature

The Dispute Settlement Understanding received a very warm, if not enthusiastic, welcome in scholarly literature. According to Bhala (1999a), a sizeable portion of this literature is ‘characterised by a near irrational exuberance ... about the new adjudicatory system’. It was called a ‘crown jewel’ and a ‘core linchpin’ of the multilateral trading system.⁷ Hudec (1998) wrote that trading nations granted an ‘unprecedented degree of power to a legal tribunal’ to enforce the obligations under the WTO agreement. The DSU has also been hailed as a model for other international organisations, and it has brought forth a debate on the ‘constitutionalisation’ of international trade law.⁸ The increased academic interest in the WTO dispute settlement system has also been reflected by a myriad of scholarly publications on the system from a variety of disciplines and on a variety of aspects.⁹ Both established and new periodical publications which emerged over the last few years (such as the *Journal of International Economic Law* and the *World Trade Review*) devote considerable space to articles on WTO dispute settlement.

² On dispute settlement activities related to the TRIPS, see, for instance, Samahon (2000).

³ On dispute settlement activities related to the GATS, see, for instance, Geuze and Wager (1999).

⁴ *Mexico – Measures affecting telecommunications services* (complaint brought by the US; WT/DS204).

⁵ *United States – Measures affecting the cross-border supply of gambling and betting services* (complaint brought by Antigua and Barbuda; WT/DS285).

⁶ In this section, only a global overview on the massive DSU literature can be given. Some aspects will be discussed in more detail in further chapters of this book.

⁷ See Bhala (1999a), pp 856ff for quotations.

⁸ See, for instance, the many contributions by Petersmann, including Petersmann (1999), Petersmann (1998), Petersmann (1998a) and Petersmann (1997). For an overview of the debate, see Duvigneau (2001).

⁹ See Part V.

Specifically, the quasi-automaticity in the establishment of panels as well as in the adoption of panel and Appellate Body reports was among the most-lauded elements. This quasi-automaticity removed blockage possibilities for losing defendants that had existed in dispute settlement under the old GATT. The introduction of precise time-limits was equally seen as a highly positive step. From a legal point of view, the introduction of an appellate review mechanism and the institution of a permanent Appellate Body composed of highly-qualified lawyers were greeted as particularly important contributions towards improved legal quality of decisions and as a further step towards the rule of law in trade matters.¹⁰ More generally, this appellate review system was greeted as a model for other areas of international public law. Many authors are closely observing the evolving jurisprudence and are writing countless comments on panel and (much more so) Appellate Body reports.

Hudec (1999, pp 4 and 9) has warned, however, not to overstate the differences of the new DSU compared with the older procedures. With regard to the removal of the blocking possibilities, Hudec holds that blockage did not play too prominent a role in actual GATT practice either, as there was a community consensus that every member should have a right to have its claims heard by an impartial third-party decision-maker. Moreover, GATT dispute settlement had already become a more judicial instrument in the late 1970s and 1980s, where the cornerstones were laid for the later evolution towards the DSU (see Sections 2.2.2.5 – 2.2.2.7). As Hudec (1999, p 11) states with regard to the success of dispute settlement in the 1980s, an international legal system does not require rigorously binding procedures to be generally effective but that requisite political will can achieve a great deal. Even more, stringent procedures by themselves are not likely to make a legal system effective unless there is sufficient political will behind them. He cautioned, therefore, that even the new system would not lead to 100 per cent compliance. As under the GATT, countries would be unable or unwilling to comply in specific cases in the WTO as well. The system would accordingly have to learn to live with legal failure: 'Just as GATT did, [the new WTO legal system] will have to learn how to get up off the floor, brush off its soiled authority, and move on to the next piece of business with the same high expectations of achieving compliance.'

Indeed, legal literature began to take these problems into account towards the end of the 1990s as implementation problems surged in a number of high profile cases, including, *inter alia*, *EC – Bananas*, *EC –*

¹⁰ See, for instance, the many contributions by Jackson or Petersmann.

Hormones and *US – Foreign Sales Corporations*. In these cases, the refusal of defendants to implement the DSB recommendations triggered the suspension of concessions or other obligations (SCOO) by the complainant government under authorisation from the Dispute Settlement Body. More commonly known under terms like ‘retaliation’ or ‘sanctions’, the SCOO itself has become the focus of much criticism: By suspending concessions or other obligations, the complainant government usually harms its own economy as well as ‘innocent’ individual economic actors in both countries who are not responsible for the defendant government’s failure to implement the DSB recommendations properly. Similar to any other import restriction, the SCOO weakens the competitiveness of the complainant’s domestic industries by shutting out competitive raw materials or intermediate products. It may also promote rent-seeking behaviour in the complainant’s newly-protected industries and undermine their long-term competitiveness. On a general level, the SCOO reduces the predictability of trade conditions. Moreover, developing and small countries have difficulties in using the SCOO as they usually lack the market size to make a credible retaliatory threat. Retaliation may also have a negative impact on third countries, for instance, if their industries supply inputs to industries in the defendant country. Finally, the SCOO has a problematic psychological connotation as it creates the erroneous impression that trade restrictions would make a country better off.¹¹ In addition to implementation problems in cases that were subject to an Article 21.5 compliance dispute, the actual degree of market opening as a consequence of ‘implemented’ DSB rulings has been questioned as well.¹²

Other problems identified with the new procedure include the often poor respect of the deadlines laid down in the DSU, the lack of a remand procedure which would allow the Appellate Body to remand certain issues back to the panels for further factual clarification, and the problems of developing countries wishing to participate more actively in the system.

More recently, some quite strong criticism has been spelt out on the jurisprudence of the Appellate Body in trade remedy cases. The gist of this criticism is that the adjudicating bodies are exceeding their authority and are legislating instead of adjudicating, that they are not showing sufficient deference to members’ trade policy decisions, and that the

¹¹ For a discussion of the SCOO, see, *inter alia*, Charnovitz (2003), Anderson (2002), Charnovitz (2001), Hudec (2000) and Mavroidis (2000). A critical view of the current focus on retaliation from an industry perspective is included in UNICE (2001).

¹² See Zimmermann (2001) for a discussion of implementation measures in *WT/DS31: Canada – Measures Prohibiting or Restricting Importation of Certain Periodicals* (brought by the US).

system is biased towards trade liberalisation.¹³ That criticism has been particularly strong in the US. However, for the time being, strong criticism may be considered a minority view in literature. And, as some observers hold: 'it is not always clear that some of the harshest critics of WTO jurisprudence, many of whom have advocacy roles related to a variety of special interests, have the best interests of the overall WTO system in mind.'¹⁴

Yet, there is a real concern about what some commentators perceive to be an imbalance between relatively effective legal decision-making by the adjudicating bodies and ineffective political decision-making by the political bodies of the WTO.¹⁵ Unlike the lengthy search for compromise at the negotiating table, the quasi-automatic architecture of the DSU allows complainants to exact decisions on politically highly sensitive issues from the dispute settlement system. It is therefore hardly surprising that the DSU is the forum of choice for governments that perceive their position to be in accordance with WTO rules. The danger associated with such a trend is that member governments that see their interests insufficiently safeguarded might be driven out of the system. This would be particularly problematic if large members with 'systemic weight' were to retreat from the system. There are currently two strands in DSU literature that seek to strike a balance between the relative success and well-functioning of the dispute settlement system with its adjudicative bodies on the one hand, and the weakness of the consensus-based political decision-making at the WTO on the other. One school of thought – probably the minority point of view – seeks to re-strengthen political control of WTO dispute settlement and to weaken its adjudication character,¹⁶ whereas, by contrast, other authors vehemently oppose any effort to weaken the adjudicating system and argue in favour of focusing reform efforts on improved political decision-making.¹⁷

4.2.2 Theoretical Literature in Economics and Political Science

Besides legal scholars, economists and political scientists have discovered the WTO dispute settlement system as an interesting topic for theoretical research.¹⁸

¹³ See, for instance, Greenwald (2003), Magnus, Joneja and Yocis (2003), Ragosta, Joneja and Zeldovich (2003), Wilson and Starchuk (2003), as well as Ragosta, Joneja and Zeldovich (no year specified).

¹⁴ See Consultative Board (ed) (2004), p 55.

¹⁵ See, for instance, Ehlermann (2002a).

¹⁶ See Barfield (2002) and Barfield (2001). An earlier contribution to the discussion from a critical perspective is Hippler Bello (1996).

¹⁷ See Ehlermann (2003, 2002, 2002a), Jackson (2002), Steger (2002a), as well as Cottier and Takenoshita (2003); see also Section 9.1.3 of this study.

¹⁸ Analyses have already been established for dispute settlement under the GATT; see, for example, Hungerford (1991).

Although there is no comprehensive political or economic theory of GATT/WTO dispute settlement so far, research progresses on several avenues. In the emerging literature, methods such as those developed for the economic analysis of the courts (law and economics)¹⁹ and game-theory are being applied to explain how the WTO dispute settlement system affects members' behaviour. These methodological approaches are adapted to the political economy considerations underlying the architecture of the multilateral trading system. For instance, payoffs in trade litigation are not monetary but they are modelled as gains (or losses) in political support that governments can draw from action before the WTO and/or from dispute settlement outcomes. Furthermore, litigation in the domestic context is often motivated by uncertainty with regard to the outcome of cases²⁰ which is not necessarily the case in international trade disputes. And finally, such studies take the relatively weaker enforcement of international economic law (compared with domestic law) into account.

Hauser and Büttler (2000) studied the incentives of members in the litigation process.²¹ In their game-theoretic analysis, they explain that new trade restrictions occur despite the existence of a dispute settlement system with the political benefits which stem from such restrictions and which continue to accrue to the defendant while the litigation procedure lasts. Dealing with the role of early settlements, the authors predict that such settlements are more likely in the early stages of the procedure and that the settlement will be oriented towards the expected outcome of litigation. The high rate of appeals is similarly explained with the delay (during which the measure can be upheld) and with the desire of litigants to prove their determination to domestic constituents. Given the agenda control of the complainant, they argue that trade restrictions are, however, less attractive under the new system. Nevertheless, the authors hold that the implementation procedure as such is insufficient to induce compliance.

In further developing this line of thought, Hauser (2001) argues that incentives for compliance lie mainly outside the dispute settlement system and that they can be captured as reputation costs of non-compliance. Such reputation costs could take the form of reduced credibility in future negotiations or the form of the decline of the whole

¹⁹ An excellent overview of this tradition is offered by Kaplow and Shavell (2002).

²⁰ Such asymmetry can be the result of asymmetric information (tradition established by Bebchuk (1984)) or of divergent expectations (tradition established by Priest and Klein (1984)).

²¹ The ideas set out in the formal paper of Hauser and Büttler (2000) were developed in an earlier contribution by Hauser and Martel (1997).

system. Such reputation mechanisms also play a central role according to Maggi (1999) who sees the main functions of dispute settlement in the verification of violations and the dissemination of pertinent information, whereby he underlines the multilateral character of the GATT. These findings are in line with earlier research on the GATT system (which was characterised by a legally speaking even 'weaker' dispute settlement system) that stressed the role of 'normative pressures' and countries' sense of international obligations²² for compliance with multilateral trade rules (see Sections 2.2 and 2.3).

Guzman (2003) analyses the patterns of settlement and litigation. He argues that unlike in a domestic context where asymmetric information is bringing actors into court, it is the asymmetry of payoffs that determines the pattern of settlement and/or litigation in the WTO. This asymmetry is due to the 'political' nature of payoffs in trade litigation. Based on this understanding, the author builds a theory which predicts that cases where the complainant is likely to win at the panel stage will fail to settle if the political payoffs from empanelment received by complainants are systematically larger than those received by the defendant. If the payoffs to defendants are larger than those to complainants, cases where the complainant is likely to win settle more easily than cases where the defendant is likely to win. This theory is corroborated by the fact that in 90 per cent of the 82 panel rulings that were issued until July 2002 and that were examined by Guzman, the defendant was found in violation of WTO law in at least one respect. Since litigation before the WTO is no zero-sum game according to Guzman, both the complainant and the defendant can be better off by litigating a case to the end.

Rosendorff (2001) argues that the dispute settlement procedure allows governments in times of political stress to respond to domestic political pressures by introducing a trade barrier, pay compensation or accept retaliation and nevertheless remain part of the community of co-operating nations. From a systemic perspective, that mechanism yields stability to an international trade agreement and provides an insurance mechanism against random political fluctuations.²³ The reflections in

²² See Kovenock and Thursby (1992) who gave countries' sense of obligation a supplementary role (with regard to dispute settlement under the old GATT) in addition to the threat of retaliatory deterrence. Mitchell (1997) argued that this sense of obligation was even necessary for compliance, given the weaknesses of retaliation. Kovenock and Thursby (1997) replied by defending their thesis, arguing that unilateral retaliation *outside* the GATT system is an important factor of deterrence.

²³ See Rosendorff (2001). The role of such escape clauses is discussed in more general terms in Rosendorff and Milner (2001).

Ethier (2001) follow a similar thrust, starting from the idea that trade agreements are incomplete contracts as trade can be affected by all sorts of policies that countries cannot foresee or are not willing to negotiate. Trade agreements therefore contain an implicit agreement to allow countries to violate commitments as long as reciprocity is safeguarded through commensurate 'punishments'.²⁴ This theoretic approach is particularly intriguing as it corresponds closely to the core legal concept of the balance of rights and obligations that is a central element in the WTO architecture (see Section 2.2.1.2).

Other contributions perceive WTO dispute settlement as a re-negotiation mechanism,²⁵ or as a mechanism for the gathering and exchange of information.²⁶ Still others analyse the impact that the presence of a dispute settlement system has on international trade co-operation in general.²⁷ Some contributions focus on the role of trade policy flexibility and the limits of enforcement.²⁸

4.2.3 Empirical Literature

Finally, a number of empirical contributions have enriched our understanding of WTO dispute settlement.

Some of the more basic analyses, such as those published regularly by the *Journal of International Economic Law*, give an account of basic figures on the trend in the use of the dispute settlement mechanism. While these descriptive statistics help us to identify trends in the application of the system, they do not attempt to identify the 'driving forces' behind the trends that are depicted.²⁹

Another line of empirical research with a more qualitative orientation was established early by Hudec (1993) who offers descriptions and statistical analyses of the 207 GATT legal complaints that were brought under the GATT between 1948 and 1989. He analysed the cases under

²⁴ See Ethier (2001). The author goes on to explain specific behavioural patterns in the negotiation of agreements and abidance by the rules.

²⁵ See Bagwell and Staiger (1999).

²⁶ See Maggi (1999).

²⁷ See Ludema (2001) and Furusawa (2003).

²⁸ On the role of flexibility and the limits of enforcement, see for instance Rosendorff and Milner (2001) and Koremenos (2001).

²⁹ See, for instance, Leitner and Lester (2003), Park and Panizzon (2002), Park and Umbricht (2001) and Park and Eggers (2000). Recent data is also available on WorldTradeLaw.Net's Dispute Settlement Commentary, a subscription-based information service available at <http://www.worldtradelaw.net>.

criteria such as procedural outcome (rulings, settlements without rulings, withdrawn/abandoned cases) and substantive outcome (result unknown, full satisfaction, partial satisfaction, negative outcome). The author also examined dispute settlement activities by member, type of measure, and sector concerned. Continuing this approach, Hudec (1999) examined the first three years of the new WTO dispute settlement system along similar lines, too. Based on his dataset, he found that: 'there is a strong case for saying that *substantially all* the increase in WTO litigation can be traced to the new or intensified obligations of the Uruguay Round.' He did not find a significant change in the identity of complainants (as a consequence of the new procedures) either. However, he found a significant increase in cases brought against developing countries. This increase, in turn, was largely explained with the significant increase in legal discipline against developing countries which came with the entry-into-force of the Uruguay Round agreements.³⁰

Hudec also examined whether empanelment of disputes increased as a consequence of the greater automaticity in the proceedings, as intuition might suggest. His findings, however, reveal no significant increase in the panelling of disputes. The proportion of early settlement remained largely the same under the new DSU as under the old GATT. Moreover, experience in the first three years even suggested that the proportion of complaints leading to a ruling is even lower in the WTO than it was under the GATT. Two hypotheses could explain this pattern. One is that the binding quality of the new procedure persuades more governments to remove illegal practices voluntarily. A second hypothesis is that legal complaints are increasingly used as negotiating instruments, ie as devices to increase pressure without intending to carry the litigation further. However, testing these hypotheses would require an analysis of cases settled early which is a tremendous task.³¹

Hudec's line of research has recently been taken up by other researchers. Busch and Reinhardt, along with a few other authors, have conducted massive empirical research on the WTO dispute settlement system and its predecessor under the GATT.³² The results of this research are briefly summarised in the following sections.

³⁰ See Hudec (1999), pp 24ff.

³¹ See Hudec (1999), pp 25–27.

³² See Guzman and Simmons (2002), Busch (2000), Busch and Reinhardt (2003a), Busch and Reinhardt (2003), Busch and Reinhardt (2000), Reinhardt (2001), Reinhardt (2001a), Reinhardt (2000), Reinhardt (2000a), Sevilla (1998) and Sevilla (1997). An excellent overview is Busch and Reinhardt (2002), also embarking upon the methodological problems that researchers face when dealing empirically with the DSU.

4.2.3.1 Dispute Initiation

Dispute settlement reforms did not significantly raise the likelihood of disputes among developed states, at least not up to the end of 1998. Although the DSU is usually viewed as a much more substantial reform than the 1989 Improvements, Reinhardt (2000) finds in his statistical analysis that the coming-into-force of the new DSU has not increased the probability of dispute initiation between developed countries, whereas he finds that the mid-term improvements made in 1989 during the Uruguay Round increased the probability of dispute initiation between developed countries by a factor of 3.3. As the institution's fundamental lack of enforcement was not altered, Busch and Reinhardt (2002, p 464) concur with Hudec that writers have tended to overstate the difference between dispute settlement under the GATT and under the WTO. Rather, the often-quoted increase in disputes can be regarded as tracking the evolution of GATT/WTO membership.

With regard to dispute initiation, 'positive feedback' and 'bandwagon effects' are identified as other features of the dispute settlement system. Positive feedback means that defendants often file counter-complaints. The average complaint increases the probability of a counter-complaint within a year by 55 times.³³ Bandwagon effects occur as other Members are also more likely to target the policy of a defendant as soon as one member has filed a complaint. It has also been found that members of preferential trade agreements are seven times less likely to file disputes against each other than are other states. Reinhardt (2000) also rebuts conventional wisdom that past successes in resolving complaints cause greater reliance on the system. Pointing to the *Bananas* case where the EC's failure to implement the rulings caused further sets of complaints, it is argued that disputes are just as likely to be responses to the failure rather than success of the adjudication system.

The position of developing countries in WTO dispute initiation has also been studied. Horn, Mavroidis and Nordström (1999) found that the pattern of bringing complaints largely reflects the diversity of a country's exports over products and partners, and that litigation costs also explain the greater restraint from developing countries. Whereas the availability of legal capacity matters to some extent, the authors found that power measures do not. Interestingly, the proportion of complaints brought by developing countries has even decreased under the WTO *vis-à-vis*

³³ See Busch and Reinhardt (2002), p 464.

the GATT. Despite the increasing number of developing WTO Members, they constituted 31 per cent of the GATT complainants, compared with 29 per cent of the complainants under the WTO. Reinhardt (2000, p 19) found that Least Developed Countries (LDCs) are one-third less likely to file complaints against developed states under the WTO than under the GATT, whereas they are five times more likely to be subject of a complaint under the WTO than under the 1989 Improvements. Busch and Reinhardt (2002, p 467) therefore conclude that: 'the evidence strongly supports the claims of many developing country advocates that the WTO dispute settlement system is not working as effectively for LDCs. Several reasons have been offered in literature, such as ballooning treaty text, ever-increasing loads of case law, new stages and the judicialisation which put a premium on sophisticated legal argumentation.'

4.2.3.2 Dispute Escalation

Looking at dispute escalation, there are some interesting findings with regard to the effect of the 1989 Improvements which removed the blocking of panel requests. Busch (2000) found that cases filed for consultations were no more likely to go to a panel after the 1989 Improvements than before. This would contradict the views of many commentators that the increased 'legalism' would be preferred over the 'power politics' of consultations. This finding should, however, not be interpreted so as to portray the modifications as inconsequential. As Busch and Reinhardt (2000, p 170) note, this experience could point to the fact that 'the real action is still likely to be found in pre-trial negotiations'. The mere possibility of a panel leads to bargaining in the shadow of the law and may therefore enhance early settlement.

Reasons inducing such early settlement – even in the absence of strong enforcement – are the delivery by adjudicating bodies of a timely and coherent normative statement, which could empower groups in the defendant country opposing a protectionist measure, or which could enable the defendant's executive branch of government to 'tie hands' and to make commitments more acceptable by citing the need to be a 'good citizen'. Reinhardt (2001) offers an alternative explanation for early settlement in the GATT. Accordingly, the complainant has greater resolve prior to a ruling, believing that the defendant will be compelled to concede to an adverse judgment. Even if this belief is erroneous, this resolve induces early settlement and generous concessions from the defendant.

4.2.3.3 Dispute Outcomes

Busch and Reinhardt (2002, p 471) have found that the chances the defendant will concede are greater *prior* to a ruling than they are after a ruling against the defendant.³⁴ The probability of full concessions by the defendant jumps an average of 27 per cent after a panel is established, but it drops 18 per cent if the panel rules in favour of the complainant and 55 per cent if it rules in favour of the defendant. Several explanations are offered for this trend, which is puzzling at first sight, as defendants could always 'spurn rulings with impunity', due to the low likelihood of retaliation. One explanation is that countries are wary of bringing down the GATT system. That explanation is, however, insufficient, as the larger members (EC, US) in particular account for much of the non-compliance, whereas precisely these countries should show responsibility for the system. Another explanation offered is the normative power of a GATT ruling and the pressure to observe it. Yet, it does not explain the high use of early settlement. Of course, a simple explanation (subject to further verification) could be that cases which are settled early do not involve high political stakes, and have clear legal merits. In other terms, the 'political cost' to the defendant of losing the case will be inferior to the 'political cost' of removing a measure without further litigation (pp 471ff). This finding would also be in line with another finding on compliance. Busch and Reinhardt (2002, p 473) found that only two-fifths of rulings for the complainants result in full compliance, counting also those rulings which were not adopted. Their conclusion which, at first sight, may be surprising is: 'whatever positive effect [the institution] has on a defendant's willingness to liberalise occurs *prior* to rulings, in the form of early settlement.' This finding also holds for problematic transatlantic trade-disputes. Busch and Reinhardt (2003) find that: '(i)f Washington and Brussels fail to resolve their trade tensions prior to a panel ruling, the likelihood of concession drops precipitously. Indeed, concessions offered in the transatlantic relationship are typically had in advance of a ruling, or not at all' (footnote omitted).³⁵

With regard to settlements, Busch (2000) found that pairs of highly democratic countries are up to 21 per cent more likely to settle disputes in the pre-panel stage than pairs with one or more states that are not fully democratic. The confidential nature of the pre-panel stage seems to make it easier for those governments to come to a settlement. Increased

³⁴ Based on Reinhardt (2001).

³⁵ See Busch and Reinhardt (2003), pp 161ff for an overview, and Busch and Reinhardt (2003a) for an in-depth analysis of transatlantic trade disputes. On transatlantic trade disputes, see also Hauser and Roitinger (2003).

transparency at this stage could make it more difficult to settle early. It has also been found that open economies are up to 31 per cent less likely to make concessions during consultations, and up to 13 per cent less likely to make concessions during the panel stage. An explanation offered is that these countries have less 'slack' for further liberalisation.

With regard to compliance with adverse rulings, Reinhardt (2000, pp 19 and 33) finds that democratic states are less likely to comply.³⁶ The reason could be that they find it more difficult to give in as they are more sensitive to public opinion. Besides, defendant countries which are economically smaller than the complainant country or which depend on the complainant's export market are more likely to comply. LDCs are more likely to comply than comparably sized, more developed countries. As to the overall impact of adjudication, Busch and Reinhardt (2002, p 474) find that 'evidence is accumulating that the regime indeed makes a difference'. Invoking adjudication increases the level of liberalisation of disputed measures by about 10 per cent. Moreover, liberalisation is four times as likely after a ruling for the complainant than for the defendant, thereby showing that the system affects the bargaining between the litigants. Finally, they have found for cases involving actions under Section 301 that the defendant is more likely to comply if action under Section 301 is accompanied by a GATT/WTO complaint.³⁷ Bown (2003) found in an empirical study of GATT/WTO disputes between 1973 and 1998 that it is the potential cost of retaliation that allows governments to commit to liberalisation.

4.2.4 Summary: General Reception of the DSU in Literature

The prevailing mood in WTO dispute settlement practice and literature is that the mechanism has worked generally well in its first 10 years of existence. Although problems are emerging, its continued high use suggests that it is still an attractive forum for the discussion of trade issues.

The undertone of the literature on the system is generally positive. Yet, most legal contributions, particularly the early ones, appear to overstate the differences between dispute settlement under the old GATT and the new WTO. This conclusion is based on the findings of empirical research carried out by economists, political scientists and also by legal scholars such as Hudec. The larger lines of the theoretical and empirical literature seem to lead back to the concept of reciprocity. Dispute settlement has

³⁶ Quoted in Busch and Reinhardt (2002), p 473.

³⁷ Based on Busch (2000a).

to safeguard the negotiated balance of rights and obligations as well as to prevent (and remedy, if necessary) the nullification or impairment of benefits accruing under these agreements. It is the balance of political support which governments have exchanged that needs to be protected if the system is to work.

Since the *Uruguayan Recourse* (see Section 2.2.2.4), violations of WTO law have been considered *prima facie* instances of nullification or impairment. This approach to dispute settlement clearly has its legal merits and it may be the best proxy available for restoring the political balance, given the difficulties of measuring political support and thus reciprocity. However, this approach does not necessarily secure reciprocity over time. Agreements remain constant whereas trade patterns evolve with economic development and technological progress, as may the structure of political support for governments. This holds particularly if normal negotiations are blocked due to weak political decision-making (see Section 9.1.3 for a more detailed discussion). Given the role of political will behind GATT/WTO dispute settlement that has been stressed in literature, one could argue that adjudicating bodies should not lose sight of the reciprocity concept when they draft their decisions. In this line of thought, the dispute settlement in general, and the combination of diplomatic and legal ingredients in particular, are most of all instruments to secure the maintenance of reciprocity in trade relations and thus the political support behind the WTO system and its principles.

PART II

THE DSU REVIEW: NEGOTIATIONS AND PROPOSALS

5. EVOLVING DSU REVIEW NEGOTIATIONS AND THEIR CONTEXT

As we are not aware of any treatise on the DSU review negotiations at the time of writing, this chapter gives an overview of the different stages of the negotiations. It shows how the negotiations evolved amidst emerging issues of on-going dispute settlement practice. We start with the first review effort under the 1994 Ministerial Declaration that took place in 1997 and 1998 (Section 5.1) and under the 1999 extension in the run-up to Seattle (Section 5.2). After the failure of the Seattle Ministerial, the discussion remained in an inconclusive limbo (Section 5.3) until the Doha Ministerial Conference, where a new negotiating mandate regarding the DSU was included in the Ministerial Declaration. The negotiations under this mandate between early 2002 and the May 2003 deadline are discussed in Section 5.4. Section 5.5 outlines the negotiations up to the May 2004 deadline whereas Section 5.6 recapitulates developments until the end of 2004. Finally, Section 5.7 offers some conclusions that are based on the preceding account of the negotiations process.

5.1 Getting Started Amidst Emerging Issues (1997–1998)

Initially, the DSU review had been mandated by the Ministerial Decision on the ‘Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes’. This decision, which had been adopted on 14 April 1994, called upon ministers to ‘complete a full review of dispute settlement rules and procedures’ within four years after the entry into force of the WTO agreement and ‘to take a decision on the occasion of its first meeting after the completion of the review, whether to continue, modify or terminate such dispute settlement rules and procedures’.

The DSU review appeared as an item on the agenda of the Dispute Settlement Body (DSB) for the first time on 18 November 1997.¹ At this meeting, the chairman asked members for their views on procedural aspects of the DSU review. Consultations on these issues were held informally, and the chairman issued a report on the results in February 1998.² In this report, the chairman stated that no delegation favoured

¹ See Document WT/DSB/M/39, 12.

² See Document WT/DSB/W/74 of 26 February 1998.

the option of terminating the DSU and that the DSU was generally considered to be working effectively. Accordingly, a 'careful approach to the review was warranted'. The review was to be conducted by the DSB which would then report to the General Council, and ultimately to the Ministerial Conference. The review was timed to be conducted mainly after the 1998 Geneva Ministerial in order to allow delegations to dedicate more time to the latter. The DSB took note of this report as a basis for future discussions.³ To sum it up, the start of the DSU Review was slow and characterised by a general satisfaction with the system as well as by a lack of experience with 'hard cases'.⁴

In the following months, mostly informal discussions and consultations on procedural aspects of the DSU review were held.⁵ Members were to submit informal suggestions preferably before the end of July 1998, and substantive discussions were to start in late September or early October 1998. Discussions were to be supported by a compilation of suggestions from members and statistical data on dispute settlement provided by the secretariat.⁶ Although input from the Appellate Body or academics on an informal basis was judged to be a useful complement to the discussions, it was explicitly held that: 'the DSU review is an exercise to be conducted by Members exclusively on the basis of their suggestions.'⁷

The informal documents prepared by the secretariat included a compilation of informal comments submitted for the review of the DSU⁸ and statistical data on the operation of the DSU.⁹ They were circulated in late summer.¹⁰ This input was discussed in an informal meeting of the DSU on 1 October 1998. Members also made their submissions.

³ See Document WT/DSB/M/42, 6. For contributions in the academic discussion during the early stage of the DSU review, see, for instance, Jackson (1998), Shoyer (1998), Steger and Hainsworth (1998).

⁴ On issues that were dealt with as 'candidates' for the review in these early stages, see 'Major Changes to WTO Dispute Settlement Unlikely During 1998 Review', in *Inside US Trade*, 26 December 1997.

⁵ DSB meetings of 25 March 1998 (see WT/DSB/M/44, no 8; see also 'WTO Members Asked to Submit Suggestions on Dispute Settlement', in *International Trade Reporter*, vol 15, no 13, 1 April 1998), 22 April 1998 (see WT/DSB/M/45, no 10), and informal DSB meetings and consultations, including on 29 April 1998, 10 June 1998 (see also 'WTO Off to Slow Start on Review of Dispute Settlement Mechanism', in *Inside US Trade*, 12 June 1998).

⁶ See WT/DSB/M/46, 11.

⁷ See WT/DSB/M/47, 10; see also 'World Trade Organisation Begins Review To Reform Procedures for Settling Disputes', in *International Trade Reporter*, vol 15, no 29, 29 July 1998; and 'US Blocks First EU Request For WTO Panel on FSC Tax Provision', in *Inside US Trade*, 24 July 1998.

⁸ Job no 4762.

⁹ Job no 4750.

¹⁰ See WT/DSB/M/48, no 9.

However, the response to the invitation to submit informal suggestions was relatively weak. By the beginning of October 1998, no inputs had been received from the two major players, the US and the EC, which caused a delay in the negotiations.¹¹

In retrospect, one likely reason for the hesitant approach to the review may be found in the context of the dispute settlement practice. The review negotiations started right at a time when politically difficult cases were beginning to cause stress in WTO dispute settlement and when crucial developments were taking place that countries were eager to observe. First, the US became increasingly worried about implementation. The EC showed reluctance with regard to the implementation of the adverse rulings in the politically delicate disputes on *Hormones*¹² and *Bananas*,¹³ whereas Canada planned a law which would ban advertising in foreign periodicals and thereby circumvent the market opening obligations which the US had expected from the rulings in the *Magazines*¹⁴ case. Whereas Canada should have already implemented the ruling by the end of October 1998, implementation periods were also nearing their end in *Bananas* (1 January 1999) and *Hormones* (13 May 1999). Deceived by its trade partners' unwillingness towards compliance, and under pressure from Congress, the US administration was proceeding with plans for retaliatory measures as concerns were growing that the DSU could turn out to be insufficient when it came to implementation.¹⁵ Secondly, there were growing concerns in the US after the ruling in the so-called *Fuji-Kodak* case¹⁶ that the system would be insufficient to open foreign markets if more subtle protectionist measures were at stake. Some observers therefore suggested that the US should return to a more aggressive use of its unilateral *Section 301* policies.¹⁷

¹¹ See 'Talks on WTO Dispute Settlement Review Delayed Until Later in October', in *International Trade Reporter*, vol 15, no 39, 7 October 1998.

¹² *European Communities – Measures Affecting Livestock and Meat (Hormones)* (WT/DS48). On this case, see, for instance, Hughes (1998), Quick and Bluthner (1999).

¹³ *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (WT/DS27). On this case, see, for instance, Palmer (2002), Salas and Jackson (2001), Bishop (2001), Jackson and Grané (2001), Slotboom (1999) and Bessko (1996).

¹⁴ *Canada – Certain Measures Concerning Periodicals* (WT/DS31). On this case, see Zimmermann (2001).

¹⁵ See 'US, EU Banana Dispute May Become Test Case for WTO Rules', in *Inside US Trade*, 14 August 1998; 'Administration Withstands Gingrich, Lott Pressure on EU Retaliation', in *Inside US Trade*, 9 October 1998; 'US, EU Clash Over Planned Retaliation for EU Banana Policy', in *Inside US Trade*, 23 October 1998; and 'WTO Begins Contentious Talks on Reform of Dispute Resolution Rules, Delays Expected', in *International Trade Reporter*, vol 15, no 42, 28 October 1998.

¹⁶ *Japan – Measures Affecting Photographic Film and Paper* (WT/DS44). On this case, see, for instance, Linarelli (2000), Furse (1999), Goldman (1999) and Fujii (1997).

¹⁷ See, for instance, Wolff and Magnus (1998).

Thirdly, the US came under increasing pressure from internal interest groups such as environmentalist NGOs to press for more transparency in WTO dispute settlement.¹⁸ WTO dispute settlement was fiercely criticised when the Appellate Body confirmed a prior panel ruling on 12 October 1998 according to which a US ban on imported shrimp from countries without adequate conservation policies for sea-turtles was WTO-inconsistent.¹⁹ Similar criticism had already mounted after the Appellate Body, in its first-ever ruling, had found policies used by the US under its Clean Air Act to be WTO-inconsistent (*Gasoline* case²⁰). This situation had a direct impact on the negotiations. With crucial decisions and developments ahead, delegations apparently chose a 'wait and see' attitude.

The first of the two major trade powers to finally come out with a proposal was the EC.²¹ It outlined its ideas on 19 October 1998. The EC suggested the establishment of a standing body of professional panellists.²² The EC also suggested that all arguments put forward to panels and the Appellate Body should be made available to the public. In addition, the WTO should either allow the public to attend hearings before the panels and the Appellate Body, or allow interested parties to express their views to the panel. Moreover, the time available for the Appellate Body to hand down rulings should increase from the current 60/90 day time-frame to a period of three to six months which would allow the Appellate Body to remand issues back to panels.²³ Further issues covered by the EC proposal include the distinction between mandatory and discretionary law, a refusal to extend the special standard of review under the Anti-dumping agreement to other agreements and cases involving several complainants or defendants. Finally, the EC proposal sought to strengthen the consultative element, including in

¹⁸ On US private party comments regarding WTO dispute settlement, see 'Comments on WTO DSU Review Seek Transparency, Private Party Role', in *Inside US Trade*, 3 July 1998. For an earlier contribution, see also 'ACTPN Urges Greater Transparency in WTO Dispute Settlement', in *Inside US Trade*, 28 April 1995. The issue of transparency is discussed in more detail in Section 7.1.

¹⁹ *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (WT/DS58); see 'WTO Appeals Body Faults Implementation of Shrimp-Turtle Law', in *International Trade Reporter*, vol 15, no 40, 14 October 1998; see also 'WTO Ruling in Shrimp-Turtle Dispute Will Not Halt Protection Efforts, USTR Says', in *International Trade Reporter*, vol 15, no 14, 8 April 1998.

²⁰ *United States – Standards for Reformulated and Conventional Gasoline* (WT/DS2 and WT/DS4). On this case, see Nogueira (1996), Scott (1996), Shenk (1996) and Waincymer (1996).

²¹ Review of the Dispute Settlement Understanding – Discussion Paper from the European Communities; Job no 5602; DSU/7.

²² For a discussion of this idea, see Section 6.2.1.

²³ For a discussion of remand authority, see Section 6.3.5.

implementation issues. This proposal has to be seen in the light of a letter from the White House to Congress where retaliatory measures against the EC for failure to implement the *Bananas* and *Hormones* rulings were outlined. Where as the EC wanted to engage in consultations with the US on implementation, the US sought immediately to reconvene the original panel for a dispute on implementation.²⁴

With regard to its own position, the US submitted an informal paper on 3 November 1998.²⁵ It included calls for faster compliance, arguing that: '(i)t is clear that these rules have functioned fairly well with respect to the panel and appellate process, but that significant problems remain in ensuring good faith implementation.' The US also suggested a review of the procedures for the selection of panel members, a review of the time-frames allocated to the various stages of dispute settlement, including the rule that panels are established only at the second meeting where the issue appears on the agenda. In order to increase confidence in the system, the US called both for the opening to the public of dispute hearings and for giving outside parties the opportunity to present 'friend of the court' (*amicus curiae*) briefs.²⁶ These are unsolicited reports which a private person or entity submits to the court with a view of informing and influencing its decision (see Section 7.3 for details). This latter proposal was likely spurred by the rulings in the *Shrimp-Turtle* case²⁷ already mentioned which dealt with a US import prohibition of shrimp that is not caught 'turtle-friendly'. While the import ban was found to be inconsistent under WTO law, the Appellate Body found in favour of the US on the *amicus curiae* issue and reversed a previous panel finding by concluding that panels do have the authority to accept *amicus curiae* briefs, and by upholding another finding according to which parties had the right to attach such briefs to their own submissions.²⁸ Already prior to its proposal under the DSU review, the US had been pressing

²⁴ See 'EU Outlines Its Proposal For Reforming Dispute System', in *International Trade Reporter*, vol 15, no 41, 21 October 1998, and 'EU Outlines Proposals for Changes to WTO Dispute Settlement System', in *Inside US Trade*, 30 October 1998.

²⁵ Preliminary Views of the United States Regarding Review of the DSU, document dated 29 October 1998.

²⁶ See 'US Recommends Prompt Compliance, Transparency to Reform WTO Process', in *International Trade Reporter*, vol 15, no 44, 11 November 1998; and 'US Calls on WTO Members to Open Dispute Mechanism to Public', in *Inside US Trade*, 6 November 1998.

²⁷ *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (WT/DS58/AB/R). On the case, see also Ahn (1999), Appleton (1999), Bree (1999), Cadeddu (1998), Chang (2000), Howse (2002), Mavroidis (2000a), Puls (1999), Qureshi (1999), Richard and McCrory (2000), Simmons (1999) and Warnken (1998).

²⁸ See WT/DS58/AB/R, para 110.

hard for strengthened transparency,²⁹ although it made its proposals outside the DSU review to the General Council in July and October 1998.³⁰

India called in its submission³¹ for a clarification of the DSU provisions on special and differential treatment (S&D) of developing countries. It urged developed countries to make less aggressive use of the dispute settlement system against developing countries 'to prove their aggression to domestic constituencies', arguing that dispute settlement proceedings should not be initiated where the trade effect on developed countries was only marginal. India also argued in favour of giving developing countries extra time for the preparation of submissions and rebuttals, and a longer reasonable period of time (RPT) for implementation which should be 30 months in the case of developing country defendants.³² At that time, India was struggling in two major disputes with trading partners. In *India – QRs*, it sought to shelter its quantitative restrictions (QR) which played a major role in Indian trade policy from challenges under the WTO.³³ In addition, India had been defeated in the politically highly sensitive *Patents* case by the US and the EC, where it now had to implement the rulings.³⁴

Pakistan, Singapore and Thailand sought in their proposal changes that would reverse the Appellate Body's conclusion that non-governmental organisations (NGOs) be allowed to submit unsolicited friends-of-the-court briefs to dispute panels, motivated by the findings in the *Shrimp-Turtle* case on that issue.³⁵

²⁹ See 'ACTPN Urges Greater Transparency in WTO Dispute Settlement', in *Inside US Trade*, 28 April 1995; 'US Seeks More Transparency in WTO Dispute Settlement Process, Lang Says', in *International Trade Reporter*, vol 13, no 14, 3 April 1996; and 'US Will Seek More Transparency in WTO Dispute Settlement Process', in *International Trade Reporter*, vol 15, no 15, 15 April 1998.

³⁰ See 'US Proposal Calls on WTO to Release Dispute Panel Papers', in *International Trade Reporter*, vol 15, no 28, 15 July 1998; and 'US Submits Revised Proposal on WTO "Timely" Transparency', in *International Trade Reporter*, vol 15, no 41, 21 October 1998. On the General Council discussions, see also 'WTO Chief Outlines Plans for Increased Transparency', in *International Trade Reporter*, Vol 15, no 29, 22 July 1998; and 'Ruggiero Places Onus for Additional Transparency on WTO Members', in *Inside US Trade*, 24 July 1998.

³¹ Review of the Dispute Settlement Understanding – Discussion Paper by India (undated).

³² See 'US Recommends Prompt Compliance, Transparency to Reform WTO Process', in *International Trade Reporter*, vol 15, no 44, 11 November 1998.

³³ *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* (WT/DS90, 91, 92, 93, 94, 96).

³⁴ *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* (WT/DS50 and WT/DS79).

³⁵ See 'Four Nations Submit Proposals to Reform WTO Dispute Settlement Process', in *International Trade Reporter*, vol 15, no 47, 2 December 1998; and, with regard to the report, 'Complainants in WTO Shrimp Case Slam Appellate Body at DSB', in *Inside US Trade*, 13 November 1998.

Other countries that made proposals for the DSU review at this stage included Hong Kong, Hungary,³⁶ Japan,³⁷ South Korea,³⁸ Venezuela,³⁹ Argentina,⁴⁰ Guatemala⁴¹ and Australia.⁴²

Despite discussions held in some 10 informal meetings, the original deadline to complete the review in 1998 could not be met. It had become clear already at the time when the 'substantive discussions' started in mid-October 1998 that the deadline would probably be missed.⁴³ In the light of the slow progress the DSU review made, the DSB finally agreed in its meeting on 8 December 1998 to ask the General Council for an extension of the deadline until the end of July 1999.⁴⁴ This extension was granted at the General Council Meeting of December 1998.⁴⁵

5.2 The Extension in the Run-Up to Seattle (1999)

Informal meetings continued in 1999. Meanwhile, the DSU review changed – as Canada's deputy permanent representative in Geneva put it – from a 'once-over-lightly' tune-up of the DSU to dealing with serious concerns over compliance with panel rulings. At this time, the *Bananas* case was the prime motivator in raising the level of the review.⁴⁶ The reasonable period of time (RPT) for the implementation of the rulings in the *Bananas* case had expired on 1 January 1999 and a row was developing over whether the EC had complied.

³⁶ Comments on the Review of the Dispute Settlement Mechanism, Non-Paper by Hungary, 18 September 1998.

³⁷ The Review of the Dispute Settlement Understanding – Informal suggestions with respect to the issues to be considered for evaluation and review by the Government of Japan, 29 May 1998, 3150 DSU/2.

³⁸ Issues Relevant to the DSU Review – Informal Suggestions by Korea, Job no 3224 DSU/3.

³⁹ Comments on the Review of the Dispute Settlement Mechanism, Non-Paper by Venezuela, 24 February 1998.

⁴⁰ Review of the Dispute Settlement Understanding, Non-Paper Argentina, 27 October 1998.

⁴¹ Proposal by Guatemala Regarding the Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes, 26 October 1998.

⁴² Not publicly available.

⁴³ See 'WTO Begins Contentious Talks on Reform of Dispute Resolution Rules, Delays Expected', in *International Trade Reporter*, vol 15, no 42, 28 October 1998.

⁴⁴ See WT/DSB/M/52.

⁴⁵ See WT/GC/M/32 15; see also 'Dispute Settlement Review Will Continue into Next Year', in *International Trade Reporter*, vol 15, no 48, 9 December 1998; and 'Members of the WTO Vote to Delay Review of the DSU Until Next Year', in *Inside US Trade*, 18 December 1998.

⁴⁶ See 'Next WTO Negotiating Round Must Clarify Dispute Settlement, Canadian Official Says', in *International Trade Reporter*, vol 16, no 14, 7 April 1999.

On 10 February 1999, Canada presented its submission. It was the first proposal to address the so-called 'sequencing issue' that had arisen between the US and the EC on account of procedural gaps or even contradictions in the DSU. Whereas the US held that it could (and even had to) proceed with an Article 22 request for retaliation 30 days after the expiry of the RPT, the EC argued that the US would first have to request an Article 21.5 panel to review the implementation process. In a parallel development, the EC sought an authoritative interpretation pursuant to Art. IX.2 of the WTO agreement from the General Council in order to clarify the problem.⁴⁷ Canada (which faced similar problems as the EU in the *Magazines* case⁴⁸ with the US as complainant) proposed a sequential approach, making the successful challenge of an implementation measure under Article 21.5 a prerequisite for the complainant's request for authorisation to suspend concessions *vis-à-vis* the defendant.⁴⁹ Furthermore, Canada's proposal also called for more transparency by making country submissions to panels and the Appellate Body publicly available on a timely basis, and by requiring members to release public versions of their submissions. The proposal also mentioned the possible establishment of an advisory centre on WTO law to help developing countries better participate in the system.⁵⁰ This submission was followed by a further textual submission on 19 May which proposed the text for a new Article 21*bis* to eliminate the sequencing problem.⁵¹ From press reports quoting trade officials, it appears that the US was the only member to oppose such sequencing in the negotiations.⁵²

The US reluctance to agree on a sequencing approach at this time is likely related to two new complaints brought forward by the EC in November 1998 and March 1999. They were closely related to the disagreement on the 'sequencing issue'. In *US – Section 301*,⁵³ the EC complained about allegedly WTO-inconsistent time-frames in the US

⁴⁷ For the discussion in the General Council on 15 and 16 February 1999, see WT/GC/M/35. See also the texts submitted by the EC (WT/GC/W/133 and WT/GC/W/143) and by the United States (WT/GC/W/144). On the discussion, see 'WTO General Council Passes On Clarifying WTO Dispute Rules', in *Inside US Trade*, 19 February 1999.

⁴⁸ *Canada – Certain Measures Concerning Periodicals* (WT/DS31).

⁴⁹ For details on sequencing, see Section 6.4.3.

