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The WTO Dispute Settlement System

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It would make little sense to spend years negotiating the detailed rules in international trade agreements if those rules could be ignored. Therefore, a system of rule enforcement is necessary. In the World Trade Organization (WTO), that function is performed by the Understanding on Rules and Procedures Governing the Settlement of Disputes (usually called the "Dispute Settlement Understanding," or simply the "DSU"). As stated in Article 3.2 of the DSU, "[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system." In the commercial world, such security and predictability are viewed as fundamental prerequisites to conducting business internationally.

In this chapter, I will first describe the WTO dispute settlement process by outlining its four basic phases: consultations, the panel process, the appellate process, and the surveillance of implementation. Secondly, the actual performance of the system from 1 January 1995 to date will be evaluated.[1] Finally, a number of important issues currently facing the system will be discussed. Among those issues are whether or not the system adequately takes into account the special needs of developing countries and whether or not the system's transparency should be increased through, for example, allowing greater access for the public to the various elements of the process. These two concerns have been particularly important in WTO cases that have touched on environmental issues.

At the outset, it is important to recall that the WTO dispute settlement system is an elaboration of the General Agreement on Tariffs and Trade (GATT) system that preceded it. The GATT system was relatively successful as an international dispute settlement mechanism. It produced 100 or so formal decisions (more than the International Court of Justice during the comparable period). One extensive academic study of the GATT dispute settlement system concluded that countries with legitimate complaints achieved complete satisfaction in some 60 per cent of the cases and partial satisfaction in most of the rest.[2] However, the system was criticized because the GATT consensus decision-making rules meant that a party could prevent the dispute settlement process from starting and, even if the process was allowed to go forward, a losing party could prevent formal adoption of a decision against it (and losing parties did so more frequently over time).[3] Without adoption, the report remained in limbo; it expressed the view of three experts but had no status in GATT. Thus, the dispute remained unresolved. As a result, there was a perception that the GATT system was not adequate. Moreover, it was believed that cases that should have been resolved in the system were never even brought to it because of this perceived shortcoming.

In the Uruguay Round trade negotiations, the United States in particular wanted to improve and strengthen the dispute settlement system. Traditionally, the United States had supported a more judicial-like system in GATT, whereas major powers such as the European Communities and Japan preferred a system that stressed the negotiated settlement of disputes.[4] However, one of their major concerns in international trade was what they viewed as inappropriate US unilateralism and they became convinced during the course of the Uruguay Round that one way to restrain US unilateralism would be to strengthen the GATT dispute settlement system and persuade the United States to commit to use the improved system in lieu of taking unilateral action.

As a result and as will be seen below, compared with the GATT system, the WTO system operates with more efficiency and within defined time-frames. Its increased automaticity is highlighted by the fact that in the WTO dispute settlement reports must be adopted unless there is a consensus to the contrary, in contrast to the GATT system where a positive consensus was needed to adopt reports. Moreover, in the WTO, there is a new appellate process and a much more

effective system for surveillance of the implementation of the conclusions of the reports.

1. WTO dispute settlement: An outline of the process[5]

The settlement of disputes in the World Trade Organization is governed by the Dispute Settlement Understanding (DSU), which is in effect an interpretation and elaboration of Articles XXII and XXIII of GATT 1994.[6] Article XXII provides for consultations generally with respect to any matter affecting the operation of the agreement. Article XXIII provides for consultations and dispute settlement procedures where one member considers that another member is failing to carry out its obligations under the agreement.[7] The other agreements annexed to the WTO Agreement also rely on GATT Articles XXII and XXIII, or very similar provisions, as a basis for dispute settlement.[8]

There are essentially four phases in the WTO dispute settlement process: consultations, the panel process, the appellate process, and surveillance of implementation. Each is discussed in turn.

Consultations

Under the WTO dispute settlement system, a member may ask for consultations with another WTO member if the complaining member believes that the other member has violated a WTO agreement or otherwise nullified or impaired benefits accruing to it. The goal of the consultation stage is to enable the disputing parties to understand better the factual situation and the legal claims in respect of the dispute and to resolve the matter without further proceedings. The DSU provides that "[t]he 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 [WTO] agreements is clearly to be preferred."[9] At this stage, as well as at later stages in the process, there is a possibility of utilizing the good offices of the WTO Director-General or mediation to settle a dispute.[10]

If consultations are requested under Article XXII of GATT 1994 or the equivalent provision of another WTO agreement,[11] WTO members

with a substantial trade interest may request to be joined in the consultations as third parties.[12] If the member asked to consult agrees that the claim of substantial interest is well founded, the request to join will be honoured. If, however, consultations are requested under Article XXIII (or its equivalent), there is no provision for third parties to join in the consultations.

The manner in which the consultations are conducted is up to the parties. The DSU has no rules on consultations beyond that they are to be entered into in good faith and are to be held with 30 days of a request.[13] Typically, they are held in Geneva and involve capital-based officials, as well as local delegates. During the consultations, both parties are likely to try and learn more about the facts and the legal arguments of the other party. Written questions may be exchanged and written answers requested. Despite the fact that the structure of consultations is undefined and there are no rules for conducting them, consultations lead to settlements (or at least the apparent abandonment of a case) in respect of a significant number of consultation requests. For example, of the 138 consultation requests made prior to 30 June 1998 (i.e. requests that are over one year old as of the date of this chapter), slightly more than one-half (72) have not been brought before a panel. Although some of these may eventually end up before a panel, this statistic suggests that the consultation process disposes of roughly one-half of the cases brought.

