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Brookings Trade Forum, 2000, pp. 179-219 (Article)

Published by Brookings Institution Press

DOI: <https://doi.org/10.1353/btf.2000.0007>

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The Role and Effectiveness of the WTO Dispute Settlement Mechanism

THE WORLD TRADE ORGANIZATION (WTO) has been in existence for slightly more than five years. Its predecessor, the General Agreement on Tariffs and Trade (GATT), operated for almost fifty years as a provisional treaty and institution, but the WTO has a definitive organizational structure recognized under international law. By most accounts, the WTO has been an enormous success, and it has provided and begun to implement the appropriate infrastructure for the massive treaty results of the Uruguay Round of multilateral negotiations (1986–94). The WTO has the unparalleled responsibility of overseeing a treaty of some thirty-thousand pages, including approximately one thousand pages of dense and often ambiguous treaty text. (The remainder largely comprises schedules of concessions regarding goods and services.) However, increasing concerns have arisen about the direction and the long-term viability and strength of the WTO, particularly during the last year or two, accentuated by the failure of the 1999 Third Ministerial Conference in Seattle.¹

A central feature of the WTO is its dispute settlement mechanism. Indeed, the statesmen involved in the Uruguay Round, as well as current WTO officials and ambassadors, take considerable pride in this feature. The WTO dispute settlement system has had an enormous impact on the world trade system and trade diplomacy. It is unique in international law in its juridical and

1. See, for example, Bruce Stokes, "Comment and Analysis: Preparing to Bypass the WTO: US Corporations Are So Frustrated by the Trade Body That They May Abandon Multilateral Initiatives," *Financial Times*, March 29, 2000, p. 17. For counter-arguments, see Thomas M. T. Niles, "US Business Has Not Written Off WTO," *Financial Times*, April 7, 2000, p. 12 (responding to Stokes); and Keith M. Rockwell, "Out of Touch with WTO's Initiatives Since Seattle," *Financial Times*, April 6, 2000, p. 12 (responding to Stokes).

legalistic system for disputes, with virtually automatic, binding application of its decisions and reports to its members. Unlike some of the more specialized systems of this type, these attributes are nested in an extraordinarily broad and comprehensive jurisprudence. In addition, the questions posed to the dispute settlement system often strike at the heart of the tension between the protection of nation-state sovereignty and the globalization of national economies, which require more expansive cooperative mechanisms in order to succeed internationally.²

The next section reviews the institutional structure of the WTO and includes a brief history of the dispute settlement system, an explanation of the current procedures, an account of the caseload and statistics regarding WTO cases, and an inventory of the effectiveness of the results of the dispute settlement procedures. I also comment on some of the difficult issues facing this system in implementing the results of the dispute settlement cases. The section following offers some preliminary evaluations of the developing WTO jurisprudence and examines the role of the dispute system in the broader WTO "constitution." As is true in other institutions, both national and international, a tribunal-like institution must be understood in the context of its place in a broader governmental and institutional constitution. Although one may be tempted to draw analogies from national tribunal systems, the WTO dispute settlement system is situated in a constitutional setting totally different from that of nation-states, and this gives rise to certain questions about the appropriate role of the dispute settlement process. The paper ends with some tentative conclusions about the dispute settlement system.

The Landscape of WTO Dispute Settlement Procedures

The WTO dispute settlement system builds upon the GATT dispute settlement procedures, a mechanism inherently flawed in part because GATT was intended to be part of an International Trade Organization that never came into being. The International Trade Organization's draft charter called for a rigorous dispute settlement procedure that contemplated the use of vol-

2. This chapter is distilled from a forthcoming longer work (to be published by Oxford University Press) that examines and evaluates the institutional structure of the WTO. Topics discussed herein are explored in greater depth in Jackson (1997b; 1998a, 1998b, 1998c; 2000a; 2000b); and Salas and Jackson (2000). See also the author's bibliography at <http://data.law.georgetown.edu/faculty> [November 2000].

untary arbitration, while providing for appeal to the World Court in some circumstances.³

GATT and WTO Dispute Settlement

The centerpiece of GATT dispute settlement was the agreement's Article XXIII, which provided for consultation as a prerequisite to invoking the multilateral GATT procedures. Three features of these procedures warrant emphasis. First, GATT's contracting parties (that is, the nations that are signatories to the agreement) could usually invoke the procedures on grounds of "nullification or impairment" of benefits expected under the agreement; allegations did not depend upon actual breach of a legal obligation. Second, the contracting parties could not only investigate and recommend action but also had the authority to rule on matters. Finally, the contracting parties could, in appropriately serious cases, authorize a contracting party or parties to suspend obligations to other contracting parties. Article XXIII does not elaborate on these principles, which evolved over four decades of practice.⁴

At the beginning of GATT's history, disputes were resolved through diplomatic means at semiannual meetings of the contracting parties. Later, disputes were brought to an intersessional committee of the contracting parties and subsequently were delegated to a "working party."⁵ Around 1955 a major shift in the procedures took place, largely due to the influence of then director-general Eric Wyndham-White.⁶ It was decided that disputes would be referred to a panel of three to five experts acting as individuals, rather than to a working party composed of government representatives. This development constituted a shift from a negotiating atmosphere of multilateral diplomacy to a more arbitral or judicial procedure designed to arrive impartially at the truth of the facts and the best interpretation of the law. Almost all subsequent GATT dispute settlement procedures have contemplated the use of a panel in this fashion.⁷

3. *Final Act of the United Nations Conference on Trade and Employment, Havana Charter for an International Trade Organization*, arts. 92–97 (1948) (governing the settlement of disputes). See also Wilcox (1949, pp. 159, 305–08).

4. See, for example, WTO (1995: 2, pp. 628–787) (discussing Article XXIII of GATT).

5. See Hudec (1975a, pp. 66–96).

6. Some of this information is developed from private conversations with senior GATT officials closely associated with the early development of GATT.

7. See *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*, November 28, 1979, GATT B.I.S.D. (26th Supp.), p. 210 (1980), especially paras. 10–21.

Although Article XXIII of GATT authorized the contracting parties to suspend concessions, they did so in only one case, brought in 1953 by the Netherlands against the United States, alleging a GATT-inconsistent import restraint imposed by the United States on dairy products imported from the Netherlands.⁸ For seven years in a row, the Netherlands was authorized to impose restraints on importation of wheat flour from the United States, but it never acted upon that authorization.⁹ This had no effect on U.S. action, however. There were other moves to seek authorization to suspend obligations against the United States,¹⁰ and the United States has taken retaliatory measures without authorization. In the *Citrus* case, for example, the United States imposed increased duties on pasta in retaliation for the European Community's failure to accept the findings of a 1985 GATT panel.¹¹

In 1962 Uruguay brought an important case alleging that various practices of certain industrial countries violated GATT obligations.¹² In considering the language of Article XXIII, which called for nullification or impairment as the basis of a complaint, the panel looked beyond the language of the article and

8. See *Netherlands—Measures of Suspension of Obligations to the United States*, November 8, 1952, GATT B.I.S.D. (1st Supp.), p. 32 (1953); *United States Import Restrictions on Dairy Products*, October 13, 1953, GATT B.I.S.D. (2d Supp.), p. 28 (1954); *United States Import Restrictions on Dairy Products*, November 5, 1954, GATT B.I.S.D. (3d Supp.), p. 46 (1955); *Suspension of Certain Obligations to the United States by the Kingdom of the Netherlands*, December 1, 1955, GATT B.I.S.D. (4th Supp.), p. 31 (1956); *United States Import Restrictions on Dairy Products—Suspension of Certain Obligations by the Kingdom of the Netherlands*, November 16, 1956, GATT B.I.S.D. (5th Supp.), p. 28 (1957); *United States—Suspension of Certain Obligations by the Kingdom of the Netherlands*, November 28, 1957, GATT B.I.S.D. (6th Supp.), p. 14 (1958); *United States Import Restrictions on Dairy Products*, November 20, 1958, GATT B.I.S.D. (7th Supp.), p. 23 (1959). This was one result of the United States Congress's enactment of Section 22 of the Agriculture Act in 1951.

9. The Netherlands never enforced the quota, arguably because of its ineffectiveness. See Hudec (1975b, p. 507).

10. As a result of the panel decision in the so-called *Superfund* case, the European Community requested that the GATT contracting parties authorize retaliation. See *United States—Taxes on Petroleum and Certain Imported Substances*, June 17, 1987, GATT B.I.S.D. (34th Supp.), p. 136 (1988).

11. See Proclamation 5354, 50 Fed. Reg. 26,143 (1985). Less than three months later, the president temporarily suspended the application of the duties in light of continuing discussion between the European Community and the United States Proclamation 5363, 50 Fed. Reg. 33,711 (1985). The duties were effective until August 21, 1986, when the president revoked the increased rates because of the settlement of the *Citrus* case. *Withdrawal of Increased Rates of Duty on Certain Pasta Articles from the European Economic Community*, 51 Fed. Reg. 30,146 (1986). Trade in pasta between the United States and the European Community was itself disputed, so retaliation against a problematic product may have had a certain added attraction.

12. *Uruguayan Recourse to Article XXIII*, November 16, 1962, GATT B.I.S.D. (11th Supp.), p. 95 (1963).

determined that any violation of GATT would be considered *prima facie* nullification or impairment.¹³ The panel's ruling required the defending contracting party to carry the burden of proving that nullification or impairment did not exist. This case, followed by many subsequent GATT panels, reinforced a shift in the focus of GATT cases toward the agreement's treaty obligations—that is, in the direction of rule orientation. The panels continued to discuss the need to facilitate settlements and sometimes acted like mediators. Indeed, several panels have been criticized for mediating at the expense of developing precise, analytical approaches to disputes regarding law.¹⁴

The procedure that developed under GATT was for the panel to make its report and deliver it to the Council, the agreement's standing body, which met regularly and disposed of most of the business of GATT. (This body was not provided for in the GATT text but arose through decisions of the contracting parties.) A practice became firmly established that if the Council approved the panel's report by consensus, it became binding on the disputing parties; in the absence of consensus approval, the report would not be binding. The procedure's reliance on consensus meant that the "losing" party could in effect block the Council's action by raising objections to the consensus and thus avoid the consequences of its loss. The ability of losing parties to block panel reports was deemed the most significant defect in the GATT process.

During the 1980s, as GATT procedures became more legally precise and juridical in nature, a distinction emerged between two types of cases brought under the agreement: violation cases (based on the *prima facie* nullification or impairment concept) and cases that did not allege a violation but nevertheless alleged nullification or impairment. In fact, nonviolation cases have been relatively infrequent; one group of scholars has indicated that there are only from three to eight cases of this type in the history of GATT (out of sev-

13. See GATT B.I.S.D. (11th Supp.), p. 100 (1963). See also *DISC—United States Tax Legislation*, November 12, 1976, GATT B.I.S.D. (23d Supp.), p. 98 (1977) (*prima facie* violation of Article XVI); *Japanese Measures on Imports of Leather*, May 15–16, 1984, GATT B.I.S.D. (31st Supp.), p. 94 (1985) (*prima facie* violation of Article XI). The *prima facie* concept was also applied in situations involving quotas or domestic subsidies on products subject to agreed upon tariff limitations (that is, tariffs bound under Article II). See generally Jackson (1969, p. 182).

14. See, for example, *French Assistance to Exports of Wheat and Wheat Flour*, November 21, 1958, GATT B.I.S.D. (7th Supp.), p. 46 (1959); *Spain—Measures Concerning Domestic Sale of Soybean Oil*, GATT Doc. L/5142 (June 17, 1981). See also WTO (1995:1, p. 171) (explaining several contracting parties' criticism of the *Spanish Oil* panel's conclusion that the term "like products" meant "more or less the same product").

eral hundred total cases). Nevertheless, some of these nonviolation cases have been quite important.¹⁵

Many of the treaty agreements resulting from the Tokyo Round negotiations (1973–79) included special procedures devoted to the settlement of disputes relating to a particular agreement. Some of these closely followed the traditional GATT procedure and unfortunately used the nullification or impairment language. In a few cases, special expert groups were called into the process to handle scientific judgments or highly technical matters.¹⁶

The GATT process still had a number of problems, most of them the result of the agreement's flawed origins. These included

- the sparsity of detail within the agreement about goals or procedures,
- the imprecise power of the contracting parties to supervise the dispute settlement process, leading to the practice of requiring consensus for many decisions,
- the potential for blocking by respondents, either at the time of a complainant's request for a panel or at the time of the request to the Council to adopt a panel report,
- fragmented dispute settlement procedures arising from separate dispute settlement procedure options in various Tokyo Round-specific "code" agreements, and
- instances of a contracting party government interfering with potential panel decisions by inappropriately pressuring a particular panelist.

With meager treaty language as a start, as well as divergent views about the policy goals of the system, GATT, like so many institutions, took on a life of its own. The GATT dispute settlement procedures increasingly evolved toward rule orientation with regard both to dispute procedures (marked by a shift from working parties to panels) and the substantive focus of the system (marked by a shift from ambiguous notions of nullification or impairment to more analytical approaches to interpreting treaty obligations).

The agreement's dispute settlement procedures became widely admired, to the point that various trade policy interests sought to bring their subjects under its authority. This motivated both intellectual property interests and trade-in-services interests to urge—successfully—that these subjects be included in the Uruguay Round.¹⁷

15. See Jackson (1969, pp. 167–71).

16. *Agreement on Technical Barriers to Trade*, GATT B.I.S.D. (26th Supp.), p. 8 (1980).

17. *Agreement Establishing the World Trade Organization*, annex 2, *Understanding on Rules and Procedures Governing the Settlement of Disputes* [hereafter DSU].