⁵⁰ See 'Canada Urges WTO to Adopt "Refinements" to Dispute Rules', in *International Trade Reporter*, vol 16, no 7, 17 February 1999. See also Section 7.5.4 of this study.

⁵¹ See 'Canada Proposes Change for Dispute Rules in Draft Submitted to WTO Settlement Body', in *International Trade Reporter*, vol 16, no 21, 26 May 1999; and 'Canada Floats Language to Clarify WTO Dispute Settlement Provisions', in *Inside US Trade*, 28 May 1999.

⁵² See 'US Isolated on Sequencing Issues at WTO Dispute Reform Negotiations', in *International Trade Reporter*, vol 16, no 28, 14 July 1999.

⁵³ *United States – Sections 301–310 of the Trade Act of 1974* (WT/DS152).

trade legislation which would mandate the USTR to make determinations in a time frame shorter than that included in the DSU procedures. Whereas this complaint was more general in nature, the EC complained in *US – EC Products*⁵⁴ against specific retaliatory measures which the US had taken to counter the EC's failure to implement the *Bananas* ruling. The EC held that the US measures were not consistent with WTO rules as the US had not exhausted the Article 21.5 procedure. Obviously, the US did not want to prejudice its own position in the negotiations by agreeing to any sequencing procedure as long as it was not mandated to do so by the panels or the Appellate Body.

The US followed up on its first proposal on 21 April 1999 with a new proposal, suggesting a reduction of the time frame for consultations prior to the panel request from 60 to 30 days, and the elimination of the interim panel stage. Final panel rulings should be issued to the parties, other WTO members and the public simultaneously. The proposal would shorten the entire procedure by 20–27 weeks.⁵⁵

As the final stage of the pre-Seattle negotiations began, there were some signs that the US was beginning to accept the idea of sequencing. That acceptance may have been fostered by an adverse panel ruling in the high-profile *Foreign Sales Corporations (FSC)* case⁵⁶ which was circulated on 8 October 1998 and which pushed the US for the first time into a defensive position in dispute settlement practice under the DSU on an important issue. However, another issue was already emerging as a new transatlantic stumbling block on the way to an agreement: President Clinton had signed a provision into law which would have mandated periodic changes to the list of products subject to the suspension of concessions, thereby maximising the negative impact of retaliation on exporters in the defendant country.⁵⁷ The move towards this 'carousel retaliation' had been motivated by the non-compliance of the EC in the *Hormones* and *Bananas* cases. In order to avoid any such 'carousel retaliation', the EC now proposed the addition of a footnote to Article 22.7 DSU on the arbitration procedure on the level of suspension of concessions or other obligations which would have effectively banned the rotation of product lists. By contrast, the US sought a footnote explicitly allowing such retaliation. As in the case of sequencing, the EC

⁵⁴ *United States – Import Measures on Certain Products from the European Communities* (WT/DS165).

⁵⁵ See 'Canada Proposes Change for Dispute Rules in Draft Submitted to WTO Settlement Body', in *International Trade Reporter*, vol 16, no 21, 26 May 1999 (Section on the US Paper).

⁵⁶ *United States – Tax Treatment for 'Foreign Sales Corporations'* (WT/DS108).

⁵⁷ See Section 6.4.6 on carousel retaliation.

position reportedly enjoyed much wider support among the membership than the US position.⁵⁸

Informal meetings continued through the July 1999 deadline. However, they did not bring about the completion of the review, and a draft report circulated at the end of July 1999 did not find sufficient support among members. Countries such as India, Malaysia or Mexico opposed any continuation of the review after the 1999 summer break.⁵⁹ At an informal meeting held on 30 July 1999, delegations had concluded that the DSU review had not been terminated in time, and that any further work would have to be approved retroactively by the General Council. The DSB chairman therefore proposed to start informal consultations at the beginning of September with a view to finalising a report on the DSU review at the DSB meeting of 22 September 1999.⁶⁰ However, no agreement was reached, not even on whether to extend the 31 July 1999 deadline once more. The DSB therefore decided to adjourn the meeting until further notice.⁶¹

In the subsequent meeting of the General Council on 6 October 1999, the chairman of the DSB requested the General Council to consider how to proceed with the DSU Review. Strong resistance against continuing the DSU Review came from Mexico, Malaysia, the Philippines and Egypt. In particular, these countries had no interest in a modification of the DSU that would increase transparency and would legitimise the admission of *amicus curiae* briefs. By contrast, many other members, such as the EC, Japan, Canada, Thailand, Hungary, Hong Kong, Brazil, New Zealand, Venezuela, Ecuador, Australia, Uruguay, Singapore, Guatemala, Switzerland, Korea, Costa Rica and Bulgaria favoured continuation of the discussions. The United States in particular argued strongly in favour of continuing the review, holding that even the continuation of the DSU required a consensus decision to be taken in Seattle. Other countries such as India or Indonesia factually took

⁵⁸ See 'Revised Dispute Reform Text Presented to WTO Members, Differences Remain', in *International Trade Reporter*, vol 16, no 46, 24 November 1999; 'Trade Officials Say Accord is Near on WTO Dispute Settlement Reform', in *International Trade Reporter*, vol 16, no 47, 1 December 1999; and 'EU May Challenge United States in WTO on Carousel Approach to Trade Sanctions', in *International Trade Reporter*, vol 17, no 19, 11 May 2000.

⁵⁹ See 'WTO Fails to Meet Deadline for Completing DSU Review', in *International Trade Reporter*, vol 16, no 31, 4 August 1999; and 'WTO Members Deadlocked on DSU Review After Missing July Deadline', in *Inside US Trade*, 6 August 1999.

⁶⁰ See WT/DSB/M/67; no 3.

⁶¹ See WT/DSB/M/68; no 9. See also 'Review of Dispute System in Limbo as Members Fail to Extend Mandate', in *International Trade Reporter*, vol 16, no 38, 29 September 1999.

intermediate positions with regard to this issue. The discussion ended inconclusively with the General Council agreeing to revert to the matter at its next session.⁶²

Before the next meeting of the General Council, the DSU review was subject to a final debate in the Dispute Settlement Body which met on 27 October and 3 November 1999. At this meeting, the Chairman Kåre Bryn invited Mr Suzuki of the Japanese delegation to report in his personal capacity on informal consultations that he had chaired. These informal consultations had taken place after the lapse of the 31 July 1999 deadline between a large group of WTO members that were interested in the continuation of the DSU review beyond the deadline.⁶³ Suzuki subsequently presented the text dated 15 October on his personal capacity, without prejudice to the position of any participating member. It included many proposals on the sequencing issue and the implementation stage, on time-frames, third party rights and other aspects.⁶⁴

As negotiators became aware that no consensus on the Suzuki text would emerge, the discussion then turned to how to proceed with the DSU review exercise. It became increasingly clear that many members refused to consider an extension of the DSU Review beyond Seattle, and that the general feeling was that in the absence of a decision by Ministers, the DSU would continue without modifications. However, the US in particular did not share this view of automaticity, reiterating as on prior occasions that: '... it should not be assumed that the United States would agree to the continuation of the DSU or to any modifications which would not be acceptable to it.'⁶⁵ When the meeting was reconvened a

⁶² See WT/GC/M/48, no 7; see also 'Proponents, Opponents of DSU Review Fail to Break Stalemate in WTO', in *Inside US Trade*, 8 October 1999; and 'North-South Stalemate Continues in Talks on Reform of WTO Dispute Process Rules', in *International Trade Reporter*, vol 16, no 40, 13 October 1999.

⁶³ These open discussions, where all members had an option to participate, had started in early July and continued until the middle of September 1999. The first result was a paper entitled 'Elements of Possible Agreement' dated 21 September 1999, which subsequently served as the basis for a first draft of a legal text. A series of discussions on the legal draft was held until 15 October which was the informal deadline that had been set in light of the constraints imposed by preparations for the Seattle Ministerial Conference. Based on the outcome, Suzuki had produced a proposal entitled 'Proposed Amendment of the DSU', dated 15 October, that – like prior versions – was circulated to all WTO members. The venues for the meetings had been provided by Hong Kong and Canada.

⁶⁴ See 'Official Says WTO Members Still Disagree on Reform of Dispute Resolution Procedure', in *International Trade Reporter*, vol 16, no 43, 3 November 1999. On the US position, see also 'DSU Review Draft Falls Short of US Demands for Transparency', in *Inside US Trade*, 22 October 1999.

⁶⁵ See WT/DSB/M/70, p 27.

few days later, on 3 November 1999, the discussion resumed on the basis of a statement summarising the state of the discussions, which the chairman proposed to make at the General Council in his own responsibility, in the absence of agreement on a report of the DSB.

In the statement, DSB chairman Kåre Bryn reported that it had not been possible to reach agreement on a report by the DSB on the DSU review and that he could therefore only make a statement in his capacity as chairman on his own responsibility, which should be read in conjunction with individual statements by members on their national positions. Referring to the former chairman's prior oral report to the General Council, he held in carefully balanced diplomatic language that the 31 July deadline for the review process had lapsed, that informal consultations among some interested parties had continued beyond that deadline, that in his view there was a consensus on the effectiveness of WTO dispute settlement and that it could be further improved. He proposed to the General Council to take note of all the discussions that had taken place during the review, and that some proposals to amend the DSU could still emerge in time for a decision at the Seattle Ministerial. The report by the DSB chairman – along with the proposals and statements by delegations – was forwarded to ministers, meeting in Seattle, without any particular recommendation.⁶⁶

In a final attempt to move the DSU review, Japan also submitted the Suzuki text for the Seattle Ministerial in December 1999. This submission entitled 'Proposed Amendment of the DSU' was co-sponsored by Canada, Costa Rica, the Czech Republic, Ecuador, the European Communities and its Member States, Hungary, Japan, Korea, New Zealand, Norway, Peru, Slovenia, Switzerland, Thailand and Venezuela.⁶⁷ It was largely based on Suzuki's informal consultations and it already left out some of the more contentious issues in order to make the text palatable to delegations. The issues that had not been considered included the proposed establishment of a standing panel body, modalities for civil society to provide inputs to panel proceedings (*amicus curiae* briefs), public observance of dispute settlement proceedings (transparency), co-defendants, collective retaliation and certain aspects of strengthening third party rights. Certain disputed aspects regarding Article 21.3 DSU on the reasonable period of time for implementation were also left open. It included, however, a footnote with restrictions on carousel retaliation in two different versions.

⁶⁶ See WT/GC/M/50, no 5.

⁶⁷ See WT/MIN(99)/8.

Ministers were not able to take a decision in Seattle with regard to the DSU and in accordance with the 1994 Ministerial Decision.⁶⁸ From a review of press reports, it appears that US opposition to the provision banning carousel retaliation on which the EC insisted was the main stumbling block, whereas the provision was acceptable to other WTO members.⁶⁹

After the Seattle Ministerial, the DSU review disappeared from the agenda of the Dispute Settlement Body.⁷⁰

5.3 The Limbo Between Seattle and Doha (2000–2001)

After the failure of the Seattle Ministerial, the DSU review remained in limbo for some time. It only came back on the WTO agenda later in 2000. Negotiations did not move, however, as long as the controversial footnote banning carousel-style retaliation was still included in drafts.

On 20 May 2000, President Clinton had signed the carousel provisions into law and the US prepared its application for the first time.⁷¹ On 31 May, USTR published the proposed changes to the list of sanctioned products in a Federal Register notice, seeking public comments on the proposed modifications.⁷² Arguing that it needed time to review the ‘hundreds of comments’ it had received on the proposed modifications, the US administration dragged its feet and delayed the rotation of the product list to the disliking of Congress.⁷³ The administration had voiced

⁶⁸ See also WT/DSB/M/72, no 4.

⁶⁹ On the discussions immediately before Seattle, see ‘North-South Stalemate Continues in Talks on Reform of WTO Dispute Process Rules’, in *International Trade Reporter*, vol 16, no 40, 13 October 1999; ‘Official Says WTO Members Still Disagree Reform of Dispute Resolution Procedure’, in *International Trade Reporter*, vol 16, no 43, 3 November 1999; ‘Draft DSU Text Languishes as Countries Oppose Formal Consideration’, in *Inside US Trade*, 5 November 1999; ‘EU Demands on Retaliation Delay Progress on DSU Draft Review in WTO’, in *Inside US Trade*, 12 November 1999; ‘Revised Dispute Reform Text Presented to WTO Members, Differences Remain’, in *International Trade Reporter*, vol 16, no 46, 24 November 1999; ‘US, WTO Members Split Over How to Change DSU at Seattle’, in *Inside US Trade*, 26 November 1999; ‘Trade Officials Say Accord is Near on WTO Dispute Settlement Reform’, in *International Trade Reporter*, vol 16, no 47, 1 December 1999; and ‘Negotiators Try to Hammer out Agreement on DSU Review’, in *Inside US Trade*, 3 December 1999.

⁷⁰ For an overview of the state of the discussions immediately after Seattle, see ‘DSU Review Faces Substantive, Procedural Challenges After Seattle’, in *Inside US Trade*, 24 December 1999.

⁷¹ See ‘USTR Puts Public Comments on “Carousel” Sanctions in Hundreds’, in *WTO Reporter*, 21 June 2000 and ‘Text’s Footnotes on Carousel Retaliation Seen Likely to Sink Dispute Settlement’, in *WTO Reporter*, 21 July 2000.

⁷² See FR vol 65, no 105, of 31 May 2000, pp 34786ff.

⁷³ See ‘USTR Puts Public Comments on “Carousel” Sanctions in Hundreds’, in *WTO Reporter*, 21 June 2000.

its opposition against the carousel approach previously, arguing that it already had the discretionary authority to alter its retaliation lists if necessary.⁷⁴

Even before the measure had been signed into law, the EC had already signalled that it might decide to challenge the new provisions in the WTO, also hinting that the carousel approach could be used one day against the US in the *FSC* case.⁷⁵ Additionally, the EC requested consultations under the DSU on the carousel provision in summer 2000.⁷⁶ However, the EC signalled that it would only request a panel once the carousel provision was effectively applied.⁷⁷

While the row over the carousel issue went on, EC efforts to impose its view of the sequencing problem through rulings by the adjudicative bodies received a blow: Although the final panel report of 17 July 2000 in *US – Certain EC Products*⁷⁸ had found that the US acted inconsistently when it made a unilateral determination of the WTO-compliance of the implementing measures taken in *EC – Bananas*, it had also stated that the WTO-consistency of implementation measures could be determined both through recourse to an Article 21.5 panel and through an arbitration under Article 22.6/22.7.⁷⁹ The EC appealed against this finding as it ran counter to its sequencing approach. The Appellate Body found in its December 2000 report that the panel's determination with regard to the sequencing issue was outside its terms of reference. Moreover, it also held that: '(d)etermining what the rules and procedures of the DSU ought to be is not our responsibility nor the responsibility of panels; it is clearly the responsibility solely of the Members of the WTO.'⁸⁰ By thus exercising judicial restraint, the Appellate Body elegantly evaded the problem, and the ball was back in the court of members.

Regarding material disputes, new developments in the *FSC* case occurred. After it had become obvious that the US replacement legislation

⁷⁴ See 'EU May Challenge United States in WTO on Carousel Approach to Trade Sanctions', in *International Trade Reporter*, vol 17, no 19, 11 May 2000.

⁷⁵ See 'EU May Challenge United States in WTO on Carousel Approach to Trade Sanctions', in *International Trade Reporter*, vol 17, no 19, 11 May 2000. See also Sek (2002).

⁷⁶ *United States – Section 306 of the Trade Act of 1974 and Amendments Thereto* (WT/DS200).

⁷⁷ See 'EU-US Trade Disputes: negotiation and compensation rather than sanctions', in *EU/US News – A review of Transatlantic Relations*, vol II, no 6, December 2000, p 11.

⁷⁸ *United States – Import Measures on Certain Products from the European Communities* (WT/DS165).

⁷⁹ See WT/DS165/R, para 6.126; see also 'Ruling May Revive "Sequencing" Issue in Dispute Rules for Settlement Reform', in *WTO Reporter*, 11 September 2000, and 'EU to Appeal WTO Panel Finding on Dispute Settlement Sequencing', in *WTO Reporter*, 14 September 2000.

⁸⁰ See WT/DS165/AB/R, para 92.

(Extraterritorial Income Exclusion Act; ETI) would not be in compliance with the DSB recommendations, the US and the EC negotiated in September 2000 a bilateral agreement on how to proceed in the FSC case.⁸¹ According to the agreement, a sequencing approach was adopted under which a panel (subject to appeal) would review the WTO consistency of the replacement legislation, and arbitration over the appropriate level of sanctions would only be conducted if the replacement legislation was found WTO-inconsistent.⁸² Not only did the EC grant the US another 30 days to enact the replacement legislation, but the US itself had now become a beneficiary of the sequencing approach (even with the possibility of subsequent appeal) which it had opposed before.⁸³ It is believed that the US had to back down, in exchange for the agreement, on carousel retaliation although no such deal had been explicitly made part of the procedural agreement.⁸⁴ Whereas the EC requested, on 17 November 2000, an authorisation from the DSB to impose sanctions against the US worth more than 4 bn USD, the US official said one day later that the US would not publish a revised list of sanctions under the carousel approach, as long as progress was being made toward settling the dispute.⁸⁵ The sanctions requested by the EC were several times higher than the US Sanctions in *EC – Bananas* and *EC – Hormones* combined. Indeed, the arbitrators later confirmed that the suspension of concessions in the form of 100 per cent *ad valorem* duties on imports worth 4.043 bn USD constituted ‘appropriate countermeasures’.⁸⁶ As the annual CEO-level conference under the Trans-Atlantic Business Dialogue (TABD) noted in November 2000, the transatlantic disputes had now placed ‘enormous economic and political strain’ on the overall US-European Union relationship.⁸⁷

⁸¹ *United States – Tax Treatment for ‘Foreign Sales Corporations’* (EC) (WT/DS108); see also Hauser (2000).

⁸² See ‘US-EU Reach Agreement on FSC Procedures’, USTR Press Release, 00–65, 30 September 2000.

⁸³ Already previously, it had insisted that consultations be held prior to the establishment of a compliance panel on its implementation in *United States – Anti-dumping Duty on Dynamic Random Access Memory Semi-conductors (DRAMs) of One Megabit or Above from Korea* (Korea) (WT/DS99); see ‘US Blocks WTO Compliance Review With Reversal on DSU Rules’, in *Inside Trade*, 24 March 2000.

⁸⁴ See ‘US-EU Trade Tensions De-Escalate in FSC Case’, in *BRIDGES Weekly Trade News Digest*, vol 4, no 37, 4 October 2000; also see a remark in ‘WTO Appellate Body Affirms Legality of Dispute Settlement “sequencing”’, in *WTO Reporter*, 12 December 2000.

⁸⁵ See ‘Corporate Leaders Say US-EU Disputes Harming Business, Urge Quick Resolution’, in *International Trade Reporter*, vol 17, no 46, 23 November 2000.

⁸⁶ See WT/DS108/ARB, circulated on 30 August 2002. The EC was authorised to suspend concessions on 7 May 2003.

⁸⁷ See Hauser and Zimmermann (2000) as well as ‘Corporate Leaders Say US-EU Disputes Harming Business, Urge Quick Resolution’, in *International Trade Reporter*, vol 17, no 46, 23 November 2000.

The FSC case was by far not the only reason that had forcefully driven the US from an initially offensive approach into a defensive position in WTO dispute settlement during the year 2000. More and more cases against US trade remedy laws were being brought to the WTO.⁸⁸ Observers argued that these cases included disputes that could have been settled in Seattle, had there been negotiations, and that had now to be clarified under the DSU.⁸⁹ With the US finding itself more and more often on the bench, criticism of WTO dispute settlement was mounting in the US. Almost inevitably, a plan for a US WTO dispute settlement review commission that had originally been presented by Dole was revived. Under the plan, WTO rulings adverse to the US would be reviewed under four criteria: (i) did the panels exceed their authority?; (ii) did they add to the obligations or diminish the rights of the United States under the WTO agreements?; (iii) did they act arbitrarily, engage in misconduct, or depart from established procedures?; (iv) did they deviate from the applicable standard of review, including in anti-dumping cases?⁹⁰

Not only issues such as sequencing or carousel retaliation and the transatlantic trade disputes in general made any progress on the DSU review in the year 2000 difficult. Decisions that came about in late 2000 highlighted the importance of the *amicus curiae* issue and the question of third party rights as well as the close linkages between these two issues. On the one hand, some rulings increased or at least confirmed the possibilities of NGOs to submit *amicus curiae* briefs (*British Steel*,⁹¹ *Australia – Salmon*,⁹² *Music Licensing*⁹³). On the other hand, the US refused to grant third party rights to Japan and Australia and others in the carousel consultations. This refusal was viewed by adversaries of *amicus* briefs as amounting to a preferential treatment of NGOs *vis-à-vis* members. It became clear that the DSU review would now also have to

⁸⁸ For a list of such cases under review in August 2000, see 'WTO Action Proceeding on Key Disputes, Many Affecting United States Trade', in *WTO Reporter*, 31 August 2000. See also GAO (2003) for a more recent analysis.

⁸⁹ See 'Sen Baucus Warns of Attacks on US Trade Laws in WTO Proceedings', in *WTO Reporter*, 21 July 2000.

⁹⁰ See 'Rep Cardin Revives Dole Plan to Create Panel to Review WTO Rulings Against US', in *WTO Reporter*, 23 June 2000. For a discussion of the Dispute Settlement Review Commission proposal, see Herman (1996) and Horlick (1995).

⁹¹ *United States – Imposition of Countervailing Duties on Certain Hot-rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* (European Communities) (WT/DS138); See, for instance, 'Key WTO Members Score Appellate Body For Decision to Accept Amicus Briefs', in *WTO Reporter*, 8 June 2000; and 'WTO Members Fight Appellate Body on British Steel Over NGO Briefs', in *Inside US Trade*, 9 June 2000.

⁹² *Australia – Measures Affecting Importation of Salmon* (Canada) (WT/DS18).

⁹³ *United States – Section 110(5) of the US Copyright Act* (EC) (WT/DS160).

bring improved third party rights.⁹⁴ With regard to *amicus* briefs, the publication of an 'additional procedure' by the Appellate Body for the submission of such briefs in the *EC – Asbestos* case⁹⁵ fuelled additional outrage among many members against the Appellate Body in late 2000.⁹⁶

This generally tense atmosphere at the WTO was barely conducive to the DSU review efforts. Nevertheless, Japan basically resubmitted on 29 September 2000 the Suzuki text of 1999 to the General Council for an amendment of the DSU pursuant to Article X WTO agreement.⁹⁷ Beside some minor modifications, the new proposal changed only in one aspect more substantially from its predecessor. The controversial footnote to Article 22.7 guiding arbitration proceedings on carousel retaliation was not included any more. The dropping of the footnote presumably prompted the European Union (and EC membership candidates Czech Republic,⁹⁸ Hungary⁹⁹ and Slovenia) as well as Thailand¹⁰⁰ not to co-sponsor the proposal any longer.¹⁰¹ The proposal was still co-sponsored by many delegations already sponsoring the Suzuki draft (ie Canada, Costa Rica, Ecuador, Korea, New Zealand, Norway, Peru, Switzerland and Venezuela). Colombia, Chile,¹⁰² Bolivia¹⁰³ and Uruguay¹⁰⁴ joined the sponsors as well.

In the subsequent General Council discussion of 10 October 2000, the EC made it clear that it was not acceptable that the proposal was silent on 'carousel' retaliation. The United States did not view the proposal as a basis for consensus either. Most other delegations took a reserved stance as well. The discussion also revealed old divides between developing

⁹⁴ See 'WTO Members Make Unfriendly Noises on 'Friends of the Court' Dispute Briefs', in *WTO Reporter*, 9 August 2000.

⁹⁵ *European Communities – Measures Affecting the Prohibition of Asbestos and Asbestos Products* (Canada) (WT/DS135); see also Zonnekeyn (2001) and Cone III (2001).

⁹⁶ See 'WTO Appellate Body Sets Out Procedures for Amicus Briefs in Asbestos Case', in *WTO Reporter*, 13 November 2000 and 'WTO Appellate Body Under Fire for Move to Accept Amicus Curiae Briefs from NGOs', in *WTO Reporter*, 27 November 2000. For details on the *amicus* issue, see Section 7.3 of this study.

⁹⁷ Proposal contained in WT/GC/W/410.

⁹⁸ The Czech Republic stated that it suggested a more comprehensive approach and a cautious approach in invoking the procedures laid down in Article X WTO agreement as this was a novum; see discussion in WT/GC/M/58, no 5.

⁹⁹ Hungary stated that it would have preferred a more comprehensive approach; see WT/GC/M/58, no 5.

¹⁰⁰ Thailand, as some other countries, stated that it favoured a more comprehensive approach; see WT/GC/M/58, no 5.

¹⁰¹ See also 'Supporters of DSU Changes Highlight Problems in Hope of Momentum', in *Inside US Trade*, 9 February 2001.

¹⁰² See WT/GC/W/410/Add 1.

¹⁰³ See WT/GC/W/410/Add 2.

¹⁰⁴ See WT/GC/W/410/Add 3.

and industrial countries (particularly the US) on issues such as transparency and *amicus curiae* briefs. It was agreed, at the end of the discussion, that the chairman would hold consultations on how to move forward, and to revert to the issue at the December 2000 General Council meeting.¹⁰⁵ However, neither that meeting nor several subsequent meetings and open consultations held in 2001 brought any result.¹⁰⁶

On 26 October 2001, Japan and the co-sponsors submitted a revised version of their proposal.¹⁰⁷ Most of the proposal remained unchanged, apart from some technical modifications and a few important amendments regarding compliance panels and transitory provisions. The new proposal introduced a right to appeal a compliance panel report before the Appellate Body.¹⁰⁸ Transitory provisions established that the new rules governing the implementation stage and resolving the sequencing issue would apply only to those disputes where the DSB adopted recommendations and rulings after the effective date of the amendment. Most likely, these transitional provisions were not only meant to provide legal clarity with regard to the application of the amendment for those cases currently under consideration by the DSB, but they were also drafted to help negotiators to agree on the new rules without being concerned that the amendments might weaken their position in any concrete case currently before the DSB.¹⁰⁹

The proposal was submitted to the Doha Ministerial Conference for decision.¹¹⁰ Another submission to the Ministerial Conference regarding dispute settlement was made by Thailand calling for an increase in the number of members serving on the Appellate Body.¹¹¹ This proposal was likely motivated by Thailand's experience with the appellate review in the case *Thailand – Anti-dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel H-Beams from Poland*¹¹² where it took the Appellate Body 140 days to circulate its report as opposed to the maximum ninety

¹⁰⁵ See WT/GC/M/58, no 5; see also 'US, EU Reject Compromise Proposal by Japan on Reform of WTO Dispute Rules', in *WTO Reporter*, 11 October 2000.

¹⁰⁶ See WT/GC/M/63, no 7; WT/GC/M/65, no 12; WT/GC/M/66, no 12; and WT/GC/M/69, no 8. See also 'WTO Chair Cites "Wide Gaps" in Member Positions on Launch of New Trade Round', in *WTO Reporter*, 26 July 2001; 'Agreement on Dispute Settlement Changes Unlikely Before Doha', in *Inside US Trade*, 3 August 2001.

¹⁰⁷ See WT/GC/W/410/Rev 1.

¹⁰⁸ See WT/GC/W/410/Rev 1, no 4 (Proposed Articles 21bis 7 and 21bis 7bis).

¹⁰⁹ See 'WTO Members Circulate Proposed Changes to Dispute System; Carousel Issues Left Out', in *WTO Reporter*, 8 November 2001; and 'Japan to Press for Dispute Settlement Changes in Qatar', in *Inside US Trade*, 9 November 2001.

¹¹⁰ See WT/MIN(01)/W/6.

¹¹¹ See WT/MIN(01)/W/2.

¹¹² WT/DS122.

day time limit laid down in the DSU. A further proposal was submitted jointly by Thailand and the Philippines, calling for a modification of Article 22.7 of the DSU by introducing clear rules on the determination of the level of nullification and impairment by the arbitrator, and by regulating carousel retaliation. The proposed text closely followed one version of the controversial footnote to Article 22.7 that had been included in the 1999 Suzuki text (which, at the time, was still co-sponsored by Thailand), and which had later been dropped.¹¹³

Both the revised text and the new submissions by Thailand and the Philippines were discussed at the General Council meeting on 31 October 2001.¹¹⁴ This was the last time the proposals for the DSU review had been the topic of formal discussions in the General Council prior to the Doha Ministerial Conference which took place from 9 to 14 November 2001. By that time, it had become clear that there was no sufficient consensus for the proposals to be adopted. However, a new mandate for negotiations on the DSU was now included in the Doha Ministerial Declaration.

5.4 The Structured Discussion Under the Doha Mandate (2002–2003)

Paragraph 30 of the Ministerial Declaration which was adopted at the end of the Doha Ministerial on 14 November 2001 contains an agreement to negotiations on improvements and clarifications of the Dispute Settlement Understanding. The negotiations were to be based on the work already done and additional proposals by members, and they were to have brought an agreement on improvements and clarifications not later than May 2003. The results should have entered into force as soon as possible thereafter without awaiting the conclusion of the entire Round.¹¹⁵

Formal discussions were held predominantly during 13 meetings of the Special Session of the Dispute Settlement Body,¹¹⁶ chaired by Péter Balás

¹¹³ See WT/MIN(01)/W/3 and WT/MIN(01)/W/4. On the resumption of the DSU Review in general, see also 'WTO Members Gear up for Talks on Dispute Settlement Rules Reform', in *WTO Reporter*, 11 October 2001.

¹¹⁴ See WT/GC/M/71, no 5.

¹¹⁵ See also para 47 of the Ministerial Declaration, adopted on 14 November 2001 (WT/MIN(01)/DEC/1).

¹¹⁶ As mandated by the Trade Negotiations Committee (see TN/C/M/1) which in turn was mandated to operate under the authority of the General Council by the Ministerial meeting in Doha; see para 46 of the Doha Ministerial Declaration (WT/MIN(01)/DEC/1). Minutes of the formal discussions are available in TN/DS/M/1, TN/DS/M/2, TN/DS/M/3, TN/DS/

of Hungary. In addition, informal sessions took place. The first formal meeting took place on 16 April 2002. Work progressed from a general exchange of views to a discussion of conceptual proposals put forward by Members. In total, 42 specific proposals had been submitted by the deadline of the negotiations at the end of May 2003. In the second half of 2002, discussions took place issue-by-issue, based on the conceptual proposals submitted by members. Textual proposals submitted by Members were subject to initial review until the end of March 2003, after which the discussion focused on various draft legal texts. The review exercise progressed much more slowly than the chairman of the negotiations had originally planned, a situation which some observers attributed to the fact that the US did not make its position on the negotiations known early enough.¹¹⁷ The relatively short deadline for the negotiations was viewed critically from the beginning. Australia suggested, for instance, that members should focus on reaching a 'consolidation of agreed DSU practices' by May 2003 with formal amendments being dealt with later.¹¹⁸

The first submission after Doha was handed in by the EC in March 2002, dealing with long-standing issues such as the sequencing problem (which, however, had lost its acrimony due to bilateral procedural agreements), a prohibition on carousel retaliation, the establishment of a permanent panel body, arbitration on the level of nullification or impairment prior to the request for an authorisation to retaliate in order to make compensation a more realistic alternative, conditions for the acceptance of *amicus curiae* briefs, rules for the formal withdrawal of consultation and panel requests, monitoring for mutually agreed solutions, and the introduction of remand authority for the Appellate Body.¹¹⁹

However, even before the first meeting of the Special (Negotiating) Session of the Dispute Settlement Body on reforming the DSU under the Doha agenda had taken place, more high-politics cases were brought

M/4, TN/DS/M/5, TN/DS/M/6, TN/DS/M/7, TN/DS/M/8, TN/DS/M/9 and TN/DS/M/10 (see Section 13.1 of this study for details, and the last column of the table in Chapter 11 on issues covered). Reports of the chairman of the negotiations to the Trade Negotiations Committee (TNC) are available in TN/DS/1, TN/DS/2, TN/DS/3, TN/DS/4, TN/DS/5, TN/DS/6, TN/DS/7, TN/DS/8 and TN/DS/9.

¹¹⁷ See 'US Still Long Way off from Offering Plan in WTO to Fix Dispute Settlement Regime', in *WTO Reporter*, 4 October 2002.

¹¹⁸ See 'WTO Members Highlight Sequencing Issue as Main Focus of Dispute Settlement Talks', in *WTO Reporter*, 15 March 2002.

¹¹⁹ See 'EU Lays Out Proposed Changes to Dispute Settlement Rules', in *Inside US Trade*, 15 March 2002; 'EU Offers Proposal for WTO Dispute Rules With Ban on US-Style "Carousel Retaliation"', in *WTO Reporter*, 5 March 2002; and 'WTO Members Discuss DSU Changes Based on EU Proposal', in *Inside US Trade*, 19 April 2002.

to the WTO. Still in March 2002, eight WTO members, headed by the EC, requested consultations with the US on its steel safeguards¹²⁰ for violating several provisions of the Agreement on Safeguards and the GATT. Also in March, Canada requested urgent consultations with the US regarding a provisional anti-dumping investigation on softwood lumber imports from Canada.¹²¹ At the same time, members disagreed fundamentally on whether to pursue a broad review of the DSU negotiations (an approach favoured by the EC) or whether negotiations should focus on a narrow, well-prepared set of issues such as the sequencing problem.¹²²

The DSU review continued nevertheless. In the following months, a submission of Thailand and a joint submission of Thailand and the Philippines (both had already been submitted to the Doha Ministerial) followed, as did submissions from Australia, Ecuador, Korea and Costa Rica, the latter with a focus on third party rights.¹²³ The first US proposal came only in August 2002, focusing on improved transparency.¹²⁴ Developing countries submitted comprehensive proposals either as groups (African Group, LDC Group, joint submissions by Cuba, Honduras, India, Indonesia, Jamaica, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe) or individually (Paraguay, Jamaica) with a focus mainly on the specific concerns of developing and least developed countries.¹²⁵ At the end of October 2002, Japan submitted its proposal, mainly consisting of a re submission of the core proposals on sequencing that had been around in discussions since 1999, and a few other issues. Mexico submitted what has been regarded a 'radical' proposal that called for retroactivity to strengthen the impact of retaliatory measures and for other incentives towards earlier compliance. Other countries that submitted proposals include Taiwan and China.

While discussions on the many conceptual proposals were held during much of 2002, criticism of the DSU in the US was still mounting. In

¹²⁰ *United States – Definitive Safeguard Measures on Imports of Certain Steel Products* (WT/DS248 (EC), WT/DS249 (Japan), WT/DS251 (Korea), WT/DS252 (China), WT/DS253 (Switzerland), WT/DS254 (Norway), WT/DS258 (New Zealand), and WT/DS259 (Brazil)).

¹²¹ *United States – Provisional Anti-Dumping Measure on Imports of Certain Softwood Lumber from Canada* (WT/DS247).

¹²² See 'WTO Members Split on Scope of Dispute Rules Review for Next Year', in *Inside US Trade*, 22 March 2002.

¹²³ See also 'DSU Review Fields New Proposals, as Informal Talks Fail to Close Gaps', in *Inside US Trade*, 20 September 2002.

¹²⁴ See also 'US Proposal to Open WTO Dispute Process Recycles Controversial Ideas', in *Inside US Trade*, 16 August 2002.

¹²⁵ For an overview of the main proposals received until August 2002, see also 'DSU Talks Face Shortest Deadline Outside Overall Doha Package', in *Inside US Trade*, 30 August 2002.

April 2002, Senator Max Baucus, Chairman of the influential Senate Finance Committee, called on the Bush administration to make reforming dispute settlement the 'single most important' objective of the US, and not to treat it 'as a technical issue isolated from larger issues at stake in the new round of WTO negotiations'. He particularly referred to several adverse panel or Appellate Body decisions on trade remedies regarding trade measures that did allegedly not have demonstrable adverse impact on trade. As had happened in several instances before, the panels and the Appellate Body were accused of exceeding their scope of responsibility and of legislating instead of interpreting, thus creating new legal obligations. They were accused of ignoring the negotiated standard of review by leaving too little deference to US agencies making determinations under US trade remedy laws.¹²⁶

The situation got more and more critical during the summer of 2002, at a time when the Trade Promotion Authority (TPA) Bill was under way in Congress and the US had still not made any proposals on the DSU Review.¹²⁷ TPA, traditionally known as 'fast track', gives the President the authority to negotiate trade agreements that can only be accepted or rejected by Congress but that are shielded from changes. On 25 July 2002, the panel in the *Steel* case was composed. Also in July, an unfavourable interim ruling was handed down in the *US – Byrd Amendment* case,¹²⁸ and Canada requested the establishment of a panel regarding countervailing duties on softwood lumber imports, followed by another consultation request in September regarding a final dumping determination on softwood lumber imports under the urgency procedures of the DSU.¹²⁹ Additionally, the Article 22.6 arbitration report in the *FSC* case was circulated on 30 August 2003, concluding that the

¹²⁶ See 'Sen Baucus Calls Dispute Resolution Reform "most Important" US Objective in WTO Talks', in *WTO Reporter*, 16 April 2002, 'Baucus Lays out Demands For Changes to WTO Dispute Settlement', in *Inside US Trade*, 19 April 2002. The letter by Senator Baucus to USTR Zoellick was reprinted in *Inside US Trade* on 19 April 2002. An early contribution on the standard of review issue in WTO dispute settlement was made by Croley and Jackson (1996). On the US criticism and the discussion on the standards of review, see, for instance, Ehlermann (2002), pp 619–21. From early on, US anti-dumping interests have followed critically the evolution of the jurisprudence on anti-dumping, including the standard of review; see 'Steel Companies Call for Reinforcement of WTO Dumping Review Rules', in *Inside US Trade*, 10 July 1998. See also Section 7.7 for more details.

¹²⁷ See also 'US Officials See Proposals on WTO Rules, Dispute Settlement', in *Inside US Trade*, 14 June 2002.

¹²⁸ *United States – Continued Dumping and Subsidy Offset Act of 2000* (WT/DS217) (Australia, Brazil, Chile, EC, India, Indonesia, Japan, Korea and Thailand); (WT/DS234) (Canada, Mexico).

¹²⁹ *United States – Final Dumping Determination on Softwood Lumber from Canada* (WT/DS264) and *United States – Final Countervailing Duty Determination with respect to Certain Softwood Lumber from Canada* (WT/DS257).

EC was entitled to impose 100 per cent *ad valorem* duties as SCOON on imports worth 4,043 bn USD.

All these events caused strong reactions in the US. It was argued that decisions like that on the *Byrd Amendment* would further increase efforts in Congress such as the Dayton-Craig amendment to restrict negotiations on US trade laws. Under that amendment, a majority of the Senate can shield changes to US trade remedy laws from TPA procedures.¹³⁰ Senator Baucus called again upon the US not to leave the agenda on the DSU discussions to other countries, as the US had only submitted a proposal on transparency by that time and it remained unclear what other proposals the US would make.¹³¹ Senator Baucus, from lumber-producing Montana, likened WTO dispute settlement to a 'kangaroo court' determined to destroy US trade laws, a trend that had to be stopped. Senator Baucus therefore brought up again the idea of a US dispute settlement review commission.¹³²

In December 2002, the US finally submitted its long-awaited proposal (jointly with Chile) to strengthen flexibility and member control in dispute settlement. The proposal would have shifted influence from the adjudicative bodies to the parties to disputes, as it would have allowed, *inter alia*, the deletion of portions of a panel or Appellate Body report by agreement of the parties to a dispute. Moreover, it called for 'some form of additional guidance' to WTO adjudicative bodies. The proposal was

¹³⁰ See 'US Criticizes WTO in Wake of Decision Upholding Complaints Over Byrd Amendment', in *WTO Reporter*, 19 July 2002.

¹³¹ See the letter by Max Baucus to Secretary Donald Evans and Ambassador Robert B. Zoellick on DSU negotiations, dated 4 September 2002, reprinted in *Inside US Trade*, 6 September 2002. See also 'Baucus Urges Administration to Design Proposal for WTO Dispute Settlement Reform', in *WTO Reporter*, 6 September 2002; 'Baucus Pressures USTR to Step Up Efforts to Change WTO Dispute Rules', in *Inside US Trade*, 6 September 2002. On previous efforts of the same Senator, see, for instance 'Baucus Lays Out Demands for Changes to WTO Dispute Settlement', in *Inside US Trade*, 19 April 2002, and the letter by Senator Baucus reprinted in *Inside US Trade* on 19 April 2002.

¹³² See 'Sen Baucus Calls WTO "Kangaroo Court" With Strong Bias Against the United States', in *WTO Reporter*, 27 September 2002; 'US Still Long Way off from Offering Plan in WTO to Fix Dispute Settlement Regime', in *WTO Reporter*, 4 October 2002; and Sen Baucus Introduces Bill Creating Commission to Review WTO Decisions', in *WTO Reporter*, 21 March 2003. In addition to US criticism over WTO dispute settlement, there equally seems to be discontent with regard to NAFTA Dispute Settlement; see 'Baucus Urged to Back Proposal Calling for NAFTA Chapter 19 Reform', in *International Trade Reporter*, vol 20, no 12, 20 March 2003. On NAFTA dispute settlement in general, see Folsom, Gordon and Spanogle (2003) or Trakman (1997). For comments of US interest groups on WTO dispute settlement, see, for instance, 'AG Coalition Presses To Change WTO DSU, Seek Permanent Panelists', in *Inside US Trade*, 17 May 2002, including the AgTrade Coalition Policy Paper on Dispute Settlement Understanding Reform, reprinted in *Inside US Trade*, 17 May 2002.

greeted with scepticism, with members arguing that deleting parts of interim reports could weaken the WTO panels and the Appellate Body. A diplomat who commented on the proposal said that the US wanted panels and the Appellate Body to issue rulings without making the payment of allowing these bodies to establish jurisprudence to guide future panellists.¹³³ Moreover, the move would contradict earlier proposals on improving transparency as parties could 'bury' more controversial or groundbreaking decisions by the adjudicating bodies before the rulings were made public. The proposal was deemed to attend the complaints from Congress that the WTO adjudicating bodies were legislating.¹³⁴ Switzerland said in reaction to the proposal that providing 'additional guidance' to panels or the Appellate Body would mean limiting their independence. Ironically, support for the US proposal came mainly from Malaysia, Hong Kong and Singapore, citing the Appellate Body's decisions on *amicus curiae* briefs as examples of why the proposal merited attention.¹³⁵

By December 2002, Balás was quoted as saying that a 'critical mass' of proposals had been received, but that the overall situation was 'confusing', and that he did not believe there was a single issue so far where a consensus could be reached at that stage.¹³⁶ Towards the beginning of 2003, proposals changed in character from conceptual towards more textual, containing specific legal draft texts that should be integrated into the DSU. Most of these textual proposals that were now handed in were based on the ideas expressed in the conceptual proposals that had been submitted before. Only few new submissions from additional members (Canada, Jordan and Brazil) were received at that time. In the spring of 2003, and until the end of May deadline, negotiations took place on the textual proposals and subsequently on

¹³³ Although the DSU holds that panels and the Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements, such reports factually establish precedents and provide guidance to the adjudicative bodies in future proceedings. The precedent effect is also recognised by members when it serves their interests. For instance, Petersmann (2002a) cites the example of an EC complaint against US customs user fees in 1988. Although the US had lost the case, it immediately used the legal interpretation of the panel report to enforce the newly-established interpretation against all other GATT members. See also Bhala (2001), Bhala (1999) and Bhala (1999a).

¹³⁴ See 'US, Chile Unveil Proposal for Increasing "Member Control" of WTO Dispute Procedures', in *WTO Reporter*, 17 December 2002.

¹³⁵ See 'US Proposal on Dispute Settlement Reform Gets Mixed Reaction from WTO Delegations', in *WTO Reporter*, 20 December 2002. With regard to discussions on this proposal, see also 'US-Chile Text For DSU Changes Leaves Out Standard of Review', in *Inside US Trade*, 14 March 2003.

¹³⁶ See 'Supachai Cites "Mixed" Results, Expresses Concern for Cancun Meeting', in *WTO Reporter*, 5 December 2002.

draft legal texts compiled by Ambassador Balás.¹³⁷ As the deadline drew closer, the chairman of the negotiations was increasingly exposed to criticism for lacking leadership and not weeding out enough on the many proposals received. Whereas several smaller and medium-sized trading nations such as Argentina, Brazil, Chile, Colombia, Peru, Uruguay, Ecuador, Hong Kong, Israel, Malaysia and New Zealand wished a concentration in negotiations on core issues such as sequencing, third party rights, the remand procedure, housekeeping and time-saving proposals, other members such as Canada, the US and the EC rather sought an 'ambitious, balanced package'. In order still to meet the deadline, the EC had also proposed to agree on a small package by May if members agreed that negotiations on a broader deal would take place subsequently. However, this proposal did not enjoy sufficient support.¹³⁸

The deadline for the completion of talks that had been set for the end of May 2003 was finally missed. While many smaller trading nations would have favoured coming to a conclusion on a limited package of issues, both the EC and the US obviously preferred negotiations to go on, and to address those (of their) concerns that had been left out in the Balás text.¹³⁹ These include the establishment of a permanent panel body (for the EC) and the partial adoption procedure as well as the deletion of portions of reports (for the US). According to press reports, another problem that stood in the way of an agreement was that total time-lines under the new DSU text (with sequencing and an interim review at the appellate stage) would have extended beyond the timelines in the US Section 301 legislation. This could have led, in the future, to further findings of inconsistency if the US were to take retaliatory measures before the multilateral procedures were completed. Moreover, the US had reportedly linked an agreement on sequencing to progress in the

¹³⁷ See 'DSU Chair to Move to Draft Text by Early May, Precursor Paper in April', in *Inside US Trade*, 21 March 2003.

¹³⁸ On the EC proposal, see 'Lamy Proposes Small DSU Package by May, as WTO Negotiations Lag', in *Inside US Trade*, 21 February 2003. On negotiations during the last months before the expiry of the May 2003 deadline, see 'WTO Chair Issues "Framework" Text for Reform of Dispute Settlement Rules', in *WTO Reporter*, 8 April 2003; 'DSB Reform Talks Stall as Deadline Looms; Pressure to Limit Negotiations to Core Issues', in *WTO Reporter*, 14 April 2003; 'WTO Members Still Stalled on DSU Changes One Month Before Deadline', in *Inside US Trade*, 25 April 2003; 'Countries Clash Over DSU Chairman's Proposal for Small Deal', in *Inside US Trade*, 23 May 2003; 'DSU Chairman to Table Draft Showing Possible Areas of Consensus', in *Inside US Trade*, 16 May 2003; and 'Chairman Offers Compromise Text for WTO Dispute Settlement Review', in *WTO Reporter*, 19 May 2003.

