# WTO Dispute Settlement: Revitalization of Multilateralism After the Uruguay Round

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## 1. INTRODUCTION

For several years, there has been a tension between differing philosophies of General Agreement on Tariffs and Trade (GATT) dispute settlement. Commentators have taken different views on whether the system was fundamentally based on an arbitration or a judicial model.[1] The Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Annex II to the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement),[2] represents the first extensive, negotiated agreement revitalizing the dispute settlement system in the history of the General Agreement. It represents nothing less than a complete reform of the GATT dispute settlement system. What is remarkable is that it is the product of extensive multilateral negotiations. In the past, modifications were made to the system on an incremental, case-by-case basis. Since the GATT came into existence in 1948, Articles

* Director, Appellate Body, Secretariat, World Trade Organization. The views expressed in this paper are those of the author, and not those of the WTO or the Appellate Body.

1. See, *e.g.*, J.H. Jackson, The World Trading System: Law and Policy of International Economic Relations 85-88 (1989); J.H. Jackson, Restructuring the GATT System 59-68 (1990); and W. Davey, *Dispute Settlement in the GATT*, 11 Fordham International Law Journal 51 (1987).
2. 33 ILM 112 (1994).

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XXII and XXIII have formed the basis of the dispute settlement mechanism. They are very sparse provisions, and most of the procedures that have come to characterize the pre-WTO GATT system have evolved over time as a result of experience in specific cases. Some of these procedural improvements were codified in Decisions and Understandings[3] negotiated at various points in GATT history, but none were as comprehensive as the DSU.

The original purpose of dispute settlement, as set out in Articles XXII and XXIII of the GATT,[4] was the mutual resolution of disputes by the parties, through means such as consultations, conciliation, good offices, and mediation. Article 3 of the DSU pays homage to prior practice under Articles XXII and XXIII of the GATT 1947[5] and recognizes the primary objective of achieving a satisfactory settlement of the matter between the parties in accordance with the rights and obligations under the WTO Agreements. Article 3(7) states explicitly: "[a] solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred."[6]

It has always been the view that GATT dispute settlement was fundamentally a matter between the governments that are parties to the dispute. The rulings and conclusions set out in a panel report are deemed to apply only to the matter at issue and the parties involved in the particular case. In prior GATT practice, there was no concept of *stare decisis*; panel reports have not been viewed, strictly speaking, as legal precedents, although panels have regularly referred to and followed prior panel reports.[7]

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3. Procedures Under Article XXIII, Decision of 5 April 1966, BISD 14S/18; Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, adopted on 28 November 1979, BISD 26S/210; Improvements to the GATT Dispute Settlement Rules and Procedures, Decision of 12 April 1989, BISD 36S/61.
4. 55 UNTS 194.
5. *Id.*
6. 33 ILM 115 (1994).
7. Professor Jackson has recently argued that the legal effect of an adopted GATT panel report was most likely a combination of: 1. an obligation under international law binding on the parties; and 2. 'practice' under the treaty within the meaning of Art. 31(3) of the Vienna Convention of the Law of Treaties (1969), 1155 UNTS 331 (1980). *See* J.H. Jackson, *The Legal Meaning of a GATT Dispute Settlement Report: Some Reflections*, *in* N. Blokker & S. Muller (Eds.), Towards More Effective Supervision by International Organizations, I Essays in Honour of Henry G. Schermers 149-164 (1994). *See also* R.E. Hudec, Enforcing International Trade Law: The Evolution of the Modern GATT Legal System 263-264 (1993).

GATT practice was also unique in that panel reports were required to be adopted, or 'blessed', by a consensus decision of the contracting parties (in practice, the GATT Council) before they became legally binding on the parties to the dispute. As a political consensus had to be achieved in order for the conclusions of the panel to be formally accepted, a losing party had the power to prevent the panel report from becoming effective by simply blocking adoption in the GATT Council.

It is clear that even before the WTO Agreement came into force, the dispute settlement system was evolving towards a more 'judicialized' model.[8] Over the last 10 to 15 years, a large proportion of disputes have led to the establishment of a panel. Only rarely have alternative forms of dispute resolution, such as mediation, conciliation, good offices, or arbitration been used. The DSU moves the system even more dramatically toward a judicial model.[9] It contains a highly formalized set of rules and procedures, including specific time frames, greater automaticity in decision making, and the establishment of an appellate mechanism, all of which adds greatly to the legalistic nature of the system.

