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The WTO Dispute Settlement System—A Practitioner Perspective

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Abstract

The purpose of this Essay is to discuss the areas in which the World Trade Organization dispute settlement system may be improved in light of the first five years of experience from the practitioner point of view, and in particular, practitioners advising business or governments acting on behalf of domestic businesses. Key reforms relating to implementation and compensation may not necessarily require an amendment to the Understanding on Rules and Procedures Governing the Settlement of Disputes, since they could be answered by changes in practice.

THE WTO DISPUTE SETTLEMENT SYSTEM— A PRACTITIONER PERSPECTIVE

*Mark Clough QC**

INTRODUCTION

The purpose of this Essay is to discuss the areas in which the World Trade Organization¹ (“WTO”) dispute settlement system may be improved in light of the first five years of experience from the practitioner point of view, and in particular, practitioners advising business or governments acting on behalf of domestic businesses. Key reforms relating to implementation and compensation may not necessarily require an amendment to the Understanding on Rules and Procedures Governing the Settlement of Disputes² (“DSU”), since they could be answered by changes in practice.

The new WTO dispute settlement system was intended to strengthen the legitimacy of the substantive rights created by the WTO Agreements,³ so that producers of goods, exporters and importers, and service suppliers could conduct their business around the globe and enjoy the benefits of world trade. The ultimate goal of the WTO is to enable free trade to flow in an undistorted and competitive market with the value chain from supplier to consumer as the beneficiary. The WTO dispute procedure, therefore, provides increased opportunities for lawyers and other professionals to advise the international business community as to the existence of its legal rights and the dispute procedure available to the governments responsible for their commercial interests. It follows that these practitioners will be con-

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1. Marrakesh Agreement Establishing the World Trade Organization, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1, 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement].

2. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, WTO Agreement, Annex 2, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 1226 (1994) [hereinafter DSU].

3. The World Trade Organization (“WTO”) Agreements covered by the Understanding on Rules and Procedures Governing the Settlement of Disputes (“DSU”) consist of all multilateral agreements listed in the WTO Agreement Annex 1 and 2, and all plurilateral agreements listed in the WTO Agreement Annex 4.

cerned about the effectiveness of the WTO and its dispute settlement mechanism for businesses to ensure that their clients' interests are sufficiently protected.

Although the direct participants in trade disputes are WTO Members, the majority of governments are becoming involved so as to ensure that their corporate citizens fully enjoy the benefits provided by trade liberalisation agreements. It is clear that behind every complaining government stands a large company, or group of smaller companies, representing an industry. These companies lobby their government to initiate the procedure and provide evidence to establish a breach of a WTO covered agreement on the basis, for example, of market access, denial discrimination, or other protectionist measures.

At the moment the number of disputes before WTO authorities has surpassed 200, which is a sign of confidence in the system. Conversely, it also demonstrates the level of non-compliance and, indirectly, the barriers to trade encountered by businesses. As far as businesses are concerned, however, the ultimate goal of the dispute settlement system is to expeditiously implement the recommendation of the Panel or Appellate Body. Not surprisingly, one of the major areas of criticism of the DSU concerns the provisions pertaining to implementation and compensation. The dispute concerning the U.S. Foreign Sales Corporation ("FSC") tax system for U.S. exporters is a recent illustration.

I. THE ROLE OF BUSINESS IN DISPUTE SETTLEMENT

Almost all business sectors have been the subject of dispute proceedings during the first five years of the DSU's operation. Disputes cover such products as alcohol, brooms, buses, cars, cement, coconut, coffee, computers, footwear, gasoline, leather, macaroni, rice, scallops, steel, tobacco, tomatoes, and underwear,⁴ in addition to aircraft, computers, and telecommunications equipment. Services are still under-represented, as there have been only ten cases out of more than 200.⁵

4. Press Release, WTO No. 180 (June 5, 2000).

5. Examples where General Agreement on Trade in Services ("GATS") provisions were invoked include *European Communities—Regime for the Importation, Sales and Distribution of Bananas*, WT/DS27; *United States—The Cuban Liberty and Democratic Solidarity Act*, WT/DS38; *Japan—Measures Affecting Distribution Services*, Request for Consultations by the United States, WT/DS45/1 (June 20, 1996); *Belgium—Measures Affecting Commercial*

A. Consultation Stage

Faced with a trade barrier of a legislative nature, the affected business will seek to enlist its government to assist. In the event that the measure in question is believed to be incompatible with any of the WTO agreements, the government can be persuaded to initiate the WTO dispute settlement procedure by requesting formal consultations. In many cases this would be sufficient for the other WTO Members to take action to remove the trade barrier.⁶

A typical WTO consultation meeting lasts no more than two or three hours in a tiny room of the WTO building in Geneva, during which governments and their legal counsel discuss the issue carefully.⁷ At this stage of the procedure, the business community is not officially represented by its legal counsel of choice, but by the government and its legal staff.

It is unclear whether business interests are well served by consultation. In a scenario where the European Communities forbid exports of a specific product, the only complainant could be the government of the Member whose importers are being frustrated. That government, however, might not consider that the interests of its importers deserve protection. The government may have a pending and more important case to solve with the European Communities, and probably the most convenient thing for it is to use the dispute as part of a trade-off. This leads to unlawful practices that are in conflict with business interests.

Some WTO Members, however, allow their business community to voice concerns any time business interests are at stake in other markets.

Telephony Directory Services, Request for Consultations by the United States, WT/DS80/1S/L/36 (May 13, 1997); *Canada—Measures Affecting Film Distribution Services*, Request for Consultations by the European Communities, WT/DS117/1S/L/53 (Jan. 22, 1998); *Nicaragua—Measures Affecting Imports from Honduras and Columbia*, WT/DS201; and *Mexico—Measures Affecting Telecommunications Services* WT/DS204.

