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The DSU Review (1998-2004): Negotiations, Problems and Perspectives

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REFORM AND DEVELOPMENT
OF THE
WTO DISPUTE SETTLEMENT SYSTEM

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WTO DISPUTE SETTLEMENT SYSTEM

edited by
Dencho Georgiev and Kim Van der Borgh

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TABLE OF CONTENTS

Foreword	
Supachai Panitchpakdi	9
Introduction	
Dencho Georgiev and Kim Van der Borght	11
Chairing the DSU Negotiations: An Overview	
Péter Bálas	15
Sanctions and Countermeasures: Do the Remedies Make Sense?	
Jacques H.J. Bourgeois	37
Financial Compensation in the WTO: Improving Remedies in WTO Dispute Settlement	
Marco Bronckers and Naboth Van den Broek	43
Fixing What “Ain’t Broke”? Third Party Rights, Consultations, and the DSU	
Marc L. Busch and Eric Reinhardt	73
Is it Beneficial to WTO Members to Reform the Panel System?	
Pornchai Danvivathana	87
Memoirs of a DSU Negotiator	
Mateo Diego-Fernández	109
DSU Reform: What are the Underlying Issues?	
Ignacio Garcia Bercero and Paolo Garzotti	123
The Authoritative Interpretation Under Article IX:2 of the WTO Agreement: Current law, Practice and Possible Reform	
Claus-Dieter Ehlermann and Lothar Ehring	153

Dispute Settlement System in the WTO: Developing Country Participation and Possible Reform	
Mohan Kumar	177
“Sovereignty” Issues in Interpreting WTO Agreements. The Sardines Case and Article 2.4 of the TBT Agreement	
Mitsuo Matsushita	191
Impartiality, Independence, and the WTO Appellate Body	
Petros Mavroidis & Kim Van der Borgh	201
Retaliation Revisited: Compliance and Implementation Issues in WTO Dispute Settlement	
Brendan McGivern	225
Unresolved Issues in the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)	
Hector A. Millan Smitmans	247
Working Procedures: Recent Changes and Prospective Developments	
Pierre Monnier	265
If the DSU is “Working Reasonably Well”, Why Does Everybody Want to Change it?	
Eduardo Pérez Motta & Mateo Diego-Fernández,	293
Three Developing Country Challenges in WTO Dispute Settlement: Some Strategies for Adaptation	
Gregory Shaffer	309
Proposals for DSU Reform that Address, Directly or Indirectly, the Limitations on Panels and the Appellate Body Not to Create Rights and Obligations	
Terence P. Stewart, Amy S. Dwyer & Elizabeth M. Hein	331
“Sequencing” and Compliance	
Yoichi Suzuki	367

Consideration of Whether There Are Reasons to Put Limits on the Absolute Right of WTO Members to Appeal Panel Decisions to the Appellate Body Pursuant to the Understanding on Dispute Resolution	
Charles O. Verrill	393
Evaluating Options for Dispute Settlement Reform	
Jeff Waincymer	405
Flexibility and Simplicity as Guiding Principles for Improving the WTO Dispute Settlement Mechanism	
Ching-Chang Yen	423
The DSU Review (1998-2004): Negotiations, Problems and Perspectives	
Thomas A. Zimmermann	443
About the Contributors	473

THE DSU REVIEW (1998-2004): NEGOTIATIONS, PROBLEMS AND PERSPECTIVES

Thomas A. Zimmermann*

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), however without yielding any result so far.

The DSU review exercise has only attracted limited academic interest to date. This lack of interest in Members' proposals and negotiations is rather astonishing, particularly if judged in the light of the general explosion of literature on the World Trade Organization (WTO), including on its dispute settlement system. Whereas even single adjudicating decisions such as the rulings in the *Shrimp/Turtle* or the *Bananas* cases have each become the subject of countless contributions, the efforts of the entire WTO community to make the DSU evolve further have long been neglected. Only recently, a certain academic interest in these negotiations and in the submitted proposals can be noticed.¹

The over-emphasis of the DSU literature on rulings and recommendations, and the parallel lack of interest in the political discussions on the DSU, is questionable 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 tends to be chronically overstated and where the intergovernmental, member-driven character of the WTO 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 undermine the sustainability of the system.

* The views expressed in this article are exclusively those of the author and shall not be attributed to any institution with which the author is affiliated. This contribution is based in part on Thomas A. Zimmermann, *Negotiating the Review of the WTO Dispute Settlement Understanding* (London: Cameron May, 2006).

¹ An interesting collection of recent essays is F. Ortino and E.-U. Petersmann, *The WTO Dispute Settlement System 1995-2003* (The Hague: Kluwer, 2003).

The DSU review negotiations, albeit unsuccessful so far, have brought forth a variety of proposals in the last seven years. These submissions are supposed to contribute to improvements and clarifications of the mechanism. Not only is the DSU review of interest in its own right, but it also offers a reflection of the experience that WTO Members have gathered in 10 years of dispute settlement practice. In doing so, the discussions are revealing with regard to the general degree of satisfaction of Members with the system. They can also serve as an indicator for problems or tensions in the mechanism and for changes in the position of certain Members in and towards the system. Finally, the DSU review discussions assist us in establishing some hypotheses on the future evolution of the WTO dispute settlement mechanism.

This chapter seeks to contribute to the DSU literature by retracing the negotiating process in its context and by analyzing the main reasons why the negotiations have failed so far. Part 1 analyzes the negotiations that have taken place between 1997 and 2004. In Part 2, the reasons for the failure to bring the negotiations to a successful conclusion so far will be discussed, based on a brief presentation of major proposals. Part 3 presents some elements of a “DSU Review in practice”, ie practical steps that Members and adjudicating bodies have undertaken to adapt DSU practice to changing circumstances and requirements without modifying the text of the DSU. Part 5 concludes with the following. The last chapter offers some conclusions from the preceding analysis.

1. The DSU Review Negotiations (1997-2004)

1.1 The Initial Stage of DSU Review Negotiations (1997-1999)²

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”. The 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”.

² For a detailed account of this stage of DSU review negotiations and further references, see Th. A. Zimmermann, *Negotiating the Review of the WTO Dispute Settlement Understanding* 93-105 (London: Cameron May, 2006).

After some preparatory work, substantive negotiations under this mandate started in mid-1998. They were held in a largely informal mode and were supposed to conclude by the Third Ministerial Conference, ie the Seattle meeting in December 1999. Several Members participated in the negotiations (*inter alia* the European Communities, Canada, India, Guatemala, the United States, Venezuela, Hungary, Korea, Argentina and Japan). Despite the generally broad negotiating approach, the negotiations were soon dominated by two divides: one ran between certain industrialized countries (mainly between the US and the EC) whereas the other pitted industrialized against developing countries.