## 2. THE NEW WTO SYSTEM

A number of important reforms were introduced into the dispute settlement process as a result of the Uruguay Round of multilateral trade negotiations. As early as the conclusion of the Montreal Mid-Term Review in 1988, elements of automaticity were added, making the system more legalistic and predictable, while at the same time reducing the autonomy of parties to the dispute. These new elements included explicit, short time frames for every step in the process, standard terms of reference for panels, provisions allowing the Director General to select the panellists if the parties fail to agree on composition within a short period of time, and the automatic establishment of a panel upon request of the complaining party where consultations fail to resolve the dispute within 60 days. After the Montreal Ministerial Meeting, major problems remained in the GATT

8. Hudec, *supra* note 7, at 14-15.
9. *Id.*, at 231-239. Hudec discusses the increasingly legalistic emphasis in the Uruguay Round negotiations.

dispute settlement system, including the possibility of blockage of adoption of panel reports by a losing party, failure to implement the recommendations and rulings of panels, and the use of unilateral retaliatory measures. There was also the problem of fragmentation of the dispute settlement system - the GATT and the Tokyo Round Codes[10] had separate dispute settlement rules and procedures with different bodies having authority over those mechanisms. As a result, forum shopping and inconsistent results were a possible threat to the coherence of the system.

The Draft Final Act of 1991 produced a fully negotiated understanding on dispute settlement rules and procedures, which included the following key elements:

1. strict time frames for every step of the process;
2. establishment of the Dispute Settlement Body (the DSB) to administer the DSU, and oversee the handling of disputes;
3. explicit procedures for consultations, including an opportunity for multiple complainants to consult with the defending party;
4. 'automatic' establishment of a panel if the parties fail to settle the dispute within 60 days of consultations;
5. standard terms of reference and provisions ensuring expeditious, impartial composition of panels;
6. 'automatic' adoption of panel reports and Appellate Body reports, i.e., the report is deemed adopted unless there is a consensus decision by the DSB to the contrary;
7. establishment of the Appellate Body to review possible errors of panels (this was the *quid pro quo* for automatic adoption of panel reports);
8. an explicit requirement that a party must implement the results of DSB recommendations and rulings within a reasonable period of time (which is a defined term), or the complaining party may be given authorization to retaliate. The losing party is also required to notify the DSB as to its explicit intentions to comply with the results of a panel or Appellate Body report within 30 days after its adoption; and

10. BISD 26S.

9. a prohibition on certain 'unilateral' actions, such as determinations by governments that nullification or impairment has occurred or retaliatory action without proper authorization by the DSB under the DSU, and a specific obligation that, in matters involving the WTO agreements, the rules and procedures of the DSU must be followed.

The understanding agreed to in December 1991 applied only to dispute settlement under Articles XXII and XXIII of the GATT 1947.[11] That text was revised between January 1992 and December 1993 to produce an integrated dispute settlement system for all of the WTO agreements: the GATT, the twelve other goods agreements in Annex 1A, the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Intellectual Property Rights (TRIPs), and certain of the Plurilateral Trade Agreements (PTAs) in Annex 4.[12] These agreements, together with the DSU itself and the WTO Agreement, are defined as 'covered agreements' in Article 1 of the DSU.[13]

The DSB is the central body responsible for administering the rules and procedures of the DSU.[14] It has the authority to establish panels, adopt panel reports or Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions or other obligations under the WTO agreements ('retaliation'). Unlike the previous GATT system, which was characterized by several dispute settlement systems with a different body having legal authority over each agreement, the WTO regime allows for one mechanism to deal with a particular matter in issue between members. It enables parties to a dispute to have all claims under the applicable agreements dealt with at the same time and heard by the same panel. The provisions

11. *See* note 4, *supra.*
12. Note that Appendix 1 of the DSU provides that the applicability of the DSU to the Plurilateral Trade Agreements is "subject to the adoption of a decision by the signatories of each agreement setting out the terms for the application". *See* note 7, *supra*, at 131. Thus far, only the Agreement on Government Procurement appears to have been made subject to the DSU.
13. *See* note 2, *supra*, at 114.
14. The DSB was established pursuant to Art. 2 of the DSU. Under Art. IV(3) of the WTO Agreement, the General Council (open to all WTO members) is required to convene as appropriate to carry out the functions of the DSB. Therefore, the DSB is, in effect, the General Council sitting with a 'dispute-settlement hat'.

relating to standard terms of reference allow parties on both sides of the dispute to raise issues under any relevant covered agreement.