The panel process

Panel establishment

If consultations fail to resolve the dispute within 60 days of the request, the complaining WTO member may request the WTO Dispute Settlement Body (DSB) to establish a panel to rule on the dispute.[14] The DSB is composed of all WTO members and is charged with administering the rules and procedures of the DSU and overseeing the operation of the WTO dispute settlement system.[15] Technically, the DSB is the WTO General Council, performing its dispute settlement role under a separate chairperson. Under the DSU, if requested, the DSB is required to establish a panel no later than the second meeting at which the request for a panel appears on the agenda,[16] unless there is a consensus in the DSB to the contrary.[17] Thus, unless the member requesting the estab-

lishment of a panel consents to delay, a panel will be established within approximately 90 days of the initial request for consultations.[18] It should be stressed, however, that parties are not required to request a panel at any point in time and that, in most cases, a panel is not requested 60 days after the start of consultations. Rather, consultations continue for some time thereafter.

Panellist selection

After the panel is established by the DSB, it is necessary to select the three individuals who will serve as panellists.[19] To accomplish this, the WTO Secretariat suggests the names of possible panellists to the disputing parties. The DSU allows the parties to reject a Secretariat proposal only for "compelling reasons,"[20] but in practice the parties have rather free rein to object since their agreement to the composition of the panel is necessary, unless the Director-General of the WTO is requested to appoint the panel. The practice of frequent objections means that the panel selection process is often rather slow. The median time for selection is seven weeks.[21]

If the parties cannot agree on the identity of the panellists within 20 days of the panel's establishment, any party to the dispute may request the WTO Director-General to appoint the panel, which he is required to do within 10 days of the request.[22] Over time, it has become more common for the Director-General to appoint panels. To date, he has appointed 16 of the 45 panels that have been composed. It should be noted, however, that it is common for the parties to have agreed upon one or two of the panellists on the panels appointed by the Director-General.

The DSU provides that panels shall be composed of "well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member."[23] These criteria could be roughly summarized as establishing three categories of panellists: government officials (current or former), former Secretariat officials, and academics. It is specifically

provided that panellists shall not be nationals of parties or third parties, absent agreement of the parties.[24] It is also specified that, in a case involving a developing country, one panellist must be from a developing country (if requested).[25] The 135 WTO panellist positions filled through 30 June 1999 were filled by 93 different individuals, with four individuals having served on four panels and nine individuals having served on three panels. Most of these positions were filled by government officials (114), one-third of whom were Geneva based; 29 positions were filled by academics; and 8 positions were filled by former Secretariat officials.[26] The DSU provides for the creation of an indicative list of individuals qualified for panel service. Members have followed varying practices in respect of nominations to the list—most nominate non-governmental individuals, but many also nominate non-Geneva governmental individuals and some even nominate Geneva-based officials. Most members do not nominate anyone. To date, about one-third of the panel positions have been filled with persons on the indicative list.

The 135 panellist positions have been filled with persons from a wide range of countries (38 in all), with Switzerland, New Zealand, Australia, Hong Kong/China, and European Union countries supplying the most.[27] More than one-half of the WTO panellists selected to date had served on a previous GATT or WTO panel at the time of their selection.

Rules of conduct for panellists and Secretariat staff

The DSU provides that panellists serve in their individual capacities and that members should not give them instructions or seek to influence them.[28] In addition, in December 1996, the DSB adopted rules of conduct applicable to participants in the WTO dispute settlement system.[29] There were no such rules in the past. The rules require that Appellate Body members, panellists, arbitrators, experts, and Secretariat staff assigned to assist in the dispute settlement process "shall be independent and impartial, shall avoid direct or indirect conflicts of interest and shall respect the confidentiality of proceedings."[30] To ensure compliance with the rules, such persons are to disclose "the existence or development of any interest, relationship or matter that person could reasonably be expected to know and that is likely to affect, or give rise to justifiable doubts as to, that person's independence or impartiality."[31] Disputing parties have the right to raise an alleged material violation of

the rules, which, if upheld, would lead to the replacement of the challenged individual.

The panel's functions and terms of reference

A panel's terms of reference are normally determined by the complaining party's request for a panel, unless the parties agree upon special terms of reference. The normal terms of reference provide that the panel shall examine, in light of the relevant WTO agreements, the matter referred to the DSB by the complainant and make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[32] More specifically, the DSU provides that 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 WTO agreements.[33] The "matter" referred to a panel is typically that contained in the complaining party's request for the establishment of a panel. The DSU requires that such a request be in writing and identify the specific measures at issue and provide a brief summary of the legal basis of the complaint.[34]

Panel proceedings

A panel normally meets with the parties shortly after its selection to set its working procedures and time schedule.[35] The standard proposed timetable for panels makes provision for two meetings between the panel and the parties to discuss the substantive issues in the case.[36] Each meeting is preceded by the filing of written submissions. In the case of the first meeting, the complainant files first and the respondent is expected to file two or three weeks thereafter. Rebuttal submissions filed after the first meeting are typically filed simultaneously. Panels normally ask oral and written questions to which the parties are expected to respond. If it deems it appropriate, a panel may either consult individual experts or form an expert review group to advise it on technical and scientific issues.[37]

After completing the fact-gathering and argument phase, the panel issues a draft of the "descriptive part" of its report, which summarizes the arguments of the parties and on which the parties may submit comments.[38] Following receipt of comments, the panel issues its "interim report," which contains the descriptive part as revised, as well as the

panel's findings and recommendations. The interim report becomes the final report unless one of the parties requests the panel to review "precise aspects" of the report.[39] If requested, the panel is required to hold an additional meeting with the parties to hear their views on those aspects of the interim report. With one exception, parties have always commented on some aspects of the interim report. However, it is not uncommon for parties to forgo an additional meeting with the panel and to make their comments in written form only. The extent of those comments varies widely. Some parties comment only on factual issues, saving their legal arguments for appeal. Others treat the interim review process as a mini-appeal in which they raise a multitude of factual and legal issues. The prevailing party typically suggests ways to strengthen the panel's reasoning. In light of the comments received, the panel then issues its final report. To date, no final report has reached a different result than an interim report, although some significant changes in wording have been made from time to time.