The rift between industrialized countries was mostly due to the efforts of the United States to strengthen the enforcement quality of the system. Being a “net complainant” in these initial years of DSU practice, and having prevailed in several “high profile” cases (such as *EC–Hormones*, *EC–Bananas*, *Canada–Magazines*, or *India–Patents*), the United States became increasingly worried that the implementation of the dispute settlement reports would remain behind their expectations. They therefore pressed forward with retaliatory measures and threats thereof, whereas the European Union and Canada tried to delay the implementation of rulings. This situation translated into different proposals in the DSU review negotiations on the so-called sequencing issue which arose for the first time in *EC–Bananas* over ambiguities (or even contradictions, as some may argue) in Articles 21.5 and 22 DSU. The key question was whether a “compliance panel” must first review the implementation measures undertaken by a defendant before a complainant may seek authorization to retaliate on grounds of the defendant’s alleged non-compliance. Whereas the US initially opposed any idea of sequencing and favored immediate retaliation, the EC and many other Members argued in favor of the completion of such a compliance panel procedure as a prerequisite to seeking an authorization to retaliate. The EC underlined its position, *inter alia*, by bringing a DSU case against US legislation requiring early retaliation³ and against its application⁴ in *EC–Bananas*, as well as by seeking an authoritative interpretation of the DSU in this respect.⁵ All these attempts ultimately failed.

³ *United States–Sections 301-310 of the Trade Act of 1974* (brought by the EC) (WT/DS152).

⁴ *United States–Import measures on certain products from the European Communities* (brought by the EC) (WT/DS165).

⁵ Request for an Authoritative Interpretation Pursuant to Article IX.2 of the Marrakech Agreement Establishing the World Trade Organization (Communication by the EC to the General Council) (WT/GC/W/143).

Another attempt by the US to increase the enforcement power of WTO dispute settlement was to introduce so-called “carousel retaliation”. This term refers to periodic modifications of the list of products that are subject to the suspension of concessions, and it surfaced for the first time when the “Carousel Retaliation Act of 1999” was introduced in Congress. Its purpose was to increase pressure on the EC Commission and European governments in *EC–Bananas* and *EC–Hormones* by requiring the US Administration periodically to rotate the list of products subject to retaliation in order to maximize the effect of the sanctions. The measure was signed into law in May 2000 but has so far never been applied. Whereas the EC (supported by many other nations) sought a prohibition of carousel retaliation in the DSU review of 1998/1999, the US had sought a footnote explicitly allowing such retaliation. In a parallel development, the EC had requested consultations under the DSU on the carousel provision in summer 2000, however, without proceeding to the panel stage.⁶

Finally, the US did not only pursue a “tough stance” on sequencing and on the carousel issue, but it also sought shorter timelines for certain steps in WTO dispute settlement.

The controversy between developed and developing countries was of a different nature. It mainly focused on whether the external transparency of dispute settlement should increase, and on whether so-called “*amicus curiae* briefs” should be accepted by the WTO adjudicating bodies. The United States pressed hardest for both forms of public involvement. Regarding transparency, the US sought to make submissions of parties to panels and the Appellate Body public, and to allow public observance of panel and Appellate Body meetings. Developing countries in particular, but also some industrialized countries, opposed such increased transparency, as they feared “trials by media” and undue public pressure. Insisting on the intergovernmental nature of the WTO, developing countries equally rejected efforts by the US and the EC to formalize the acceptance of *amicus curiae*, or “friend of the court”, briefs. *Amicus curiae* briefs are unsolicited reports which a private person or entity submits to an adjudicative body in order to support (and possibly influence) its decision-making. These briefs became an issue for the first time in 1998 when the Appellate Body decided in *US–Shrimp/Turtle*⁷ that the panel had the authority to accept unsolicited *amicus curiae* briefs. That right was subsequently confirmed in further disputes, causing

⁶ *United States–Section 306 of the Trade Act of 1974 and Amendments Thereto* (brought by the EC) (WT/DS200).

⁷ *United States–Import prohibition of shrimp and Shrimp Products* (brought by India, Malaysia, Pakistan and Thailand) (WT/DS58).

outrage among many developing country Members who feared undue interference from NGOs.⁸

As has been mentioned before, the DSU review negotiations should have been concluded by 1 January 1999 and a decision on whether to continue, modify, or terminate the DSU should have been taken at the Seattle Ministerial Conference in late 1999. Despite fairly intense discussions on the DSU review and a first extension of the deadline until July 1999, no result was achieved. In further informal consultations organized by Japan, a proposal was hammered out and later submitted to the December 1999 Ministerial meeting in Seattle. Co-sponsored by the EC, Canada, Korea, Switzerland and 10 other industrial and developing countries, this so-called Suzuki text sought to clarify the “sequencing issue” and certain other problems of the DSU. The proposal, however, did not enjoy sufficient support among Members, and ministers failed to take the decision which would have been required.

1.2 The “Limbo” in the DSU Review Negotiations (2000-2001)⁹

After the December 1999 Seattle Ministerial Conference had failed, the DSU review essentially remained in limbo through most of 2000 and 2001. Isolated efforts of Members to change the DSU failed.

However, as DSU practice moved along, negotiating positions changed behind the scenes. New developments in the case *US–Foreign Sales Corporations* which the US had lost and where implementation measures were now disputed, weakened in particular the US position on issues such as carousel or sequencing. After it had become increasingly clear that the US replacement legislation (Extraterritorial Income Exclusion Act; ETI) would not be in compliance with the recommendations of the Dispute Settlement Body (DSB), the US and the EC negotiated, in September 2000, a bilateral procedural agreement on how to proceed in this case in order to bridge the gaps in the DSU on the sequencing issue. According to the agreement, a sequencing approach was adopted under

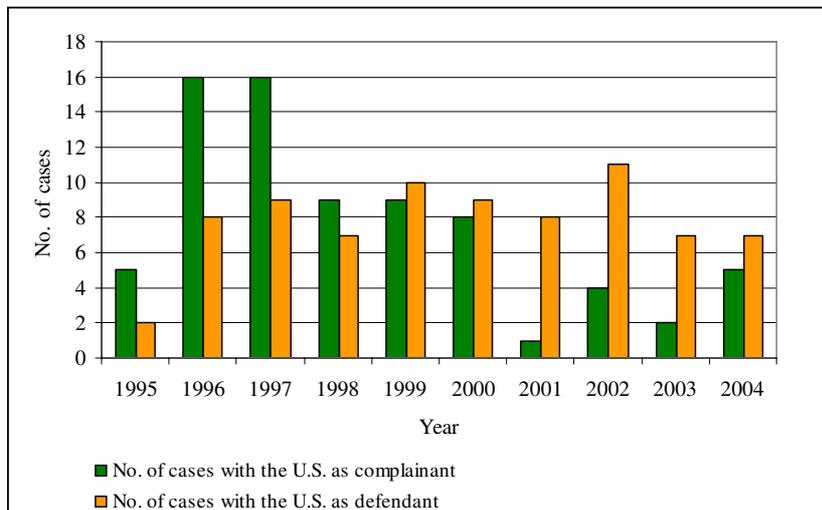
⁸ On the *amicus curiae* issue, see, for instance, G. C. Umbricht (2001), “An ‘Amicus Curiae Brief’ on Amicus Curiae Briefs at the WTO”, 4(4) *Journal of International Economic Law* 773-794 (2001); P.C. Mavroidis, “Amicus Curiae Briefs Before The WTO: Much Ado About Nothing”; Jean Monnet Working Paper 2/01 (2001); G. Marceau and M. Stilwell, “Practical Suggestions for Amicus Curiae Briefs Before WTO Adjudicating Bodies”, 4(1) *Journal of International Economic Law* 155-187 (2001). For further references, see also Th. A. Zimmermann, *Negotiating the Review of the WTO Dispute Settlement Understanding* 172-176 (London: Cameron May, 2006).