¹³⁹ See 'WTO Dispute Reform Talks Miss Deadline; Parties Plan to Keep Trying, but Set No Date', in *WTO Reporter*, 29 May 2003.

area of transparency. The EC allegedly linked its agreement on sequencing to a prohibition of carousel retaliation.¹⁴⁰

Despite some initial disagreement on whether the mandate allowed the continuation of discussions (which is familiar from past missed deadlines) and how broad the scope of such negotiations should be, Members agreed at an informal meeting on 10 July 2003 to extend the deadline for the review until the end of May 2004. The decision was formally adopted by the General Council at its 24–25 July meeting.¹⁴¹

5.5 Negotiations Under the Deadline Extension (May 2003 – May 2004)

No new developments from negotiations were reported during summer and autumn 2003. The failure of the Fifth Ministerial Conference held in Cancún, Mexico, in mid-September 2003 caused a further setback to overall negotiations under the Doha mandate, which also affected DSU review negotiations.

While the momentum behind the negotiations was slow, transatlantic disputes took on new fervour again. Already in May 2003, the United States, along with Canada and Argentina, requested consultations with the EC on its moratorium on genetically modified agricultural and food products.¹⁴² In addition to this high-profile dispute, a number of other disputes began to escalate: In the *FSC* dispute,¹⁴³ the EC announced on 5 November 2003 that it was set to impose a gradually phased-in scheme of retaliatory tariffs, beginning in March 2004 unless the US repealed its inconsistent legislation. Also, the US and Canada refuted EC calls for an end to the SCOO in the *Hormones* case on 7 November 2003.¹⁴⁴ They dismissed the EC's argument that it had presented new scientific evidence to justify the EC ban on hormone beef.¹⁴⁵ Finally, in November

¹⁴⁰ See 'WTO Members Fail on DSU Deal, Further Negotiations After Cancun', in *Inside US Trade*, 30 May 2003.

¹⁴¹ See 'WTO Members Fail on DSU Deal, Further Negotiations After Cancun', in *Inside US Trade*, 30 May 2003; 'DSU Consultations Focus on Extending Time, Sidestepping Mandate', in *Inside US Trade*, 11 July 2003; 'New Deadline Set For DSU Negotiations', in *BRIDGES Weekly Trade News Digest*, vol 7, no 27, 28 July 2003; and 'General Council Endorses New Deadline for Changing DSU Rules', in *Inside US Trade*, 1 August 2003.

¹⁴² *European Communities – Measures Affecting the Approval and Marketing of Biotech Products* (WT/DS291 (United States), WT/DS292 (Canada), WT/DS293 (Argentina)).

¹⁴³ *United States – Tax Treatment for 'Foreign Sales Corporations'* (WT/DS108).

¹⁴⁴ *European Communities – Measures Affecting Meat and Meat Products (Hormones)* (WT/DS26 (United States), WT/DS48 (Canada)).

¹⁴⁵ See 'DSB: EC-US Disputes Top Agenda', in *BRIDGES Weekly Trade News Digest*, vol 7, no 38, 13 November 2003.

2003, the Appellate Body confirmed a prior panel ruling that found the safeguard measures imposed by the United States on steel imports illegal.¹⁴⁶ The US withdrew the tariffs at the beginning of December 2003.

The renewed increase in transatlantic trade tensions and the gloomy post-Cancún perspective for the Doha negotiations were barely conducive to a fast conclusion of the DSU review. Reportedly, the members, meeting on 16 October 2003 for a special (negotiating) session of the DSB, which was then converted into an informal (and therefore undocumented) meeting were on the whole reluctant to engage in substantive discussions.¹⁴⁷ On 13 and 14 November 2003, a further negotiating session took place. It mainly dealt with a study undertaken by Mexico, which held that the May 2003 deadline was missed mostly because of a lack of focus. Mexico therefore proposed 'diagnosis-based work' as an alternative approach, offering statistical data on eight and a half years of WTO dispute settlement practice in order to help identify problems in dispute settlement practice.¹⁴⁸ Mexico concluded from this analysis that the most important problem of the dispute settlement mechanism was non-compliance. The Mexican study was reportedly welcomed by developing countries whereas some other delegations held that it did little to move the discussions.¹⁴⁹

A final meeting in 2003 took place shortly before Christmas. It did, however, not bring any significant progress either. During the meeting, the chair proposed a list of questions to guide an issue-by-issue discussion on consultations, panel proceedings, appellate review, and the implementation stage. Questions included an earlier establishment of panels, and the automatic appointment of developing country panellists in cases where developing country members are parties to the dispute. Although most members gave their reactions, there were no converging views on the issues, even among developing countries.

¹⁴⁶ *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*; WT/DS248 (European Communities), WT/DS249 (Japan), WT/DS251 (Korea), WT/DS252 (China), WT/DS253 (Switzerland), WT/DS254 (Norway), WT/DS258 (New Zealand), WT/DS259 (Brazil). On the introduction of the steel tariffs, see Wolff (1998).

¹⁴⁷ See 'Members Unprepared to Engage in DSU Review', in *BRIDGES Weekly Trade News Digest*, vol 7, no 35, 23 October 2003; and 'Formal DSU Talks Stall, WTO Considers US Appellate Body Appointees', in *Inside US Trade*, 24 October 2003.

¹⁴⁸ See 'Diagnosis of the Problems Affecting the Dispute Settlement Mechanism; Some Ideas by Mexico', undated file (November 2003).

¹⁴⁹ See 'DSU Review: Members React to Mexican Study', in *BRIDGES Weekly Trade News Digest*, vol 7, no 40, 26 November 2003; 'Mexican Study Cites Non-compliance as Top Problem in WTO Dispute System', in *WTO Reporter*, 14 November 2003; and 'Mexican Analysis Does Little to Dislodge Impasse in WTO on DSU Talks', in *Inside US Trade*, 28 November 2003.

Only few new formal proposals were submitted in this stage of the DSU review. Indonesia and Thailand circulated a communication outlining a number of questions and issues.¹⁵⁰ Malaysia reportedly announced that it would submit a proposal on provisional measures that could be applied if an industry is irreversibly hurt while an issue is under examination by a panel. However, the idea reportedly left delegates with more questions than answers.¹⁵¹

On 11 February 2004, the General Council appointed a new chair for the DSU negotiations, Ambassador David Spencer of Australia.¹⁵² Even under the new chair, however, negotiations did not gain any additional momentum. Meetings of the negotiating session at the end of January and February that had originally been scheduled for two days lasted only little more than one hour as delegations did not put forward any new proposals and seemed unwilling to bridge the gaps between the respective positions. As members continued to disagree with regard to the scope of the negotiations – ie whether a limited number of technical issues should be discussed or whether the negotiations should focus on a broad package including more ambitious components – it became clear already at the end of February that the May 2004 deadline would likely be missed again.¹⁵³

A call of the chairman upon members to negotiate among themselves did not produce any result either. Whereas a group that was led by Canada and included Argentina, Brazil, India, New Zealand and Norway reportedly tried to achieve some progress on a limited number of technical issues during spring 2004, several other delegations such as the United States, the EU, and some developing countries were not prepared to consider a conclusion of the negotiations without an implementation of their more ambitious proposals. The group worked on the sequencing issue, third party rights, the remand procedure, ways to improve compliance, developing country issues, rules for the removal of existing sanctions, and transparency. The idea was to develop a 'non-paper' and a legal text on these issues which could serve as an alternative

¹⁵⁰ See TN/DS/W/61 (Indonesia, Thailand); see also 'Dispute Settlement: Lumber, Byrd Amendment and DSU Review', in *BRIDGES Weekly Trade News Digest*, vol 8, no 1, 14 January 2004; and 'WTO DSU Chair Lays out New Timetable for Meeting May deadline', in *Inside US Trade*, 2 January 2004.

¹⁵¹ See 'DSU Review Off to Slow Start', in *BRIDGES Weekly Trade News Digest*, vol 8, no 3, 28 January 2004.

¹⁵² See 'WTO Chairpersons for 2004', *WTO Press Release*, no 371, http://www.wto.org/english/news_e/pres04_e/pr371_e.htm; see also 'WTO Agrees to New Chairs for Doha Round, Puts Off Decision on Ministerial', in *Inside US Trade*, 13 February 2004.

¹⁵³ See 'DSU Review: May 2004 Deadlines Slipping Out of Reach', in *BRIDGES Weekly Trade News Digest*, vol 28, no 8, 4 March 2004.

to the Balás text. On the basis of the support that this paper would receive from the EU, the US and developing countries, it could be formally introduced into the negotiations.¹⁵⁴

The meeting on 30 April 2004 focused on the forthcoming package of the group led by Canada. Developing countries and the African Group reportedly argued that developing country interests were not sufficiently taken into consideration. The support that the US and the EU would give to the work of the group once it would be presented was unclear as well.¹⁵⁵ On 10 May 2004, when the group was expected to present their work, Norway only reported on the progress achieved so far. At that stage, the six countries had agreed on three issues under consideration: sequencing, remand and the procedures for the lifting of retaliatory measures. The group, however, was still working on transparency, third party rights, compliance and developing country issues.¹⁵⁶ The proposal was finally presented to members as a 'non-paper' in the 24 May DSU negotiations session – not to be discussed as a proposal but rather with the intention of informing members on the work done.

The DSU Special Negotiating Session met for the last time prior to the lapse of the deadline on 28 May. At that meeting, Members considered, *inter alia*, the non-paper by the group around Canada, as well as proposed changes to the Working Procedures of the Appellate Body which were drawn up by the latter.¹⁵⁷ The proposal included a move to increase the clarity of the notice of appeal – an issue, which also surged in the DSU review negotiations.

The meeting was, however, unable to conclude the DSU review before the expiry of the May 2004 deadline as required by the mandate. Members supported a statement by the chairman to extend the deadline for the DSU review negotiations, yet without setting a new target date. Some Members questioned whether sufficient momentum could be generated for these negotiations if they were to go on without a clear deadline. The relationship between the DSU review negotiations on the

¹⁵⁴ See 'Chairman's Call for Informal DSU Talks Produces Little Action', in *Inside Trade*, 9 April 2004.

¹⁵⁵ See 'Package Deal to Salvage DSU Negotiations?', in *BRIDGES Weekly Trade News Digest*, vol 8, no 16, 4 May 2004; and "'Magnificent Seven" Offer Compromise as Clock Ticks Down to Deadline in May', in *WTO Reporter*, 4 May 2004.

¹⁵⁶ See 'Deliberations on Package Deal for DSU Review Ongoing', in *BRIDGES Weekly Trade News Digest*, vol 8, no 17, 13 May 2004. See also 'Proponents Unveil Proposal for Limited Reform of WTO Dispute Settlement Rules', in *International Trade Reporter*, vol 21, no 22, 27 May 2004.

¹⁵⁷ See WT/AB/WP/8.

one hand and the overall Doha negotiations was also a topic of discussions. Whereas some delegations were anxious not to establish any links (in order to avoid that countries would have to pay for changes to the DSU in other areas), others argued that the negotiations would remain stalled until the overall Doha negotiations would gain additional momentum.¹⁵⁸

The chairman then established a brief report on his own responsibility to the Trade Negotiations Committee. It held that additional progress had been made since the General Council meeting of 24 July 2003, building on the work done thus far, including the proposals put forward by members as well as the Balás text of May 2003. He also reported that there was agreement among Members that more time was needed for the completion of the work, that all existing proposals would remain under consideration, and that the negotiations were outside the single undertaking. He therefore suggested that action be taken by the Trade Negotiations Committee or the General Council for the continuation of the work. Whereas he noted that some members would prefer to establish a new specific target-date, he did not propose to recommend any such date at that time.¹⁵⁹

5.6 Negotiations from May 2004 Onwards

In the decision adopted by the General Council on 1 August 2004 on the Doha Work Programme – the so-called ‘July Package’ – the General Council accordingly took note of the above-mentioned report and it reaffirmed members’ commitment to progress in this area of negotiations in line with the Doha Mandate. The work should continue on the basis set out by the chairman of that body in his report.¹⁶⁰ No new deadline was set.

The Special Negotiating Session of the DSB met two more times in October and November 2004, yet without achieving any significant progress.¹⁶¹ Negotiations will continue in 2005 with six dates being reserved for further meetings before the summer break.

¹⁵⁸ See ‘Chair to Propose Indefinite Continuation of Dispute Reform’, in *WTO Reporter*, 25 May 2004; ‘Chairman Seeks Third Extension of WTO DSU Talks, but no Deadline’, in *Inside Trade*, 28 May 2004; and ‘DSU Update: DSU Review Deadline Extended; Appellate Body Developments’, in *BRIDGES Weekly Trade News Digest*, vol 8, no 19, 2 June 2004.

¹⁵⁹ See TN/DS/10.

¹⁶⁰ See WT/L/579.

¹⁶¹ See ‘DSU Review: Members Discuss May Proposal, Dispute Settlement Data’, in *BRIDGES Weekly Trade News Digest*, vol 8, no 36, 27 October 2004; and ‘Dispute Settlement Review Focuses on “Package Deal”’, in *BRIDGES Weekly Trade News Digest*, vol 8, no 41, 1 December 2004.

5.7 Summary: The DSU Review Negotiating Process (1997-2004)

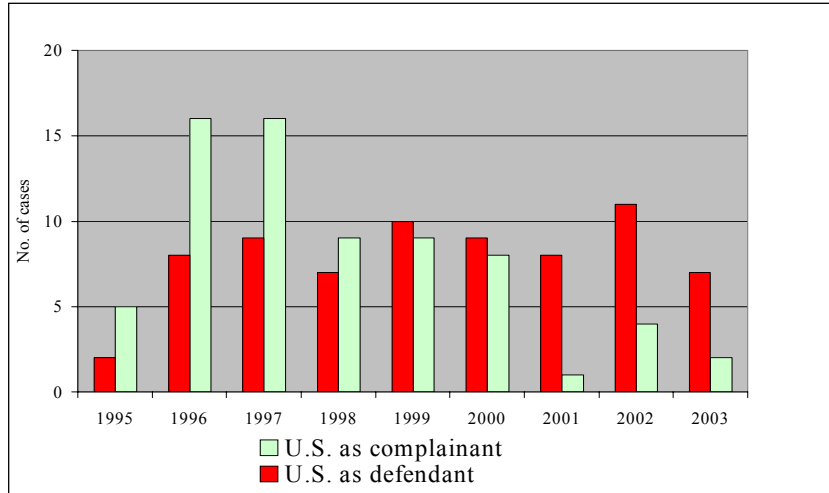
As the previous account has shown, the DSU review negotiations are closely linked to emerging dispute settlement practice.

The negotiations started in 1997/1998 at a time when a general feeling of satisfaction with the mechanism prevailed. Shortly thereafter, however, the negotiations became increasingly captured by the emergence of two divides. One was essentially transatlantic. The US was concerned with the implementation of rulings and wished to secure immediate compliance whereas the EC struggled from a defensive position to cope with adverse rulings in *Bananas* and *Hormones*. The different approaches on sequencing were symptomatic of these different positions. The second divide ran between industrialised countries (with the US at the forefront) and developing countries regarding both transparency and the *amicus* issue.

After Seattle, the context of the DSU review changed. While the US was initially still in an offensive position which was highlighted by its stance on the carousel issue, negotiating positions changed fundamentally in the course of the year 2000. The defeat in the *FSC* case as well as numerous complaints against US trade remedy measures increasingly pressured the US into a defensive stance (see Graphs 5.1 and 5.2). In tune with these new circumstances, the carousel provision was never applied despite initial pressures from Congress. During this time of change without a clear negotiating mandate, the review exercise essentially remained in a limbo.

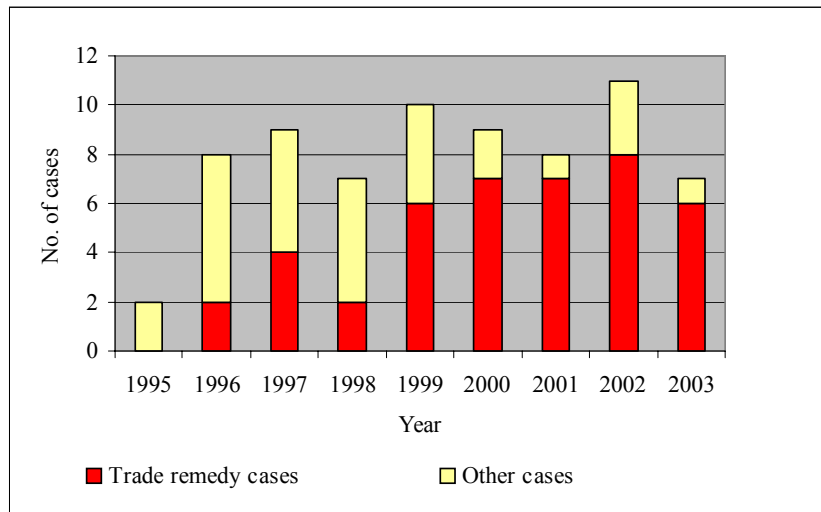
The post-Doha negotiations took place under a specific Ministerial mandate again. The divides between country positions were, however, less clear-cut compared with previous negotiations as a multitude of proposals on all stages and horizontal issues of the DSU had come in. These covered virtually all provisions of the understanding. They will be subject to more detailed analysis in Chapters 6 and 7.

Graph 5.1 The US in WTO Dispute Settlement as Complainant and Defendant



Author's calculations and graph, based on information contained in WT/DS/OV/18

Graph 5.2: DSU Cases Brought Against the US: Trade Remedy and Other Cases



Author's calculations and graph, based on information contained in WT/DS/OV/18

After the May 2003 deadline, the negotiations lost their momentum. Sessions ended early and only few additional proposals were submitted in this stage, not even as formal proposals but only as non-papers. Members such as the EU and the US did not participate actively any more in the process, but they left the negotiations to others like the group led by Canada. However, even this small group of six countries was unable to agree on seven rather technical issues.

As most issues on the table have been discussed for a long time, it is hardly conceivable how a compromise should emerge in the near future. This holds in particular as long as the DSU review remains separated from the overall Doha Round negotiations, as this separation stands in the way of a political package deal that would emerge from bargaining across different negotiating areas. The absence of a clear deadline for the new negotiations will not add much credibility or momentum to these negotiations either. As countries will likely have to concentrate their resources in other areas such as agriculture and as delegations are unwilling to appear as 'demandeurs' in the DSU review process, the outlook for a successful conclusion of the review in the near future is rather dim (see also Part III of this study).

6. THE DOHA ROUND PROPOSALS (I): STAGE-SPECIFIC ISSUES

In Chapters 6 and 7, the proposals which were made under the Doha mandate in negotiations up to the (missed) May 2003 deadline are discussed. Whereas Chapter 7 covers horizontal issues that concern several or all stages of the procedure (such as transparency or special and differential treatment of developing countries), this chapter considers the stage-specific proposals. For each stage of the multilateral dispute settlement procedure, the proposals are presented and commented, including where possible reference to the relevant discussion in academic literature. Information is also contained on whether the issues were taken up in the Balás text. As a separation between stage-specific and horizontal proposals is not always neatly possible, readers are encouraged to check both chapters for issues that could fall into either category. The tabular overview in Chapter 11 may be helpful in locating specific proposals.

6.1 The Consultation Stage

Consultations are among the negotiatory elements of the DSU. They have a long tradition in dispute settlement as it gradually evolved under the GATT. Even today, a high proportion of disputes are settled during consultations.¹

The rules on consultations have been crafted to facilitate pre-panel resolutions. Consultations are confidential and there is no record which might figure into later proceedings and thereby prejudice any member's position. As Davey and Porges (1998) indicate, consultations typically last 'no longer than two or three hours', are 'generally conducted in English with no interpreters, no transcript, and no taping' and are closed to the public and other WTO members. Despite this informal design, Roessler (2003) argues that consultations under the DSU are no longer conducted in the same meaningful way as they were under the conciliatory mechanism of the GATT. Today, they are often regarded as merely formal prerequisites for the panel process. Incentives are such that there is no real co-operation from the respondents to engage in meaningful discussions. From this perspective, successful settlements during the consultation stage are explained with the respondent's fear

¹ See Part I for details and references.

of a formal adverse ruling, but not with the respondent's obligation to engage in consultations.² Finally, another problem with consultations is that there is no multilateral instrument to keep the implementation of mutually agreed solutions under surveillance.³ Many proposals have been made on consultations, ranging from rather programmatic calls for strengthening the consultative process to suggestions for specific modifications.

6.1.1 Consultation Requests

The European Communities and Jordan proposed procedures that would allow the withdrawal of consultation requests, or an automatic lapse of a consultation request, if no panel request follows within a certain period of time.⁴ These proposals would help in 'house-keeping' by avoiding the accumulation of a large number of dormant cases, as has happened in the past.⁵

The proposals were integrated into the Balás text. The proposed rules would establish that a request for consultations may no longer serve as the basis for the establishment of a panel if the complaining party has not submitted a panel request within 18 months after the date of circulation of the request for consultations. As an exception to the rule, the complainant could notify both the defendant and the DSB of its objection to the lapse in which case the request for consultations may continue to serve as a basis for a panel request for another 18 months. Even further extensions would be possible.⁶

The new rule would beyond any doubt contribute to house-keeping as the long list of 'pending consultations' would be cleaned up at regular intervals. The regularly published overview of the state of play of disputes⁷ contains many disputes that were initiated several years ago and where neither any outcome nor progress has ever been reported. For instance, the October 2004 version of this overview still lists an April

² Similar views are expressed by Wethington (2000). The consultations stage has, so far, received relatively little attention in literature. The few contributions include Parlin (2000), Horlick and Butterson (2000), Horlick (1998) and Davey and Porges (1998).

³ See Shoyer (1998a).

⁴ See TN/DS/W/1 (EC), Attachment, no 4; TN/DS/W/43, no III (Jordan) and TN/DS/W/53 (Jordan).

⁵ See Davey (2002), pp 38–39.

⁶ See the proposed Article 4.12, as contained in TN/DS/9.

⁷ This is the 'WT/DS/OV/' document series. For an overview on the current status of disputes, see WT/DS/OV/18 (Update of WTO Dispute Settlement Cases) of 23 December 2003.

1995 complaint by the United States regarding Korean testing and inspection requirements for agricultural products under the heading 'pending consultations'.⁸

Beyond house-keeping, there would also be further important, although more subtle effects. The proposed rules would allow disputes to dissipate from public attention without the outcome ever being known. From the point of view of both internal and external transparency, such a development could be problematic. Through the back-door, it would allow members to avoid the notification requirement of mutually agreed solutions regardless of the strengthening of the notification discipline which has been suggested elsewhere (see below in Section 6.1.3). Parties that have *de facto* agreed on a solution could simply let the consultations request lapse and the issue would dissipate. It would in many instances be difficult to tell whether a consultations request lapses because a solution has been found or because the complainant has stopped pursuing the issue for other reasons (pressure from the defendant in other trade or non-trade areas, lack of interest etc). The automatic lapse could therefore also undermine third party rights. On the positive side, however, both the possibility to withdraw consultation requests and their automatic lapse would increase the attractiveness of consultation requests as a bilateral 'negotiation tool'.

6.1.2 The Process of Consultations

In a general effort to strengthen the consultative element, and with reference to Article 3.7 DSU which establishes that the aim of the dispute settlement mechanism is to secure a positive solution to a dispute, Jamaica suggests that consultations as well as good offices, conciliation and mediation (Article 5 DSU) should be made more attractive. This would particularly benefit developing countries, as ordinary panel procedures can be costly and time-consuming.⁹ The proposal, however, was not considered in the Balás text.

Both the EC¹⁰ and Japan¹¹ suggested a reduction of the time-frame for consultations from 60 to 30 days, thus resubmitting an idea they had already put forward in the Suzuki text. China made a similar proposal.¹²

⁸ Korea – Measures Concerning the Testing and Inspection of Agricultural Products; WT/DS3; see WT/DS/OV/22, no I.108.

⁹ See TN/DS/W/21, no 1, first three paragraphs (Jamaica).

¹⁰ See TN/DS/W/1, Attachment, no 1 (EC).

¹¹ See TN/DS/W/22, Attachment, no 9 (Japan), and TN/DS/W/32, Attachment, no 10 (Japan).

¹² See TN/DS/W/51 (China).

Whereas the Japanese proposal also contains the possibility of extending this time frame in cases involving developing countries, that S&D provision has a more mandatory character in the Chinese proposal. The Balás text did not incorporate the proposal for a shortened time frame for consultations.

Costa Rica and Taiwan sought to strengthen third party rights during the consultation stage (see also Section 7.4 on third party rights).¹³ The LDC Group made a case for special and differential treatment during consultations by holding consultations which involve developing countries in the capitals of these countries.¹⁴ Furthermore, some other developing countries proposed to make Article 4.10 mandatory by replacing the word 'should' with 'shall'. This paragraph calls upon Members to give special attention to developing country members' problems and interests during consultations.¹⁵ Both proposals have been integrated into the Balás text (for more details on special and differential treatment, see Section 7.5).¹⁶

6.1.3 Notification of Mutually Agreed Solutions

The issue of the notification of mutually agreed solutions (MAS) is closely related to consultations.¹⁷ Article 3.6 DSU provides that: '(m)utually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements shall be notified to the DSB and the relevant Councils and Committees, where any Member may raise any point relating thereto.' The unwillingness of disputing parties to notify such solutions, however, is notorious and arose as a problem very early in dispute settlement practice.¹⁸ Accordingly, proposals to remedy this situation had already been contained in the original Suzuki text of the pre-Seattle review.

The notification requirement should be read in context with Article 3.5 DSU establishing that '(a)ll solutions to matters formally raised under

¹³ See TN/DS/W/12 and TN/DS/W/12/Rev 1 (Costa Rica), TN/DS/W/36 (Taiwan).

¹⁴ See TN/DS/W/17 (LDC Group).

¹⁵ See TN/DS/W/19, no III (Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe).

¹⁶ See new Article 4.10, as contained in TN/DS/9. The language in the Balás text would require for complaints against least developed countries that 'the possibility of holding consultations in the capital of that Member shall always be considered'.

¹⁷ See, for instance, Davey (2002), p 37 or Petersmann (2002b), p 131, UNICE (1999) favouring improved notification of bilateral settlements.

¹⁸ See, for instance, the discussions in the Dispute Settlement Body on 24 April 1996 (WT/DSB/M/15, no 4) and the statement made by the chairman of the DSB on 19 July 1995 (WT/DSB/M/6, no 6).

the consultation and dispute settlement provisions of the covered agreements, including arbitration awards, shall be consistent with those agreements and shall not nullify or impair benefits accruing to any Member under those agreements...'. Without proper notification, it cannot be excluded that a solution is inconsistent with the material provisions of the covered agreements, and it cannot be excluded either, that the settlement comes at the expense of countries not participating in the dispute.

To strengthen the notification of MAS, Japan¹⁹ and some developing countries²⁰ called for a more precise wording of the notification requirement in Article 3.6 DSU that would oblige parties to a dispute explicitly to notify such solutions to the DSB. Jamaica made a similar proposal, which could be understood as going even further than the other proposals. It suggested that the party requesting consultations should submit a factual and concise written report from the consultations to the DSB that would indicate whether a mutually agreed solution had been found.²¹ In other terms, not only mutually agreed solutions (as under the proposals by Japan and some developing countries) would have to be notified but *all* matters subject to consultations under the DSU would, sooner or later, be concluded with a report. Implemented properly, the Jamaican proposal would shed light on the result of many consultation requests whose outcome remained in the dark, to the detriment of both internal and external transparency. Yet, these effects could be offset by new provisions on the automatic lapse of consultation requests (see Section 6.1.1 above).

The Balás text would require each party to a mutually agreed solution to notify the terms of that solution within 60 days to the DSB and to the relevant councils and committees. Such notification shall contain sufficient information relevant to the covered agreements to enable other members to understand the mutually agreed solution.²²

From the viewpoint of transparency and third party rights, improved notification requirements for bilateral solutions are highly welcome. On the other side, however, improved public scrutiny of the outcome of consultations would significantly decrease the flexibility of governments

¹⁹ See TN/DS/W/22, Attachment, no 15 (Japan), and TN/DS/W/32, Attachment, no 16 (Japan).

²⁰ See TN/DS/W/18 (Cuba, Honduras, India, Jamaica, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe) and TN/DS/W/47 (India, Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia).

²¹ See, for instance, TN/DS/W/21 (Jamaica).

²² See Article 3.6 as contained in TN/DS/9.

to settle on compromise solutions. It would alter one fundamental aspect of the consultations process which is confidentiality. Confidentiality plays an important role in these negotiatory stages of the process, as it allows negotiators to explore compromise solutions by shielding them from pressures exerted by their constituents. Strengthened notification requirements and the emerging paper trail could therefore make early settlements during consultations more difficult and less probable than they are today.

6.1.4 Implementation of Mutually Agreed Solutions

The EC made an additional proposal on mutually agreed solutions which, however, was not considered in the Balás text. It proposed the creation of a new Article 22*bis* on the examination of mutually agreed solutions which would subject a notified MAS to a compliance review. In case it were found that the defendant did not comply with the mutually agreed solution as notified, the complainant would be entitled to request an authorisation from the DSB to suspend concessions or other obligations.²³ Petersmann has argued that such a compliance review would set both an incentive for dispute prevention through more mutually agreed solutions, and for their more precise notification as procedures would not have to restart from scratch.²⁴

Again, however, the word of caution that has been mentioned on the improved notification of MAS has to be repeated. Compliance reviews of the implementation of mutually agreed solutions necessarily require a high degree of transparency and formal documentation with regard to the solution. The high degree of precision of the solution which is a prerequisite to legal review under a compliance panel procedure could have a chilling effect on negotiators' ability to explore avenues of compromise. Moreover, the shadow of strict enforcement could preclude a MAS from the start. Finally, the higher visibility which would result at least *ex post* from a compliance review of a MAS could create problems. Even if the mutually agreed solution were identical in content to the expected outcome of a panel procedure, the defendant could be blamed by domestic interests for having foregone the extra time during which the inconsistent measure could have been upheld if the full panel and appellate review procedures had been utilised and during which rents from protection would have continued to accrue. Complainants, in turn, could be prevented from entering into a compromise because any 'softening' on the issue could *ex post* become visible and thus entail political costs. To sum it up, improved enforcement and the requisite higher visibility of MAS could make early settlements more difficult

²³ See TN/DS/W/1, Attachment, no 29.

²⁴ See Petersmann (2002b), p 131.

and could drive governments into a more aggressive use of the panel mechanism. The empirical literature discussed in Chapter 4 offers some support for this view.

6.2 The Panel Stage

6.2.1 The Composition of Panels

With regard to the panel stage,²⁵ one of the most far-reaching proposals is the EC call for a permanent panel body (PPB).²⁶ This proposal had already been made in 1998, and it has also led to a lively discussion in academic literature. It is aimed at assuring the supply of qualified panellists at times when the use of the dispute settlement mechanism increases, and to overcome the mounting problems in the selection of panellists for individual cases, as parties find it increasingly difficult to agree on panellists in the current *ad hoc* appointment system. It has been argued that delays and increasingly frequent recourse to the Director General for the composition of the panel are a reflection of the problem. Given the higher complexity of cases, the EC expects that a system of permanent panellists would also result in a professionalisation of the panel process with fewer reversals of cases and altogether shorter time-frames for the procedure. According to the EC, it would also enhance the legitimacy and credibility of the panel process through an elimination of conflicts of interest. Finally, it could lead to an increased presence of developing countries on panels as the composition of the permanent panel body would be broadly representative of WTO membership.

The proposal has also been interpreted as being intended to bring into panels more citizens of those states that are the most frequent users (eg the EC, US, Japan and some developing countries) and whose nationals cannot serve on cases involving their countries under the current rules.²⁷ While it is true that nationals of a number of small and mid-sized trading nations have occupied a high number of panel positions (such as

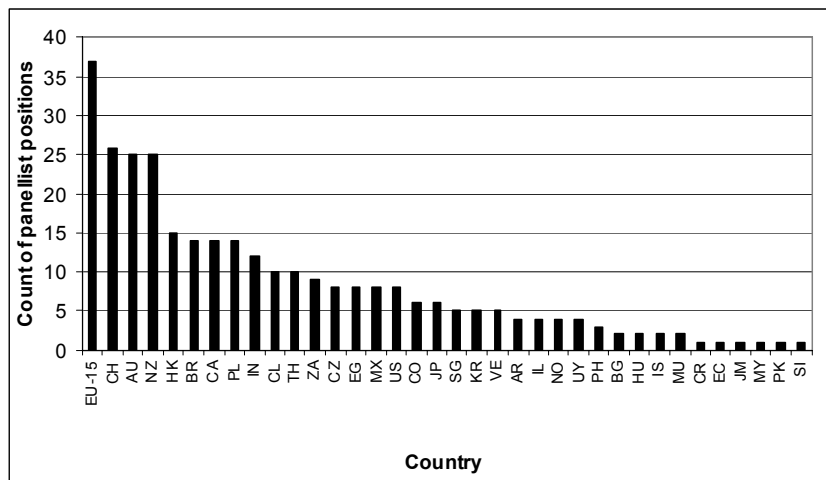
²⁵ For references to specific issues within the panel process, see the references given below and the overview (as of 2000) by Stewart and Karpel (2000).

²⁶ See TN/DS/W/1, no I (EC), and Attachment, no 7.

²⁷ Argument presented by Cartland (2003). For the discussion on a permanent panel body in general, see for instance Petersmann (2002a), pp 14–15 and Steger (2002), pp 63–64. Support for a permanent panel body is expressed, to varying degrees, by Bourgeois (2003), Bourgeois (2001), Chang (2003), Cottier (2002), Davey (2003), Davey (2002a), Davey (2000), Davey (2000a), Ehlermann (2002), pp 627–828, Kingery (2000), Roessler (2003), Rosas (2001), p 144, UNICE (2001) and UNICE (1999). For more cautious or rather critical comments on the idea of a permanent panel body, see Cartland (2003), Hecht (2000) and Shoyer (2003). Wasescha (2003) makes the case for a mixed system of professional and non-professional panellists and some accompanying measures to overcome current problems. On the organisational ‘culture’ of the panel system, see the highly interesting contribution by Weiler (2001).

Switzerland, Australia and New Zealand – each of which has had far more panellist positions than, for instance, the US) the EU-15 is leading in this ranking (see Graph 6.1). It is therefore questionable whether the EU that is the main proponent of a PPB, would really gain many additional panel positions.

Graph 6.1: WTO Panellist Positions by Country (1995-2004)



Graph by the author; Data: <http://www.worldtradelaw.net> (downloaded on 15 January 2005).

Opponents of the idea of a permanent panel body fear that a PPB could be more ‘ideological’ than *ad hoc* panels and that it could engage in judicial activism or law-making. The current system of appointing panel members by agreement or with the help of the Director General has also been seen as giving Members certain flexibility and to be therefore in line with the ‘member-driven’ approach of the WTO.²⁸ As Cottier (2003) argues, there are also constitutional implications, as the move towards a permanent panel body would de-link law-making and adjudication and further alienate trade diplomacy, giving rise to complaints about an extensive judicialisation of trade policy and governments’ increased loss of control.

Canada’s proposal, although being more limited, goes into a similar direction as that of the EC. Canada suggests replacing the current indicative list of panellists by a new panel roster where each WTO member would be invited to nominate one individual for inclusion. Panel

²⁸ See Shoyer (2003).

members would mostly be selected from the roster although off-roster candidates could also be proposed. The Director General would continue to be in charge of panel composition absent agreement of the disputing parties. In addition, Canada suggests an increase in the *per diem* of panellists which is very low compared to other international tribunals.²⁹ Thailand sought to build a bridge between the EC proposal and what it had perceived to be the views expressed by members. In addition to existing practices for the composition of panels, Thailand suggests the establishment of a roster of panel chairs, from which individuals would be appointed as chair by lot. The selection of the remaining panel members could be based on nominations proposed by the secretariat or they could be appointed by the Director General.³⁰ None of these proposals is reflected in the Balás text. Obviously, the moves in the direction of a permanent panel body did not enjoy sufficient support.

Other proposals that deal with the composition of panels were submitted by the African Group, calling for a better representation of Africa on panels,³¹ as well as from the LDC Group and Jordan which demanded a better representation of developing countries and LDCs in panels that deal with cases involving them.³² Their proposals are partly reflected in the Balás text. Whereas the current Article 8.10 DSU provides for the presence of a panellist from a developing country on a panel only upon request from the developing country party, this 'default setting' would now be reversed. In disputes between a developing and a developed Member, panels would include a panellist from a developing country unless the developing member agreed otherwise. Additionally, a similar provision on cases with LDC defendants would ensure the inclusion of a panellist from an LDC unless the LDC party agrees otherwise.³³

The qualification of panellists is an issue in the joint proposal made by the United States and Chile. Both countries sought to ensure 'that the members of panels have appropriate expertise to appreciate the issues

²⁹ See TN/DS/W/41, no 2 (Canada).

³⁰ See TN/DS/W/31 (Thailand). Similar concepts are discussed by Cottier (2003), but criticised by Chang (2003) as rather aggravating existing problems, and by Roessler (2003) as not resolving the particular problems of the *ad hoc* selection procedures. Hudec (1999), pp 34ff proposes transition to a system with one professional jurist per panel. At the time of writing (the 1998 DSU review), he states, however, that: '(a)t the moment, most observers are predicting that governments will not be ready to consider a professional-jurist proposal (...)' After the lapse of the May 2003 deadline, Thailand submitted jointly with Indonesia a further communication with comments and questions on the panel appointment system; see TN/DS/W/61 (Thailand and Indonesia).

³¹ See TN/DS/W/15 (African Group).

³² See TN/DS/W/17 (LDC Group), TN/DS/W/43 (Jordan) and TN/DS/W/53 (Jordan).

³³ See the modified Article 8.10, as contained in TN/DS/9.

presented in a dispute' by adding such an explicit requirement into the DSU.³⁴ Obviously, the proposal also implied a fair amount of criticism of the work of the panels. No suggestions were made, however, with regard to how such a requirement could be made operational, eg on whether proposed panellists would need to give proof of work experience in the related field or whether they would have to prove their qualifications in another way. The request was not incorporated into the Balás text.

6.2.2 Time-Frames

Besides the composition of panels, time-frames for the panel procedure have also been a topic in the negotiations. Australia,³⁵ the EC,³⁶ Japan³⁷ and China³⁸ separately called for the abolition of the rule according to which panels are established only at the second meeting at which the panel request appears on the agenda of the DSB. These countries suggest that panels should be established already at the first meeting, a proposal that had already been made in the Suzuki text. Additional time savings should be achieved through an obligation for members to provide their first written submissions along with the panel request.³⁹ These concerns have partly been taken up in the Balás text. According to the modified Article 6.1 DSU, panels would be established at the first meeting where the item appears on the agenda, unless the DSB decides by consensus not to establish the panel. As an S&D measure, however, panels would continue to be established only at the second meeting in cases involving developing countries as defendants.⁴⁰

This modification is more than merely a technical change. Under the current rule, the panel request constitutes an additional negotiatory instrument. Complainants do not yet have a right to the establishment of a panel at the first meeting. They can, however, demonstrate their resolve to proceed with a complaint. This leaves some room for additional negotiations, particularly for the defendant. Under the modified rule, that negotiating instrument would be available only to

³⁴ See TN/DS/W/28, no 6(e) (US, Chile) and TN/DS/W/52, lit (e) (US, Chile).

³⁵ See TN/DS/W/8 (Australia), and TN/DS/W/34, lit (d) (Australia).

³⁶ See TN/DS/W/1, Attachment, no 5 (EC) and TN/DS/W/38 (EC).

³⁷ See TN/DS/W/22, Attachment, no 10 (Japan) and TN/DS/W/32, Attachment, no 11 (Japan).

³⁸ See TN/DS/W/51 and TN/DS/W/51/Rev 1 (China).

³⁹ See TN/DS/W/8, lit (d) (Australia), TN/DS/W/34, lit (d) (Australia), and TN/DS/W/49 (Australia).

⁴⁰ See Article 6.1, as contained in TN/DS/9.

the complainant as he would have full control over whether the panel is established at the first meeting or not.⁴¹

6.2.3 Withdrawal of Panel Requests and Suspension of Panel Procedures

Currently, there is no procedure for the withdrawal of panel requests. Regarding the suspension of panel procedures, the ultimate decision on whether to suspend the proceedings lies with the panels and is therefore outside full control of the disputing parties.

The EC proposed the introduction of a provision that would allow a complainant to withdraw a panel request.⁴² In reaction to concerns that such a provision could be abused for the withdrawal of panel requests just after the issuance of the interim report (ie when a complainant would already be informed of a potentially adverse decision), the suggestion was modified in the EC's second proposal which would allow the complainant to withdraw a panel request only prior to the issuance of the interim panel report. After the interim review, the panel proceeding could be terminated only at the joint request of the parties.⁴³ Another proposal on the withdrawal of panel requests was submitted by Jordan. It first called for a provision allowing countries to withdraw panel requests prior to the second written submission,⁴⁴ but later modified its suggestion to limit such a withdrawal to the time prior to the composition of the panel.⁴⁵ A joint US-Chilean proposal would also give parties a right to suspend panel procedures by mutual agreement.⁴⁶

The Balás text took these proposals into consideration by both incorporating a modification to Article 12.12 and by including a new Article 12.13. Currently, Article 12.12 states that '(t)he panel *may* suspend its work any time at the request of the complaining party for a period not to exceed 12 months' (emphasis added). According to one version of the new proposed wording, the panel would *be obliged* to suspend its work at the request of the complainant. In the second version, it would still be up to the panel to decide. However, the complainant's right to request the suspension of the panel procedure under Article 12.12 would

⁴¹ See Davey (2002), p 38.

⁴² See TN/DS/W/1, no V and Attachment, no 6.

⁴³ See TN/DS/W/1, no V, 2nd bullet point (EC), and TN/DS/W/38 (II.C) (EC).

⁴⁴ See TN/DS/W/43, no IV (Jordan).

⁴⁵ See TN/DS/W/53 (Jordan).

⁴⁶ See TN/DS/W/28, no 6(d) (US, Chile) and TN/DS/W/52, lit (d), proposing changes to Article 12.12 and Article 17.5 DSU (US, Chile).

now be limited to the time before the issuance of the interim report. Thereafter, such suspension would be possible only upon agreement of the parties.

The Balás text would also add some precision to the provision on the lapse of the panel's authority, detailing that a lapse would occur only if the panel's work was suspended for 12 *consecutive* months.⁴⁷ A new Article 12.13 would contain provisions on the termination of panel procedures. The text, however, is bracketed. It would give the complainant a right to terminate the panel process any time prior to the issuance of the interim report. In case of termination after the panel has been composed, a complainant could only request a new panel on the same matter after going through new consultations. In case of mutual agreement of the parties to terminate panel procedures, the panel procedure could be terminated at any time before issuance of the final report, ie including after the interim review. Should the panel already be composed when the termination of the procedure occurs, the panel's report would be confined to a brief description of the case and to reporting that the panel process had been terminated.⁴⁸

The suggested amendment would introduce much greater flexibility for members in WTO dispute settlement. It would strengthen disputing parties *vis-à-vis* the adjudicating bodies, and it would probably also fortify parties with strong negotiating powers. A complainant could stop the procedure at any time prior to the interim review. Even thereafter, in case the interim report contained language which the complainant would not want to be adopted (for whatever reason), the complainant could negotiate with the defendant a termination of the procedure. As a result, the proposed provisions would expand the possibilities of using panel requests and panel proceedings for negotiating purposes.

6.2.4 Interim Review

The EC and Japan resubmitted a proposal to simplify the procedures for the interim review which had already been contained in the Suzuki text. It would remove the requirement for an additional meeting of the panel with the parties on the issues identified in the comments to the interim report.⁴⁹ The Balás text considered this request. However, the changes are less far-reaching than those requested by the EC. Under the new rules of the Balás text, a further meeting of the panel with the parties

⁴⁷ See modified Article 10.12, as contained in TN/DS/9.

⁴⁸ See new Article 10.13, as contained in TN/DS/9.

⁴⁹ See TN/DS/W/1, Attachment, nos 11 and 12 (EC); TN/DS/W/22, Attachment, no 12 (Japan).

would only take place if requested by both parties, whereas today, a request from one party is sufficient. If no such meeting is requested, the Balás text would introduce a new opportunity to comment in writing on the written comments previously submitted by other parties.⁵⁰

6.2.5 Adoption of Panel Reports

As part of their 'flexibility proposal', the US and Chile propose to provide for the partial adoption of panel reports. The co-sponsors hold that: '(t)he WTO dispute settlement system is almost unique in that adoption of panel and Appellate Body reports is quasi-automatic under the reverse consensus rule.' As 'the reasoning and findings of reports may at times go beyond what the parties consider to be necessary to resolve the dispute, or, in some circumstances, may even be counterproductive to resolution of the dispute', the US and Chile suggest that: 'there should be mechanisms that would enhance the parties' flexibility to resolve the dispute and Members' control over the adoption process.'⁵¹

This objective is translated into two concrete proposals:

- insertion of a provision according to which a panel shall not include in the final report any finding, or basic rationale behind a finding, that the parties have agreed is not to be included;⁵²
- insertion of a provision that would allow the DSB to decide, by consensus, not to adopt a finding in the report or the basic rationale behind a finding.⁵³

Critics have argued, *inter alia*, that the provision allowing the deletion of findings by mutual agreement of the parties could lead to 'arm-twisting' to the detriment of the weaker party. It could also negatively affect the interests of third parties.⁵⁴ Neither suggestion has been integrated in the Balás text.

⁵⁰ See modified Article 15.2, as contained in TN/DS/9.

⁵¹ See TN/DS/W/28, para 3.

⁵² See TN/DS/W/28, no 6(b) (US, Chile) and TN/DS/W/52, lit (b), first proposal (US, Chile).

⁵³ See TN/DS/W/28, no 6(c) (US, Chile) and TN/DS/W/52, lit (c), amendment to Article 16.4 (US, Chile).

⁵⁴ See 'US Proposes Changing Dispute Settlement Rules to Encourage Deals', in *Inside US Trade*, 20 December 2002.

6.2.6 Other Issues

In order to facilitate the resolution of disputes with multiple complainants and in order to avoid delays, the EC suggests that any member having participated as a third party in consultations should be able to join in any request to establish a panel without having to request its own consultations. Similarly, a member should be entitled to become a party to a panel proceeding regarding the same matter even if it has not held consultations for 60 days at that point in time.⁵⁵ This proposal is likely motivated by the EC's complaint against India's patent regime. It had participated as a third party in a proceeding which had been begun by the United States and it later requested a panel on its own behalf. The EC request not only met with resistance from India, but the EC also had to go through the entire consultations procedure.⁵⁶ The Balás text did not consider the proposal and it left the procedures for multiple complainants unchanged.