Without solving all the problems associated with GATT, the Dispute Settlement Understanding (DSU) adopted at the Uruguay Round measurably improves the agreement's dispute settlement procedures in several respects by

- establishing a unified dispute settlement system for all parts of the WTO system, including the new subjects of trade in services and intellectual property, thus ending controversies over which procedure to use,

- clarifying that all parts of the Uruguay Round legal text relevant to the matter at issue and argued by the parties can be considered in a particular dispute case,

- reaffirming and clarifying the right of a complaining government to have a panel process initiated, preventing blocking at that stage, and

- establishing a unique new appellate procedure that will substitute for some of the former procedures governing Council approval of a panel report.

Under the DSU, a panel report will effectively be deemed adopted by the new Dispute Settlement Body (DSB)—the entity within the WTO responsible for supervising dispute settlement rules and procedures—unless the report is appealed by one of the parties to the dispute. If appealed, the dispute goes to an appellate panel. After the Appellate Body has ruled, its report goes to the DSB, but in this case it is deemed adopted unless there is a consensus against adoption, and presumably any major objector can defeat that negative consensus. Thus the presumption of the previous procedures is reversed, with the result that the appellate report comes into force as a matter of international law in virtually every case. The opportunity of a losing party to block adoption of a panel report is no longer available.

The DSU is designed to provide a single unified dispute settlement procedure for almost all the Uruguay Round texts; however, some potential disparities remain. Many of the separate documents titled “agreements” (including GATT in Annex 1A and certain other texts, such as the subsidies code or the textiles text) contain clauses relating to dispute settlement. But Article 1 of the DSU provides that the understanding's rules and procedures apply to all disputes concerning covered agreements (that is, the WTO agreements, including the Uruguay Round results) listed in an appendix to the DSU, so presumably this trumps most of the specific dispute settlement procedures.¹⁸

18. DSU., art. 1.1.

Current WTO Procedures

In general, a WTO dispute settlement procedure (outlined in figure A-1) is launched at the request of one or more member governments for a consultation regarding complaints against defending members. This process is entirely government-to-government and available only to WTO members in procedures against other members. The DSU provides that all members will settle their differences regarding the covered agreements by referring those disputes to the procedures of the WTO as elaborated in the DSU. When such a request is made and transmitted to the secretariat, a DS number is assigned to the dispute, and all documents relating to that particular process will bear that DS number. On some occasions, other complaints will be combined for a proceeding, and, in such a case, there may be more than one DS number to a particular set of issues involving complaints against different WTO members. If more than one country brings a complaint against the same measure, the complaints are consolidated and reviewed by a single panel.

The first step in dispute settlement is a consultation between the complaining party (or parties) and the responding party (or parties). This consultation is designed to explore the nature of the complaint and is sometimes used by the respondents to ascertain the details of the complaint or by the complainants to discover the responding party's potential defenses. If the parties have failed to settle the dispute by the end of sixty days, then the complaining party may ask the DSB to establish a dispute panel.¹⁹ Any WTO member can belong to the DSB, and its membership is essentially the same as that of the General Council, which is the WTO's overall supervising body and acts between the biannual ministerial meetings. Under the new procedures of the DSU, the DSB must automatically approve the request for a panel procedure, although there are some provisions for short delays to that approval.²⁰

When the DSB approves the establishment of the panel (normally composed of three members), the secretariat begins the sometimes prolonged process of designating the panelists for the particular procedure, ideally by means of consensus between the parties. If the parties cannot agree within twenty days, the matter is referred to the WTO's director-general, who has the authority to impose a panel on the parties.²¹ Recourse to the director-general's decision has become increasingly necessary, and it has proved difficult to find

19. DSU, art. 4.7.

20. DSU, art. 6.1 (providing that a panel will be established unless the DSB decides by consensus not to establish a panel).

21. DSU, art. 8.7.

persons who are appropriate and willing to serve as panelists. The panelists can be from member governments, either officials on mission to the WTO or from their capitals. They can also be from other professions and occupations, such as retired members of the secretariat or ambassadors, academics, or other knowledgeable persons. Citizens of one of the parties to the dispute are normally not designated as panelists in such disputes absent a waiver of objection by all parties.²²

The panel operates under terms of reference, which may also be negotiated.²³ If the negotiation for this fails, standard terms of reference are used.²⁴ The panel then receives oral and written arguments from the parties to the dispute and from third parties. Any WTO member can become a third party in a dispute, usually by simply indicating that it has an interest in the subject matter.²⁵ This interest may not involve a direct effect of a potential decision on the government; it may be a broader notion of the third-party government's interest in the direction of the jurisprudence concerning the interpretation of the treaty clauses relevant to the case.

The parties must file their submittals within time limits set by the panel. Oral arguments are presented in hearings, which are closed to the public and, indeed, to WTO members not participating as complainants, respondents, or third parties. The first hearing before the panel is between the disputing parties (excluding third parties). A hearing of the third parties generally follows the first hearing on a separate day, but the disputing parties are also present and can actively participate in the discussion.

Following the initial hearings and submittals, the parties have the opportunity for reply submittals and a reply hearing, normally limited to the disputing parties. After this, the panel drafts an interim report, which is given to each of the parties, who have the opportunity to comment on it (normally within thirty days) or reach a settlement, keeping in mind the likely report of the panel. The interim report is confidential, although often it is leaked to the press.

After the comment period on the interim report has expired, the panel decides whether to revise its report or whether further proceedings (including oral or written submissions by the parties) are necessary. In the absence of further proceedings, the panel completes a final report that goes to the DSB for adoption.

22. DSU, art. 8.3.

23. DSU, art. 7.1.

24. DSU, art. 7.1.

25. DSU, art. 10.2.

The adoption of the report is a critical step and a significant change from procedures under GATT. Since negative consensus can be broken by parties who feel that the report should be adopted, the DSB is automatically to have adopted the report of the first-level panel unless the report is appealed or there is a consensus of the DSB against adoption. The adopted report becomes binding on disputing parties as a matter of international law.

The parties may appeal the report to the Appellate Body, a new institution with broad competence and high visibility. The Appellate Body consists of seven individuals who have been selected by the DSB through a consensus process. These individuals are retained part time for their services, depending on the caseload. (In the last year or two, the work load has been such that the Appellate Body members have been on WTO duty for more than half of their annual time, and it is projected that this work load will increase substantially, maybe even double, during year 2000.)

The Appellate Body members each hold terms of four years, renewable once. (The original seven members determined that three members would be limited to two-year terms. Those who received two-year terms were automatically renewed for another four, and thus are serving for six years.) Appeals are heard by a specifically constituted division, composed of three members of the Appellate Body. The procedures for this selection are purposely kept highly secret, so that no government will be able to predict which Appellate Body members will be on its appeal. The Appellate Body then goes through a process similar to that of the first-level panel: oral and written submissions, a hearing with discussion and questioning by the division members, and then the preparation of an Appellate Body report. This is supposed to be accomplished within sixty days, and in exceptional cases within ninety days, but more frequently the latter is the case.²⁶ Indeed, occasionally even that time limit proves inadequate for the Appellate Body to complete its work on an appeal.

A practice sometimes labeled *collegiality* has developed within the Appellate Body, under which at some point in the course of the deliberations concerning an appealed case the other four members (who are kept informed with documentation) will convene with the acting division members in Geneva for a general discussion of the case. The practice promotes consistency in decisions, and it offers the acting division members the benefit of their colleagues' expertise.

26. DSU, art. 17.5.

Once the Appellate Body has completed its report, it sends the report to the DSB, which adopts the report virtually automatically, through the “reverse consensus” process.

The Caseload So Far

The WTO secretariat periodically publishes an overview of all the cases brought under the WTO dispute settlement process.²⁷ This document is updated regularly, as complaints are filed and as cases progress through the system. The current document, as of October 1, 2000, contains the following statistical overview (see also Appendix B below).

Since the WTO entered into force, 205 complaints have been filed, involving 151 distinct matters. To date, the DSB has adopted thirty-nine panel or Appellate Body reports—twenty-nine Appellate Body reports and ten panel reports (see Appendix B). Since the appellate reports usually accept or affirm part of the first-level panel report, about sixty reports overall have all or part application.

At the beginning of the WTO, it was generally expected that almost every case would be appealed. To date, thirty-nine panel reports have been issued. In three cases, the time for appeal has not run out.²⁸ Of the remaining thirty-six cases, twenty-eight were appealed, and eight were not appealed. Thus Appellate Body review was invoked in 78 percent of the cases, although there is a modest trend developing of nonappeal. This may be attributable to the growing predictability of the Appellate Body’s decisions and reports, enabling disputing parties to determine when appeals would likely face denial. There may be other reasons not to appeal: both sides may not want certain issues tested at the appellate level, or they may have achieved what they wished to achieve from the first-level panel report. In addition, appeals entail additional expense.

Statistics reveal several trends in the profile of the dispute settlement mechanism. In 1995 the developed and developing countries brought a roughly equal number of complaints.²⁹ During the last five years, the number of cases brought

27. This document is titled *Overview of the State-of-Play of WTO Disputes* (May 19, 2000) and is available on the WTO Web site (www.wto.org) [hereafter *State-of-Play of WTO Disputes*].

28. Panel Report, *Canada—Patent Protection Term*, WT/DS170/R, circulated May 5, 2000; Panel Report, *Korea—Measures Affecting Government Procurement*, WT/DS163/R, circulated May 1, 2000; Panel Report, *United States—Anti-Dumping Act of 1916*, WT/DS136/R, circulated March 31, 2000.

29. See Park and Eggers (2000, pp. 194–95).

by less-developed countries has remained relatively constant, while the number brought by industrialized countries peaked at forty cases in 1997 and fell to twenty-two in 1999.³⁰ The United States and the European Community have been the most frequent complainants, each participating as a complainant or respondent in about half of the WTO cases.³¹

Most of the early WTO cases concerned GATT, and in many of those cases the issues were reasonably familiar to the panels. Some of the cases brought during the early period were left over from GATT: they were tried under the GATT system, but the resulting panel reports were blocked because of the objection of a contracting party (normally the losing party), as was permitted by the procedure under agreement.

Later some cases were brought in the intellectual property area. To date, there have been few cases regarding trade-in-services issues. Likewise, for the first several years there were very few antidumping or subsidy-countervailing duty cases. In the last year or so, however, there has been a dramatic surge in those cases, and currently about twenty cases are pending on each of those subjects.

One encouraging characteristic of the cases brought so far is that a large number are settled, in the sense of never leading to a panel report. The DSB has established 64 panels out of 151 distinct matters. The WTO statistical overview indicates that thirty-one cases are considered to be settled or inactive. Our statistical analysis concluded that adopted panel or Appellate Body reports resolved forty-six disputes, while forty-three disputes were resolved in other ways (such as settlement or withdrawal of contested measures).³² Significantly, no cases were resolved by the good offices, conciliation, or mediation, remedies provided for in the DSU rules.³³

One of the significant overall statistics is the sheer number of cases and thus the exceptional work load of the WTO dispute settlement system, both at the first-level panel stage and at the appellate stage. Some estimates suggest that well over half, maybe two-thirds or three-quarters of the effective work of the diplomats, missions, and secretariats in the WTO system is now related in one way or another to the dispute settlement process, including consideration of potential suits. A key question, not yet fully answered (although practice so far is encouraging), is whether the dispute settlement system is in fact lending a greater degree of predictability and reliability to the world trad-

30. See Park and Eggers (2000, p. 194).

31. See Park and Eggers (2000, p. 194).

32. See www.wto.org/english/tratop_e/dispu_e/stplay_e.doc (November 2000).

33. See Park and Eggers (2000, pp. 196–97).

ing system, including the millions of entrepreneurs who depend on trade treaties for the security of their cross-border transactions and other economic activities.

The Tough Issues of Implementation

Implementation of dispute settlement decisions faced a significant challenge during the second half of 1998, when the *Banana* case brought some of these issues to the forefront.³⁴ Until that time, compliance and implementation seemed to be on an appropriate track, with most of the countries complying with the DSU rules—even the trading superpowers, namely, the United States, Japan, and the European Community. Each had indicated that it would comply with the results of the dispute settlement system, and in many cases the countries have either fully complied or are in the process of complying.

The DSU contains rules and procedures on implementation of adopted panel or Appellate Body reports. One of these is the reasonable period of time within which compliance should occur.³⁵ The DSU provides three ways of establishing the reasonable period of time: (1) the losing party can propose a period of time, provided that it is approved by the DSB; (2) the parties can agree on a period of time within forty-five days; or (3) the period can be determined through binding, fast-paced arbitration within ninety days.³⁶ The time period for implementation has been determined in twenty-four cases. In fourteen cases, the parties agreed upon the reasonable period of time for implementation. In seven cases, the period was determined through binding arbitration.³⁷ Generally, it is the complaining party that requests arbitration, but in two cases a responding party did so.³⁸ The three remaining cases involved a prohibited subsidy, and therefore the DSU rules are not relevant in determining the period

34. Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted September 25, 1997. See generally Salas and Jackson (2000) (discussing procedural aspects of the banana dispute).

35. DSU, art. 21.3.

36. DSU, art. 21.3.

37. *Japan—Taxes on Alcoholic Beverages*, WT/DS8, 10, and 11; *Indonesia—Certain Measures Affecting the Automobile Industry*, WT/DS54, 55, 59, and 64; *Korea—Taxes on Alcoholic Beverages*, DS75 and 84; *Australia—Measures Affecting the Importation of Salmon*, DS18; *European Communities—Measures Affecting Meat and Meat Products (Hormones)*, DS26 and 48; *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, DS27; and *Chile—Taxes on Alcoholic Beverages*, WT/DS87 and 110.