⁹ For a detailed discussion and further references, see Th. A. Zimmermann, *Negotiating the Review of the WTO Dispute Settlement Understanding* 105-111 (London: Cameron May, 2006).

which a panel (subject to appeal) would review the WTO consistency of the replacement legislation, and arbitration on the appropriate level of sanctions would be conducted only if the replacement legislation was found WTO-inconsistent. The US had now become a beneficiary of the sequencing approach (even with the possibility of subsequent appeal) which it had opposed before. It is believed that, in exchange for the agreement, the US had to back down on carousel retaliation although no such deal had been explicitly made part of the procedural agreement. The retaliatory measures requested by the EC were several times higher than US retaliation in *EC-Bananas* and *EC-Hormones* combined.¹⁰ 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, as requested by the EC, constituted “appropriate countermeasures”.

US-Foreign Sales Corporations was not the only case that had a weakening impact on the negotiating stance of the US. With more and more trade remedy cases – traditionally the Achilles heel of US trade policy – being brought against the US and the latter losing most of these, the US stance in WTO dispute settlement changed from offensive into highly defensive (see Graphs 1 and 2).

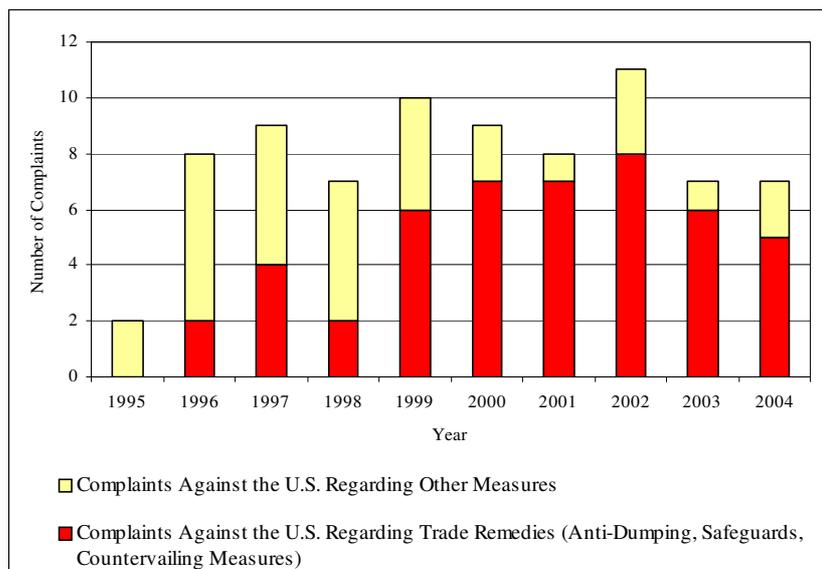
Graph 1: The United States as Complainant and Defendant (1995-2004)



¹⁰ The respective amounts are USD 191.4 mn in *EC-Bananas* and USD 116.8m in *EC-Hormones*.

Author's calculations and graph; based on WTO data (WT/DS/OV/22 and on the WTO website http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm, downloaded on 15 January 2005)

Graph 2: The United States as Defendant: Trade Remedy and Other Cases



Author's calculations and graph; based on WTO data (WT/DS/OV/22 and on the WTO website http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm, downloaded on 15 January 2005)

As attempts to move the DSU review forward in 2000 and 2001 proved to be unsuccessful, the DSU review only returned to the fore at the Fourth Ministerial Conference in Doha in November 2001. The Doha Ministerial Declaration committed Members to negotiate on improvements to and clarifications of the Dispute Settlement Understanding.

1.3 The Doha-Mandated DSU Review Negotiations (2002-2004)¹¹

According to the Doha mandate on the DSU Review, an agreement was to be reached not later than May 2003. Formal and informal discussions

¹¹ See also Paragraph 47 of the Ministerial Declaration, Adopted on 14 November 2001 (WT/MIN(01)/DEC/1). For a detailed discussion and further references, see Th. A. Zimmermann, *Negotiating the Review of the WTO Dispute Settlement Understanding* 111-122 (London: Cameron May, 2006).

were held under the auspices of the Special Negotiating Session of the Dispute Settlement Body, chaired by Péter Balás of Hungary. 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. The negotiations were very comprehensive. Not only did they cover virtually all provisions of the DSU,¹² but they also included a variety of Members, including, *inter alia*, all the “Quad” Members (with submissions being made by the EC, the US, Canada and Japan) as well as developing countries of all sizes and stages of development.

Compared with the pre-Seattle stage of the DSU review negotiations, negotiating positions were less clear-cut now. The most remarkable change occurred in the position of the United States, which reflected its new defensive stance in dispute settlement practice. In December 2002 the US submitted, jointly with Chile, a proposal to strengthen flexibility and member control in dispute settlement.¹³ The proposal would allow the deletion of portions of panel or Appellate Body reports by agreement of the parties to a dispute, and it would also provide for an only partial adoption of such reports by the Dispute Settlement Body (DSB). Moreover, it calls for “some form of additional guidance” to WTO adjudicative bodies. The gist of the submission is to transfer influence from the adjudicative bodies to the parties to a dispute, and to Member governments through the DSB. The proposal was greeted predominantly with skepticism, with Members arguing that deleting parts of panel or Appellate Body reports would weaken the WTO adjudicating bodies. Moreover, the move was seen as a contradiction to earlier proposals on improving transparency as parties would be able to “bury” more controversial or groundbreaking decisions by the adjudicating bodies before the rulings would become public. The proposal was understood as attending to the complaints from US Congress that the WTO adjudicating bodies were legislating and thus exceeding their authority.

A large number of other proposals, only some of which can be presented here, were submitted. The EC reiterated calls (familiar from the pre-

¹² For an overview, see Th. A. Zimmermann, *Negotiating the Review of the WTO Dispute Settlement Understanding* (London: Cameron May, 2006), at 127-165 (on stage-specific proposals) and at 167-198 (on horizontal proposals).

¹³ See TN/DS/W/28 (US, Chile) for the conceptual proposal, and TN/DS/W/52 (US, Chile) for the textual proposal. For a discussion of this proposal, see C.-D. Ehlermann, Reflections on the Appellate Body of the WTO, 6(3) *Journal of International Economic Law* 695-708 (2003). See also the critical remarks in Consultative Board, “The Future of the WTO – Addressing institutional challenges in the new millennium – Report by the Consultative Board to the Director-General Supachai Panitchpakdi” 56 (WTO, 2004, available online at http://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf), which presumably refers to the US-Chilean proposal.

