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THE REVIEW OF THE WTO UNDERSTANDING ON DISPUTE SETTLEMENT: SOME REFLECTIONS ON THE CURRENT DEBATE

KIM VAN DER BORGH^t*

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INTRODUCTION

“Whoever speaks of dispute settlement in GATT must start from nearly nothing.”¹ It is true enough that after the International Trade Organization, with a comprehensive chapter on dispute settlement, was voted into an early grave by the United States Congress, the General Agreement on Trade and Tariffs (“GATT”) was left as a multilateral treaty, provisionally applied with no veritable organiza-

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1. Pierre Pescatore, *The GATT Dispute Settlement Mechanism: Its Present Situation and its Prospects*, 10 J. INT’L ARB. 27, 27 (1993).

tional structure and only two Articles on dispute settlement.² From these two Articles, Articles XXII and XXIII of the GATT, a system for the settlement of disputes developed incrementally through a mix of creativity and necessity.³ The most fundamental change occurred during the Uruguay Round, which spawned the rules of the new dispute settlement mechanism ("DSM") found in the Understanding on Dispute Settlement ("DSU").⁴ The DSU changed the nature of the dispute settlement process from a diplomatic to a legalized process and from a power-based to a rule-based procedure.⁵ With the new World Trade Organization ("WTO"), the DSM introduced a series of features to deal with the problems of the past. There is now a "right to a panel," and reports are adopted "as of right" unless there is a consensus in the Dispute Settlement Body ("DSB") to the contrary—the so-called negative or inverted consensus rule. Further, the DSB introduced strict deadlines to settle disputes within a time-frame acceptable to the business community. Finally, a standing Appellate

2. See generally JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 163-192 (1969) (surveying and analyzing Articles XXII and XXIII); Paul Demaret, *The Metamorphoses of GATT: From the Havana Charter to the World Trade Organization*, 34 COLUMBIA J. TRANSNAT'L L. 123, 125-33 (1995) (discussing the evolution of the GATT from 1947 to its present structure).

3. See William R. Sprance, *The World Trade Organization and United States' Sovereignty: The Political and Procedural Realities of the System*, 13 AM. U. INT'L L. REV. 1225, 1236-38 (1998) (describing the deficiencies in clarity of the early GATT dispute settlement system, which led to the modification of Articles XXII and XXIII).

4. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 353; 33 I.L.M. 1125 (1994) [hereinafter DSU].

5. See generally Judith Hippler Bello, *The WTO Dispute Settlement Understanding: Less is More*, 90 AM. J. INT'L L. 416, 416-18 (1996) (discussing the concessional and non-binding nature of panel decisions); Judith H. Bello & Alan F. Holmer, *U.S. Trade Law and Policy Series No. 24: Dispute Resolution in the New World Trade Organization: Concerns and Net Benefits*, 28 INT'L L. 1095, 1096-03 (1994) (relating the United States' involvement in changing the dispute settlement process and its current concerns regarding this new framework); J.G. Castel, *The Uruguay Round and the Improvements to the GATT Dispute Settlement Rules and Procedures*, 38 INT'L. & COMP. L.Q. 834, 834-49 (1989); Thomas Dillon Jr., *The World Trade Organization: A New Legal Order for World Trade?*, 16 MICH. J. INT'L L. 349 (1995) (discussing the evolution of the WTO and its dispute settlement mechanism).

Body presides to ensure the legal consistency of the reports and of the jurisprudence in general.

In short, the DSU created a legalized, predictable, and reliable system for settling disputes. This system is now under review, pursuant to a decision of the WTO Members in 1994.⁶ This decision invites “the Ministerial Conference to complete a full review of dispute settlement rules and procedures under the World Trade Organization within four years . . . and to take a decision . . . whether to continue, modify or terminate such dispute settlement rules and procedures.”⁷ The Review was scheduled for completion in 1998, but as a result of the numerous proposals submitted, the deadline for the review was extended until the end of July 1999.⁸

I. IS EVERYBODY HAPPY?

If there is one point of agreement among the WTO Members who have utilized the dispute settlement procedure, it is their general satisfaction with the system, which they do not hesitate to express in their submissions for the review. They praise its role in strengthening the credibility and predictability of the multilateral trading system, the impartial and objective manner in which disputes are settled, and the positive and satisfactory solutions found. As a consequence, the proposals stress that there is no need for a major overhaul of the system. Instead, they address inadequacies and technical issues, clarifying provisions, fine-tuning, and enhancing the efficacy of the system. Major issues for these WTO Members include the strengthening of the consultation phase, eradicating the problems involved with the establishment of a panel, and clarifying the Appellate Body’s position. Some adjustments to the time limits also are discussed generally. Finally, many WTO Members in this group stress

6. See Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, 33 I.L.M. 1125, 1259, *reprinted in* JOHN H. JACKSON, 1995 DOCUMENTS SUPPLEMENT TO LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 446 (3d ed. 1995).