38. The responding parties in the *Beef Hormones* case (WT/DS26 and 48) and the *Chile Alcoholic Beverages* case (WT/DS87 and 110) requested arbitration.

of time for implementation,³⁹ since in such cases panels recommend that the subsidizing member “withdraw the subsidy without delay” (ninety days in each of the three cases on which panels have issued rulings).⁴⁰ Although early cases suggest fifteen months as a reasonable period of time for compliance, more recent cases have established that the shortest period possible is appropriate, taking into account the legislative process of the losing party when it is necessary to complete implementation.⁴¹

Another issue that has been raised in several cases is whether remedial action taken by a losing party constitutes a “true implementation” of the recommendations of the report. In the *Banana* case, for example, the United States challenged the European Community in a series of ancillary procedures, to try to resolve differing viewpoints on implementation.⁴² The procedures brought to light a significant inconsistency between two provisions of the DSU (Articles 21.5 and 22). Differing views of the meaning of those articles resulted in something of an impasse, and a number of suggestions have been brought forward to rephrase those clauses in order to resolve the apparent inconsistency. In the meantime, the parties to several subsequent disputes have concluded bilateral agreements governing the application of Articles 21.5 and 22 to that dispute, in an attempt to resolve that particular dispute.⁴³

39. See Appellate Body Report, *Brazil—Export Financing Programme for Aircraft*, WT/DS46/AB/R, adopted August 20, 1999, para. 192 (finding that “the provisions of Article 21.3 of the DSU are not relevant in determining the period of time for implementation of a finding of inconsistency with the prohibited subsidies provisions of Part II of the SCM Agreement”); *Canada—Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted August 20, 1999; and *Australia—Subsidies Provided to Producers and Exporters of Automotive Leather*, WT/DS126/AB/R, adopted June 16, 1999.

40. *Agreement on Subsidies and Countervailing Measures*, art. 4.7 (www.wto.org/wto/legal/finalact.htm [November 2000]).

41. See the survey of the case law in Gleason and Walther (2000) (“although both the reasonable periods set by arbitration and those set by agreement have followed a gradual trend towards shorter implementation periods, it has been the arbitral rulings that have primarily driven that trend”).

42. See Salas and Jackson (2000).

43. See *Brazil—Export Financing Programme for Aircraft, Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/13, November 26, 1999; *Canada—Measures Affecting the Export of Civilian Aircraft, Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/9, November 23, 1999; *Australia—Subsidies Provided to Producers and Exporters of Automotive Leather, Recourse by the United States to Article 21.5 of the DSU*, WT/DS126/8, October 4, 1999; *Australia—Measures Affecting Importation of Salmon—Request by Canada for Determination of Consistency of Implementation Measures*, WT/DS18/14, March 8, 1999. See also Rhodes (2000).

The *Banana* case has a contrary history in respect to compliance, and the *Beef Hormones* case has also proven difficult in this regard.⁴⁴ Several recent cases look as if they will also be difficult to manage in the compliance or implementation phase. One of these is the so-called FSC (foreign sales corporation) case against the United States.⁴⁵ Other cases that may pose important problems in this regard are the aircraft subsidization disputes between Canada and Brazil and the *Australia–Leather* case, in which a panel required a refund of duties to the Australian government. In the *Australia–Leather* case, a “compliance review” panel (established pursuant to Article 21.5 of the DSU) determined that Australia had failed to withdraw the prohibited subsidies within ninety days and thus had not taken measures to comply with the recommendation of the DSB.⁴⁶ Compliance review panels concluded that Brazil had failed to withdraw its export subsidies for regional aircraft under its *Programa de Financiamento às Exportações* (PROEX) within ninety days and that Canada had failed to withdraw assistance to the Canadian regional aircraft industry within ninety days.⁴⁷

Compensatory measures may be taken if the losing party does not bring into effect a true implementation of the report, and the United States has on several occasions applied compensatory measures against the European Union.⁴⁸ The specific requirements of the DSU regarding implementation of reports have raised controversy almost from the beginning of the WTO dispute settlement system. At issue is whether the treaty obligations of the DSU require the losing WTO member to perform obligations as set forth in the final

44. Appellate Body Report, *European Communities—Measures Affecting Meat and Meat Products (Hormones)*, WT/DS26 & 48/AB/R, adopted February 13, 1998.

45. Appellate Body Report, *United States—Tax Treatment for “Foreign Sales Corporations,”* WT/DS108/AB/R, adopted March 20, 2000.

46. Panel Report, *Australia—Subsidies Provided to Producers and Exporters of Automotive Leather: Recourse to Article 21.5 of the DSU by the United States*, WT/DS126/RW and WT/DS126/RW/Corr.1, adopted February 11, 2000, para. 7.1.

47. Panel Report, *Brazil—Export Financing Programme for Aircraft, Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/RW, circulated May 9, 2000, para. 7.1. Panel Report, *Canada—Measures Affecting the Export of Civilian Aircraft, Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/RW, circulated May 9, 2000, para. 6.2. On the other hand, the panel determined that Canada had implemented the August 20, 1999, DSB recommendation that Canada withdraw “TPC assistance to the Canadian regional aircraft industry” within ninety days.

48. In both the *Banana* and the *Beef Hormones* cases, the United States sought and received authorization from the DSB to suspend concessions to the European Community. See *State-of-Play of WTO Disputes*. In the *Beef Hormones* case, Canada also sought and received authorization to suspend concessions to the European Communities.

dispute report or whether the country concerned has the complete juridical freedom to choose between performing and providing compensation or accepting retaliatory measures. I have argued elsewhere that the treaty text imposes an international law obligation to perform and does not give a free choice to prefer compensatory measures.⁴⁹ Policy considerations, moreover, suggest that performance is the more equitable requirement: to have a system under which wealthy countries can buy their way out of obligations, particularly those with respect to small or less powerful countries, raises an important asymmetry that could undermine the credibility of the entire dispute settlement procedure. It also creates a climate of uncertainty for millions of independent entrepreneurs and traders, who depend upon the rule structure as formulated by the treaty text. Nevertheless, other alternatives (such as “payment compensation” schemes to avoid retaliation) warrant consideration, since retaliation tends to undermine liberalizing trade policies.

Other legal problems that have arisen during the implementation phase include the formulation of appropriate remedies (such as a refund of antidumping duties, which had been applied incorrectly) and how to handle situations like the *FSC* case, where the potential compensatory measures are so enormous as to risk disruption to international trade. Indeed, the entire notion of trade retaliation to a large extent undermines some of the fundamental principles of the liberal trading system.

The DSU and the WTO also lack provisions for provisional measures in situations where the time required for the normal procedures under the dispute settlement procedure creates considerable ongoing harm and damages to the complaining party.

The Record of Implementation or Compliance

Assessing the WTO’s compliance or implementation caseload is complicated by the difficulty of ascertaining when adequate compliance has occurred. The facts may be disputed, or they may involve certain category indications that are not uniform.

One way to assess whether the losing party has complied with the recommendations and rulings of the DSB is to examine whether a party to the dispute

49. Jackson (1997a).

has challenged implementation. To date, the voluntary implementation period has expired and implementation has been mandated in twenty cases. In two cases, the DSB authorized the suspension of concessions.⁵⁰ In four additional cases, a compliance review panel found that the losing party had failed to comply.⁵¹ In one of these cases, the winning party is currently pursuing the suspension of concessions.⁵² In another case, a compliance review panel is assessing whether the losing party has complied with the recommendations or rulings of the DSB.⁵³ In four cases, it is unclear whether implementation has or has not been successfully completed. Since the process of compliance and implementation in these cases is ongoing, an evaluation of the compliance and implementation rules may be somewhat premature. Moreover, scholars have suggested that, despite the strength of compliance and implementation rules, political will on the part of the losing governments plays a key role in the implementation of an adverse ruling.⁵⁴

50. *European Communities—Regime for the Importation, Sale and Distribution of Bananas, Recourse by the United States to Article 22.7 of the DSU*, WT/DS27/49, April 9, 1999; *State-of-Play of WTO Disputes* (stating that the DSB authorized the United States to suspend concessions to the EC on April 19, 1999); see also *European Communities—Regime for the Importation, Sale, and Distribution of Bananas—Recourse to Article 22.7 of the DSU by Ecuador*, WT/DS27/54, May 8, 2000. *European Communities—Measures Concerning Meat and Meat Products (Hormones), Recourse by the United States to Article 22.7 of the DSU*, WT/DS26/21, July 15, 1999; *State-of-Play of WTO Disputes* (stating that the DSB authorized the suspension of concessions to the European Communities by the United States and Canada on July 26, 1999).

51. Panel Report *Brazil—Export Financing Programme for Aircraft, Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/RW, circulated May 9, 2000; Panel Report, *Canada—Measures Affecting the Export of Civilian Aircraft, Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/RW, circulated May 9, 2000; Panel Report, *Australia—Measures Affecting the Importation of Salmon*, WT/DS18/RW, adopted March 20, 2000; Panel Report, *Australia—Subsidies Provided to Producers and Exporters of Automotive Leather, Recourse to Article 21.5 of the DSU by the United States*, WT/DS126/RW & WT/DS126/RW/Corr.1, adopted February 11, 2000.

52. Panel Report, *Australia—Measures Affecting the Importation of Salmon*, WT/DS18/RW, adopted March 20, 2000.

53. *United States—Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabit or Above from Korea, Recourse by Korea to Article 21.5 of the DSU*, WT/DS99/9, compliance review panel constituted April 25, 2000. Initially, the United States sought to block South Korea's request by insisting that Korea could not request the establishment of a compliance review panel "without going through consultations that normally precede the establishment of a new panel." "U.S. Blocks WTO Compliance Review with Reversal on DSU Rules," *Inside US Trade*, March 24, 2000.

54. See Hudec (1999, p. 14).

Evaluating the Process and Assessing the Jurisprudence

The Appellate Body has made it clear that general principles of international law apply to the WTO agreements. Under GATT, there had been some question about this, and certain parties argued that the agreement was a separate regime. The Appellate Body explicitly ruled that it is not and has referred to international law in support of its ruling, particularly as embodied in the Vienna Convention on the Law of Treaties, on which the Appellate Body calls for questions of treaty interpretation.⁵⁵

The Appellate Body's reports, while arguably not entirely free of error, have been carefully crafted and give the strong impression of opinions that judicial institutions in many legal systems follow. The reasoning of the decisions has been thorough and generally careful (especially given the short time limits within which the Appellate Body has to operate) and attests to its members' independence and impartiality. There is no indication of particular authorship of any part of an Appellate Body report and no provision for dissenting opinions. Each Appellate Body report is attributed collectively to the three members of the division. The Appellate Body's reports are typically more juridical in tenor—some might say legalistic—than GATT panel reports; certainly they are more so than those of other international tribunals.

The 1998 *Shrimp-Turtle* case is probably the most important case so far in the WTO's jurisprudence.⁵⁶ The report of the first-level panel took a very narrow position based entirely upon the panel's view that trade policies were supreme in the WTO system and that even then the system was giving unbridled priority to multilateralism. The Appellate Body correctly reversed this view, criticizing the first-level panel on several different points, most significantly for placing priority on multilateralism well beyond what the treaty text would require. In addition, the Appellate Body went through a careful process of treaty interpretation, based heavily upon the interpretive rules laid down by customary international law as reflected in the Vienna Convention on the Law

55. See, for example, Appellate Body Report, *Korea—Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted January 12, 2000, para. 80; Appellate Body Report, *Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103 and 113/AB/R, adopted October 27, 1999, paras. 131–32, 138; Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted May 20, 1996, p. 17. See also DSU, art. 3.2 (providing that the WTO dispute settlement system serves “to clarify the existing provisions of [the WTO] agreements in accordance with the customary rules of interpretation of public international law”).

56. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted November 6, 1998.

of Treaties. It determined that the WTO dispute settlement process must take into account policies other than those that are merely “trade liberalizing.” On this point, many observers believe that the Appellate Body rose to a high standard; some, however, have faulted the Appellate Body as perhaps a little too innovative. Nevertheless, most legal systems of the world, national and international, have to struggle with the problem of balancing competing policy goals in contexts where each has considerable merit. The WTO system cannot escape that difficult position, and the Appellate Body has not sought to escape it. The Appellate Body’s opinion and report in the *Shrimp-Turtle* case is silent about some issues that seem to require attention, most particularly, the so-called product-process question. Indeed, the Appellate Body ruled that there *may* be circumstances under which a country might prohibit the importation of goods based not on the product characteristics of those goods but on the process by which those goods were developed, harvested, or prepared for commerce—namely, prohibiting shrimp imports on the basis of whether shrimp harvesting resulted in deaths of an endangered species of turtles.

The jurisprudence of the Appellate Body appears more deferential toward national government decisions (in other words, to national sovereignty) than has sometimes been the case among first-level panels or the GATT panels.⁵⁷ In some sense, therefore, the Appellate Body has been exercising more judicial restraint and has been more hesitant to develop new ideas of interpreting the treaty language than other GATT and WTO judicial bodies. It is not clear why this is so, but it may be significant that the Appellate Body roster contains relatively few GATT specialists. In contrast to the first-level panels and earlier GATT panels, members of the Appellate Body tend to be generalists.

57. Examples of some attitudinal statements of this type (not necessarily supported by the “holding” of the case) include: Appellate Body Report, *EC—Measures Affecting Livestock and Meat (Hormones)*, WT/DS26 and 48/AB/R, adopted February 13, 1998, especially para. 165 (“We cannot lightly assume that sovereign states intended to impose upon themselves the more onerous, rather than the less burdensome obligation by mandating conformity or compliance with such standards, guidelines and recommendations. To sustain such an assumption and to warrant such a far-reaching interpretation, treaty language far more specific and compelling than that found in Article 3 of the SPS Agreement would be necessary.”); Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, WT/DS8, 10, and 11/AB/R, adopted November 1, 1996, p. 35 (“WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgments in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world”); Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted May 20, 1996, p. 31 (“WTO Members have a large measure of autonomy to determine their own policies on the environment [including its relationship with trade], their environmental objectives and the environmental legislation they enact and implement”).

Certainly, the Appellate Body's tendency to accord deference to national sovereignty favors the acceptance by the WTO's disparate constituents of the work of the DSB over the long run.