Seattle review) for the establishment of a permanent panel body instead of the current system where panelists are appointed *ad hoc*, discharging their tasks on a part-time basis and in addition to their ordinary duties.¹⁴ Developing countries submitted a variety of proposals with quite different orientations. For instance, some countries sought to strengthen enforcement by introducing collective retaliation.¹⁵ It is meant to address the problems caused by the lack of retaliatory power of many small developing economies, such as those experienced by Ecuador in *EC–Bananas*. With collective retaliation, all WTO Members would be authorized (or even obliged under the concept of collective responsibility) to suspend concessions *vis-à-vis* a non-complying Member. Proposals for the retroactive calculation of the level of nullification and impairment and for making the suspension of concessions or other obligations (SCOO) a negotiable instrument (Mexico),¹⁶ for introducing a fast-track panel procedure (Brazil),¹⁷ and for calculating increased levels of nullification or impairment (Ecuador)¹⁸ have a similar thrust. At the same time, the African Group questioned the automaticity of the current dispute settlement process and sought the reintroduction of more political elements.¹⁹ China even proposed the introduction of a quantitative limitation on the number of complaints per year that countries could bring against a particular developing country.²⁰

By contrast to these highly controversial proposals, a large number of less controversial submissions were integrated into a compromise text that was elaborated by Ambassador Péter Balás of Hungary. This so-called Balás text²¹ contains modifications to all stages of the process, including, *inter alia*, improved notification requirements for mutually agreed solutions, a procedure to overcome the “sequencing issue” in Articles 21.5 and 22 DSU, the introduction of an interim review into the appellate review stage, and a remand procedure in which an issue may be remanded to the original panel in case the Appellate Body is not able fully to address an issue due to a lack of factual information in the panel report. The compromise text would also have introduced numerous amendments in other areas, including, *inter alia*, housekeeping proposals,

¹⁴ See TN/DS/W/1, No I (EC), and Attachment, No 7.

¹⁵ See TN/DS/W/15, No. 6, and TN/DS/W/42, No IX (both submitted by the African Group) as well as TN/DS/W/17 (LDC Group). For a discussion on collective retaliation, see J. Pauwelyn, “Enforcement and Countermeasures in the WTO – Rules are Rules – Toward a More Collective Approach”, 94(2) *American Journal of International Law* 335-347 (2000).

¹⁶ See TN/DS/W/23 and TN/DS/W/40 (both submitted by Mexico).

¹⁷ See TN/DS/W/45 and TN/DS/W/45/Rev.1 (Brazil).

¹⁸ See TN/DS/W/9 and TN/DS/W/33 (both submitted by Ecuador).

¹⁹ See TN/DS/W/15 and TN/DS/W/42 (both submitted by the African Group).

²⁰ See TN/DS/W/29, No 1, and TN/DS/W/57, No 1 (both submitted by China).

²¹ See TN/DS/9.

enhanced third party rights, enhanced compensation, and several provisions on the special and differential treatment of developing countries.

Despite the existence of this compromise proposal, the deadline for the completion of the talks that had been set for the end of May 2003 was finally missed. While many smaller trading nations would have favored coming to a conclusion on a limited package of issues such as the Balás text, both the EC and the US preferred negotiations to continue, and to address those (of their) concerns that had been left out in the Balás text.

Members subsequently agreed to extend the deadline for the review until the end of May 2004. However, the review negotiations did not regain their previous momentum. 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 the DSU review negotiations adversely. The May 2004 deadline was missed again. The chairman then established a brief report on his own responsibility to the Trade Negotiations Committee. He suggested continuing the negotiations, however, without any new target date.²² In the subsequent decision adopted by the General Council on 1 August 2004 on the Doha Work Program – the so-called “July Package” – the General Council took note of the above-mentioned report, and the continuation of negotiations according to the Doha Mandate along the lines set out in the chairman’s report was decided.²³

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

2. Problems in Concluding the DSU Review

The difficulties which negotiators have faced so far in their attempts to reach a successful conclusion of the DSU review negotiations may be explained with several reasons. Some of the major reasons shall be discussed subsequently in more detail.

2.1 Consensus Requirement for Changes to the DSU

Traditionally, political decision-making in the consensus-oriented GATT/WTO regime is a cumbersome process, and hurdles for

²² See TN/DS/10.

²³ See WT/L/579.

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. Yet, 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 polarized discussion in which compromise and an agreement are more difficult to achieve.

2.2 Controversial Views on 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 industrialized 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 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 industrialized countries, and the US in particular, have been strongly in favor 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, on the other hand, will have realized 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. Moreover, a very recent development could show the way forward. In September 2005, panel proceedings were opened for the first time to the public, following a joint request by the parties to the respective disputes (see below).

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 realization.

2.3 The Fundamental Controversy: Power Orientation versus Rule Orientation

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 diplomatic – ie power-oriented – approach?²⁴ For the purpose of this contribution, rule-orientation is

²⁴ Rule-orientation and power-orientation as basic concepts for the settlement of international trade disputes were initially introduced into the literature by J. H. Jackson, "The Crumbling Institutions of the Liberal Trade System", 12(2) *Journal of World Trade* 93-106 (1978). 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 favor this technique more than do small countries; the latter being more inclined to institutionalized 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 utilized in the negotiation, so

Continued

understood as the heavy 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.

Among others, the following proposals could be regarded as contributing directly or indirectly to more rule-orientation:

- *Strengthened notification requirements for mutually acceptable solutions (MASs) and the requirement to submit written reports on the outcome of consultations.* In the past, the sort of many consultation requests has remained in the dark. In some instances, it has not become known whether and how a dispute has been resolved, despite the existence of a general obligation to notify such MASs. Absent correct notifications, however, it cannot be excluded that MASs are not in full conformity with WTO disciplines. Specifically, it is thinkable that a MAS comes at the expense of a third party. In order to strengthen the notification of MASs, Japan²⁵ and some developing countries²⁶ called for a more precise wording of the notification requirement in Article 3.6 DSU that would explicitly oblige disputing parties to notify such solutions to the DSB. Jamaica

...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." (p 98 et seq.). For a short overview, see J. H. Jackson, *The World Trading System – Law and Policy of International Economic Relations* 109 ff (Cambridge, Mass.: The MIT Press, 1997, 2nd ed). For a critical comment, see M. S. Dunne III, "Redefining Power Orientation: A Reassessment of Jackson's Paradigm in light of Asymmetries of Power, Negotiation, and Compliance in the GATT/WTO Dispute Settlement System", 34 *Law and Policy in International Business* 277-342 (2002).

²⁵ See TN/DS/W/22, Attachment, No 15 (Japan), and TN/DS/W/32, Attachment, No 16 (Japan).

²⁶ See TN/DS/W/18 (Cuba, Honduras, India, Jamaica, Malaysia, Pakistan, Sri Lanka, Tanzania Zimbabwe) and TN/DS/W/47 (India, Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia).

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.²⁷ 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. These proposals could thus make early settlements more transparent. Such transparency, in turn, could create both normative and political pressure for solutions that are not too far apart from WTO rules and from the outcome of potential litigation. They could therefore strengthen the rule-oriented element in dispute settlement.

- *Compliance Reviews of MASs:* The EC proposed the creation of a new Article 22*bis* on the examination of mutually agreed solutions (MASs) which would make a notified MAS subject to a compliance review. If it were found that the defendant did not comply with the mutually agreed solution as notified, the complainant would be entitled to request an authorization from the DSB to suspend concessions or other obligations.²⁸ Compliance reviews of mutually agreed solutions would make the latter better enforceable. That could increase their attractiveness for complainants and strengthen the security and predictability of trading conditions under such solutions.
- *Reduced timeframes:* Several proposals have been submitted that aim at the explicit or implicit reduction of timeframes in the DSU. The “explicit” category includes reduced timeframes 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 intentions. Such proposals would generally deprive Members of time and options that are available for diplomatic tactics, “controlled escalation”, and the search for political

²⁷ See, for instance, TN/DS/W/21 (Jamaica).