7. *Id.* at 1260.

8. See International Communique on Trade and Sustainable Development, *Decision of the General Council of 8 Dec. 1998*, 2 BRIDGES, Nov.-Dec. 1998, at 9, 9 (visited Mar. 23, 1999) <<http://www.ictsd.org>> (noting the surprising amount of proposals submitted, which made an extension until the end of July 1999 necessary).

the importance of public participation and transparency of the system in order to enhance “public understanding of the benefits of the multilateral trading system in order to build support for it and agree to work towards that end.”⁹

However, to conclude that there is a general satisfaction among all WTO Members that the dispute settlement is working well and is fair for all WTO Members would be a mistake. While developed countries can take an active part in the dispute settlement process, the majority of WTO Members are developing countries that in many cases have neither the financial means nor the expertise to effectively protect their rights under the covered agreements. Even if a favorable report is adopted, the developing nations have no effective way of enforcing its recommendations, as retaliation is likely to hurt them more than a prospectively targeted developed country. Therefore, on the wish-list of the developing countries are better funding for the legal assistance, access to a defense counsel, and certainly an enforcement mechanism that is equally effective for developing countries.

Numerous non-government organizations (“NGOs”) are also unsatisfied with the current system. These organizations do not have direct access to the dispute settlement process. Nevertheless, the causes for which they fight—such as the environment, labor standards, economic development, and consumer rights—are as important as the free trade principles that form the basis of the WTO. As it stands, one should not expect the WTO to be able to forcibly defend these causes under the current agreements. The WTO agreements are essentially free trade agreements. The conclusion of some critics that, “the dispute settlement rules subordinate or diminish non-trade-policy objectives,”¹⁰ only reveals a truism that is a result of the state of affairs of the current rules. The solution is not a frontal attack on the WTO, but the creation of relevant rules by states and international organizations. In the words of WTO’s Director-General Renato Ruggiero:

9. WTO Secretariat, *May 1998 Ministerial Conference, 52nd Session*, WTO Doc. WT/MIN(98)DEC/1 (May 20, 1998).

10. Bello, *supra* note 6, at 416; see also Constance Kann, *Review of the WTO Dispute Settlement System—A Sneak Preview?*, 4 INT’L TRADE & REG., Aug. 1998, at 152.

In all this we must also be clear that every global issue should have its own solution. Environmental and social problems need environmental and social answers—and seeking solutions through trade rules is not a substitute. And those solutions should be multilaterally agreed in the proper forum—in coordination with trade rules—so that different policies can reflect common values and be mutually supportive. The reality is that many of the existing problems the WTO system faces with environmental and other objectives do not lie in differences of values or of priorities, but in the lack of multilateral rules in these areas—which in turn calls for an impossible blessing of unilateral and extraterritorial rules.¹¹

NGOs, especially environmental NGOs, have mounted a well-organized campaign to gain better access to the WTO and the DSM in particular. Their actions have been successful in several respects: first, they have increased public awareness; second, they were invited by the United States to submit their views on the DSU Review, and; third, they succeeded in convincing the Appellate Body to accept the concept of *amicus curiae* briefs.¹² For the Review, the NGOs are looking for greater transparency in the form of open hearings, and earlier removal of restrictions on parties' submissions—or a public summary thereof. To ensure the future of *amicus curiae* briefs in the DSM, they must become a formal procedural element in the DSU.

II. THE REVIEW PROPOSALS

A. TRANSPARENCY AND PUBLIC PARTICIPATION

The main request from NGOs is greater transparency of the DSM to give more information to NGOs and civil society. The aim is two-fold: first, they wish to provide NGOs with more information sooner so they can participate usefully, both directly and indirectly, in the

11. Renato Ruggiero, *The Next 50 Years: Challenges and Opportunities for the Multilateral Trading System* (last modified June 11, 1998) <<http://www.wto.org/wto/speeches/hamburg.htm>>.

12. See Report of the Appellate Body on United States-Import Prohibition of Certain Shrimp and Shrimp Products, Oct. 12, 1998, WTO Doc. WT/DS58/AB/R, para. 110 [hereinafter *Shrimp-Turtle*] (“We find, and so hold, that the Panel erred in its legal interpretation that accepting non-requested information from non-governmental sources from non-governmental sources is incompatible with the provisions of the DSU.”).

defense of the causes for which they stand, and, second, they want to heighten public awareness to increase the legitimacy of the system.¹³ Important WTO Members, such as the United States and the European Communities, support such changes.