In order to make this integrated system fully effective, the special dispute settlement provisions in certain agreements, particularly the Agreement on Subsidies and Countervailing Measures and the GATS,[15] were modified to ensure their compatibility with the general provisions of the DSU. Another major concern was to establish some rules of interpretation, for example by explicit reference to customary international law in Article 3(2) of the DSU, to enable panels and the Appellate Body to determine the relative priorities of certain provisions of the relevant agreements. As there is a unique problem in the goods area, with the GATT 1994 and twelve other goods agreements, a specific conflicts rule was developed as an interpretative note at the beginning of Annex 1A to the WTO Agreement, to ensure that these agreements would be interpreted in their proper context. That note provides that:

> [i]n the event of a conflict between a provision of the [...] GATT 1994 and a provision of another agreement in Annex 1A [...], the provision of the other agreement shall take precedence to the extent of the conflict.[16]

The new dispute settlement system established under the DSU represents a significant break with the past GATT system. First, it applies across a range of approximately 20 major substantive agreements and enables all of the relevant provisions relating to a matter in issue between parties to a particular dispute to be considered in resolving that dispute between those parties. The implementation of the WTO Agreement, with over 20 substantive agreements annexed as part of a single undertaking, has raised for the GATT system whole new questions relating to the interpretation of, and relative priorities between, the rights and obligations of the agreements. Second, the high degree of automaticity in decision making at every stage of the dispute settlement process, including the establishment of a panel, adoption of the panel and Appellate Body reports, surveillance of implementation of DSB rulings, and authorization of retaliatory measures for non-implementation, results in a system that is legalistic and judicial in nature. Third, although the parties still have considerable

15. 33 ILM 44 (1994).
16. 33 ILM 24 (1994).

flexibility to influence the process under this new system, many procedural avenues for delay or blockage are no longer available because there are explicit rules providing for automatic steps to be taken. It is also clear that governments must decide early as to the form of their participation in a particular dispute. The DSU provides significant advantages to governments who choose to become full-fledged parties to the dispute, as opposed to third parties. Participation in the process must take place in one of the two recognized formats, either as a party or as a third party, and there are deadlines by which a government must formally indicate its intentions in this respect.

Of all of these developments, perhaps the most significant, and likely to lead to fundamental reform in the future, is the establishment of the Appellate Body pursuant to Article 17 of the DSU.[17] Although it is early to make any general conclusions, it is clear that the Appellate Body, as a quasi-permanent, standing tribunal, will have a significant impact not only in individual cases by determining the outcome of those cases, but also in encouraging the system to evolve in a more legalistic and judicial manner in the future.

## 3. EXPERIENCE SINCE ESTABLISHMENT OF WTO - JANUARY 1995

Since the WTO Agreement came into effect in January 1995, the number of dispute settlement cases has increased significantly, as compared to the experience under the GATT 1947. This is true despite the fact that there are specific transition provisions in some agreements, e.g., anti-dumping and subsidies, and countervailing measures, limiting the cases that could be brought in the first year. Other agreements have staged or delayed implementation, e.g., TRIPs and government procurement. Still others, most notably agriculture and TRIPs, have 'peace clauses' preventing certain types of actions for several years. In addition, there was an overall inclination on the part of WTO members to give the system time to become established before initiating a lot of disputes.

Since January 1995, 40 complaints have been filed resulting in approximately 30 discrete cases. Of these 40 complaints, two are in the

17. *See* note 2, *supra*, at 123.

implementation phase, seven are currently under consideration by a panel, 21 are in the consultation phase, and mutually agreed-upon solutions have been reached or the panels have become inactive in 10.