Non-party WTO members may participate in the dispute settlement process to a limited degree as third parties if they have a substantial interest in the matter.[40] Otherwise panel proceedings are not open to non-parties. Parties may make their own submissions to a panel public and, if a party does not do so, it may be requested to provide a non-confidential summary of its submissions that can be made public.[41] As discussed below, there is interest in expanding access to the system, particularly for other members, but also for interested non-governmental entities (i.e. NGOs and the public at large).

The DSB sets as a goal that the final report should be issued to the parties within six months of the panel's composition[42] and that, at the latest, the report should be circulated to all members within nine months of the panel's establishment.[43] To date, 27 WTO panels have issued reports, and the median time elapsed between establishment and circulation has been 11.1 months. The failures to meet the nine-month target have often involved cases where the panel felt it necessary to have recourse to outside experts, where there were translation delays, and where the cases were extraordinarily complex. The current median time of 11.1 months is, however, an increase in median time of one month since August 1998, suggesting that the timely performance of panels has been declining, perhaps because of inadequate resources in the system, an issue discussed below.

Adoption of the panel report

After its circulation to WTO members, the final report is referred to the DSB for formal adoption, which is to take place within 60 days unless there is either a consensus not to adopt the report or an appeal of the report to the WTO Appellate Body. This so-called negative consensus rule is a fundamental change from the GATT dispute settlement system, where a positive consensus was needed to adopt a panel report, thus permitting a dissatisfied losing party to block any action on the report. Now, as long as one member wants the report adopted, it will be adopted. Although the power to block adoption of reports was used relatively infrequently, its use was increasing over time, as noted above. Moreover, it was used in a number of high-profile cases and had led to significant complaints about the effectiveness of the GATT system. Observers found it hard to accept that the losing party could exercise such control. Now, however, the losing party cannot block adoption but, in part to compensate for the loss of that power, there is a right of appeal. If a panel report is appealed, after completion of the appeal it is adopted as affirmed, modified, or reversed by the Appellate Body.

The appellate process

The possibility of an appeal is a new feature of the WTO dispute settlement system. The Appellate Body[44] consists of seven individuals, appointed by the DSB for four-year terms.[45] The Appellate Body hears appeals of panel reports in divisions of three, although its rules provide for the division hearing a case to exchange views with the other four Appellate Body members before the division finalizes its report.[46] The members of the division that hears a particular appeal are selected by a secret procedure that is based on randomness, unpredictability, and the opportunity for all members to serve without regard to national origin.[47]

The Appellate Body's review is limited to issues of law and legal interpretation developed by the panel.[48] However, the Appellate Body has taken a broad view of its power to review panel decisions. It has the express power to reverse, modify, or affirm panel decisions,[49] but the DSU does not discuss the possibility of a remand to a panel. Partly as a

consequence, the Appellate Body has adopted the practice, where possible, of completing the analysis of particular issues in order to resolve cases where it has significantly modified a panel's reasoning. This avoids requiring a party to start the whole proceeding over as a result of those modifications.[50]

The Appellate Body is required to issue its report within 60 (at most 90) days from the date of the appeal,[51] and its report is to be adopted automatically by the DSB within 30 days, absent consensus to the contrary. There have been 17 Appellate Body reports adopted to date. In three cases, the panel was affirmed; in one case, it was reversed. In the remaining 13 cases, the Appellate Body has modified, sometimes extensively, the panel's findings. In all but two cases, however, the basic result reached by the panel has been upheld, albeit sometimes to a different degree and/or on the basis of different reasoning.

It is probably much too early to judge an institution that has been in operation for fewer than four years. None the less, to date there seems to be general satisfaction with the overall performance of the Appellate Body and none of the proposals in the ongoing review of the DSU (discussed below) suggest any fundamental change to the Appellate Body or the way it would work, except for the possibility of extending the scope of its review powers and permitting it to remand cases to the original panel for reconsideration in light of its decision.

Surveillance of implementation

The final phase of the WTO dispute settlement process is the surveillance stage. This is designed to ensure that DSB recommendations (based on adopted panel/Appellate Body reports) are implemented. If a panel finds that an agreement has been violated, it typically recommends that the member concerned bring the offending measure into conformity with its WTO obligations.[52] Although a panel may suggest means of implementation, it is left to members to determine how to implement.[53]

Under the surveillance function, the offending member is required to state its intentions with respect to implementation within 30 days of the adoption of the applicable report(s) by the DSB. If immediate im-

plementation is impractical, a member is to be afforded a reasonable period of time for implementation.[54] Absent agreement, that period of time may be set by arbitration. The DSU provides that, as a guideline for the arbitrator, the period should not exceed 15 months.[55] In the first six cases, the reasonable periods of time, whether set by arbitration or by agreement, happened to be 15 months. In the next nine cases, the times ranged from 7 to 13 months, with a median of 8.3 months. Starting six months after the determination of the reasonable period of time, the offending member is required to report to each regular DSB meeting as to its progress in implementation.[56]

If a party fails to implement the report within the reasonable period of time, the prevailing party may request compensation.[57] If that is not forthcoming, it may request the DSB to authorize it to suspend concessions (i.e. retaliate) owed to the non-implementing party.[58] DSB authorization is automatic, absent consensus to the contrary, subject to arbitration of the level of suspension if requested by the non-implementing member.[59] To date, suspension of concessions has been authorized in two cases—at the request of the United States vis-à-vis the European Union in respect of the *Bananas* case; at the request of Canada and the United States vis-à-vis the European Union in respect of the *Hormones* case. In each case, the level of suspension was set by arbitration.[60] Suspension of concessions is viewed as a last resort and the preference is for the non-implementing member to bring its measure into conformity with its obligations.[61]

The above-described rules on suspension of concessions work without problem when it is agreed that there has been no implementation. However, if there is a disagreement over whether or not there has been satisfactory implementation, the provisions of the DSU do not work harmoniously.