In furtherance of these goals, three issues emerge: the removal of restrictions on documents, the mandatory review of *amicus curiae* briefs, and the conversion to open hearings. The United States and the European Communities propose all three. Many WTO Members have serious reservations about greater transparency, however, because they fear that it would harm the intergovernmental character of the WTO, and would diminish the control of the parties over the dispute settlement process. Dispute settlement is still regarded by many WTO Members as an arbitral system, despite the fact that it is highly judicialized.¹⁴ They fear that the interests of some pressure groups will gain more importance to the detriment of the system as a whole.¹⁵ Some apprehension also exists as to the protection of business or commercial secrets.

Article 18.2 of the DSU states that submissions of the parties to panels or Appellate Body proceedings are confidential, but that they can decide to make their submissions public.¹⁶ In case the submissions remain confidential, the same Article provides for the possibility of making public summaries. This possibility, however, has remained largely unused. It is suggested that secrecy restrictions in parties' submissions should be removed as soon as possible, or at least from the non-confidential parts thereof. Moreover, a strict deadline is suggested for the public summary of confidential submissions. This demand for more information sooner is not limited to the DSM, but is part of a larger debate in the WTO, in order to involve civil society in the WTO's work as public hostility towards this or-

13. See John H. Jackson, *Due Process in the WTO Dispute Settlement Body*, Address at the 2nd Annual Conference of the World Trade Law Association: Liberalisation and Protectionism in the World Trading System (May 15, 1998).

14. See, e.g., Debra Steger, *Overview of WTO Dispute Settlement*, Address at the 2nd Annual Conference of the World Trade Law Association: Liberalisation and Protectionism in the World Trading System (May 15, 1998).

15. See Jeffrey L. Dunoff, *The Misguided Debate over NGO Participation at the WTO*, 1 J. INT'L ECON. L. 433, 433-57 (1998).

16. See DSU, *supra* note 4, art. 18.2.

ganization grows. Many see the WTO as protecting economic globalization without regard for social, cultural, or environmental concerns of domestic policies. For similar reasons, open hearings would serve to increase the public's trust in the system, and take away any unfounded suspicions of involvement in a cover-up or a conspiracy that a non-transparent process fosters.

The Appellate Body in the *United States-Import Prohibition of Certain Shrimp and Shrimp Products* ("Shrimp-Turtle") report opens the door for *amicus curiae* briefs by interpreting the right to seek information¹⁷ through a discretionary authority, to request information or expert advice, and to consider both requested and non-requested information.¹⁸ Some WTO Members are opposed to *amicus curiae* briefs and strive to block this evolution by interpreting the right "to seek" information more as a right "to request" information, thus excluding unsolicited views.¹⁹ This interpretation is in accordance with the view that the DSM is an essentially arbitral procedure controlled by the parties.²⁰ Others look more favorably on *amicus curiae* briefs as a way to enrich the panel and the Appellate Body proceedings. Furthermore, they reject the argument that the panel or Appellate Body would be deluged and the procedure consequently delayed because the panel or Appellate Body still would decide whether or not to entertain the *amicus curiae* briefs. Moreover, they would not be bound to reply to the arguments contained therein.

B. DEVELOPING COUNTRIES

Developing countries in the GATT have fought for special rules and more favorable treatment, which they have received gradually since

17. See DSU, *supra* note 4, art. 13.

18. See *Shrimp-Turtle*, *supra* note 12, paras. 79-91 (analyzing the admissibility of three *amicus* briefs attached to the United States' submissions to the Panel and concluding that if the United States agreed with the arguments presented in these briefs then they were properly submitted).

19. See THE SHORTER OXFORD ENGLISH DICTIONARY ON HISTORIC PRINCIPLES (1970) (defining the verb to seek as "to go in search or quest of; to try to find," suggesting some form of action on the part of the panel or Appellate Body which is more in line with treaty interpretation).

20. See *supra* note 14 and accompanying text (noting that WTO members still view the dispute settlement process as arbitral in nature despite its judicial-like procedures).

the Tokyo Round.²¹ Under the current dispute settlement system a number of special rules exist for developing countries:²²

- legal assistance,²³
- guaranteed one developing country panelist (on request),²⁴
- good offices of the Director-General,²⁵ and
- allowances as to time limits.²⁶

Undoubtedly the most important change for the developing countries has been the metamorphosis of the GATT system into the WTO system of settling disputes. The current DSM is relied upon by several developing countries to enforce their legal rights under the current agreement. Contrary to the GATT system, the WTO DSM is a rule-based system that guarantees that a decision does not depend on the economic strength of the parties concerned, but on the merit of the claims. To advocate a claim effectively, however, expertise is needed in both substantive WTO law and in the procedural aspects of the DSM, something that is often lacking when developing countries are bringing a case or defending themselves before a panel. Whereas the DSU provides for assistance from the Secretariat on legal, historical, and procedural aspects,²⁷ as well as additional legal advice

21. See generally ROBERT E. HUDEC, *DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM* (1987); Kofi Oteng Kufour, *From the GATT to the WTO-The Developing Countries and the Reform of the Procedures for the Settlement of International Trade Disputes*, 31 J. WORLD TRADE, Oct. 1997, at 117.