From 1991 through 1994, 36 complaints were filed under the GATT, constituting 32 discrete disputes. Twelve led to the circulation of final panel reports, of which only four were ultimately adopted. In the transition year 1994, there was even less use of the GATT dispute settlement machinery. There were seven complaints, none of which resulted in a final panel report. In the 1980s, 115 complaints were filed, of which 47 produced panel reports. This represented an average of 11 complaints and approximately five panel reports per year. During the 1970s, 32 complaints were filed, of which 16 led to panel reports. This represented a sparse average of about three complaints per year, leading to one or two panel reports. During the entire decade of the 1960s, only seven legal complaints were brought, leading to five panel reports.[18]

Only one dispute, *United States - Standards for Reformulated and Conventional Gasoline*,[19] which was based on complaints from Venezuela and Brazil against a regulation of the United States Environmental Protection Agency, has gone all the way through the new WTO system. A panel was established in this dispute on 10 April 1995 in response to a request by Venezuela, and a joint panel was constituted on 28 April 1995 in response to a second complaint by Brazil. The panel report was circulated to the WTO members on 29 January 1996. The United States appealed certain aspects of that report dealing with the interpretation of the GATT Article XX(g) conservation exception on 21 February 1996, and the Appellate Body released its report on 29 April 1996. The Appellate Body report and the panel report, as modified by the Appellate Body report, were adopted by the DSB on 20 May 1996.

It is likely that only one other dispute, *Japan - Taxes on Alcoholic Beverages*,[20] brought by the European Communities, Canada, and the United States, will wend its way through the system by the end of this year. The interim report of the panel was circulated to the parties for comments on 20 May, and the final report will likely be circulated in early

18. *See* Hudec, *supra* note 7, at 12-15.
19. WT/DS2/9.
20. WT/DS8; WT/DS10; and WT/DS11.

July. After that, it must either be put before the DSB for adoption or appealed to the Appellate Body.

The growing number of disputes presently in the consultation and panel phases, as well as the broad range of areas that they cover - including many of the new issues, such as TRIPs, GATS, and TRIMs - provide convincing evidence that the system is functioning well. The cases range from relatively simple, traditional GATT market access complaints, *e.g.*, *United States - Standards for Reformulated and Conventional Gasoline*[21] and *Japan - Taxes on Alcoholic Beverages*,[22] to extremely complex cases involving allegations under several covered agreements and multiple parties, *e.g.*, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*.[23] There are also a number of disputes with a strong political component, *e.g.*, *United States - The Cuban Liberty and Democratic Solidarity Act*.[24] The number of disputes launched under the DSU has meant that the level of activity of the DSB has been high, and consequently it meets frequently, often twice per month.

The DSU disciplines, such as the strict time frames and automaticity at key stages of the process, have functioned well and have bolstered the effectiveness and credibility of the WTO. In addition, in the first case before the Appellate Body, participants demonstrated their willingness to adhere to the procedural requirements and the working schedule established pursuant to the Appellate Body's *Working Procedures for Appellate Review*. This augurs well for the functioning of the new appellate mechanism.

One of the most notable developments since the establishment of the WTO has been the increased propensity for parties to reach mutually agreed-upon solutions to disputes. The binding nature of decisions, the short time frames, the automaticity of the steps in the process, and the strengthened mechanisms for surveillance and enforcement of rulings provide greater incentives to settle disputes. Since the introduction of the new dispute settlement regime, ten cases have either been formally settled or have become inactive while the parties pursue settlement negotiations.

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21. *See* note 19, *supra*.
22. *See* note 20, *supra*.
23. WT/DS16 and WT/DS27.
24. WT/DS38.

With the increased 'judicialization' of the system, the parties appear to be looking for ways to control both the process and the outcome as much as possible. As the system has become more formalistic, the WTO members seem to be pushing the pendulum back in favour of a party-driven process.

Of the ten disputes that have been settled or are inactive, three were resolved in the consultation phase before a request for a panel was made (*United States - Imposition of Import Duties on Automobiles from Japan under Sections 301 and 304 of the Trade Act of 1974,* complaint by Japan;[25] *Korea - Measures Concerning the Shelf-Life of Products,* complaint by the United States;[26] and *Korea - Measures Concerning Bottled Water,* complaint by Canada[27]). Two disputes have been settled by withdrawal of the request for a panel (*Malaysia - Prohibition of Imports of Polyethylene and Polypropylene,* complaint by Singapore;[28] and *United States - Measures Affecting Imports of Womens' and Girls' Wool Coats,* complaint by India[29]). One case has been suspended while the parties seek a settlement (*European Communities - Trade Description of Scallops*, complaints by Canada, Peru, and Chile[30]). Indeed, in that case the parties asked that the final panel report not be issued on the morning it was to be circulated, pending the outcome of their settlement negotiations.