The EC also proposed the inclusion of an additional paragraph into the working procedures governing the contents of the panel report. Accordingly, the descriptive part of the panel report would have to include a brief summary of the facts and the procedural history of a case.⁵⁷ It was not incorporated into the Balás text either.

Brazil called for the introduction of a fast track panel procedure. It could be invoked by a complainant if it could demonstrate that the measure at issue was the same as one that had already been the subject of a panel or appellate proceeding. The panel would then have 10 to 15 days to announce its decision on whether it was the same measure or not. If it were the same, the fast track panel would have to continue its work up to a maximum period of 90 days, and appellate review would be limited to 45 days. Otherwise, regular procedures would apply.⁵⁸ The proposal did not find entry into the Balás text.

The EC and Jordan suggested the establishment of standard panel working procedures.⁵⁹ This proposal has been cautiously supported by Davey (2002). He suggests, however, that if a permanent panel body

⁵⁵ See TN/DS/W/38, no ILB (EC).

⁵⁶ *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products (EC)* (WT/DS79). The US complaint on the same issue was dealt with in WT/DS50.

⁵⁷ See TN/DS/W/1, Attachment, no 35 (EC).

⁵⁸ See TN/DS/W/45 (Brazil) and TN/DS/W/45/Rev 1 (Brazil).

⁵⁹ See TN/DS/W/1, no V, last bullet point (EC); see also TN/DS/W/43, no VI (Jordan). For a discussion, see Davey (2002), pp 27–28. An early comment on procedural issues is available in Steger and Van den Bossche (1998).

were established (which he actively supports in other writings⁶⁰) this body should be given the power to codify its own procedures, subject to DSB approval. Secondly, such codification should occur only after a few years of experience. Thirdly, not too many resources should be spent on the codification process in case it became controversial.⁶¹ The issue was left out of the Balás text.

Finally, the African Group called for a provision that would oblige panel members to state their separate written opinion in panel reports and to hand down majority decisions. According to the LDC Group, dissenting opinions should be allowed in panel reports.⁶² This proposal was not accounted for in the Balás text. It could undermine both the independence of panels and the collegiality of panelists.

6.3 The Appellate Review Stage

6.3.1 Composition and Terms of Appointment of the Appellate Body

In the discussions on the appellate review stage, a point raised by various delegations was the composition and the terms of appointment of the Appellate Body. The EC proposed converting the Appellate Body mandate into full-time appointment.⁶³ Moreover, the EC proposal would give the General Council the authority to modify the number of Appellate Body members from time to time.⁶⁴ Thailand suggested increasing the number of Appellate Body members by two to four persons.⁶⁵ With similar intentions, a Japanese proposal would change Article 17.1 DSU by providing that the number of Appellate Body members could be modified, as required, by the DSB or the General Council.⁶⁶ The proposals came closer together with Thailand's second proposal on this issue which was to increase the number of Appellate Body members to nine while

⁶⁰ See Section 6.2.1.

⁶¹ See Davey (2002), pp 27ff.

⁶² See TN/DS/W/17 (LDC Group) and TN/DS/W/42, no VI (African Group). For a critical discussion, see McCall Smith (2003), pp 80ff. Currently, Article 14.3 DSU provides: 'Opinions expressed in the panel report by individual panellists shall be anonymous.'

⁶³ See TN/DS/W/1, no V (EC). Ehlermann (2002), p 609 views such a shift as unavoidable.

⁶⁴ See TN/DS/W/1, Attachment, no 13 (EC).

⁶⁵ See TN/DS/W/2 (Thailand). Ehlermann (2002), p 610, does not share the view that a greater number of Appellate Body members is the best reaction to the heavier workload. He argues that the small number has had a beneficial effect on the intimacy and collegiality of deliberations.

⁶⁶ See TN/DS/W/22, no 2(c) (Japan) and TN/DS/W/32, no 2(c) (Japan), as well as the related proposal for an amendment in the Attachment to TN/DS/W/32, no 20 (Japan).

allowing the DSB to modify this number if circumstances so warranted.⁶⁷ The EC also supports giving competence to the DSB for modifications to the number of Appellate Body members.⁶⁸ In the Balás text, this issue was taken into account and it is suggested that the Appellate Body shall be composed of *at least* seven persons, and that '(t)he total number of Appellate Body members may be modified by the DSB, after consultation of the General Council on any potential budgetary implications...'.⁶⁹

This debate has also been the subject of scholarly discussion.⁷⁰ Recently, Appellate Body veterans such as Lacarte-Muro⁷¹ and Steger⁷² have voiced concerns about calls for an enlargement of the Appellate Body. One argument is that the Appellate Body has so far come to terms with its workload quite well and in a timely manner and that therefore no increase is warranted. Furthermore, the authors fear that the collegiality of the Appellate Body and its members could be put at risk and that it may be difficult to achieve consensus in a larger group. It is also feared that coalitions could emerge in a larger group, or that 'regional seats' could develop in an enlarged Appellate Body.

Regarding the terms of appointment, a group of developing countries suggested changing the terms of appointment for Appellate Body members into non-renewable six-year terms,⁷³ a proposal also brought by the EC.⁷⁴ With regard to the composition of the Appellate Body, the African Group argued in favour of a better representation of Africa, as it already did for panels.⁷⁵ The Balás text, however, remains silent on this issue.

As the LDC group already suggested for panels, it also made a proposal according to which dissenting opinions should be allowed in Appellate

⁶⁷ See TN/DS/W/30 (Thailand). A third proposal with a view to increasing the number of Appellate Body members has been brought by Thailand after the May 2003 deadline, on 8 December 2003 (TN/DS/W/60).

⁶⁸ See TN/DS/W/38, no VA (EC).

⁶⁹ See modified Article 17.1, as contained in TN/DS/9.

⁷⁰ On this issue, see, for instance, Shoyer and Solovy (2000).

⁷¹ As quoted in Petersmann (2002a), pp 15–16.

⁷² See Steger (2002), pp 53–66. Steger headed the secretariat of the Appellate Body.

⁷³ See TN/DS/W/18 and TN/DS/W/18/Add 1, no IV (Cuba, Honduras, India, Jamaica, Malaysia, Pakistan, Sri Lanka, Tanzania Zimbabwe), and TN/DS/W/47 (India, Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia).

⁷⁴ See TN/DS/W/38, no VA (EC). Steger (2002), while being in favour of a non-renewable term, argues that its length should be somewhere between 8 and 10 years in order to guarantee independence and in order to allow for a 'learning curve'.

⁷⁵ See TN/DS/W/15 (African Group).

Body reports.⁷⁶ The African Group went one step further by suggesting that Appellate Body members should be required to give their separate written opinion and to take majority decisions.⁷⁷ Neither of these issues was taken into consideration in the Balás text. Obviously, such proposals could also undermine the principle of collegiality which is held high by the Appellate Body.

6.3.2 Notice of Appeal

Some developing countries suggested the establishment of additional guidelines on the nature of the notice of appeal in order to make sure that such notices are sufficiently clear.⁷⁸ Three of these countries, namely India, Pakistan and Malaysia had previously complained that the United States' notice of appeal in *US – Shrimp-Turtle* had been too 'vague and cursory'.⁷⁹ This concern was taken up in the Balás text which stipulates that: '(a) notification of appeal ... shall identify the relevant issues of law covered in the panel report and legal interpretations developed by the panel in sufficient detail to present the issues under appeal clearly.'⁸⁰

The concerns of members regarding sufficient clarity of the notice of appeal have in the meantime been considered by the Appellate Body itself. New Working Procedures for Appellate Review entered into force on 1 January 2005. The modified rules require, *inter alia*, more detail on the nature of the appeal. Appellants are now requested to include a list of the legal provision(s) of the covered agreements that the panel is alleged to have erred in interpreting or applying, and to provide an indicative list of the paragraphs of the panel report containing the alleged errors.⁸¹

6.3.3 Suspension of Appellate Review

As part of their 'flexibility proposal', the US and Chile also suggested introducing the possibility of suspending the appellate review by mutual

⁷⁶ See TN/DS/W/17 (LDC Group). For a critical discussion, see McCall Smith (2003), pp 80ff.

⁷⁷ See TN/DS/W/42, no VI (African Group). Currently, Article 17.11 DSU states: 'Opinions expressed in the Appellate Body report by individuals serving on the Appellate Body shall be anonymous.' This proposal is similar to the African Group proposal on the panel stage; see Section 6.2.6.

⁷⁸ See TN/DS/W/18 and TN/DS/W/18 Add 1, no VI (Cuba, Honduras, India, Jamaica, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe).

⁷⁹ See WT/DS58/AB/R, para 92.

⁸⁰ See Article 17.5(a), as contained in TN/DS/9.

⁸¹ See the modified Rule 20(2), as contained in WT/AB/WP/5.

agreement of the parties⁸² (as they did for the panel procedure, see Section 6.2.3). The time-frames for appellate review (and for the overall dispute settlement procedure) would be expanded by the amount of time that the work was suspended. The proposed provision does not include a time frame for the resumption of the work of the Appellate Body. As the proposal stands today, it could, if implemented, result in more cases ending in a similar kind of inconclusive limbo that is familiar from those cases ending in the consultation stage.

The Balás text would oblige the Appellate Body to suspend its work ‘at the request of the parties’ for a period of time determined by the parties.⁸³ It remains open how long such a period of time may be. There is nothing in the proposed text which would prevent proceedings from being suspended indefinitely. However, there is no provision on the lapse of the Appellate Body’s authority (similar to that in the rules on the suspension of panel procedures) either. Also, without a provision to the contrary, a request for a suspension of appellate review procedures could presumably be made at any time during the appellate review, including the time after the issuance of the proposed interim report (which the Balás text would also introduce; see Section 6.3.5). In other words, the parties could still suspend the proceeding when they already knew the essence of the ruling. If the parties agreed on a settlement of the dispute, possible at any time, the report would be confined to a brief description of the case and to reporting that a solution had been reached.⁸⁴

6.3.4 Introduction of an Interim Review Stage

In their “flexibility proposal”, the United States and Chile also proposed the introduction of an interim review stage (similar to the one known from the panel procedure). By consequence, they also suggested that the general time frame for appellate review would rise from currently sixty days to ninety days, and it could even be increased to 120 days in cases where the Appellate Body considered that it was unable to issue the report in the time suggested.⁸⁵ (One will note that this increase in time-frames is quite at odds with the US stated objective of keeping time-frames under the DSU as short as possible, *inter alia* in order to avoid interference with strict time-frames for the national Section 301 procedures.⁸⁶)

⁸² See TN/DS/W/28, no 6(d) (US, Chile), and TN/DS/W/52, lit (d), proposed amendment to Article 17.5 DSU (US, Chile).

⁸³ See Article 17.5(d), as contained in TN/DS/9.

⁸⁴ See Article 17.5(e), as contained in TN/DS/9.

⁸⁵ See TN/DS/W/28, no 6(a) (US, Chile) and TN/DS/W/52, lit (a) (US, Chile).

⁸⁶ See also ‘US-Chile Text For DSU Changes Leaves Out Standard of Review’, in *Inside US Trade*, 14 March 2003; and ‘WTO Members Fail on DSU Deal, Further Negotiations After Cancun’, in *Inside US Trade*, 30 May 2003.

The purpose of such an interim review at the appellate stage has been questioned. First, it has been argued that the interim review during the panel stage has deceived hopes that parties would use this phase to settle their differences.⁸⁷ Moreover, it is held that the reviews did not lead to changes in panel decisions.⁸⁸

The Balás text took the proposal for an interim review into consideration; however, the proposed provisions are bracketed. They provide for the issuance of an interim report to the parties which would include the descriptive sections as well as the findings and conclusions. Parties may submit written requests for the Appellate Body to review aspects of the interim report prior to the circulation of the final report. Only if requested jointly, a further meeting would be held with the parties on the issues identified in the written comments. If no comments are received, the interim report shall be considered the final report. The report shall include a discussion of the arguments made at the interim review stage.⁸⁹ According to the text, the ordinary time frame for appellate review would be extended from 60 to 90 days, or from 90 to 120 days if the Appellate Body could not provide its report within the ordinary time-frame.⁹⁰

6.3.5 Introduction of Remand Authority

There are instances where the Appellate Body had to leave certain claims unresolved because of insufficient factual findings in panel reports.⁹¹ As the Appellate Body's mandate consists of reviewing 'issues of law covered in the panel report and legal interpretations developed by the panel' according to Article 17.6 DSU, it is argued that the authority to remand certain issues back to the panels for further fact-finding would save time and resources.⁹²

⁸⁷ Hudec (1999), p 41, questions the usefulness of the interim review stage.

⁸⁸ According to this argument, voicing concerns on a report during the interim review would only contribute to making the panel report better and thus make the objectionable findings less vulnerable to appeal. Parties that did not agree with a report would therefore rather keep quiet during the interim review and spend their time and effort on the preparation of an appeal. See also 'US Proposes Changing Dispute Settlement Rules to Encourage Deals', in *Inside US Trade*, 20 December 2002.

⁸⁹ See Article 17.5(c), as contained in TN/DS/9.

⁹⁰ See Article 17.5(b), as contained in TN/DS/9.

⁹¹ One such example is *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products* (WT/DS103 (US), WT/DS113 (New Zealand)); see also 'Canada Dairy Fight Raises Questions on Agriculture, Dispute Rules', in *Inside US Trade*, 4 January 2002.

⁹² See, for instance, Steger (2002), pp 62–63 and, for an early discussion, Palmeter (1998). See also Shoyer and Solovy (2000) and Cottier (1998).

The EC has been proposing the introduction of ‘remand authority’ for the Appellate Body since 1998.⁹³ If the Appellate Body were unable to resolve an issue as a result of insufficient factual findings in a panel report or insufficient undisputed facts on the record of the panel proceedings, the Appellate Body would explain the specific insufficiencies, and any party to the dispute could then request a remand of the matter to the original panel. The remand panel would then have to issue its report which, in turn, could be appealed. The introduction of a remand procedure is also explicitly supported by Jordan.⁹⁴

This remand procedure is included in the Balás text. Its purpose is twofold. First, if the Appellate Body is unable to fully address an appealed issue due to insufficient factual findings in the panel report or insufficient undisputed facts on the panel record, it shall indicate this in its report and explain in detail the specific insufficiencies. This procedure would apply to ‘ordinary’ panel reports as well as to compliance panel reports and remand panel reports (see below). Within 30 days from the adoption of the panel report, the complainant may request the DSB to remand that issue to the original panel, pursuant to the provisions of the proposed Article 17*bis*. Secondly, the modified paragraph would also provide rules for situations where the Appellate Body is unable to establish whether a measure in respect of which an issue was raised on appeal is inconsistent. In such cases, the Appellate Body shall indicate this in its report and, according to bracketed wording, it shall refrain from making recommendations that the measure concerned be brought into conformity. The remand procedure would be without prejudice to the adoption of those recommendations and rulings that relate to findings which were not appealed and which the Appellate Body was able to address fully.⁹⁵

Details for the remand procedure are laid down in Article 17*bis* of the Balás text. The entire text of this Article is bracketed. According to the procedure, the DSB shall establish a remand panel at the first meeting where the request appears on the DSB’s agenda. The remand panel shall consist of the original panellists. Its terms of reference mandate an examination of the matter referred to the DSB under the Article 17.12 procedure in accordance with the indications given by the Appellate Body. The remand panel would normally circulate its report within 90 days from the request, and in no case later than within six months. The remand panel report would be adopted by the DSB within 10 days unless

⁹³ See TN/DS/W/1, no V (EC) and Attachment, nos 15 and 16.

⁹⁴ See TN/DS/W/43, no X (Jordan) and TN/DS/W/56 (Jordan).

⁹⁵ See modified Article 17.12, as contained in TN/DS/9.

a party to the remand panel proceeding formally notified the DSB of its decision to appeal.⁹⁶

The establishment of the remand procedure would be one of the key improvements to the DSU. While it is true that this procedural device may lengthen proceedings, it could help to enhance the acceptance of adverse findings as the legal quality of reports could benefit from remand. Observers, however, also argue that the introduction of a remand authority could deter suitable persons from serving on panels due to the extra workload in case of a remand. Obviously, that problem would be less significant if a permanent body of full-time panellists were established.

6.3.6 Adoption of Appellate Body Reports

Similar to their proposal on the partial adoption of panel reports (see Section 6.2.5), the US and Chile also suggested the introduction of a provision that would allow for the partial adoption of Appellate Body reports. Again, the proposal consists of two elements:

- insertion of a provision which would require the Appellate Body to set out the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it made. In its final report, however, the Appellate Body would be prevented from including any finding, or basic rationale behind a finding, that the parties had agreed is not to be included;⁹⁷
- insertion of a provision that would allow the DSB to decide, by consensus, not to adopt a finding in the report or the basic rationale behind a finding. Moreover, a party to the dispute would not need to accept any finding or basic rationale that the DSB did not adopt.⁹⁸

The proposed text would deliver a device to increase the hurdles for the Appellate Body (as the highest adjudicating body) to hand down rulings which a party with strong negotiating powers opposes. The new provision would particularly suit negotiators from powerful countries. The provision on the deletion of findings by mutual agreement of the

⁹⁶ See Article 17*bis*, as contained in TN/DS/9.

⁹⁷ See TN/DS/W/28, no 6(b) (US, Chile) and TN/DS/W/52, lit (b), second proposal seeking an amendment to Article 17.13 DSU (US, Chile).

⁹⁸ See TN/DS/W/28, no 6(c) (US, Chile) and TN/DS/W/52, lit (c), second proposal seeking an amendment to Article 17.14 (US, Chile).

parties could also interfere unduly with the rights of third parties. Clearly, this proposal ranks among those which display the strongest tendency away from the adjudication-oriented approach towards more member control and more diplomatic dispute settlement.⁹⁹ The partial adoption procedure did not find its way into the Balás text.

6.4 The Implementation Stage

A major part of the discussion on the DSU, both in practice and in academic literature,¹⁰⁰ is related to the implementation stage, corresponding to a more general perception that this is both a very problematic and crucial stage in the procedure. Several issues have been dealt with regarding implementation.

6.4.1 Determination of the Reasonable Period of Time for Implementation

In the light of the proposed introduction of an appellate stage into the compliance panel procedure (see Section 6.4.3.1 below) and the subsequent delays in the process, Korea suggests that the time frame for the determination of the reasonable period of time (RPT) for implementation should be shortened. Officially, that time frame is now 90 days from the adoption of the reports. Factually, however, Korea offers statistics which show that the average time it took to issue the award in the proceedings was 137 days for all proceedings, or 157 days in the proceedings that have taken place since 2000. This corresponds to an average delay of 47 or 67 days respectively.

Korea therefore seeks to reduce the time frame for bilateral negotiations on the RPT (or the appointment of an arbitrator for such determination) from 45 to 30 days. At the DSB meeting taking place after the lapse of this deadline, the complainant should be entitled to ask the Director

⁹⁹ For an initial discussion of the proposal, see 'US Proposes Changing Dispute Settlement Rules to Encourage Deals', in *Inside US Trade*, 20 December 2002.

¹⁰⁰ See, for instance, Petersmann (2002a), pp 16–20. With regard to the use of arbitration (including under Article 21.3 on the reasonable period of time), see Hughes (2002), pp 107–18. With regard to the sequencing issue, see Mavroidis (2002), Rhodes (2000), Valles and McGivern (2000). Beyond sequencing, several aspects of Article 21.5/22 procedures are discussed in Pauwelyn (2002). The general experience with Article 21.5 procedures is discussed in Kearns and Charnovitz (2002). A critical perspective on the current state of implementation procedures is given by Gleason and Walther (2000). For an EC perspective, see Rosas (2001).

General to appoint an arbitrator within 10 days. Arbitration would then have to be carried out within 45 days. This should ensure that arbitration proceedings can be finished within the ninety day time frame foreseen in the DSU. In this context, Korea also suggests that Members make better use of the time between the circulation and the adoption of panel and Appellate Body reports (which ranges from 20 to 60 days) to study ways of implementation.¹⁰¹

A similar proposal on the RPT was made by the EC. In its first submission, the EC suggested that the time frame for the completion of the arbitration should start from a 'more logical date than the date of the adoption of the report, for example by providing a 45-day period from the date of the appointment of the arbitrator'.¹⁰² The EC's second proposal tries to bridge the gaps between the EC and the Korean idea by suggesting that each party may request arbitration on the RPT within 30 days from the adoption of the report. Parties would then have another 10 days to agree on an arbitrator who, without such agreement, would be drawn from the roster of panellists that the EC proposes. The arbitrator should then issue the award within 45 days.¹⁰³

The Balás text took the proposals into account with slight modifications. As proposed, it would grant any party a right to refer the matter to arbitration within 30 days from the date of the adoption of the reports. If there were no agreement on the arbitrator within 10 days, the Director General would appoint one within seven days (bracketed provision). The arbitrator should then issue its award within 50 days.¹⁰⁴ As a result, the scope for delay tactics in the implementation stage would be slightly reduced.

6.4.2 Length of the Reasonable Period of Time for Implementation

The length of the RPT has been discussed as well.¹⁰⁵ Some developing countries called for a longer RPT in cases involving developing country defendants. While the Balás draft added a programmatic provision on S&D treatment, it does not propose any concrete changes to the numbers (see Section 7.5.3 for details).

¹⁰¹ See TN/DS/W/11, no III.A (Korea).

¹⁰² See TN/DS/W/1, no V and Attachment, no 19 (EC).

¹⁰³ See TN/DS/W/38, nos 22 and 23 (EC).

¹⁰⁴ See the modified Article 21.3(c), as contained in TN/DS/9.

¹⁰⁵ See Petersmann (2002a), pp 19–20; Monnier (2001).

The EC¹⁰⁶ and Japan¹⁰⁷ also resubmitted a proposal with regard to the RPT that is well-known from prior stages in the DSU review. It suggests inclusion of a footnote to Article 21.3, establishing that the RPT shall include the time period specified under Article 4.7 of the Agreement on Subsidies and Countervailing Measures (SCM) for the withdrawal of a subsidy. The Balás text integrated this proposal.¹⁰⁸

6.4.3 Sequencing During the Implementation Stage

Especially at the beginning of the review exercise, the so-called ‘sequencing issue’ was much debated.¹⁰⁹ This problem arose from gaps or – as some would argue – contradictions in the DSU regarding the application of Articles 21.5 and 22 DSU, thereby giving rise to different interpretations. It first surfaced in the *Bananas* case,¹¹⁰ where a dispute arose on the WTO-consistency of the EC implementation measures. 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. Whereas the US initially opposed any idea of sequencing and favoured immediate retaliation, the EC and many other members argued in favour of the completion of 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 *FSC* case,¹¹¹ finding itself unable to implement the rulings in a timely and WTO-consistent manner. The EC and the US then agreed bilaterally on a case-specific sequencing procedure which filled the gaps of the DSU.

During the Doha Round negotiations on the DSU review, the problem was debated again. However, it was viewed as clearly less acute in the light of the practice to conclude bilateral agreements which has developed. Such bilateral agreements regularly provide that an Article 21.5 ‘compliance panel’ first review an implementation measure before the complainant may seek authorisation to suspend concessions or other obligations pursuant to Article 22.2. In some instances, such

¹⁰⁶ See TN/DS/W/1, Attachment, no 20 (EC).

¹⁰⁷ See TN/DS/W/22, Attachment, no 1 (Japan) and TN/DS/W/32, no 1 (Japan).

¹⁰⁸ See the note marked with an asterisk below the modified Article 21.3(c), as contained in TN/DS/9.

¹⁰⁹ See, for instance, Petersmann (2002a), pp 16–17, Mavroidis (2002), Rhodes (2000), Valles and McGivern (2000). Beyond sequencing, several aspects of Article 21.5/22 procedures are discussed in Pauwelyn (2002).

¹¹⁰ *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (WT/DS27).

¹¹¹ *United States – Tax Treatment for ‘Foreign Sales Corporations’* (WT/DS108).

arrangements provide for the possibility to appeal the compliance panel report. Some arrangements also include the timing for an arbitration procedure on the equivalence of the level of the suspension of concessions or other obligations with the level of nullification or impairment pursuant to Article 22.6.

6.4.3.1 Compliance Panel Procedure

The most comprehensive proposals in this regard were made by the EC and Japan, based on former proposals brought in by these countries and other members back in 1999 and thereafter.¹¹² Those portions of the Balás text dealing with sequencing draw mainly on these two proposals and the co-ordination efforts between them. Therefore, the Balás text and its contents are briefly outlined here directly, without embarking on the specifics of the original proposals.

According to the Balás text, a defendant must start to report on the status of implementation from the mid-point of the RPT or six months after the adoption of the DSB recommendations, whichever is earlier. This reporting requirement would last until the parties to the dispute have mutually agreed that the issue is resolved. The draft would further clarify the reporting requirement by holding that status reports must be 'detailed' and 'written'.¹¹³ Once the defendant considers that it has complied, it shall submit to the DSB a written notification of the measures it has taken. Such notification would have to include a detailed description as well as the text of any relevant measures.¹¹⁴

¹¹² See TN/DS/W/1 (EC), with an attachment (particularly nos 22–26) largely based on WT/MIN(99)/8 and TN/DS/W/38 (EC); see TN/DS/W/22 and TN/DS/W/23 (Japan), both with an attachment (particularly nos 3–7) largely based on WT/MIN(01)/W/6. Other countries making proposals on sequencing include Australia (see TN/DS/W/8 lit (e), TN/DS/W/34 lit (e), and TN/DS/W/49), Jordan (see TN/DS/W/43, no VIII), China (see TN/DS/W/51 and TN/DS/W/51/Rev 1, no 5), as well as Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe (see TN/DS/W/19, proposal relating to Article 21.2, lit (b)ii and (c)). The proposal of these developing countries calls for mandatory consultations and additional time-frames in cases involving developing countries as defendants. They were, however, not considered in the Balás text.

¹¹³ However, brackets indicate that there is disagreement as to whether specific measures taken since the last report should be included. Given the poor information provided in many such status reports so far, this disagreement is another reflection of members' reluctance to disclose substantial information on implementation during the RPT. Interestingly, the draft would also introduce a new obligation on the Director General to issue public reports on the status of implementation of DSB rulings at regular intervals; see Article 21.6(b) as contained in TN/DS/9.

¹¹⁴ See Article 21.6(c)(i) and Article 21.6(c) last sentence, as contained in TN/DS/9. While this requirement would trigger a notification only if the defendant did consider that it was in compliance, brackets indicate disagreement as to whether a defendant should be *generally* obliged to submit written notifications on measures taken to comply at a certain point in time; see bracketed Article 21.6(c)(ii) and Article 21.6(c)(iii), as contained in TN/DS/9.

In case of disagreement between the complainant and the defendant as to the existence or WTO-consistency of implementing measures, a compliance panel procedure would be available. The text offers two versions both of which are bracketed. According to version A, consultations should be held prior to the request for a compliance panel in order to discuss possible mutually acceptable solutions for the implementation of DSB recommendations and rulings. According to version B, the establishment of a compliance panel could be requested directly.¹¹⁵ Such a request could be made either once the defendant has indicated that it does not need a RPT for implementation, or once it has submitted a notification of compliance, or once the RPT has expired, whichever is earlier.¹¹⁶ The compliance panel would be composed of the members of the original panel.¹¹⁷ Unless the parties agreed on special terms of reference, the compliance panel would operate under standard terms of reference.¹¹⁸ It would be established at the DSB meeting where the request appeared first as an item on the DSB agenda, unless the DSB decided by consensus not to establish the compliance panel.¹¹⁹ It would circulate its report within 90 days after its establishment.¹²⁰ The compliance panel report would be adopted by the DSB at the request of any party unless it were appealed.¹²¹ In case of appeal, the normal procedures for Appellate Review as included in Article 17 would apply.¹²² If it were found that the defendant had not complied with the rulings, it would not be entitled to any further period of time for implementation.¹²³

If the defendant did not inform the DSB that it intended to implement the recommendations, if it did not submit a notification of compliance,

¹¹⁵ See new Article 21.5 (bracketed) and Article 21*bis*.2 (bracketed) as contained in TN/DS/9. Japan had originally intended to make such consultations voluntary (see Article 21.3*bis* in TN/DS/W/22, Attachment, no 2 (Japan) and TN/DS/W/32, Attachment, no 2 (Japan)) while the EC insisted that they should be mandatory before a compliance panel could be requested (see no 21 of the attachment to TN/DS/W/1). In a co-ordination effort, and to counter fears that such mandatory consultations could delay the process, the EC proposed that these consultations, while being mandatory, could begin as early as 30 days prior to the expiry of the RPT in order to avoid delays in comparison with the Japanese proposal (see TN/DS/W/38, no 27 (EC)).

¹¹⁶ See Article 21*bis*.2, as contained in TN/DS/9. Brackets indicate that in alternative A, consultations could be requested already 20 days prior to the expiry of the RPT. In this case, the defendant would have to reply to the request within 10 days and it should enter into consultations within 20 days. Twenty days after the circulation of the request for consultations, the complainant would have the right to request the establishment of a compliance panel; see Article 21*bis*.3, as contained in TN/DS/9.

¹¹⁷ See Article 21*bis*.3, as contained in TN/DS/9.

¹¹⁸ See Article 21*bis*.4, as contained in TN/DS/9.

¹¹⁹ See Article 21*bis*.5, as contained in TN/DS/9.

¹²⁰ See Article 21*bis*.6, as contained in TN/DS/9.

¹²¹ The adoption procedure is bracketed; see Article 21*bis*.7, as contained in TN/DS/9.

¹²² See Article 21*bis*.8, as contained in TN/DS/9.

¹²³ See Article 21*bis*.9, as contained in TN/DS/9.

or if the result of the compliance panel procedure was that the defendant had failed to bring its trade measures into conformity, the complainant could either request the defendant to enter into consultations with a view of agreeing on a mutually acceptable trade or other compensation, or the complainant could request an authorisation from the DSB to suspend concessions or other obligations (SCOO) *vis-à-vis* the defendant.¹²⁴ The DSB should meet 15 days after the request to authorise the SCOO. In the case of disagreement on the level of suspension or whether the principles for the determination of the sectors subject to the SCOO (Article 22.3) had been followed, the matter could be referred to arbitration. The arbitrator should decide within 60 days from the referral of the matter, or within 30 days if an arbitration on the level of nullification or impairment had taken place before.¹²⁵ After this arbitration, the complaining party could submit a request to the DSB for an authorisation to SCOO, which the DSB should grant as long as it were consistent with the arbitrator's determinations.¹²⁶ A new obligation would be imposed on the complainant who would have to notify the DSB of any retaliatory measures taken.¹²⁷

6.4.3.2 Determination of the Level of Nullification or Impairment

Several proposals discuss the timing of the determination of (or arbitration on) the level of nullification or impairment and its equivalence with the level of suspension of concessions or other obligations.

The most far-reaching proposal comes from Mexico. The Mexican paper suggests incorporating the determination of the level of nullification and impairment into the original panel process. Such determination could already be requested after the interim panel report has been issued. Subsequent findings in this regard would form part of the final panel

¹²⁴ See new Article 22.2, as contained in TN/DS/9. This paragraph contains a bracketed subparagraph (c) which would block recourse to Article 22 before the completion of a compliance panel procedure in case of disagreement on whether implementing measures exist or are WTO-consistent. With regard to the SCOO, further bracketed language indicates disagreement on whether the complainant would have to submit, along with its request, an indicative list of the concessions or other obligations to be suspended; see Article 22.2ter(a), as contained in TN/DS/9.

¹²⁵ See Article 22.2ter(b) and Article 22.6, as contained in TN/DS/9.

¹²⁶ See Article 22.7, as contained in TN/DS/9. Again, this paragraph contains bracketed language as to whether the complainant should submit an indicative list of those concessions and other obligations that the complainant proposed to suspend.

¹²⁷ See Article 22.8, as contained in TN/DS/9. Also with regard to compliance review procedures, both Japan (TN/DS/W/22, Attachment, no 16) and the EC (TN/DS/W/1, Attachment, no 30) proposed extending such compliance reviews to arbitration awards under Article 25. This issue, which had already been brought up in earlier stages of the DSU review, was not considered in the Balás text.

report and could be subject to appeal. The Mexican proposal could lead to important time-savings, particularly if it were implemented jointly with other proposals contained in the Mexican submission (see Section 6.4.11 on increased incentives for compliance).¹²⁸

Ecuador submits a draft proposal which is also aimed at making such determination occur earlier. According to the new paragraphs *3bis* and *3ter* which Ecuador suggests for inclusion into Article 21, a complainant could seek arbitration on the level of nullification and impairment as soon as it becomes clear that the defendant has not complied immediately with the DSB recommendations and rulings. The arbitrator in charge of determining the RPT could also determine the level of nullification or impairment. The entire procedure could be completed before the complainant would seek authorisation to retaliate from the DSB.¹²⁹

Korea proposes to have compliance panels determine the level of nullification or impairment, holding that both the compliance panel and the arbitration panel are composed of the members of the original panel. Not only would such 'front-loading' provide stronger incentives for compliance (as members would have a clear picture of the consequences of non-compliance up-front), but it would facilitate negotiations on compensation and it might make recourse to the arbitration procedures under Article 22.6 (on whether the level of suspension was equivalent to the level of nullification, and on whether the rules on cross-retaliation had been followed) less frequent.¹³⁰

The EC is equally in favour of an earlier determination of the level of nullification or impairment. However, according to the EC proposal, it should only occur towards the end of the reasonable period of time (when the non-complying party indicates that it will not be able to comply with the DSB recommendations), or after the end of the reasonable period of time if both parties agree that there has not been implementation, or if a compliance panel has found that the measures are insufficient.¹³¹ This idea was later also integrated into a Japanese proposal.¹³²

¹²⁸ See TN/DS/W/40 (Mexico) for the textual proposal, and TN/DS/W/23 (Mexico) no II(a) for the conceptual background.

¹²⁹ See TN/DS/W/26 (Ecuador) and TN/DS/W/33 (Ecuador).

¹³⁰ See TN/DS/W/11, no III.B (Korea) and TN/DS/W/35, no III.B (Korea). Pauwelyn (2002) is in favour of this proposal, as it would eliminate recourse to Article 25 arbitration as in *United States – Section 110(5) of the US Copyright Act* (WT/DS160).

¹³¹ See TN/DS/W/1, at II.B, and no 24 (attachment) (EC); see also TN/DS/W/38, at VI.C (EC).

¹³² See TN/DS/W/32, no 1a, and para 5 of the attachment (Japan).

Some of these differing views are accounted for in the Balás text which proposes different versions. According to one version, arbitration could be requested at any point of time after the DSB has adopted the recommendations of the original panel and Appellate Body reports. According to the second (bracketed) version, such arbitration could be requested only after completion of the compliance panel procedure. The arbitration should be carried out by the original panel, and the award of the arbitrator should be circulated to members within 45 days after the date of the request.¹³³

One may regret that the Balás text did not embark upon any of the more ambitious proposals such as those put forward by Ecuador or Mexico. From the viewpoint of ‘prompt settlement’ as called for in Article 3.3 DSU, the Mexican proposal is beyond doubt the most intriguing one. A determination of the level of nullification or impairment occurring as early as in the original panel stage could shorten the entire compliance proceeding considerably because no additional arbitration procedure would have to be completed. Moreover, negotiations on compensation to restore reciprocity would be facilitated if parties had information on the level of nullification or impairment up-front. This might even lead to less cases of SCOO (see also Section 6.4.5). Additionally, the proposal could bring efficiency gains as panels would deal directly with the level of nullification or impairment while they are profoundly investigating the issue instead of having to reconvene much later for the arbitration. Finally, one could argue that the legal protection of members was enhanced because the determination made by the panel would be subject to appeal.

6.4.4 Level of Nullification or Impairment

The level of nullification and impairment is a crucial element in the application of retaliatory measures. Article 22.4 stipulates that the level of suspension of concessions or other obligations shall be equivalent to the level of nullification or impairment.¹³⁴ This idea is directly linked to the core concept of reciprocity (see Part I).

Japan wishes to account for the chilling effects of ‘mandatory’ laws in the level of nullification or impairment. Mandatory laws are laws which mandate the application of WTO-inconsistent measures, and thus are found to be WTO-inconsistent as such (eg anti-dumping laws). Japan asserts that not all trade-distorting effects that such laws generate are

¹³³ See Article 22.1*bis*, as contained in TN/DS/9.

¹³⁴ For a critical discussion of this concept, see Anderson (2002), pp 127ff.

currently being taken into account, because only the effects of existing measures (eg a specific anti-dumping order) and not those of similar measures which may be taken in the future are considered. According to Japan, this leads to an underestimation of the level of nullification and impairment, resulting in a lack of encouragement for the member concerned to bring such laws into compliance with WTO obligations. Japan therefore proposes to take into account trade effects of similar subsequent measures that may be taken under the same legislation.¹³⁵ The proposal could be seen as directed towards the United States which has often been the defendant in disputes (particularly on trade remedies) where the mandatory versus discretionary debate arose. Obviously, the proposal is not only politically delicate, but it would be very difficult to implement in practice. As might be expected, it was not integrated into the Balás text.

For cases between developing country complainants and developed country defendants, Ecuador suggests that the arbitrator in charge of determining the level of nullification or impairment may also make an estimate of the impact of the WTO-inconsistent measures on the complainant's economy. This impact should then be taken into account in proceeding with compensation or retaliation.¹³⁶ Again, it remains unclear how this impact should be calculated. This proposal is not reflected in the Balás text either.

6.4.5 Compensation Versus Suspension of Concessions

In the last few years, both practitioners and scholars have increasingly questioned the suitability of the suspension of concessions or other obligations (SCOO) as a response to non-compliance. In general, this literature is critical, as authors point to many disadvantages that are associated with the SCOO. While a full discussion of the many adverse effects of the SCOO would be outside the scope of this study, a few arguments shall be noted here. By suspending concessions or other obligations, the complainant government usually harms its own economy (as it curbs previous trade which, presumably, was in the economic interest of both parties). More specifically, harm is done to individual economic actors who are not responsible for the defendant government's failure to implement. Similar to any other import restriction, the SCOO weakens the competitiveness of the complainant's

¹³⁵ See TN/DS/W/22, no 2(a) (Japan) and TN/DS/W/32, Attachment, no 21 (Japan). For a general overview of the discussion on mandatory versus discretionary laws, see Bhuiyan (2002) and Sim (2003).

¹³⁶ See TN/DS/W/33, modification in Article 21.3*bis* (Ecuador); see also Section 7.5.3.

domestic industries because it shuts out competitive raw materials or intermediate products. It may also promote rent-seeking behaviour in the complainant's newly-protected industries and may undermine their long-term competitiveness. On a general level, the SCOO reduces the predictability of trade conditions which the WTO is normally set to preserve, as every concession and trade rule can be revoked as part of a SCOO.

Moreover, the SCOO is not an equally powerful instrument for all countries. Developing and small countries will have difficulties in using the SCOO as they usually lack the market size to make a credible retaliatory threat. The difficulties faced by developing countries were illustrated in Ecuador's struggle against the EC non-compliance in the *Bananas* case. Retaliation may also have a negative impact on third countries, for instance if their industries supply inputs to industries in the defendant country.¹³⁷ Finally, it has a problematic psychological connotation as it creates the erroneous impression that trade restrictions would make a country better off. Given the many negative aspects of the SCOO, other options of enforcement would be desirable.

Some proposals were submitted during the DSU review with a view to making trade-enhancing compensation more attractive *vis-à-vis* the trade-restricting SCOO. As past practice has shown, parties prefer the SCOO to compensation as a remedy against non-compliance. According to the EC, this is due to the structure of the DSU. Article 22.2 establishes that members have only 20 days after the end of the reasonable period of time (RPT) for implementation to conclude negotiations on compensation. Further on, it is only the request for the authorisation to SCOO that triggers the Article 22.6 arbitration which enables parties to ascertain the level of nullification and impairment. This information could otherwise play an important role in any negotiations on compensation. As a measure to enhance the attractiveness of compensation, it has therefore been suggested to 'front-load' the determination of the level of nullification or impairment.¹³⁸ That same idea has also been brought forth by Ecuador (see Section 6.4.3.2 for details).

¹³⁷ See Charnovitz (2003), Anderson (2002), Charnovitz (2001), Hudec (2000) and Mavroidis (2000) for a discussion. A critical view of the current focus on retaliation from an industry perspective is included in UNICE (2001).

¹³⁸ See TN/DS/W/1, no II.B and the subsequent legal text (EC). See also Rosas (2001), p 144.

Some countries have suggested the introduction of monetary compensation, including Ecuador,¹³⁹ China,¹⁴⁰ the LDC Group and the African Group. The latter suggests introducing (mandatory) monetary compensation which should continually be paid pending the withdrawal of the measures.¹⁴¹ The LDC Group even argues that monetary compensation is to be preferred, as any form of enhanced market access would prejudice other members. It should be equal to the loss or injury suffered, and it should be calculated from the date that the offending measure was adopted.¹⁴²

The Balás text considered the preference of many (particular developing) members for strengthened compensation. It suggests that the complainant could choose whether to proceed with a request for an authorisation to retaliate, or whether it preferred negotiations with the defendant on compensation. In the latter case, the defendant would enter into consultations with the complainant 'with a view to agreeing on a mutually acceptable trade or other compensation'. While negotiations would be underway, the complainant could not request authorisation from the DSB to suspend concessions. The defendant should then submit a proposal for mutually acceptable trade or other compensation to the complainant (bracketed language indicates disagreement as to whether the submission of such a proposal would be mandatory or not).¹⁴³ With regard to compensation affecting cases with a developing country complainant, the Balás text calls upon the defendant in programmatic language to 'take into account all relevant circumstances and considerations relating to the application of the measure and its impact on the trade of that developing country', whereby 'the suitable form of compensation should also be an important consideration'. Special attention would be given to the specific constraints of LDCs which find it particularly difficult to suspend concessions or obligations.¹⁴⁴

The language used in the Balás text makes it clear that more profound changes regarding the compensation versus retaliation issue did not command consensus among members. Complainants would retain control over whether negotiations on compensation would take place or whether they would proceed directly to seeking authorisation from

¹³⁹ See TN/DS/W/33 (Ecuador).

¹⁴⁰ See TN/DS/W/29, no 2 (China).

¹⁴¹ See TN/DS/W/15, no 5 (African Group) and also TN/DS/W/42, no VIII (African Group).

¹⁴² See TN/DS/W/17, no 13 (LDC Group). This suggestion was not included in the second submission of the LDC Group, circulated as TN/DS/W/37; see also Section 7.5.3.

¹⁴³ This should happen within 30 days (bracketed version A) or 20 days (bracketed version B). See new Article 22.2*bis*(b), as contained in TN/DS/9.

¹⁴⁴ See the new Article 22.2*bis*(c), as contained in TN/DS/9.

the DSB to SCOO. Moreover, the provisions aiming at putting developing country complainants in a better position are of a rather programmatic nature. In light of the Ecuadorian experience in the *Bananas* case and the magnitude of the difficulties encountered, substantial improvements under the proposed rules are hard to identify.

With regard to compensation agreements, Australia further voiced concerns that bilateral compensation deals could impair the rights of third parties and constitute waivers of their obligations. This issue, which is discussed in detail in Section 7.4 below, was taken into consideration by Balás. His draft would require parties to a dispute that reached an agreement on mutually acceptable trade or other compensation to notify the text of such agreement to the DSB. Further on, the defendant would have an obligation to notify to the DSB the measures it had taken in application of the compensation agreement.¹⁴⁵

6.4.6 Carousel Retaliation

The term 'carousel retaliation' refers to periodic modifications of the list of products that are subject to the suspension of concessions. The issue surfaced for the first time on 22 September 1999 when the 'Carousel Retaliation Act of 1999' was introduced into Congress. The purpose of the bill, which was supported by farm and cattle groups as well as the Hawaii Banana Industry Association, was to induce the EC towards compliance with the WTO rulings in the *Hormones* and *Bananas* cases. To this purpose, increased pressure on the EC Commission and European governments should be exerted through the channel of EC exporters affected. Under the bill, the USTR is required to periodically 'carousel', ie rotate, the list of products subject to retaliation in order to maximise the effect of the sanctions. The measure was signed into law in May 2000 but has so far never been applied.¹⁴⁶

In the light of these developments, the EC had already sought a prohibition of carousel retaliation in the DSU review of 1998/1999, by adding a footnote to Article 22.7 DSU on the arbitration procedure on the level of the SCOO. By contrast, the US had sought a footnote explicitly allowing such retaliation.¹⁴⁷ In a parallel development, the EC had

¹⁴⁵ See the new Article 22.2bis(d), as contained in TN/DS/9.

¹⁴⁶ See Sek (2002).

¹⁴⁷ See 'Revised Dispute Reform Text Presented to WTO Members; Differences Remain', in *International Trade Reporter*, vol 16, no 46, 24 November 1999; 'Trade Officials Say Accord Is Near On WTO Dispute Settlement Reform', in *International Trade Reporter*, vol. 16, no 47, 1 December 1999 and 'EU May Challenge United States in WTO on Carousel Approach to Trade Sanctions', in *International Trade Reporter*, vol 17, no 19, 11 May 2000.

requested consultations under the DSU on the carousel provision in summer 2000, however without proceeding to the panel stage.¹⁴⁸

Although carousel retaliation has so far never been applied, the EC is still among the staunchest opponents of this type of sanctions. In its conceptual proposal, the EC insisted once more that a specific provision had to be integrated into the DSU, making it clear that a country did not have the ability to unilaterally modify the list of concessions or other obligations for which a DSB authorisation had been granted.¹⁴⁹ A similar direction was pursued in a joint proposal by Thailand and the Philippines. To ensure the equivalence of the level of the SCOO with the level of the nullification or impairment, their text would require the complainant to submit to the arbitrator a detailed proposal containing a list of the concessions or other obligations it intended to suspend. Once the arbitrator approved this list as equivalent, the complainant could only suspend obligations and concessions contained in its own list. Modifications of the list would be possible only by mutual agreement, or for technical purposes.¹⁵⁰ In its determinations, the arbitrator would also be required: 'to take due account of any time-period necessary for trade in the affected sectors to adjust itself prior to and during the suspension of concessions or other obligations, and to regain its normal course thereafter.'¹⁵¹

Australia also submitted a proposal which would oblige complainants not to vary the list of suspended concessions or other obligations – except to correct technical errors or in unforeseen circumstances. In case of such corrections, the defendant would have the right to seek new arbitration under Article 22.6 DSU.¹⁵²

Given the differences in the approach by the US on the one hand and many other members on the other, the Balás text does not contain any provision on carousel retaliation. The only timid step it does take in this

¹⁴⁸ *United States – Section 306 of the Trade Act of 1974 and Amendments Thereto* (WT/DS200).