22. See Asif H. Qureshi, *The New International Trade Dispute Settlement Framework under the Uruguay Round of Trade Negotiations*, 5 INT'L COMPANY & COMM. L. REV. 204-05 (1994); Palitha T. B. Kohona, *Dispute Settlement under the World Trade Organisation-An Overview*, 28 J. WORLD TRADE, Apr. 1994, at 22, 31-33 (1994); Fadi A. Makki, *African Countries and the WTO Dispute Settlement Mechanism*, Address at the Eighth Annual Conference of the African Society of International and Comparative Law 43-47 (Sept. 2-4, 1996); ERNST-ULRICH PETERSMANN, *The GATT/WTO DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS AND DISPUTE SETTLEMENT* 202-04 (1997); Maria Martha Ching, *Evaluating the Effectiveness of the GATT Dispute Settlement System for Developing Countries*, 16 WORLD COMPETITION 105-11 (1993).

23. See DSU, *supra* note 4, art. 27.2.

24. See *id.* art. 8.

25. See *id.* arts. 3.10, 24.2.

26. See *id.* arts. 3.10, 12.2.

27. See *id.* art. 27.1.

and assistance provided when developing countries are involved,²⁸ this has been insufficient in practice. Consequently, the foremost request from developing countries is additional support to allow them to defend their claims effectively.

The minimum request seems to be an augmentation of the staff provided for in Article 27.2 of the DSU,²⁹ currently consisting of two part-time consultants. Reportedly, Venezuela has the most far-reaching proposal with five consultants in an independent legal unit. Such a unit would ensure that developing countries receive independent advice on every aspect of the procedure without prejudice to the neutrality of the Secretariat.³⁰ Furthermore, it is suggested that a Permanent Defense Counsel be established to assist developing countries whenever cases are brought against them. Many countries have suggested that WTO budget surpluses be used to create a reserve fund to finance this Counsel.³¹

As general as the perceived lack of sufficient legal assistance is the fear for the large costs that result from the advice of law firms located in developed countries. This advice is needed by developing countries because of the lack of in-house expertise and the aforementioned inadequacies of the assistance offered under Article 27 of the DSU.³² Considerable expenditure also will be incurred as a consequence of having to collect technical, economic, scientific, and other data to support a claim. To help developing countries cover these costs, it is proposed to establish a trust fund to help finance the

28. See DSU, *supra* note 4, art. 27.2.

29. See *id.*

30. Some suspicion could be raised about a Secretariat that assists both the panels and one of the parties to the dispute. The maxim, "Justice need not only be done, it must also be seen to be done," stresses the importance of appearances. Therefore, the strict separation of both roles of the Secretariat should be made clearer. This could be done by setting up a separate legal advice division, as suggested in some Review proposals, directly responsible to the DSB or the Director-General. It could alternatively be achieved by the creation of so-called "Chinese walls," which are used in banking to separate divisions of the same department between which no sharing of information or ideas are to occur.

31. See *supra* note 25 and accompanying text (discussing a fund created by the United Nations).

32. See BHAGIRATH LAL DAS, THE WTO AGREEMENTS: DEFICIENCIES, IMBALANCES AND REQUIRED CHANGES 9-12 (1998).

costs of retaining external experts—such as lawyers and consultants. If implemented, this WTO Counsel would be similar to the Trust Fund managed by the United Nations Secretary-General and financed by voluntary contributions of various states. The United Nations Trust Fund was established to help developing countries meet the costs of litigation in the International Court of Justice.³³

Finally, developing countries face the problem of enforcing the findings of the adopted reports. The threat of retaliation is not an effective tool for these WTO Members. Whereas the DSM is a rule-based system, enforcement is only effective for those WTO Members with sufficient economic power. This problem is not new and neither are the proposed solutions.³⁴ Once again, monetary damages are suggested as well joint or collective retaliation.³⁵

C. CONSULTATIONS

In public international law, consultations are a form of negotiation that appears as a means of settling disputes.³⁶ Consultations are sometimes provided in treaties as the sole means of settling disputes. In other cases, they prescribe the first stage in a more comprehensive dispute settlement system. If the parties in the consultation fail to reach a solution, they can proceed to a form of third-party dispute settlement.³⁷ Consultations are generally regarded as an effective and flexible means of settling disputes.³⁸ Most international conflicts are settled through a form of negotiation whereby the parties hold direct discussions in order to find a solution acceptable to all the parties involved.³⁹

33. See, e.g., Peter H. F. Bekker, *International Legal Aid in Practice: The ICJ Trust Fund*, 87 AM. J. INT'L L. 659, 660-65 (describing the establishment, purpose and criteria for eligibility of the Fund).