The first WTO anti-dumping case appears to have been settled, in *Venezuela - Anti-dumping Investigation in Respect of Imports of Certain Oil Country Tubular Goods,* complaint by Mexico.[31] A panel has been established in the first countervailing duty case, *Brazil - Measures Affecting Desiccated Coconut* (complaint by Costa Rica),[32] which raises interesting issues concerning the applicable law, i.e., whether the Tokyo Round Code or GATT Article VI apply to the measure at issue.

Some of the settled disputes dealt with major, politically sensitive issues, which could have severely tested the WTO. A prime example was the dispute between the United States and Japan concerning autos and auto

25. WT/DS6.
26. WT/DS5.
27. WT/DS20.
28. WT/DS1.
29. WT/DS32.
30. WT/DS7; WT/DS12; and WT/DS14.
31. OCTG, and WT/DS23.
32. WT/DS22.

parts, *United States - Imposition of Import Duties on Automobiles from Japan under Sections 301 and 304 of the Trade Act of 1974*.[33] A mutually agreed-upon solution to this dispute was reached during the consultations phase of the dispute settlement process and was notified to the DSB in July 1995. The outcome in this case can be viewed as a major success for the system, as the knowledge that both sides were prepared to use the DSU to its fullest may have strongly influenced them to reach a settlement. It is noteworthy that both Japan and the United States decided to resort to the WTO Agreement in this major case, rather than pursuing unilateral or bilateral alternatives.

Although Article 3(6) of the DSU requires parties to notify the DSB and other relevant WTO bodies of mutually agreed-upon solutions that have been reached, this has not been done in all cases. Currently, there are at least three disputes in which the parties appear to have reached a mutually-agreed solution, but have failed to give the requisite notification (*European Communities - Duties on Imports of Cereals*, complaint by Canada;[34] *European Communities - Duties on Imports of Grains*, complaint by the United States;[35] *Japan - Measures Affecting the Purchase of Telecommunications Equipment*, complaint by the European Communities[36]). These disputes have simply stopped moving through the system, but have not been formally resolved. In addition, no formal notification of a mutually agreed-upon solution has been received in European Communities - Trade Description of Scallops,[37] although the parties to this dispute have taken the formal step of suspending the panel proceedings under Article 12(12) of the DSU, apparently to allow time to negotiate a settlement.

One of the major new and encouraging trends has been the greater involvement of smaller and developing countries in WTO disputes, although the Quad countries (the United States, the European Communities, Japan, and Canada) remain the most frequent users of the dispute settlement system. Under the prior GATT system, approximately 90 per cent of the cases involved the Quad - particularly the United States and the

33. *See* note 25, *supra*.
34. WT/DS9.
35. WT/DS13.
36. WT/DS15.
37. *See* note 30, *supra*.

European Communities. Of the 30 cases brought since the establishment of the WTO, 17 have been launched by developed-country members, of which 12 have been brought against developed countries and five have been against developing countries.

There is a pronounced, new tendency for smaller and developing countries to bring complaints, which shows that they are taking their rights and obligations seriously. In addition to the three complaints brought by both developed- and developing-country members against developed-country members, to date there have been five complaints brought by developing-country members against developed-country members. For example, Costa Rica has recently brought a complaint against the United States concerning restrictions on certain types of underwear. There have also been four disputes launched by developing-country members against other developing-country members, another situation that was not common in the prior GATT system. Indeed, the first WTO dispute involved two developing countries: Singapore and Malaysia. Singapore complained about Malaysia's prohibition of imports of polyethylene and polypropylene in January 1995.[38] This dispute was settled bilaterally in July 1995 when Singapore withdrew its request for a panel.

Several of the disputes involve multiple issues, multiple complainants, or both. Of the eight cases that have been, or currently are, in the panel process, four have involved multiple complainants. As the requests for consultations in these cases have not always been filed by separate complainants at the same time, there have been some procedural difficulties in ensuring that these complaints were heard by a single panel on a similar timeline. The *European Communities - Regime for the Importation, Sale and Distribution of Bananas* dispute,[39] which has now entered the panel phase, promises to be an exceedingly complex case, involving five parties, over 20 third parties, and allegations under five agreements.