Although the findings of the dispute settlement reports have come under some criticism (often from observers who have not fully understood the reports), the reports are carefully crafted and soundly reasoned. First-level panels tend to bear in mind how their rulings will be treated by the Appellate Body, and the WTO reports are more carefully reasoned than most reports under GATT. There is, of course, a certain lack of political accountability within the dispute settlement process, particularly among the rulings of the Appellate Body. This is due largely to the failure of the members of the WTO to appropriately exercise their responsibilities regarding negotiations and the making of certain decisions under the WTO charter,⁵⁸ which members could use to critique dispute settlement reports with which they disagree. The charter has constrained both negotiations and decisions, making it harder for anything short of complete, or almost complete, consensus to operate in the WTO. WTO members, however, have largely accepted the findings of the dispute settlement reports, and arguably that satisfaction represents accountability for the system toward governments and their constituencies. Members of the so-called civil society argue that the system is not sufficiently accountable to the interests they represent. These arguments raise important questions of jurisprudential and political theory that the WTO system will have to consider in the years to come.

The dispute settlement system under the new procedures is already having a profound impact on the world trading system. Rather than operating in an atmosphere of pure negotiation, diplomats find themselves acting as lawyers, or relying on lawyers, much more heavily than before and to a far greater extent than some of them would like. The dispute settlement procedure itself becomes part of the negotiating tactics for various dispute settlement attempts. The media abounds with reports of one nation faulting the trade measures of another and threatening to bring a case in the WTO if it does not get the matter resolved.⁵⁹

58. The phrase "WTO Charter" refers to the Agreement Establishing the World Trade Organization. See "Agreement Establishing the World Trade Organization," *International Legal Materials*, vol. 33 (1994), pp. 13, 15.

59. See, for example, "US Threatens Canada with WTO Case, Hints at Mexico Challenge," *Inside US Trade*, April 3, 1998; J. Zarocostas, "US to Request a WTO Panel on Duty Hikes," *Journal of Commerce*, February 20, 1997, p. 2A; J. Zarocostas, "EU May Go to WTO Over US Textiles Rules," *Journal of Commerce*, March 10, 1997, p. 3A; "US Considering WTO Talks on Japanese Barriers to Apples," *Inside US Trade*, November 29, 1996.

The negotiations concerning threatened U.S. action against Japanese automobile imports are a case in point: the option of bringing the matter before the WTO apparently worked in a way that the Japanese deemed favorable to their negotiating position.⁶⁰ In another case, Costa Rica brought a case against the United States concerning U.S. import quotas on cotton underwear and certain other textile products.⁶¹ Costa Rica won the case, both at the first-level panel and before the Appellate Body, and the United States implemented the rulings. That a small nation like Costa Rica could prevail against a trading giant attests to the power of the dispute settlement process in redressing claims of trade imbalance.

One noteworthy ongoing development in WTO dispute settlement is the participation of private attorneys retained by governments. Small governments in particular often do not have in-house expertise adequate to handle some of the complex cases (or even some of the simple cases) that are finding their way into the WTO dispute settlement arena. Such states are put at a substantial disadvantage against large entities such as the United States or the European Community. Consequently, these smaller states have in some circumstances been eager to retain the services of private attorneys, usually Europeans or Americans. In some cases, when governments sought to have such private counsel present in the hearing room and sometimes even to speak on their behalf, the opposing party (most often the United States) has objected to the practice. During the course of the last several years, developments seem to have moved substantially in the direction of permitting the use of private attorneys, albeit with certain limitations. In its 1997 *Banana* case report,⁶² the Appellate Body division indicated that there were few valid grounds for refusing the participation of government-retained private counsel in the appellate proceeding. Several first-level panels as well seem to have accepted the practice.⁶³ This is a welcome move, but it will require careful thinking about the role and relationship of the private attorneys vis-à-vis their government clients

60. See "Japan Files Case with Trade Body in Fight with US Over Auto Sanctions," *International Trade Reporter* (BNA), vol. 12 (1995), p. 891; "Japan to Charge US in WTO with Violation of MFN, Bound Tariffs," *Inside US Trade*, May 17, 1995. See also Statement by Ambassador Mickey Kantor (June 28, 1995) (www.ustr.gov/releases/1995/06/95-45 [November 2000]) (announcing the settlement of the dispute).

61. Appellate Body Report, *United States—Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/AB/R, adopted February 25, 1997.

62. Appellate Body Report, *EC—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted September 25, 1997, paras. 4–12.

63. WTO Panel Report, *Indonesia—Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, adopted July 23, 1998, p. 19.

and vis-à-vis the WTO system. It would be wise for the DSB or other appropriate bodies to develop standards and rules of ethics governing conflicts of interest and confidentiality (among other subjects) that governments could incorporate in their contracts with private attorneys.

Dispute Settlement in the WTO “Constitution”

The new dispute settlement system is having a profound impact on the methods of diplomacy. The fact that the final report of the dispute settlement system is now essentially automatically adopted as a matter of course has shifted the dynamics of dispute settlement. As noted earlier, under GATT, parties could block decisions with which they disagreed; implementation of the decisions was also impeded by a “political filtering” process through which a political body (the GATT Council) would evaluate a report and on some occasions refuse to adopt the report (even when blocking did not cause such refusal). Thus there was arguably something of a political legitimization for the end result, which could operate as a check against the dispute settlement process. The elimination of a blocking opportunity was one of the important features of the Uruguay Round reforms, but the quid pro quo was the development of an appellate procedure. The WTO’s appellate procedure has many admirable traits, but in the context of the WTO, where the decisionmaking process is often paralyzed and cannot effectively review or change the results of an Appellate Body report and its determinations, a great deal of power has been concentrated in the Appellate Body. By contrast, many national systems balance powerful judicial systems with legislatures that have the authority to overrule the highest court. Many observers have expressed concern that the WTO appeal procedure has concentrated power in the hands of a group whose members, although undeniably skilled, are not able to appraise all of the different political and economic factors that would go into a legislative judgment. The members of Appellate Body would be quick to recognize this and, indeed, have been extremely cautious in how they have applied the treaty texts.

What might the future bring? Several emerging developments may have significant impact on the dispute settlement system. If a new negotiating round is finally launched, at least some results of such a negotiation are likely to have specific and generalized impact on the dispute settlement system. The DSB itself might recognize and give more weight to its responsibility to super-

vise the dispute settlement process and could develop means to critique the Appellate Body's and first-level panels' adopted reports.

Furthermore, the effects of the decisions on the economies of developing countries may lead these interests (as well as their allies among industrial countries) to try to redress the disadvantages that developing countries face in the WTO process. One particular reform would be to provide legal aid assistance to the advocacy of developing countries, in part to improve their capacities to participate in the dispute settlement procedures but also to reduce the costs that they incur in such procedures.

The potential impact of China's membership in the WTO has been commented on extensively. There is considerable concern that the transition of the Chinese economy from government control to market orientation could give rise to a number of dispute settlement procedures brought against China by existing members of the WTO, even to the point of overwhelming the dispute settlement system.⁶⁴ Certainly, some care needs to be taken by the negotiators in this context, perhaps to develop alternative means to resolve disputes involving China.

Finally, there are increasing demands for transparency and democratic participation in the dispute settlement process. This is in part a function of the increasing understanding among knowledgeable critics of the WTO about the power of the dispute settlement process and how it can impact constituents' lives.

Emerging Constitutional Problems of the WTO

Almost every institution has to face the task of how to adapt to conditions and circumstances not originally considered when the institution was set up. This is most certainly true of the original GATT and now of the WTO. Given the changes implicated by a globalizing economy, the WTO will necessarily have to cope with new factors, new policies, and new subject matters. If it fails to do so, it will sooner or later be marginalized. This could be detrimental to its multilateral approach to international economic relations, pushing nations to solve their problems through regional arrangements, bilateral arrangements, and even unilateral actions. Although these alternatives can have an appro-

64. See, for example, Representative Richard A. Gephardt, Press Release: Speech on China PNTR (April 19, 2000) (democraticleader.house.gov/media/b_speech.asp [November 2000]).

prate role and can be constructive innovators for the world trading system, they also risk ignoring key interests and the diversity of societies and policies. In other words, they run a high risk of generating significant disputes and rancor among nations, which can inhibit or debilitate the advantages of cooperation otherwise hoped for under the multilateral system.

It may be an inevitability of treaty negotiations involving more than 130 participating nations or entities, but the Uruguay Round and the WTO treaty contain considerable ambiguities that are beginning to emerge in the dispute settlement proceedings of the WTO. These ambiguities are proving particularly significant in the context of the new issue texts, namely, the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). However, there are ongoing issues that call for new approaches within the text of GATT. There is an evident evolution in thinking about the national treatment obligations under the agreement's Article III, as affected and perhaps embellished by other texts in the context of GATT in Annex 1A, such as the Agreement on the Application of Sanitary and Phytosanitary Measures and the Agreement on Technical Barriers to Trade.⁶⁵

Already a number of subjects have been suggested for allocation to cooperative mechanisms in the WTO context, including competition policy, investment rules, human rights issues, environment in trade, labor standards issues, sanctions (unilateral or otherwise) to enforce some of these policies, and questions of threats to peace and arms control. The inventory of potential new issues does not stop there.⁶⁶

How will the WTO solve or attempt to solve some of these issues? The First Ministerial, held at Singapore in 1996, considered some of these questions.⁶⁷ Many observers, however, concluded that the meeting failed to consider innovative ways to cope with new issues. Obviously, the ministers felt both the legal constraints of the WTO charter and political as well as economic constraints of attitudes of constituents in several different societies. The Third

65. See, for example, Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, WT/DS8, 10 and 11/AB/R, adopted November 1, 1996; Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted September 25, 1997; Appellate Body Report, *European Communities—Measures Affecting Meat and Meat Products (Hormones)*, WT/DS26 and 48/AB/R, adopted February 13, 1998.

66. See Jackson (1998a).

67. *WTO Singapore Ministerial Declaration*, WT/MIN(96)/DEC, adopted December 13, 1996.

Ministerial Conference in Seattle failed to develop a framework for a new negotiation that might address some of these issues.

The issues needing resolution can be broadly grouped into two categories: (1) substantively new issues, and (2) procedural or arguably interstitial (“fine-tuning”) issues for the organization. It is clear, for example, that several procedures underlying the dispute settlement process (particularly those relating to the text of the DSU), as well as other procedures regarding decision-making, waivers, and new accessions, are being scrutinized and that various suggestions for improvement have been put on the table. With respect to dispute settlement, the treaty text itself called for a review during 1998, which was not accomplished.⁶⁸

How can these many issues be addressed in the current WTO institutional framework? There is a delicate interplay between the dispute settlement process, on the one hand, and the difficulties of negotiating new treaty texts or making decisions that are authorized by the Uruguay Round treaty text, on the other.

The possibilities of negotiating new text or making decisions pursuant to the WTO charter are clearly quite constrained. During the final months of the Uruguay Round negotiations, the negotiators built a number of checks and balances into the WTO charter in order to place limits on intrusions into national sovereignty. The decisionmaking provisions (Article IX) and the amending provisions (Article X) of the WTO charter limit what the WTO membership can do.⁶⁹ These amending provisions, however, are probably as difficult as those that existed under GATT (with the exception of certain nonsubstantive procedural amendments, the provisions of the WTO charter are largely copied from GATT). By the time of the Tokyo Round in the 1970s, amendment of GATT was perceived as virtually impossible, so the contracting parties developed the technique of *side agreements*. In principle, the Uruguay Round sought to avoid this à la carte approach and pursue a *single agreement*.

Apart from formal amendments, the WTO charter enumerates powers concerning decisions, waivers, and formal interpretations, but the provisions are framed within substantial constraints. Decisionmaking (at least as a fallback from attempts to achieve consensus) is generally ruled by a majority-vote system, but the WTO charter contains language (Article IX:3), as well as longstanding practice under GATT, suggesting that decisions cannot be used

68. The Uruguay Round treaty text calls for a “full review of the dispute settlement rules” of the WTO during 1998. See *Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes*.

69. WTO charter, arts. IX and X.

to impose new obligations on members.⁷⁰ Under GATT, waivers were sometimes used to adjust to new circumstances, but this process fell into disrepute and caused the negotiators to develop Uruguay Round texts that limit the use of waivers, particularly as to the duration of waivers, and subjected waivers to explicit revocation authorities. GATT contained no formal provision regarding interpretations, and thus the GATT panels had a bit more scope for setting forth interpretations that would ultimately become embedded in practice and even subsequent negotiated treaty language. However, the WTO charter addresses this issue of formal interpretations directly, imposing a very stringent voting requirement of three-fourths of the total membership. Since as much as a fourth of the WTO membership is not present at key meetings, the process of adopting formal interpretation is not an easy one to achieve. Some observers feel, however, that in some contexts the technical requirements of consensus (as opposed to unanimity)⁷¹ may not always be so difficult to fulfill.

Given these various constraints, the temptation to use the dispute settlement process and the general conclusions of the panel reports to redress treaty ambiguity or gaps is understandable. However, Article 3.2 of the DSU itself warns against proceeding too far in this direction: "Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements." The emerging attitudes of the Appellate Body reports seem to reinforce a policy of considerable deference to national government decisionmaking, whether it arises from judicial restraint, the explicit language of the DSU's Article 3, or the sentiments of countries that fear excessive intrusion on national sovereignty. The provision of an explicit power of formal interpretation with a supermajority requirement in the WTO charter also arguably constrains how far the dispute settlement system can push the idea of its report rulings and recommendations becoming definitive.

The dispute settlement system cannot and should not bear the weight of formulating new rules either by filling gaps in the existing agreements or by setting forth norms that carry the organization into totally new territory such as competition policy or labor standards. In addition, some of the procedures under the DSU are now being questioned. Various suggestions are coming forward, and some lists of proposals for change contain more than eighty dis-

70. WTO charter, arts. IX:2, X:3, and X:4; DSU, art. 3.2.

71. The WTO charter, art. IX, n. 1, defines *consensus* as follows: "The body concerned shall be deemed to have decided by consensus on a matter submitted for consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision."

tinct items. Many of these suggestions are reasonable fine-tuning, without dramatic consequence to the system, but even the fine-tuning can be difficult to achieve given some of the constraints on decisionmaking. One of the virtues of GATT was the agreement's ability to evolve through trial and error. Indeed, dispute settlement under GATT evolved quite dramatically over four decades; concepts such as *prima facie* nullification or the use of panels instead of working parties became gradually embedded in the process. With the Tokyo Round's Understanding on Dispute Settlement, these practices became definitive by consensus action of the contracting parties.