34. See GATT, BISD 14th Supp. 18, at 139-40 (1966); ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM 42 (1993).

35. See, e.g., DAS, *supra* note 32, at 11-14, 18-21.

36. See UNITED NATIONS, HANDBOOK ON THE PEACEFUL SETTLEMENT OF DISPUTES BETWEEN STATES 10 (1992) (OLA/COD/2394).

37. See *id.*

38. See *id.* at 9.

39. See DSU, *supra* note 5, art. 11 (stating that WTO panels should give the

According to the DSU, WTO Members are under a legal obligation to enter into consultations as a first step in the WTO dispute settlement process.⁴⁰ The complaining party may request the establishment of a panel, only if these consultations fail to settle the dispute within sixty days after the date of receipt of the request.⁴¹ It is clear, however, that the DSU prefers a negotiated “solution mutually acceptable to the parties to a dispute and consistent with the covered agreements”⁴² to an outcome through panel proceedings.⁴³

The effectiveness of these consultations depends solely on the parties’ willingness “to engage in these procedures in good faith in an effort to resolve the dispute” as required by the general provisions section of the DSU.⁴⁴ WTO Members expressly affirmed their resolve to strengthen and improve the effectiveness of the consultation procedures in the DSU.⁴⁵ Practice shows, however, that not all WTO Members appear to attach the same importance to this commitment. They abuse the flexibility inherent in the system to avoid real consultations. A textual interpretation of the DSU puts no clear obligations on the complainant in this respect. It suffices for the complaining party to submit a request for consultations and possibly hold an initial meeting.⁴⁶ The only remaining requirement to request the establishment of a panel is to wait the expiry of the sixty-day period.⁴⁷ Such attitude, however, reduces the consultation phase to a mere

parties adequate opportunity to find a mutually acceptable solution).

40. *See id.* art. 4.1.

41. *See id.* art. 4.7.

42. *Id.* art. 3.7.

43. *See id.* art. 4.5 (“In the course of consultations in accordance with the provisions of a covered agreement, before resorting to further action under this Understanding, Members should attempt to obtain satisfactory adjustment of the matter.”). This “further action,” however, is no longer regarded as the hostile act it once was. *See id.*

44. *Id.* art. 3.10.

45. DSU, *supra* note 5, art. 4.1.

46. *See id.* art. 4.7. Although there is no specific sanction if the complaining party refuses to hold an initial meeting. It would of course be contrary to the general principles governing the DSU and volatile of its good faith obligations. If the defendant refuses conversely, the complainant can proceed directly to request the establishment of a panel. *See id.* art. 4.3.

47. *See id.* art. 4.7.

formality, which is a hurdle in the way of panel proceedings and is, at best, a cooling-off period.

How this evolution could be halted and how substantial debate could be encouraged in the consultation phase is a concern expressed in a number of submissions. The adjustment proposed involves increasing the obligations and thus limiting the flexibility because the existing obligations are seen as insufficient to bring parties to real consultations. Let us briefly look at the existing legal obligations of the parties under the DSU. Even though there is no obligation to reach a result,⁴⁸ the DSU does hold an obligation to employ best efforts to reach a mutually satisfactory solution.⁴⁹ Moreover, Members are required to respect certain principles in an obligation to negotiate solutions to their disputes, such as the consultations in the DSU. They include: "good faith as properly understood; sustained upkeep of the negotiations over a period appropriate to the circumstances; awareness of the other party's interest; and a persevering quest for an acceptable compromise."⁵⁰

If one of the parties was unwilling to hold consultations, this would violate both its best efforts obligation and the aforementioned principles. Furthermore, if a party adopts a negotiating position "without contemplating any modification of it,"⁵¹ this would violate Articles 4.1 and 4.2 of the DSU because they do not take into account the views and opinions of the other party.⁵² It also would vio-

48. See SIR ROBERT JENNINGS & SIR ARTHUR WATTS, *OPPENHEIM'S INTERNATIONAL LAW* 1182 (1997); BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 117-18 (1987) (discussing that only good faith and the "sincere and honest desire as evidenced by a genuine effort" are required to fulfill a legal agreement).