¹⁴⁹ See TN/DS/W/1, no II.D and subsequent legal text (EC).

¹⁵⁰ In this case, the complainant would have to request authorisation from the arbitrator for the adjustment. If the arbitrator agreed that the equivalence between the level of suspension and the level of nullification or impairment remained intact, the DSB would grant the authorisation to adjust the list unless it decided by consensus not to do so.

¹⁵¹ See TN/DS/W/3 (Thailand, Philippines). In this context, Mavroidis (2002) raises the question of how precisely to calculate nullification and impairment. The EC later expressed support for the proposal by Thailand and the Philippines; see TN/DS/W/38, no VI.C (EC).

¹⁵² See TN/DS/W/8, lit (c) (Australia), TN/DS/W/34, lit (c) (Australia) and the proposed change to Article 22.7 DSU, as contained in TN/DS/W/49 (Australia).

direction is a bracketed provision in the new Article 22.2*ter*(a) which would require the complainant to submit an indicative list of the concessions or other obligations it proposed to suspend. Even this list, albeit only indicative, would be 'without prejudice to the determination by that Member of the specific concessions or other obligations that it may ultimately suspend'.¹⁵³

6.4.7 Collective Retaliation

Arguing that individual developing countries can hardly use the suspension of concessions as an enforcement device against developed countries, the African Group suggests that all WTO members shall be authorised to collectively suspend concessions to a developed member that adopts measures in breach of WTO obligations against a developing country, notwithstanding the requirement that the suspension of concessions is to be based on an equivalent level of nullification and impairment.¹⁵⁴ The LDC Group basically echoes this call, arguing that under a 'principle of collective responsibility', all WTO members would collectively have the right and the responsibility to enforce recommendations of the DSB. Collective retaliation should therefore be available automatically where a developing country or a LDC has been a successful complainant, as a matter of S&D. In determining whether to authorise collective retaliation, the DSB should not be constrained by quantification on the basis of the rule on nullification and impairment.¹⁵⁵

Although collective retaliation has been a long-standing concern of developing countries, particularly after the Ecuadorian experience in the *Bananas* case, this concept did not find its way into the Balás draft.

6.4.8 Freedom of Cross-Retaliation for Developing Countries

A group of developing countries (India, Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia) suggests that developing countries should have the right to suspend concessions in sectors of their choice in their disputes with developed countries.¹⁵⁶

¹⁵³ See the last sentence of the new Article 22.2*ter*(a) and footnote 22, both bracketed, as contained in TN/DS/9.

¹⁵⁴ See TN/DS/W/15, no 6 (African Group), and see TN/DS/W/42, no IX (African Group). Collective retaliation is also discussed in Pauwelyn (2000) who supports the introduction of collective countermeasures, albeit incrementally.

¹⁵⁵ See TN/DS/W/17, no 15 (LDC Group).

¹⁵⁶ See the proposal for a new Article 22.3*bis* in TN/DS/W/47 (India, Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia).

This proposal was likely motivated by an arbitration in the *Bananas* case where the EC accused Ecuador of not having properly followed the rules on cross-retaliation as laid down in Article 22.3 DSU.¹⁵⁷ The general principle laid down in this provision is that the SCOOC should first take place in the same sector as that where the violation has occurred. Yet, a SCOOC in other sectors under the same agreement is admissible if a SCOOC in the same sector is 'not practicable or effective'. The SCOOC may even occur under other agreements if 'the circumstances are serious enough'. Although the arbitration proceedings had held that Ecuador followed Article 22.3 as an overall matter, it had criticised the Ecuadorian approach in one instance,¹⁵⁸ and it allocated the burden of proof for the necessity of the SCOOC in another sector or under another agreement on the party wishing to cross-retaliate.¹⁵⁹

The proposal which would have greatly enhanced the freedom of developing countries to cross-retaliate (by lowering the prerequisites for cross-retaliation) was not considered in the Balás text. One may regret that the proposal has not been considered. If one is willing to accept the SCOOC concept at all (despite its flaws), one should indeed allow complainants to SCOOC in those sectors where they can minimise the economic and political costs to themselves and where they can maximise the political cost to the defendant government in order to incite compliance. Moreover, limitations on cross-retaliation have a particularly restrictive impact on developing countries because their trade with developed countries is usually inter-industry trade. This makes an effective SCOOC in the same sector more difficult than in the usual intra-industry trade relationships between developed countries.

6.4.9 Exemption for Goods En Route

The EC suggested the exemption of 'goods en route' from the SCOOC.¹⁶⁰ In its second proposal, Japan also incorporated this element.¹⁶¹ It was, however, not considered in the Balás text.

¹⁵⁷ Ecuador had, *inter alia*, requested authorisation to SCOOC under the TRIPS.

¹⁵⁸ See the Article 22.6 Arbitration Decision in *European Communities – Regime for the Importation, Sale and Distribution of Bananas; Recourse to Arbitration by the European Communities* (WT/DS27/ARB/ECU), paras 100 and 101.

¹⁵⁹ See WT/DS27/ARB/ECU, paras 59–60 and 75.

¹⁶⁰ See TN/DS/W/1, no II.C and Attachment, no 27 (EC). This proposal was later included in the second Japanese proposal (TN/DS/W/32, Attachment, no 8 (Japan)) as well.

¹⁶¹ See TN/DS/W/32, no 1(b), and para 8 of the attachment (Japan).

6.4.10 Termination of the Suspension of Concessions

A final stage in the implementation procedure that was discussed during the DSU review is the lifting of the SCOO, or the recomputation of the level of nullification or impairment respectively. It concerns the procedure that should apply if the defendant asserts that he has since complied with a WTO ruling after the complainant had already been granted the authorisation to suspend concessions or obligations. So far, the DSU did not include any detailed provision in this respect. The EC¹⁶² and Japan¹⁶³ suggest a compliance panel procedure to decide in such cases. In case of partial implementation, the EC additionally suggests a specific arbitration procedure for the recomputation of the level of nullification or impairment.¹⁶⁴

The Balás text contains such a procedure for the termination of suspension of concessions or other obligations. The proposed procedure would allow the defendant to request the withdrawal of the authorisation to SCOO on the grounds of its implementation of the DSB recommendations. The defendant should submit with its request a written notice with a detailed description of the measures taken, including the text of the relevant measures. The DSB would then withdraw the authorisation to SCOO, unless the complainant requested the establishment of another compliance panel which found that the measures were still inconsistent. The provisions of the newly created Article 21*bis* (also see Section 6.4.3 on the sequencing issue) would apply to this compliance panel, too. That means that any compliance report issued under this article would also be subject to appeal. If the measures were still found to be inconsistent, each party could seek a new arbitration on the level of nullification or impairment. If that level differed from the level of suspension of concessions previously authorised by the DSB, the DSB would have to modify the authorisation.¹⁶⁵

The addition of a provision on the termination of the SCOO has gained some relevance: The US and Canada reportedly refuted EC calls for an end to the SCOO in the *Hormones* case in a DSB meeting on 7 November

¹⁶² See TN/DS/W/1, no II.E and Attachment no 28 (EC).

¹⁶³ See TN/DS/W/22, Attachment, no 8 (Japan) and TN/DS/W/32, Attachment, no 9 (Japan).

¹⁶⁴ See TN/DS/W/22, Attachment, no 28, proposed Article 22.9(d) (Japan).

¹⁶⁵ See the newly-introduced Article 22.9, lit (a) – (d) as contained in TN/DS/9. A bracketed subparagraph (e) is also included. It would provide for a possibility to redetermine the level of nullification or impairment by ways of arbitration according to Article 22.7 if the defendant had taken measures to comply whose WTO-consistency was not disputed among the parties.

2003.¹⁶⁶ They dismissed the EC's argument that it had presented new scientific evidence to justify the EC ban on 'hormone beef'.¹⁶⁷ The question of which procedures should be followed in order to end trade sanctions has triggered new discussions in the DSB.

6.4.11 Increased Incentives for Implementation

Some members proposed increased incentives for implementation. Mexico noted in its proposal that: 'the fundamental problem of the WTO dispute settlement system lies in the period of time during which a WTO-inconsistent measure can be in place without the slightest consequence.' Mexico argued that: '(e)very time an illegal measure is unilaterally introduced, or as long as it is maintained in force, ... the delicate balance of concessions or other obligations achieved in the Uruguay Round is upset.' It complained that: '(i)llegal measures may be in place for more than three years before a complaining party can obtain compensation or suspend concessions or other obligations.'

Based on these considerations, Mexico came up with a whole package of measures designed to enhance mechanisms that foster early implementation.¹⁶⁸ The first proposal aimed at an early determination and application of nullification and impairment (see also Section 6.4.3.2).¹⁶⁹ Mexico's second suggestion called for the retroactive determination and application of nullification or impairment. Mexico considered the fact that an illegal measure could be maintained 'for free' throughout the dispute settlement proceedings as a '*de facto* waiver' that should be eradicated. To this purpose, and with reference to a general incorporation of the concept of retroactivity into public international law, Mexico suggested that nullification or impairment should be calculated retroactively, eg from the date of imposition of an illegal trade measure. Alternatively, the date of the request for consultations or the date of the establishment of the panel could be used as starting points for the calculations. The amount calculated could also include lawyer's fees and litigation expenses.¹⁷⁰

¹⁶⁶ *European Communities – Measures Affecting Meat and Meat Products (Hormones)* WT/DS26 (United States), WT/DS48 (Canada).

¹⁶⁷ See 'DSB: EC-US Disputes Top Agenda', in *BRIDGES Weekly Trade News Digest*, vol 7, no 38, 13 November 2003.

¹⁶⁸ See TN/DS/W/23, no I (Mexico).

¹⁶⁹ See TN/DS/W/23, no II(a) (Mexico) and the proposed new Article 15.4 in TN/DS/W/40 (Mexico).

¹⁷⁰ See TN/DS/W/23, no II(b) (Mexico). For the textual proposal, see the modified Article 22.7, as included in TN/DS/W/40, where the inclusion of litigation costs has been dropped (Mexico). Canada reportedly criticised this proposal, as the concept of retroactivity had

In order to prevent damage which is difficult to repair, Mexico called in its third suggestion for the introduction of preventive measures into the DSU. A complainant should have the right to ask the panel to request the defending member to suspend the application of a challenged measure for a certain period. If the defendant refused to suspend the application of the measure, the panel could authorise the complainant to take preventive measures for the duration of the proceedings.¹⁷¹

Finally, Mexico wanted to make the suspension of concessions a negotiable instrument. Member A that is unable to suspend concessions towards member C without adversely affecting its own interests should be allowed to transfer the right to suspend concessions towards member B. In exchange, A could obtain from B a mutually agreed benefit which could even take the form of cash.¹⁷² Seen from a different perspective, the Mexican proposal would allow country B to buy protection from country A against imports from country C.

Ecuador equally proposed a radical remedy if countries refused to comply with rulings on a continued basis. It suggested that the right of such members to invoke the dispute settlement mechanism as complainants should be suspended.¹⁷³ Additionally, Ecuador also wanted to make the SCOO better usable by developing countries. To this purpose, the impact on the developing country economy should also be considered in the calculation of the level of the admissible level of retaliatory measures.¹⁷⁴

None of these proposals found their way into the Balás text. This might be regretted in the light of the delay tactics often used to protract timely implementation of rulings. However, WTO members are obviously not ready really to tighten the disciplines on implementation in such a 'radical' way.

been widely condemned by the membership when it was applied in the US-Australian dispute over Australian automotive leather subsidies (*Australia – Subsidies Provided to Producers and Exporters of Automotive Leather* (US) (WT/DS126). See also 'DSB Adopts Report on Leather Subsidies Despite Australia Protest', in *Inside US Trade*, 18 February 2000; and 'Mexico Presents "Radical" Proposal For WTO Dispute Resolution Reform', in *International Trade Reporter*, vol 19, no 46, 21 November 2002. Mavroidis (2002), pp 97–98, voices support for retroactivity. For a discussion on retroactive remedies in international law and in the WTO tradition, see also Goh and Ziegler (2003), Grané (2001) and Rosas (2001), pp 140ff.

¹⁷¹ See TN/DS/W/23, no II(c) (Mexico) and, for a textual proposal, the newly introduced Article 12.6bis and 12.6ter in TN/DS/W/40 (Mexico).

¹⁷² See TN/DS/W/23, no II(d) (Mexico) and, for a textual proposal, the newly-introduced Article 22.7bis in TN/DS/W/40 (Mexico).

¹⁷³ See TN/DS/W/9 (Ecuador). This idea is also supported by Mavroidis (2002), p 98.

¹⁷⁴ See TN/DS/W/33 (Ecuador). According to Ecuador's first submission (TN/DS/W/9), that could be done by multiplying the level of nullification or impairment by the factor two.

7. THE DOHA ROUND PROPOSALS (II): HORIZONTAL AND OTHER ISSUES

Many proposals do not focus on one particular stage of the dispute settlement process but are 'horizontal' as they concern issues that pertain to several or all stages of the procedure. These proposals are presented in this chapter, grouped by topics. As has already been noted at the beginning of Chapter 6, this separation between stage-specific and horizontal proposals is not always neatly possible, and readers may therefore want to check both Chapters 6 and 7 for issues that could fit into both categories. Again, the overview in Chapter 11 may be helpful in locating specific proposals.

7.1 Transparency

The issue of transparency surged early in dispute settlement practice,¹ and it has been among the most difficult topics of DSU review discussions.²

Advocates of more transparency argue that the confidentiality requirements for the panel and appellate review process³ run counter to the traditions of most members. They erode legitimacy and make it easy to criticise unwelcome rulings, thereby undermining efforts of governments to comply with panel rulings.⁴ A further argument against the confidentiality of panel proceedings is that arguments will become

¹ At first, the issue surfaced due to the early 'leakage' of information in panel reports. It then rapidly developed into a more general debate. See 'Ruggiero Calls on Members Not to Talk About Cases Undergoing Dispute Settlement', in *International Trade Reporter*, vol 15, no 8, 25 February 1998; 'WTO Chief Floats Solutions to Problem of Leaked Reports', in *International Trade Reporter*, vol 15, no 17, 29 April 1998; see also Discussion in WT/DSB/M/45, no 9, and 'WTO Members Asked to Submit Suggestions on Dispute Settlement', in *International Trade Reporter*, vol 15, no 13, 1 April 1998. Further proposals were brought by the US on 14 July 1998 (Transparency in WTO Work – Procedures for the Circulation and Derestriction of WTO Documents – Proposal by the United States; WT/GC/W/88), and jointly with Canada (Transparency in WTO Work – Procedures for the Circulation and Derestriction of WTO Documents – Revised Proposals by the United States and Canada, WT/GC/W/106).

² Waincymer (2000) offers a usefully structured discussion on the different concepts of transparency.

³ Article 14 DSU on panel deliberations, Article 17.10 DSU on the proceedings of the Appellate Body and Article 18.2 on written submissions of the parties.

⁴ See Roessler (2003), pp 232ff.

public at the end of the procedure in any way, due to the publication of the reports.⁵ It is held that the lack of transparency in WTO dispute settlement emanates from the 'old' diplomatic model of dispute settlement where compromise was encouraged and confidentiality played an important role. In the litigation setting of a more judicial dispute settlement system, withholding litigation documents would no longer be appropriate.⁶

By contrast, opponents to more transparency argue that the government-to-government nature of the WTO should be preserved. Enhanced transparency would only lead to increased public pressure on negotiators and thereby preclude mutually agreed settlements.⁷ Hudec, in balancing the arguments in favour of and against increased transparency, argues that public access to documents and hearings 'would help to deflect serious attacks on the legitimacy of WTO panel rulings' and that: 'WTO governments should accept the inevitability of less co-operative legal practice.'⁸

Even before the DSU review started, the United States has continuously been the most vociferous advocate of enhanced transparency in the sense of more openness.⁹ Initially, the early leakage of interim rulings was one of the problems to be addressed through enhanced transparency and faster derestriction of reports. Politically, however, it was much more important to address increasing criticism from domestic constituents

⁵ See Davey (2000a), p 17; Shoyer (1998a), pp 77ff.

⁶ See Ragosta (2000), who also argues that private parties as the 'real complainants' should be given improved access to the judicial dispute settlement system. See also UNICE (2001) and UNICE (1999).

⁷ For a discussion of transparency, see also Davey (2002), pp 28–31. See also Busch and Reinhardt (2002) who argue, based on empirical studies by Busch (2000), that transparency should not be increased in the consultation and panel operation stage as 'highly democratic pairs of countries are especially likely to settle early in consultations, suggesting that they find it easier to compromise in a setting that is relatively less transparent, when the terms of any arrangement, in sharp contrast to what occurs after panel rulings, are not subject to 21.5 or "compliance" reviews' (pp 477ff). See also Busch and Reinhardt (2000).

⁸ See Hudec (1999), p 46.

⁹ See USTR: '1998 Trade Policy Agenda and 1997 Annual Report of the President of the United States on the Trade Agreements Program', <http://www.ustr.gov>; see also 'US Seeks More Transparency in WTO Dispute Settlement Process, Lang Says', in *International Trade Reporter*, vol 13, no 14, 3 April 1996; 'US Will Seek More Transparency in WTO Dispute Settlement Process', in *International Trade Reporter*, vol 15, no 15, 15 April 1998; 'Ruggiero Urges Greater Public Access to WTO Dispute Settlement Proceedings', in *International Trade Reporter*, vol 15, no 16, 22 April 1998; 'US Has "Very Active" Trade Agenda, Official Asserts', in *International Trade Reporter*, vol 15, no 20, 20 May 1998. See also a communication from the US with regard to transparency and derestriction (WT/GC/W/77) of 9 February 1998, and the protocols of subsequent General Council meetings on 19 February 1998 (WT/GC/M/26, no 7) and 24 April 1998 (WT/GC/M/28, no 9).

that the WTO was an undemocratic and intransparent organisation, eroding national sovereignty on key issues such as environmental protection.¹⁰ Such criticism was particularly strong in the light of rulings such as *US – Gasoline* or *US – Shrimp/Turtle*, further deepening the mistrust that politically influential NGOs had against the WTO since the controversial *Tuna* rulings under the old GATT. While one leg of transparency was the openness of panel or Appellate Body proceedings and the public accessibility of submissions, the other leg was more participation from ‘civil society’ in the WTO, particularly in dispute settlement (see Section 7.3 on *amicus curiae* briefs below).¹¹

In the current negotiations under the Doha mandate, the US proposed opening panel, Appellate Body and arbitration meetings to public observers, except for those portions where confidential information is dealt with. In its proposal, the US also pleads in favour of making submissions public.¹² Canada, another long-standing supporter of more transparency,¹³ similarly suggests making submissions public at the time of filing, except for confidential information. The latter should, however, be made public in a redacted non-confidential version. Canada is also in favour of making panel and Appellate Body meetings public, again except for those portions dealing with confidential information.¹⁴

The EC has also supported more transparency.¹⁵ Its approach to the negotiations under the Doha mandate is, however, more cautious than that of the United States, reflecting different approaches between EC Member States. According to the EC, the DSU should provide flexibility to parties and third parties with regard to whether certain parts of the

¹⁰ Sovereignty issues traditionally play a crucial role in the US approach to dispute settlement. See, for instance, the contributions by Jackson (1997a) and Jackson (1998b).

¹¹ For an overview of early debate, see the discussions held in the General Council on 15 July 1998 (WT/GC/M/29, no 6), and on 14 October 1998 (WT/GC/M/31, no 7). Members’ proposals have been reproduced by the Secretariat in WT/GC/W/117/Rev 1 (Review of Procedures for the Circulation and Derestriction of WTO Documents – Note by the Secretariat on Proposals made by delegations).

¹² See TN/DS/W/13 (United States) and TN/DS/W/46 (United States); see also ‘US Proposal on Dispute Transparency Gets Cool Reception From WTO Members’, in *WTO Reporter*, 11 September 2002; and ‘US Official Backs WTO Amicus Briefs As Promoting Transparency, Legitimacy’, in *WTO Reporter*, 13 September 2002.

¹³ See, for instance, the submission made by Canada (Transparency and Derestriction – Communication by Canada, WT/GC/W/98 of 22 September 1998); joint submission by Canada and the US (Transparency in WTO Work – Procedures for the Circulation and Derestriction of WTO Documents – Revised Proposals by the United States and Canada, WT/GC/W/106 of 13 October 1998).

¹⁴ See TN/DS/W/41, no 3 (Canada).

¹⁵ See, for instance, the submission made by the EC (Improving the Transparency of WTO Operations – Communication from the European Communities, WT/GC/W/92 of 14 July 1998).

panel and appellate proceedings should be public or not. Specifically, the EC proposed amending the working procedures so as to allow parties to agree within 10 days of the establishment of a panel that the panel hearing should be open to the public, wholly or in part.¹⁶ The first substantive hearing could further be divided into a first part that is open to the public and a second part that is closed to the public. Third parties would have to decide whether they wanted to present their views in the first or in the second part of the meeting.¹⁷ Similar procedures would apply for appellate review.¹⁸ Panels and the Appellate Body should be in a position to impose restrictions on such opening, especially when dealing with confidential information.¹⁹ Japan also called for public access to submissions of parties and third parties within two weeks from the date of each meeting.²⁰

Support for the transparency-related proposals was far from universal. Major developing countries including Mexico, Malaysia, Egypt and India have staunchly opposed any opening of the dispute settlement process from early on, as they have also refused calls for more transparency in the WTO in general.²¹ Taiwan voiced concerns about 'taking the dispute process into the public domain' as this 'could lead to complications that get in the way of an efficient settlement'. Although it supported the US proposal for a timely circulation of final reports, Taiwan cautioned that one 'should not lose sight of the fact that the dispute settlement mechanism was originally designed as a 'government-to-government' process', and that 'it was never conceived as a public process'.²² More outspoken resistance came from many developing countries: The African Group did not wish to accord priority treatment to the transparency issue, and it did not consider it appropriate to open the dispute settlement mechanism to the public at this time.²³

¹⁶ See TN/DS/W/1, Attachment, no 32 (EC).

¹⁷ See TN/DS/W/1, Attachment, no 34 (EC).

¹⁸ See TN/DS/W/1, Attachment, no 14 (EC).

¹⁹ See TN/DS/W/1, no III (EC). See also Section 7.2 on the treatment of confidential information.

²⁰ See TN/DS/W/22 (Japan). With regard to confidential information, non-confidential summaries that could be disclosed to the public should be provided upon request from a Member; see TN/DS/22, Attachment, no 14 (Japan) and TN/DS/W/32, no 2(d), as well as Attachment, nos 15, 18 and 19 (Japan). This proposal, which was also brought by the EC (see TN/DS/W/1, Attachment, nos 17 and 33 (EC)), had already been included in the Suzuki text (WT/MIN(99)/8).

²¹ For instance, the discussion in the General Council on the derestriction of WTO documents had dragged on for more than four years before new procedures, watered-down from an earlier draft, were finally adopted on 14 May 2002 (see WT/GC/M/74, no 5). The new procedures are contained in WT/L/452 (Procedures for the Circulation and Derestriction of WTO Documents).

²² See TN/DS/W/25, no I.1 (Taiwan).

²³ See TN/DS/W/15 (African Group).

Given the controversial character of the transparency issue throughout the deliberations, it is not surprising that the consensus-oriented Balás text does not suggest any substantial modifications with regard to the transparency issue. The sparse provisions contributing to more transparency regard the release of non-confidential summaries of confidential information, which is discussed in the next section.

7.2 Treatment of Confidential Information

A topic related to transparency is the treatment of confidential information. It arises as a particular problem in cases on subsidies or trade remedies, where sensitive business information may have to be provided by the parties to the panel.²⁴ However, there are only rudimentary provisions in the DSU with regard to the protection of confidential information.²⁵ The problem of confidential information has been recognised as 'one of the most urgent, but also one of the most difficult problems to be resolved'.²⁶

Canada proposes the inclusion of a new Appendix to the DSU which would allow parties to designate information as 'Business Confidential Information' (BCI). Such BCI would then be limited in its circulation to certain groups of persons having signed a declaration of non-disclosure. Panel reports would not disclose BCI but would only state conclusions drawn from BCI. Finally, BCI would have to be destroyed or returned after the end of the proceedings.²⁷ This submission was likely motivated by Canada's early experience under the DSU in its dispute with Brazil on aircraft subsidies, where the WTO panel's finding against two Canadian measures was seen as a direct result of the Canadian government's decision not to submit information requested by Brazil.²⁸ Panels may draw negative inferences if members violate their duties under Article 13 DSU to provide the information requested.²⁹

²⁴ See, for instance, Davey (2002), p 34.

²⁵ Article 18.2 DSU according to which 'members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential. A party to a dispute shall also, upon request of a Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public.'

²⁶ See Ehlermann (2002), pp 625ff.

²⁷ See TN/DS/W/41, no 3 (Canada).

²⁸ *Canada – Measures Affecting the Export of Civilian Aircraft (WT/DS70)*. See 'Next WTO Negotiating Round Must Clarify Dispute Settlement, Canadian Official Says', in *International Trade Reporter*, vol 16, no 14, 7 April 1999, and 'Trade Lawyer Links More Negotiation to More Effective WTO Dispute Resolution', in *WTO Reporter*, 3 April 2000. See also Behboodi (2000).

²⁹ See Ehlermann (2002), pp 624ff.

The Balás text would add some provisions on the handling of confidential information to the DSU. The major modification would be to Article 18 DSU. It would require the DSB to establish procedures for the treatment of information which is designated as ‘privileged’ (this term is bracketed). Moreover, the text would add precision to the provisions requiring each party or third party – upon request by any member – to provide a non-confidential version of the written submission which would be disclosed to the public. Access to these non-confidential versions of written submissions would be administered in a dispute settlement registry at the WTO, which would operate according to rules and procedures established by the DSB. The coverage of Article 18 which has so far applied explicitly to panels and the Appellate Body only would be extended to arbitrators.³⁰

7.3 *Amicus Curiae* Briefs

Transparency has also been discussed in the sense of public participation in dispute settlement, namely through so-called *amicus curiae* (or ‘friend of the court’) briefs.³¹ It is an issue to which even ‘constitutional significance’ has been attributed.³² *Amicus curiae* briefs can be defined as unsolicited reports which a private person or entity without direct stake or interest in the dispute at hand submits to the court. In these reports, the person or entity articulates its own views on legal questions and informs the court about factual circumstances in order to facilitate the court’s ability to decide the case. Whereas the concept of the impartial *amicus* goes back to Roman times when oral history was the principal way to submit information and such briefs were crucial for informed decision-making, this idealised concept has changed over time. Today, most *amici* are guided by their own interests and try to influence judges accordingly.³³

In the WTO, the issue surfaced for the first time in 1998 when the Appellate Body decided in *US – Shrimp-Turtle* that the panel had the authority to accept unsolicited *amicus curiae* briefs under its right to seek information pursuant to Article 13 DSU, and that the Appellate Body had the right to consider such briefs if submitted as attachments by the

³⁰ See the modified Article 18.2, as contained in TN/DS/9.

³¹ On the *amicus* issue, see, for instance, Hollis (2002), Davey (2002), pp 32–33, Umbricht (2001), Mavroidis (2001), Marceau and Stilwell (2001), Zonnekeyn (2001), Padideh (2000), Ragosta (2000) and Marceau and Pedersen (1999). See also Charnovitz (2001), Charnovitz (2000), Nichols (1996), Shell (1996) and Charnovitz (1996) on the relationship between non-governmental entities and the WTO in general.

³² See Umbricht (2001), pp 773ff.

³³ See Umbricht (2001), p 778.

parties to the dispute.³⁴ The Appellate Body then expanded this right in *United States – Lead Bars* when it found that it had the authority under the DSU to accept and consider *amicus* submissions even when they were not submitted by the parties.³⁵ In *EC – Asbestos*, the Appellate Body published – in anticipation of receiving *amicus* briefs – an ‘additional procedure’ for filing such briefs.³⁶ Although the Appellate Body had rejected all the briefs filed, the way it had dealt with the briefs had provoked outrage by an overwhelming number of WTO members, particularly developing countries. A special meeting of the General Council was convened, at the end of which the chairman of the General Council announced that he would recommend the Appellate Body to ‘exercise extreme caution’ on these matters in the future.³⁷

Amicus curiae briefs had been an important topic throughout the DSU review discussions since 1998. During the negotiations under the Doha mandate, the EC suggested in its first proposal to ‘define better the framework and the conditions for allowing such *amicus curiae* briefs in potentially all cases’. According to the EC, this should be based on the two-stage approach (first application for leave, then effective submission) already developed by the Appellate Body.³⁸ A similar move was made by the United States, which – in its first submission – calls upon members to consider the proposition of a guideline procedure for handling *amicus curiae* briefs.³⁹ In its second submission, however, the US stated that it did “not believe that an amendment to the Dispute Settlement

³⁴ *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (India, Malaysia, Pakistan and Thailand) (WT/DS58). On this issue, see in particular WT/DS58/AB/R, para 89 (attachment of *amicus* briefs to submissions in the appellate stage) and para 110 (acceptance of *amicus curiae* briefs by the panel). Apparently, however, the question of providing for the possibility of *amicus curiae* submissions in the dispute settlement system had already been discussed in the Informal Group on Institutional Issues back in 1993 when the Uruguay Round Agreements were negotiated, where ‘one delegation put forth an informal negotiating proposal to the effect that the panels may invite interested persons (other than parties or third parties to the dispute) to present their views in writing. As there was overwhelming opposition to the proposal, the proposal was not incorporated in the DSU’ (TN/DS/W/18 (Cuba, Honduras, India, Jamaica, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe)).

³⁵ *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* (EC) (WT/DS138). On this issue, see WT/DS138/AB/R, para 42.

³⁶ *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* (Canada) (WT/DS135); on this issue, see in particular documents WT/DS135/9 and WT/DS135/AB/R, paras 51–57.

³⁷ Special meeting of the General Council held on 22 November 2000; the minutes are contained in document WT/GC/M/60.

³⁸ See TN/DS/W/1, no IV and Attachment, no 10 (EC).

³⁹ See TN/DS/W/13, no V (United States); see also ‘US Proposal on Dispute Transparency Gets Cool Reception from WTO Members’, in *WTO Reporter*, 11 September 2002.

Understanding was necessary (...)'.⁴⁰ Similarly, *amicus briefs* no longer appeared as an issue in the EC's second proposal (although the proposal formally held that '(t)hose EC proposals that were included in Document TN/DS/W/1, and do not appear in the present document, remain unaltered').⁴¹

In contrast to those members favouring acceptance of *amicus* submissions, major developing countries have from early on opposed any such opening of the process.⁴² In the current discussion under the Doha mandate, the African Group raised its voice against any interpretation of the 'right to seek information' that would include acceptance of unsolicited *amicus curiae* briefs by the panel or the Appellate Body. According to the Group, new rules should be adopted stating that unrequested information should be directed only to the parties and not to the panels. Moreover, the Group holds that the right to seek information under Article 13 only applies to panels but not to the Appellate Body which, according to the group, has the exclusive function of examining issues of law and legal interpretations raised on appeal. Panels, in turn, should consult the parties and their legal advisers in deciding whether to seek information.⁴³ The second proposal by the African Group, however, was less far-reaching. This proposal only calls for the inclusion of a paragraph according to which the right to seek information should not be construed as a requirement to receive unsolicited information or technical advice.⁴⁴ Another group of developing countries equally opposed the acceptance of *amicus* briefs. Drawing on the negotiating history of the Uruguay Round and the ordinary meaning of the term 'seek' which is 'ask for, request, demand', they call for the inclusion of a footnote to Article 13. According to this footnote, "'(s)eeek'" shall mean any information that is sought or asked for, or demanded or requested by the panels. Unsolicited information shall not be taken into consideration by the panels'. A similar footnote would also apply to the Appellate Body.⁴⁵

⁴⁰ See TN/DS/W/46, no 4 (United States).

⁴¹ See TN/DS/W/38, no 1 (EC).

⁴² See the intense discussion in the Dispute Settlement Body on 6 November 1998 when both the Appellate Body report and the panel report as modified by the Appellate Body report were adopted (WT/DSB/M/50, no 1); see also 'WTO Appeals Body Faults Implementation of Shrimp-Turtle Law', in *International Trade Reporter*, vol 15, no 40, 14 October 1998.

⁴³ See TN/DS/W/15 (African Group).

⁴⁴ See TN/DS/W/42, no V (African Group).

⁴⁵ See TN/DS/W/18, no III (Cuba, Honduras, India, Jamaica, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe), and TN/DS/W/47 (India, Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia).

Taiwan holds, with reference to the EC proposal, that allowing unsolicited *amicus curiae* submissions and even systematising this in a new Article would create a situation where members that do not have the social resources such as think tanks, academic institutions and NGOs would be put at a disadvantage. With reference to the US proposal for the establishment of guidelines, Taiwan points out that the handling of *amicus curiae* submissions was already covered by precedents from past cases which the panels and the Appellate Body could follow.⁴⁶ Jordan finally made a proposal with regard to *amicus* submissions that would seek to remedy the differences in members' capabilities to deal with *amicus* briefs. It proposes a fund that would be established by industrial countries with the aim of remitting costs or expenses that may be incurred by developing countries or LDCs in reviewing, analysing or responding to *amicus* briefs.⁴⁷

As one would expect in the light of the seemingly irreconcilable positions on the issue, the consensus-oriented Balás draft does not make any suggestions with regard to the *amicus* issue or Article 13 DSU which includes the controversially debated 'right to seek information'. Nevertheless, a review of the proposals made under the Doha mandate suggests that the debate has lost some of its acrimony, compared with the discussion in 1998/1999. Parties seem to become aware of the fact that the Appellate Body *has* already developed a practice on this issue.⁴⁸ On the one hand, this practice leaves the door open to public participation in principle and thereby satisfies those countries interested in more transparency and more participation to some extent. On the other hand, the Appellate Body does not appear to have attached decisive weight to *amicus* briefs in those cases where they have so far been submitted, thereby reassuring the opponents of *amicus* briefs to some extent of the limited role that such briefs do factually play. Finally, no one could prevent interested governments from co-operating with NGOs in the preparation of submissions and from incorporating the arguments put forward by NGOs into their own submissions.

In short, parties' insistence on a modification of the DSU in either direction seems to weaken, a trend which is also reflected in the wording of more recent proposals. The issue increasingly appears as some kind of bargaining chip which could be traded for concessions on more substantive issues.

To conclude, and with a view of the next section, it should also be noted that the *amicus* issue is closely related to the issue of third party rights in

⁴⁶ See TN/DS/W/25, no I.2 (Taiwan).

⁴⁷ See TN/DS/W/43, no XI (Jordan) and TN/DS/W/53 (Jordan).

⁴⁸ See also TN/DS/W/5 (EC), Answers to Questions 28–39 (EC).

dispute settlement. Many members have argued that admitting *amicus* briefs, particularly at the appellate stage, would put members at a disadvantage compared to non-members such as NGOs, which would normally not enjoy standing at the WTO. The reason is that a member which is not directly involved in a case as either complainant or defendant, is subject to specific provisions on third party participation. These rules establish that in order to participate as a third party in an appellate review, a member must have previously participated as a third party in the prior panel proceedings. In the *Sardines* case,⁴⁹ this led to a situation where Morocco – a member which had not participated as a third party in the panel proceeding – filed an *amicus* brief. Although Morocco was accused by other Members of circumventing the provisions on third party participation, the Appellate Body decided, that it was ‘entitled to accept the *amicus curiae* brief submitted by Morocco, and to consider it’.⁵⁰ At the same time, Colombia had been prevented from presenting its views as a third party due to the restrictive provisions on third party participation.⁵¹ Members subsequently criticised the Appellate Body for the move because both the *amicus curiae* issue and third party rights were part of the ongoing DSU review which could be prejudiced.⁵² To sum up, the rules and practice in place for both third party rights and *amicus curiae* briefs should be seen in close context, and a ‘package deal’ could bring about a solution for both issues.

7.4 Third Party Rights

In accordance with the multilateral nature of the WTO system, a minimum of ‘internal transparency’ in handling bilateral disputes must be safeguarded. Besides the requirement to notify mutually agreed solutions (see Section 6.1.3), specific procedural rights of third parties constitute another safeguard to prevent that bilateral disputes are settled at the expense of uninvolved parties. Furthermore, the topics under review in bilateral disputes are often of interest to parties other than the complainant and the defendant, as these parties may have a stake in the outcome of the case (eg ACP countries in the *Bananas* case). The DSU therefore contains specific provisions for third party participation in disputes. As a ‘multilateral element’ in the dispute settlement procedure, these rules are of particular interest to small and medium-sized trading

⁴⁹ *European Communities – Trade Description of Sardines (Peru)* (WT/DS231).

⁵⁰ See WT/DS231/AB/R, paras 160–68 and para 314.

⁵¹ See ‘WTO Appellate Body Braces for Criticism for Easing Rules on Third Party Participation’, in *WTO Reporter*, 10 October 2002; and ‘WTO Appellate Body Chair Offers to Discuss Appellate Review Rules’, in *WTO Reporter*, 23 October 2002.

⁵² See ‘WTO Appellate Body Under Fire Again for Amicus Rulings in Dispute Proceedings’, in *WTO Reporter*, 25 October 2002; ‘Appellate Body Procedural Moves Stir Controversy at WTO’, in *Inside US Trade*, 25 October 2002.

nations that are anxious about safeguarding the spirit of the most favoured nation principle in the handling of disputes. On the negative side, however, the involvement of third parties may also complicate political negotiations on bilateral settlements, as the freedom of negotiating parties is limited to some extent.⁵³

Key rules on third party participation are laid down in Article 4.11 DSU (regarding participation in consultations), Appendix 3 to the DSU (Working Procedures), and foremost in Article 10 DSU. The latter gives third parties, which have notified their substantial interest in a matter, an opportunity to be heard by the panel and to make written submissions to the panel. Moreover, third parties have a right to receive the submissions of the disputing parties to the first meeting of the panel. Finally, the panel granted so-called 'enhanced' third party rights in the *Bananas* case in the light of the importance of the EC Bananas regime for the third parties and in the light of prior practice. These enhanced rights consisted of the permission to observe the second substantive meeting of the panel with the parties, and to make a brief statement during this meeting. The panel, however, declined to grant further third party rights such as participation in the interim review.⁵⁴ Third party rights also surfaced as an issue in some other disputes, including the *Hormones* case, and in *US – Anti-dumping Act of 1916*.

Given the systemic importance of third party rights, and their relationship to other topics such as *amicus* briefs (see preceding Section), several proposals have been dedicated to this issue. Costa Rica underlined the importance which it attaches to the issue by focussing its proposal entirely on third party rights.⁵⁵ Costa Rica seeks the expansion of third party rights in each stage of the procedure from consultations to implementation.⁵⁶ It proposes to ease the 'substantial trade interest' requirement for third party participation in consultations (Article 4), especially by eliminating the need for approval from the party to which the request is addressed.⁵⁷ With regard to the panel stage, Costa

⁵³ Interestingly, not much research has been dedicated to third party rights so far. The contributions include Davey (2002, pp 31–32) and Covelli (1999). Enhanced third party rights against the background of the case *United States – 1916 Anti-Dumping Act* (WT/DS136, 162) are discussed in Antoniadis (2002).

⁵⁴ See WT/DS27/R, paras 7.5–7.9.

⁵⁵ See TN/DS/W/12 and TN/DS/W/12/Rev 1 (Costa Rica).

⁵⁶ For a comment on 'multilateralising' consultations, see Petersmann (2002b), p 129.

⁵⁷ A similar proposal has also been made by Jamaica; see TN/DS/W/44, nos 2, 4 and 5 (Jamaica). The proposals are obviously motivated by these members' experiences in the *Bananas* case where they participated as third parties and where disagreement arose on the extent to which third parties should be able to participate in the proceeding; see the panel report in *European Communities – Regime for the Importation, Sale and Distribution of Bananas*; (WT/DS/27/R), paras 7.4–7.9.

Rica proposes the inclusion of a 10-day time frame for the notification of third party interest to the DSB (as do the EC and Jordan⁵⁸). Third parties would get access to all the submissions (except those containing confidential information) and to all the stages of the proceeding.⁵⁹ Panels would henceforth have to address the arguments of third parties in the findings of the report, too (Article 10). The interim report (Article 15) would have to be issued to the third parties as well, and they would obtain a right to make comments.

Concerning appellate review, Costa Rica proposes that third parties should be able to notify their interest in a case and participate in appellate proceedings even if they did not participate in the previous panel proceedings, as is currently required (Article 17).⁶⁰ The strengthening of third party rights during the appellate stage is also supported by a group of other developing countries.⁶¹ With regard to the implementation stage, the Costa Rican proposal would require disputing parties to afford third parties an adequate opportunity to express their views in consultations on the implementation of rulings (Article 21.5 DSU).

The African Group equally proposed improving third party rights from a developing country perspective. Developing countries shall have a right to all the documents and information, and to full participation in all the proceedings. To this purpose, the 'substantial trade interest' requirement should be interpreted very extensively in the case of developing and least developed third parties, and third party rights would be strengthened during the appellate stage. The African Group holds that improved third party rights for developing countries would allow them to gain better insight into procedural, substantive and systemic issues in the multilateral trade order, and that such rights could thus be regarded as a 'concrete contribution towards capacity building'.⁶²

⁵⁸ See TN/DS/1, Attachment, no 8 (EC) and TN/DS/W/43, no VII (Jordan). In a later submission, however, Jordan proposes that such notification should be made only within ten days after the establishment of a panel; see TN/DS/W/53 (Jordan). The time frame for notification of third party interest surged, for instance, in the compliance panel in the case *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*; (WT/DS103) (United States) and (WT/DS113) (New Zealand); see also 'Canada Dairy Panel Gives Rise To Larger Policy Debate in WTO', in *Inside US Trade*, 9 March 2001.

⁵⁹ Proposal also made by the EC (see TN/DS/W/1, Attachment, no 9). Costa Rica also seeks amendments to Article 12 and the Working Procedures governing the panel stage so as to afford more weight to the role and interests of third parties. A proposal to this effect has also been submitted by Jordan; see TN/DS/W/43, no VI (Jordan).

⁶⁰ See TN/DS/W/12 and TN/DS/W/12/Rev 1 (Costa Rica).

⁶¹ See TN/DS/W/18 and TN/DS/W/18/Rev 1 (Cuba, Honduras, India, Jamaica, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe) and also TN/DS/W/47 (India, Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia).

⁶² See TN/DS/W/15 (African Group) and TN/DS/W/42, no IV (African Group).

In this same line of reasoning, Lacarté-Muro and Gappah (2000) hold that: '(d)eveloping countries that have been third parties have no doubt found that their knowledge of the functioning of the dispute settlement system has been considerably enhanced by such participation.'⁶³

Japan and the EC equally submitted proposals for improved third party access that are familiar from the early stages of the review. They establish that third parties shall receive copies of documents or information submitted prior to the interim review, and that they should be able to observe any of the substantive meetings.⁶⁴ Again, both proposals are likely motivated by the experience of the two parties, this time in their respective complaints in *US – Anti-dumping Act of 1916*.⁶⁵ Both the EC and Japan had made separate complaints, and each party had requested to be granted 'enhanced' third party rights in the other complainant's case. Whereas each complainant accepted the other complainant's request, the US as defendant opposed it. The panel refused to grant either the EC or Japan enhanced third party rights in each other's cases,⁶⁶ a decision that was upheld by the Appellate Body.⁶⁷

Whereas the EC supports most of the Costa Rican suggestions on third party rights, it is not supportive of an automatic right to join consultations, and it does not wish to involve third parties at the interim review stage.⁶⁸ Taiwan, while being supportive of a general strengthening of third party rights, raises some reservations with regard to modifications to the substantial trade interest provision, to the requirements that third party arguments be reflected in the panel and Appellate Body reports, and to the right for third parties to comment on the descriptive part and the interim report. Taiwan asserts that these proposals would increase the complexity of the dispute process and that they would not be in line with judicial economy considerations.⁶⁹

An Australian proposal called for strengthened non-party rights in bilateral compensation agreements. It would call upon parties fully to

⁶³ See Lacarté-Muro (2000), p 397.

⁶⁴ See TN/DS/W/22, Attachment, no 13 (Japan); TN/DS/W/32, Attachment, no 14 (Japan) and TN/DS/W/1, Attachment, no 9 (EC).

⁶⁵ *United States – Anti-Dumping Act of 1916* (WT/DS136) (Complaint by the European Communities) and *United States – Anti-Dumping Act of 1916* (WT/DS162) (Complaint by Japan).

⁶⁶ WT/DS136/R, paras 6.33–6.36 and WT/DS162/R, paras 6.29–6.35.

⁶⁷ WT/DS136/AB/R and WT/DS162/AB/R, paras 139–150.

⁶⁸ See TN/DS/W/38, no III (EC).

⁶⁹ See TN/DS/W/25, no II (Taiwan). The textual proposal is contained in TN/DS/W/36 (Taiwan).

observe the requirement of Article 3.7 DSU (according to which compensation is temporary) and the requirement of Article 22.1 DSU (according to which compensation must be consistent with the covered agreements). Compensation should further be granted on an *erga omnes* basis. In this submission, Australia stated that it was: 'concerned by a recent trend toward bilateral compensation deals agreed between parties which have no timetable for implementation and which are not offered to other members whose rights and obligations have also been nullified and impaired.' If members were forced to initiate their own complaints to acquire compensation rights, this would place enormous pressure on WTO dispute settlement and would lead to a waste of resources.⁷⁰ In its third proposal, Australia suggests amending Article 22.2 on compensation with a view of obliging defendants to enter within 10 days into negotiations with any party that has invoked the dispute settlement mechanism. If compensation were not available to third parties, defendants would have to agree to expedited arbitration under Article 25 DSU to determine the right of third parties to compensation.

The Australian proposal has likely been motivated by the country's experience in the *US Copyright* case where a panel had to rule on an EC complaint against the US 'Fairness in Music Licensing Acticle'.⁷¹ This Act exempted small establishments from paying royalties on music broadcast in their establishment. The panel found the rule to be in contravention of the TRIPS agreement. The US subsequently agreed to offer compensation to EC artists. However, such compensation was denied to artists from countries such as Australia who had also been harmed by the US legislation.⁷²

The Balás text integrated some of the demands for increased third party participation. However, the 'substantial trade interest' requirement would still continue to apply. Under the draft, a third party with an interest in participating in consultations would have to indicate the reasons for its claim of substantial trade interest. In addition, the new text would impose a requirement on the party to which the request to be joined in the consultations is addressed, to inform the DSB within 10 days on whether it agrees with the claim of substantial trade interest or not.⁷³

The Balás text would set a 10-day time limit after the establishment of a panel for the notification of third party interest at the panel stage. Third

⁷⁰ See TN/DS/W/8, lit (b) and TN/DS/W/34, lit (b) (Australia).