On the one hand, Article 21.5 of the DSU provides that such a disagreement shall be referred to the original panel, where available, which shall issue its report in 90 days. It is unclear whether there is a requirement for consultations prior to such referral and whether the DSB must make the referral. Likewise it is not clear whether there is a right of appeal. Article 21.5 refers to using "these dispute settlement procedures," which arguably suggests that all of these steps may be necessary (although, unlike the case of the panel process, Article 21.5 does not provide that these other steps should be expedited).

At the same time, Article 22.2 of the DSU provides that, on request, the DSB must authorize suspension of concessions, absent consensus to the contrary, within 30 days of the expiration of the reasonable period of time. An Article 21.5 proceeding would normally not be completed within 30 days of the expiration of the reasonable period of time. As a consequence, a number of questions arise. Can the procedures be followed simultaneously or must the Article 21.5 procedure precede the Article 22 procedure? Can the deadline for DSB authorization of suspension pursuant to the negative consensus rule be suspended until completion of an Article 21.5 proceeding? Would the right to a decision absent negative consensus still apply? These issues are not clearly dealt with in the DSU and became quite controversial in the *Bananas* case. As a result, as explained below, the ongoing review of the DSU has focused on these issues.

2. The operation to date of the WTO dispute settlement system

Generally speaking, the WTO dispute settlement system has operated well since the founding of the WTO on 1 January 1995. WTO members have made extensive use of the system. To date, there have been 175 requests for consultations, involving over 130 distinct matters.[62] Consultation requests since 1995 have been on the order of 40–50 a year. This extensive use of the system suggests that WTO members have confidence in it.

As noted above, a significant number of consultation requests seem to have been resolved by the parties without the need for recourse to the panel process.[63] It appears that roughly one-half of the cases are resolved in this manner.

To date, there have been panels established in respect of 54 matters (involving some 70 total consultation requests). Of those 54 matters, 6 were later settled or abandoned. Of the remaining 48 matters, the DSB has adopted reports of panels and/or the Appellate Body in 23 matters (17 after appeal). The remaining 25 matters are at various stages in the dispute settlement process: 1 awaiting adoption by the DSB; 3 on appeal; 5 panel reports pending adoption or appeal; 8 in the panel

process; 3 suspended for the moment; 5 in the panel composition process.

So far the record of implementation of panel results has been good. To date, all parties found not to be in compliance with their WTO obligations have indicated that they intend to comply with the DSB's recommendations within a reasonable period of time. In respect of the 23 completed cases, implementation has occurred in 8 cases and no implementation was required in 4 other cases.[64] Of the remaining 11 cases, the reasonable period of time for implementation has not expired in 7 cases.[65] The remaining four cases are *EC–Bananas* (two cases), *EC–Hormones,* and *EC–Poultry.* In the *Bananas* case, the original panel was asked to consider the EU's implementing measures under Article 21.5 of the DSU and found that they were WTO inconsistent. Serving as arbitrators under Article 22.6 of the DSU, the original panel concluded that retaliation by the United States of US$191.4 million would be equivalent to the level of nullification and impairment suffered by the United States. In the *Hormones* case, the EU conceded that it had not implemented the DSB's recommendations. The original panel, acting as arbitrators under Article 22.6 of the DSU, concluded that the level of nullification and impairment suffered by the United States was US$116.8 million and the level suffered by Canada was Can$11.3 million. Negotiations in the *Poultry* case were ongoing as of 30 June 1999, the reasonable period of time for implementation having expired on 31 March 1999.

Although the volume of cases submitted to the WTO has far exceeded the volume during comparable periods under GATT, the WTO dispute settlement system has coped reasonably well in meeting the tight time-periods established by the DSU.

3. The review of the WTO Dispute Settlement Understanding

At the time that the Uruguay Round negotiations were concluded on 15 December 1993, ministers decided to "[i]nvite the WTO Ministerial Conference to complete a full review of dispute settlement rules and procedures under the [WTO] within four years of 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."[66] The DSB did not complete the review by the end of 1998 but currently hopes to complete the review by the end of July 1999. It is possible, however, that the DSU review will become part of the Seattle Ministerial process.

It is too early to know whether and how the DSU may be changed as a result of the review. However, among the issues raised that are particularly important are the following: (a) the operation of the surveillance function, and in particular the need to define more precisely the relationship of Articles 21, 22, and 23 of the DSU; (b) the adequacy of the WTO's resources for processing disputes; (c) the professionalization of panels; (d) transparency and access issues; and (e) the problems of developing country member participation in the system. So far, the focus of discussion has been on the first issue. The second issue has been ignored, while the other three have only been introduced. It is not likely that the 1999 review will produce major action, except perhaps in respect of the first issue.