49. See DSU, *supra* note 5, art. 4.5 ("In the course of consultations in accordance with the provisions of a covered agreement, before resorting to former action under this Understanding, Members should attempt to obtain satisfactory adjustment of the matter.").

50. *Kuwait v. American Indep. Oil Co.*, 21 I.L.M. 976, 1014 (Perm. Ct. Arb. 1982).

51. *North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.)* 1969 I.C.J. 4, 47 (Feb. 20).

52. See DSU, *supra* note 4, arts. 4.1-4.2. Article 4.2 of the DSU requires "[e]ach Member to . . . afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of any covered agreement taken within the territory of the former." *Id.* art.

late Article 4.5 because they make no attempt to obtain a settlement.⁵³ Moreover, this position would not be in accordance with the overall aims of the dispute settlement procedure.⁵⁴

Using the consultation phase as a mere formality constitutes an evasion of a treaty obligation and is, as such, an abuse of right.⁵⁵ The consultation phase as it stands is largely unregulated and thus leaves considerable discretion to the parties.⁵⁶ This discretion, however, is not unlimited. It must be used in conformity with the general spirit of the treaty.⁵⁷ Any other use has to be qualified as an abuse of discretion.

In sum, the whole system of consultations depends essentially on the goodwill of the parties. The obligations are vague and rely heavily on good faith. Therefore, the enforcement is subsequently difficult. In the words of Professor Bin Cheng:

unless this discretion is normally exercised by every subject of law spontaneously in a bona fide manner well within the limit beyond which the exercise may be regarded as an abuse, even if the law is able ultimately to prevent certain manifest abuses, the legal system will be strained to breaking point.⁵⁸

The review proposals acknowledge the problem by introducing specific obligations that are aimed at making it possible to review the

4.2.

53. See DSU, *supra* note 4, art. 4.5 (encouraging WTO Members to "obtain satisfactory adjustment of the matter").

54. See DSU, *supra* note 5, art. 3.7 (setting forth the aim of the dispute settlement mechanism as to "secure a positive solution," which is "mutually acceptable to the parties").

55. See CHENG, *supra* note 48, at 123 (commenting that "any fictitious exercise of a right for purpose of evading either a rule of law or a contractual obligation will not be tolerated").

56. See generally, DSU, *supra* note 4, art. 4 (setting forth the terms of the consultation phase).

57. See *id.* art. 3.3 (calling for the prompt settlements of disputes and the proper balance between the rights and obligations of members); *id.* art. 3.7 (describing the aim of the dispute settlement mechanism as securing a positive solution to a dispute whereby it is mutually acceptable to the parties but also consistent with covered agreements).

58. CHENG, *supra* note 48, at 136.

consultations by the panel. For example, it recommends an obligation of holding at least two meetings. More common are requirements of written evidence, starting with the request for consultations. Article 4.4 of the DSU requires that the request is in writing and gives reasons including identification of the legal basis of the complaint. An indication of the legal basis would no longer suffice.⁵⁹ The complainant's case should be stated adequately and unambiguously. The European Communities go even further by proposing that any legal claim in the request for the establishment of a panel should be included in the request for consultations, or raised during the consultations, confirmed in writing, and followed by new consultations unless the defending party agrees otherwise.⁶⁰ These proposals set the trend for a formalization of the procedure whereby the efforts of the parties have to be evidenced in writing. Additional suggestions include written questions and answers, and the introduction of an agreed written records of the consultations. These documents should give a subsequent panel the possibility of investigating in a preliminary phase whether there has been an attempt to obtain a satisfactory adjustment of the matter in good faith. The following sanctions are proposed if a party's written submissions are found lacking: extra consultations for claims that have not been the subject of previous consultations; if a party refuses to reply to a written question, the other party could be given direct access to a panel; if an answer is found to be inadequate, the panel can request further information, and in case this is not provided proceed on "the best information available," possibly the information in the complaint.⁶¹

All these measures are aimed at strengthening the role of the consultations and forcing the parties to go through the motions of the consultative phase. The proposed measures may inspire serious criticism as to their effectiveness. For example, these proposed rules will increase the formality of the consultation process, which is by defi-

59. See DSU, *supra* note 4, art. 4.4.

60. See European Communities, Discussion Paper on the Review of the Dispute Settlement Understanding (DSU) [hereinafter EC Discussion Paper] (on file with *American University International Law Review*).