⁷¹ *United States – Section 110(5) of the US Copyright Act* (EC), (WT/DS160).

⁷² See 'Australia, South Korea Outline Proposals for Revamping of WTO Dispute Settlement', in *WTO Reporter*, 19 July 2002.

⁷³ See new Article 4.11, as contained in TN/DS/9.

parties would be granted the right to be present at all meetings of the panels with the parties prior to the issuance of the interim report, in addition to the right to be heard, which they already enjoy now.⁷⁴ Moreover, they would get access to all submissions of the parties prior to the interim review, except those including 'privileged' information. Until now, they have access only to the first submission.⁷⁵

The Balás text would also strengthen third party rights in the panel procedures. The new Article 12.1 calls upon panels in a rather programmatic style to 'bear in mind' the 'interest of third parties' when modifying the standard working procedures as laid down in Appendix 3.⁷⁶ Panels should set deadlines for written submissions not only by parties (as is now the case) but also for submissions by third parties.⁷⁷ Furthermore, the Balás text suggests modifications to the Working Procedures in Appendix 3. In addition to the right to attend the first substantive meeting and to present their views on this occasion, third parties would have to be invited by panels to make a written submission.⁷⁸ More importantly, they would also be invited to be present at the second substantive meeting of the panel where rebuttals to the first submissions are made.⁷⁹ If additional substantive meetings were held prior to the issuance of the interim report, third parties would also be invited to be present at these meetings.⁸⁰ A right for the panel would be included to put questions to third parties and to ask them for explanations at any time prior to the issuance of the interim report.⁸¹ Third party rights would also be strengthened at the interim review stage. The panel would be required to issue to each third party that portion of the descriptive section of its draft report which reflects that third party's argument, and the third parties would get an opportunity to submit their comments in writing.⁸²

Beyond the panel stage, the Balás text would strengthen third party rights during appellate review, although the modification is bracketed.⁸³

⁷⁴ See modified Article 10.2, as contained in TN/DS/9.

⁷⁵ See Article 10.3 DSU, as contained in TN/DS/9. The term 'privileged' is bracketed.

⁷⁶ See modified Article 12.1, as contained in TN/DS/9.

⁷⁷ See modified Article 12.5, as contained in TN/DS/9.

⁷⁸ See modified Paragraph 6 of the Working Procedures in Appendix 3, as contained in TN/DS/9.

⁷⁹ See modified Paragraph 7 of the Working Procedures in Appendix 3, as contained in TN/DS/9.

⁸⁰ See modified Paragraph 12 of the Working Procedures in Appendix 3, as contained in TN/DS/9.

⁸¹ See modified Paragraph 8 of the Working Procedures in Appendix 3, as contained in TN/DS/9. The current Paragraph 10 of the Working Procedures would be deleted.

⁸² See the modified Article 15.1, as contained in TN/DS/9.

⁸³ On current third party participation in appellate proceedings, see McCall Smith (2003), pp 84ff.

Members which have not participated as third parties during the panel stage would get an opportunity to notify their substantial interest within 10 days after the date of the notice of appeal. Third parties would have an opportunity to be heard and to make written submissions to the Appellate Body. Their submissions would also be circulated to the parties to the dispute.⁸⁴ In this respect, it is worth noting that the Appellate Body itself had modified its working procedures in September 2002 to give third parties the possibility to attend oral hearings even if they did not make a written submission prior to the hearing, as the old rule required. This old rule had been designed to give parties to a dispute the ability to review third party arguments in advance and prepare for their questions, but it was abused in a half dozen cases to deny entry to Appellate Body hearings to countries which had reserved their third party rights but did not file written submissions. The issue surfaced in the *Sardines* case in context to the *amicus* issue (see Section 7.3 on *amicus curiae* briefs).⁸⁵

Finally, third party rights are also strengthened in the implementation stage through enhanced notification requirements for mutually agreed trade or other compensation in response to the Australian proposal (see Section 6.4.5).

In an overall evaluation, the draft would substantially expand third party rights in the panel stage and during appellate review. First, the modifications would respond to the concerns and to the experience of members who found themselves shut out from the multilateral proceedings in several instances. Secondly, it would integrate the practice already developed by panels and the Appellate Body (with regard to 'enhanced' third party rights) into the DSU. Thirdly, it responds to fears among members that NGOs could get better access to the DSU procedure than members as a consequence of the rulings on the *amicus* issue. In accordance with the negotiatory and bilateral nature of consultations, the expansion of third party rights in the consultation stage is, however, less substantial. This holds particularly if one considers that the notification requirements for mutually agreed solutions could be spurned by new rules on the lapse of consultation requests. Negotiators are obviously aware of the fact that transparency at an early stage of the

⁸⁴ See the modified Article 17.4, as contained in TN/DS/9.

⁸⁵ The new Working Procedures are contained in WT/AB/WP/7. See 'WTO Appellate Body Braces for Criticism for Easing Rules on Third Party Participation', in *WTO Reporter*, 10 October 2002; 'WTO Appellate Body Chair Offers to Discuss Appellate Review Rules', in *WTO Reporter*, 23 October 2002; and 'Appellate Body to Clarify Working Procedures on Role of Third Parties', in *Inside US Trade*, 15 November 2002.

proceeding could make bilateral settlements increasingly difficult. Given the systemic implications of third party rights for the multilateral trading system, they are only *prima facie* a technical issue. It is to some extent surprising that they have not been the topic of more intense scholarly research.

7.5 Special and Differential Treatment

Development issues are supposed to play a major role in the current 'Doha Development Agenda', and they have also been a key topic in the current negotiations on the DSU. An intense discussion has taken place on why developing countries are still less frequent users of dispute settlement procedures than industrialised countries, and on what could be done to improve their participation.⁸⁶ Proposals on special and differential treatment of developing countries (S&D) have therefore played a prominent role in DSU negotiations.

7.5.1 S&D in Consultations

With regard to consultations, the Least Developed Countries (LDCs) Group proposes the introduction of a provision according to which the possibility of holding consultations in the capitals of LDC members should be explored in cases involving LDCs.⁸⁷ This should help them overcome problems that arise from their 'extreme human resource constraint' and from the fact that they are often underrepresented or not represented at all in Geneva. The issue was accounted for in the Balás draft.⁸⁸

Cuba, the Dominican Republic, Egypt, Honduras, India, Indonesia, Jamaica, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe want further to strengthen some S&D provisions that are already included in the DSU. They wish to make Article 4.10 mandatory by replacing 'should' by 'shall' in a provision which calls upon disputing parties to give special attention to developing-country members' particular concerns and

⁸⁶ On developing countries in WTO dispute settlement, see Jackson (2002), pp 111ff, Petersmann (2002a), pp 20–22, Roessler (2002), Delich (2002), Hudec (2002a), Olivares (2001), Footer (2001), Gabilondo (2001), Lacarté-Muro and Gappah (2000), Hoekman and Mavroidis (2000) and Horn and Mavroidis (1999) with a focus on enforcement. For a general overview of developing countries' experience with dispute settlement mechanisms in international trade, see Kufuor (1997) and Kuruvila (1997).

⁸⁷ See TN/DS/W/17, para 3 (LDC Group) and TN/DS/W/37, no I (LDC Group).

⁸⁸ See the modified Article 4.10, as contained in TN/DS/9.

interests during consultations.⁸⁹ This proposal, which had already been included in the Suzuki text, was also supported by the EC.⁹⁰ Balás equally integrated it into his draft.⁹¹

Furthermore, the same countries suggest that the additional time-frames which are available under Article 12.10 for consultations and the panel process shall be made more operational by giving developing country defendants an additional 30 days for consultations.⁹² Balás considered this issue by creating a new Article 4.10*bis* on consultations with developing country defendants. These would be entitled to ask the chairman of the DSB for an extension of the consultations which the latter would decide, after consulting with the parties.⁹³

Jamaica proposes a general strengthening of consultative processes (ie consultations pursuant to Article 4, good offices, conciliation, mediation) because better use of these would make the participation of developing countries in WTO dispute settlement more likely.⁹⁴ A proposal by Paraguay to make the procedures of Article 5 (good offices, conciliation and mediation) mandatory in cases involving developing countries goes in a similar direction,⁹⁵ as does a proposal by Jordan.⁹⁶ However, these issues were not specifically accounted for in the Balás draft.

7.5.2 S&D in the Panel and Appellate Review Stages

The African Group, the LDC Group and Jordan submitted proposals regarding the composition of panels, with an aim of ensuring a more balanced geographical representation, and improving the rights of developing countries to request representatives of such countries as

⁸⁹ See TN/DS/W/19, no III, paragraph on Article 4.10 (Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania, Zimbabwe) and TN/DS/W/47, paragraph on Article 4.10 (India, Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia). On a related proposal made by India in the Special Session of the Committee on Trade and Development, see 'India Proposes Differential Treatment in DSU, SPS Agreements', in *Inside US Trade*, 19 April 2002.

⁹⁰ See TN/DS/W/1, Attachment, no 3 (EC).

⁹¹ See the modified Article 4.10 as contained in TN/DS/9.

⁹² See TN/DS/W/19, no III, paragraph on Article 12.10 (Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe) and TN/DS/W/47, paragraph on Article 12.10 (India, Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia).

⁹³ A part of the text is bracketed, reflecting disagreement on whether '(a) guideline for the Chairman of the DSB shall be that such extension should normally not exceed 15 days...', see Article 4.10*bis* as contained in TN/DS/9.

⁹⁴ See TN/DS/W/21, no 1 (Jamaica).

⁹⁵ See TN/DS/W/16 (Paraguay); see also Petersmann (2002b), p 132.

⁹⁶ See TN/DS/W/43, no II (Jordan).

panellists in cases involving them.⁹⁷ These requests were partly considered in the Balás text (see Section 6.2.1 on panel composition).

The African Group generally questions automaticity and sequencing from a developing country perspective. Specifically, the African Group wants to include in panels' terms of reference an obligation to evaluate the development implications of findings, a proposal also made by the LDC Group⁹⁸ and Jamaica.⁹⁹ Moreover, according to the African Group, the DSB should be required to take into account reports on the development implications of findings and recommendations which international organisations such as the United Nations Conference on Trade and Development (UNCTAD) and the United Nations Development Programme (UNDP) would prepare.¹⁰⁰ The LDC Group suggests that panels should be required to take into account all relevant provisions for differential and more favourable treatment in cases involving developing or least-developed countries, regardless of whether or not the parties have raised these provisions.¹⁰¹

While the Balás text keeps to the principle that S&D provisions should specifically be raised by developing countries in the proceedings, it seeks nevertheless to add precision to Art. 12.11. Developing countries wishing to avail themselves of S&D provisions shall raise arguments relating thereto as early as possible. If the other party is an industrialised country, the latter would also be required to address such arguments in its submissions. Finally, the panel report shall explicitly take into account the consideration given to any S&D provisions that have been raised.¹⁰²

Cuba, the Dominican Republic, Egypt, Honduras, India, Indonesia, Jamaica, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe suggest that the additional time-frames which are available under Art. 12.10 to developing countries during the panel process shall be made more operational by giving developing country defendants an additional two weeks for the preparation of their submissions.¹⁰³ India, as one of the co-sponsors, had once asked for an additional three weeks to prepare and present its first written submission to the panel in the QR case but

⁹⁷ See TN/DS/W/15, no 11 (African Group); TN/DS/W/37, no III (LDC Group); TN/DS/W/43, no V (Jordan), and TN/DS/W/53 (Jordan).

⁹⁸ See TN/DS/W/37, no II (LDC Group).

⁹⁹ Proposal with regard to Article 21.8 DSU; see TN/DS/W/21, no 6 (Jamaica).

¹⁰⁰ See TN/DS/W/15, no 7 (African Group).

¹⁰¹ See TN/DS/W/37, no IV (LDC Group).

¹⁰² See modified Article 12.11, as contained in TN/DS/9.

¹⁰³ See TN/DS/W/19, no III, paragraph on Article 12.10 (Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe) and TN/DS/W/47, paragraph on Article 12.10 (India, Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia).

was granted only 10 days.¹⁰⁴ Balás took this issue up by suggesting a (bracketed) modification of Art. 12.10 DSU according to which panels would have to afford developing country defendants additional time to prepare their submissions, normally not less than 15 additional days for their first submission and 10 additional days for their second submission.¹⁰⁵

7.5.3 S&D in the Implementation Stage

Article 21.2 contains a specific provision on S&D during the implementation stage. According to this provision, 'particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement'. As even the panel has stated in applying the provision in the *Indonesia – Autos* case, 'the language of this provision is rather general and does not provide a great deal of guidance'. It was only invoked in a few cases. In the *Indonesia – Autos* case, the arbitrator (who had to decide on the length of the reasonable period of time (RPT) for implementation) added another six months to the period normally required for the domestic rule-making process, conceding that Indonesia was 'a developing country ... in a dire economic and financial situation'.¹⁰⁶ The same logic was also applied in the arbitration in *Argentina – Bovine Hides*.¹⁰⁷ Moreover, it appears that the provision informed implicitly the decision of the arbitrator in *Chile – Alcoholic Beverages*.¹⁰⁸ Whereas these cases affected developing countries as defendants, some developing countries also invoked the provision in the arbitration on the RPT in the *Byrd Amendment* case where the US is a defendant. The arbitrator, however, stated that he had 'some difficulty in seeing how the fact that several Complaining Parties are developing country members should have an effect on the determination of the shortest period possible within the legal system of the United States to implement'.¹⁰⁹ The compliance panel in *EC – Bed Linen* also rejected Indian allegations about a violation

¹⁰⁴ See the panel report in *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* (WT/DS90/R), paras 5.8–5.10.

¹⁰⁵ See the modified Article 12.10, as contained in TN/DS/9.

¹⁰⁶ See the Award of the Arbitrator, para 24, in *Indonesia – Certain Measures Affecting the Automobile Industry; Recourse to Arbitration under DSU Article 21.3(c)* (WT/DS54/15, WT/DS55/14, WT/DS59/13 and WT/DS64/12); see also Roessler (2002).

¹⁰⁷ See the Award of the Arbitrator, paras 50–51, in *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather; Recourse to Arbitration under DSU Article 21.3(c)* (WT/DS155/10).

¹⁰⁸ See the Award of the Arbitrator, paras 41–45 in *Chile – Taxes on Alcoholic Beverages* (WT/DS87/15 and WT/DS110/14).

¹⁰⁹ See the Award of the Arbitrator, para 81, in *United States – Continued Dumping and Subsidy Offset Act of 2000; Recourse to Arbitration under DSU Article 21.3(c)* (WT/DS217/14, WT/DS234/22).

of the provision by the EC through the specific actions it took in this anti-dumping case. The panel had found that the 'hortatory' word 'should' does not mean 'shall' and that nothing was therefore in that provision which would explicitly require a member to take any particular action.¹¹⁰

The vague wording of Article 21.2 DSU and the jurisprudence on this Article likely prompted Cuba, the Dominican Republic, Egypt, Honduras, India, Indonesia, Jamaica, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe to suggest that the provision should be made more operational. To this purpose, it is proposed that the reasonable period of time (RPT) for implementation of disputes which involve industrial countries as complainants and developing countries as defendants should normally not be less than fifteen months. It should be extended to at least two years (or beyond) if statutory changes were required or if a 'long held practice/policy' such as a quantitative restriction (QR) or a balance of payment measure (BOP) was involved.¹¹¹ QRs and BOPs have played an important role in the trade policy of India, one of the co-sponsors. Moreover, the time frame for the compliance panel process in such cases should be extended to 120 days. Also, developing countries should not have to present a status report on implementation at every meeting but only at every second meeting. By contrast, developing countries demand that in cases where the developing country is a complainant and the developed country is a defendant, the RPT should not exceed 15 months, that the 90-day limit for compliance panel procedures should be strictly observed, and that mutually acceptable compensation should be offered in case of delays by the developed country to offset the trade loss to the developing country.¹¹²

The Balás text considered some of these requests: It would make Art. 21.2 DSU mandatory by replacing 'should' with 'shall'.¹¹³ Furthermore, developing countries would have to present their status reports only at every second meeting of the DSB.¹¹⁴ With regard to the length of the

¹¹⁰ See the compliance panel report, paras 6.262–6.271 in *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India; Recourse to Article 21.5 of the DSU by India*.

¹¹¹ See TN/DS/W/19, proposal on Article 21.2, lit (b)(i) (Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe).

¹¹² See TN/DS/W/19, no III, paragraph on Article 21.2 (Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe) and TN/DS/W/47 (India, Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia).

¹¹³ See the modified Article 21.2, as contained in TN/DS/9. This proposal, which had already been included in the Suzuki text (WT/MIN(99)/8), is also supported by the EC See TN/DS/W/1, Attachment, no 18 (EC).

¹¹⁴ See the proposed text marked with an asterisk at the end of Article 21.6(b), as contained in TN/DS/9.

RPT, Balás did not propose to introduce any new numbers into the DSU. He added, however, a programmatic provision which would apply to developing country defendants. Accordingly: 'the arbitrator shall take due account of any particular problems which may affect the time within which that Member can implement the DSB recommendations and rulings.' Additionally, the provision would call upon the arbitrator to give due consideration to the special situation faced by LDC defendants.¹¹⁵ The concrete effect of this provision is difficult to see today, given its programmatic character.

Other issues brought forward by developing countries include a call for monetary compensation to be paid continually until a trade measure is withdrawn,¹¹⁶ and for collective retaliation.¹¹⁷ Ecuador also proposed to improve the SCOO for developing countries. As part of its proposal on implementation, Ecuador suggests that developing countries complainants should be allowed to take into account the impact of a trade restrictive measure on their economy when calculating the level of retaliation, and not just the level of nullification or impairment. This could be done, for instance, by multiplying the amount authorised by the DSB by a factor of at least two.¹¹⁸ Cuba, the Dominican Republic, Egypt, Honduras, India, Indonesia, Jamaica, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe want to grant developing countries the freedom to suspend concessions *vis-à-vis* non-complying industrial countries in sectors of their choice.¹¹⁹ However, none of these proposals found entry into the Balás text.

7.5.4 Legal Costs and Secretariat Assistance

The monetary cost of an active participation in dispute settlement and the level of support which the secretariat should provide to developing countries have often been raised by developing countries in the discussions. According to Roessler (2002), the cost of legal advice provided by law firms is prohibitive for many developing countries, and special and differential treatment in the field of WTO dispute settlement should therefore primarily take the form of privileged access to legal expertise. The need to expand the resources available to

¹¹⁵ See the modified Article 21.3, as contained in TN/DS/9.

¹¹⁶ See TN/DS/W/15, no 5 (African Group). See also Section 6.4.5 of this study.

¹¹⁷ See TN/DS/W/15, no 6 (African Group). See also Section 6.4.7 of this study.

¹¹⁸ See TN/DS/W/9 (Ecuador).

¹¹⁹ See TN/DS/W/19 (Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe), no I and TN/DS/W/47 (India, Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia). See also Section 6.4.8 of this study.

developing countries effectively to participate in the system has been recognised.¹²⁰

In this respect, the African Group calls for the establishment of a fund which could be used by developing countries that wish to avail themselves of the dispute settlement procedures. That fund would be used to develop the institutional and human capacity of developing countries for using WTO dispute settlement. It would complement the already-existing Advisory Centre on WTO Law (ACWL), an international organisation which has been set up to provide legal assistance to developing countries in WTO disputes.¹²¹

Further on, Cuba, the Dominican Republic, Egypt, Honduras, India, Indonesia, Jamaica, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe suggest that litigation costs in disputes involving both industrial and developing countries should be borne by the industrial country if the developing country prevails in the dispute.¹²² Similar proposals on legal costs have also been made separately by Jamaica¹²³ and China.¹²⁴ Specifically with regard to *amicus* briefs, Jordan seeks the establishment of a fund which would support developing countries and LDCs in the submission and handling of such briefs.¹²⁵

The Balás text proposes a new Article 28 on litigation costs. However, it is bracketed and its contents are rather vague. Its application would require further decisions and a substantial amount of interpretation by panels or the Appellate Body. According to the proposed article, Members shall bear their own costs in procedures brought under the DSU. However, panels or the Appellate Body may decide to award upon request by the parties to a dispute an amount for litigation costs, taking into account the specific circumstances of the case, the respective

¹²⁰ See Davey (2000a), pp 17ff.

¹²¹ See TN/DS/W/15, no 3 (African Group). According to the African Group, the ACWL 'should not be considered as panacea for all institutional and human capacity constraints of developing countries', as the latter's terms of reference were allegedly equivocal in certain instances and as it did not cover all developing countries. Jamaica argues with regard to the ACWL that the cost of membership is still prohibitive for some developing countries so that they cannot access its facilities; see TN/DS/W/21, no 2a (Jamaica). On the ACWL and its activities, see ACWL (2002).

¹²² See TN/DS/W/19 (Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe) and TN/DS/W/47 (India, Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia).

¹²³ See TN/DS/W/21, no 7 (Jamaica).

¹²⁴ See TN/DS/W/29, no 1 (China), TN/DS/W/51, no 4 (China), TN/DS/W/51/Rev 1, no 4 (China) and TN/DS/W/57, no 2 (China).

¹²⁵ See TN/DS/W/43, no XI (Jordan) and TN/DS/W/53.

conditions of the parties concerned as well as special and differential treatment to developing countries. The panel or the Appellate Body decisions in this respect shall be guided by principles to be determined in a decision by the DSB.¹²⁶

With regard to legal assistance granted to developing country members by the Secretariat, Jamaica calls for a strong expansion of such services. The African Group also calls for fully-fledged assistance to developing countries. It includes the provision of a pool of experts and lawyers for the conduct of cases, the payment of fees and expenses entailed, the compilation of all applicable law by the secretariat including past decisions for use by the parties and the adjudicating bodies.¹²⁷ Additionally, the LDC Group argues that the impartiality requirement included in Article 27.2 on legal assistance to developing countries unnecessarily constrains the legal experts and may prevent them from offering the 'full breadth of assistance' as envisaged by the members. Jamaica also argues that the services provided under Article 27.2 are insufficient for developing countries that need the services of advisers on a full time basis.¹²⁸

The Balás text proposes only a slight modification of Article 27.2 DSU. Accordingly, the Secretariat shall maintain a roster of qualified legal experts from which an expert shall be made available to any developing country member which so requests. However, the impartiality requirement would not be relaxed.¹²⁹

7.5.5 Other Matters Relating to S&D

The African Group also called for an easing of the requirements for third party participation of developing countries in disputes (see Section 7.4 on third party rights).¹³⁰ Moreover, periodic reviews of dispute settlement should take place every five years and ensure that the dispute settlement mechanism contributes to development objectives.¹³¹ None of these objectives was taken into account in the Balás draft.

China suggests as a matter of S&D that industrial countries should not bring more than two cases per calendar year against a particular

¹²⁶ See new Article 28, as contained in TN/DS/9.

¹²⁷ See TN/DS/W/15, no 8 (African Group).

¹²⁸ See TN/DS/W/21, no 2(a) (Jamaica). See also Ragosta (2000).

¹²⁹ See modified Article 27.2, as contained in TN/DS/9.

¹³⁰ See TN/DS/W/15, no 9 (African Group).

¹³¹ See TN/DS/W/15, no 10 (African Group).

developing country member.¹³² In addition, developing country members' participation in WTO dispute settlement should be enhanced by the provision of technical assistance and capacity-building programmes. Finally, China proposes that any tightened rules (for instance regarding time-frames) on dispute settlement should not apply to developing countries.¹³³ As one might expect, the Balás text did not integrate the Chinese proposal to limit the number of cases that could be brought against any particular developing country. Such a proposal could factually amount to exempting developing countries from compliance with the WTO agreements, and any negotiated balance of rights and obligations could thus be upset. As far as the Chinese suggestion on time-frames is concerned, the Balás text indeed exempts developing countries from some of the modifications suggested, such as, for example, the proposed establishment of a panel at the first meeting where the panel request appears on the DSB agenda.

7.6 Role of the Secretariat

Some proposals also deal with the role of the WTO Secretariat in disputes. The LDC Group holds that the Secretariat provides a broad spectrum of assistance to panels such as support on legal, historical and procedural aspects of the case and secretarial and technical support under Article 27.1 DSU. The Group asserts that '(o)ften, such support is pernicious and impacts heavily on the outcome of the case'.¹³⁴ LDCs therefore want such assistance, particularly the legal research, to be provided to the parties so as to allow them to get a full picture as to how a decision was reached.

A similar proposal is made jointly by Cuba, Honduras, India, Jamaica, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe. They hold that: '(i)n certain disputes the Secretariat seemed to have provided negotiating history, which does not have the approval of the members, to the panels and the panels would no doubt have relied on these inputs.' The co-

¹³² See TN/DS/W/29, no 1 and TN/DS/W/57, no 1 (China).

¹³³ See TN/DS/W/29 (China), TN/DS/W/51, no 4 (China), TN/DS/W/51/Rev 1, no 4 (China) and TN/DS/W/57, no 3 (China).

¹³⁴ See also Hudec (1999), pp 34ff who acknowledges that: '(w)hile most panel members have insisted on exercising their own judgment at the end of the day, Secretariat legal advisors have clearly exercised considerable influence.' While he argues that the criticism of those who argue that Secretariat officials have no mandate to perform this quasi decision-making role is understandable, he warns against overstating the argument as, in most cases, the Appellate Body has the final responsibility for the outcome, and that Secretariat support will remain the only available source of legal expertise as long as panel members are selected as they have been in the past (ie without making legal expertise a mandatory requirement).

sponsors therefore want to include a provision into the working procedures that would require that: '(a)ny document, notes, information, etc, submitted by the secretariat to the panel shall be given promptly to the parties to the dispute, whose views on such documents, notes, information etc, shall be taken into consideration by the panel.'¹³⁵ Jordan supports this proposal, too, and wants to include third parties in the circle of those who receive the material prepared by the secretariat and who may comment on it.¹³⁶ Davey questions such propositions and argues that disclosure requirements for Secretariat submissions to panels would be unworkable as most of this interaction is verbal. Moreover, it could lead to further disputes.¹³⁷ The involvement of the Secretariat in dispute settlement had already led to criticism in the *Fuji-Kodak* case in 1998, where Kodak charged the Secretariat of unfair intervention.¹³⁸

7.7 Criticism of Adjudicating Bodies and Proposals to Regain Political Control

One major proposal of systemic importance is the joint proposal by the United States and Chile on 'improving flexibility and member control in WTO dispute settlement'. They argue that: 'some limitations in the current procedures may have resulted, in some cases, in an interpretative approach or legal reasoning applied by WTO adjudicative bodies ... that could have benefitted from additional member review.' The co-sponsors hold that 'the reasoning and findings of reports may at times go beyond what the parties consider to be necessary to resolve the dispute, or ... may even be counterproductive to resolution of the dispute' and that mechanisms should therefore be introduced to 'enhance the parties' flexibility to resolve the dispute and members' control over the adoption process'.¹³⁹

Specifically, they hold that: 'panel and Appellate Body reasoning and findings should not go beyond those aspects of the dispute that the complainant and respondent parties consider necessary to resolve the dispute.' As examples for such 'sensitive areas that could have benefited from additional opportunity for member discussion and review', they

¹³⁵ See TN/DS/W/18, no V (Cuba, Honduras, India, Jamaica, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe). That issue has been a long-standing concern for India and has also been raised on other occasions; see 'India, Mexico Block Proposal to Release More WTO Documents', in *International Trade Reporter*, vol 16, no 7, 17 February 1999.

¹³⁶ See TN/DS/W/43, no XIII (Jordan).

¹³⁷ See Davey (2002), pp 30–31.

¹³⁸ *Japan – Measures Affecting Consumer Photographic Film and Paper* (United States), (WT/DS44); see 'Kodak Charges WTO Secretariat With Unfair Intervention in Film Case', in *Inside US Trade*, 3 July 1998.

¹³⁹ See TN/DS/W/28, nos 1–5 (US, Chile).

cite 'situations where the relevant WTO text does not address an issue, leading to concerns over whether an adjudicative body might "fill the gap" and consequently add to or diminish rights and obligations under the relevant agreement instead of clarifying those rights and obligations', or 'situations in which legal concepts outside the WTO texts have been applied in a WTO dispute settlement proceeding, including asserted principles of international law other than customary international law rules of interpretation' (eg state responsibility, proportionality).

To implement the proposal, several suggestions are made that have already been discussed elsewhere in this study: the introduction of an interim review at the appellate stage similar to that already known from the panel stage,¹⁴⁰ the suspension of panel or Appellate Body procedures by mutual agreement,¹⁴¹ the deletion of findings by mutual agreement¹⁴² and partial adoption procedures.¹⁴³ Moreover, a provision would be introduced into Article 8.2 DSU according to which 'expertise to examine the matter at issue in the dispute' should be integrated explicitly as a selection criterion into the provision on the composition of panels.¹⁴⁴ Finally, the co-sponsors wish to: 'provide some form of additional guidance to WTO adjudicative bodies concerning (i) the nature and scope of the task presented to them (for example when the exercise of judicial economy is most useful) and (ii) rules of interpretation of the WTO agreements.'¹⁴⁵

To summarise, the overarching goal is to strengthen political elements in WTO dispute settlement, and to regain control over the adjudicating process by reorienting it towards bilateral deals and making it less automatic. Moreover, it is coupled with strong implicit (and, indeed, close to explicit) criticism of panel members' expertise and of the ability of adjudicating bodies to carry out their tasks independently. The proposal may thus be viewed as a 'diplomatic translation' of the strong criticism that had been voiced in the US Congress on dispute settlement

¹⁴⁰ See TN/DS/W/28, no 6a (US, Chile) and TN/DS/W/54, lit (a) (US, Chile); see also Section 6.3.4.

¹⁴¹ See TN/DS/W/28, no 6(d) (US, Chile) and TN/DS/W/52, lit (d), proposing changes to Article 12.12 and Article 17.5 DSU (US, Chile); see also Sections 6.2.3 and 6.3.3.

¹⁴² See TN/DS/W/28, no 6(b) (US, Chile) and TN/DS/W/52, lit (b), proposing changes to Article 12.7 and Article 17.13 DSU (US, Chile); see also Sections 6.2.5 and 6.3.6.

¹⁴³ See TN/DS/W/28, no 6(c) (US, Chile) and TN/DS/W/52, lit (c), proposing changes to Article 16.4 and Article 17.14 DSU (US, Chile); see also Sections 6.2.5 and 6.3.6.

¹⁴⁴ See TN/DS/W/28, no 6(e) (US, Chile) and TN/DS/W/52, lit (e), proposing a change to Article 8.2 DSU (US, Chile); see also Section 6.2.1.

¹⁴⁵ See TN/DS/W28, no 6(f) (US, Chile) and TN/DS/W/52, lit (f). For a discussion of the proposal, see Ehlermann (2003).

in the time preceding this proposal (see Section 5.4 for details). Specifically, Congress members complained that the WTO was legislating instead of interpreting and that it allegedly did not apply the negotiated standard of review that would leave sufficient deference to US agencies that make determinations under US trade remedy laws (anti-dumping, safeguards, countervailing duties). In seeking to weaken the adjudicative elements of dispute settlement, the proposal represents a reversal in the position that the US held during the Uruguay Round on important points. At that time, the US had sought to make the mechanism as automatic as possible in order to prevent defendants from blocking decisions.¹⁴⁶ Automaticity was demanded by the US in exchange for restraint in the unilateral application of Section 301 (see Section 2.2.2.8).

Criticism of adjudicating bodies is, however, not limited to the US. The African Group criticises panels and the Appellate Body for coming up with “surprises” in their interpretation and application of WTO provisions, in some cases totally unexpected and unintended in the negotiations of the provisions’. This has, in the view of the African Group, affected the rights and obligations of members. The Group complains about conflicts between agreements or provisions that ‘have been conveniently interpreted away’ to the prejudice of developing countries such as in the case of transition periods. It also mentions the interpretation of the right to seek information under Article 13 (see *amicus curiae* issue). In order to ‘address such excesses’, the African Group therefore proposes, *inter alia*, that the General Council be regularly briefed on the jurisprudence developed in dispute settlement. Parties to a proceeding should have the right to refer questions of interpretation to the General Council at any stage before the authorisation of retaliatory measures.¹⁴⁷ In its second proposal, the Group suggests a concrete obligation for panels or the Appellate Body to refer questions on whether

¹⁴⁶ On the allegations that the adjudicating bodies were ignoring the negotiated standard of review and on the general criticism of the dispute settlement system, an intense debate has emerged. On an overview on the standards of review issue, see Oesch (2003). On the treatment of trade remedy measures by the adjudicating bodies, see also Cunningham and Cribb (2003), Jackson and Benke (2003) (introducing the debate), Benke (2003), Stewart and Dwyer (2001) and Bourgeois (1998). On these and several other aspects of the WTO criticism, see Esserman and Howse (2003) (essentially supporting the WTO), Davey (2001), Clough (2001), Jackson (2000a) and Magnus (2000). Particular criticism has been voiced by Magnus, Joneja and Yocis (2003), Ragosta, Joneja and Zeldovich (2003), Wilson and Starchuk (2003), Ragosta, Joneja and Zeldovich (no year specified). The US General Accounting Office has also reviewed, in several instances, US participation in the WTO and in dispute settlement. It generally found that there is no bias against the US in the use of the system; see GAO (2003). See also GAO (2000), GAO (2000a) and GAO (2000b) for further information on US experience under the DSU.

¹⁴⁷ See TN/DS/W/15 (African Group).

or not there is a conflict between provisions inside an agreement or between agreements to the General Council for determination. The latter should have recourse to the authority conferred under Article IX.2 of the WTO agreement, which allows decisions to adopt an interpretation to be taken by a three-fourths majority of the members.¹⁴⁸

Jordan's proposal equally deals with questions of interpretation. The country suggests that the panels, Appellate Body and the DSB be granted the power to seek advisory opinions from the International Court of Justice (ICJ) on matters of international law. The advisory function of the ICJ would therefore be extended to the WTO, as has been done with other specialised bodies. Such advisory opinions should be considered as instruments of interpretation which should be subject to adoption by the Ministerial Conference or the General Council pursuant to Article IX.2 WTO agreement. Jordan also supports the proposal made by the African Group on this issue (see above) and recommends that it should be included in a new Article *5bis* on 'Questions of Interpretation'.¹⁴⁹

While the proposal which had been submitted by the African Group and Jordan received less public attention than the US proposal, both proposals – if seen in synopsis – reveal a substantial degree of unease of both a developed trade power and a large number of developing countries with the interpretations of panels and the Appellate Body. The common thrust is the desire to regain (or at least considerably strengthen) member control over the adjudicative bodies. Whereas the numerous but less powerful African countries seek to enhance this control by giving more authority to the General Council under (problematic) voting procedures (where they would enjoy comfortable majorities), the US prefers better control through the parties to a dispute. These bilateral settings would give the US higher leverage for its negotiating power.

7.8 Time-Frames

The EC proposed a new Article 13.3 DSU which would allow parties to extend any time period in the DSU by mutual agreement. This amendment had already been suggested in the Suzuki text. The EC would add a sentence requiring members to give special attention to the particular problems and interests of developing country members.¹⁵⁰

¹⁴⁸ See TN/DS/W/42, no I (African Group).

¹⁴⁹ See TN/DS/W/43, no XII (Jordan).

¹⁵⁰ See TN/DS/W/1, Attachment, no 1 (EC).

Australia made a suggestion with regard to time-frames under the Safeguard agreement, suggesting a harmonisation with the time-frames on subsidies. Whereas accelerated dispute settlement procedures are available to challenge subsidies under the SCM Agreement, such procedures are not available under the Safeguard Agreement, the Agreement on Textiles and Clothing, and the Agreement on Agriculture. With regard to the Safeguard Agreement, Australia considers that this is an anomaly, as safeguard actions have similar adverse trade effects as prohibited and actionable subsidies and because they are by definition time-limited. Australia therefore proposes expedited dispute settlement procedures on all safeguard matters brought under the DSU.¹⁵¹ The motivation for this proposal may be found in the experience that Australia made in the *US – Lamb Safeguard* case¹⁵² where the proceedings were initiated almost immediately after the safeguard came into force but where withdrawal of the illegal measure could only be secured seven months before the three-year safeguard was set to expire anyway.¹⁵³ More generally, China is also in favour of the establishment of specific shortened time-frames for disputes concerning trade remedy measures. These should, however, not apply in the case of developing country defendants.¹⁵⁴ The proposals were not integrated into the Balás text.

7.9 Measures Withdrawn

The African Group raises the problem of trade measures which are withdrawn before the finalisation or even the commencement of DSU proceedings. Particularly in the case of small developing country economies, even short-timed export restrictions would inflict serious injury. Nevertheless, the DSU has currently no remedies to address such situations. Developing countries therefore suggest notification requirements for measures withdrawn by members during consultations with a subsequent recommendation by the DSB regarding compensation of the injury suffered by the member. Measures withdrawn prior to a DSU proceeding or even without such a proceeding should equally entitle the injured party to compensation.¹⁵⁵ This proposal, which has some similarities to the Mexican proposal on retroactivity (see Section

¹⁵¹ See TN/DS/W/8, lit (a) (Australia), TN/DS/W/34, lit (a) (Australia), and TN/DS/W/49, lit (a), proposing changes to Articles 1.2 and the inclusion of a new Article 8bis (Australia).

¹⁵² See *United States – Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb from New Zealand and Australia* (WT/DS177) (New Zealand) and (WT/DS178) (Australia).

¹⁵³ See 'Australia, South Korea Outline Proposals for Revamping of WTO Dispute Settlement', in *WTO Reporter*, 19 July 2002.

¹⁵⁴ See TN/DS/W/29, no 3 (China), and TN/DS/W/51 as well as TN/DS/W/51/Rev 1, no 4.2 (China).

¹⁵⁵ See TN/DS/W/15, no 4 (African Group).

6.4.11 on increased incentives for implementation), was not considered in the Balás text.

7.10 Composition of Delegations

Jamaica wishes to introduce a new Article 3.13 DSU which would establish that a WTO member has the right to determine the composition of its delegation in dispute settlement proceedings.¹⁵⁶ This proposal has to be seen against the background of the experience of the small banana-growing Caribbean island of Saint Lucia. It wanted to include a private attorney into its delegation but the panel objected, arguing that the working procedures only allow members of government to attend panel meetings.¹⁵⁷ That finding, however, was overturned by the Appellate Body which noted that representation by counsel of a government's own choice was a matter of particular significance, especially for developing country members.¹⁵⁸ The proposal was not integrated into the Balás text – possibly because the clarity of this ruling has made any provision on this issue redundant.

7.11 Measures Under Discretionary Laws

In addition to its proposal on the level of nullification or impairment caused by measures taken under so-called 'mandatory laws' (See Section 6.4.4), Japan also suggests a change to the 'theory of discretionary law'. According to this theory, a law that permits a member to choose between WTO-consistent and WTO-inconsistent measures is not WTO-inconsistent as such, unless WTO-inconsistent measures are taken in its application.¹⁵⁹ Japan suggests that an exception to the theory of discretionary law be made when repetition of an illegal measure under a discretionary law is highly probable. If a member has intentionally applied the same measure that was already found to be WTO-inconsistent through a dispute settlement procedure, panels or the Appellate Body 'may find the discretionary law inconsistent' and 'recommend that necessary steps be taken to prevent ... the repetition of WTO-inconsistent measures'. Measures taken under the discretionary

¹⁵⁶ See TN/DS/W/44, no 1 (Jamaica). This suggestion is no longer included in Jamaica's second proposal; see TN/DS/W/44/Rev 1 (Jamaica).

¹⁵⁷ See WT/DS27/R, paras 7.10–12; for a comment, see also Bronckers and Jackson (1999), Ehrenhaft (1999), Vermulst, Mavroidis and Waer (1999), pp 4–5, Pearlman (1999) and Martha (1997). See also Ragosta (2000) who deals with several aspects of private party participation in dispute settlement.

¹⁵⁸ See WT/DS27/AB/R, paras 5 and 10–12.

¹⁵⁹ For a general overview of the discussion on mandatory versus discretionary laws, see Bhuiyan (2002) and Sim (2003).

law which are similar to measures already found WTO-inconsistent should be presumed to be inconsistent, with the burden of proof being shifted to the defendant.¹⁶⁰ The proposal could be seen as directed towards the United States with its record of violations that occurred through actions taken under discretionary laws. Given the potential high-politics implications of the proposal, it is barely surprising that it did not find consideration in the consensus-oriented Balás text.

¹⁶⁰ See TN/DS/W/22, no 2(b) (Japan) and TN/DS/W/32, Attachment, no 22 (Japan).

PART III

**PROBLEMS AND PERSPECTIVES OF THE DSU REVIEW:
CONCLUSIONS, RECOMMENDATIONS AND OUTLOOK**

8. ANALYSING THE DIFFICULTIES: REASONS FOR THE FAILURE TO REACH AN AGREEMENT

Having reviewed the last six years of negotiations and the multitude of proposals that have been submitted, one will identify six major stumbling blocks and disincentives that have stood in the way of an agreement. First, any amendment to the DSU requires consensus which is difficult to achieve. Secondly, key decisions of the adjudicative bodies and members' experience with the system created controversial views on specific aspects of the system that have become increasingly difficult to bridge. Thirdly, the discussion reveals a more profound controversy regarding the overall direction which the DSU should pursue, namely whether it should continue its route towards more rule-orientation and adjudication, or whether it should return to a more negotiatory, diplomatic approach. Fourthly, and on a more systemic level, it is difficult to reform a system that is in use while the review negotiations are taking place. Fifthly, members appear to be unwilling to modify the DSU simply for the sake of modifying it – in the light of a general sense of satisfaction with the functioning of the current DSU and a fundamental concern which is not to do any harm to the system through the review. Sixthly, there appears to be some amount of a 'DSU review in practice'. Although no modifications to the text of the DSU have been made, members and adjudicating bodies have managed to adapt the system to changing practical needs. This flexibility has reduced the pressure towards a reform. These six elements are subject to a more detailed discussion in this chapter.

8.1 The Procedure for Amendments to the DSU

Traditionally, political decision-making in the consensus-oriented GATT/WTO regime is a cumbersome process, and hurdles for amendments to the texts are very high. The rules for such amendments are established in Article X WTO Agreement. The particular systemic importance of the DSU in the architecture of the multilateral trading system is reflected by a specific provision on amendments to the DSU which is laid down in Article X:8 WTO Agreement. It reads as follows:

Any Member of the WTO may initiate a proposal to amend the provisions of the Multilateral Trade Agreements in Annexes 2

and 3 by submitting such proposal to the Ministerial Conference. The decision to approve amendments to the Multilateral Trade Agreement in Annex 2 [ie the DSU; note by the author] shall be made by consensus and these amendments shall take effect for all Members upon approval by the Ministerial Conference. ...

In other words, any amendment of the DSU requires a consensus decision and approval by the Ministerial Conference. To understand this provision, it is helpful to recall the meaning of the term 'consensus' and to contrast it with the concept of 'unanimity' which is not meant here. Consensus in GATT parlance means that no member, present at the meeting when the decision is taken, formally objects to the proposed decision. Whereas the concept apparently grants veto powers, absent parties (or those abstaining from voting) do not prevent such consensus. Consensus thus gives members a tool which they can use to protect their vital interests. If they do not wish to support an amendment but do not have 'strong feelings' against it either, they may abstain from a vote without thereby inhibiting consensus. However, even in such cases, the consensus requirement gives members some leverage for bargaining as they could still make their agreement to a modification conditional upon approval of their own proposals in the same or in another negotiating area.

Such bargaining opportunities in the DSU review negotiations under the Doha mandate are, however, very limited. According to this mandate, members were to come to a conclusion on the DSU review prior to the overall deadline for the Doha Round negotiations. Whereas this attempt of members to reap an 'early harvest', and the resulting partial insulation of the DSU review from other negotiating areas may facilitate an issue-oriented discussion which is not burdened by factually unnecessary but politically motivated linkages, the political advantages of package deals when it comes to *agreeing* on the issues discussed are being lost. Each negotiator needs to see his own position, however controversial it may be, reflected to some extent in a potential agreement on the DSU review because there is no scope for bargaining across different negotiating areas. This could lead to a more polarised discussion in which compromise and an agreement are more difficult to achieve.

8.2 Controversies on Major Specific Issues

As in other negotiating areas of the Doha Round, members partially pursue negotiating objectives in the DSU review that appear to be diametrically opposed to each other, or otherwise irreconcilable. Major issue-specific controversies have shaped in particular the early stages of the DSU review (ie the 1998–1999 stage). These controversies arose between the US and the EC, and between industrialised and developing countries. Whereas the debate has softened in most of these areas, diverging approaches to these issues remain.

The transatlantic divide was particularly strong in the initial stage of the DSU review (1998–1999). The US was mainly preoccupied with strengthening the enforcement quality of the system, as it denounced any idea of ‘sequencing’ between Article 21.5 and Article 22 DSU as ‘delay tactics’, and as it explored the possibility of carousel retaliation to increase the impact of the suspension of concessions and other obligations (SCOO) on the defendant. By contrast, the EC sought to avoid the ‘teeth’ of the system and to delay the SCOO as it was struggling with the implementation of the rulings in *Bananas* and *Hormones*, hence its insistence on sequencing and on a prohibition of carousel retaliation. Both positions were so far apart and apparently essential enough for each party that there was no scope for an agreement that would have enjoyed consensus between both partners in the early stages of the review exercise. The change in the US position from offensive into defensive – in particular after the lost *FSC* case and after the surge of complaints against US trade remedy measures – made this topic lose some of its acrimony.

The North-South divide regarded initially mainly questions related to the openness of the dispute settlement system and options for participation from civil society. Some industrialised countries, and the US in particular, have been strongly in favour of more transparency in order to appease increasingly critical domestic constituents and powerful NGOs. By contrast, major emerging and developing countries including Mexico, Malaysia, Egypt and India sharply opposed any opening of the dispute settlement process and thus pursued diametrically opposed negotiating objectives.

Whereas transparency and *amicus* briefs were clearly the most controversial North-South issues during the initial stage of the review exercise, the discussion evolved over time. Concerning *amicus* briefs, the Appellate Body developed its own approach that allowed it to retain a maximum of flexibility. It thus created accomplished facts despite harsh criticism from developing countries. Northern countries now began to

signal that they could live with the practice developed by the Appellate Body. Developing countries, however, will have realised that *amicus* briefs have so far not had a decisive role in the adjudicative decision-making. In this light, demands for action on the *amicus* issue increasingly resemble bargaining chips that may, at a later stage, be traded against concessions in more important areas.