²⁸ See TN/DS/W/1, Attachment, No 29 (EC).

compromise. In doing so, these proposals could speed up the way to a legal settlement. However, the actual impact of such changes should not be overrated. Time frames in the DSU are already relatively short. Delays occur more often because already-existing time frames are not being respected. Such delays cannot be eliminated by simply reducing time frames on paper.

- *The creation of a professional permanent panel body (PPB):* One far-reaching proposal is the EC call for a permanent panel body (PPB).²⁹ It is aimed at assuring the supply of qualified panelists and at overcoming the mounting problems in the selection of panelists for individual cases, as parties find it increasingly difficult to agree on the composition of a panel in the current *ad hoc* appointment system. The EC also hopes that a system of permanent panelists would result in a professionalization of the panel process with fewer reversals of cases and altogether shorter timeframes for the procedure. The establishment of a PPB could also further contribute to the evolution of a consistent body of precedent law. Opponents of the idea of a permanent panel body fear that a PPB could be more “ideological” than *ad-hoc* panels and 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. It has also been argued that permanent panelists could pursue a more legalistic approach to dispute settlement than government officials on whom the current system strongly relies, since the latter are expected to be more familiar with the constraints faced by governments. In a similar sense, opponents of the proposal argue that a permanent panel body could be more “ideological” and might engage in law-making. There are also constitutional implications, as the move towards a permanent panel body would delink law-making and adjudication and further alienate trade diplomacy, giving rise to complaints about an extensive judicialization of trade policy and governments’ increased loss of control. Moreover, with Members losing their control of the composition of panels, potential considerations related to reappointment as a panelist could have less weight in a PPB, thereby increasing

²⁹ See TN/DS/W/1, No I and Attachment, No 7 (EC).

the independence of panelists. 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. All in all, shifting from *ad hoc* panels to a PPB has the potential of significantly increasing the rule-orientation of the system.³⁰

- *Terms of appointment of the Appellate Body:* The EC proposed converting the Appellate Body mandate into full-time appointment.³¹ 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,³² a proposal also brought by the EC.³³ By thus removing any potential considerations related to reappointment, the proposal could further strengthen the independence of Appellate Body members and their ability to focus solely on legal considerations in their decision-making.
- *Sequencing and implementation:* 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

³⁰ The proposal has been discussed intensely in scholarly literature. Support for the idea is expressed, to varying degrees, by J. H. J. Bourgeois, "Comment on a WTO Permanent Panel Body", 6(1) *Journal of International Economic Law* 211-214 (2003); Th. Cottier, "The WTO Permanent Panel Body – A Bridge Too Far?", 6(1) *Journal of International Economic Law* 187-202 (2003); Th. Cottier, "Proposals for Moving from Ad Hoc Panels to Permanent WTO Panelists, in E.-U. Petersmann (ed), *Preparing the Doha Development Round: Improvements and Clarifications of the WTO Dispute Settlement Understanding* 40-52 (2002); W. J. Davey, "The Case for a WTO Permanent Panel Body", 6(1) *Journal of International Economic Law* 177-186 (2003); and W. J. Davey, "A Permanent Panel Body for WTO Dispute Settlement – Desirable or Practical", in D. L. M. Kennedy and J. D. Southwick (eds), *The Political Economy of International Trade Law – Essays in Honour of Robert E. Hudec* 496-527 (Cambridge: Cambridge University Press, 2000). A more cautious approach is contained in M. Cartland, "Comment on a WTO Permanent Panel Body", 6(1) *Journal of International Economic Law* 214-218 (2003); J. C. Hecht, "Operation of WTO Dispute Settlement Panels – Assessing Proposals for Reform", 31(3) *Law and Policy in International Business* 657-664 (2000); and in A. W. Shoyer, "Panel Selection in WTO Dispute Settlement Procedures", 6(1) *Journal of International Economic Law* 203-209 (2003).

³¹ See TN/DS/W/1, No V (EC). See also C.-D. Ehlermann, "Six Years on the Bench of the "World Trade Court" – Some Personal Experiences as Member of the Appellate Body of the World Trade Organization", 36(4) *Journal of World Trade* 605-639 (2002), who views such a shift as unavoidable.

³² See TN/DS/W/18 and TN/DS/W/18/Add.1, No IV (Cuba, Honduras, India, Jamaica, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe), as well as TN/DS/W/47 (India, Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia).

³³ See TN/DS/W/3 (Thailand, Philippines); TN/DS/W/38, No V (EC); TN/DS/W/8, lit. c (Australia), TN/DS/W/34, lit. c (Australia) and the proposed change to Art 22.7 DSU as contained in TN/DS/W/49 (Australia).

ultimate stage of WTO dispute settlement. By clarifying the DSU and suggesting one-fits-all solutions, the need for bilateral negotiations on procedural aspects would be substantially reduced. This could move this final stage of 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 authorization to suspend concessions or other obligations, notification requirements of retaliatory measures taken, and the extension of the scope of compliance review procedures to arbitration awards.

- *Prohibition of carousel retaliation:* The proposals for a discipline prohibiting the use of carousel retaliation³⁴ would have a somewhat ambiguous effect. On the one hand, prohibiting carousel retaliation would eliminate legal uncertainty with regard to the application of retaliatory measures. Market conditions for the defendant's exporters would, despite being restricted through retaliatory measures, remain predictable and agreed-on trade rules would continue to apply to non-affected exports. A prohibition of carousel retaliation 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 suspension of concessions or other obligations for the defendant, however, there would presumably be less pressure towards compliance.
- *Strengthened enforcement:* Several proposals to strengthen compliance and the enforcement of material WTO law have been submitted, mostly by emerging or developing economies. 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 seek to ensure that reciprocity is maintained and that the negotiated balance of rights and obligations is protected. These submissions include proposals on collective retaliation;³⁵ freedom of cross-retaliation;³⁶ retroactive determination and

³⁴ See TN/DS/W/1, No II.D and subsequent legal text (EC).

³⁵ See TN/DS/W/15, No 6 (African Group), and see TN/DS/W/42, No. IX (African Group); TN/DS/W/17, No. 15 (LDC Group).

³⁶ See the proposal for a new Art. 22.3bis in TN/DS/W/47 (India, Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia).

application of nullification and impairment, including the allocation of litigation expenses;³⁷ mandatory (monetary) compensation,³⁸ including for measures withdrawn during proceedings; and the negotiability of the right to suspend concessions or other obligations.³⁹ Other measures such as preventive measures,⁴⁰ the suspension of a defendant's right to use the dispute settlement mechanism as a complainant if it does not comply with adverse rulings,⁴¹ the fast-track panel procedure,⁴² the method of calculating increased amounts of nullification or impairment in the case of "mandatory laws",⁴³ and the proposed change to the doctrine of "discretionary laws"⁴⁴ 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:* A variety of proposals has been brought with a view of improving third party participation in DSU procedures.⁴⁵ 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 such deals are at their expense, or if they include any other violation of the most-favored nation clause. In general, improved third party rights impose limitations on the negotiating

³⁷ See TN/DS/W/23, No II(b) (Mexico). For the textual proposal, see the modified Art 22.7 as included in TN/DS/W/40 (Mexico), where the inclusion of litigation costs has been dropped.