38. *See* note 28, *supra.*
39. *See* note 23, *supra.*

## 4. ISSUES AND CONCERNS

Looking at the cases on the horizon, a number of observations can be made. First, there is a dramatic increase in the number of disputes in the system. The cases are largely being brought by the major powers, particularly the United States and the European Communities, against each other, but there is a notable greater participation by developing countries, both against other developing countries and against developed countries. If all, or even most, of the cases currently in the consultation phase actually lead to establishment of panels, there will be an enormous increased burden on the resources of the system. At the panel stage, it will become more difficult to select panellists who are acceptable to all of the parties to the dispute. Under the DSU, there is a general rule that nationals of the parties to the dispute should not be selected to serve on a panel, unless the parties agree otherwise. As several of the current cases involve multiple parties, this significantly limits the sources for potential panellists. The Appellate Body is, of course, in a different situation, as it is a standing tribunal made up of seven members who have fixed terms. The Appellate Body is broadly representative of the WTO membership, but nationality is not a factor in selecting members to sit on a division to hear a particular case.[40]

Second, as a result of the more binding and automatic process established by the DSU, there is a strong incentive for parties to negotiate mutually acceptable solutions. In fact, in the first year and a half of the WTO, approximately one-third of the cases are being settled. Recently, in the second WTO dispute to go before a panel (*European Communities - Trade Description of Scallops*[41]), the case was settled on the eve of the release of the final panel report to the parties. This tendency bodes well for the multilateral trading system; after all, the objective of dispute settlement is prompt resolution of disputes between the parties.

Third, it is clear that WTO members, particularly the major players, are demonstrating a strong inclination to use the system rather than the alternative of resorting to unilateral measures or bilateral negotiations. In

40. *See* Rule 6(2) of the Working Procedures for Appellate Review, WT/AB/WP/1, 15 February 1996.
41. *See* note 30, *supra*.

some of the major political disputes, for example, *United States - Imposition of Import Duties on Automobiles from Japan Under Sections 301 and 304 of the Trade Act of 1974*,[42] involving the United States and Japan, and *European Communities - Measures Concerning Meat and Meat Products (Hormones)*,[43] involving the United States and the European Communities, both sides used the rules and procedures of the DSU to launch complaints and counter-complaints against each other, arguing different provisions of the WTO agreements. The smaller players and developing countries also appear to be taking their obligations seriously, and are actively seeking to enforce their rights and obligations *vis-à-vis* others whom they believe are not complying with the agreements. This tendency is extremely positive for the trading system.

With respect to unilateralism, Article 23 of the DSU provides a specific cause of action against unilateral actions. That Article, entitled 'Strengthening of Multilateral System', provides that WTO members seeking to resolve disputes under the covered agreements are required to follow the rules and procedures set out in the DSU. Specifically, members are prohibited from making unilateral determinations that a violation of an agreement has occurred or that benefits or concessions have been nullified or impaired. Unilateral retaliatory action, without obtaining authorization from the DSB pursuant to the provisions of the DSU, is also prohibited. This was an issue in *United States - Imposition of Import Duties on Automobiles from Japan Under Sections 301 and 304 of the Trade Act of 1974*,[44] which was subsequently resolved between the parties. It has arisen again in the European Communities' counter-claim against the United States for the use of Section 301 measures against European restrictions on beef containing hormones. It will be interesting to see how these provisions are interpreted and applied in the future.

42. *See* note 25, *supra*.
43. WT/DS26.
44. *See* note 25, *supra*.

## 5. CONCLUSIONS: OUTLOOK FOR THE FUTURE

After a year and a half of experience under the WTO, it is still too early to come to definitive conclusions about how the dispute settlement system is working in practice. Only one case, *United States - Standards for Reformulated and Conventional Gasoline*,[45] has worked its way through the system to the stage of adoption of the Appellate Body and panel reports by the DSB. However, that dispute is not over, because the implementation phase remains. Only one other case, *Japan - Taxes on Alcohol*,[46] is likely to lead to a final panel report and possibly an Appellate Body report this year. Although some general observations can be made about the propensity of parties to bring cases, it is impossible at this early stage to come to conclusions on whether the more judicial nature of the system is good or bad as a whole for international trading relations.