With regard to external transparency and openness of the system, however, the divisive approach seems to remain – at least *prima facie*. Nevertheless, one is tempted to question the US insistence on increasing external transparency in the light of more recent US calls for increased Member control and flexibility of dispute settlement. Such negotiating flexibility is at odds with transparency and public scrutiny.

The two major lines of controversy (US-EC, North-South) as outlined above can explain to some extent why no consensus on the outcome of the DSU review has been achieved in the past. In this light, attempts of many small and medium-sized traders to move the review and to settle at least on a mini-package of less controversial improvements in the interest of the system, had no chance of realisation.

8.3 Controversies on the Fundamental Orientation of the DSU

In addition to issue-specific divergences, there is also a more profound controversy regarding the overall direction the DSU should pursue. Should the dispute settlement system continue its route towards more rule-orientation and adjudication (as it did in the past 30 years), or should it rather return to a more negotiatory and diplomatic – ie power-oriented – approach?¹

¹ Rule-orientation and power-orientation as basic concepts for the settlement of international trade disputes were initially introduced into the literature by Jackson (1978), pp 98ff. He described power oriented techniques as suggesting: ‘a diplomat asserting, subtly or otherwise, the power of the nation he represents. In general, such a diplomat prefers negotiation as a method of settling matters, because he can bring to bear the power of his nation to win advantage in particular negotiations ... Needless to say, often large countries tend to favour this technique more than do small countries; the latter being more inclined to institutionalised or “rule oriented” structures of international activity. A rule oriented approach, by way of contrast, would suggest that a rule be formulated which makes broad policy sense for the benefit of the world and the parties concerned, and then there should be an attempt to develop institutions to insure the highest possible degree of adherence to that rule. In the case of disputes between countries, a power oriented approach is often utilised in the negotiation, so that the dispute, even if it involves a breach of a rule, may be settled more from the point of view of who has the effective power, economic or otherwise, than from the point of view of determining whether a rule has been breached. A rule oriented approach, on the other hand, would also involve negotiation for a settlement, but in such a negotiation the negotiators would be more inclined to resolve the dispute by reference to what they would expect an international body would conclude about the action of the transgressor in relation to its international obligations.’ For a short overview, see also Jackson (1997). For a critical comment, see Dunne III (2002).

For the purpose of this contribution, rule-orientation is understood as the strong reliance on procedural and material rules for the settlement of trade disputes, ideally involving independent third party adjudication. By contrast, a power-oriented (or diplomacy-oriented) dispute settlement procedure relies strongly on political negotiations and therefore on the political power of the parties concerned. In such a setting, the role of procedural and material rules for the settlement of disputes is limited. The role and independence of third party adjudication is also subject to narrow limits in a power-oriented setting.

Each of these two generic orientations is reflected in a substantial part of the proposals.

8.3.1 Proposals Towards Strengthening Rule-Orientation

Some proposals would contribute directly or indirectly to more rule-orientation. Major proposals include:

- *Strengthened notification requirements for mutually acceptable solutions and written reports on the outcome of consultations* (see Section 6.1.3): These proposals would make early settlements more transparent. Such transparency, in turn, would create both normative and political pressure for solutions that are not too far apart from WTO rules and the outcome of a potential litigation. They could therefore strengthen the rule-oriented element in dispute settlement.
- *Compliance reviews of mutually agreed solutions* (see Section 6.1.4): Compliance reviews of mutually agreed solutions could be a powerful instrument in making early settlements a more attractive means of dispute settlement since their results would become better enforceable. That could increase their attractiveness for complainants and strengthen the security and predictability of trading conditions under such solutions.
- *Reduced time-frames*: Several proposals have been submitted that aim at the explicit or implicit reduction of time-frames. The 'explicit' category includes reduced time-frames for consultations and for the determination of the RPT. The 'implicit' category includes the removal of the requirement that panels are established only at the second meeting after the request has appeared on the DSB agenda, or the introduction of a provision that would mandate members to submit their first written submission along with the panel

request. The establishment of a fast-track panel procedure follows similar directions. Such proposals will generally deprive members of time and options that are available for diplomatic settlements and for 'controlled escalation'. In reducing opportunities for political tactics and negotiations, these proposals would inevitably strengthen the legal elements in the procedure. In the light of experience which suggests that consultations are often not held in a meaningful way under the new DSU, and that they are limited to one or two short meetings, time for consultations does currently not appear as the primary constraint during consultations or as the major problem in arriving at an early settlement. However, the actual impact of such changes should not be overrated. Time-frames in the DSU are already relatively short. Delays often occur because existing time-frames are not respected. Such delays cannot be eliminated by reducing time-frames on paper.

- *The creation of a professional permanent panel body (PPB; see Section 6.2.1):* One far-reaching proposal is the EC call for a permanent panel body. Modelled after the existing Appellate Body, the PPB would become some kind of a 'Court of First Instance' in the WTO dispute settlement system. Members would lose their control of the composition of panels. Considerations related to re-appointment as a panellist would presumably have less weight in a PPB, thereby increasing the independence of panellists. Moreover, it is often argued that permanent panellists would pursue a more legalistic approach to dispute settlement than that pursued by government officials on which the current system strongly relies. Finally, the establishment of a PPB could further contribute to the evolution of a consistent body of precedent law. Of course, its actual impact would depend largely on the composition of the PPB, eg on whether it would mainly be composed of litigation-oriented lawyers or of government officials.
- *Terms of appointment of the Appellate Body (see Section 6.3.1):* It has been proposed to appoint Appellate Body members on a non-renewable six-year term. By thus removing any considerations related to reappointment from Appellate Body members' minds, the proposal would strengthen the independence of the Appellate Body members and their ability to focus solely on legal considerations.

- *Sequencing and implementation* (see Section 6.4): A major portion of the proposals on the implementation stage are dedicated to the elaboration of a solution to sequencing and other open issues (such as the lifting of retaliatory measures) in this ultimate stage of WTO dispute settlement. In clarifying the DSU and suggesting a one-fits-all solution, the need for bilateral negotiations on procedural agreements is eliminated. This would clearly move dispute settlement towards more rule-orientation. The same holds for other proposals such as the strengthening of the defendant's reporting requirements in the implementation stage, the obligation of the complainant to submit the list of concessions it wishes to withdraw along with its request for an authorisation to SCOO, notification requirements of retaliatory measures taken and the extension of the scope of compliance review procedures to arbitration awards.
- *Prohibition of carousel retaliation* (see Section 6.4.6): The proposals for a prohibition of carousel retaliation would have a somewhat ambiguous effect: On the one hand, it would eliminate legal uncertainty with regard to retaliatory measures. Market conditions for the defendant's exporters would, although being restricted through retaliatory measures, remain predictable and agreed-on trade rules would continue to apply for non-affected exporters. A prohibition would also be in line with the requirement that retaliation shall be equivalent to the level of nullification or impairment. By thus reducing the potential cost of the SCOO for the defendant, however, there would be less pressure towards compliance.
- *Strengthened enforcement*: Several proposals to strengthen compliance and the enforcement of material WTO law have been submitted. Their basic rationale is to increase the cost of a violation for defendants and thus the incentives for prompt compliance. At the same time, they would ensure that reciprocity is maintained and that the negotiated balance of rights and obligations is protected. These submissions include: proposals on collective retaliation; freedom of cross-retaliation; retroactive determination and application of nullification and impairment, including the allocation of litigation expenses; mandatory (monetary) compensation, including for measures withdrawn during proceedings; and the negotiability of the right to suspend concessions or other obligations. Other measures such as

preventive measures, the suspension of a defendant's right to use the dispute settlement mechanism as a complainant if it does not comply with adverse rulings, the fast-track panel procedure, the method of calculating increased amounts of nullification or impairment in the case of 'mandatory laws', and the proposed change to the doctrine of 'discretionary laws' also follow a similar thrust. However, these proposals may be more difficult to implement and may unfold some adverse effects as well. All these proposals have in common that they would restrict the ability of members to reach policy goals by means of trade policy interventions in contravention of WTO disciplines.

- *Strengthened third party rights* (see Section 7.4): Strengthened third party rights increase internal transparency and may raise the costs of negotiated settlements. Potentially affected third parties will have better opportunities to oppose bilateral deals between the main parties to a dispute if these deals are at their expense, or if they treat them less favourably than the original complainant. Improved third party rights may also prevent negotiators from settlements that are too far away from the WTO principles. As a result, negotiating flexibility of the main parties is reduced, and outcomes are likely to be closer to WTO rules than they are today.
- *Increased external transparency* (see Section 7.1): Similar to strengthened third party rights and strengthened notification requirements, external transparency sheds light on negotiations and therefore 'disinfects' bilateral deals from negotiated elements that are not necessarily in line with WTO provisions. The logic is that concessions and package deals would become more difficult as adversely affected interest groups would pressure their governments to take a 'hard stance' and bring issues to adjudication instead of settling on a compromise with 'unnecessary concessions'. Not surprisingly, empirical studies have found that democracies find it particularly hard to settle if the process is public, and scholars are issuing warnings against the increase of transparency as it would preclude early settlements (see Chapter 4). Transparency can thus be associated with the move towards a more accountable, rules-based system, whereas the current confidentiality

requirements and lack of public transparency belong rather to the domain of diplomatic negotiations.

To conclude, a large number of proposals would lead to more rule-orientation in the multilateral trading system. However, a word of caution must be said. While each of these proposals may increase the impact of rules for the resolution of disputes, it cannot be excluded that the implementation of these proposals could in the long run weaken the system. For instance, increased transparency, improved notification requirements and compliance reviews of mutually agreed solutions appear, *prima facie*, to strengthen rule-orientation. However, the paper trail which such consultations would leave could put governments under considerable pressure. Complainants would presumably have fewer incentives than today to settle early (see empirical findings in Chapter 4) as compromises would be well-documented and governments could come under pressure domestically for not pursuing a 'tougher line' with the defendant. Similarly, compliance reviews could deter defendants from agreeing to early settlements as they would fear the threat of enforcement.

As a result, political strains on the WTO dispute settlement system in particular, and on the WTO as a whole, could increase if more cases (including more difficult ones) were brought to litigation. Moreover, powerful players that are interested in some negotiating flexibility could be driven out of a too legalist system. If they turned to settling their disputes outside the WTO, any strengthening of rule-orientation in the DSU would be only a pyrrhic victory. The anti-legalist backlash, which occurred in the 1960s (see Section 2.2.2.4) shows, that such dangers are real.

8.3.2 Proposals Towards Strengthening Power-Orientation

- *Automatic lapse or withdrawal of consultations/panel requests* (see Section 6.2.3): Proposals have been brought that provide for the automatic lapse of consultations/panel requests or for an easier withdrawal. Both instruments would allow members to use consultation and panel requests more vigorously as negotiatory instruments. Notification requirements for mutually agreed solutions could be spurned even more easily if consultation or panel requests dissipated automatically. This would clearly enhance the flexibility of disputing parties and reduce the power of adjudicating bodies.

- *Calls for separate opinions by individual panel(ists)/Appellate Body members* (see Sections 6.2.6 and 6.3.1): Calls for panel or Appellate Body members to hand down their opinions separately would expose individual members of the adjudicating bodies to undue pressure from governments and might reduce their independence. It cannot be excluded that such proposals would lead to more 'political' decisions.
- *Flexibility during appellate review* (see Sections 6.3.3 and 6.3.4): Several proposals seek to introduce more flexibility and member control at the appellate stage by allowing an interim review and the suspension of the appellate procedures. The appellate stage is currently the most rule-oriented stage of the process, with cases undergoing review by law experts and without any noteworthy Member control over the procedure. It is therefore of little surprise that this stage is targeted by those members who would prefer to turn back the clock. The interim review or the suspension of procedures would provide members with a new, powerful political control instrument and with increased possibilities for bilateral negotiations at a stage which has so far remained largely outside their control.
- *Deletion of findings from reports* (see Sections 6.2.5 and 6.3.6): The US-Chilean proposal to allow parties to delete findings from panel and Appellate Body reports by mutual agreement could fundamentally alter the nature of the DSU. Its implementation could lead to situations where a weaker party in a bilateral setting could come under considerable pressure from a more powerful counterpart to consent to such deletion. Moreover, the effects of such a provision on the rights of third parties are rather detrimental, as their interest in a ruling on a specific issue would be disregarded. The proposal is also at odds with calls for more transparency. The power of adjudicating bodies would be curbed as they could be prevented from making findings which could contribute to the further evolution of the multilateral trading system. The rule of law in international economic relations would therefore be weakened.
- *Partial adoption procedures* (see Sections 6.2.5 and 6.3.6): By contrast to the deletion of findings, another suggestion of the US-Chilean proposal, which is to allow the DSB to decide by consensus not to adopt specific findings or the basic rationale behind a finding in a report, seems less

problematic. This proposal is basically in line with the member-driven character of the organisation, and it could remedy to some extent the imbalance between the legal and the political elements in the WTO system. Furthermore, its effect should not be overrated. As soon as the Appellate Body makes a controversial finding, it is likely to be in the interest of at least one member in an organisation of 148 states, and that member could still block a consensus not to adopt a finding – and were it only to create a situation which allows for bargaining on open issues with the party interested in the deletion.

- *Special and differential treatment for developing countries* (see Section 7.5): Several proposals have been made that would introduce more flexibility for developing countries and would ease the ‘burden’ of rule-orientation upon them. This holds basically for most proposals on S&D, including the mandatory provision on S&D during consultations (although it remains so far unclear how it should be made operational), the mandatory use of Article 5 procedures (good offices, conciliation and mediation) in cases involving developing countries, the mandatory study of development implications of findings and recommendations, and the mandatory consideration of S&D by panels. Proposals for the implementation stage such as extension of the RPT to two to three years have a similar direction. Finally, the proposal by China according to which industrial countries should not bring more than two cases per calendar year against a particular developing country, would provide a highly effective means for developing countries to shield themselves against challenges to their trade policy measures. It would basically release developing countries from their obligation to comply, amounting to an invitation to defy multilateral trade rules where it seems politically appropriate.
- *Various other proposals*: Several other proposals would increase the flexibility of members to negotiate during the procedure and help gain more political control over the mechanism. These include the EC proposal to give parties to a dispute the possibility of extending any time frame in the DSU by mutual agreement, proposals to oblige adjudicating bodies to submit certain issues to the General Council for interpretation, and the call by the US and Chile for ‘additional guidance’ to be provided to adjudicating bodies.

8.3.3 Rule-Oriented Versus Power-Oriented Proposals: Summary

A classification of the proposals according to their fundamental orientation shows that both the trend towards more rule-orientation and towards more power-orientation and negotiation are represented in current negotiations.

Table 8.1: 'Power-Orientation' Versus 'Rule-orientation' in the Doha Round DSU Negotiations

Proposals strengthening 'rule-orientation'	Proposals strengthening 'power-orientation'
<ul style="list-style-type: none"> • Strengthened notification requirements for mutually acceptable solutions and written reports on the outcome of consultations; • Compliance reviews of mutually agreed solutions; • Reduced time-frames; • Creation of a professional permanent panel body (PPB); • Terms of appointment of the Appellate Body; • Regulating sequencing and implementation; • Prohibition of carousel retaliation; • Strengthening enforcement and increasing the cost of non-compliance; • Strengthening third party rights; • Increasing external transparency. 	<ul style="list-style-type: none"> • Automatic lapse or withdrawal of consultations/panel requests; • Calls for separate opinions by individual panellists/Appellate Body members; • Flexibility during appellate review: interim review and the suspension of the appellate procedures; • Deletion of findings from reports; • Partial adoption procedures; • Additional measures of special and differential treatment of developing countries; • Extension of time-frames by agreement of the parties; • Obliging adjudicating bodies to submit certain issues to the General Council for interpretation; • Providing 'additional guidance' to adjudicating bodies.

As the historic account in Chapter 2 has shown, the trend in the evolution of WTO dispute settlement has been towards more rule-orientation and towards a reduction of political elements, with the important exception of the anti-legalist period in the 1960s. Particularly since the Tokyo Round, rule-orientation has gained ground, not least under pressure of the United States which was always interested in a strong dispute settlement system to open up foreign markets. In the light of the more recent proposals, however, the future evolution seems less clear. A considerable number of proposals from both the presumably most important single member (ie the US) and a large number of developing countries reveal a certain degree of scepticism towards the rules-based, adjudication-oriented approach.

Whereas the newly-discovered US interest in flexibility and member control could be interpreted as a direct reflection of the currently defensive US position in dispute settlement, the reasons for the criticism from developing countries are less obvious at first sight. Normally, we would expect these mostly small and medium-sized economies to be particularly interested in a largely rule-oriented approach to the resolution of trade disputes as it shields them from undue pressure from powerful industrial nations. It appears, however, that the system does not work satisfactorily for developing countries.

A variety of reasons might explain their sense of dissatisfaction. First, developing countries are disappointed with the final outcome of the litigious process. As the Ecuadorian experience in the *Bananas* case has bluntly illustrated, the SCOO as the enforcement device of last resort is an ineffective instrument for small developing countries. Not only do they lack retaliatory power because of insufficient market size, but they also mainly harm their own development prospects by shutting out imports which are needed for their economic development. Secondly, participation in the increasingly rules-based system requires more fine-tuned legal reasoning and therefore costly legal assistance. Both the financial and human resources required to carry out litigation before the WTO are apparently a serious impediment for poorer countries. And thirdly, many developing countries face multiple political constraints that may prevent them from bringing disputes against a developed country. These may stem from linkages of multilateral trade policy with other policy areas. For instance, a developing country that depends on a developed country's Generalised System of Preferences (GSP) scheme or on its Official Development Assistance (ODA) programmes may decide not to bring an otherwise substantiated complaint against the latter.

To sum it up, the divergences in specific proposals also reflect a more fundamental controversy on the basic direction that the DSU should take, i.e. on whether it should further evolve towards a rules-based mechanism relying on legal process, or whether diplomacy and negotiations should be emphasised more strongly again. These fundamental divergences may be more difficult to bridge than the issue-specific controversies.

8.4 Systemic Problems of Renegotiating a System in Use

It has been said above that the dispute settlement mechanism has a 'constitutional' character as it includes the basic rules under which members settle disputes between each other which may arise under any of the covered agreements. The systemic importance of the DSU is reflected in the particular requirements for amendments to the DSU (see Section 8.1.1 above) that go beyond the requirements for amendments to other provisions.

According to Rawls, constitutional rules should always be agreed by actors in the 'original position' and behind a 'veil of ignorance'² in order to prevent self-serving choices. Transposed into the DSU review discussion, this means that the best approach from a systemic perspective would be if the discussions took place far away from any concrete dispute brought to Geneva. In the reality of trade policy, however, such a 'veil of ignorance' does obviously not exist. Members know their own and the other parties' vulnerable points fairly well after having applied the mechanism to more than 300 disputes in the past 10 years. In order properly to understand the DSU review and the slow, if any, progress it has made, it is therefore clearly not sufficient to focus narrowly on the discussions held in the DSB, let alone in its special negotiating session. Rather, the context should be considered as well.

This context may pose additional systemic difficulties in completing the DSU review, arising on three levels in particular: ongoing material disputes, specific procedural disputes and ongoing negotiations on material WTO rules.

² This is a constructivist technique developed by Rawls in his book 'A Theory of Justice' (1971) to show the underpinnings of what everyone could conceive as a just state. If actors conceived themselves as potential constructors of a mythical just future society but were ignorant of their racial, social, and economic position within that society, rational actors would be in an 'original position' from which they would be able to take optimal decisions on how a just society would look.

Parallel material disputes: First and foremost, the context of the DSU review consists of the 'material' disputes that are brought to the WTO on a continued basis, and in particular of the politically more controversial ones. It is here that several of the controversial issues in the debate have emerged, and where individual country positions have been shaped (eg sequencing and collective retaliation in *Bananas*, carousel retaliation in *Hormones*, and *amicus curiae* in *Shrimp-Turtle* etc; see Chapter 5 for details).

In addition to these past experiences, members' expectations with regard to looming disputes that may threaten to come up in the future will also have an influence on the negotiating positions.

Parallel procedural disputes: A second layer of this context consists of specific "procedural" disputes which focus on issues that, at the same time, are subject to DSU review negotiations. Examples are *US – Section 301*, *US – Certain EC Products*, or *US – Section 306*, where the EC tried to obtain rulings that would confirm its positions on sequencing or carousel retaliation, respectively (see Chapter 5 for details).

As long as such disputes are going on and both parties see chances to prevail, no party has an interest in prejudicing its position through a prior settlement on these issues.

Parallel negotiations on material WTO rules and on the substance of negotiations: In a third layer, ongoing discussions on the 'material' WTO rules and on the 'substance' of negotiations play a crucial role in governments' approach to the DSU. An illustrative example is the current 'two-part strategy' of the US administration to avoid 'bad rulings', ie to avoid more defeats in trade remedy cases. To this purpose, the US takes an active part in both the negotiations on the 'rules' (such as anti-dumping, safeguards, subsidies and countervailing measures) and on the DSU.³

Moreover, the extent to which new areas such as investment or competition could become subject to dispute settlement rules has a direct bearing on members' readiness to accept such new disciplines on the

³ See 'Commerce Outlines Two-Part Strategy to Fight Bad Rulings', in *Inside US Trade*, 3 January 2003; and 'Shirzad Says US Will Focus on Market Distortions in Rules Paper', in *Inside US Trade*, 4 October 2002.

one hand, and on their agenda with regard to a strengthening (or a weakening) of the dispute settlement mechanism on the other.⁴

Clearly, it would not make much sense to contemplate and evaluate the DSU review in isolation of developments on the three levels as outlined in the preceding sections. The situation is further complicated by the dynamic nature of these three levels: The entire context of the DSU review is not static, but it evolves with each new (or merely expected) development that modifies or threatens to modify positions taken on the DSU review, thereby making negotiations even more difficult.

A nice illustration is a position paper prepared by the Union of Industrial and Employers' Confederations of Europe (UNICE), the representative business organisation of corporate Europe and a main stakeholder in the system. On 1 October 1999, after two deadlines for the DSU had already lapsed and with the Seattle Ministerial only two months away, it issued a 'Preliminary UNICE position on WTO Dispute Settlement', holding explicitly that '(t)hese views might be reviewed/complemented as the discussions on this matter evolve at EC and WTO levels'.⁵

Negotiators seem to be aware of the particular difficulties that re-negotiating a system in use does entail. In order to avoid further complications through additional linkages, delegations were anxious not to link the DSU review negotiations to other negotiations, as one diplomat mentioned. Attempts by certain members to construe such linkages between the DSU review and other negotiating areas during the Doha-mandated negotiations were reportedly rejected by a large majority of WTO members.

8.5 General Sense of Satisfaction with the Current DSU

Despite the criticism that is occasionally voiced about the DSU, there seems to be a general sense of satisfaction with the system. As the Consultative Board (2004, p 56) holds with regard to the lack of success of the DSU review to date, '... an important underlying concern is, or

⁴ Indeed, such a debate has already begun in negotiations. With regard to investment, see, for instance, 'Proposals to Apply WTO Dispute System to Investment Pact Draw Fire', in *Inside US Trade*, 20 September 2002; with regard to competition, see, for instance, 'Informal Competition Group Focuses on Dispute Settlement', in *Inside US Trade*, 13 April 2001.

⁵ See UNICE (1999).

should be, to not ‘do any harm’ to the existing system since it has so many valuable attributes’.

Although there is some scope for improvements, there appears to be a well-founded fear that the required modifications (which are mostly technical) should not come at the expense of fundamental alterations of the system that are demanded by some members. This holds in particular for those changes to the DSU which would be motivated by particular interests of single countries, and which would not necessarily be in the overall interest of the system. In this context, it is understandable that delegations prefer to ignore negotiating mandates and let the DSU review negotiations drag on without a conclusion beyond fixed deadlines.

8.6 Limited Progress: Elements of a ‘DSU Review in Practice’

The pressure towards a fast conclusion of the DSU review is further reduced by the ‘DSU review in practice’ which has occurred in some instances, as the following examples show.

First, the sequencing problem has been overcome by the conclusion of bilateral agreements between disputing parties during the implementation stage. These agreements allow members to overcome the gaps and contradictions in the DSU text in a practical way. Whereas there has not yet been a consensus to adapt the DSU text to this evolving practice, members have adapted to the bilateral agreements and no longer appear to consider the sequencing issue as a pressing concern.⁶

Secondly, with regard to *amicus curiae* briefs, the Appellate Body has *de facto* developed a very pragmatic approach, despite initially strong opposition from mostly developing countries. On the one hand, the Appellate Body displays a general openness towards the acceptance of *amicus curiae* briefs. On the other hand, it does not appear to accord decisive weight to these submissions in its decisions – at least not explicitly. This approach gives adjudicating bodies a maximum of flexibility while it respects the concerns of members who are against such briefs.⁷

⁶ See Section 6.4.3.

⁷ See Section 7.3.

Thirdly, on a related matter, the Appellate Body has found a response to the concerns of many members who held that the acceptance of *amicus curiae* briefs gave NGOs an edge over members, as the latter had to cope with restrictive requirements on third country participation. It relaxed these requirements by adopting new working procedures in late 2002 which extended the possibility of third parties to attend oral hearings.⁸ Similarly, the Appellate Body only recently adopted new working procedures requiring more precision in notices of appeal, thus catering for a long standing concern of some members who had called for increased precision in notices of appeal but were unable to reach such a modification through the DSU review negotiations.⁹

As a further example, the establishment of an Advisory Centre on World Trade Law (ACWL) has remedied some of the resource constraints that developing countries face when litigating in the more sophisticated legal settings of the new dispute settlement system. By providing legal assistance to such countries, the centre serves to a certain degree as a substitute for other institutions such as a special fund or the reimbursement of litigation costs that have been called for by some developing countries during the DSU review negotiations.¹⁰

As these examples show, members and adjudicating bodies have managed to adapt the dispute settlement system to changing circumstances without changing one single provision of the DSU. Dispute settlement *practice* has thus brought some amount of DSU reform, without facing the problems of political renegotiations of the DSU text.

⁸ See Section 7.4.

⁹ See Section 6.3.2.

¹⁰ See Section 7.5.4.

9. POLICY RECOMMENDATIONS AND OUTLOOK

Having analysed the stumbling blocks in the DSU negotiations, this chapter derives some policy recommendations in order to move the DSU review forward and it evaluates the chances of an agreement.

9.1 Policy Recommendations: How to Advance the DSU Review

9.1.1 Trimmed Ambitions and a Focus on Technical Improvements

The controversies on specific issues and in particular the more fundamental conflict between rule-oriented and power-oriented proposals indicate the difficulties associated with the DSU review. In an attempt to include only those proposals into the compromise draft on which consensus seemed to be feasible, the Balás compromise text already left out many major issues such as, for instance, the permanent panel body, increased external transparency and the partial adoption procedure.

Given these controversies along with the consensus requirement for any amendment to the DSU, it is difficult to perceive how a review that stretches beyond rather technical improvements (some of which are already established DSU practice) should materialise. Given the fact that the DSU works generally well, any effort to move the DSU review should be limited to the less controversial aspects. Of course, this could make it difficult for more ambitious players who would have to return to their capitals with nothing in their hands. This is, however, a difficulty inherent to the 'early harvest' idea which isolates the DSU review from remaining negotiations and which will be dealt with in Section 9.1.5.

9.1.2 Improved Integration of Developing Countries

Roughly three-quarters of the WTO's 148 member states are developing and least developed countries. Despite their importance in terms of membership, developing countries have not been frequent participants in dispute settlement cases. Empirical studies even suggest that the new DSU could make it harder for developing countries to participate in dispute settlement (see Section 4.2.3).

If this large majority of members is to be truly integrated into the mechanism, and if they are to support any DSU reform effort (which, it should be remembered, can only be arrived at by consensus), taking developing country interests into consideration is of particular importance. The major problems of developing countries, many of which do not even have a mission of their own in Geneva, are the human and financial resource constraints. Such resources are a precondition to high-levelled litigation. The improved legal quality of the dispute settlement reports under the new DSU has often been hailed as a major contribution of the Uruguay Round and as a sign of the DSU's increasing rule-orientation. At the same time, however, this evolution has increased the requirements with regard to the quality of legal reasoning. Developing countries often do not have sufficient means to participate in these elaborate proceedings.

Similar to legal aid which is available in national legal systems to persons without adequate resources, developed countries and the WTO should be ready to support developing countries. The establishment of an Advisory Center on World Trade Law (ACWL) is an important step in this direction. Further ways to contribute to the resources of developing countries wishing to participate in dispute settlement proceedings could be explored, including the establishment of a fund that developing countries could tap in order to bring forth their complaints or to defend their interests in a case filed against them. The terms of usage should, however, be defined in a way that does not lead to abuse (such as the filing of politically motivated 'nuisance suits' at the expense of other countries).

An improved integration of developing countries into dispute settlement practice is of key importance – both as a matter of fairness, and as an instrument to secure their support for and sense of ownership in the system.

9.1.3 Rebalancing Adjudication and Political Decision-making

9.1.3.1 *Imbalance Between Adjudication and Political Decision-making as a Problem*

It has been said several times that the dispute settlement system has gradually moved from barely codified practices relying heavily on diplomatic negotiations to an increasingly codified litigation mechanism with a relatively strong emphasis on the rule of law (see Chapter 2 for a detailed account of this evolution).

More recently, some observers have become concerned that the relative success and well-functioning of the dispute settlement system with its adjudicative bodies on the one hand, and the weakness of the consensus-based political decision-making in the WTO on the other, is leading to a serious imbalance. Automaticity and the allocation of full agenda control with the complainant government have made WTO dispute settlement become the forum of choice for governments to pursue their agenda, including on sensitive issues. Judges have to decide the cases which are brought before them, and they cannot refuse rulings just because they are politically sensitive. The judge's job becomes even more delicate, where the political decision-making process is slow or practically blocked, which is the case in the WTO.¹ Although the WTO agreement includes rules for the adoption of interpretations or the amendment of the agreements which would enable members to exercise some control, the high hurdles that are built into these rules deprive them *de facto* of the possibility of correcting rulings.

The consequence of such 'wrong cases' are heavily-criticised rulings and allegations that panel or Appellate Body reports add to or diminish the rights or obligations of members, or that these organs exceed their authority. Although such criticism – which has partly translated into some of the proposals discussed in this study² – appears to be largely unfounded,³ it is a symptom of increasing tensions in the system. The fundamental divergence between rule-oriented and power-oriented proposals is one aspect of the problem which should be remedied in order to move the DSU review.

Two generic options are available to remedy the current situation of imbalance and to bring legal and political decision-making back into tune again. One option is to pull the teeth of the adjudicating mechanism and to make dispute settlement again subject to increased political control. The second option is to enhance the political decision-making process and thus make it more effective. Whereas most observers would likely favour the second option, the matter is not so straightforward.

9.1.3.2 Option 1: Weakening the Adjudication System

Barfield (2001), a key proponent for more political control of WTO dispute settlement,⁴ suggests that the WTO should adopt a less rigid,

¹ See Ehlermann (2002).

² See Section 7.7.

³ See, for instance, the reports by GAO.

⁴ See Barfield (2002) and Barfield (2001). An earlier contribution to the discussion is Bello (1996).

more flexible dispute settlement system. He also suggests that in order to achieve continued democratic legitimacy, the WTO should remain a government-to-government organisation in which governments take decisions to the WTO after having reconciled the conflicting interests in the domestic political process. With regard to dispute settlement, his recommendations explicitly follow the goal of moving the WTO dispute settlement system partially back into the direction of the original diplomatic model for dispute settlement, and away from the judicial model introduced by DSU.

His proposals for 'constitutional reform' have four elements. First, he recommends the introduction of a 'safety valve'. In the case of highly-politicised disputes that threaten to damage the WTO, or where there are no established legislative rules or where treaty language masks disagreement between members, the Director-General or a special standing committee of the DSB would step in and direct the disputing members to settle their differences through bilateral negotiations, mediation, or arbitration by an outside party. Secondly, he suggests the reintroduction of a blocking mechanism, allowing one-third of DSB members representing one-fourth of trade between WTO members to block the adoption of a panel or Appellate Body report which, as a consequence, would not become binding WTO law. Thirdly, he suggests abolishing retaliation as a remedy and replacing it by monetary fines or trade compensation. Fourthly, he recommends that the US continues to deny direct effect to WTO provisions. In addition, he proposes improving transparency, a restrictive stance towards *amicus* briefs, a greater diversity of panellists beyond trade experts, public hearings, and more dialogue with 'outside interest groups', as well as the establishment of an 'Eminent Persons Group' similar to the Leutwiler Group in the 1980s.⁵ Domestically, he calls for increased congressional oversight, through a bipartisan commission and a joint committee, as a means of increasing the democratic accountability and legitimacy of the WTO.

⁵ One will note that such a group – the Consultative Board to the Director-General Supachai Panitchpakdi – has, in the meantime, been established. In its report entitled 'The Future of the WTO', however, the Consultative Board (2004, p 80) does not recommend to re-politicise WTO dispute settlement. Rather to the contrary, it argues that: '... any measures or ideas for reform that would create a sort of "diplomatic veto" or the opportunity for specific disputants to "nullify" or change aspects of the final adopted report should be strongly resisted.'

9.1.3.3 Option 2: Strengthening Political Decision-making at the WTO

Other authors, however, vehemently oppose any effort to weaken the adjudicating system and argue in favour of focusing reform efforts on improved political decision-making.⁶

Traditionally, both in the former GATT and now in the WTO, political decision-making has been a cumbersome process. The practice in GATT was to avoid voting, and that preference has also found entry into the WTO agreement where Article IX on decision-making explicitly states in its first sentence that '(t)he WTO shall continue the practice of decision-making by consensus followed under GATT 1947'. Where consensus cannot be reached, Article IX:1 WTO agreement provides for ordinary decisions that the majority of votes cast is sufficient. The authority for *decisions* rests with the Ministerial Conference or the General Council. In both bodies, each member has one vote.

The Ministerial Conference and the General Council also have the exclusive authority for the adoption of *interpretations*. The adoption of interpretations requires an affirmative vote of a three-fourths majority of all WTO members (ie not only of members present) according to Article IX:2 WTO agreement. Furthermore, the Ministerial Conference has the right to *waive* an obligation imposed on a member by the agreements – a technique which has been used in the past to accommodate political realities to some extent. According to Article IX:3 WTO agreement, such waivers, unless granted by consensus, require a three-fourths majority of all the members.

For *amendments to the text*, Article X GATT prescribes a rather complex and cumbersome procedure: The authority for amendments rests with the Ministerial Conference. Usually, acceptance of an amendment shall be decided by consensus within 90 days after the proposal has been tabled. If consensus is reached, the proposed amendment is submitted to Members for acceptance. Members shall then deposit an instrument of acceptance with the WTO within the period of acceptance specified by the Ministerial Conference. If no consensus is reached, the Ministerial Conference shall decide by a two-thirds majority of the members on whether to submit the amendment to the members for acceptance. In practice, interpretations of an agreement and amendments occur only

⁶ See Ehlermann (2003) (including the comment by McRae (2003)), Ehlermann (2002), p 635ff, Ehlermann (2002a), Jackson (2002), p 111, Steger (2002a) and Cottier and Takenoshita (2003).

rarely. No single amendment to an agreement has been decided since the conclusion of the Uruguay Round.

Reform suggestions to strengthen political decision-making in the WTO have already been made. Schott and Watal (2000) propose the establishment of a small, informal steering committee with roughly 20 seats, distributed according to both the value of foreign trade and the goal of achieving global geographic representation. While each of the larger traders would have one seat, smaller nations would pool their resources and each of these groups of countries would be represented by one country. Actually, this approach would be similar to the composition of the boards governing the IMF and the World Bank.⁷ Such a structure would still allow the continuation of decision-making by consensus, as the proponents explicitly abstain from suggesting proportional or weighted voting. The main strength of the proposal lies accordingly in facilitating the preparation of decisions and the search for a consensus.

Focusing more narrowly on the problem of 'legislative response' to decisions by adjudicating bodies, Cottier and Takenoshita (2003) base their suggestions on the diagnosis that both the amendment and the interpretation of provisions in the multilateral trade agreements are virtually impossible. Members whose interpretation prevailed in a panel or Appellate Body proceeding will usually not agree to an interpretation of the losing party. Therefore, consensus is illusory, and a three-fourths majority (if voting ever happens) is extremely difficult to achieve. Similarly, attempts to amend the agreement will likely fail, unless the negotiations take place in a wider context (eg in a trade round) where the points at issue can be traded. This, however, is a lengthy process. The authors wish to facilitate the conditions for legislative response, not least in order to liberate the Appellate Body from the extreme judicial restraint and to allow it to make 'forward-looking, purposive interpretations and clarifications (...)'. They argue that: '(i)deally, the fragmented and often incomplete law of the WTO would rather call for a larger scope of interpretation in order to achieve full coherence with the system. Yet, the lack of possibilities of legislative response and thus a true dialogue between the judicial and the political branches of the WTO renders this politically difficult.'⁸ In order to counter the problems, the authors suggest a transition towards voting. However, current membership structures would not allow voting along the lines of formula 'one state = one vote' as the 24 industrial member countries,

⁷ See Schott and Watal (2000).

⁸ See Cottier and Takenoshita (2003), pp 175ff.

corresponding to 79 per cent of GDP, would only have 16.8 per cent of the votes. According to the authors, this explains why decision-making remains reserved to consensus as voting could drive developed countries out of the WTO. Based on a calculation of voting weights and related power assessments, the authors propose a weighted voting model that uses trade shares, GDP, market openness, population variables and/or basic votes.

The efforts to loosen the consensus requirements are understandable in the light of the immobility of the political decision-making process. However, we do not think that a transition to voting which would remove the de-facto veto position of important Members such as the US or the EC is a realistic way forward for the WTO. Sovereignty concerns and political reality considerations appear to be the key motivation behind the consensus practice. It stems from the insight that even the strongest majority vote would not succeed in forcing an issue upon major members, because 'they will simply not accept direction of their foreign trade policies by majority votes of international organizations', as Hudec notes: 'GATT consensus decision making is often contrasted to majority voting in United Nations organizations, particularly the United Nations Conference on Trade and Development (UNCTAD), which is in many ways the UN twin of GATT. The records of UNCTAD are replete with resolutions voted 100–10. Such acts do have a role in establishing a long-term normative framework for policy, but no one ever pretends they can accomplish actual policy changes.'⁹

9.1.3.4 *An Economic Perspective:
Taking Globalisation into Account*

When evaluating the two generic options, we should take a step back and consider the economic context of the WTO dispute settlement system.

For the time being and in extrapolating past experience, we may assume that the process of globalisation and the international fragmentation of sourcing, production, marketing and distribution will continue in coming decades, as nations wish to reap the benefits of international specialisation and economies of scale. First, economic fundamentals such as patterns of comparative advantage, differential factor endowments, or economies of scale will drive globalisation forward. Both small and large firms will continue to rely on international markets. Producers of

⁹ See Hudec (1993), p 8.

goods for mass markets will further the concentration of production due to cost considerations, and even smaller producers of specialised niche products will need a global market in order to serve their narrow segments and in order to recover the increasing costs of technological research and development.

Secondly, technological fundamentals such as ever-improving information and communications technology as well as productivity gains in transportation technology – along with decreasing costs – will likely continue to drive this globalisation process forward and foster international transactions. Thirdly, regulatory activity in the past decades has so far been conducive to the process of globalisation. Not only does it include the WTO level, but it includes an increasing number of comprehensive bilateral or regional trade agreements, and instruments in non-trade areas on various levels (eg bilateral investment treaties, double taxation agreements, unilateral easing of capital controls etc).

Fourthly, more sophisticated forms of international economic activity than classical goods trade (which is still the focus of the current WTO system) will assume increasing importance. These include trade in services (including electronic commerce), licensing agreements (highlighting the importance of intellectual property rights) and foreign direct investment (establishment of subsidiaries, mergers and acquisitions). These activities may require improved rules, as is the case in services and intellectual property protection, or the establishment of new rules, for instance on investment and competition.

Fifthly, new important markets are emerging in the world economy: Traders such as China, India and Brazil are growing in importance. The current 'triad' or 'quad' structure (US, the EC, Japan and Canada) of world economic relations is likely to be replaced by a more multipolar structure. Unless all these economic relations were covered by preferential trade agreements (their number has recently increased sharply¹⁰), the WTO rules will continue to play an important role for providing predictability to traders and investors.

In sum, there will likely be more international transactions and more economic interdependence in the future, presumably in a more multipolar setting. By and large, this evolution is at odds with attempts to correct the imbalance between effective adjudication and ineffective

¹⁰ See the Consultative Board (2004, Chapter II) for a critical comment on the 'spaghetti bowl' of trade preferences.

political decision-making by reducing the predictability of market access conditions through a re-politicisation of international trade rules and the dispute settlement system.

9.1.3.5 *Correcting the Imbalance: An Incremental Strategy*

To conclude, correcting the current imbalance between the effective adjudication system and the ineffective political decision-making system is both an important and a difficult issue. If this imbalance remains without correction, an alienation of members from the adjudicative system is possible, ultimately leading to a situation of 'anti-legalism' similar to the one already experienced in the 1960s. Such alienation should be avoided, given the weak legal options for enforcement of public international law on the one hand and the importance of 'soft factors' for the system (reputation costs, allegiance to the system, and normative pressures; see Chapters 2 and 4 for details) on the other.

None of the two generic options discussed to remedy the situation – weakening adjudication or strengthening political decision-making – holds great promise. Weakening adjudication is not an attractive option as members would have to forego the achievements which the new DSU brought for a rules-based international trading system. It would also be at odds with globalisation and its increasing reliance on international transactions.

Alternatively, improving political decision-making is a difficult task. Any attempt to make political decision-making at the WTO more effective would necessarily imply that the sacred consensus principle would have to be replaced by some form of majority voting which could drive important members out of the system. Sovereignty concerns similar to those that are currently voiced against allegedly overreaching dispute settlement could ultimately be raised against undesired outcomes of voting procedures as they could force results upon countries which the latter cannot or do not want to accept. While it is correct that the WTO could be (and actually is) 'hamstrung by inaction derived from its "consensus" culture'¹¹, it has at least managed to keep powerful players interested in the system.

For the time being, only incremental steps by a variety of actors do therefore seem to be feasible and desirable to remedy the situation. Such a gradual approach could include the following elements:

¹¹ See Jackson (2000), p 383.

- Members, particularly the larger ones, should assume their systemic responsibility by exercising restraint in bringing politically sensitive cases to adjudication.
- Adjudicating bodies might prefer to continue their current approach to dispute settlement, based on judicial restraint and the avoidance of ‘sweeping statements’ which might provoke strong political reactions from members without yielding any benefit to the overall stability of the system.
- Selective political elements could be built into the dispute settlement procedure without altering the basic architecture of the DSU. One option could be to allow the DSB to decide by consensus not to adopt specific findings or the basic rationale behind a finding in a report.
- Work should be intensified to explore alternative political decision-making mechanisms. In the recent report of the Consultative Board (2004, Chapters VII–IX), some interesting proposals have been made in this respect.

9.1.4 Inclusion of Transition Periods

As has been pointed out in Section 8.4 above, negotiations on dispute settlement are also being made more difficult by the fact that they basically deal with a system currently in use, where any proposal is inevitably judged in the light of current and expected disputes. The use of generous transition periods in a prospective agreement could, however, mitigate some of the problems.

- Long transition periods would ensure that none of the more contentious modifications would apply to any case (or follow-up case) that is currently undergoing litigation. For instance, rules on transition periods could not only define specific dates of entry into force for each modification that is suggested, but they could also provide an exclusion for all complaints filed after that date under matters that are already being processed by the system (eg compliance reviews etc). In short, the rationale should be that none of the new rules would apply to any currently known or expected dispute. Moreover, members should have sufficient time to file new disputes before the new rules would come into effect.

- Transition periods could also lower the inhibition threshold to agree on new rules as the costs of a potentially adverse amendment could be discounted. It is often stated that political actors follow short-term orientations in line with electoral cycles. Accordingly, they have high discount rates. The establishment of transition periods is therefore a popular means to help negotiators agree on rules which might entail some political cost in the future. The same technique could be used in the DSU reform process.

Surprisingly, whereas transition periods were an issue in the 1998/1999 DSU review discussions, they do not appear to play a dominant role in the discussions under the Doha mandate. Similarly, they have not been integrated into the Balás text.¹² Their explicit consideration might help negotiators reach an agreement.

9.1.5 Abandoning the Idea of an 'Early Harvest'

In all DSU review efforts since 1998, including under the Doha mandate, the DSU review was conceived as a separate undertaking in isolation of a larger round. As has been pointed out in Section 8.1 above, this approach has certain advantages but it also has disadvantages when it comes to striking a deal. Moreover, the relationship between the DSU review negotiations and material disputes, procedural disputes, ongoing negotiations and the unpredictability of new developments (particularly new disputes) stands in the way of an agreement, as has been pointed out in Section 8.4 above.

Both findings raise the question whether it might not be better to integrate the DSU review negotiations into a broader negotiating framework. One may argue, of course, that the idea of an early harvest on the DSU (as mandated by the Doha Ministerial Declaration) could have been fostered by the experience in the Uruguay Round, where members were indeed able to agree on improvements to the dispute settlement mechanism prior to the conclusion of the entire Round (see Section 2.2.2.7). Today, however, the situation differs in at least two regards:

- Unlike in the Uruguay Round, there is currently no unifying force behind members such as the threat of more aggressive US Section 301 procedures which made members agree to the new procedures at the time.

¹² The issue of transition provisions was raised in a press report, 'WTO Members Fail on DSU Deal, Further Negotiations After Cancun', in *Inside US Trade*, 30 May 2003.

- Members are less like-minded on the direction which the DSU should pursue. Moreover, the heterogeneity of the WTO community has further increased since the early 1990s, due to the admission of many new members.
- Today's DSU presumably carries a higher burden of conflict-laden cases compared to its predecessor under the GATT, because 'wrong cases' are no longer filtered under the 'quasi-automatic' proceedings as they had been under the old rules which had allowed blocking.