6. Consultations must be held within 60 days after the receipt of the request from the requested Member. If the requested Member does not enter into consultations within that period, the complainant may proceed to request the establishment of a Panel. See DSU art. 4.3.

7. William J. Davey & Amelia Porges, *Performance of the System I: Consultations & Deterrence*, 32 INT'L. LAW. 695-707 (1998).

B. *European Communities Example: The Trade Barriers Regulation (or "TBR")*

The trade-off scenario described above may be avoided in legal orders where a legally enforceable procedure has been created for the business community to complain against unfair trade practices, such as in the EU and the United States. Section 301 of the Trade Act of 1974⁸ provides explicit procedures under which U.S. citizens could petition the U.S. government for action against harmful foreign government activities.⁹

In the EU, in addition to lobbying their government and/or the European Commission (informally), businesses can request the European Commission, to take action to remove obstacles to trade¹⁰ under the so-called "Trade Barriers Regulation."¹¹ These obstacles include practices violating the WTO rules, as well as practices that do not infringe WTO rules but nevertheless nullify or impair the benefits that are expected to arise from the trade agreements. If the Commission's investigation under the TBR confirms the complaining business's claims and there are no prevailing interests against such action, the Commission may initiate a WTO dispute settlement procedure to remove the obstacle to trade. The settlement procedure attempts to remove the obstacle to trade through consultations and eventually the establishment of a Panel to find that the contested practice constitutes an infringement by the third country of the WTO rules and to recommend that it be removed.

During the whole TBR proceeding, the complainant, the exporters and importers involved, as well as representatives of the countries concerned may have access to all information

8. 19 U.S.C. §§ 2411-2419 (1994).

9. The Act was amended in 1979, 1984, and 1988. See JOHN H. JACKSON ET AL., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS, CASES, MATERIAL AND TEXT* 815-17 (1995).

10. For a comparative analysis of § 301 with the Trade Barriers Regulation ("TBR"), see Petros C. Mavroidis & Werner Zdouc, *Legal Means to Protect Private Parties' Interests in the WTO: The Case of the EC New Trade Barriers Regulation*, J. INT'L. ECON. L. 407, 407-32 (1998).

11. Council Regulation No. 3286/94, O.J.L. 349/71 (1994), laying down Community procedures in the field of common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization. This regulation was amended by Council Regulation No. 356/95, O.J.L. 41/3 (1995).

made available to the European Commission.¹² If successful, a TBR procedure, may achieve the early termination of the trade barriers in issue.

The first TBR case resulting in a Panel ruling was the EU complaint regarding the U.S. Anti-Dumping Act of 1916¹³ ("1916 Act"). The complaint in that case was submitted by the European Confederation of Iron and Steel Industries ("EUROFER") as a result of several lawsuits under the 1916 Anti-Dumping Act brought by the U.S. steel industry against imports from the EU. The 1916 Act is different from the anti-dumping provisions in the U.S. Tariff Act, as it entitles Federal Courts to impose treble damages and criminal penalties on persons found to have imported goods into the United States at dumped prices. This act has been invoked several times against EU companies over the last few years, thereby affecting EU exports to the United States. The TBR investigation concluded that the 1916 Act was in breach of the anti-dumping rules of the WTO. Having failed to resolve the matter amicably, the EU requested WTO consultations with the United States on June 4, 1998. Following unsuccessful consultations on July 29, 1998, the EU requested a Panel on November 11, 1998. The Panel, which was established on February 1, 1999, issued its final report to the parties on February 15, 2000, and circulated it to all the WTO Members on March 31, 2000.¹⁴ The Panel ruled that the 1916 Act covers anti-dumping practices but without fulfilling the basic conditions under which dumping measures are permitted under the WTO rules, in particular, (i) by not requiring the establishment of a material injury, (ii) by going beyond the permitted remedy against dumping (i.e., anti-dumping duties), and (iii) by not complying with the procedural requirements regarding anti-dumping investigations (e.g., that a complaint shall be supported by a minimum proportion of the industry). The United States, therefore, was asked to bring its regime into compliance with its WTO obligations. The Panel report was appealed and on August 28, 2000, the Appellate Body issued its final report upholding the Panel's findings.¹⁵

12. Council Regulation No. 3286/94, art. 8, O.J.L. 349/71 (1994).

13. Revenue Act of 1916, 39 Stat. 756 (1916).

14. *United States—Anti-Dumping Act of 1916*, Complaint by the European Communities, WT/DS136/R (Mar. 31, 2000).

15. *Id.*

The second TBR case resulting in a Panel ruling was the recent EU complaint regarding Argentina's export regime on raw hides and Argentina's import regime of finished leathers. The TBR investigation was initiated on February 26, 1997 (the complaint was submitted by the Confederation of EC Tanners and Dressers ("COTANCE")) and presented to the EU Member States in December of 1997. The investigation concluded that the Argentinean export regime on raw hides and the import regime of finished leather were contrary to General Agreement on Tariffs and Trade 1994¹⁶ ("GATT 1994") rules, in particular Articles XI, X:3, and III:2. Bilateral discussions between the two countries were initiated after the TBR findings, but they did not lead to an amicable solution. On December 23, 1998, the EU requested WTO consultations with Argentina. These consultations failed to lead to a satisfactory solution and, therefore, the EU requested the establishment of a Panel on May 31, 1999. A Panel was established on June 26, 1999, and its final report was circulated to all WTO Members on December 19, 2000.¹⁷ The Panel found that Argentina's export regime for raw hides violated Argentina's obligations under GATT Article X:3. In particular, Argentina failed to administer its customs laws in a manner that is "uniform, impartial and reasonable." At the same time the Panel rejected the EU's complaint regarding the legitimacy of Argentina's export regime on raw hides with GATT 1994 Article XI. In particular the Panel found that the EU had not been able to prove that there was an export restriction made effective by the Argentinean measure within the meaning of Article XI. The Panel, however, found that Argentina's import regime of finished leather was contrary to GATT 1994 Article III:2 because the tax treatment reserved to European finished leather products exceeded that imposed on Argentinean finished leather products. Argentina, therefore, was asked to bring its regimes into compliance with its WTO obligations.