Before examining the five issues specified, it should be mentioned that there are a number of proposals to improve various phases of the panel and Appellate Body process. For example, there are proposals to formalize the consultation process and to make it more of a discovery procedure, to eliminate the interim review of panel reports, and to grant remand authority to the Appellate Body. By and large, however, most members seem to believe that the system works in a mechanical sense and that only some tinkering with the details of the procedures is appropriate, with the exception of the first issue discussed below.

Operation of the surveillance function: Articles 21, 22, and 23 of the DSU

As noted above, the time-frames specified in Articles 21.5 and 22 of the DSU do not seem to have been appropriately coordinated. For the sake of clarity and to avoid week-long DSB meetings such as occurred in the *Bananas* case, members have committed themselves to clarify this stage of the process. It is generally agreed that if there is no dispute over whether or not implementation has occurred at the end of the reasonable period of time, then the prevailing party should be entitled to seek

compensation or authorization to suspend concessions. It is also agreed in principle that, if there is a dispute over whether or not implementation has occurred (for example, there is a claim that the new measures are inconsistent with WTO agreements), it is first necessary to determine whether or not there has been implementation before moving to the issues of compensation and suspension of concessions. It is also agreed that the determination of WTO consistency must be done in the WTO system and not unilaterally.

The sticking point in the negotiations appears to be over the amount of time that this determination should take, which in turn depends on the procedures to be followed in making it. For example, are consultations after the expiration of the reasonable period of time needed (and, if so, for how long), must the DSB meet (how many times?) to refer the matter for determination, should the determination be made by the panel followed by a possibility of appeal or only by the last instance (i.e. the Appellate Body if the original matter had been appealed; the panel if it had not), must the DSB adopt the determination, how quickly can authority to suspend concessions be requested, and, if the amount of suspension is challenged, how long should the arbitration take? Some members do not want to add to the overall time of WTO dispute settlement, which means that, if more time is devoted to this last phase of the process, they want the time allocated to some other part of the overall process to be reduced. Others argue that this part of the process is no less important than the initial proceedings and therefore deserves a similar amount of time. It seems that an agreement should be possible, but it may be difficult to reach if the issue becomes part of a larger negotiation over a new round of trade negotiations.

WTO resources for processing disputes

The increase in dispute settlement activity in the WTO system compared with the GATT system can be seen from the following statistics on pages of panel findings:[67]

1986–1995 (GATT)	855 pages, or 86 pages/year
1996–1998 (WTO)	1,379 pages, or 394 pages/year
1999 to date (WTO)	563 pages in 6 months[68]

This increase is explained by an increase not so much in the number of disputes (although that has taken place as well) but in their complexity. Claims under more than one agreement were not possible in the GATT system; in the WTO system, one-third of the cases involve three or more agreements, while another one-third involve two agreements. Moreover, the existence of the Appellate Body has tended to make panel reports longer and more analytical and to give panels an impetus to consider more of the claims made, lest a modification of the panel report by the Appellate Body result in the need to start the case over.

Although there has been an increase in Secretariat resources devoted to dispute settlement (from panel secretaries to legal officers to translators), that increase has not kept pace with the increase in the workload. For example, the staff of the WTO Legal Affairs Division, which has the principal responsibility for providing legal advice to panels, has doubled since 1991, but the panel workload has increased much more. More significantly, the burden placed on panellists has significantly increased in terms of the time that they must devote to cases. Although the system has continued to function, it is clear that problems of inadequate resources are leading to delays and that WTO members may soon be forced to confront the reality that, if more resources are not devoted to the system, its effectiveness may decline significantly. To date, they have not done so.

Professionalization of panels

One of the proposals made in the review is to form a permanent panel body, like the Appellate Body, from which all panellists would be drawn. Although this idea is not ready for action in the near future, it seems inevitable that the WTO system will have to move in this direction. Currently, most panellists serve only once or twice. Yet, as cases become more complex, particularly in respect of procedural aspects and the evaluation of evidence, experience is ever more necessary. A standing panel body would have a host of advantages: it would speed the process because the time now taken for panellist selection would be avoided and scheduling delays would be less common; panellists would likely know each other and be able to establish an effective working relationship immediately; panellists would have greater expertise on procedural

issues and could more easily meet at short notice to deal with preliminary issues; consistency of approach and results would be more easily achievable.

There are, of course, a few disadvantages. From the members' perspective, there would be more expense. Nowadays most panellists are not paid (except to reimburse travel and living expenses). The choice of the members of the panel body would be difficult, given the importance of their role. Depending on how members handled the selection process and the importance given to nationality, there could be a politicization of the system. Moreover, the use of professional panellists would mean that delegates and government officials would be much less involved in the process than at the moment, which would mean there would be less contact with the realities of governments and trade negotiations. In the end, however, these disadvantages do not seem so great, especially given that the same concerns exist in respect of the Appellate Body. Yet, in its case, they do not seem to have prevented its emergence as an effective institution.

Transparency and access to the WTO dispute settlement system

There have been complaints, particularly by non-governmental organizations, that the WTO dispute settlement system lacks transparency and does not permit sufficient access for non-members. In this regard, it is worth noting that panel and Appellate Body reports (and all other WTO documents relating to specific disputes) are issued as unrestricted documents and placed on the WTO website immediately after their distribution to members.[69]

The United States has proposed that dispute settlement proceedings be open to the public, that submissions be made public, and that non-parties be permitted to file "friend-of-the-court" submissions to panels. These matters are currently under discussion; it is unclear whether or not the proposals will be accepted. Some members view the WTO system as exclusively intergovernmental in nature and hesitate to open it to non-governments. In their view, if a non-governmental organization wants to make an argument to a panel, it should convince one of the parties to make it and, if no party makes the argument, those members would view that as evidence that the argument is not meritorious.