Integrating the DSU review into a broader package might also have a positive impact on the outcome of negotiations: Negotiators, particularly the more ambitious ones, will be better able to settle on less far-reaching changes to the DSU if they can justify their compromises domestically with advantages obtained in other areas and agreements. By contrast, if the DSU negotiations continue in isolation, some parties (in particular the US but also the EC and certain developing countries) could feel obliged to insist on more 'radical' changes that could be detrimental to the DSU. While the current strategy of the negotiators to avoid linkages with other negotiating topics is justifiable on the factual level, the political nexus between the DSU negotiations and negotiations in other areas should not be overlooked. In the terms of negotiations technique, the negotiations would change from a distributive towards a more integrative approach.¹³

Nevertheless, a final word of caution must be said. Striking package deals is not an easy task either. It may complicate negotiations, and if the ambitions that are brought into the package are too broad (such as was the case with the Singapore issues in Cancún), it does not facilitate the task either. Speaking about a 'broader package' does therefore not necessarily mean that it should contain a multitude of issues such as investment or competition. A 'traditional' negotiating round with agricultural and non-agricultural market access as well as improved commitments on services could suffice.¹⁴

9.2 Outlook: The Chances of an Agreement

Before we conclude this study, let us consider the chances of an agreement on the DSU review.

¹³ For an overview on negotiating approaches and techniques, see Saner (1997).

¹⁴ The contributions of Hauser (2003) and Hauser (2002) advocate a small package of negotiations.

In Chapter 8, we have identified some major reasons for the failure to conclude the DSU review so far. Some policy recommendations have been derived from this analysis in the preceding Section 9.1. Against this background, the outlook for a conclusion of the DSU review is determined by: (i) whether and how the parameters analysed in Chapter 8 will change; and (ii) whether and how the recommendations set out in the preceding Section 9.1 can be implemented.

With regard to the stumbling blocks on the way to a successful conclusion of the DSU review negotiations, not much will likely change in the near future. The consensus requirement (see Section 8.1) for any change to the DSU is here to stay. As a conciliation of the different positions on controversial issues and, in particular, on the fundamental orientation of the DSU will not be easily achieved, any fast conclusion of the DSU review outside a larger negotiating package (where deals and the exchange of concessions are possible across different negotiating areas) does not appear to be feasible. This impression is reinforced by the general feeling of satisfaction with the functioning of the DSU (despite its flaws) and a lack of sense of urgency with regard to the conclusion of the negotiations. The latter is also due to the progress which has been achieved on practical issues through elements of the 'DSU review in practice'.

The ideal setting for a conclusion of the DSU review negotiations increasingly appears to be the conclusion of the Doha Round (or any other major negotiating round). The conclusion of such a round could also include a political settlement of controversial trade disputes between major trade powers, in particular the many trade disputes between the US and the EC. As some of these disputes are very delicate, a political settlement would also take pressure off the dispute settlement mechanism and reduce the imbalance between legal and political decision-making at the WTO. Even though the outcome of such a political package deal would not necessarily be fully in line with material provisions of WTO law, it could be beneficial to the overall stability of the WTO system. A further advantage of concluding the DSU review negotiations in the context of a larger trade deal is that a considerable portion of the uncertainty which is inherent to the context of the DSU review negotiations (see Section 8.4) would be removed.

To conclude, the outlook for a conclusion of the DSU review seems to be linked to the chances to successfully conclude the Doha Round. Realistically, such a conclusion would have to occur prior to the expiry of the Trade Promotion Authority (TPA) of US President Bush, ie before

1 July 2007. An evaluation of the chances for the conclusion of the Doha Round would be outside the scope of this study. Nevertheless, the very limited progress that has been achieved in these negotiations so far does not hold much promise. Similarly, the diversion of negotiating resources and attention away from the multilateral scene to regional trade agreements is working against the Doha Round as well. The Hong Kong Ministerial Conference, planned for late 2005, and the likely continuation of the negotiations into the year 2006 will bring more clarity on these issues.

10. CONCLUSIONS

The Dispute Settlement Understanding that entered into force in 1995 has undergone several review efforts since 1998. The most substantial effort so far has been undertaken under the Doha mandate in 2002 and 2003. Proposals on virtually all provisions of the DSU have been received, including suggestions on each stage of the process and on most horizontal issues. So far, all attempts to review and reform the system have failed as members were unable to reach consensus on a package of modifications.

While the evolving dispute settlement practice under the DSU has revealed a certain number of flaws in the system, the mechanism has generally worked well. Despite a recent slowdown in dispute settlement activity, Members have used the DSU intensely, and the DSB still appears to be the WTO's most active body with the most efficient decision-making process. Despite this generally positive assessment, the imbalance between the relatively effective quasi-judicial decision-making in dispute settlement and the largely ineffective political decision-making between negotiating rounds has recently become a major concern.

As this study has shown, several factors are responsible for members' inability to conclude the DSU review. Among these is the consensus requirement for any amendment to the DSU which sets high hurdles that are difficult to overcome. In addition, members are in disagreement on several crucial issues and on the more fundamental orientation of the system, i.e. whether it should develop towards more rule-orientation or whether the clock should be turned back towards more power-orientation. Moreover, there are the systemic hurdles of renegotiating a system in use. Whereas amendments to the text are therefore difficult to achieve, the sense of urgency to conclude the negotiations has been quite low: There is a general feeling of satisfaction with the DSU, and there is a concern that a poorly-founded set of modifications to the DSU could do harm to the system while bringing only modest benefits. Moreover, some practical reforms could be achieved without amending the DSU text. This 'DSU review in practice' which includes practical actions both by Members and by the adjudicating bodies, has brought some progress in areas such as sequencing, *amicus curiae* briefs, third party rights, the clarity of the notice of appeal, and legal assistance to developing countries. Such elements of evolving practice are likely candidates for inclusion into a new or modified DSU text at a later date.

Regarding the outlook for the DSU review negotiations, an agreement appears to be feasible as long as several conditions are fulfilled. First, members may want to focus on a technical package that avoids, for the time being, any of the more controversial issues, particularly those implying fundamental choices towards either more rule-orientation or more power-orientation. Secondly, the concerns of the large majority of developing country Members should be better taken into account. In particular, their access to the expensive judicialised dispute settlement mechanism should be further improved in order to secure their support for the system. Thirdly, and on a more fundamental level, the current imbalance between the strong adjudication mechanism on the one hand and the weak political decision-making mechanisms on the other needs to be remedied in order to reduce tensions in the system. From an economic point of view, a major repoliticisation of dispute settlement that would reduce the predictability of the multilateral trading system is not an attractive solution. Rather, various incremental steps from the different actors involved could help to remedy the situation. Fourthly, the explicit integration of transition periods into any amendment could increase its acceptance. Finally, the inclusion of the DSU review into the larger Doha Round negotiation package might ease cross-agreement compromise and enhance the acceptability of a DSU review deal that does not contain the more ambitious proposals. Embedding the DSU review into a package deal would be particularly beneficial if that deal also included a settlement of major current trade disputes.

Whereas the chances of coming to an agreement in the short run (ie before the conclusion of the Doha Round) are rather dim, an agreement on the DSU could still be feasible in the context of the conclusion of the Doha Round which should occur before the expiry of the US President's Trade Promotion Authority on 1 July 2007.

A failure to conclude the DSU review exercise would probably not pose a major threat to the DSU and to the WTO system as a whole. On the one hand, there appears to be a general sense of satisfaction with the functioning of the system – despite the flaws that have been identified. As dispute settlement *practice* has thus brought some amount of DSU reform without facing the problems of political renegotiations of the DSU text, the system seems to build once more on its historic strength, which is to evolve with a certain degree of flexibility and in a pragmatic spirit, and to deal with new issues as they arise. Such adaptations clearly make a completion of the DSU review less urgent.

Part IV

ANNEX

11. TABULAR OVERVIEW OF COUNTRY PROPOSALS UNDER THE DOHA-MANDATED DSU REVIEW

Notes:

- ‘**Doc No**’ designates the document number that was given to the proposal and under which the text can be retrieved in the WTO’s document dissemination facility (http://docsonline.wto.org/gen_home.asp?language=1&_=1). Documents not included in this overview (eg TN/DS/W/4) do not constitute negotiating proposals but are limited to information on the agenda of meetings.
- ‘**Type**’ designates whether a proposal is mainly conceptual (C) or textual (T) in nature.
- ‘**Issues Covered**’ refers to the issues that are covered in a proposal: C = Consultations; P = panel stage; A = appellate review; I = implementation; Tr = transparency; AC = *Amicus Curiae* briefs; 3P = Third party rights; SD = special and differential treatment of developing countries; Ot = other issues. Brackets indicate instances where the effect of a proposal on a stage/horizontal issue is rather indirect.
- ‘**Concrete Proposals**’ gives an overview of the contents of a proposal. The numbering of issues follows the original numbering in the respective documents so as to facilitate readers’ access to specific issues.
- ‘**Discussed in**’ refers to the minutes of the meeting where the proposals were discussed.

Doc No	Type	Sponsors	Issues Covered										Concrete Proposals	Discussed in:	
			C	P	A	I	Tr	AC	3P	SD	Ot				
TN/DS/W/1	C, T	EC	x	x	x	x	x	x	x	x				Proposal for (I) A permanent panel body; (II) A Resolving the sequencing issue (completion of Article 21.5 Procedure as prerequisite for invoking Article 22); B) Making compensation a more attractive alternative to retaliation; C) Exempting goods en route from retaliation; D) Prohibiting carousel retaliation; E.) Termination of retaliation; (III) Call for limited transparency; (IV) Regulation of <i>amicus curiae</i> submissions while maintaining the two-staged approach developed by the Appellate Body; (V) Further proposals (including a procedure for the withdrawal of consultation requests, ensuring compliance with mutually agreed solutions, an explicit time-frame for third party interest notification, conversion of Appellate Body mandate into full-time appointment, introducing remand authority for the Appellate Body, new start for time-frame for arbitration under Article 21.3 (starting from the date of the appointment of the arbitrator), new starting period for the arbitration on the suspension of concessions, development of working procedures for panels). Attached is a proposal for amendments which largely follows the lines of the 'Suzuki Text' (WT/MIN(99)/8); see below.	TN/DS/M/1 (indirectly also TN/DS/M/2 (No 39-46) and TN/DS/M/3 (No 52-59)

Doc No	Type	Sponsors	Issues Covered										Concrete Proposals	Discussed in	
			C	P	A	I	Tr	AC	3P	SD	Ot				
Attachment to TN/DS/W/1 (partly based on WT/MIN(99)/8	T	EC	x	x	x	x	x	x	x	x	x	x	x	Attachment to the EC proposal, building in parts on the Suzuki Text as contained in WT/MIN(99)/8: 1. Possibility to extend any time period in the DSU by mutual agreement of the parties and providing special attention to developing country interests; 2. Reduction of the time-frame for consultations from 60 to 30 days; 3. Making S&D treatment in consultations mandatory; 4. Introduction of a provision allowing the withdrawal of a consultations request at any time, and the automatic lapse of the consultations request if no panel request is made within 18 months; 5. Establishment of a panel at the first meeting; 6. Withdrawal of the panel request by the complainant any time prior to the final report; 7. Creation of a permanent panel body (detailed rules); 8. 10-day time limit for the notification of third party interest; 9. Third party access to information and meetings; 10. Inclusion of a comprehensive Art. 13bis on amicus curiae submissions; 11. and 12. Modifications to Article 15 on the interim review; 13. The General Council shall have the authority to modify the number of Appellate Body members; 14. Parties may agree that a hearing before the Appellate Body shall be open to the public; 15. and 16. Introduction of a remand procedure; 17. Provision of non-confidential summaries of information contained in submissions; 18. Making S&D mandatory at the implementation stage; 19. Modified time-frames for the determination of the reasonable period of time for implementation (RPT); 20. Extension of RPT rules to the SCM agreement; 21. Consultations on implementation during the RPT; 22., 23., 24., 25. Implementation related issues such as compliance panels, sequencing, arbitration, retaliation (Article 21.5/Article 21bis, Article 22); 27. Goods en route exemption; 28. Termination of retaliation; 29. Examination of mutually agreed solutions; 30. Extension of the coverage of Article 21bis to arbitration awards; 31. Modification of para 1 (proposal says para 2 [sic!]) of the Working Procedures; 32. Opening of the panel procedure to the public upon agreement of the parties; 33. Provision of non-confidential summaries of information contained in submissions; 34. Division of first substantive meeting of a panel into a first part (open to the public) and a second part (closed); third parties to indicate in which part they want to present their views; 35. Contents of panel report; 36 and 37. Changes to time-frames in panel working procedures.	

Doc No	Type	Sponsors	Issues Covered										Concrete Proposals	Discussed in	
			C	P	A	I	Tr	AC	3P	SD	Ot				
TN/DS/W/2	C	Thailand			x									Increasing the number of Appellate Body members by at least two to four persons; (see also WT/MIN(01)/W/2 and Corr.1, TN/DS/W/30 and TN/DS/W/60).	TN/DS/M/2 (No 1–8)
TN/DS/W/3	C, T	Philippines Thailand				x								Ensuring strict equivalence of retaliation to the level of nullification and impairment, including a prohibition of carousel retaliation.	TN/DS/M/2 (No 9–18)
TN/DS/W/5	C	India		x		x	x	x						39 questions on the EC Proposal as contained in TN/DS/W/1, covering the proposals for a permanent panel body, implementation issues (in particular on making compensation more attractive), transparency, and <i>amicus curiae</i> submissions (answers in TN/DS/W/7).	TN/DS/M/2 (No 39–46), TN/DS/M/3 (No 52–59)
TN/DS/W/7	C	EC		x		x	x	x						The EU's answers to India's questions, as contained in TN/DS/W/5.	TN/DS/M/2 (No 39–46), TN/DS/M/3 (No 52–59)
TN/DS/W/8	C	Australia		x		x						x	x	Five proposals, relating to a) Time-frames for dispute settlement on safeguards (including under the ATC); b) Respecting non-party rights in compensation arrangements; c) Ensuring consistence between retaliatory measures actually taken and the level of retaliation authorised by the DSB (inter alia by not modifying product lists); d) Time-savings through faster establishment of a panel and an earlier first written submission; e) Provision of an understanding on sequencing that may be adapted case-by-case.	TN/DS/M/3 (No 3–24)

Doc No	Type	Sponsors	Issues Covered										Concrete Proposals	Discussed in	
			C	P	A	I	Tr	AC	3P	SD	Ot				
TN/DS/W/9	C	Ecuador				x						x		Conceptual proposal encouraging compliance. It aims at making compensation more viable by 1. Broadening the scope of arbitration on RPT by including also the level of nullification and impairment as a basis for negotiations on compensation, 2. Subsequent proposition of a compensation package by the defendant in accordance with the level already determined, and 3. Provision of either voluntary compensation within 20 days after expiry of the RPT or after a compliance-panel has confirmed non-compliance. Compensation could consist of trade benefits or other forms not affecting other members. For developing countries, the MFN clause could be waived temporarily in order to allow compensation. The proposal also wants to make retaliation better usable by developing countries. To this purpose, the impact on the developing country economy should also be considered in the calculation of the admissible level of retaliatory measures which should be at least twice the level of nullification or impairment. Instead of retaliatory measures, compensation could be made mandatory. It could consist of a cash payment equivalent to the level of nullification or impairment. If the defendant continues its inconsistent measures for more than six months after compulsory compensation is paid, more extreme measures such as the suspension of the right of the defendant to invoke the DSU or large-scale SCOO should be envisaged.	TN/DS/M/3 (No 25-38)
TN/DS/W/11	C	Korea				x								Proposal for A) Shorter and improved procedures for the determination of the reasonable period of time; B) Mandating compliance panels with the determination of the level of nullification or impairment to facilitate further procedures.	TN/DS/M/3 (No 39-47)
TN/DS/W/12 and TN/DS/W/12/Rev 1	C, T	Costa Rica	(x)	(x)	(x)	(x)						x		Textual proposal, aimed at strengthening third party rights during consultations (Article 4), the panel stage (Articles 10, 12, and 15), appellate review (Article 17), and implementation (Article 21.5), also including communications with the panel or Appellate Body (Article 18) and modified working procedures (Appendix 3).	TN/DS/M/3 (No 50-51); TN/DS/M/4 (No 1-25)

Doc No	Type	Sponsors	Issues Covered										Concrete Proposals	Discussed in	
			C	P	A	I	Tr	AC	3P	SD	Ot				
TN/DS/W/13	C	United States		(x)	(x)	(x)	x	(x)						Conceptual proposal with (I) An introduction, and calling for (II) An opening of panel, Appellate Body and arbitration meetings (except those portions involving confidential information) to public observers; (III) Timely access to submissions; (IV) Timely access to final reports once they are issued to parties. The US also proposes (V) To consider the proposition of guideline procedures for handling amicus curiae briefs. Textual Proposal included in TN/DS/W/46.	TN/DS/M/4 (No 26–55)
TN/DS/W/15	C	African Group (submitted by Kenya)		x	x	x	x	x	x	x	x	x	x	Conceptual Proposal, consisting of 1./2. An introduction, and calling for 3. The establishment of a fund to be used by developing countries that wish to use dispute settlement; 4. The establishment of remedies for injury suffered as the result of trade measures withdrawn before DS proceedings have commenced or have been finalised); 5. Monetary compensation pending withdrawal of inconsistent trade measures; 6. Collective retaliation; 7. Evaluations of development implications of DSB findings and recommendations, with support from international organisations such as UNCTAD and UNDP; 8. Special and differential treatment involving financial, legal expert and other assistance for developing countries; 9. Unconditional access as third parties to proceedings; 10. Enhanced DS supervision by the General Council, and for a narrow interpretation of Art. 13 and the right to seek information; 11. More balanced representation of Africa on panels and the Appellate Body; The proposal also 12. Warns against priority treatment of external transparency in DSU negotiations; 13. Calls for 'real justice'; 14./15. Includes final remarks.	TN/DS/M/4 (No 56–60)
TN/DS/W/16	C, T	Paraguay										(x)	x	Proposal to amend Article 5 DSU (Good Offices, Conciliation and Mediation) with a view of making its use more attractive and mandatory in cases involving developing countries, or at the request of a party.	

Doc No	Type	Sponsors	Issues Covered											Concrete Proposals	Discussed in	
			C	P	A	I	Tr	AC	3P	SD	Ot					
TN/DS/W/17	C, T	LDC Group (submitted by Zambia)	x	x	x	x							x	x	Introduction of LDC-specific provisions into Article 4 (Consultations); call for holding consultations involving LDCs in LDC capitals due to human resource constraints; better representation of developing countries and LDC on panels dealing with cases involving such countries; allowing dissenting opinions in panel or Appellate Body reports; improved consideration of provisions on special and differential treatment; easing compliance obligations for LDCs ('Clarity between Article 21.1 and 21.2'); call for mandatory compensation under Article 22.2; call for a transition to a monetary compensation system, and for making compensation retroactive; introduction of collective retaliation which should be mandatory in case of successful developing country or LDC complainants; call for a strengthening of Article 24 (Special and Differential Treatment); call for improved assistance from the Secretariat and easing of impartiality requirement (Article 27).	
TN/DS/W/18 and TN/DS/W/18/Add.1	C, T	Cuba, Honduras, India, Jamaica, Malaysia, Pakistan, Sri Lanka, Tanzania, Zimbabwe	x	(x)	x				x	x			x		Proposal, consisting of (I) An introduction, and calling for (II) An obligation to notify within 60 days the terms of settlement of mutually agreed solutions; (III) Clarification that the term 'seek' (right to seek information) shall be limited to information sought actively by the panels and the AB, and that unsolicited information (<i>amicus curiae</i> briefs) shall not be taken into consideration; (IV) New terms of appointment for AB members, consisting of non-renewable six-year terms; (V) Prompt distribution to disputing parties of inputs provided by the Secretariat; (VI) Establishment of guidelines on the nature of the notice of appeal in order to make sure such notices are sufficiently clear (Working Procedures for Appellate Review, WT/AB/WP/4); (VII) Preservation and expansion of third party rights during the appeal.	TN/DS/M/4 (No 61-65); TN/DS/M/5

Doc No	Type	Sponsors	Issues Covered										Concrete Proposals	Discussed in	
			C	P	A	I	Tr	AC	3P	SD	Ot				
TN/DS/W/19	C, T	Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania, Zimbabwe	(x)			(x)						x	(x)	Conceptual and textual proposal calling for (I) The freedom of developing countries to suspend concessions <i>vis-à-vis</i> non-complying industrial countries in sectors of their choice; (II) Awarding litigation costs in cases involving developing countries and industrial countries to the industrial country if it does not prevail in the dispute; (III) Further S&D provisions, regarding consultations, time-frames, and implementation.	TN/DS/M/4 (No 70-75); TN/DS/M/5
TN/DS/W/21	C	Jamaica	x	(x)		x						x	x	Conceptual proposal calling for 1. A strengthening of the consultative process and the use of Good Offices, Conciliation and Mediation; 2. Enhancing legal assistance from the WTO Secretariat and other WTO members for developing countries and writing down the right of countries to constitute their delegations according to their wishes in the DSU; 3. Early consideration of procedural issues; 4. Clarification of the conditions for the admission of third parties and establishment of guidelines; 5. Establishment of guidelines for granting members 'enhanced' third party rights; 6. Better assessment of the economic and social impact of disputes involving developing countries; 7. Payment of legal costs by developed countries under certain conditions; 8. Sequencing of the procedures as contained in Articles 21.5 and 22; 9. Strengthening compensation; 10. Development of a negotiating history record for DSU negotiations; 11. Technical assistance.	TN/DS/M/4 (No 66-69); TN/DS/M/5
TN/DS/W/22	C/T	Japan	x	x	x	x	x					x	x	1. Resubmission of a revised version of the submission for the Doha Ministerial (WT/MIN(01)/W/6) as attachment (see below); 2a) Ensuring equivalence between the levels of suspension of concessions and of nullification or impairment caused by a WTO-inconsistent 'mandatory law' by taking into account actions that might be taken in the future under that law; 2b) Preventing the repeated application of WTO-inconsistent measures under 'discretionary laws', eg by the presumption that similar measures taken under the same law are WTO-inconsistent unless the defendant can prove the contrary; 2c) Increasing the number of Appellate Body members; 2d) Publication of submissions of parties and third parties two weeks after each meeting of the panel and Appellate Body.	TN/DS/M/5; TN/DS/M/6 (in particular No 1-4)

Doc No	Type	Sponsors	Issues Covered										Concrete Proposals	Discussed in	
			C	P	A	I	Tr	AC	3P	SD	Ot				
Attachment to TN/DS/W/22 (partly based on WT/MIN(01)/W/6	T	Japan	x	x		x					x		x	Attachment to the Japanese proposal, building in parts on the proposal submitted to the Doha Ministerial with other co-sponsors (Bolivia, Canada, Chile, Colombia, Costa Rica, Ecuador, Korea, New Zealand, Norway, Peru, Switzerland, Uruguay and Venezuela) in document WT/MIN(01)/W/6: Proposals: 1. Extension of RPT rules to the SCM agreement; 2. Consultations on implementation; 3., 4., 5., 6., 7. Implementation-related issues such as compliance panels, sequencing, arbitration, retaliation (Article 21.5/Article 21bis, Article 22); 8. Termination of retaliation; 9. Reduction of the time-frame for consultations from 60 to 30 days; 10. Establishment of a panel at the first meeting; 11. Changes regarding time-frames in panel working procedures; 12. Elimination of the meeting to discuss issues identified in the written comments to the interim report; 13. Third party access to information and meetings; 14. Provision of non-confidential summaries of information contained in submissions; 15. Strengthened notification requirement for mutually agreed solutions; 16. Extension of the coverage of Article 21bis to arbitration awards.	
TN/DS/W/23	C	Mexico		(x)		x							x	Conceptual proposal that (I) aims at reducing the period of time during which a WTO-inconsistent measure can be in place. This goal should be reached by (II) a) The early determination of the level of nullification and impairment after the interim panel report; b) The retroactive determination and calculation of the level of nullification and impairment; c) Preventive measures if allegedly WTO-inconsistent measures cause damage which would be difficult to repair; d) Introduction of negotiable remedies. (III) Mexico considers that changes would be required to Articles 6, 7, 11, 12, 19 and 22 DSU.	TN/DS/M/6 ; TN/DS/M/7
TN/DS/W/25	C	Taiwan					x	x	x					Conceptual proposal commenting on other proposals. With regard to (I) Transparency, the proposal 1. Questions the US proposal for opening meetings to the public and allowing public access to submissions; 2. Questions EU and US proposals regarding <i>amicus curiae</i> briefs. The proposal also deals with (II) Third party rights where it selectively supports certain proposals of enhancing third party rights while taking a more reserved stance on others.	TN/DS/M/7

Doc No	Type	Sponsors	Issues Covered										Concrete Proposals	Discussed in	
			C	P	A	I	Tr	AC	3P	SD	Ot				
TN/DS/W/26	C/T	Ecuador				x								Proposal consisting of a conceptual introduction (stressing in particular the usefulness of early determination of the level of nullification and impairment) and a textual proposal in relation thereto by introducing new paragraphs to Article 21 (Article 21.3bis and 21.3ter) into the drafting proposal already submitted by Japan (see TN/DS/W/22 and WT/MIN(01)/W/6).	TN/DS/M/7
TN/DS/W/28	C	US, Chile		x	x							x		Conceptual proposal in favour of improving flexibility and member control in WTO dispute settlement by a) Introducing an interim review at the Appellate Body stage; b) Giving disputing parties the possibility to delete findings from AB reports by mutual agreement; c) Providing a 'partial adoption' procedure for the DSB; d) Allowing disputing parties to suspend panel and AB procedure by mutual agreement; e) Ensuring panel member's expertise; f) Giving additional guidance to WTO adjudicative bodies (see also textual proposal contained in TN/DS/W/52).	TN/DS/M/7 and TN/DS/M/7/Corr.1 (TN/DS/M/8)
TN/DS/W/29	C	China				x						x	x	Conceptual proposal in favour of 1. New and strengthened special and differential treatment provisions in the DSU; 2. Cash compensation for developing countries if industrial countries fail to comply; 3. Shorter time-frames for dispute settlement, particularly with regard to trade remedy measures.	TN/DS/M/8
TN/DS/W/30	T	Thailand			x									Textual proposal calling for an increase in the number of Appellate Body members to nine and in favour of granting authority to the DSB to modify this number if circumstances so warrant (see also TN/DS/W/2 and TN/DS/W/60).	(TN/DS/M/8)
TN/DS/W/31	C	Thailand		x										Conceptual proposal consisting of (I) An introduction and (II) An Overview, and (III) A proposal to provide parties with a greater range of options for panel composition by allowing a party to request that the Panel Chair be appointed by lot from a 'Roster of Panel Chairs' (IV) Implementation could occur by a DSB decision without amending the DSU.	TN/DS/M/8

Doc No	Type	Sponsors	Issues Covered										Concrete Proposals	Discussed in	
			C	P	A	I	Tr	AC	3P	SD	Ot				
TN/DS/W/32	C, T	Japan	x	x	x	x	x				x		x	Conceptual and textual proposal, consisting of 1. The results of co-ordination with the EC Proposal (TN/DS/W/1), incorporating a) The early determination of the level of nullification or impairment, and b) The exemption of 'en route' goods. 2. Resubmission of the conceptual proposal contained in TN/DS/W/22 as legal texts regarding a) The equivalence between retaliation and nullification or impairment, b) The prevention of the repeated application of WTO-inconsistent measures under discretionary laws, c) An increase in the number of Appellate Body members, and d) Access to submissions. Attachment of the revised proposal by Japan on the Amendment of the DSU (see TN/DS/W/22).	(TN/DS/M/8)
TN/DS/W/33	T	Ecuador				x								Textual proposal based on the proposal made in TN/DS/W/26 with modifications in the proposed Art. 21.3 <i>bis</i> .	(TN/DS/M/8)
TN/DS/W/34	C, T	Australia		x		x					x		x	Chiefly textual proposal for an adoption of a decision on agreed practice by the DSB regarding the matters already raised in TN/DS/W/8.	(TN/DS/M/8)
TN/DS/W/35	C, T	Korea				x								Textual proposal with a conceptual introduction based on the proposal included in TN/DS/W/11.	(TN/DS/M/8)
TN/DS/W/36	T	Taiwan	x				x				x			Textual proposal based on the conceptual proposal made in TN/DS/W/25. The proposal calls for the inclusion of an Appendix 5 to the DSU in order to strengthen third party participation in consultations, for the establishment of deadlines and clearer rules regarding third party participation, including during interim review and during the Appellate stage. In addition to the proposals made in TN/DS/W/25, Taiwan proposes amendments to Appendix 3 (working procedures) with a view of strengthening third party rights.	(TN/DS/M/8)
TN/DS/W/37	T	LDC Group (submitted by Haiti)	x	(x)	x	x							x	Textual proposal largely based on the conceptual proposal made in TN/DS/W/17. The proposal for improved compensation included in the former does not appear any more. According to a newly included proposal, the terms of reference should be changed so that panels specifically consider the development implications in cases involving LDCs.	(TN/DS/M/8)

Doc No	Type	Sponsors	Issues Covered										Concrete Proposals	Discussed in
			C	P	A	I	Tr	AC	3P	SD	Ot			
TN/DS/W/38	C, T	EC	(x)	x	x	x	(x)	(x)	x			x	Revised proposal building on prior proposal TN/DS/W/1, containing (I) An introduction (holding that proposals made in TN/DS/W1 and not appearing in the present proposal remain unaltered), and (II) Aiming at A) The establishment of the panel at the first request, except cases involving developing countries (see Japanese proposal); B) Procedures for multiple complainants (modified); C) Rules for the withdrawal of panel requests (modified); D) Permanent panellists (modified). According to the proposal, the EC also (III.) Supports Costa Ricas proposal (TN/DS/W/12) with regard to third party rights (with exceptions), and wants to (IV) Add flexibility to panel procedures, (V) A) Grant the DSB the authority to change the number of Appellate Body members and supports India's call for a non-renewable fixed term of appointment; B) Introduce a remand panel procedure (modified). With regard to (VI) Surveillance and implementation, the proposal seeks to explore compromises on A) The time frame for arbitration based on the Korean proposal (TN/DS/W/11), B) Details regarding sequencing in relation to the Japanese proposal. It also stresses C) The need for a specific prohibition of unilateral changes to lists of products subject to retaliation ('carousel issue').	(TN/DS/M/8)
TN/DS/W/40	T	Mexico		(x)	(x)	x						x	Textual proposal, largely based on the conceptual proposal contained in TN/DS/W/23. It would suggest amendments to Article 3.7 (adding transferability of retaliation rights), Article 6 (counteraction in case of irreparable damage), Article 7 (early determination of the level of nullification and impairment, and authorisation of counteraction), Article 11 (idem), Article 12 (idem), Article 15 (idem), Article 17 (idem), Article 22 (retroactivity of retaliation, transferability of retaliation), Article 23, Appendix 3 (Working Procedures).	(TN/DS/M/8)
TN/DS/W/41	C, T	Canada		x			x					x	Proposal calling for 1. A procedure to protect business confidential information (BCI); 2. Enhanced panel professionalisation through creation of a panel roster and an increase of the currently low <i>per diem</i> ; 3. Increased transparency through public access to submissions and meetings (panel and Appellate Body).	(TN/DS/M/8)

Doc No	Type	Sponsors	Issues Covered										Concrete Proposals	Discussed in	
			C	P	A	I	Tr	AC	3P	SD	Ot				
TN/DS/W/42	T	African Group (submitted by Kenya)		x	x	x			x	x			x	Textual proposal, partly based on the conceptual proposal submitted in TN/DS/W/15, (I) Granting authority to the General Council to decide in cases of conflict between provisions of the agreements in dispute settlement (Article 3.2); (II) Calling for compensation in case of injury stemming from trade measures applied against developing countries or LDCs which are withdrawn before or during consultations (Article 3.6); (III) Adding a development perspective to the terms of reference (Article 7); (IV) Strengthening of third party rights (Article 10 and Article 17); (V) Adding paragraph 3 to Article 13 which would state that the right to seek information shall not be construed as a requirement to accept <i>amicus curiae</i> briefs; (VI) Requiring panelists and AB members to give their separate written opinion and to take majority decisions (Articles 14 and 17); (VII) Introducing a development perspective in the implementation by developing countries (Article 21.1); (VIII) Introducing monetary compensation and computation of injury (Article 21.8); (IX) Introducing collective retaliation (Article 22.6); (X) Requiring the Secretariat to provide specific support and counsel to developing countries and LDCs (Article. 27); (XI) Establishing a fund on dispute settlement for developing countries and LDCs (new Article 28).	(TN/DS/M/8)

Doc No	Type	Sponsors	Issues Covered										Concrete Proposals	Discussed in
			C	P	A	I	Tr	AC	3P	SD	Ot			
TN/DS/W/43	C, T	Jordan	X	x	x	x			x	x	x	x	Conceptual and textual proposal, (I) Consisting of an introduction and (II) Strengthening Art. 5 (Good offices, conciliation and mediation) by making these procedures mandatory in cases involving developing countries or LDCs; (III) Calling for a procedure to withdraw consultation requests or to consider them to be withdrawn if they are not followed by a panel request within a certain time; (IV) Allowing countries to withdraw panel requests at any time prior to the second written submission; (V) Strengthening the presence of panel members from DCs and LDCs in cases involving them; (VI) Calling for standard panel working procedures and making specific suggestions regarding third party involvement and the treatment of confidential information; (VII) Explicit inclusion of a 10-day time frame for third parties to notify the DSB of their interest in a dispute; (VIII) Calling for sequencing of the procedures contained in Article 21.5 and Article 22.6; (IX) Modifying the time frame for arbitration as starting from the date of appointment of the arbitrator; (X) Calling for a remand procedure; (XI) Calling for a procedure on <i>amicus curiae</i> briefs and establishing a fund to support developing countries and LDCs in the submittal of such briefs; (XII) Calling for the introduction of an advisory opinion system (with ICJ involvement) and introduction of an Article 5bis on questions of interpretation to be referred to the General Council for decision by 3/4 majority of the vote (see also proposal of the African Group; (XIII) Calling for a procedure making documents prepared by the Secretariat available to the parties and third parties whose comments shall be taken into account by the panel.	TN/DS/M/8
TN/DS/W/44 and TN/DS/W/44/Rev 1	T	Jamaica							x		x		Further to its proposal in TN/DS/W/21, Jamaica calls for 1. A new Article 3.13 giving members an explicit right to determine the composition of their delegation in dispute settlement proceedings (dropped in TN/DS/W/44/Rev 1); 2. Removing the requirement that a disputing party to whom a request for being joined in consultations is addressed agrees that the claim of substantial interest is well-founded.	(TN/DS/M/9)

Doc No	Type	Sponsors	Issues Covered										Concrete Proposals	Discussed in		
			C	P	A	I	Tr	AC	3P	SD	Ot					
TN/DS/W/45 and TN/DS/W/45/Rev 1	C, T	Brazil		(x)		(x)								x	Conceptual and textual proposal, consisting of (I) An introduction, and (II) Calling for a fast track panel procedure that would apply if a dispute arises from a measure that has already been found to be inconsistent with WTO rules by a panel or the Appellate Body. The textual proposal is included in (III) It is further refined in TN/DS/W/45/Rev 1.	(TN/DS/M/9)
TN/DS/W/46	C, T	US		(x)	(x)		x	x							(I) Mainly textual proposal based on the conceptual proposal contained in TN/DS/W/13, calling for (II) Opening panel, Appellate Body and arbitration meetings to public observers (except those portions involving confidential information); (III) Timely access to submissions; (IV) Timely access to final reports once they are issued to parties; (V) Further work on the <i>amicus</i> issue (reference to EC proposal as contained in TN/DS/W/1); statement that the US does not believe that an amendment to the DSU is necessary for this purpose.	(TN/DS/M/9)
TN/DS/W/47	T	India, Cuba, Dominican Republic, Egypt, Honduras, Jamaica, Malaysia	x	x	x	x			x	x	x				Textual proposal, strengthening the notification requirement of mutually acceptable solutions (Article 3.6), factually prohibiting panels to accept unsolicited information (footnote to Article 13), appointing Appellate Body members on a non-renewable six year term (Article 17.2), giving third parties a right to be heard by the Appellate Body (Article 17.4); establishing minimum requirements for notices of appeal (footnote to Article 17.6); denying the Appellate Body the right to seek or accept information from anyone other than parties or third parties (footnote to Article 17.6); expanding freedom for developing countries regarding sectors subject to retaliation (Article 22.3bis); awarding litigation costs to developing countries of 500,000 USD or actual expenses, whichever is higher (Article 3bis); strengthening the S&D provisions in Article 4.10, Article 12.10 and Article 21.2.	(TN/DS/M/9)

Doc No	Type	Sponsors	Issues Covered										Concrete Proposals	Discussed in	
			C	P	A	I	Tr	AC	3P	SD	Ot				
TN/DS/W/49	C, T	Australia		x		x					x		x	Textual proposal based on the textual proposal submitted as TN/DS/W/34 and on the conceptual proposal submitted as TN/DS/W/8. Unlike in TN/DS/W/34, the viewpoint that the changes could be implemented through decisions on agreed practice by the DSB has been dropped, and the proposal calls instead for amendments of Article 1, 6, <i>8bis</i> (procedural time-frames for safeguards), Article 22.2 (third party rights in compensation arrangements), Article 22.7 (equivalence of the actual level of retaliation with the authorised level of retaliation), Art. 6 and item 12 of Appendix 3 (time savings), Article 21.5 <i>bis</i> and Article 22.6 (sequencing).	(TN/DS/M/9)
TN/DS/W/51 and TN/DS/W/51/Rev 1	T	China	x	x		x						x	x	Textual proposal in addition to TN/DS/W/29, calling for 1. a reduced time-frame (30 days) for consultations except in cases involving DCs; 2. call for immediate establishment of the panel at the first DSB meeting where the panel request appears on the DSB agenda; 3. 10-day time-frame for the notification of substantial interest of third parties, and strengthened third party rights in the panel procedure; 4. inclusion of a special S&D provision calling for restraint in complaints against DCs and attribution of legal costs to IC if complaint against a DC was unsuccessful; shortened time-frames for disputes involving safeguard and anti-dumping except those with a DC as defendant; 5. introducing an obligation to notify compliance with rulings; 6. amending time-frames in the working procedures.	
TN/DS/W/52	T	US, Chile		x	x								x	Textual proposal based on the conceptual proposal contained in TN/DS/W/28 in favour of improving flexibility and member control in WTO dispute settlement, by a) Introducing an interim review at the Appellate Body stage, implying also an extension of the time frame for appellate review by 30 days; b) Giving disputing parties the possibility to delete findings, or the basic rationale behind a finding from panel and AB reports by mutual agreement; c) Providing a 'partial adoption' procedure by allowing the DSB to decide by consensus not to adopt a finding or the basic rationale behind a finding (Members would not need to accept unadopted findings); d) Giving parties the possibility to suspend the panel and appellate review procedure by mutual agreement; e) Ensuring panel member's expertise; f) The proposal also includes without further elaboration its call for 'some form of additional guidance to WTO adjudicative bodies'.	

Doc No	Type	Sponsors	Issues Covered										Concrete Proposals	Discussed in
			C	P	A	I	Tr	AC	3P	SD	Ot			
TN/DS/W/53	C, T	Jordan	x	x					x	x	x	x	Mainly textual proposal based on TN/DS/W/43 above. It modifies items III (consultations), IV (panel requests), V (panel composition), XI (establishment of a fund to recover costs incurred by developing countries in dealing with <i>amicus curiae</i> briefs), and VII (third party rights).	
TN/DS/W/56	C, T	Jordan		(x)	x								Mainly textual proposal based on TN/DS/W/43 and TN/DS/W/53 above. It modifies item X (remand procedure) of the original proposal.	
TN/DS/W/57	C	China									x	x	Responses to questions on China's proposal (see TN/DS/W/51 above) on 1. The limitation of cases brought against developing countries; 2. Legal costs; 3. Shortened time-frames for disputes involving safeguard and anti-dumping measures.	
TN/DS/W/60	C	Thailand			x								Figures on the number of cases assigned to each Appellate Body member per year, and questions regarding the increase of the number of Appellate Body members (see also TN/DS/2 and TN/DS/W/30).	
TN/DS/W/61	C	Thailand, Indonesia		x									Comments and questions related on the process for the appointment of panellists.	

PART V

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13. OFFICIAL WTO DOCUMENTS

Note: The sections and entries in this chapter are sorted alphabetically by Document Number, except for a few single documents regrouped in Section 13.10.

13.1 Special (Negotiating) Session of the DSB (Doha Round Only) Minutes of Meetings

TN/DS/M/1; Special Session of the Dispute Settlement Body – Minutes of Meeting; Held in the Centre William Rappard on 16 April 2002; 12 June 2002

TN/DS/M/2; Special Session of the Dispute Settlement Body – Minutes of Meeting; Held in the Centre William Rappard on 21 May 2002; 3 July 2002

TN/DS/M/3; Special Session of the Dispute Settlement Body – Minutes of Meeting; Held in the Centre William Rappard on 15 July 2002; 9 September 2002

TN/DS/M/4; Special Session of the Dispute Settlement Body – Minutes of Meeting; Held in the Centre William Rappard on 10 September 2002; 6 November 2002

TN/DS/M/5; Special Session of the Dispute Settlement Body – Minutes of Meeting; Held in the Centre William Rappard on 14 October 2002; 27 February 2003

TN/DS/M/6; Special Session of the Dispute Settlement Body – Minutes of Meeting; Held in the Centre William Rappard on 13–15 November 2002; 31 March 2003

TN/DS/M/7; Special Session of the Dispute Settlement Body – Minutes of Meeting; Held in the Centre William Rappard on 16–18 December 2002; 26 June 2003

TN/DS/M/7/Corr 1; Special Session of the Dispute Settlement Body – Minutes of Meeting; Held in the Centre William Rappard on 16–18 December 2002; Corrigendum; 23 July 2003

TN/DS/M/8; Special Session of the Dispute Settlement Body – Minutes of Meeting; Held in the Centre William Rappard on 28–30 January 2003; 30 June 2003

TN/DS/M/9; Special Session of the Dispute Settlement Body – Minutes of Meeting; Held in the Centre William Rappard on 17–18 February 2003; 1 July 2003

TN/DS/M/10; Special Session of the Dispute Settlement Body – Minutes of Meeting; Held in the Centre William Rappard on 10–11 March 2003; 14 August 2003

13.2 Special (Negotiating) Session of the DSB (Doha Round Only) Country Proposals

Note: Documents not included in this section (eg TN/DS/W/4) do not constitute negotiating proposals but contain information on the agenda. For an overview of the contents of each proposal, please refer to Chapter 11.

TN/DS/W/1; Contribution of the European Communities and its Member States to the Improvement of the WTO Dispute Settlement Understanding; Communication from the European Communities; 13 March 2002

TN/DS/W/2; Proposal to Review Article 17.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes; Communication from Thailand; 20 March 2002

TN/DS/W/3; Proposal to Review Article 22.7 of the Understanding on Rules and Procedures Governing the Settlement of Disputes; Communication from the Philippines and Thailand; 21 March 2002

TN/DS/W/5; India's Questions to the European Communities and its Member States on their Proposal Relating to Improvements of the DSU; Communication from India; 7 May 2002

TN/DS/W/7; The European Communities' Replies to India's Questions; Communication from the European Communities; 30 May 2002

TN/DS/W/8; Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding; Communication from Australia; 8 July 2002

TN/DS/W/9; Contribution of Ecuador to the Improvement of the Dispute Settlement Understanding of the WTO; Communication from Ecuador; 8 July 2002

TN/DS/W/11; Contribution of the Republic of Korea to the Improvement of the Dispute Settlement Understanding of the WTO; Communication from the Republic of Korea; 11 July 2002

TN/DS/W/12; Proposal by Costa Rica – Third Party Rights; Communication from Costa Rica; 24 July 2002

TN/DS/W/12/Rev.1; Proposal by Costa Rica – Third Party Rights; Communication from Costa Rica; Revision; 6 March 2003

TN/DS/W/13; Contribution of the United States to the Improvement of the Dispute Settlement Understanding of the WTO Related to Transparency; Communication from the United States; 22 August 2002

TN/DS/W/15; Negotiations on the Dispute Settlement Understanding; Proposal by the African Group; 25 September 2002

TN/DS/W/16; Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding; Communication from Paraguay; 25 September 2002

TN/DS/W/17; Negotiations on the Dispute Settlement Understanding; Proposal by the LDC Group; 9 October 2002

TN/DS/W/18; Negotiations on the Dispute Settlement Understanding; Proposals on DSU by Cuba, Honduras, India, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe; 7 October 2002

TN/DS/W/18/Add 1; Negotiations on the Dispute Settlement Understanding; Proposals on DSU by Cuba, Honduras, India, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe; Addendum [addition of Jamaica to the list of sponsors]; 9 October 2002

TN/DS/W/19; Negotiations on the Dispute Settlement Understanding; Special and Differential Treatment for Developing Countries; Proposals on DSU by Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe; 9 October 2002

TN/DS/W/21; Contribution by Jamaica to the Doha Mandated Review of the Dispute Settlement Understanding (DSU); Communication from Jamaica; 10 October 2002

TN/DS/W/22; Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding; Proposal by Japan; 28 October 2002

TN/DS/W/23; Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding; Proposal by Mexico; 4 November 2002

TN/DS/W/25; Contribution by the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu to the Doha Mandated Review of the Dispute Settlement Understanding (DSU); Communication from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; 27 November 2002

TN/DS/W/26; Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding; Proposal by Ecuador; 26 November 2002

TN/DS/W/28; Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding on Improving Flexibility and Member Control in WTO Dispute Settlement; Contribution by Chile and the United States; 23 December 2002

TN/DS/W/29; Improving the Special and Differential Provisions in the Dispute Settlement Understanding; Communication from China; 22 January 2003

TN/DS/W/30; Proposal to Review Article 17.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes; Communication from Thailand; 22 January 2003

TN/DS/W/31; Contribution to Clarify and Improve the Dispute Settlement Understanding: Panel System; Communication from Thailand; 22 January 2003

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WT/DS18; Australia – Measures Affecting Importation of Salmon [Canada]

WT/DS27; European Communities – Regime for the Importation, Sale and Distribution of Bananas (Ecuador, Guatemala, Honduras, Mexico, United States)

WT/DS26; European Communities – Measures Affecting Livestock and Meat (Hormones) [United States] (see also WT/DS48)

WT/DS31; Canada – Certain Measures Concerning Periodicals [United States]

WT/DS44; Japan – Measures Affecting Consumer Photographic Film and Paper [United States]

WT/DS48; European Communities – Measures Affecting Livestock and Meat (Hormones) [Canada] (see also WT/DS26)

WT/DS50; India – Patent Protection for Pharmaceutical and Agricultural Chemical Products [United States] (see also WT/DS79)

WT/DS54; Indonesia – Certain Measures Affecting the Automobile Industry [European Communities] (see also WT/DS55, WT/DS59, WT/DS64)

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WT/DS103; Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products [United States] (see WT/DS113)

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WT/DS110; Chile – Taxes on Alcoholic Beverages [United States] (see also WT/DS87)

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16. INDEX

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