³⁸ See TN/DS/W/15, No 5 (African Group) and also TN/DS/W/42, No VIII (African Group). On (monetary) compensation, see also TN/DS/W/17, No 13 (LDC Group); TN/DS/W/33 (Ecuador); and TN/DS/W/29, No 2 (China).

³⁹ See TN/DS/W/23, No II(d) (Mexico) and, for a textual proposal, Art 22.7bis in TN/DS/W/40 (Mexico).

⁴⁰ See TN/DS/W/23, No II(c) (Mexico) and, for a textual proposal, Art 12.6bis and 12.6ter in TN/DS/W/40 (Mexico).

⁴¹ See TN/DS/W/9 (Ecuador).

⁴² See TN/DS/W/45 (Brazil) and TN/DS/W/45/Rev.1 (Brazil).

⁴³ See TN/DS/W/22, No 2(a) (Japan) and TN/DS/W/32, Attachment, No 21 (Japan).

⁴⁴ See TN/DS/W/22, No 2(b) (Japan) and TN/DS/W/32, Attachment, No 22 (Japan).

⁴⁵ See in particular, TN/DS/W/12 and TN/DS/W/12/Rev.1 (Costa Rica); see also TN/DS/W/38, No III (EC), TN/DS/W/25, No. II and TN/DS/W/36 (Taiwan); TN/DS/W/44 (Jamaica), TN/DS/W/18 and TN/DS/W/18/Rev.1 (Cuba, Honduras, India, Jamaica, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe), TN/DS/W/47 (India, Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia), TN/DS/W/15 and TN/DS/W/42, No IV (African Group); TN/DS/W/8, lit. b and TN/DS/W/34, lit. b (Australia).

flexibility of the main parties to a dispute by reducing opportunities for settlements that are too far away from WTO principles.

- *Increased external transparency:* Some industrialised countries have called for increased transparency in dispute settlement.⁴⁶ Similar to strengthened third party rights and strengthened notification requirements, external transparency sheds light on negotiations and therefore tends to “disinfect” bilateral deals from negotiated elements that are not necessarily in line with WTO provisions. The logic is that concessions within gentlemen’s agreements and package deals would become more difficult to maintain as adversely affected interest groups would pressure their governments to take a “hard stance” and bring issues to adjudication instead of settling on compromises with “unnecessary concessions”. Not surprisingly, empirical studies have found that democracies find it particularly hard to settle if the process is public. Some observers therefore warn against the increase of transparency as it could preclude early settlements. 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 rather belong to the domain of diplomatic negotiations.⁴⁷

Although there is no agreement in the DSU review negotiations on the issue of external transparency, the recent decision of two panels to open their proceedings to the public may be considered an interesting precedent (see also Section 2.2. above): In the complaint of the EU against the continued application of retaliatory measures by the United States and Canada against the EU in the *Hormones* case,⁴⁸ the parties to the dispute had requested jointly that the proceedings be opened to the public. The panels subsequently followed this request and the panel hearings of 12 – 13 September 2005 were broadcast by closed-circuit

⁴⁶ See TN/DS/W/13 (United States) and TN/DS/W/46 (United States); TN/DS/W/41, No 3 (Canada); TN/DS/W/1, Attachment (EC); TN/DS/W/22 (Japan).

⁴⁷ For a detailed discussion of the various facets of transparency, see J. Waincymer, “Transparency of Dispute Settlement Within the World Trade Organization”, 24(3) *Melbourne University Law Review*, 797-838 (2000). See also Th. A. Zimmermann, *Negotiating the Review of the WTO Dispute Settlement Understanding* 167 et seq. (London: Cameron May, 2006) for an introductory discussion and further references.

⁴⁸ *United States – Continued Suspension of Obligations in the EC–Hormones Dispute* (WT/DS320) and *Canada–Continued Suspension of Obligations in the EC–Hormones Dispute* (WT/DS321).

television to an audience of trade negotiators, NGO representatives, media and academics that had gathered at the WTO in Geneva. By contrast, the panels' meetings with third parties remained closed to the public since not all of the third parties had agreed to open the proceedings.⁴⁹

As opposed to a substantial number of proposals submitted in favour of increasing the rules-based elements of dispute settlement, some of the proposals show a tendency towards power-orientation and a more negotiations-based approach to dispute settlement. These include the following:

- *Automatic lapse or withdrawal of consultations/panel requests:* Proposals brought by the European Union and Jordan provide for the automatic lapse of consultations/panel requests and for an easier withdrawal of such requests.⁵⁰ Both submissions could facilitate the use of consultation and panel requests as tactical, negotiatory instruments. Notification requirements for mutually agreed solutions could be spurned even more easily than today if consultation or panel requests were to dissipate automatically. This could enhance the flexibility of disputing parties to come to whatever agreement they prefer in a given dispute, thus diminishing the impact of material WTO rules on early settlements and the role of adjudicating bodies.
- *Calls for separate opinions by individual panellists/Appellate Body members:* Calls for panel or Appellate Body members⁵¹ to hand down their opinions separately could expose individual members of the adjudicating bodies to undue pressure from governments or other interests and reduce their independence. This holds in particular as long as panelists continue to be appointed *ad hoc*, and as long as Appellate Body members are subject to re-election in case they wish to serve a second term, which is possible under current rules. Therefore, requiring panelists or Appellate Body members to hand down separate opinions might lead to more "political" decisions.

⁴⁹ See "Beef Hormones Dispute Hearings to Be Opened to Public", in *Bridges Weekly Trade News Digest*, Vol 9, No 29, 7 September 2005; "First Public WTO Dispute Settlement Hearing Under Way", in *Bridges Weekly Trade News Digest*, Vol 9, No 30, 15 September 2005.

⁵⁰ See TN/DS/W/1 (EC), Attachment No 4; TN/DS/W/43, No III (Jordan); and TN/DS/W/53 (Jordan).

⁵¹ See TN/DS/W/17 (LDC Group) and TN/DS/W/42, No VI (African Group).

- *Flexibility during appellate review:* Several proposals seek to introduce more flexibility and Member control at the appellate stage by introducing an interim review⁵² and by allowing the suspension of the appellate procedures.⁵³ The appellate stage is currently the most rule-oriented stage of the process, with cases undergoing review by law experts without much Member control over the procedure. This stage is therefore targeted by those Members who would prefer a less rigid approach to dispute settlement. The interim review and the suspension of procedures would provide Members with a new political 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:* A US-Chilean proposal to allow parties to delete findings from panel and Appellate Body reports by mutual agreement⁵⁴ 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 proposal might harm third parties, 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 role of adjudicating bodies would diminish as they could be prevented from making findings which could contribute to the further evolution of the multilateral trading system.
- *Partial adoption procedures:* Another proposal in the aforementioned US-Chilean submission is to allow the DSB to decide by consensus not to adopt specific findings or the basic rationale behind a finding in a report.⁵⁵ This proposal would thus give the DSB a means to correct the jurisprudence of adjudicating bodies. By contrast to the deletion of findings from reports by the parties to the dispute, this modification appears to be less problematic.