61. See *id.* (discussing how some of these sanctions are reportedly also proposed by other WTO Members).

tion an informal process.⁶² Some of the submissions address this point. The European Communities emphasize that the oral phase in the consultation should stimulate real discussion and therefore should be free of procedural formality and remain confidential.⁶³ Overall, the European Communities still remain of the opinion that consultations should remain as informal as possible. Switzerland reportedly states the consultations should be as flexible as possible. Guatemala is said to consider the consultations to be already too formalistic.

A warning also should be directed at proposals that refer to a second function of the DSU consultations. The second function would be fact-finding. Some people see this as an additional function when a mutually satisfactory solution, the first function, cannot be reached. This fact-finding function is based on a statement of the Appellate Body in the *India-Patent Protection for Pharmaceutical and Agricultural Chemical Products* case:

All parties engaged in dispute settlement under the DSU must be fully forthcoming from the very beginning both as to the claims involved in a dispute and as to the facts relating to those claims. Claims must be stated clearly. Facts must be disclosed freely. This must be so in consultations as well as in the more formal setting of panel proceedings. In fact, the demands of due process that are implicit in the DSU make this especially necessary during consultations, for the claims that are made and the facts that are established during consultations do much to shape the substance and the scope of subsequent panel proceedings.⁶⁴

This statement clarifies the consequences of the principles of good faith and due process for consultations. Consultations conducted in good faith will result in a clarification of the facts and legal claims at issue, and will be important in shaping the case put before the panel. The Appellate Body, however, does not elevate fact-finding to a separate function, nor is fact-finding identified as a separate function for consultations in the DSU. Strengthening the role of fact-finding in the consultation phase might contribute to increased effectiveness

62. See DSU, *supra* note 4, art. 5.

63. DSU, *supra* note 4, art. 4.6.

64. See Report of the Appellate Body on *India-Patent Protection for Pharmaceutical and Agricultural Chemical Products*, Dec. 19, 1997, WTO Doc. WT/DS50/AB/R, para. 94 [hereinafter *Patent Protection*].

of the consultations phase. Making it a separate function is likely to change the nature of consultations and is contrary to the spirit of the DSU.⁶⁵

D. PANELS

I. Composition

As with all adjudicative procedures in contemporary public international law, the panel procedure is rooted in arbitral practice where it is usual that parties themselves control the procedure and determine who will adjudicate the dispute.⁶⁶ As stated in the 1907 Hague Convention, "International arbitration has for its object the settlement of disputes between States *by Judges of their own choice*."⁶⁷ Similarly, the DSU leaves the composition of panels to the parties.⁶⁸ The Secretariat can make suggestions, but it is the parties that have to agree on the identity of the panelists within twenty days after the establishment of the panel.⁶⁹ In practice, this has proven to be a difficult issue because the parties' views diverge as to what makes a good panelist. The first difficulty arises from the fact that WTO Members distinguish two types of panelists on the basis of their background and qualifications. The first type of panelists are government offi-

65. Note that where fact-finding was meant to be a distinct function in WTO Agreements, this is mentioned *expressis verbis*. See Agreement on Subsidies and Countervailing Measures, Apr. 14, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, art. 12, para. 5, FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 229 ("The purpose of the consultations shall be to clarify the facts of the situation and to arrive at a mutually acceptable solution.").

66. See generally R.P. ANAND, INTERNATIONAL COURTS AND CONTEMPORARY CONFLICTS 67-97 (1974) (discussing various methods of dispute settlement); J.L. SIMPSON & HAZEL FOX, INTERNATIONAL ARBITRATION: LAW & PRACTICE 42-43 (1959) (explaining, for example, that the agreement to arbitrate should include the names of persons to comprise the tribunals; or describe the way they are appointed).

67. Convention for the Pacific Settlement of International Disputes, Oct. 18, 1907, art. 37, 36 Stat. 2199, 2220, 1 Bevens 557, 591 (emphasis added).

68. See DSU, *supra* note 4, art. 8.6 (allowing the parties to the dispute to oppose the composition of the panel only for "compelling reasons").

69. See *id.* art. 8.7 (setting forth the procedure for establishing a panel if the parties cannot agree to its composition).

cials, especially Geneva-based diplomats, while the second type are practitioners or academics. WTO Members tend to favor one or the other.