Other members argue that the credibility of the system would be much enhanced if it were more open and that openness would have no significant disadvantages. Given popular fears of globalization and the WTO's connection therewith, such increased credibility is viewed as essential to ensure the future effectiveness of the WTO itself, as well as of the dispute settlement system.

In this regard, it is noteworthy that the Appellate Body recently ruled that panels have the right to accept non-requested submissions from non-parties (such as NGOs).[70] It remains to be seen to what extent panels will exercise this right since the Appellate Body also ruled that a panel could appropriately call such submissions to the attention of the parties and ask if the parties wished to adopt all or part of them.

Developing countries and dispute settlement

Developing countries have made greater use of the WTO dispute settlement system than they made of the GATT system. In some cases, they are bringing claims that would not have been cognizable under GATT, such as claims based on the Agreement on Textiles and Clothing. Even allowing for this, they seem to be more active users of the system than they were, as they have made some 40 consultation requests. It is also noteworthy that they have become more frequent targets of complaints (by both developed and developing countries). Their greater involvement is undoubtedly good for the system in the long run.

The DSU provides special treatment for developing countries in a number of respects. For example, it provides the possibility (used only once under GATT) of an expedited process (Article 3.12), that special consideration should be given to developing countries in consultations (Articles 4.10 and 12.10) and in the panel process (Articles 8.10, 12.10, and 12.11), and that account should be taken of developing country interests in the surveillance phase (Article 21.2, 21.7, and 21.8). There are also special provisions for least developed countries (Article 24), although none of those countries has been involved in the dispute settlement proceedings to date. By and large, none of these provisions has been of great importance in dispute settlement proceedings, mainly because they relate to procedures. There have been proposals for addi-

tional such provisions considered in the DSU review, but they are not under very active discussion at the moment.

The principal issue of interest to developing countries in the DSU review has concerned the resource difficulty that many developing countries face when they participate in the dispute settlement system. For the moment, the DSU addresses this problem by requiring the WTO Secretariat to provide legal assistance to such countries,[71] which it does through two staff lawyers in the Technical Cooperation Division and through the use of lawyers (typically ex-Secretariat employees) who are hired on a consultancy basis to provide assistance on a regular (e.g. one day a week) or case-specific basis. The Secretariat also conducts a number of training courses that either include or are exclusively focused on dispute settlement. Earlier in 1999, a group of developed and developing countries announced plans for an Advisory Centre on WTO law, which would be an international intergovernmental organization providing legal assistance to developing countries in respect of WTO matters. It is not known whether or not sufficient funding for the Centre will be forthcoming, but a number of substantial pledges have been made. The Centre seems to offer the best hope for a significant improvement in dealing with inadequate developing country resources.

4. Conclusion

I noted in the spring of 1996 that there were five difficult cases on the horizon that would severely test the WTO dispute settlement system: *Bananas, Hormones, Helms-Burton, Shrimp-Turtle,* and *Japan–Film.* The EU suspended its action against the US Helms-Burton law, so no report was issued. A panel rejected the US complaint in the *Japan–Film* case and the United States did not appeal. The resolution of the *Bananas* and *Hormones* cases is described above, while the reasonable period of time for implementation in the *Shrimp-Turtle* case has not expired. Although the results in the four decided cases were very controversial, so far the system seems to have survived relatively unscathed, no mean feat given that these severe tests were imposed on it at the very beginning of its existence.

One must not be complacent, however. The solutions in *Bananas* and *Hormones* are temporary in that the EU measures found to be WTO

inconsistent are still in place. Yet the possibility of retaliation has acted as a sort of pressure relief valve for the moment. However, long-term non-compliance could undermine the system if other less powerful members ask themselves why they should accept adverse decisions if the major trading partners are unwilling to do so. Moreover, even if these cases have been processed successfully, a number of other difficult cases are now wending their way through the system. Many of them will not receive the media attention of those mentioned above, but they may pose difficult implementation problems if violations are found.

Outside of these five cases, the record of implementation of panel/Appellate Body decisions has been quite good. But members continue to bring difficult and potentially controversial cases. In the end, the most difficult challenge facing the WTO dispute settlement system is to promote and maintain an image of impartiality and competence, so as to give the decisions of the panels and Appellate Body a degree of legitimacy and ensure their acceptability by WTO members and, in the long run, by their citizens. At a minimum that will require greater resources, increased professionalization, and increased openness to the world at large.

Acknowledgements

The author would like to thank Werner Zdouc for comments on an earlier draft.

Notes

1. The cut-off date for statistics in this paper was 30 June 1999.
2. Robert E. Hudec, *Enforcing International Trade Law,* Salem, NH: Butterworth Legal Publishers, 1993.
3. Of the 25 panel reports circulated in the five-year period from 1986 to 1990, only 3 were not adopted. Of the 24 reports circulated in the five-year period from 1991 to 1995, 11 were not adopted.
4. William J. Davey, "Dispute Settlement in GATT," *Fordham Journal of International Law* 11(1), 1987, 51.
5. See, generally, David Palmeter and Petros C. Mavroidis, *Dispute Settlement in the World Trade Organization: Practice and Procedure,* The Hague: Kluwer Law International, 1999.

6. One of the annexes to the Marrakesh Agreement Establishing the World Trade Organization ("WTO Agreement") is the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), the basic provisions of which are essentially identical to the General Agreement on Tariffs and Trade of 1947, although GATT 1994 also includes several understandings on GATT 1947 provisions and incorporates various past acts of the GATT 1947 contracting parties. GATT 1994 does not change the text of GATT 1947 Articles XXII and XXIII, which were the basis for dispute settlement in the GATT system and are the basis of the WTO system. The DSU, which is also an annex to the WTO Agreement, extensively elaborates the procedures to be followed in WTO dispute settlement. Article 3.1 of the DSU provides: "Members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein."