Other important cases that started as a TBR investigation and ended in Geneva are *Japan—Tariff Quotas and Subsidies Af*

16. General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, WTO Agreement, Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1, 33 I.L.M. 1154 (1994) [hereinafter GATT 1994].

17. *Argentina—Measures Affecting the Export Bovine Hides and Import of Finished Leather*, Report of the Panel, WT/DS155/R (Dec. 19, 2000).

*fecting Leather*¹⁸ regarding the Japanese system of tariff quotas for leather (the complaint was again submitted by COTANCE), and more recently, *Chile—Measures Affecting the Transit and Importation of Swordfish*¹⁹ (“*Chile—Transshipment of Swordfish*”) (complaint by the Spanish National Association of owners of Deep-Sea longliners (“ANAPA”)).

In *Japan—Tariff Quotas and Subsidies Affecting Leather*, the TBR investigation concluded that the tariff quota management for leather was in violation of the WTO Agreement on Import Licensing Procedures²⁰ and the Agreement on Subsidies and Countervailing Measures²¹ (“SMS Agreement”). In particular, the European Commission found that Japan was granting subsidies to its domestic leather industry within the meaning of Article 1 of the SCM Agreement, causing serious injury to the EC leather industry. The subsidy was also granted to a “specific” industry, namely the leather industry, in violation of Article 2 of the SCM Agreement.

In *Chile—Transshipment of Swordfish*, the Chilean authorities prohibited the transit and transshipment of swordfish catches in Chilean ports without a specific zoo-sanitary certificate. The European Commission contended that the requirement of a zoo-sanitary certificate was inconsistent with Article 2 of the Agreement on the Application of Sanitary and Phytosanitary Measures²² (“SPS”) since the measure was not the sole remedy available to the Chilean authorities to conserve swordfish resources in the South Pacific area. The European Commission also claimed inconsistency with Article V of GATT 1994 that could not be justified under GATT Article XX(b).

Japan—Tariff Quotas and Subsidies Affecting Leather is still pending at the consultation stage of WTO dispute settlement proceedings, whereas for *Chile—Transshipment of Swordfish*, the

18. *Japan—Tariff Quotas and Subsidies Affecting Leather*, Request for Consultations by the European Communities, WT/DS147 (Oct. 14, 1998).

19. *Chile—Measures Affecting the Transit and Importation of Swordfish*, WT/DS193 (Nov. 7, 2000).

20. Agreement on Import Licensing Procedures, Apr. 15, 1994, WTO Agreement, Annex 1A, at http://www.wto.org/english/docs_e/legal_e/final_e.htm.

21. Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, WTO Agreement, Annex 1A, at http://www.wto.org/english/docs_e/legal_e/final_e.htm.

22. Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, WTO Agreement, Annex 1A, at http://www.wto.org/english/docs_e/legal_e/final_e.htm.

European Commission recently requested the establishment of a panel. However, on January 25, 2000 the European Commission and Chile have found an amicable solution. As a result, the EU, on behalf of its Member States, will request a suspension of the panel proceedings.

C. *The Panel and Appellate Body Stage*

If formal consultations within the WTO fail, the government may be persuaded to request the establishment of a Panel, whose recommendation, if adopted by the Dispute Settlement Body ("DSB"), is binding on WTO Members.

Throughout Panel and Appellate Body proceedings, the business interested in the success of the dispute, since the WTO's Appellate Body ruling in *United States—Import Prohibition of Certain Shrimp and Shrimp Products*²³ ("*Shrimps*"), may be able to provide the relevant Panel with an *amicus curiae* brief containing its view and evidence to support it.

In *Shrimps*, the United States attached to its submission three *amicus curiae* briefs prepared by non-governmental organizations ("NGOs"), and the Appellate Body found that a party has a right to attach whatever it wishes to its submissions, but when it does, it is responsible for the contents of that submission.

In *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*,²⁴ as a preliminary procedural issue, the Appellate Body ruled that it had the authority to accept and consider *amicus curiae* briefs in an appeal where it finds it "pertinent and useful to do so." In that case, two U.S. steel industry associations submitted *amicus curiae* briefs to the Appellate Body in support of the position of the appellant, the United States. The EC objected to the filing of these briefs, arguing that the Appellate Body did not have legal authority under the DSU to accept and consider such briefs. The Appellate Body found that it did have legal authority, but also found that it was not necessary, in that

23. *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, WT/DS58/AB/R (Oct. 12, 1998).

24. *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, Request of the Establishment of a Panel by the European Communities, WT/DS138/3 (Jan. 14, 1999).

case, to take the two briefs filed into account when rendering its decision.

In *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*²⁵ (“Asbestos”), the Panel considered that two *amicus curiae* briefs included in the submission of the European Communities were relevant for the purpose of the case, but it dismissed three others that were not relevant. *Asbestos* was appealed on October 23, 2000. In its proceeding, the Appellate Body recently confirmed the right of any person, other than disputing or third party Members, to submit written briefs to WTO authorities.²⁶

In the recent case regarding imports into EC of *Cotton-Type Bed Linen from India*,²⁷ the Panel received an unsolicited *amicus curiae* brief that was made promptly available to the parties to the dispute, though none of the parties subsequently made comments. The Panel, therefore, did not take it into account.

D. *The Implementation Stage.*

If the Panel or Appellate Body report contains a recommendation that the measure in question be withdrawn, the affected WTO Member must, within a month from the date of adoption of the report by the DSB,²⁸ inform the DSB of its intentions in respect of implementation. If immediate compliance is impracticable, a “reasonable period of time” will be determined either (i) by the Member concerned and approved by the DSB, (ii) by the Parties to the dispute within forty-five days, or (iii) by an arbitrator within ninety days from the adoption of the recommendations by the DSB. The arbitrator must take into account the guideline that a “reasonable period of time” should not exceed fifteen months from the date of adoption of a Panel or Appellate Body report.²⁹

In case of disagreement as to whether the implementing measures taken are consistent with the covered agreement, the

25. *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the Panel, WT/DS135/R (Sept. 18, 2000).