But in comparison with GATT, the language of the DSU (as well as the WTO charter) seems to place unwarranted limits on this approach. Article 2.4 of the DSU states that "where the rules and procedures of this understanding provide for the DSB to take a decision, it shall do so by consensus." The definition of *consensus* is then supplied in a footnote and, although not identical with *unanimity*, provides that an objecting member can block consensus. Likewise, the WTO charter itself provides a consensus requirement for amendments to Annexes 2 (the DSU) and 3. Thus the opportunity to evolve by experiment and practice over time seems considerably more constrained under the WTO charter than was the case under the very loose and minimalist institutional language of GATT. This inflexibility raises the substantial risk of impasse in addressing the problems that the WTO faces.

Reform Proposals and Prospects

The WTO may be able to develop somewhat better opportunity for explicit amendment using the two-thirds (and three-fourths in substance cases) power of amendment contained in the WTO charter. Some of the decisions of the WTO membership at its ministerial meeting or various council meetings may creep up on some of the issues and decide them in such a way that certain small steps of reform can be taken. These decisions will become part of the "practice under the agreement" referred to in the Vienna Convention on the Law of Treaties. With respect to dispute settlement, it may be possible to work within the consensus rule to make some changes in the procedures governed by Annex 2. It may be possible, for example, to promulgate interpretations without requiring member approvals of treaty text amendments, thus avoiding some of the elaborate procedures governing ratification.

The question of consensus implicates at least two different kinds of decisions: (1) changes in the text of the DSU, and (2) decisions by the DSB that

could involve incidental or ancillary procedural rules, assuming that they are not inconsistent with the treaty provisions of the DSU. There may be a few situations where basic small and relatively unimportant decisions can be made as a matter of practice of the dispute settlement system's administration, such as decisions about how to interpret deadlines, the form of complaints that should be filed, or the development of a relatively uniform set of procedural rules about activities of panels and panel members, translations, and documentation. Even then, there is at least some likelihood that an objecting member could force an issue to go to the DSB and block consensus in that forum.

Larger subjects for inclusion in the WTO (such as rules on investment, competition policy, or environmental rules) will likely prove more intractable than procedural changes. If amendment of the agreements is not feasible, one could look at the WTO Annex 4 plurilateral trade agreements, which are optional and thus in the drafting process do not need to be subject to consensus. However, to add a negotiated plurilateral agreement to Annex 4 does require full consensus. Thus once again that could be blocked, and clearly that opportunity for blocking will translate back into the negotiations over what can be placed in a new plurilateral agreement. Other legal and procedural innovations to accomplish change may develop. For example, implementation of the results of both the telecommunication services negotiation and the financial services negotiation rely heavily upon insertions of commitments by members into the individual service schedules.⁷²

The critical issue for the WTO is to address consensus procedures and to do so by refining the meaning and practice of consensus. It might be feasible, for example, to develop practices that would lead WTO member nations to refrain from blocking a consensus in certain circumstances and under certain conditions. In other words, the General Council or the DSB might develop a series of criteria concerning consensus in certain kinds of decisions, which would strongly suggest to member states that if these criteria were fulfilled, they would normally refrain from blocking the consensus. Perhaps this could develop like the practice in the European Community or the jurisprudence of the Luxembourg Compromise, where it has been understood that governments will refrain from exercising their potential vote against a measure unless the measure involves an issue of vital interest to the member involved. Without

72. See, for example, WTO Secretariat, *Successful Conclusion of the WTO's Financial Services Negotiation*, PRESS/86, December 15, 1997 (www.wto.org/wto/press/press86.htm [November 2000]); WTO Secretariat, *Basic Telecommunications—Schedules of Commitments and Lists of Article II Exemptions*, January 29, 1998 (www.wto.org/wto/new/gbtoff.htm [November 2000]).

pursuing the analogy too far, one might see something similar develop in the context of the WTO. A “vital national interest” declaration could be a condition for blocking consensus, but a practice could develop to subject such declarations to inquiry, debate, and criticism.

Several conditions might encourage nations to refrain from blocking a consensus on some of the more purely procedural reforms that might be desired, either in amending the DSU or in decisions of the DSB.

—Clearly the major criterion is that a proposed measure be consistent with the fundamental principles of the WTO, including most favored nation status and perhaps some of the substantive requirements of treaty texts, such as national treatment or restraints on border measures. Procedural changes ought not to challenge those particular rules in any event.

—A supermajority threshold such as 70 or 90 percent of the members present, or some threshold percentage of total WTO membership trade represented by agreeing members (for example, 90 percent of WTO trade) could be built into procedural decisionmaking. Proposals for a critical mass threshold have already been raised by the WTO’s director-general.⁷³

—A special expert group appointed by the DSB or the WTO membership could examine any new procedural measure in depth in advance of its consideration by WTO members. Such a group would include individuals with expertise on the legal procedures at issue and would be recognized as impartial. It would be preferable that the members of the expert group act in their own right and not on the instruction of their governments. Indeed, such an expert group might draw upon individuals who are not part of the diplomatic missions at Geneva and in some cases not even government employees. The expert group could prepare certain recommendations or evaluate proposals and then send them to the DSB or the General Council with a recommendation of adoption. Then, if the other criteria were fulfilled, members would be strongly encouraged to refrain from blocking consensus, partly with the notion that in the future they may be supporting some other measures that likewise would benefit from restraint in using consensus blocking.

Similar approaches might be developed through plurilateral agreements as candidates for Annex 4.

73. See WTO Director-General Renato Ruggiero, *Opening Remarks at the Fiftieth Anniversary Symposium*, April 30, 1998 (www.wto.org/wto/new/symp_rem.htm [November 2000]).

The Broader Context of International Economic Law

International economic law covers a broad range of subjects within the context of regulating “economic activity”: environmental regulation, agricultural trade, product standards, and consumer protection in their broader ramifications, as well as securities regulation. Such diverse issues as labor regulation, labor standards, and human rights have also begun to push the frontiers of the subject.

Indeed, almost every conceivable area of economic activity that for one reason or another attracted governmental concern and often regulation is now affected by actual or potential international regulation. Thus we need to step back and ask, what are the common elements of these many specific topics and often ad hoc government responses? The fundamental subject appears to be the question of regulation of economic behavior that crosses national borders. How should policymakers (and scholars) approach this broad question? Are there general principles of government regulatory activity that could be applied in most or all situations involving cross-border economic behavior? Can we develop some sort of general framework for policy analysis of this type? This paper is a preliminary and tentative attempt to do that. These and many more questions will engage scholarly and policymakers’ attention for years to come, including the attention of this scholar.

Conclusion

Appraising the value and effectiveness of the WTO dispute settlement process during its first five years requires a good measure of caution. As recently as two years ago, some of the more vexing issues, including issues of implementation, had not yet been reached, and major governments were indicating that they intended to perform all obligations raised by the dispute settlement reports. During the last two years, a number of further issues and some very tough cases have come to the floor.

Nevertheless, it is possible to make some preliminary judgments. First, such judgments depend very much on the question one is asking. For example, we could appraise the dispute settlement system by asking how effective it is in promoting the settlement of cases or how it develops the jurisprudence in the sense of providing greater certainty and stability while resolving ambiguities in the rule structure. Another possibility is to ask how effectively the results

of dispute settlement cases have been implemented. Finally, one can evaluate the extent to which the results of the dispute settlement process have been accepted, both politically and publicly.

The first two questions can be answered by the WTO's good record so far of settling cases (including approximately half the cases that settled before they got to a panel). The WTO also deserves high marks for the quality of its jurisprudence. On the other hand, there are some important questions about implementation of the results of the procedures and, in addition, some developing troubles concerning political acceptance.

Important problems are emerging regarding the WTO's dispute settlement procedures. Most salient are the problems of caseload, which risk overloading the system. Also troublesome are the controversies that, in the absence of effective ways to negotiate, are passed on to the dispute settlement process. Nevertheless, the WTO's record has been extraordinarily good during the first five years, perhaps better than any other comparable international law tribunal.

APPENDIX A

Figure A-1. WTO Dispute Settlement Panel Process

At all stages, countries in dispute are encouraged to consult each other in order to settle “out of court.” At all stages, the WTO director-general is available to offer his good offices, to mediate, or to help achieve a conciliation.

Source: World Trade Organization (www.wto.org/wto/english [November 2000]).

APPENDIX B

*WTO Dispute Settlement, 1995 to 2000:
A Statistical Analysis*

YOUNG DUK PARK

Table B-1. Classification of the WTO Members and Their Participation in the Dispute Settlement Mechanism (as of October 1, 2000).

<i>Country group</i>	<i>Participants in the WTO Dispute Settlement Process</i>	<i>Non-Participants in the WTO Dispute Settlement Process</i>	<i>Total</i>
Developed countries	Australia, Canada, the European Communities and its 15 Member States, Iceland, Japan, New Zealand, Norway, Switzerland, the United States (24)	Liechtenstein (1)	25
Newly industrialized countries	Argentina, Brazil, Hong Kong, Korea, Malaysia, Mexico, Singapore, Thailand (8)	0	8
Traditional developing countries	Barbados, Belize, Bolivia, Cameroon, Chile, Colombia, Costa Rica, Côte d'Ivoire, Cuba, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Ghana, Grenada, Guatemala, Honduras, India, Indonesia, Israel, Jamaica, Nicaragua, Nigeria, Pakistan, Panama, Paraguay, Peru, Philippines, Saint Lucia, Saint Vincent & the Grenadines, Senegal, South Africa, Sri Lanka, Suriname, Swaziland, Trinidad and Tobago, Turkey, Uruguay, Venezuela, Zimbabwe (41)	Antigua and Barbuda, Bahrain, Botswana, Brunei Darussalam, Congo, Cyprus, Fiji, Gabon, Guyana, Jordan, Kenya, Kuwait, Macau, Malta, Mauritius, Mongolia, Morocco, Namibia, Papua New Guinea, Qatar, Saint Kitts (Saint Christopher) and Nevis, Tunisia, United Arab Emirates (23)	64

continued

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Table B-1. Classification of the WTO Members and Their Participation in the Dispute Settlement Mechanism (as of October 1, 2000), *continued*.

<i>Country group</i>	<i>Participants in the WTO</i>	<i>Non-Participants in the WTO</i>	<i>Total</i>
	<i>Dispute Settlement Process</i>	<i>Dispute Settlement Process</i>	
Least developed countries	0	Angola, Bangladesh, Benin, Burkina Faso, Burundi, Central African Republic, Chad, Democratic Republic of the Congo, Djibouti, Gambia, Guinea, Guinea-Bissau, Haiti, Lesotho, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Myanmar, Niger, Rwanda, Sierra Leone, Solomon Islands, Tanzania, Togo, Uganda, Zambia (29)	29
Transitional economies	Czech Republic, Hungary, Poland, Romania, Slovak Republic (5)	Albania, Bulgaria, Estonia, Georgia, Republic of Kyrgyz, Latvia, Slovenia (7)	12
Total	78	60	138

Table B-2. Actors Involved in WTO Disputes

<i>Country or country group</i>	<i>Number of requests for consultation^a (percent)</i>		
	<i>As complainant^b</i>	<i>As defendant</i>	<i>As complainant or defendant</i>
United States	63 (30.7)	44 (21.5)	107 complaints (52.2)
European Community	51 (24.9)	42 (20.5)	93 complaints (45.4)
Canada	15 (7.3)	10 (4.9)	25 complaints (12.2)
Japan	8 (3.9)	12 (5.9)	20 complaints (9.8)
All developed countries	147 (71.7)	114 (55.6)	...
Traditional developing countries	49 (23.9)	84 (41.0)	...
Least developed countries	0 (0)	0 (0)	...
Transitional economies	2.0 (4)	3.4 (7)	...

a. The data include four requests for the establishment of a panel by India (DS32 & DS33), Thailand (DS181), and Pakistan (DS192), although they were not preceded by requests for consultations under the DSU but fulfilled the consultation requirements under the Agreement on Textiles and Clothing (& indicates cases of the same measure).

b. Five co-complaints raised from 1995 to October 2000 are not considered in the table.

Table B-3. WTO Disputes: Complainants and Defendants (as of October 1, 2000)

As complainant	As defendant								Total cases brought	Percent
	United States	European Community	Canada	Japan	Other developed countries	Newly industrialized countries	Traditional developing countries	Transitional economies		
United States	...	22	3	5	4	18	10	1	63	30.7
European Community	18	...	3	6	...	13	11	0	51	24.9
Canada	4	6	...	1	1	2	1	0	15	7.3
Japan	4	...	1	...	0	1	2	0	8	3.9
Other developed countries	2	1	1	0	1	1	3	1	10	4.9
Newly industrialized countries	7	3	2	0	0	2	10	0	24	11.7
Traditional developing countries	8	7	0	0	0	3	6	1	25	12.2
Transitional economies	0	0	0	0	0	1	0	3	4	2.0
Co-complainants	1	3	0	0	0	0	0	1	5	2.4
Total cases defended against	44	42	10	12	6	41	43	7	205	
Percent	21.5	20.5	4.9	5.9	2.9	20.0	21.0	3.4		

Table B-4. Use of Requests for Consultation, 1995–99^a

<i>Country category</i>	<i>1995</i>	<i>1996</i>	<i>1997</i>	<i>1998</i>	<i>1999</i>
Developed countries	13	27	40	33	22
Developing countries ^b	11	9	10	8	7
Total	24	36	50	41	29

a. Five co-complaints raised from 1995 to 1999 are not considered.

b. Comprises newly industrialized countries, traditional less-developed countries, least-developed countries, and transitional economies. See also Park and Eggers (2000, pp. 194–95).