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

⁵³ See TN/DS/W/28, No 6(d) (US, Chile), and TN/DS/W/52, lit. d, proposed amendment to Art. 17.5 DSU (US, Chile).

⁵⁴ See TN/DS/W/28, No 6(b) (US, Chile) and TN/DS/W/52, lit. b, proposing changes to Art 12.7 and Art 17.13 DSU (US, Chile).

⁵⁵ See TN/DS/W/28, No 6(c) (US, Chile) and TN/DS/W/52, lit. c, proposing changes to Art. 16.4 and Art 17.14 DSU (US, Chile); see also Parts 6.2.5 and 6.3.6.

It would not take place in a bilateral setting, but in the multilateral setting of the DSB, and it would require consensus. The proposal is therefore basically in line with the Member-driven character of the organisation, and it could remedy to some extent the existing imbalance between the (strong) legal and the (weak) political decision-making mechanisms in the WTO system (see below in Part 5).

- *Special and differential treatment for developing countries:* Several proposals have been made that would increase flexibility for developing countries in the DSU and ease the “burden” of rule-orientation upon them. For instance, proposals for the implementation stage such as the extension of the RPT to two to three years in cases with developing country defendants⁵⁶ could reduce the pressure to comply with WTO rules for these countries. Moreover, the proposition of a limit on the number of cases per calendar year that could be brought against a particular developing country⁵⁷ might provide an effective means for developing countries to shield themselves against challenges to their trade policy measures and against the enforcement of WTO disciplines. This would, in turn, undermine the credibility of their trade policy commitments both internally (eg *vis-à-vis* domestic interests seeking protection) and externally (*vis-à-vis* their trade partners).
- *Various other proposals:* Several other proposals would increase the negotiating flexibility of Members during the procedure and help them gain more political control over the mechanism. These include the EC proposal to give parties to a dispute the possibility of extending any timeframe in the DSU by mutual agreement,⁵⁸ proposals to oblige adjudicating bodies to submit certain issues to the General Council for interpretation,⁵⁹ and the calls by the US and Chile to provide “additional guidance” to WTO adjudicative bodies.⁶⁰

Table 1 contains a non-exhaustive summary of DSU reform proposals according to their orientation.

⁵⁶ See TN/DS/W/19, proposal on Art 21.2, lit. b(i) (Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe).

⁵⁷ See TN/DS/W/29, No 1 and TN/DS/W/57, No 1 (China).

⁵⁸ See TN/DS/W/1, Attachment, No 1.

⁵⁹ See TN/DS/W/42, No I (African Group).

⁶⁰ See TN/DS/W/28, No 6(f) (US, Chile) and TN/DS/W/52, lit. f (US, Chile).

Table 1: "Power-Orientation" versus "Rule-Orientation" in the Doha Round DSU Negotiations⁶¹

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 panelists/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 timeframes by agreement of the parties; • Obliging adjudicating bodies to submit certain issues to the General Council for interpretation; • Providing "additional guidance" to adjudicating bodies.

⁶¹ For more details, see Th. A. Zimmermann, *Negotiating the review of the WTO Dispute Settlement Understanding* 204-214 (London: Cameron May, 2006).

With regard to this dichotomy of rule-oriented versus power-oriented proposals, a word of caution needs, however, to be said. Whereas the immediate contribution of certain reform proposals towards either more rule-orientation or more power-orientation in the system may be quite straightforward, the overall effect may be less clear. It cannot be excluded that increased rule-orientation in the dispute settlement system might drive more powerful Members out of the WTO system and induce them to solve their trade disputes outside the multilateral arena where their power has greater leverage. In such a scenario, the overall role of multilateral disciplines for the resolution of international trade disputes could factually diminish. Such concerns are not just theoretic considerations, as history shows: In the 1960s, GATT dispute settlement became virtually inactive as a spirit of “anti-legalism” prevailed and complaints were regarded as unfriendly confrontations poisoning the atmosphere.⁶²

The basic controversy between rule-oriented and power-oriented proposals in the DSU review therefore also reflects a broader discussion on what some commentators recently perceive to be a general imbalance between the relatively effective legal decision-making process (as incorporated in the DSU) and the relatively ineffective political decision-making process in the WTO.⁶³ 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. Again, the danger associated is that Member governments that see their interests insufficiently safeguarded in such a setting might be driven out of the system.

There are currently two strands in the WTO literature that seek to strike a balance between the strong dispute settlement system and the weak, consensus-based political decision-making process at the WTO. One school of thought – probably the minority point of view – seeks to re-strengthen Members’ political control of WTO dispute settlement and to weaken its adjudication character.⁶⁴ Other authors, however,

⁶² See R.E. Hudec, *The GATT Legal System and World Trade Diplomacy* 235-250 (Salem: Butterworth, 1990).

⁶³ See for instance, C.-D. Ehlermann, “Tensions Between the Dispute Settlement Process and the Diplomatic and Treaty-Making Activities of the WTO” 1(3) *World Trade Review* 301-308 (2002).

⁶⁴ See C. E. Barfield, “WTO Dispute Settlement System in Need of Change”, 37(3) *Intereconomics – Review of European Economic Policy* 131-134 (2002); and C. E. Barfield, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization* (Washington, D.C.: The AEI Press, 2001). An earlier contribution to the discussion from a critical perspective is J. Hippler Bello, “The WTO Dispute Settlement Understanding – Less Is More”, 90(3) *The American Journal of International Law* 416-418 (1996).

vehemently oppose any effort to weaken the adjudication system and argue in favor of focusing reform efforts on improved political decision-making.⁶⁵ Both avenues have their pitfalls as the brief discussion in the conclusions will show.

2.4 The Difficulty of Negotiating a System in Use

Some problems of the DSU review may be explained with the difficulties of negotiating reforms to a system that is constantly in use. Negotiating positions are subject to permanent change as Members continuously gather new experience due to new cases and new reports. Moreover, on-going negotiations on material WTO rules (eg the negotiations on "Rules", including on anti-dumping) may also have a bearing on the stance of Members towards the dispute settlement system. Such problems could be partly remedied by including generous transition periods for any change to the DSU.

2.5 General Sense of Satisfaction and the "Do No Harm" Imperative

Finally, despite the criticism that is occasionally voiced,⁶⁶ 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 should be, to not 'do any harm' to the existing system since it has so many valuable attributes."

⁶⁵ See C.-D. Ehlermann, "Reflections on the Appellate Body of the WTO", 6(3) *Journal of International Economic Law* 695-708 (2003); C.-D. Ehlermann, "Six Years on the Bench of the "World Trade Court" – Some Personal Experiences as Member of the Appellate Body of the World Trade Organization", 36(4) *Journal of World Trade* 605-639 (2002); C.-D. Ehlermann, "Tensions Between the Dispute Settlement Process and the Diplomatic and Treaty-Making Activities of the WTO"; 1(3) *World Trade Review* 301-308 (2002); J. H. Jackson, "Perceptions about the WTO trade institutions", 1(1) *World Trade Review* 101-114 (2002); D. P. Steger, "Review of: Claude E. Barfield, *Free Trade, Sovereignty, Democracy – The Future of the World Trade Organization*", 5(2) *Journal of International Economic Law* 565-570 (2002). Proposals for new reforms to political decision-making are included, for instance, in J. J. Schott and J. Watal, "Decision-Making in the WTO", Policy Brief 00-2 (Washington: Institute for International Economics: 2000); and in Th. Cottier and S. Takenoshita, "The Balance of Power in WTO Decision-Making – Towards Weighted Voting in Legislative Response", 59(2) *Aussenwirtschaft* 171-214 (2003).