26. *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, Communication from the Appellate Body, WT/DS135/9 (Nov. 8, 2000).

27. *European Communities—Anti-dumping Duties on Imports of Cotton-Type Bed Linen from India*, Report of the Panel, WT/DS141/R (Oct. 30, 2000).

28. DSU art. 21(3).

29. DSU art. 21(3)(c).

matter will be referred to the original Panel, which must circulate its report within ninety days after the date of referral.³⁰

Business input at this stage is very important, as only the companies trading with the WTO Member in question are in a position to assess whether the obstacles to trade have been effectively removed. WTO rules provide that the surveillance of the implementation of the recommendations or rulings must be included on the agenda of the DSB meeting six months after the date on which the "reasonable period of time" was established and must remain on the DSB's agenda until the issue is resolved. At least ten days prior to each DSB meeting, the Member concerned has to provide the DSB with a written status report describing its progress in the implementation of the recommendations or rulings. As the issue of implementation may be raised at the DSB by any Member at any time,³¹ businesses belonging either to the Member that brought the original complaint, or any other Member, can alert their government and provide it with accurate status reports so that the implementation of the Panel or Appellate Body's recommendations will be given full attention. On the other hand, businesses operating in the territory of the condemned WTO Member would be well advised to monitor the rulings and implementation procedures in case they can assist that Member to defend its industry from retaliatory measures.

If the condemned measures are not removed within the "reasonable period of time," mutually acceptable compensation or the suspension of concessions or other obligations (retaliatory measures)³² could be considered within twenty days from the expiry of the "reasonable period of time," subject to DSB authorization.³³ Unlike in the case of implementation (i.e., the removal of the obstacle to trade), compensation or retaliatory measures as a temporary solution to the dispute might be less interesting

30. DSU art. 21(5). If the Panel requires further time, it should inform the DSB in writing of the delay together with an estimate of the period within which it will submit its report.

31. DSU art. 21(6); see also *European Communities—Measures Affecting Meat and Meat Products (Hormones)*, WT/DS26 and WT/DS48; *European Communities—Regime for the Importation, Sales and Distribution of Bananas*, Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU, Decision by the Arbitrators, WT/DS27/ARB/ECU (Mar. 24, 2000).

32. DSU art. 22(1).

33. DSU art. 22(2).

for the affected businesses. Compensation may be in relation to goods or services that, albeit in the same or related trade sector, are of no benefit to them. Retaliation would benefit businesses only indirectly as a means of pressuring the offending Member government to implement the ruling and remove the contested measure.

Retaliatory measures are directed primarily at concessions or other obligations applicable to the same sector as that in which the Panel or Appellate Body found an infringement or if not practicable or effective, other sectors under the same WTO agreement or under another agreement.³⁴ DSB authorization for retaliatory measures will be granted within thirty days from the expiration of the "reasonable period of time" unless arbitration by the original Panel is requested in respect of the level of suspension proposed.³⁵

The arbitrator may only examine whether the level of the retaliatory measures is equivalent to the level of nullification or impairment caused by the condemned measure and whether such measures are permitted under the covered agreement. The DSB will grant authorization to retaliate in accordance with the arbitrator's decision unless there is a consensus against it.³⁶ This procedure was applied for the first time in the *European Communities—Regime for the Importation, Sales and Distribution of Bananas*³⁷ ("Banana Dispute"), where the arbitrator reduced the level of suspension sought by the United States against the EU from US\$520,000,000 to US\$191,400,000. This level was determined by the arbitrators to be the level of nullification suffered by the United States and was approved by the DSB. Similarly, in *European Communities—Measures Concerning Meat and Meat Products (Hormones)*,³⁸ the EU offered compensation in view of the likelihood that it would not be able to comply with the recommendations and rulings of the DSB by the deadline. Canada and the United States, however, requested authorization for the suspension of concessions in the amount of US\$202,000,000 and

34. DSU art. 22(3)(a)-(c).

35. DSU art. 22(6).

36. DSU art. 22(7).

37. *European Communities—Regime for the Importation, Sales and Distribution of Bananas*, Decision by the Arbitrators, WT/DS27/ARB/ECU (Mar. 24, 2000).

38. *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26.

CAN\$75,000,000, respectively. At the EU's request, the level of suspension was referred to the original Panel for arbitration. The arbitrators determined the level of nullification suffered by the United States to be equal to US\$116,800,000 and that of Canada to be equal to CAN\$11,300,000.³⁹

As mentioned above, retaliation is a means of exercising pressure on the offending government to implement the Panel or Appellate Body ruling and, in this sense, is indirectly beneficial to businesses. It would appear, however, that if the offending measures are considered very important to the WTO Member in question, as the banana regime appears to be for the EC, the effect of retaliation might be reduced. In this connection, there are two further issues that have to be considered, the size and the strength of the WTO Member against which retaliation measures are taken. (It would appear more likely that a small or developing country would rather give up the offending measure than face retaliation.)

It is noteworthy that a small developing country like Ecuador was allowed by the Panel in the *Banana Dispute* to cross-retaliate against the EC under the Agreement on Trade-Related Aspects of Intellectual Property⁴⁰ ("TRIPS") pursuant to Article 22 of the DSU.⁴¹ Ecuador, in particular targeted wine and spirit products in the context of Article 23 of TRIPS (geographical indications) since wine and spirits represent a sensitive area of exports for European industry. The sanctions are not in place yet, but the EC seems to be under great pressure to comply with its WTO obligations.⁴²

39. *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, Original Complaint by the United States, Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU, Decision by the Arbitrators, WT/DS26/ARB (July 12, 1999); *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, Original Complaint by Canada, Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU, Decision by the Arbitrators, WT/DS48/ARB (July 12, 1999).

40. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, WTO Agreement, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 1197 (1994) [hereinafter TRIPS].

41. Cross-retaliation has to be justified by the country that imposes sanctions by showing the severity of the damage suffered in economic and commercial terms. See DSU art. 22(3)(d).

42. Cristian Espinosa, A Developing Country Perspective of WTO Dispute Settlement Procedures, Paper presented at the World Trade Law Association, London (Nov. 2000).

The targeted industries of the WTO Member are those whose exports are subject to retaliation measures. Normally, retaliation occurs in respect of the same sector that is deemed to benefit from the offending measures and the retaliation would be effective if that industry engages in export activity to the complaining Member. If, however, retaliation is allowed (by the arbitrator) to target a different export industry, that could lead to internal pressure on the offending WTO Member to implement the Panel or Appellate Body recommendations and comply with the WTO rules.

The dispute between Ecuador and the EU over bananas could be a good reason for European manufacturers of wine and spirits to lobby the EC institutions to bring the regime for bananas into compliance with the EC obligations under the WTO.

II. WIN SOME—LOSE SOME: NOT WIN-WIN

The majority of WTO disputes do not reach the Panel stage.⁴³ Some are settled either as a result of an assessment by the parties of the merits of the case or for practical reasons. Some reach the Panel stage and once the Panel is established, the disputes remain pending until the Panel's authority lapses. The majority of disputes in which a Panel report has been issued, however, have also been appealed.⁴⁴ In addition, implementation is often prolonged.

The examples set out below illustrate that sometimes the establishment of a Panel may be an incentive to bring the dispute to an end, but in other cases even an Appellate Body report condemning the WTO Member concerned may not achieve the purpose of removing the contested measure. The following examples illustrate three possible results of the initiation of a WTO dispute settlement. The first is no result as the FSC dispute illustrates.⁴⁵ The second example is successful implementation fol-

43. According to Professor Hudec only fifty per cent of the cases proceed to the establishment of a panel. See Robert E. Hudec, *The New WTO Dispute Settlement Procedures: An Overview of the First Three Years*, 8 MINN. J. GLOBAL TRADE 1, 1-49 (1999).

44. 31 Appellate Body Reports have been issued from January 1, 1995, to September 18, 2000. *Dispute Settlement Body—Annual Report (2000)*, Addendum, Overview of the State of Play of WTO Disputes, WT/DSB/21/Add.1 (Nov. 27, 2000).

45. See *European Communities—Regime for the Importation, Sales, and Distribution of Bananas*, WT/DS27; *European Communities—Measures Affecting Meat and Meat Products (Hormones)*, WT/DS 26 and WT/DS48. The *Bananas* and *Hormones* disputes have not achieved meaningful results over implementation as well. In *Bananas*, retaliatory mea-

lowing the full procedure, as *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*⁴⁶ and *Canada—Certain Measures Concerning Periodicals*⁴⁷ illustrate. The third example is removal of the contested obstacle to trade without completing all stages of the procedure, as the *European Communities—Measures Affecting Butter Products*⁴⁸ and *United States—Imposition of Anti-Dumping Duties on Imports of Colour Television Receivers from Korea*⁴⁹ disputes illustrate.

A. U.S. Foreign Sales Corporations⁵⁰

The FSC scheme provided for by Sections 921-927 of the U.S. Internal Revenue Code⁵¹ and related measures establishes a special tax treatment for FSCs. This scheme exempts U.S. companies from taxes that would otherwise have to be paid on their export sales. The Appellate Body upheld the EU's claim that this scheme constituted an export subsidy giving U. S. companies an unfair advantage and creating major distortions of international trade, which cost the United States around US\$3,500,000,000 each year.⁵²

An FSC is a shell company of a U.S. corporation established in a tax haven (more than ninety percent are in the Virgin Islands, Barbados, and Guam) whose aim is to serve as a vehicle of U.S. exports, and in this way, reduce the due tax by fifteen percent to thirty percent.

asures are in place almost five years after the dispute started, whereas in *Hormones*, retaliatory measures are in place four years after the dispute started.

46. *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50 (implementing the Panel's recommendations two years after the dispute started).

47. *Canada—Certain Measures Concerning Periodicals*, WT/DS31 (implementing the Appellate Body and Panel's recommendations two years and seven months after the dispute started).

48. *European Communities—Measures Affecting Butter Products*, Request for the Establishment of a Panel by New Zealand, WT/DS72/2 (July 11, 1997) (establishing a Panel that has facilitated the termination of the dispute through a mutually agreed-upon solution two years and eight months after the dispute started).

49. *United States—Imposition of Anti-Dumping Duties on Imports of Colour Television Receivers from Korea*, Request for Consultations by Korea, WT/DS89/1 (July 16, 1997) (illustrating that the United States withdrew the contested measure following the establishment of a Panel). The dispute lasted one year and two months. *Id.*

50. *United States—Tax Treatment for "Foreign Sales Corporations,"* Request for Consultations by the European Communities, WT/DS108/1 (Nov. 28, 1997).

51. I.R.C. §§ 921-27 (1994).

52. *See id.*

This dispute was initiated by an EU complaint dated November 18, 1997, alleging that the FSC scheme was inconsistent with U.S. obligations under Articles III:4 and XVI of the GATT 1994, Articles 3.1(a) and (b) of the SCM Agreement,⁵³ and Articles 3 and 8 of the Agreement on Agriculture.⁵⁴ On July 1, 1998, the EU requested the establishment of a Panel. In its request for a Panel, the EU invoked Article 3.1(a) and (b) of the SCM Agreement and Articles 3, 8, 9, and 10 of the Agreement on Agriculture, but did not pursue the claims under the GATT 1994. At its meeting on September 22, 1998, the DSB established a Panel. Barbados, Canada, and Japan reserved their rights as third-parties to the dispute.