Table B-5. Means of WTO Dispute Settlement (205 cases as of October 1, 2000)

<i>Status</i>	<i>Number of complaints</i>	<i>Percent</i>
Cases in progress	106	51.7
Resolved by adopted panel or Appellate Body report	53	25.9
Resolved in other ways	46	22.4
Bilateral settlement ^a	31	15.1
Unilateral withdrawal of the measures at stake ^b	3	1.5
Withdrawal of the request for the establishment of a panel ^c	5	2.4
Settlement through inaction ^d	6	2.9
Other ^e	1	0.5
Resolved by good offices, conciliation, or mediation	0	0

a. The following are included under the rubric of bilateral settlement: (1) mutually agreed solutions notified to the DSB according to Article 3.6 of the DSU (twenty-eight requests for consultations: DS5, DS6, DS7 + DS12 + DS14, DS19, DS20, DS28, DS35, DS36, DS37, DS40, DS42, DS43, DS72, DS73, DS74, DS85, DS86, DS91 + DS92 + DS93 + DS94 + DS96, DS102, DS119, DS151, DS190); (2) a joint communication not notified to the DSB (DS57); (3) a unilateral official statement not notified to the DSB (DS49); and (4) a de facto bilateral settlement without an official statement (DS15). (+ indicates multiple complaints that are considered one measure.)

b. See cases DS23, DS32, DS39.

c. See cases DS1, DS13, DS89, DS106, DS123.

d. Settlement through inaction comprises cases where (1) panelists were not selected (DS9); (2) no further action was taken after the request for consultation (DS17, DS25); and (3) the panel's authority lapsed pursuant to Article 12.12 of the DSU (DS38, DS88 + DS95). (+ indicates multiple complaints that are considered one measure.)

e. A new request for consultation has been brought, superseding the former matter (DS16).

Table B-6. Outcome of Appellate Body Review (thirty matters as of October 1, 2000)^a

<i>Disposition</i>	<i>Number of matters</i>
Upheld in full	10
Upheld with modifications	5
Upheld in part, reversed in part	13
Reversed in full	2

a. As of October 1, 2000, forty-five panel reports had been issued. Not included are cases in which a mutually agreed solution to the dispute between the parties was conveyed to the DSB during the panel proceeding and the panel report was confined to a brief description of the case and to reporting that a solution has been reached under Article 12.7 of the DSU. (See DS7, DS12 & DS14, and DS72) (& indicates cases of the same measure.) Compliance panel reports circulated under Article 21.5 of the DSU are not considered here. For two matters (DS122, DS135) the time for filing an appeal had not expired. Ten panel reports were adopted by the DSB without appeal. Appellate Body review has thus been invoked in 76.7 percent of cases.

Table B-7. Complainants versus Defendants in Adopted Appellate Body and Panel Reports (fifty-three complaints [thirty-nine reports] as of October 1, 2000).

Complainant	Defendants						Total cases brought	Percent
	United States	European Community	Other developed countries	Newly industrialized countries	Traditional developing countries	Transitional economies		
United States	...	4	6	4	3	0	17	32.1
European Community	5	...	3	3	4	0	15	28.3
Other developed countries	1	1	4	1	2	0	9	17.0
Newly industrialized countries	2	1	1	0	1	0	5	9.4
Traditional developing countries	3	0	0	1	1	0	5	9.4
Transitional economies	0	0	0	0	0	0	0	0
Co-complainants	1	1	0	0	0	0	2	3.8
Total cases defended against	12	7	14	9	11	0	53	
Percent	22.6	13.2	26.4	17.0	20.8	0		

**Table B-8. Types of Products at Issue in WTO Disputes, by Disputed and Defendant Country Groups.
(130 defending governments' measures, as of October 1, 2000)**

<i>Harmonized System Section^a</i>	<i>Type of products^b</i>	<i>United States</i>	<i>European Community</i>	<i>Other developed countries</i>	<i>Newly industrialized countries</i>	<i>Traditional less-developed countries</i>	<i>Transitional economies</i>	<i>Total</i>	<i>Percent</i>
I	Agricultural products ^c								
I	Animal products	4	4	2	4	1	1	16	12.1
	(less fish and fish products)								
II	Vegetables	4	6	0	2	0	2	14	10.6
III	Animal or vegetable fats and oils	0	0	0	0	1	0	1	0.8
IV	Prepared foodstuffs	1	0	1	3	3	0	8	6.1
	Not specified	0	1	1	1	0	1	4	3.0
	Subtotal	9	11	4	10	5	4	43	32.6
	Nonagricultural								
I	Fish and fish products	2	1	1	0	1	0	5	3.8
V	Minerals	1	0	0	0	4	0	5	3.8
VI	Chemicals	1	1	3	3	4	0	12	9.1
VII	Plastics	0	0	0	2	0	0	2	1.5
VIII	Leather	0	0	3	1	2	0	6	4.5
IX	Wood	0	1	0	0	0	0	1	0.8
X	Pulp and paper	0	0	2	1	0	0	3	2.3
XI	Textiles and clothing	5	2	0	4	3	0	14	10.6
XII	Footwear	0	0	0	3	0	0	3	2.3

XIII	Glass	0	1	0	1	0	0	2	1.5
XV	Base metals	4	0	0	1	1	1	7	5.3
XVI	Machines & electronic equipment	2	1	1	2	0	0	6	4.5
XVII	Vehicles	1	1	3	2	4	1	12	9.1
XX	Other manufactures	1	0	0	0	0	0	1	0.8
	Subtotal	17	8	13	20	19	2	79	59.8
	General products	2	0	0	3	4	1	10	7.6
	Total	28	19	17	33	28	6	132	
	Share	21.2	14.4	12.9	25.0	21.2	5.3		

a. Harmonized Commodity Description and Coding System, as set up by the International Convention on the Harmonized Commodity Description and Coding System, done at Brussels on June 14, 1983, and the Protocol thereto, done at Brussels on June 24, 1986, 1035 UNTS 3, entered into force January 1, 1988. According to the Harmonized System, the first two digits identify the chapter. The basic commodity chapters are numbered from 1 to 97. Each chapter comprises sections numbered from 1 to XXI. The table refers to these sections.

b. Cases that deal with copyrights not related to a specific product (for example, DS124, DS160) are not considered here. Similarly, cases regarding trade in services (for example, DS80) are not included in these totals.

c. The Agreement on Agriculture covers all the products of HS Code, §§ I-IV (except fish and fish products) and certain products of HS Code, §§ VI VIII and XI. See Annex 1 of the Agreement on Agriculture. The term "general products" was used when the complaint(s) did not specify the category of the products but made reference to "agricultural products and industrial products (except textile and clothing products)".

Table B-9. Types of Measures Disputed and Defendant Country Groups (as of October 1, 2000)^a

Contested measures	United States	Country or country group					Transitional economies	Total	Percent
		European Community	Other developed countries	Newly industrialized countries	Traditional less-developed countries				
Antidumping measures ^b	7	2	1	6	8	0	24	12.9	
Nonautomatic licensing	1	3	1	6	7	1	19	10.2	
Protection of intellectual property rights ^c	2	7	3	3	3	0	18	9.7	
TBT/SPS measures ^d	3	4	2	5	1	1	16	8.6	
Subsidies ^e	1	3	6	2	2	1	15	8.1	
Safeguards ^f	8	0	0	3	2	1	14	7.5	
Quotas ^f	2	2	1	1	2	1	9	4.8	
Service measures ^g	1	3	2	1	1	0	8	4.3	
Countervailing duty measures ^h	4	0	0	2	1	0	7	3.8	
Preferential duties measures	0	4	1	0	1	1	7	3.8	
Internal taxes	0	0	2	2	3	0	7	3.8	
Tariff quotas ⁱ	1	3	2	0	0	0	6	3.2	
Tariff increase	0	0	0	2	2	2	6	3.2	
Prohibitions ^j	1	0	1	1	2	0	5	2.7	
Retaliatory duties	5	0	0	0	0	0	5	2.7	
Customs valuation	0	2	0	2	0	1	5	2.7	
Government procurement	1	0	1	1	0	0	3	1.6	
Administrative pricing	0	0	0	2	0	1	3	1.6	
Additional charges	1	0	0	1	0	0	2	1.1	

Tariff classification	1	1	0	0	0	0	0	2	1.1
State trading	0	0	1	1	0	0	0	2	1.1
Rules of origin	2	0	0	0	0	0	0	2	1.1
Competition policies	0	0	1	0	0	0	0	1	0.5
Total	41	34	25	41	35	10	186		
Share	22.0	18.3	13.4	22.0	18.8	5.4			

a. Each measure defended by a WTO member is counted only once, even if there were several matters, for example, *EC—Hormones* case (DS26 + DS48). However, where a case involves several distinct measures, an entry is included for each: for example, in *EC—Bananas* case (DS27) three measures were involved: nonautomatic licensing, tariff quotas, and preferential duties. Here, and in the notes following, + indicates multiple complaints that are considered one measure; & indicates cases of the same measure.

b. DS24, DS49, DS60, DS63, DS89, DS101, DS119, DS122, DS132, DS136 + DS162, DS141, DS156, DS157, DS168, DS179, DS182, DS184, DS185, DS187, DS189, DS191, DS203, DS228 & DS42, DS36, DS37, DS50-DS79, DS54 + DS55 + DS64, DS82 + DS115, DS83, DS86, DS114, DS124 + DS125, DS153, DS160, DS170, DS171, DS174, DS176, DS196, DS199, DS135, DS144, DS203, DS205.

c. Technical barriers to trade or sanitary and phytosanitary measures: DS2 + DS4, DS3 + DS41, DS5, DS7 + DS12 + DS14, DS18 & DS21, DS20, DS26 + DS48, DS72, DS76, DS77, DS100, DS133, DS142, DS147, DS172 + DS173, DS195.

d. See DS35, DS46, DS52 + DS65 + DS81, DS54 + DS59 + DS64, DS57, DS70 & DS71, DS103 + DS113, DS104, DS106 & DS126, DS108, DS127 & DS128 & DS129 & DS130 & DS131, DS139 + DS142, DS147, DS172 + DS173, DS195.

e. Safeguard duties: DS121 & DS123 & DS164, DS202. Quotas: DS24, DS29 & DS47, DS32, DS33, DS78, DS98, DS159, DS166, DS190, DS192.

f. See DS16 & DS27, DS38, DS45, DS80, DS105, DS117, DS158, DS188, DS204. Three of seven cases were related to the European Community's *Banana* regime (DS16 & DS27, DS105, DS158).

g. DS22 & DS30, DS97, DS112, DS138, DS145, DS167, DS194

h. Tariff quotas: DS177 + DS178. Prohibitions: DS181.

Comments and Discussion

Robert E. Hudec: Professor Jackson's paper starts with a description of the WTO dispute settlement procedure, as set forth in the WTO's Dispute Settlement Understanding (DSU). The objective characteristics of procedure are discussed in considerable detail for the benefit of those not familiar with WTO dispute settlement, as are the reforms that distinguish the WTO procedure from the GATT dispute settlement procedure that preceded it. In this, the paper provides a most useful introduction to the subject.

The paper then goes on to respond to the question posed by the conference organizers—Does the WTO Dispute Settlement Mechanism work? To most lawyers, and, for that matter, to most WTO observers, the standard of performance indicated by the word *work* would have roughly the same two elements as the standard applied to national courts in domestic legal systems. One would expect, first, that legal claims brought before the WTO's tribunals would be decided objectively according to the applicable law, and, second, that those legal judgments would be enforced and obeyed.

Without getting into extensive detail, Professor Jackson's answer is that, so far, the new WTO dispute settlement procedure has worked rather well. The new Appellate Body, which is the final and deciding voice of the new system, has managed to earn the respect of the WTO community by rendering objective, sensible, and legally supportable rulings. In addition, Jackson notes, the existence of the Appellate Body has already introduced a notable legal dimension into the way WTO diplomats approach problems.

As for enforcement, the prevailing attitude among WTO governments appears to be one of satisfaction with the system as a whole, although the actual data are not as pretty as one might hope. The most encouraging datum

is that, in all adopted legal rulings to date, the losing party has said that it would comply with the ruling. The actual performance by losing parties, however, has so far fallen considerably short of that standard. Jackson's paper presents some preliminary data on the twenty completed cases so far—cases in which the time for compliance has expired. In two cases, a failure to comply has reached the point of causing trade retaliation by one or more of the complainants, although in both cases the parties say they continue to work toward eventual compliance. In four other cases, the compliance tendered by the losing party has been found inadequate, and the compliance in a fifth case is currently being adjudicated. Looking ahead to the cases already in the pipeline, there is reason to believe that the WTO's caseload will continue to present a significant number of enforcement problems.¹

The fact that about one-third of the final rulings made so far have encountered compliance problems could be viewed as a worrisome number, particularly in comparison with the performance standards of domestic legal systems. On the other hand, these compliance problems are not particularly surprising when one considers the difficulty that governments often have in reversing measures that, by definition, represent significant political support. These early problems demonstrate that the new WTO dispute settlement system has not worked a miraculous conversion of political attitudes in national capitals. They demonstrate that, on some occasions, WTO governments will still have to work very hard, and with considerable patience, to bring governments to observe their obligations. And, indeed, they also remind us that on some occasions the dispute settlement system will fail altogether to achieve meaningful compliance.

Notwithstanding these limitations, WTO governments have found reason to be satisfied with the results so far. Governments are clearly committing themselves to comply, governments are clearly working harder than before to comply, and in many cases governments have managed to comply in the face of political opposition that would have blocked compliance in the days of GATT. With patience, most of these compliance problems are likely to be worked out so that they produce a satisfactory result. Although the system clearly does not work as well as a mature domestic legal system, under the

1. At this writing, the two most prominent clouds on the horizon are the questions of U.S. compliance with the rulings in the *Shrimp-Turtle* and the *Foreign Sales Corporations* cases. *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS 58/AB/R (November 6, 1998); *United States—Tax Treatment for “Foreign Sales Corporations,”* WT/DS 108/R (February 20, 2000) (Appellate Body Report).

lower standards that must be applied in a world of imperfect international institutions, the new WTO procedure has so far worked up to realistic expectations.