What is clear is that governments now have choices: they can use diplomatic means to resolve disputes in a mutually acceptable manner, or they can choose the judicial route. As is the case in domestic litigation, complaints can be brought for the purpose of obtaining leverage to achieve negotiated settlements of disputes. This is particularly beneficial for smaller countries, as without the rules and procedures of the DSU and the extensive obligations in the WTO Agreement, they would not have the necessary bargaining power *vis-à-vis* the major players. Many of the cases currently in the consultation phase appear to have been launched with this objective in mind.

If one is pressed to generalize about the perspectives of most WTO members involved in dispute settlement, one would have to observe that governments seem to be preoccupied with achieving results in specific cases, *i.e.*, with resolving particular commercial disputes. They do not seem to be interested simply in making international law or establishing legal principles or interpretations that will apply in the future. Dispute settlement is still clearly focused on resolving particular problems between individual member governments, and it is viewed as a government-to-government, party-driven process.

In the process of political accommodation within governments, the

45. *See* note 19, *supra*.
46. *See* note 20, *supra*.

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issue of enhanced transparency of WTO dispute settlement proceedings is likely to continue to be a lively one. Several non-governmental organizations (NGOs), primarily led by international environmental groups and supported by certain developed-country governments, have been pressing for greater openness in WTO dispute settlement proceedings. The DSU provides for greater transparency than was available under the prior GATT system; however, participation by non-governmental interests has not yet been accepted. The WTO is working toward making more documents, information, and submissions available to the public. However, even on this front, it lags behind other domestic legal systems and, indeed, most other international legal systems. This is clearly one area where there will be increased pressures in the future, both in terms of making documents and information publicly available early, and also providing for some means of participation by interested persons or organizations other than member governments. It is interesting in this respect that in some of the agreements in which the WTO has entered with other international organizations, for example the IMF and the World Intellectual Property Organization (WIPO), the issue of participation in each others' meetings and even in the dispute settlement process of the WTO has been raised.

Another issue that arose late in the Uruguay Round was the question of whether a standard of review should be developed for all of the agreements. With the enhanced automaticity in the process and the binding nature of panel and Appellate Body findings and conclusions, the United States, in particular, became concerned that governments needed to define the scope of how panels and the Appellate Body examine measures taken by sovereign governments. In the specific area of anti-dumping, a standard of review was set out in Article 17(6) of the Agreement on Article VI of the GATT 1994 (the Anti-Dumping Agreement). This issue has not re-emerged as a specific negotiating issue in the first year and a half of the WTO's existence, but there may be a renewed interest in it in the future.

The experience to date with WTO dispute settlement seems to indicate that the system is alive and well; even kicking. The WTO Agreement contains the most extensive set of rules and obligations ever negotiated within the context of a multilateral trade round. It is so comprehensive that many countries are still engaged in implementing the package. In some areas, such as agriculture, textiles, TRIPs, and services, there are transitional provisions and staged implementation, meaning that all of the

obligations are not fully in effect for all WTO members.

The WTO is currently going through a consolidation and implementation phase, with much of the activity focused on notifications required under the agreements, detailed review of domestic implementing legislation, and extensive trade-policy review. In addition, there are 30 countries currently engaged in accession negotiations, including Russia and several of the former Russian republics, China, and certain Arab States. All of this seems to suggest that the WTO has again become the centre of international trading relations.

In this early stage of the WTO's existence, dispute settlement appears to be a success story. Governments are clearly taking a serious and active interest in the dispute settlement system, both in terms of initiating complaints and participating as third parties where they believe there are important systemic concerns at stake. The large number of cases and the diversity of participants is a healthy sign that governments are determined to ensure compliance with the WTO obligations and to work within the system. It is extremely positive that governments, especially the major powers, are bringing their disputes formally to the WTO, and are showing less inclination to resort to unilateral measures or side deals. There also appears to be more dispute settlement activity under the WTO than under the major regional agreements in cases where parties have a clear choice of going to either available forum. In the first one and a half years of its existence, the WTO dispute settlement system is working effectively as an important vehicle for ensuring compliance with the extensive rules and obligations contained in the WTO Agreement.