7. This is an oversimplification of the provisions of Article XXIII. In fact, it covers either of two situations—where benefits accruing to a member under the agreement have been nullified or impaired or where attainment of the objectives of the agreement has been impeded—that arise as a result of one of three reasons: the failure of a member to carry out its obligations, the application by a member of any measure (whether or not it conflicts with the agreement), or the existence of any other situation. Of the six possible combinations, the vast majority of cases involve allegations of nullification or impairment arising from a failure of a member to carry out its obligations. A few cases—referred to as non-violation cases—involve allegations of nullification or impairment by a measure not in conflict with the agreement. No panel reports have been based on an impedance of the objectives of the agreement or on the existence of any other situation, although allegations thereof have occasionally been made.

8. See General Agreement on Trade in Services, Articles XXII and XXIII; Agreement on Trade-Related Aspects of Intellectual Property Rights, Article 64; Agreement on Agriculture, Article 19; Agreement on the Application of Sanitary and Phytosanitary Measures, Article 11; Agreement on Technical Barriers to Trade, Article 14; Agreement on Trade-Related Investment Measures, Article 8; Agreement on Implementation of Article VI of the GATT 1994 (Antidumping Agreement), Article 17; Agreement on Implementation of Article VII of the GATT 1994 (Customs Valuation Agreement), Article 19; Agreement on Preshipment Inspection, Article 8; Agreement on Rules of Origin, Articles 7–8; Agreement on Import Licensing Procedures, Article 6; Agreement on Subsidies and Countervailing Measures, Article 30; Agreement on Safeguards, Article 14. The DSU may also be applied by plurilateral agreements. See Agreement on Government Procurement, Article XXII. Appendix 2 of the DSU contains a list of special or additional dispute settlement rules in WTO agreements that prevail over DSU rules (DSU, Article 1.2). For an interpretation of the relationship of these special and additional rules to the DSU rules, see *Guatemala–Anti-Dumping Investigation Regarding Imports of Portland Cement from Mexico,* Appellate Body Report, adopted on 25 November 1998, WT/DS60/AB/R. For a discussion of dispute settlement in respect of textile products and in particular the role of the Textiles Monitoring Body vis-à-vis that of dispute settlement panels, see *United States–Measures Affecting Imports of Woven Wool Shirts and Blouses,* Panel Report, adopted on 23 May 1997, WT/DS33/R, paras. 7.18–7.21.

9. Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article 3.7.
10. DSU, Article 5. In fact, I am aware of no cases where this provision was invoked. The DSU also provides for ad hoc arbitration on agreement of the parties (Article 25).
11. The equivalent provisions are listed in a footnote to DSU, Article 4.11.
12. DSU, Article 4.11.
13. DSU, Article 4.3. If a member does not respond to a request within 10 days or does not enter into consultations within 30 days, the requesting member may proceed directly to request the establishment of a panel. In cases of urgency, consultations are to be held within 10 days of a request.
14. DSU, Article 4.7. In cases of urgency, a panel may be requested after 20 days.
15. WTO Agreement, Article IV:3. See also DSU, Article 2.1.
16. The wording of the relevant DSU provision is: "the DSB meeting following that at which the request first appears as an item on the DSB's agenda" (Article 6.1). This has led some members to argue that the second request must be made at the next DSB meeting. If the requests are not consecutive, these members argue that the panel need not be established by the DSB. So far, this view is shared by only a few members.
17. DSU, Article 6.1.
18. The DSB's Rules of Procedure in effect require that a request for an item to appear on the agenda must be made 11 days in advance of the meeting because the agenda is circulated 10 days in advance of the meeting. Although the matter is disputed, the practice seems to be developing that it is not appropriate to put a request for the establishment of a panel on the agenda until the 60-day consultation period has expired. Thus, in practice at the moment, the first panel request will not be considered at a DSB meeting until 71 days after the request for consultations. Thereafter, the DSU provides that the complaining party may request a second meeting within 15 days of the first. Thus, even with the possible inconvenient interference of weekends and other non-working days, a determined complainant should be able to ensure that a panel is established within 90 days of its request for consultations.
19. The DSU provides for the possibility of using five panellists (Article 8.5). Such panels were used in the early years of GATT. All of the WTO panels to date have consisted of three panellists.
20. DSU, Article 8.6.
21. Based on the 45 panels selected to date. The range was from 12 to 140 days.
22. DSU, Article 8.7.
23. DSU, Article 8.1.
24. DSU, Article 8.3.
25. DSU, Article 8.10.
26. Some individuals are counted in more than one category in light of their experience.
27. Switzerland—18; Australia—12; New Zealand—12; Hong Kong/China—9; Brazil—7; South Africa—6; Canada—5; Czech Republic—5; Norway—5; Egypt—4; Germany—4; Sweden—4; Belgium—3; Colombia—3; Finland—3; Israel—3; Mexico—3; Poland—3; Thailand—3; Chile—2; India—2; Japan—2; Singapore—2; United States—2; and one each from Argentina, Austria, Bulgaria, Costa Rica, France, Hungary, Iceland, Korea, the Netherlands, the Philippines, Slovenia, Uruguay, and Venezuela.