In the latter half of his paper, Professor Jackson examines some of the problems that the WTO dispute settlement procedure will confront in the near future and that will influence its success or failure in coming years, focusing primarily on “constitutional” problems that have emerged as a consequence of the new dispute settlement procedure.

The list of “constitutional” problems is diverse. It includes practical problems caused by the increased legalism of the new procedure, such as the resource problem for poorer countries due to the expense and professional skills needed to cope with its technical complexity. The list also includes the broader resource problem created by the significant increase in the volume of litigation under the new procedure, a volume that appears ready to grow even further as newer areas of legal discipline such as trade-related aspects of intellectual property and trade in services come into play. It includes a large number of technical legal problems that require fixing, either gaps or inconsistencies in the new Uruguay Round agreements or similar lacunae in the new dispute settlement procedures themselves. At the most general level, it includes a growing public criticism of the new procedure as antidemocratic, because it is not transparent and does not allow for participation by nongovernmental interests. Jackson calls attention to these problems, but he does not discuss them in any detail.

A significant portion of the paper is devoted to one other, overarching constitutional problem that has major implications for both dispute settlement and other areas of WTO governance: the WTO’s process of political decision-making. In other judicial systems such as those of the United States and Europe, the courts of last resort are very powerful, but there is usually a legislature that has the power to overrule them when they reach decisions that are politically unacceptable to the community at large. Such overruling powers are not used very often, but they play an important role in checking the power of the courts and maintaining a basic rapport between the law and the political community it serves.

On paper, the member governments of the WTO have a similar power to overrule legal rulings. The WTO governments can agree to amend the rules of the trade agreements being interpreted by the dispute settlement tribunals, either through a formal amendment process or by renegotiating the entire agreement. They also have the power to reach “decisions” affecting smaller issues, such as the administrative problems that currently trouble the new dis-

pute settlement procedure. But, as Jackson explains, the exercise of these powers is constrained by strict voting requirements, and even further, in the case of the DSU itself, by a requirement that changes and other decisions must be made by consensus. As a practical matter, it will be extremely hard for WTO governments to make these changes and decisions, except in larger trade negotiations where many issues are on the table simultaneously—a situation that will not arise more than once every fifteen years or so, and maybe even less often. To the extent that the WTO is unable to legislate corrections to unwise or unwanted legal rulings, it will place ever greater strain on the political viability of its dispute settlement machinery.

Professor Jackson discusses the problems of WTO decisionmaking in some detail and considers several suggestions for resolving, or at least ameliorating, the problem. Jackson's suggestions are constructive and would appeal to most WTO members under normal conditions. Thus they could provide a way forward if the right sort of political will is present. Their utility will be limited, however, if the current problems of WTO decisionmaking involve somewhat deeper divisions between WTO members, particularly divisions between developed and developing countries. I devote the rest of my remarks to examining the nature of the current problem and the likely effects of Jackson's suggestions for dealing with it.

In my view, the central constraint on WTO decisionmaking of any kind is not the super-majority voting requirements contained in the WTO charter but the aversion of the largest WTO members to voting of any kind. In practice, decisionmaking in the WTO, like GATT before it, operates almost exclusively by consensus. Proposals to resolve an issue by taking a vote are very rare, and when they are made they are greeted with what is almost blood-chilling horror: "Anything, anything, but please, please, no votes." The reason, of course, is the possibility of the larger countries being outvoted by the more numerous developing countries. The World Bank and the International Monetary Fund can vote because votes are weighted by economic importance. But the WTO, and GATT before it, have always followed the rule of one-country, one-vote.

The larger WTO governments have an object lesson of what happens when issues of international economic policy are decided by majority voting. The object lesson is the United Nations Conference on Trade and Development (UNCTAD). UNCTAD was created in 1964 as a developing country alternative to GATT. At least up to 1990 or so, UNCTAD's history has been a long series of issues decided by voting, usually with a margin of something like

112-6 with 15 abstentions. The majority normally voted in support of demands that developed countries alter their policies in favor of developing countries. The problem was not that developed countries were coerced into giving more than they wanted; , rather, the problem was that the entire process was a waste of time, because developed countries had made it clear from the outset that they would not obey mandates created in this way. According to the large countries, the same results can be expected from voting in the WTO. While UNCTAD-type voting in the WTO might cause some discomfort in the short run, because the WTO has a more rigorous legal structure than UNCTAD, in the long run the consequence of voting in the WTO would be to destroy the utility of that organization.

If majority voting is not possible, then governments can govern themselves only by consensus. That was the formula in GATT. From the point of view of developed countries, GATT operated rather successfully under a consensus decisionmaking formula. (To be sure, “success,” from a developed country viewpoint, means that developed countries get their way on most important issues.)² The last big head-to-head confrontation between developed and developing countries occurred over the developed country proposal to bring intellectual property and trade in services under the purview of GATT. As was usually the result in GATT, a deal conforming to the objectives of the developed countries was eventually struck.

The question on everyone’s mind now is whether the formation of the WTO has somehow destroyed whatever it was that made the GATT consensus decisionmaking “work”—at least, from a developed country point of view. There is some reason to believe that such consensus decisionmaking has already been, and will continue to be, more difficult under the WTO than it was before. The greater legal formality of the WTO may have some influence in this direction. The secret of getting one’s way under a regime of consensus decisionmaking is the ability to make joining consensus a better answer than the other alternatives. In GATT, there was always the risk that the larger countries would forge ahead on their own, stonewalling adverse dispute settlement decisions if it came to that. In the WTO, it is likely that large governments will feel more constrained to follow dispute settlement decisions, partly because such decisions will automatically be “legally binding,” and partly because the larger governments have made a greater political commitment to their own con-

2. To say the same thing in more neutral terms, it could also be said that GATT decision-making was “successful” in that GATT was in fact able to carry out its declared mission of trade liberalization.

stituents to provide an effective dispute settlement system. Thus the greater “legality” of the WTO may invite the smaller countries to stick to their guns longer and more forcefully.

I would mention another important factor that has changed with the WTO. In GATT, the deference of smaller countries to developed country wishes was always induced in part by a tacit understanding that, if developed countries get their way, they would not insist on developing country obedience to the rules. Most developing country markets were still protected by balance-of-payments trade restrictions, and few developing country tariffs were bound. This tacit deal was undone by the Uruguay Round trade agreements. For the first time in GATT history, the Uruguay Round negotiations made a genuinely serious effort to subject developing countries to effective GATT-WTO legal discipline. The reason for seeking this new legal discipline was the perception by developed countries that many “emerging” developing country markets offered significant commercial opportunities, particularly if legal commitments could be obtained, opening trade in services and protecting intellectual property rights.

As a result of agreeing to this new legal discipline, developing countries in the WTO consider that they are entitled to a greater say in what happens, because they have in fact paid for the privilege. And as a result of the new commercial opportunities offered by these new legal commitments, the developing country demands for participation have significantly greater economic clout behind them. This should not have come as a surprise.

A third, rather obvious factor must also be mentioned. Consensus is not possible, of course, unless the larger countries agree among themselves on what they want. Some of the WTO’s early difficulties in reaching decisions can be traced to the fact that the developed countries themselves were at odds. It is not clear whether the divisions between developed countries in these early days of the WTO were mere happenstance, or whether more fundamental divisions are developing—for example, a greater tendency to resist U.S. leadership now that the cold war seems to be over. In trying to understand any situation of impasse, it would be wise to start by looking at how well the WTO’s political leaders are leading.

Professor Jackson’s paper considers two possible solutions to a possible impasse in consensus decisionmaking: (1) the more aggressive use of the dispute settlement process to resolve differences between governments, and (2) the development of restraints upon the use of veto powers by individual governments. Jackson also mentions briefly a third possibility—the use of

“plurilateral” agreements under which like-minded governments can create new rules or procedures between themselves, without including dissenting governments. I would like to comment on each of these three possibilities.

(1) Dispute settlement powers can be employed to deal with a decision-making impasse only where the desired answer can plausibly be claimed to be already contained in one of the WTO agreements. Gaps in an agreement can be filled by reference to the meaning and purpose of the rest of the agreement. Conflicting provisions can be reconciled by interpretation. Ill-advised provisions in WTO agreements can be effectively repealed by extremely narrow construction. The appeal of such aggressive, “activist” legal decisions is easy to see, for such decisions can give answers—often viable and widely supported answers—without the need to overcome what may be a small minority’s resistance. The dangers are equally obvious, however. Given the already considerable government skepticism about surrendering sovereignty to such a new international tribunal, decisions that appear to exercise quasi-legislative powers never granted to that tribunal could prove fatal to its very existence. Professor Jackson warns against these dangers and indicates that the Appellate Body seems to be well aware of them at this time.

In the end, the degree of restraint exercised by dispute settlement tribunals will depend on the effectiveness of other alternative solutions. If it turns out that there is no other way of coping with the WTO’s apparent tendency toward decisionmaking impasse, governments will almost certainly *ask* dispute settlement tribunals to take a more “activist” approach, for want of any better answer. Faced with the pressures of such a situation, the Appellate Body could well conclude on occasion that an “activist” answer is better than no answer at all.³ One cannot exclude a more aggressive employment of dispute settlement decisions until one knows the actual circumstances in question.

3. If one were looking for a concrete example of the kind of case likely to arise in this scenario, a good example would be the celebrated *1992 Tuna/Dolphin* decision, GATT B.I.S.D. (39th Supp., 1993), p. 155. The central issue in that case was whether the GATT’s general prohibition of trade restrictions extended to U.S. trade restrictions for the “environmental” purposes of protecting dolphins. The relevant legal provisions were not clear, and in that case the conservative answer would have been to say that, in the absence of a clear obligation, governments remain free to do what they want. At that time, most GATT governments, including the European Community, believed that the U.S. action was contrary to the understandings underlying reciprocal GATT trade obligations. Governments were also concerned that a decision allowing the United States to do this would open the door to many other kinds of harmful restrictions, especially since it appeared that, then as now, GATT would never be able to agree on negotiated restraints on such conduct. The panel that decided the case (this was before the WTO and its Appellate Body) apparently shared these concerns. It had to make creative use of the rather sparse legal materials before it in order to justify a legal prohibition against the restriction. While

(2) Turning to other ways of overcoming the rigidities of consensus decisionmaking, Professor Jackson suggests that governments might try to arrive at an understanding, similar to understandings that were reached during some periods in the European Community's history, that would limit the use of the veto power to cases that meet certain conditions. The main condition would be that the issue must involve a "vital interest" of the country blocking consensus. In order to qualify for such veto restraint, the decision itself would have to meet certain other conditions: It must be consistent with the norms of the WTO, and it must be supported by a significant number of WTO members. On a somewhat different plane, Jackson suggests that some decisions might gain some greater degree of insulation from veto if they are first subjected to objective review by a small group of neutral experts.

To my knowledge, a similar sort of understanding was operative in ordinary GATT affairs during the years before the WTO. In particular, there was quite strong community pressure against blocking actions, or other kinds of interference, from countries that had no immediate interest in a problem. Such rules-of-the-game would probably receive general assent today as well. The problem today, however, is that these rules are not likely to be observed by governments that want to have a more active role in decisionmaking, and particularly a role that ensures that their own concerns will be met at the same time. Vital interest or not, governments seeking to play such a greater role will be prepared to "link" their approval of some decisions to approval of other, perhaps unrelated decisions of interest to themselves. As long as governments are willing to employ such a "linkage" strategy, a "vital interest" requirement will not be observed. One must first change the fundamentals underlying the use of a "linkage" strategy.

Professor Jackson's suggestion that proposed decisions could gather broader support by being reviewed by a group of neutral experts is to my knowledge an original one. Anyone with any knowledge of the original GATT dispute settlement system will appreciate the considerable power of normative judgments made by objective experts. In fact, the entire enforcement power of GATT's more primitive dispute settlement system lay in the force of such normative judgments, because there were no other sanctions behind it. The trick, of course, is to get the resisting minority to agree to such review in the first

GATT governments themselves unanimously endorsed the decision, the ruling was greeted with very strong public criticism, and eventually the WTO retreated from the *Tuna/Dolphin* ruling. Despite the troubled outcome of the *Tuna/Dolphin* case, answers like this will again appear attractive when similar situations arise in the future.

place. GATT dispute settlement itself never became a force until complainants acquired a *right* to have their claims adjudicated by a neutral panel of experts. The same would probably be true here. Assuming such objective review proceedings could not be performed without a consensus decision authorizing them, it is hard to see how they would ever be authorized. A minority strongly resisting the decision would be unlikely to agree to weaken its position by accepting such a review procedure.