The Panel found that, through the FSC scheme, the United States acted inconsistently with its obligations under Article 3.1(a) of the SCM Agreement, as well as with its obligations under Article 3.3 of the Agreement on Agriculture (and consequently with its obligations under Article 8 of that Agreement). The report of the Panel was circulated to Members on October 8, 1999.⁵⁵ On November 26, 1999, the United States announced its intention to appeal certain issues of law and legal interpretations developed by the Panel.

The Appellate Body circulated its report to Members on February 24, 2000. The Appellate Body upheld the Panel's finding that the FSC measure constituted a prohibited subsidy under Article 3.1(a) of the SCM Agreement. The Appellate Body, however, reversed the Panel's finding that the FSC measure involved "the provision of subsidies to reduce the costs of marketing exports" of agricultural products under Article 9.1(d) of the Agriculture Agreement, and in consequence, reversed the Panel's findings that the United States had acted inconsistently with its obligations under Article 3.3 of the Agriculture Agreement. The Appellate Body further found that the United States acted inconsistently with its obligations under Articles 10.1 and 8 of the Agriculture Agreement by applying export subsidies, through the FSC measure, in a manner which results in, or threatens to lead to, circumvention of its export subsidy commitments with re-

53. Agreement on Subsidies and Countervailing Measures art. 3.1.

54. Agreement on Agriculture art. 3, 8, Apr. 15, 1994, WTO Agreement, Annex 1A, at http://www.wto.org/english/docs_e/legal_e/final_e.htm.

55. *Id.*

spect to agricultural products. The Appellate Body also emphasised that it was not ruling that a Member must choose one kind of tax system to be consistent with that Member's WTO obligations.

The DSB adopted the Appellate Body report and the Panel report, as modified by the Appellate Body report, at its meeting on March 20, 2000.⁵⁶ Pursuant to Article 21.3 of the DSU, the United States informed the DSB on April 7, 2000, of its intention to implement the recommendations of the DSB in a manner consistent with its WTO obligations.

On May 2, 2000, the United States presented to the EU a replacement regime for FSC to bring U.S. legislation in line with its WTO obligations within the deadline established by the WTO. The EU apparently felt that the new regime would not be enough to comply with the DSB ruling.

On September 30, 2000, the United States and EU agreed on the establishment of a new panel to review the FSC replacement legislation once adopted.⁵⁷ The EU asked the WTO to authorize retaliatory sanctions in case the revisited version of the FSC was in violation of U.S. obligations under WTO rules. This Panel would report before sanctions could be imposed by the EU.

B. *Patent Protection for Pharmaceutical Products in India*⁵⁸

A complaint was made by the European Communities on April 28, 1997, with respect to the alleged absence in India of patent protection for pharmaceutical and agricultural chemical products and the absence of formal systems that permit the filing of patent applications and provide exclusive marketing rights for such products. The EC claimed that this was inconsistent with India's obligations under Article 70, paragraphs eight and nine, of the TRIPS Agreement.⁵⁹ On September 9, 1997,

56. *Id.*

57. See *The European Commission Website*, at <http://europa.eu.int/comm/dgs/trade/index/en.htm>.

58. *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, Request for Consultations by the European Communities, WT/DS79/1 (May 6, 1997).

59. See a similar United States complaint in *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, Appellate Body Report and Panel Report, Action by the Dispute Settlement Body, WT/DS50/9 (Jan. 27, 1998) (adopting the Panel and Appellate Body reports on January 16, 1998).

the EC requested the establishment of a Panel. At its meeting on October 16, 1997, the DSB established a Panel. The United States reserved its third-party rights. The Panel found that India had not complied with its obligations under Article 70.8(a) of the TRIPS Agreement by failing to establish a legal basis that adequately preserves novelty and priority in respect to applications for product patents for pharmaceutical and agricultural chemical inventions. India also was not in compliance with Article 70.9 of the TRIPS Agreement by failing to establish a system for the grant of exclusive marketing rights. The report of the Panel was circulated to Members on August 24, 1998.

At its meeting on September 2, 1998, the DSB adopted the Panel Report. India indicated at the DSB meeting of October 21, 1998, that it needed a reasonable period of time to comply with the DSB recommendations and that it intended to have bilateral consultations with the EC to agree on a mutually acceptable period of time. At the DSB meeting on November 25, 1998, India read out a joint statement done with the EC, in which it was agreed that the implementation period in this dispute would correspond to the implementation period in a similar dispute brought by the United States.⁶⁰ At the DSB meeting on April 28, 1999, India presented its final status report on implementation of *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*. The report also applies to implementation in this dispute. The report disclosed the enactment of the relevant legislation to implement the recommendations and rulings of the DSB.

C. *Canadian Periodicals*⁶¹

A complaint by the United States dated March 11, 1996, alleged that measures prohibiting or restricting the importation into Canada of certain periodicals are in contravention of GATT 1994 Article XI. The United States further alleged that the tax treatment of so-called "split-run" periodicals and the application of favourable postage rates to certain Canadian periodicals are inconsistent with GATT 1994 Article III. The DSB established a panel on June 19, 1996. The Panel found the measures applied

60. *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS10.

61. *Canada—Certain Measures Concerning Periodicals*, WT/DS31.

by Canada to be in violation of GATT 1994 rules. The report of the Panel was circulated to Members on March 14, 1997. On April 29, 1997, Canada notified its intention to appeal certain issues of law and legal interpretations developed by the Panel. The Appellate Body upheld the Panel's findings and conclusions on the applicability of GATT 1994 to Part V.1 of Canada's Excise Tax Act⁶² ("Excise Act"), but reversed the Panel's finding that Part V.1 of the Excise Act is inconsistent with the first sentence of Article III:2 of GATT 1994. The Appellate Body further concluded that Part V.1 of the Excise Act is inconsistent with the second sentence of Article III:2 of GATT 1994. The Appellate Body also reversed the Panel's conclusion that Canada's "funded" postal rate scheme is justified by Article III:8(b) of GATT 1994. The report of the Appellate Body was circulated to Members on June 30, 1997. At its meeting on July 30, 1997, the DSB adopted the Appellate Body report and the Panel report, as modified by the Appellate Body. The implementation period was agreed by the parties to be fifteen months from the date of adoption of the reports (i.e., it expired on October 30, 1998). Canada has withdrawn the contested measure.

D. *New Zealand Butter Products*⁶³

A complaint by New Zealand dated March 24, 1997, alleged that the decisions by the EC and the United Kingdom's Customs and Excise Department to the effect that New Zealand butter manufactured by the ANMIX butter-making process and the spreadable butter-making process be classified so as to be excluded from eligibility for New Zealand's country-specific tariff quota established by the EC's WTO Schedule are in violations of Articles II, X, and XI of GATT 1994, Article 2 of the Agreement on Technical Barriers to Trade⁶⁴ ("TBT Agreement"), and Article 3 of the Agreement on Import Licensing Procedures.⁶⁵ On November 6, 1997, New Zealand requested the establishment of a panel. The DSB established a panel on November 18, 1997. The United States reserved its third-party rights. At the request of the complainants, dated February 24, 1999, the Panel agreed,

62. Excise Tax Act, R.S.C. 1985.

63. *European Communities—Measures Affecting Butter Products*, WT/DS72.

64. Agreement on Technical Barriers to Trade, Apr. 15, 1994, WTO Agreement, Annex 1A, at http://www.wto.org/english/docs_e/legal_e/final_e.htm.

65. Agreement on Import Licensing Procedures art. 3.

pursuant to Article 12.12 of the DSU, to suspend the Panel proceedings. In a communication dated November 11, 1999, the parties notified the DSB that a mutually agreed solution to this dispute had been reached.

E. *U.S. Anti-Dumping Duties on Samsung*⁶⁶

A complaint by Korea dated July 10, 1997, concerned the imposition of anti-dumping duties by the United States on imports of color television receivers ("CTVs") from Korea. Korea claimed that the United States has for the past twelve years maintained an anti-dumping order for Samsung's CTVs despite the absence of dumping and the cessation of exports from Korea, without examining the necessity of continuing to impose such duties. The United States action was therefore in violation of Articles VI.1 and VI.6(a) of GATT 1994, and Articles 1, 2, 3.1, 3.2, 3.6, 4.1, 5.4, 5.8, 5.10, 11.1, and 11.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade⁶⁷ ("Anti-Dumping Agreement"). On November 6, 1997, Korea requested the establishment of a Panel. On January 5, 1998, Korea informed the DSB that it was withdrawing its request for a Panel but reserving its right to reintroduce the request. At the DSB meeting on September 22, 1998, Korea announced that it was definitively withdrawing the request for a Panel because the imposition of anti-dumping duties had now been revoked.

III. *IS THE DISPUTE SETTLEMENT SYSTEM WORKING?*

The major area of criticism of the WTO dispute settlement system concerns the provisions dealing with implementation and compensation as discussed above. The majority of the disputes, from the establishment of a Panel to the withdrawal of the WTO inconsistent measure, last from two to three years. Thereafter, long implementation periods follow and sometimes the disputes do not appear to be resolved many years after the matter has been decided on appeal. This issue is of major concern for busi-

66. *United States—Imposition of Anti-Dumping Duties on Imports of Colour Television Receivers from Korea*, Request for Consultations by Korea, WT/DS89/1 (July 16, 1997).

67. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Apr. 15, 1994, WTO Agreement, Annex 1A, at http://www.wto.org/english/docs_e/legal_e/final_e.htm.

nesses as it causes irreparable damage.⁶⁸

Implementation is ineffective because the process takes too long and the remedies available to the aggrieved Member are limited. The problem of duration can be attributed to two types of factors: those inherent in the dispute system itself, such as the general language of Panel and Appellate Body recommendations and the long period of time set by the DSU or granted by the arbitrator, and those factors caused deliberately by the losing party to the dispute. The two are inter-related, as delaying tactics have been made possible by the DSU. Remedies, such as retaliation, are available to a limited extent and at such a late stage that they risk being ineffective.

The Panel and Appellate Body recommendations do not contain useful information pertaining to implementation apart from the general requirement of "bringing the measure into compliance." Instead, the Panels seek to avoid making their rulings any more intrusive than necessary and therefore do not make any suggestion as what kind of action would bring the contested measure into compliance.⁶⁹

WTO Members are required to "promptly" comply with Panel and Appellate Body rulings and recommendations. Prompt compliance, however, seldom happens, and members often resort to arbitration to determine what is the reasonable time for implementation. Often, almost as a rule, the maximum fifteen month period will be granted, thereby prolonging the disputes, sometimes, arguably, unnecessarily.⁷⁰ The WTO case concerning the sale and distribution of bananas in the EC is an example of a procedure now entering its sixth year.

The surveillance mechanism is not sufficient to guarantee full implementation of Panel and Appellate Body rulings since there are no specific rules requiring the losing Member to report on the action taken to eliminate the inconsistent WTO measure. As a result, there have been cases where no implementa-

68. Constance Kann, *Review of the WTO Dispute Settlement System—A Sneak Preview?*, 4 INT'L. TRADE & REG. 151-55 (1998).

69. Petros C. Mavroidis, *Remedies in the WTO: Between a Rock and a Hard Place*, 11 EUR. J. INT'L. L. 4 (2000).

70. Only in a few cases did arbitrators opt for a shorter period of time, namely eight and 12 months. See *Australia—Measures Affecting the Importation of Salmon*, WT/DS18; *Indonesia—Certain Measures Affecting the Automobile Industry*, WT/DS54, WT/DS55, WT/DS59, and WT/DS64.

tion has been made at all.⁷¹

The remedies available under the DSU are limited to retaliation and compensation. Retaliation, although potentially beneficial for business as a means of exercising pressure on the offending Member to implement the Panel and the Appellate Body rulings, does not facilitate market access.

Monetary compensation to be paid to injured WTO Members may be considered an alternative provided that it grants some relief to the affected business. This remedy, however, does not seem to work in the context of GATT/WTO. Monetary compensation has been a topic of discussion in the context of GATT for more than fifty years,⁷² though GATT contracting parties have never taken it into consideration since monetary compensation would have affected the nature of GATT as a diplomatic instrument whose aim was to solve trade disputes under a consensual basis. Although the WTO has moved away from being a diplomatic instrument to a more legal one,⁷³ it is still a diplomatic instrument where governments do not give up diplomacy to settle disputes.⁷⁴

IV. OUTLOOK

The benefit for businesses, both those supporting the complaining Member and those supporting the Member subject to the complaint, is that the dispute is being resolved by the world's highest trade tribunal whose rulings, once adopted by the DSB, are legally binding and cannot be contested. In fact, in the majority of WTO disputes in which a Panel has delivered a report, the matter was appealed to the WTO Appellate Body (about

71. *European Communities—Regime for the Importation, Sales and Distribution of Bananas*, Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU, Decision by the Arbitrators, WT/DS27 (Mar. 24, 2000); *European Communities—Measures Affecting Meat and Meat Products*, WT/DS26-48.

72. In 1965 GATT developing countries proposed monetary compensation to be paid to GATT parties injured by the GATT-illegal practice. GATT Doc. COM.TD/F/W.1 and COM.TD/F/W.4.

73. ERNST-ULRICH PETERSMANN, *How to Promote International Rule of Law? Contributions by the WTO Appellate Review System*, DISPUTE RESOLUTION IN THE WTO (1998).

74. For an in-depth analysis of the Dispute Settlement Mechanism in the WTO, see Thomas Cottier, *Dispute Settlement in the World Trade Organization: Characteristics and Structural Implications for the European Union*, CMLR 35, 325-78, 1998; P. Pescatore, *The New WTO Dispute Settlement Mechanism*, in REGIONALISM AND MULTILATERALISM AFTER THE URUGUAY ROUND, EIP, Brussels, 661-85 (1997).

thirty out of forty cases to date). Most Appellate Body reports upheld all or some of the findings of the Panel. The Appellate Body reports, therefore, enhance legal certainty, which is beneficial for business.

Business, therefore, should make use of the WTO dispute system. At present, however, there are many obstacles that need to be resolved. Some of the main issues have been highlighted in this Essay.

A non-exhaustive check-list of issues that need to be resolved include the following:

- Businesses as such, being non-governmental entities, cannot bring disputes or join as third-parties but must act indirectly through their governments. Mechanisms exist in some WTO members, such as the TBR, by which businesses can require their government to initiate a WTO dispute settlement procedure.
- The duration of the procedure is too long when one considers that businesses would first need to lobby their government to bring the case before the WTO (or submit a TBR complaint in the EU). For businesses trading overseas it is important to have an idea as to the duration of the process. It is hoped that as the volume of Panel and Appellate Body reports increases, WTO Members would be able to assess whether their legislation complies with their international obligations and ensure that disputes do not arise or are settled at the consultation stage. Conciliation, good-offices, and mediation should also be more fully explored by WTO Members.
- The implementation period and the ability of WTO Members to prolong the procedure is unhelpful for business. It should be suggested, therefore, that compensation be available at an earlier stage. This would provide both an incentive and a benefit to the affected businesses.
- Retaliation does not assist businesses in gaining market access.

The WTO Appellate Body, however, is progressively allowing business a greater say in disputes. For example, the Appellate Body in the *Shrimps* case has ruled that NGOs could submit an *amicus curiae* brief stating their position on the dispute. This has been extended in the *Hot-Rolled Lead and Bismuth Car-*

bon Steel Products case also to apply to trade associations. Now that both NGOs and trade associations can inform the Panel of their position, *amicus curiae* briefs could become a beneficial tool for businesses.⁷⁵ It is hoped that this will prepare the ground for a more substantial role for business within the WTO in the years to come.

It is noteworthy that these developments coincide with the recent demands by the European Union and the United States to have more transparency within the WTO after their trade policies had been strongly criticized at the Seattle Ministerial. Both countries have submitted to the WTO General Council proposals dealing with transparency.⁷⁶ Of particular interest is the proposal of the United States in which the United States suggests "officially" launching a mechanism for third party submissions, other than governments, as well as public participation in Panel and Appellate Body meetings on a first-come first-served basis. The presence of the public in dispute settlement meetings will better assist the affected business involved in the dispute. Public participation also should be extended to the negotiation phase of the dispute so that companies and trade associations can have more accurate reports on the dispute.

In conclusion, the outlook for the WTO dispute settlement system is positive if a balance is struck between the legal nature of the system and the political nature of the organization within which it is operating. By allowing businesses to participate in the process, legal certainty will be promoted and political trade-offs will be avoided.

75. For different views expressed by the business community as to the role of the WTO Dispute Settlement mechanism in relation with private parties' interests, see the Panel Discussion at the 6th Geneva Global Arbitration Forum in 1997, *Is the WTO Dispute Settlement Mechanism Responsive to the Needs of the Traders? Would a System of Direct Action by Private Parties Yield Better Results*, 32 J. WORLD TRADE, No.2, 147-65 (1997).

76. *Improving the Function of the WTO System*, Discussion Paper from the European Community to the WTO General Council, WT/GC/W/412 (Oct. 6, 2000); *General Council Informal Consultations on External Transparency October 2000*, Submission from the United States—Revision, WT/GC/W/413 (Oct. 13, 2000).