28. DSU, Article 8.9.
29. WT/DSB/RC/1, 11 December 1996. See, generally, Gabrielle Marceau, "Rules on Ethics for the New World Trade Organization Dispute Settlement Mechanism," *Journal of World Trade* 32(3), June 1998, 57. The Appellate Body had previously adopted similar rules on the basis of an earlier draft. It modified its rules in light of the final text adopted by the DSB—WT/AB/WP/1; WT/AB/WP/2.
30. WT/DSB/RC/1, Article II, "Governing Principle," para. 1.
31. Ibid., Article III, "Observance of the Governing Principle," para. 1.
32. DSU, Article 7.1. Article 7.3 allows the DSB to authorize its chairperson to draw up terms of reference in consultation with the parties. Such authorization was granted in one case (WT/DSB/M/12) and the chair's designee brokered an agreement between the parties on non-standard terms of reference. See WT/DS22/6.
33. DSU, Article 11.
34. DSU, Article 6.2. This provision is interpreted in *European Communities–Regime for the Importation, Sale and Distribution of Bananas,* Appellate Body Report, adopted on 25 September 1997, WT/DS27/AB/R.
35. Panels have relatively broad discretion to craft their own working procedures. For example, they can revise the standard working procedures listed in DSU Appendix 3 after consulting the parties (DSU, Article 12.1).
36. DSU, Appendix 3.
37. DSU, Article 13.
38. DSU, Article 15.1.
39. DSU, Article 15.2.
40. DSU, Article 10.
41. DSU, Articles 14 and 19.
42. DSU, Article 12.8. The goal is three months in case of urgency.
43. DSU, Article 12.9.
44. The Appellate Body is established and regulated by Article 17 of the DSU. Its working procedures, which it is authorized to draw up itself in consultation with the chairperson of the DSB and the Director-General, are contained in WT/AB/WP/1.
45. The first seven members of the Appellate Body were James Bacchus (USA), Christopher Beeby (New Zealand), Claus-Dieter Ehlermann (Germany), Florentino Feliciano (the Philippines), Said El Naggar (Egypt), Julio Lacarte-Muro (Uruguay), and Mitsuo Matsushita (Japan). Ehlermann, Feliciano, and Lacarte-Muro were deemed to have initial two-year terms and were reappointed to four-year terms on expiration of those initial terms. Only one reappointment is permitted (DSU, Article 17.2).
46. Appellate Body Working Procedures, rule 4(3).
47. Appellate Body Working Procedures, rule 6(2).
48. DSU, Article 17.6.
49. DSU, Article 17.13.
50. See, e.g., *Canada–Certain Measures Affecting Periodicals,* Appellate Body Report, adopted on 30 July 1997, WT/DS31/AB/R.
51. DSU, Article 17.5. In recent cases, 90 days has been the standard.
52. As a consequence, WTO remedies are typically viewed as prospective in nature. No reparation of past damage is awarded.
53. DSU, Article 19.1.
54. DSU, Article 21.3.

55. DSU, Article 21.3.
56. DSU, Article 21.6.
57. DSU, Article 22.2.
58. DSU, Article 22.2 and 22.6.
59. DSU, Article 22.6 and 22.7.
60. In the *Bananas* case, the level of suspension requested was US$520 million and the amount authorized was US$191.4 million (WT/DS27/AB/R, op. cit.). In the *Hormones* case, the amounts requested were US$202 million and Can$75 million. The amounts authorized were US$116.8 million and Can$11.3 million (WT/DS26/AB/R; WT/DS48/AB/R).
61. DSU, Articles 3.7 and 22.1.
62. Since consultation requests involving a single measure may be made by several members, the number of consultation requests may overstate the number of disputes. Although there may be some imprecision in counting "matters," the concept is a useful one for approximating the true number of disputes.
63. It is not possible to give a precise number of settlements. Although members are supposed to notify mutually agreed solutions to the DSB (DSU, Article 3.6), it appears that this requirement is often not respected. Moreover, a fair number of cases are simply not pursued, presumably because it is felt that there is no valid claim.
64. The eight cases are *US–Gasoline, Japan–Alcohol Taxes* (compensation provided for delayed implementation of one measure), *US–Underwear, US–Shirts & Blouses, Canada–Periodicals, India–Patents* (two cases), and *Argentina–Textiles.* The four cases where the complainant lost were *Brazil–Desiccated Coconut, Japan–Film, EC–LAN Computer Equipment,* and *Guatemala–Cement.*
65. In one of the seven cases, *Australia–Salmon,* implementation was due by 6 July 1999 and did not occur. However, in another, *Indonesia–Autos,* implementation was announced prior to expiration of the reasonable period of time.
66. Decision on the Application and Review of the Understanding on the Rules and Procedures Governing the Settlement of Disputes, in the Agreement Establishing the World Trade Organization, signed Marrakesh, 15 April 1994, Annex 4.
67. The date of circulation to members is used to assign reports to specific years. The page totals focus only on the pages of panel findings, because most of the rest of the report is a detailed summary of the parties' arguments and, although its preparation is sometimes time consuming, it is largely a question of editing existing texts, whereas panel findings are the analytical part of the report and must be drafted from scratch.
68. This statistic may be somewhat misleading because 13 reports were circulated in the first half of 1999 and it is likely that far fewer will be circulated in the second half. Although at least eight reports are scheduled to go to the parties in the second half of 1999, translation delays may mean that a smaller number of reports are circulated to members.
69. A party may request that a panel report be restricted for up to 10 days after its issuance, but no party has ever done so.
70. *United States–Import Prohibition of Certain Shrimp and Shrimp Products,* Appellate Body Report, adopted on 6 November 1998, WT/DS58/AB/R, paras. 99–110.
71. DSU, Article 27.2.