There is one compulsory procedure that could be used to achieve such expert review, although it is probably not the review procedure Professor Jackson has in mind. GATT Article XXIII, which is still the basis of WTO dispute settlement, contains a seldom-used subsection—subsection 1(c)—authorizing complaints about “situations.” A “situation” is something different from a “measure” taken by one or more governments. It is simply a set of circumstances, caused by other forces, that is producing adverse effects upon the “benefits” governments expect to achieve from their membership in GATT or the WTO. It could be a worldwide depression, or financial crisis. But it could also be the lack of legal discipline in an area of international economic affairs. The original idea behind Article XXIII:1(c) was that such “situations” might justify an adjustment of legal obligations. It was believed that it would be better to have an objective appraisal of that “situation” before trying to deal with it. As originally conceived, the “situation” complaint would have led to a non-binding recommendation about what should be done to remedy the “situation,” with the possibility that the GATT contracting parties could decide, by consensus decision, to release governments from obligations as a way of dealing with it. That is still the type of outcome that would likely be produced today, because Article 26.2 of the WTO’s Dispute Settlement Understanding retains the nonbinding character of “situation” rulings. In this commentator’s view, the “situation” complaints of GATT Article XXIII:1(c) could be used to obtain expert review of almost any “problem” in WTO law today, and of various proposals to deal with it.⁴

4. It might be objected that the procedure of Article XXII:1(c) is too “legal” for the political purpose Jackson has in mind. For example, it might be objected that the typical sort of panelist chosen for dispute settlement panels would not have the kind of broad policy expertise needed to render credible judgments about such “situation” issues. Another objection might be that the Appellate Body’s legal expertise would be unsuitable for reviewing such judgments. In fact, neither of these problems will occur. “Situation” complaints will be *sui generis*. In all likelihood, the complaint will not even need to be directed against a particular country or countries as defendants. Rather, individual countries would have a right to participate, in support or in opposition to the requested nullification and impairment ruling, in a status somewhere between “parties” and “third parties,” on terms that would have to be decided by the panel if

(3) Professor Jackson's mention of "plurilateral agreements"—the conclusion of separate agreements between only those governments that agree with the substance of the agreement—introduces another way of dealing with a breakdown of consensus decisionmaking. The present WTO agreement has only two plurilateral agreements currently in force—concerning government procurement and aircraft—both of which are of interest only to a limited number of countries who do not really want disinterested countries to clutter up their business. In 1979, however, a larger group of plurilateral agreements was adopted at the end of the Tokyo Round—the antidumping code, the subsidies (and countervailing measures) code, the standards code, the customs valuation code, the code on import licensing, and then the procurement and aircraft codes.⁵

As Professor Jackson points out, the 1979 codes were a response to a decisionmaking impasse like the one that appears to be developing today. The larger governments wanted to establish new legal disciplines over several kinds of nontariff barriers but believed it would be impossible to secure the votes needed to make such codes a formal part of GATT. Despite negative reviews during the Uruguay Round negotiations ten years later, the 1979 codes were a quite successful answer to a serious problem of decisionmaking impasse. The codes succeeded in signing up enough important players to meet political demands for reciprocity. That accomplished, they created new rules and new dispute settlement procedures that became part of GATT's everyday institutional life, so that it was only a matter of time before adherence to them became a condition of membership. If the success of the 1979 codes could be repeated, they could be a quite effective alternative to the impasse in consensus decisionmaking.

Things would not be that easy in the WTO, however. The success of the 1979 codes depended to a considerable degree on strong-arming by the larger

not agreed beforehand by the Dispute Settlement Body. Since there would likely be too many "parties" to come to an agreement on proposed panelists, the members of the panel would probably have to be appointed by the director-general in consultation with all the parties. Since a "situation" case could be quite far removed from traditional Article XXIII litigation over specific government measures, the director-general would have sufficient flexibility in the choice of panelists to be able to choose the right sort of neutral experts. As for the Appellate Body, the answer is that DSU Article 26.2 deprives the Appellate Body of jurisdiction over Article XXIII:1(c) cases. The DSU ceases to apply to XXIII:1(c) complaints after the issuance of the panel report. Consensus is thus required for adoption. Actually, adoption would be irrelevant for the political purposes Jackson has in mind. The experts' report would have whatever political effect it is going to have, whether or not adopted.

5. The text of the 1979 codes appears in the GATT's published documents series, B.I.S.D. (26th Supp., 1980), pp. 8–88.

countries that would be more difficult to pull off in today's WTO. In order to obtain the signatures of some of the more important developing countries, the United States announced that nonsignatories would not be accorded the new and more expansive legal rights created by these agreements—a flat violation of GATT's "unconditional" most favored nation (MFN) obligation. Although India did contest the MFN violation and won for itself a promise of equal treatment, for most other developing countries the arm-twisting worked, aided perhaps by the then prevalent assumption that these new obligations would not be enforced to the letter upon developing countries. Similarly, the leading developed countries (being the principal financial supporters of GATT) managed to put through a decision that all the codes would be administered by the GATT secretariat and be integrated into its daily business.

Today in the WTO, threatened denial of MFN treatment would likely be met with a dispute settlement claim and would probably not succeed in twisting individual arms to sign. Moreover, as Jackson notes, Article X:9 of the WTO agreement provides that a consensus decision is required to bring a plurilateral agreement into the WTO institutional structure, meaning that no new agreement could be administered by the WTO without such a vote.⁶ While governments that are not willing to sign a plurilateral agreement would not *necessarily*, for that reason alone, veto the plurilateral agreement's acceptance into the WTO, governments could use that veto power as a second weapon to resist the kind of strong-arming that took place in 1979.

If the new political setting of the WTO proves too hostile for plurilateral agreements of any importance, a possible response will be plurilateral agreements *outside* the WTO. One model might be the investment code of the Organization for Economic Cooperation and Development (OECD). The example may seem a poor one in view of the recent failure to negotiate such a code in the OECD and the expressed desire of some governments to bring the subject into the WTO so that, they say, a broader range of national interests can be involved in the negotiations. If WTO decisionmaking encounters serious and sustained impasse, however, the OECD option could well become a workable alternative.

To summarize, Professor Jackson's paper lays out a sensible and responsible approach to the problem of decisionmaking impasse—in each case identifying the sort of policies and understandings one would wish to propose

6. Some negotiators recall that the consensus requirement was inspired by opposition to a trade-restricting plurilateral agreement on steel products being proposed during the Uruguay Round.

first as a way of constructing a more workable decisionmaking procedure. It is a good program, one calculated to appeal to the interest of a broad cross section of the WTO membership, which is always where one should start. At the same time, one must be aware that more fundamental changes in GATT-WTO practice may be afoot, and thus the very strong possibility that this broad-based approach to effective decisionmaking may prove wanting. It is not too early, therefore, to start thinking about what happens if it does not.

Donald Davis: Answering the question that John Jackson's paper addresses—Does the WTO Dispute Settlement Mechanism work?—presumes that we know what the Dispute Settlement Mechanism (DSM) is supposed to do. On one level, we may think of its aim as providing an objective forum in which claimants may enforce obligations contracted to by countries in the various GATT and WTO rounds. Thus it is a first line of defense in enforcing commitments for trade liberalization. But the DSM must also play a systemic role in preserving an international consensus for a liberal trading order. One important element in maintaining consensus is the boundary that is drawn between national prerogatives and international obligations. What we see is that the move from GATT to WTO has radically altered *who* gets to draw that line. And this—even apart from the substance of where the line is drawn—may matter for preserving the consensus for liberal trade.

There is no question what the major change in the DSM has been in moving from GATT to the WTO. Under GATT, adoption of a panel report required acquiescence of the losing party. As a judicial system, there are obvious defects when the judgment enters into force only when the loser agrees. On its face, this might appear to be a farce. Indeed, one might wonder why anyone would bother to raise a dispute under such a system or negotiate concessions when enforcement of agreements relies on a violating party's assent.

Yet agreements were concluded and disputes were argued. What this points to is that, in spite of its evident defects and weaknesses, the previous form of the DSM neither prevented agreements nor led countries to conclude that the dispute settlement process was useless. What it did was emphasize the importance of mediation and negotiation in reaching settlements, with the panels serving as a forum for airing and assessing evidence. The force of the panels was persuasion, rather than compulsion. The decisive shift of the new Dispute Settlement Understanding is that decisions of the panels are adopted virtually automatically, unless appealed, and that the decisions of the Appellate Body are binding on members.

It is worth pondering for a moment the formal power of the WTO Appellate Body. One fact that we know is that in general equilibrium any action or policy of national authorities may affect international trade flows. If a WTO member believes that another member's policy impairs its enjoyment of prior concessions, it can bring this charge before a panel. Critics may ask: "What elements of national policy are immune from intervention by the Appellate Body and its binding rulings?" One need be neither Jesse Helms nor Ralph Nader to be concerned about the implied issues of impinged sovereignty. In practice, Professor Jackson notes, the Appellate Body has been aware of the responsibility that comes with its exceptional domain and binding rulings and has acted with even greater discretion than was typical of at least some GATT panels. The question remains whether it is wise to place such sweeping formal power in the hands of a small group of part-time jurists in Geneva.

There are, however, some clear upsides to the present approach. Moving toward a rule- or judicial-based system may provide countries and private enterprise with a greater degree of predictability and fairness in the outcomes. The insidious temptation to renege even on small obligations without cause is removed. But also lost is the opportunity for governments to block consensus on issues they consider of national importance or that may roil domestic politics. Given that such exceptions may, in the balance, help to preserve a consensus for the liberal trade regime, this also signals a danger under the new regime. Signs of these conflicts appear in the *Bananas* and *Beef Hormones* cases.

A concern raised by Professor Jackson relates to the obligations of a country in the face of an adverse ruling. Is the country obliged to perform, to offer compensation directly for the losses, or simply to acquiesce to "compensatory" retaliation? He argues that small countries may get little relief from such a system if they are left only to withdraw concessions. Although he does not couch it in these terms, this logic would be confirmed by the conventional optimal tariff formulas. The bound tariffs of the largest WTO members are almost certainly lower than their unilaterally optimal tariff level. Hence for them, raising tariffs secures some real compensation. The presumption is reversed in the case of small countries, whose bound tariffs would lie above the conventional optimal tariff of zero. Withdrawal of concessions *does* punish, but it punishes both the transgressing country and its victim. This inhibits aggressive enforcement of the rights of smaller countries.

On the whole, Professor Jackson views the development of the new dispute settlement process as a positive development for the world trading system. I am inclined to agree. But I am also inclined to believe that greater attention

should be focused on the powers and domain of the Appellate Body. When the powers of the DSM were minimal, a little laxness about what topics fell in its purview caused no great harm. Now that the DSM is quite potent, a more thorough review and definition of the types of policies that it can consider as impairing trade rights would seem to be in order. The dilemmas raised by dispute settlement in the WTO are real. One would hope that experience with a WTO that respects the limits of its power will calm those who fear abuse of that power relative to national prerogatives.

General Discussion. Several participants made the point that the dispute settlement process should be judged by its ability to increase the volume of trade. Richard Baldwin noted that from an economic perspective the interesting questions are whether the dispute settlement mechanism encourages good behavior on the part of countries and whether it helps to implement existing commitments. He emphasized that the troubles of the WTO have little to do with the participation of developing countries; rather, they originate from conflicts between the United States and the European Union, particularly in agriculture. Paula Stern asked about how consultation (in advance of setting up panels) had worked in the past. Gary Horlick argued that the earlier GATT dispute settlement mechanism had worked well but that it had an exceedingly poor reputation. The question is whether, in nonexpert circles, the WTO dispute resolution process is casting the organization as an entity that is unable to resolve a dispute over, say, bananas between two countries that hardly even *grow* bananas. He suggested that the poor reputation of the GATT/WTO arises from a handful of cases that have not been effectively rebutted in public.

Bert van Barlingen asked whether it would be a good idea to strengthen the compensation option so as to avoid the risk of retaliation—for example, by allowing the complainant to select the areas in which compensation would be granted. He pointed out the danger of using the dispute settlement system to enforce rules that a majority of the population may oppose (as is arguably the case with respect to beef hormones or genetically altered food). He noted that the U.S. government's approach to the biotechnology issue, for example, is fundamentally different from its treatment of the beef hormones controversy for the simple reason that the government learned from its mistakes. With regard to implementation, van Barlingen argued that, as Robert Hudec explained, neither the U.S. Congress nor the European Union would accept or implement a legal obligation imposed unilaterally without advice and consent. If one accepts the traditional line that the WTO's objective is to create

mutual advantages on the basis of reciprocal elimination of trade barriers, then the question of implementation recedes in importance. Compensation can take its place, and in some instances (the beef hormones dispute, for example) the European Union may well be willing to provide compensation in excess of the trade in question. But domestic politics and the influence of the private sector in domestic policy prevents countries from making compromises and accepting redress for one perceived trade imbalance in exchange for “losing” another.

Susan Collins was struck by the statement in John Jackson’s presentation that WTO panelists (and the Appellate Body as well) do not consider themselves to be judicial activists. She asked whether this might not in fact be one of the system’s roadblocks and noted that many observers outside GATT and the WTO have expressed disappointment at the tame positions of the organizations’ juridical bodies. Claude Barfield took issue with van Barlingen, arguing that one could not establish a rule-based system and then allow countries to evade the system by using the compensation route. Having it both ways, he said, would destroy the entire system. Barfield expressed concern about the imbalance between the very inefficient legislative process and the very efficient judicial process in the WTO. With cases likely to arise regarding trade in services or the exceedingly difficult issues associated with trade-related aspects of intellectual property, WTO panels and the Appellate Body will be creating law in areas in which they may not be technically competent. Shang-Jin Wei asked about the possibility of charging user fees to decrease the case load or making the losing party pay for the expenses associated with litigation.

In response to the discussion, John Jackson expressed some uneasiness about the argument that the WTO’s mandate is to increase trade. He argued that the issue, rather, is how to design appropriate international institutions in the context of a globalized economy and emphasized the need for mechanisms that can balance trade liberalization and economic efficiency with other worthwhile goals. He expressed doubt as to whether the WTO system can or should focus exclusively on trade liberalization and cited the findings in the 1998 *Shrimp-Turtle* dispute as probably the most important constitutional case in this jurisprudence.¹

On the question about compliance versus compensation, Jackson thought that van Barlingen’s point was intriguing and had some merit. While conced-

1. The WTO panel found the United States Shrimp-Turtle Law (Section 609 of Pub. L. 101-162, restricting imports of shrimp harvested with equipment that harms endangered species of sea turtles) to be inconsistent with U.S. obligations under the WTO agreement.

ing that implementation is in a sense different from the question of rule orientation, he was still uneasy about it, noting that emphasizing the compensation route rather than rule implementation can weaken the system's rigor. On the other hand, he said, permitting a country that prevailed in a complaint to set payment compensation (as an alternative to retaliatory measures)—even to the extent of double or treble damages—was an interesting strategy which might have some effect in promoting compliance.

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