⁶⁶ See for instance the criticism in D. Wilson and L. Starchuk, "Judicial Activism in the WTO – Implications for the Doha Negotiations"; Manuscript, 13 September 2003; <http://www.johnstonbuchan.com/pubs/trade/judicial%20Activism%20in%20the%20WTO.pdf> (downloaded on 16 September 2003), and the particularly strong criticism contained in J. Ragosta, N. Joneja and M. Zeldovich, "WTO Dispute Settlement – The System Is Flawed and Must Be Fixed"; http://www.dbtrade.com/publications/wto_dispute_settlement_is_flawed.pdf (visited on 10 September 2003).

Although there is clear scope for improvements, there appears to be a well-founded fear that the required, mostly technical modifications should not come at the expense of fundamental alterations of the system that are being asked for by some Members. This holds in particular for those changes to the DSU, which would mostly be motivated by “adverse” experiences and 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 Members prefer to ignore political negotiating mandates and let the DSU review negotiations drag on, regardless of previously fixed deadlines.

3. Elements of a “DSU Review in Practice”

Whereas the political negotiations on the reform of the DSU have stalled, practical solutions have been found to some of the problems in the application of the mechanism. Indeed, there has been some kind of a “DSU review in practice”. It includes practical actions both by Members and by the adjudicating bodies further to develop the system and to come to terms with the problems in its application. The following examples may serve as illustrations.

First, the sequencing problem has been overcome by the conclusion of bilateral agreements between the parties to a dispute 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 no longer appear to consider the sequencing issue as a pressing concern.

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.

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 give third parties the possibility of attending oral hearings even

if they had not made a written submission prior to the hearing, as the old rule had required.⁶⁷

Fourthly, the Appellate Body adopted new working procedures requiring more precision in notices of appeal. It thus catered for a long standing concern of some Members who had called for increased precision of notices of appeal but have been unable to reach such a modification through the DSU review negotiations.⁶⁸

Fifthly, regarding external transparency, recent developments (September 2005) have shown that the current system allows some flexibility. The panels in the respective cases⁶⁹ opened to the public their proceedings with the main parties to the dispute, as the latter had jointly requested. At the same time, the proceedings with third parties remained closed, as not all third parties had agreed to such an opening of the process.

As a final example, the establishment of an Advisory Centre on World Trade Law (ACWL) has remedied some of the resource constraints that developing countries face in the more sophisticated legal settings of the new dispute settlement system. This international organisation, which is independent from the WTO, provides legal training, support and advice on WTO Law and on dispute settlement procedures to developing countries, in particular to least-developed countries. ACWL services are available against the payment of modest fees for legal services varying with the share of world trade and GNP *per capita* of user governments.⁷⁰ The Center thus serves to a certain degree as a substitute for other institutions such as, for instance, a special fund for developing countries. Developing countries had proposed the establishment of such a fund during the DSU review negotiations.

Conclusions

At the time of writing, the DSU review negotiations have been going on for roughly seven years. Despite the submission of many interesting

⁶⁷ These modifications were introduced into document WT/AB/WP/7 (meanwhile replaced by WT/AB/WP/8). See also "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.

⁶⁸ WT/AB/WP/8. The new procedures entered into force on 1 January 2005.

⁶⁹ *United States–Continued Suspension of Obligations in the EC–Hormones Dispute* (WT/DS320) and *Canada–Continued Suspension of Obligations in the EC–Hormones Dispute* (WT/DS321).

⁷⁰ For more information on the ACWL, see <http://www.acwl.ch> – in particular http://www.acwl.ch/e/quickguide_e.aspx.

proposals and partly intense negotiating activity, no agreement on DSU reforms has so far emerged at the negotiating table.

Nevertheless, as the afore-mentioned examples of the “DSU Review in practice” show, Members and adjudicating bodies manage to adapt the dispute settlement system continuously 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. In other terms, 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. This makes a timely completion of the DSU clearly less urgent. We should not be surprised if, as in the past, these elements of evolving practice (see Section 4) were to be codified into a new or modified text at a later date.

Today, the major challenge for the DSU is not so much whether the multitude of mainly technical questions in the DSU review negotiations can be built into an agreement but, rather, how well suited the DSU is to overcome the more fundamental concern – notably that there is an unsustainable imbalance between political and judicial decision-making in the WTO.

None of the two generic options that are being discussed to remedy the situation – weakening adjudication or strengthening political decision-making – holds great promise, if considered in isolation. Weakening adjudication is not an attractive option as Members would have to forego the achievements which the new DSU has brought for a rules-based international trading system. It would also be at odds with globalization and its increasing reliance on international transactions in economic life, which require a predictable and stable regulatory framework for international trade. Alternatively, improving political decision-making is an extremely difficult task and could result in important Members being driven out of the system, if the sacred consensus principle were to be replaced by some form of majority voting. Sovereignty concerns similar to those that are currently voiced against allegedly overreaching dispute settlement would ultimately be raised against majority voting procedures as they would eventually force results upon countries which the latter cannot or do not want to accept.

For the time being, only incremental steps by a variety of actors therefore seem to be feasible and desirable to remedy the imbalance:

- Members could assume their systemic responsibility by exercising restraint in bringing politically sensitive cases to adjudication.
- Adjudicating bodies could continue their current approach to dispute settlement, based on judicial restraint and on the avoidance of “sweeping statements”.
- Selective multilateral political elements could be built into the dispute settlement procedure without altering the basic architecture of the DSU (eg by allowing the DSB to decide by consensus not to adopt specific findings or the basic rationale behind a finding in a report.)
- Members may want to explore improvements to the WTO’s political decision-making mechanisms more actively. Indeed, the WTO community has become aware of the problems as the recent report by a “Consultative Group” to the Director General shows. This report has a clear focus on institutional issues, including on decision-making.⁷¹

Whereas such a gradual and eclectic approach may not satisfy the more ambitious observers who might favor clear reforms in either direction – ie towards more adjudication and rule-orientation or back to power-orientation and diplomacy – this eclecticism appears at least as a feasible, pragmatic option. And, if judged in the light of past experience with the gradual and rather pragmatic evolution of the system, it also appears to be the most promising approach. The current DSU is the fruit of five decades of gradual development, which was not even free of setbacks. There is no reason to assume why such gradualism should not be adequate for the future as well. If Members and adjudicating bodies continue to assume their responsibility for the system, the DSU has good chances to remain an attractive forum for dispute settlement.

⁷¹ See Consultative Board, “The Future of the WTO – Addressing institutional challenges in the new millennium – Report by the Consultative Board to the Director-General Supachai Panitchpakdi” 56 (WTO, 2004, available online at http://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf)