The Doha Development Round Negotiations on the Dispute Settlement Understanding

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1 INTRODUCTION

The WTO dispute settlement system has been operational for almost 9 years now. In that period it has arguably been the most prolific of all state-to-state dispute settlement systems. Since 1 January 1995, 302 disputes were brought to the WTO system for resolution.[2] That is more than were brought to the GATT, the WTO's predecessor, in the 47 years between 1948 and 1995. In almost a quarter of the disputes brought to the WTO system, the parties were able to reach an amicable solution through consultations or the dispute was resolved otherwise without recourse to adjudication. In other disputes, parties have resorted to adjudication and, to date, such adjudication procedures have been completed in more than 73 disputes.[3]

Some of the disputes dealt with by the WTO dispute settlement system have triggered considerable controversy and public debate and have attracted much media attention. This has been the case,

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[2] I.e. the number of requests for consultations notified to the DSB on 2 November 2003. See www.WorldTradeLaw.net, visited on 2 November 2003.

[3] I.e. the number of disputes in which panel and/or Appellate Body reports have been adopted by the DSB. See www.wto.org, '*Update of WTO Dispute Settlement Cases*', WT/DS/OV/16, dated 17 October 2003, ii.

for example, for disputes on national legislation or measures for the protection of public health or the environment, such as:

- the *EC – Hormones* dispute on the European Union's import ban on meat from cattle treated with growth hormones,[4]
- the *US – Shrimp* dispute on the US import ban on shrimp harvested with nets that killed sea turtles,[5]
- the *EC – Asbestos* dispute on a French ban on asbestos and asbestos-containing products,[6] and
- the *EC – Biotech Products* dispute on measures affecting the approval and marketing of genetically modified products in the European Union.[7]

Also the *EC – Bananas III* dispute on the European Union's preferential import regime for bananas was, for many years, head-line news.[8]

2. BASIC FEATURES OF THE WTO DISPUTE SETTLEMENT SYSTEM

The prime object and purpose of the WTO dispute settlement system is the prompt settlement of disputes through multilateral proceedings. The system prefers to resolve a dispute through consultations rather than adjudication.

Figure 1: Success of consultations – totals 1995-2003 [9]

[4] *EC Measures Concerning Meat and Meat Products (Hormones) ('EC– Hormones')*, complaints by the US (DS26) and Canada (DS48).

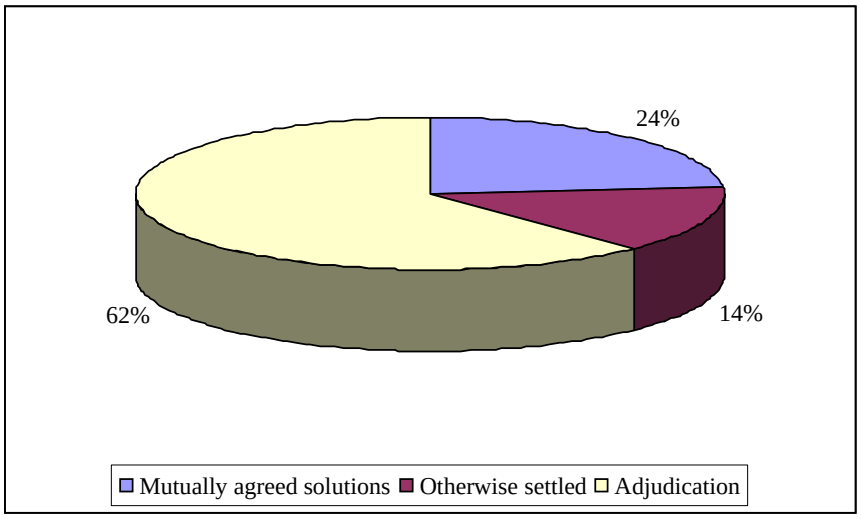
[5] *United States – Import Prohibition Of Certain Shrimp and Shrimp Products ('US – Shrimp')*, complaint by India, Malaysia, Pakistan and Thailand (DS58).

[6] *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products ('EC – Asbestos')*, complaint by Canada (DS135).

[7] *European Communities – Measures Affecting the Approval and Marketing of Biotech Products ('EC – Biotech Products')*, complaint by the United States (DS291), Canada (DS292) and Argentina (DS293).

[8] European Communities – *Regime for the Importation, Sale and Distribution of Bananas ('EC – Bananas III')*, complaint by Ecuador, Guatemala, Honduras, Mexico and the United States (DS27).

[9] See www.wto.org, '*Update of WTO Dispute Settlement Cases'*, WT/DS/OV/14, dated 30 June 2003, ii.



The WTO dispute settlement system serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements.[10] The system may not, however, add to or diminish the rights and obligations of the WTO Members.[11]

The jurisdiction of the WTO dispute settlement system is very broad in scope, covering disputes arising under the *WTO Agreement*, the DSU, all multilateral agreements on trade in goods, the GATS and the *TRIPS Agreement*.[12] Furthermore, the jurisdiction of the WTO dispute settlement system is compulsory, exclusive and contentious in nature.[13]

Access to the WTO dispute settlement system is limited to WTO Members. A WTO Member can use the system when it claims that a benefit accruing under one of the covered agreements is nullified or impaired.[14] A complainant will almost always argue that the respondent violated a provision of WTO law (violation complaint).

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[10] Article 3.2 of the DSU

[11] Articles 3.2 and 19.2 of the DSU

[12] Covered agreements as per Appendix 1 of DSU

[13] See Articles 23.1and 23.2 of the DSU (on compulsory and exclusive jurisdiction), Panel Report, *US – Section 301 Trade Act*, para. 7.43 (on exclusive jurisdiction) and Appellate Body Report, *United States – Wool Shirts and Blouses*, p. 340 (on contentious jurisdiction).

[14] Appellate Body Report, *US-Shrimp*, para. 101

If the violation is shown, there is a presumption of nullification or impairment of a benefit.[15]

NGOs, industry associations or individuals have no (direct) access to the WTO dispute settlement system. However, the Appellate Body has ruled in a series of controversial reports that panels and the Appellate Body have the right to accept and consider *amicus curiae* briefs submitted by those entities.[16]

The WTO dispute settlement process entails four major steps: consultations, the panel proceedings, appellate review proceedings and implementation and enforcement of the recommendations and rulings. The WTO dispute settlement process is subject to strict time limits.[17]

Panels and the Appellate Body interpret provisions of the covered agreements in accordance with the ordinary meaning of the words of the provision taken in their context and in the light of the object and purpose of the agreement involved.[18] If necessary and appropriate, panels and the Appellate Body have recourse to supplementary means of interpretation. The burden of proof in WTO dispute settlement proceedings is on the party, the complainant or the respondent, that asserts the affirmative of a particular claim or defence.[19]

The WTO dispute settlement proceedings are characterised by their confidentiality. Written submissions by the parties are confidential.[20] Panel meetings or the oral hearing of the Appellate Body take place behind closed doors. The *Rules of Conduct* require panellists and Appellate Body Members to be independent and impartial, to avoid direct or indirect conflicts of interest and to respect the confidentiality of proceedings.[21]

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15 Article 3.8 of the DSU.

16 See Appellate Body Report, *US – Shrimp*, paras. 104 – 106; and Appellate Body Report, *US Lead and Bismuth*, para. 39.

17 Articles 12.8, 12.9 and 17.5 of the DSU.

18 Article 3.2 of the DSU, which has been interpreted to refer to Article 31 of the *Vienna Convention on the Law of Treaties*.

19 Appellate Body Report, *US – Wool Shirts and Blouses*, p. 335.

20 See Articles 17.10, 18.2 and Appendix 3 para. 3 of the DSU

21 WT/DSB/RC/1, dated 11 December 1996

The DSU provides for three types of remedy for breach of WTO law: one final remedy, namely the withdrawal (or amendment) of the WTO-inconsistent measure; and two temporary remedies, namely compensation or suspension of concessions or other obligations (commonly referred to as 'retaliation').[22] Compliance with the recommendations or rulings of the DSB must be immediate, or if that is impracticable, within a 'reasonable period of time'.[23] Retaliation measures (usually in the form of a drastic increase in custom duties of strategically selected products) put economic and political pressure on Members to withdraw or amend their WTO-inconsistent measures. However, doubts exist as to the effectiveness of retaliation as a temporary remedy for breach of WTO law.

In recognition of the difficulties developing country Members may encounter when they are involved in WTO dispute settlement, the DSU contains some special rules for developing country Members.[24] Most of these rules are, however, of limited significance. Effective legal assistance to developing country Members in dispute settlement proceedings is given by the Geneva-based Advisory Centre on WTO Law (the 'ACWL'), an independent, international organisation that operates as a law firm.[25]

The WTO dispute settlement system offers an opportunity for economically weak countries to challenge trade measures taken by economically stronger countries. The system works to the advantage of all Members, but it especially gives security to the weaker Members who, in the past, often lacked the political or economic clout to enforce their rights and to protect their interests.[26] As a result of the dispute settlement system, right prevails over might in the WTO.

3. WTO DISPUTE SETTLEMENT FROM 1995 TO 2003

The WTO dispute settlement system became operational when the *WTO Agreement* entered into force on 1 January 1995. In the

[22] Articles 3.7 and 22 of the DSU

[23] Articles 21.1 and 21.3 of the DSU

[24] Articles 3.12, 4.10, 8.10, 12.10, 12.11, 24 and 27 of the DSU

[25] For up to date information on ACWL, see www.acwl.ch

[26] Lacarte, J. and Gappah, P., 'Developing Countries and the WTO Legal and Dispute Settlement System', *Journal of International Economic Law*, 2000, 400.

period of more than eight years since January 1995, the WTO dispute settlement system has been much and widely used and its 'output' in terms of the number of dispute settlement reports has been remarkable.

3.1. Disputes

To illustrate the use made of the WTO dispute settlement system to date, this section examines:

- the number of disputes brought to the WTO;
- the identity of the WTO Members acting as complainant or respondent; and
- the agreements at issue in the disputes brought to the WTO.

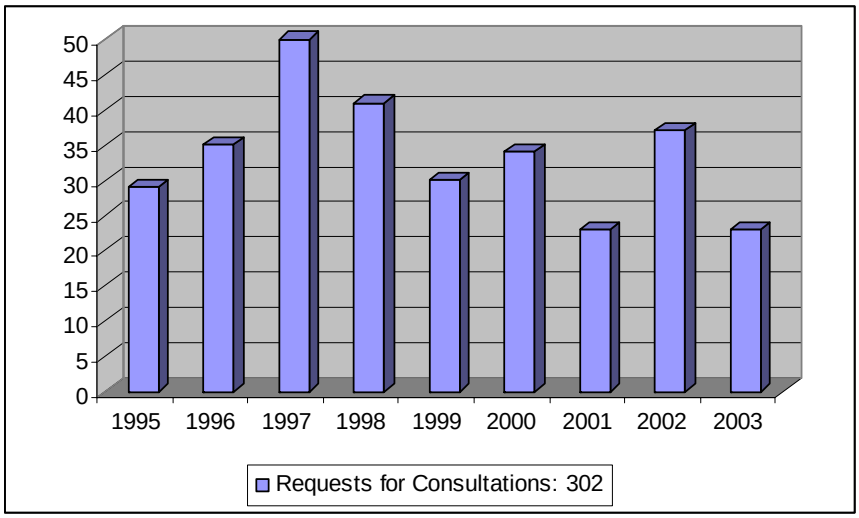
3.1.1. Number of disputes

Between January 1995 and October 2003, a period of eight and a half years, WTO Members have brought 302 disputes to the WTO for resolution under the multilateral rules and procedures of the DSU.[27] The WTO dispute settlement system is undoubtedly one of the most used international dispute settlement systems. With the exceptions of 1997 (higher) and 2001 (lower), the number of disputes brought to the WTO in any given year has been fairly stable. Roughly speaking, anywhere from 30 to 40 disputes are annually brought to the WTO.

Figure 2: Requests for consultations – trend 1995-2003 [28]

[27] See www.WorldTradeLaw.net, visited on 2 November 2003. This number refers to the number of requests for consultations notified to the DSB.

[28] See www.WorldTradeLaw.net, visited on 2 November 2003.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1995
1996
1997
1998
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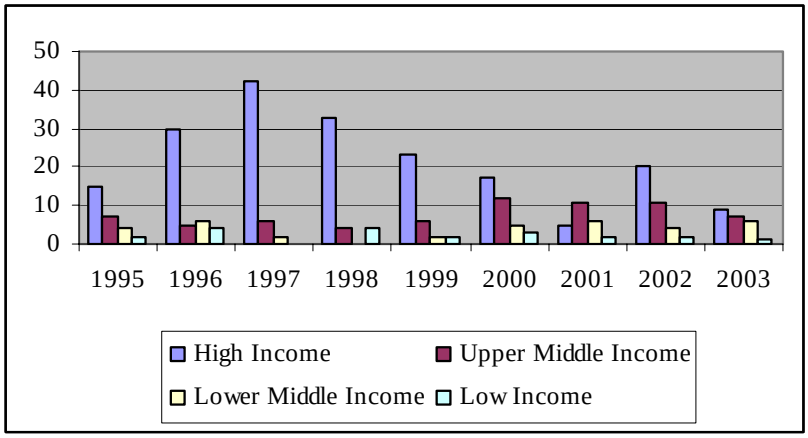
2001
2002
2003
Requests for Consultations: 302

3.1.2. Complainants and respondents

Unlike the old GATT dispute settlement system, which was scantly used by developing country Members, the WTO dispute settlement system has been used by developed and developing country Members alike. In fact, in 1995, 2000, 2001, 2002 and in 2003 thus far, developing country Members (i.e., upper[29] and lower middle income countries[30] and low income countries[31]) brought more disputes to the WTO than the developed country Members (i.e., high income countries[32]).

Figure 3: Complainants per income category – trend 1995-2003 [33]



Taken over the whole period from 1995 to 2003, high income countries have the most prolific users of the WTO dispute settlement system. In 61 percent of all disputes, high income countries, such as the United States or the European Communities, were the complainant. In view of their share of world trade, this is not surprising. However, in 39 percent of all disputes, developing

[29] Upper middle income countries are for example Argentina, Brazil, Mexico, Poland and Slovakia.

[30] Lower middle income countries are for example China, Colombia, Philippines, Romania and Turkey.

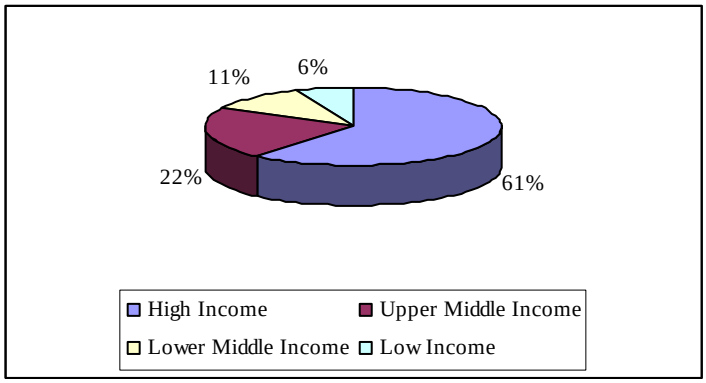
[31] Low income countries are for example India, China, Indonesia, Nicaragua and Pakistan.

[32] High income countries are for example the United States, the European Communities, Canada, Japan, Chinese Taipei and Hong Kong, China.

[33] For the data, see www.WorldTradeLaw.net, visited on 2 November 2003.

country Members, and in particular, upper middle income countries (22 percent), were complainants. The United States has been the single most active complainant (in 75 disputes), followed by the European Communities (in 62 disputes), Canada (in 24 disputes) and Brazil (in 22 disputes). To date, Chinese Taipei as well as China and Hong Kong, China were complainants in one dispute only.[34] It is remarkable that India, a low income country, has been a complainant in 15 disputes. Low income countries were complainants in a total of 20 disputes. Least-developed country Members have not yet brought any dispute to the WTO to date.[35]

Figure 4: Complainants per income category – totals 1995-2003 [36]



62 percent of all disputes thus far related, or relates, to measures of developed country Members; 38 percent related, or relates, to measure of developing country Members. Cases brought against measures of developing country Members have often been brought by other developing country Members. Small developing country Members have brought cases, and won cases, against large developed country Members. A classic example of this is *US – Underwear*, complaint by Costa Rica. The United States was the single most important respondent (in 81 disputes), followed by the European Communities (in 47 disputes), India (in 14 disputes), Japan (in 13 disputes) and Canada, Korea and Brazil (in 12 disputes each). To date, there has been no case against a measure of a least-

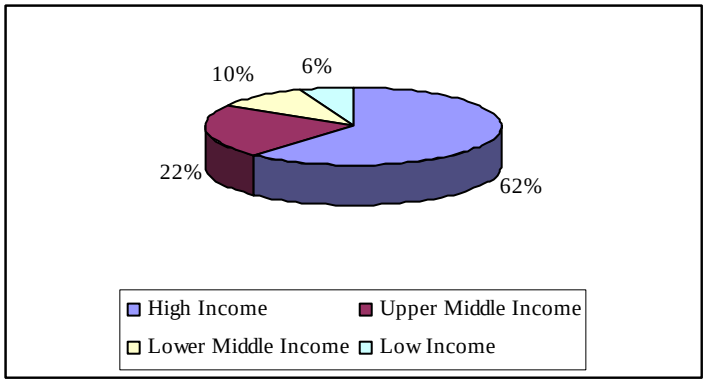
[34] Chinese Taipei and China are complainants in *US – Steel Safeguards*, WT/DS274 (complaint by Chinese Taipei) and WT/DS252 (complaint by China). Hong Kong, China was a complainant in *Turkey* – Textiles, WT/DS29..

[35] For the data, see www.WorldTradeLaw.net, visited on 2 November 2003.

[36] For the data, see www.WorldTradeLaw.net, visited on 2 November 2003.

developed country Member.[37] Also Chinese Taipei, China and Hong Kong, China have never been respondents to date.

Figure 5: Respondents per income category – totals 1995-2003 [38]



3.1.3. WTO agreements at issue in disputes

While a number of disputes concern limited economic interests, other disputes raise important and politically sensitive issues relating to the conflict between trade liberalisation and the protection of public health or the protection of the environment, or the conflict between liberalised trade and economic development or survival. The disputes brought to the WTO to date concerned, and concern, all the covered agreements. There has been dispute settlement on a very broad scope of rights and obligations. However, in 39 percent of all disputes, the complainant argued that the respondent had violated a provision of the GATT 1994. The GATT 1994 was, and is, by far the most invoked covered agreement. In 10 percent of the disputes, the complainant argued a violation of the *Anti-Dumping Agreement* and in 9 percent a violation of the *Agreement on Agriculture* and also, in 9 percent a violation of the *SCM Agreement*. The number of disputes in which a violation of the GATS or the TRIPS Agreement was argued has been relatively low to date.

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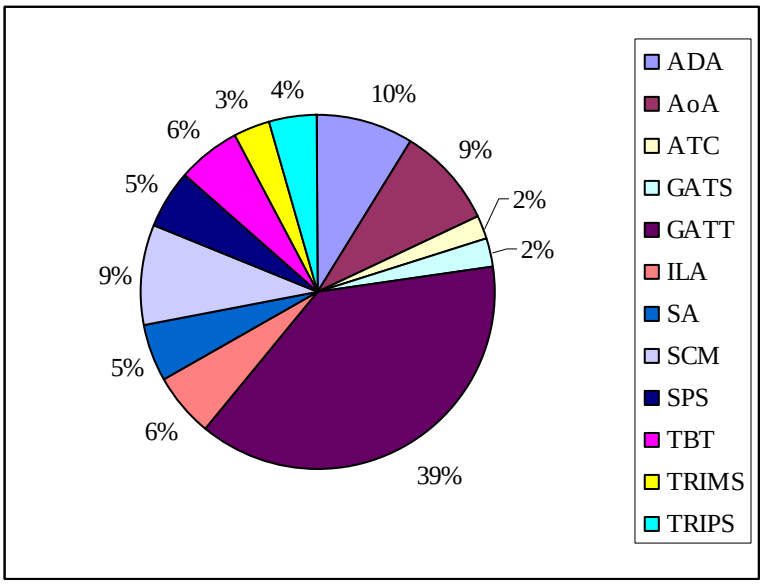
[37] See www.WorldTradeLaw.net, visited on 2 November 2003. Note that a number of these disputes concern the same measure. E.g.: *India – Quantitative Restriction on Imports of Agriculture, Textiles and Industrial Products ('India – Quantitative Restriction')* which is counted 6 times (complaints by the EC (DS96), Switzerland (DS94), New Zealand (DS93), Canada (DS92), Australia (DS91) and the US (DS90).

[38] See www.WorldTradeLaw.net, visited on 2 November 2003.

Figure 6: WTO agreements at issue – totals 1995-2003 [39]



3.2. Reports and Awards

In the period from January 1995 to November 2003, panels and the Appellate Body circulated 93 and 55 reports respectively.[40] Panel reports, in particular, tend to be quite voluminous. Furthermore, the WTO dispute settlement system also produced a number of arbitration awards.[41] When compared with the 'output' of the International Court of Justice or the International Tribunal on the Law of the Sea, the WTO dispute settlement system has been remarkably 'industrious'.

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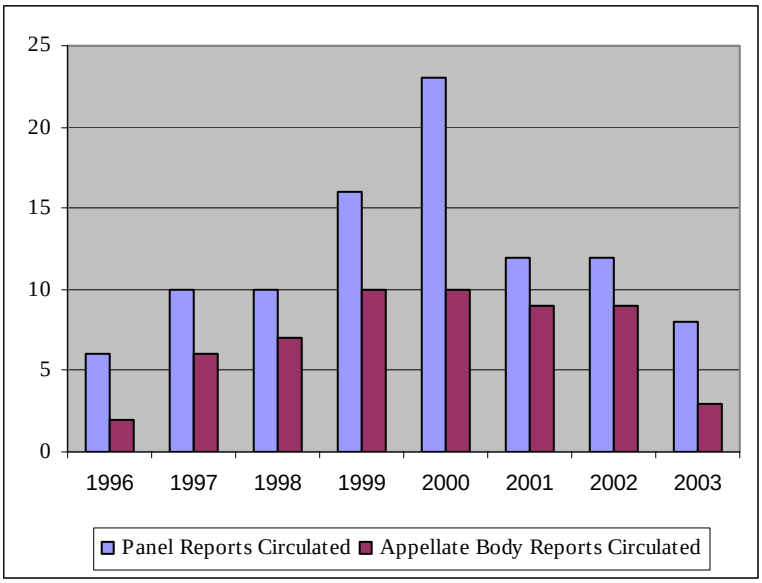
[39] See www.WorldTradeLaw.net, visited on 18 July 2003. Covered agreements under which less than 5 disputes where brought to the WTO are not included in this graph. E.g., the disputes under the *Agreement on Public Procurement*.

[40] See www.WorldTradeLaw.net, visited on 2 November 2003. Not included are 4 panel reports in cases where a mutually agreed solution was reached. Also not included is the Appellate Body Report in *India – Measures Effecting the Automotive Sector ('India – Autos')*, WT/DS146/AB/R, adopted 05 April 2002 in which the appeal was withdrawn.

[41] 16 arbitration awards under Article 21.3(c) of the DSU on the reasonable period of time for implementation, not including the Award in *United States - Definitive Safeguards Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea ('US - Line Pipe')*, WT/DS202/17, circulated 26 July 2002 in which the parties reached an agreement on the reasonable period of time for implementation; 7 arbitration decisions under Article 22.6 of the DSU on the suspension of concessions or other obligations; and 1 arbitration award under Article 25 of the DSU. See www.WorldTradeLaw.net, visited on 2 November 2003.

Figure 7: Number of reports – trend 1995-2003[42]



The number of panel reports peaked in 2000 (with 23 reports), an exceptional year partly reflecting the high number of requests for consultations in 1997. The number of panel reports has dropped considerably since 2001 and is now around 12 per year. The number of Appellate Body reports peaked in 1999 and 2000 (with 10 reports) but has remained at approximately that level since then.

4. PROPOSALS FOR THE REFORM OF WTO DISPUTE SETTLEMENT

The WTO system for resolving trade disputes between WTO Members has been, in many, respects a remarkable success. However, the current system can undoubtedly be further improved. This section first briefly discusses past and current attempts to amend the dispute settlement system, from the DSU review (1998-1999) to the current negotiations on the DSU in the context of the Doha Development Round. It then examines a number of key proposals of Members for institutional, procedural and systemic changes to the DSU currently under negotiation. This section concludes with an analysis of the main challenge to the WTO dispute settlement system, i.e., the imbalance in terms of effectiveness and impact between the political, rule-making bodies

[42] For the data, see www.WorldTradeLaw.net, visited on 2 November 2003.

and processes *and* the quasi-judicial, dispute settlement bodies and process of the WTO.

4.1. From DSU Review to DSU Negotiations

4.1.1. The DSU Review and Beyond

As agreed at the time of the adoption of the *WTO Agreement* in 1994, the WTO Members *reviewed* the DSU in 1998 and 1999.[43] While at the start of this review, Members expressed the view that the dispute settlement system was working satisfactorily, they nevertheless made a large number of proposals and suggestions for further improvement of the system. After January 1999, most Members were convinced that – if anything – the review should address and resolve the 'sequencing' issue concerning the relationship between Articles 21.5 and 22 of the DSU, a serious systemic problem that had then just surfaced. However, despite the best efforts of Members, the DSU review was concluded in July 1999 without agreement on any amendment to the DSU. Discussions on amendments to the DSU continued on an informal basis in the run-up to the Seattle Session of the Ministerial Conference in December 1999. These discussions resulted in a proposal for reform to the Ministerial Conference by a group of developed country and developing country Members, including the European Communities but without the United States.[44] While addressing also a number of minor technical issues, this proposal focused primarily on resolving the 'sequencing' issue. At the Seattle Session of the Ministerial Conference, agreement on this proposal might have been possible, but fell victim to the overall failure of that Session.[45]

4.1.2. The Doha Development Round and DSU Negotiations

In 2000 and 2001, informal efforts outside the DSB to reach agreement on amendments to the DSU were continued. These efforts resulted in October 2001 in a revised proposal for amending the DSU tabled by a group of 14 WTO Members, 'chaired' by Japan but not including the European Communities or the United

[43] Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes, published in The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations (Cambridge University Press, 1999), 465.

[44] See WT/MIN(99)/8.

[45] The only issue of disagreement left was the "carousel" retaliation issue.

States.[46] This proposal again focused on the 'sequencing' issue but also addressed the time-frames of panel proceedings, third party rights and the 'carousel' retaliation issue. However, Members failed to reach agreement on this proposal.

In November 2001, Members decided, at the Doha Session of the Ministerial Conference, to open formal negotiations on the DSU in January 2002.[47] These negotiations, based on the work on DSU reform done so far as well as on any additional proposals by Members, are currently still under way.[48] The Doha Ministerial Declaration clearly states that the negotiations on the DSU will not be part of the single undertaking — i.e. that they will not be tied to the overall success or failure of the other negotiations mandated by the Ministerial Declaration. As the improvement of the dispute settlement system is in the interest of all Members, it was considered inappropriate to make the DSU negotiations part of the give and take of the overall negotiations. The desire to keep the DSU negotiations 'separate' from the rest of the Doha Development Round, is also reflected in the time frame for the DSU negotiations. Unlike the Doha Development Round, which is to be concluded in January 2005, the deadline for the DSU negotiations was initially set at May 2003.[49]

The negotiations on the DSU were conducted by the Special Session of the DSB, established for that purpose by the TNC on 1 February 2002. Between February 2002 and May 2003, the Special Session of the DSB met formally 13 times to carry out negotiations on the DSU. In addition, it also met many times informally. While the prevailing view of Members was that 'the DSU has generally functioned well to date', in total 42 proposals for clarifications and amendments to the DSU were submitted.[50] These proposals touched on almost all DSU provisions and were submitted by developed country as well as developing country Members.

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[46] Proposal to Amend Certain Provisions of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) pursuant to Article X of the *Marrakesh Agreement Establishing the World Trade Organization*, Submission by Bolivia, Canada, Chile, Colombia, Costa Rica, Ecuador, Japan, Korea, New Zealand, Norway, Peru, Switzerland, Uruguay and Venezuela for Examination and Further Consideration by the General Council, WT/GC/W/410/Rev. 1, dated 26 October 2001.

[47] Para. 30 of the Ministerial Declaration, adopted 14 November 2001, WT/MIN(01)/DEC/1, dated 20 November 2001.

[48] Members have been asked, however, to re-submit any proposals they may have made in the past and they still want to be considered.

[49] Ministerial Declaration, WT/MIN(01)/DEC/1, dated 20 November 2001, para. 30

[50] Special Session of the Dispute Settlement Body, *Report by the Chairman to the Trade Negotiations Committee*, TN/DS/9, dated 6 June 2003, para. 3.

Unsurprisingly, the major users of the dispute settlement system, such as the United States, the European Communities, Canada, India and Brazil, all tabled proposals for reform. Of these proposals, the proposal by the European Communities was undoubtedly the most elaborate and far reaching. Surprisingly, however, also Members, that have not used the dispute settlement system to date, tabled proposals for reform. Note in this respect, the proposal by the African Group, the proposal by the Group of Least-Developed Country Members (the 'LDC Group'), the proposals by Jordan and Kenya. Also noteworthy are the proposals for reform submitted by the 'new' Members, China and Chinese Taipei.

Due to the large number and the complexity of the proposals for reform, it took until the end of March 2003 merely to complete an initial review of the proposals.[51] The Chairman of the Special Session of the DSB, Ambassador Péter Balás, subsequently put forward draft legal texts in April 2003.[52] This work eventually culminated in the so called 'Chairman's Text', issued on 16 May 2003.[53]

The 'Chairman's Text' contained proposals for reform on a significant number of issues, including:

- the extension of third party rights;
- improved conditions for Members seeking to be joined in consultations;
- the introduction of remand and interim review in appellate review proceedings;
- the 'sequencing' issue and other problems concerning the suspension of concessions or other obligations;
- the enhancement of compensation as a temporary remedy for breach of WTO law;
- the strengthening of notification requirements for mutually agreed solutions; and
- the strengthening of special and differential treatment for developing country Members.[54]

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[51] The WTO Secretariat made a very useful compilation of the proposals made by the Members. This compilation is contained in Job(03)/10/Rev.3.

[52] The draft legal texts were contained in the so-called 'Framework Document', which can be found in Job(03)/69/Rev.2.

[53] The 'Chairman's Text' can be found in Job(03)/91.

[54] Special Session of the Dispute Settlement Body, *Report by the Chairman to the Trade Negotiations Committee*, TN/DS/9, dated 6 June 2003, para. 5.

In the absence of a sufficiently high level of support, other proposals by Members were not included in the 'Chairman's Text'. These 'rejected' proposals included proposals on:

- accelerated procedures for certain disputes;
- a list of permanent panelists or a permanent panel body;
- increased control of Members over panel and Appellate Body reports;
- the treatment of *amicus curiae* briefs;
- collective retaliation and monetary retaliation.

During the intensive discussions on the 'Chairman's Text' at the end of May 2003, Members generally welcomed this document. However, in spite of a number of amendments, they were eventually unable to agree to the proposals for reform it contained.[55] Certain Members had conceptual problems with some of these proposals or objected to the fact that other proposals had been excluded from the 'Chairman's Text'.[56]

Members were thus unable to meet the May 2003 deadline for the DSU negotiations provided for in the Doha Ministerial Declaration. While there was general recognition of the need for the Special Session of the DSB to continue its work, Members were divided over whether further work should build on the Chairman's Text only *or* on other proposals by Members as well. At its meeting on 24 July 2003 the General Council, acknowledging the fact that Members needed more time to conclude the negotiations on the DSU, agreed to extend the negotiating mandate of the Special Session of the DSB by one year, to May 2004.[57]

4.2. Proposals for DSU Reform

Among the proposals for DSU reform currently on the negotiating table, one must distinguish between proposals with respect to:

- the institutions of WTO dispute settlement;
- the proceedings of WTO dispute settlement; and

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[55] The amended version of the 'Chairman's Text' can be found in annex to Special Session of the Dispute Settlement Body, *Report by the Chairman to the Trade Negotiations Committee*, TN/DS/9, dated 6 June 2003.

[56] Special Session of the Dispute Settlement Body, *Report by the Chairman to the Trade Negotiations Committee*, TN/DS/9, dated 6 June 2003, paras.10 and 11.

[57] On 16 and 17 October 2003, the Special Session of the DSB met for the first time since May 2003 to continue the negotiations on the reform of the DSU. See TN/DS/W/59, dated 14 October 2003.

- systemic issues, such as transparency of WTO dispute settlement, the *amicus curiae* brief issue and special and differential rights for developing country Members.

This section will briefly discuss the most significant of these proposals. Some of these proposals were included in the 'Chairman's Text', indicating a wide support among Members. Other proposals discussed below were not included in the 'Chairman's Text' but nevertheless deserve attention as these proposals indicate how the WTO dispute settlement system may develop in the future.

4.2.1. Key proposals with respect to the institutions of WTO dispute settlement

A far reaching proposal not included in the 'Chairman's Text' is the proposal by the European Communities to move from the current system of *ad hoc* panelists to a system of permanent panelists.[58] According to the European Communities such change will lead to faster procedures and increase the quality of the panel reports. In the opinion of the European Communities, there is currently a growing quantitative discrepancy between the need for panelists and the availability of qualified *ad hoc* panelists. Not only is the number of disputes much higher than under the old GATT, the actual conduct of a dispute settlement procedure has become much more sophisticated than before and has substantially increased the workload of panelists. Also the substance of the cases, both from a factual and a legal point of view, has become significantly more complex. For the European Communities, it is, therefore, necessary to introduce a system of permanent panelists. Under the proposal by the European Communities, panels shall be composed of individuals included on a roster of permanent panelists established by the DSB.[59] The panelists shall be appointed by the Director-General on a random basis within 5 days from the establishment of the panel. The parties may agree, however, at the time of the establishment of the panel that the panel may include two individuals from outside the roster with particular expertise on the subject matter of the dispute. The chairman of the panel must always be an individual included in the roster of permanent panelist. If within 10 days from the establishment of the panel, the parties have not agreed on the panelists from outside the roster or

[58] Communication from the European Union, TN/DS/W/1, dated 13 March 2002, 3, and Communication from the European Union, TN/DS/W/38, dated 23 January 2003, 3.

[59] The number of panelists is for the DSB to decide but the European Communities has suggested a number ranging from 16 to 25 panelists.

the Director-General has not been requested to nominate such panelist from outside the roster, the panelists shall be drawn from the roster by the Director-General on a random basis. Under the proposal of the European Communities, the DSB shall include persons on the roster for six-year terms, non-renewable. The roster shall be broadly representative of membership in the WTO. This radical proposal, which if adopted would constitute another significant step in the process of 'judicialisation' of WTO dispute settlement, has received little open support to date. One concern of Members is the additional budgetary cost of a roster of permanent panelists. There currently seems to be more support for a less radical proposal by Thailand for a 'roster of panel chairs' comprised of individuals who may be appointed as chair of a panel by lot.[60] However, also this proposal was not included in the Chairman's Text.

With regard to the Appellate Body, and in particular, to ensure the capability of the Appellate Body to meet its workload, the European Communities has suggested the DSB should be given the power to modify, when necessary, the number of Appellate Body Members, now set at 7 by Article 17.1 of the DSU.[61] This proposal has been included in the 'Chairman's Text'.[62] The European Communities as well as India have proposed to appoint Appellate Body Members for a non-renewable term of six years rather than a renewable term of four years.[63] However, this proposal has not been included in the 'Chairman's Text'.

4.2.2. Key proposals with respect to the proceedings of WTO dispute settlement

A number of Members, including the European Communities, have proposed that the parties to a dispute would have the authority to extend the time limits set forth in the DSU by mutual agreement.[64]

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60 Communication from Thailand, TN/DS/W/ 31, dated 22 January 2003, 2.

61 Communication from the European Union, TN/DS/W/1, dated 13 March 2002, 12. According to the European Communities, it would also appear 'desirable' - in view of the volume of the workload of the Appellate Body and on the basis of past experience - to convert the mandate of the Appellate Body Members into a full-time appointment. *Ibid*., 8.

62 Note that Thailand proposed to increase the number of the Appellate Body members by at least two to four persons (Communication from Thailand, TN/DS/W/2, dated 20 March 2002, 1).

63 Proposal on DSU by Cuba, Honduras, India, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe, TN/DS/W/18, dated 7 October 2002, 4-5; Communication from the European Union, TN/DS/W/1, dated 23 January 2003, 5.

64 Communication from the European Union, TN/DS/W/1, dated 13 March 2002, 1.

This proposal, which is clearly intended to give Members more control over dispute settlement proceedings again, is included in the 'Chairman's Text'. Proposals by Australia and China for accelerated time-frames for disputes on safeguard measures and anti-dumping actions are not included.[65]

With respect to consultations, the European Communities, Japan and China have proposed to reduce the minimum period for consultations from 60 days to 30 days.[66] However, this proposal did not receive sufficient support to be included in the 'Chairman's Text'. The LDC Group has proposed that in disputes involving least-developed country Members it should be possible to hold consultations in the capital of that Member, rather than in Geneva. This proposal has been included in the 'Chairman's Text'. Jamaica, Costa Rica and Chinese Taipei have all submitted proposal to facilitate Members to join consultations between other Members.[67] The 'Chairman's Text' includes, in this respect, wording that is largely based on the proposal by Chinese Taipei. Finally, Jordan and the European Communities have proposed that a request for consultations shall be deemed to have been withdrawn by the complainant if that party has not submitted a panel request within 12 or 18 months after the request for consultations.[68] The proposal for a time limit on consultations of 18 months has been included in the 'Chairman's Text'.

With respect to the panel proceedings, Japan and the European Communities have proposed that the DSB establishes a panel by reverse consensus at the meeting at which the panel request *first* appears as an item on the DSB's agenda.[69] Currently, the DSB can only establish a panel by reverse consensus at the meeting at which the request appears on the agenda for the second time. This proposal was included in the 'Chairman's Text'. However,

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[65] Communication from Australia, TN/DS/W/49, dated 17 February 2003, 1, and Communication from China, TN/DS/W/29, dated 22 January 2003, 2.

[66] Communication from the European Union, TN/DS/W/1, dated 13 March 2002, 9; Proposal by Japan, TN/DS/W/32, dated 22 January 2003, 9; Communication from China (Revision), TN/DS/W/51/Rev.1, dated 13 March 2003, 1.

[67] Communication from Jamaica, TN/DS/W/21, dated 10 October 2002, 2; Communication from the Seperate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, TN/DS/W/25, dated 27 November 2002, 3; Communication from Costa Rica, TN/DS/W/12, dated 24 July 2002, 2.

[68] Communication from Jordan, TN/DS/W/43, dated 28 January 2003, 10; and Communication from the European Union, TN/DS/W/1, dated 13 March 2002, 12, and Communication from the European Union, TN/DS/W/38, dated 23 January 2003, 27.

[69] Communication from the European Union, TN/DS/W/1, dated 13 March 2002, 5, and Communication from the European Union, TN/DS/W/38, dated 23 January 2003, 4.

reflecting a proposal by China, the 'Chairman's Text' provides that in cases against developing country Members the establishment of the panel will be postponed to the next DSB meeting if the developing country Member so requests.[70] Costa Rica and the African Group have proposed a significant extension of the rights of third parties in panel proceedings.[71] The 'Chairman's Text' contains a proposal for allowing third parties to participate in all substantive panel meetings and to receive a copy of all written submissions of the parties to the panel. With respect to the non-confidential summary of the submission which parties must provide at the request of any WTO Member, it has been proposed to require that such non-confidential summary must be provide within 15 days of the request. This proposal was taken up in the 'Chairman's Text'. Not included in the 'Chairman's Text' was a proposal by Mexico for an interim relief procedure in case the measure at issue in a dispute is causing or threatening to cause harm which would be difficult to repair.[72]

With respect to appellate review proceedings, the United States and Chile have proposed, in a joint proposal, to introduce interim review in appellate review proceedings.[73] They also proposed that the time frame for appellate review be extended from maximum 90 days to maximum 120 days.[74] Both proposals are reflected in the 'Chairman's Text'. The European Communities submitted a proposal to introduce a remand procedure, under which any party can request within 10 days after the adoption of the Appellate Body Report the DSB to remand to the original panel those issues on which the Appellate Body could not rule.[75] The 'Chairman's Text' incorporates, to a large degree, this proposal of the European Communities. A proposal of Jordan to give the Appellate Body itself remand authority was not retained.[76]

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[70] Communication from China (Revision), TN/DS/W/51/Rev.1, dated 13 March 2003, 1.

[71] Communication from Costa Rica, TN/DS/W/12, dated 24 July 2002; Proposal by the African Group, TN/DS/W/15, dated 25 September 2002, 4.

[72] Proposal by Mexico, TN/DS/W/23, 4.

[73] Textual Contribution by Chile and United States, TN/DS/W/52, dated 14 March 2003, 1.

[74] Textual Contribution by Chile and United States, TN/DS/W/52, dated 14 March 2003, 1.

[75] Communication from the European Communities, TN/DS/W/38, dated 23 January 2003, 6.

[76] Communication from Jordan, TN/DS/W/43, dated 28 January 2003, 6. In May 2003 however, Jordan replaced its proposal to grant the Appellate Body remand authority with a proposal to provide a remand procedure similar to the remand procedure proposed by the European Communities. (Communication from Jordan, TN/DS/W/56, dated 19 May 2003, 2)

The LDC Group and the African Group have proposed that in panel and Appellate Body reports, each panelist and each Appellate Body Member shall deliver a fully reasoned separate opinion on the issues and make findings stating clearly the party which has prevailed.[77] The majority opinion shall be the decision of the panel or the Appellate Body. These proposals are not reflected in the 'Chairman's Text'. The same is true for a proposal by Chile and the United States that the DSB may by consensus decide *not* to adopt a specific finding of the panel or the Appellate Body or not to adopt the basic rationale behind a specific finding.

With respect to the implementation and enforcement of recommendations and rulings, the European Communities and Japan have proposed the inclusion of an Article 21 *bis* on 'Determination of Compliance'.[78] According to this proposed Article 21 *bis*, disputes on the existence or WTO-consistency of implementing measures will be heard by a compliance panel consisting of the members of the original panel. While the procedure set forth in Article 21 *bis* reflects, to a large extent, the current practice under Article 21.5, it elaborates and clarifies the latter provision considerably. The European Communities and Japan have also proposed the amendment of Article 22 of the DSU. According to the amended Article 22 of the DSU, the complainant may only request the DSB authorisation to retaliate *after* the compliance panel or the Appellate Body finds that the respondent has failed to bring the measures found to be WTO-inconsistent into compliance with the *WTO Agreement*. Both proposals (on Article 21 bis and on Article 22) have been included in the Chairman's Text. If adopted, the amended Article 22 would resolve the 'sequencing' issue in an unambiguous manner.

The European Communities and Japan have also proposed a procedure for the termination of retaliation measures. According to this proposed procedure, it is for the respondent to request the DSB for the termination of the authorisation to retaliate on the grounds that it has taken the necessary WTO-consistent measures.[79] This proposal on a termination procedure is included in the 'Chairman's Text'. A proposal by Mexico to allow Members to transfer, i.e. to

[77] Proposal by the African Group, TN/DS/W/15, dated 25 September 2002, 11, and Proposal by the LDC Group, TN/DS/W/17, dated 9 October 2003, 5.

[78] Communication from Japan, TN/DS/W/22, dated 28 October 2002, 4, and Communication from the European Communities, TN/DS/W/38, dated 23 January 2003, 27.

[79] Communication from Japan, TN/DS/W/22, dated 28 October 2002, 6, and Communication from the European Communities, TN/DS/W/38, dated 23 January 2003, 7.

sell, the right to suspend concessions or other obligations has not been retained in the 'Chairman's Text'. The same is true for proposals by the African Group and the LDC Group for collective retaliation, i.e. the suspension of concessions or other obligations by all Members, rather than only by the complainant(s) in the dispute.[80] Other proposals on, for example, the withdrawal of Membership rights or compulsory monetary compensation in case of failure to implement, were no longer discussed in the latter part of the negotiations.

4.2.3. Key proposals with respect to systemic issues.

With respect to the transparency of the WTO dispute settlement system, the European Communities and Canada have submitted a proposal to allow panel meetings and Appellate Body hearings to be opened to the public (if the parties to the dispute agree).[81] These proposals are not included in the 'Chairman's Text'.

With respect to the *amicus curiae* brief issue, the African Group and India have proposed language that would explicitly prohibit panels and the Appellate Body to accept and consider unsolicited information and advice.[82] The European Communities has made a detailed proposal to give panels and the Appellate Body the right to accept and consider unsolicited information and advice provided that this information or advice is directly relevant to the factual and legal issues under considerations.[83] None of the proposals on *amicus curiae* briefs was retained in the 'Chairman's Text'.

Finally, with respect to special and differential treatment for developing country Members, a number of specific proposals have been made to 'strengthen' DSU provisions relating to special attention given to the needs of developing country Members by replacing 'should' by 'shall'. Most of these proposals have been taken up in the 'Chairman's Text'. Also proposals to strengthen the

[80] Proposal by the African Group, TN/DS/W/15, dated 15 September 2002, 3, and Proposal by the LDC Group, TN/DS/W/17, dated 9 October 2003, 4.

[81] Communication from the European Communities, TN/DS/W/1, dated 13 March 2003, 6, and Communication from Canada, TN/DS/W/41, dated 24 January 2003, 5.

[82] Proposal by the African Group, TN/DS/W/15, dated 15 September 2002, 5, and Proposal on DSU by India et. al., TN/DS/W/18, dated 7 October 2002, 2.

[83] Communication from the European Communities, TN/DS/W/1, dated 13 March 2002, 11. Note that the European Communities in fact proposes to include in the DSU a procedure very similar to the Additional Procedure adopted by the Appellate Body in *EC – Asbestos.*

rights of developing country Members regarding the prolongation of consultations, composition of panels and the timetable for panel proceedings, panel reports and assistance by the WTO Secretariat were all included in the 'Chairman's Text'. This is also the case for the proposal to make it possible for panels and the Appellate Body to award – upon request – an amount for litigation costs.[84] Not included in the 'Chairman's Text', however, are:

- a proposal by the African Group to establish a 'WTO Fund on Dispute Settlement' to facilitate the effective utilisation of the WTO dispute settlement system by developing and least-developed country Members;[85] and
- a proposal by China to require that developed country Members exercise due restraint in cases against developing country Members and limit the number of cases brought against to particular developing country Member to maximum two in one calendar year.[86]

5. CONCLUSION

To date, the negotiations of the reform of the WTO dispute settlement system have not yet lead to any agreement on the amendment of the DSU. The proposals for amendment contained in the 'Chairman's Text' are proposals on which a large group of Members can agree and which will most likely be part of the agreement on the amendment of the DSU eventually reached. Many of these proposals are to be welcomed as they will strengthen the WTO dispute settlement system. This is the case, for example, for the proposed amendments to Articles 21 and 22 of the DSU resolving the 'sequencing issue', the proposal for extending the rights of third parties, the proposal allowing for a faster establishment of panels, the proposal introducing a remand procedure and the proposal strengthening provisions for special and differential treatment of developing country Members. Other proposals contained in the 'Chairman's Text', such as the introduction of 'interim review' in the appellate review procedure, are, in my opinion, less fortunate as they go against the process of 'judicialisation' of WTO dispute settlement. A large number of

[84] While this proposal does not exclude that panels and the Appellate Body would award litigation costs to developed country Members, it is clearly intended to facilitate the use of the dispute settlement system by developing country Members. See in this respect, the Communication from China, TN/DS/W/29, dated 22 January 2003, 1-2.

[85] Proposal by the African Group, TN/DS/W/15, 25 September 2002, 2.

[86] Communication from China, TN/DS/W/29, dated 22 January 2003, 1.

DSU reform proposals, made by Members, were not included in the 'Chairman's Text'. With regard to a number of proposals, the exclusion is to be applauded. This is the case, for example, for the proposal to require each panelist and each Appellate Body Member to deliver a fully reasoned separate opinion on all issues in a dispute. Such a development would severely limit the ability of panels and the Appellate Body to contribute to the development of WTO law. With respect to other proposals not included in the 'Chairman's Text', it should be noted that their time has not come yet. This is the case, for example, for the proposal regarding permanent, instead of *ad hoc,* panellists and the proposal to open hearings of panels and the Appellate Body to the public. If the WTO dispute settlement system wants to retain its current effectiveness and credibility, the system will have to be amended along the lines of these proposals.

While the WTO dispute settlement system is definitely still open to improvement, it currently already constitutes an effective and efficient system for the peaceful resolution of disputes. It brings a degree of security and predictability, in international trade, to all its Members and their citizens. According to Peter Sutherland, a former WTO Director-General and now Chairman of BP and Goldman Sachs International, the WTO dispute settlement system is 'the greatest advance in multilateral governance since Bretton Woods'.[87] However, there is a genuine danger that Members overburden, and thus undermine, the dispute settlement system as a result of their inability to agree on (clearer) rules governing politically sensitive issues concerning international trade. Since 1995, the WTO dispute settlement system has been severely put to the test by politically sensitive disputes over issues touching on public health (*EC – Hormones* and *EC – Asbestos*), environmental protection (*US – Gasoline* and *US – Shrimp*), cultural identity (*Canada – Periodicals*), taxation (*US – FSC*) and foreign and development policy (*US – Havana Club* and *EC – Bananas III*). So far, the WTO dispute settlement system has performed well in handling these and other sensitive disputes. However, the task may steadily become more difficult as the WTO is drawn more deeply into politically controversial issues. Some observers fear the system may soon be overwhelmed. Claude Barfield of the Washington-based American Enterprise Institute has stirred keen debate in the international trade policy community by suggesting that the WTO dispute settlement system is 'substantively and politically

[87] As quoted by Guy de Jonquieres, in 'Rules to fight by', *Financial Times*, 24 March 2002.

unsustainable'. Barfield suggests governments may only continue to obey its rulings if its powers are curbed.[88] While disagreeing with Barfield's prescription, others have also warned WTO Members against relying too heavily on adjudication, instead of negotiated solutions, to settle disputes. Claus-Dieter Ehlermann, former chairman of the Appellate Body has noted that:

> … the system is threatened by "dangerous imbalances" between the WTO's highly efficient judicial function and far less impressive rule-making record.

To preserve the effectiveness and efficiency of the WTO dispute settlement system, Members will need to improve the ability of the political institutions of the WTO to address the major issues confronting the multilateral trading system.

[88] Claude Barfield, Free Trade, Sovereignty, Democracy. The Future of the World Trade Organisation (The AEI Press, 2001), 245 p.