A second difficulty in agreeing on prospective panelists is the nationality issue. Article 8.3 of the DSU excludes nationals of parties and third parties from becoming panelists.⁷⁰ This is a classic rule in arbitral practice that derives from the belief that nationals can never be wholly impartial.⁷¹ WTO practice, however, has employed a very extensive interpretation of the nationality concept that encompasses the nationals of all WTO Members within a given trade block—e.g., all nationalities in the European Communities. This practice does not promote the selection of the most qualified panelists as it often leaves rather few possibilities, especially in multiparty complaints.⁷² If parties cannot agree on the identity of all the panelists within the time limit, then the Director-General nominates the members of the panel.⁷³

The problem of composition of arbitral tribunals exists in arbitration, as well. Specific solutions are used when no agreement can be reached on the identity of the arbitrators. The solutions all reduce the control of the parties to some degree. Often used is the *amiable composition*, whereby the parties choose one arbitrator and these arbitrators decide on a president of the arbitral tribunal. Thus, the problem of reaching agreement on the composition of the arbitral tribunal is avoided and the problem is shifted from the parties to the arbitrators. It has been observed, however, that states always show a special confidence in the arbitrator of their choice.⁷⁴ The only arbitral tribunal that could thus be impartial and be perceived by the parties as impartial is a tribunal that is chosen as a whole body by all parties or

70. Unless the parties agree otherwise. See DSU, *supra*, note 4, art. 8.3.

71. See ANAND, *supra* note 66, at 22-27, 98-193.

72. See Steger, *supra* note 16 (noting that this leaves mainly panelists from New Zealand and Switzerland on the limited list of possibilities); Bernhard Jansen, *Free World Trade and the European Union—The Reconciliation of Interests and the Revision of Dispute Resolution Procedures in the Framework of the World Trade Organisation* (1998) (adding Australia and some Latin American countries to the limited list of possibilities).

73. See DSU, *supra* note 4, art. 8.7.

74. See ANAND, *supra* note 66, at 142.

where the arbitrators are chosen by a third party.⁷⁵ Diminishing control of the parties over the arbitral procedure, however, has not been acceptable to states.⁷⁶

The DSU procedure is different from arbitral procedure because the WTO Members have accepted that the continuance of the process does not depend on the consent of the parties.⁷⁷ The parties do not control the procedure. The procedure is automatic, the choice of panelists by the parties to the dispute only leads to delays and confirms the idea of panelists linked to parties rather than appearing wholly impartial in fact and in appearance. The European Communities proposal severs the ties with the arbitral practice by introducing a standing Panel Body. A detailed description of the Panel Body is given in the proposal:

This body could consist of between 15 and 24 members. The membership would be of high quality and be representative in terms of geography, but members would be independent. They would serve for a fixed period. A clear majority of them should have a background in international trade law; some could be selected based on their broad experience in WTO matters, others (also) for their particular sectoral experience. On the basis of a rotation mechanism, this Panel Body would itself form a chamber of three to deal with each new case as it arises. . . .⁷⁸

Although the idea of a fixed pool of panelists is also found in other proposals, only the European Communities expressly propose that the composition should no longer be in the hands of the parties. Other proposals only stress the need of discussing this point because the current system and the bias of some parties toward some types of panelist causes delays and frustrates the objectives of the DSU in ensuring the expertise, independence and integrity of a panel.

If WTO Members were to find it unacceptable to loose control over the composition of the panel, one alternative is the ad hoc

75. *See id.* at 138-43.

76. *See Draft on Arbitral Procedure, Report by Georges Scelle, Special Rapporteur*, International Law Commission, 10th Sess., UN Doc. A/CN.4/113 (1958) [hereinafter ILC Draft Arbitration Code]; ANAND, *supra* note 66, at 143-45.

77. *See* ILC Draft Arbitration Code, *supra* note 76 (proposing the same principle, known as the principle of non-frustration).

78. *See* EC Discussion Paper, *supra* note 60.

chamber procedure of the International Court of Justice.⁷⁹ This procedure allows for a composition of chambers that takes into account the views of the parties. Their views largely determine the composition of the chamber. The official decision, however, is ultimately taken by the Court.⁸⁰

2. Procedural Adjustments

Panel proceedings are instituted when a complainant requests the establishment of a panel. Article 6.2 of the DSU states that the written request "shall [. . .] identify the specific measures at issue, and provide a brief summary of the legal basis of the complaints sufficient to present the problem clearly."⁸¹ The Appellate Body holds to the legitimacy of the *minimum standard* interpretation of Article 6.2, whereby it is sufficient for the complaining parties to list the provisions of the specific agreements that allegedly were violated, without setting out detailed arguments as to which specific aspects of the measures at issue relate to which specific provisions of those agreements. It is exactly this linkage of disputed facts and legal claims that some WTO Members propose. This would no doubt increase the transparency but seems difficult to achieve as the linkage involves building legal reasoning, something that is done progressively during the panel procedure.⁸² Nevertheless, the legal and factual issues need to be clearly specified as this will form the basis of the panel's delib-

79. See Dr. Allan Rosas, *EC and the WTO Dispute Settlement: Some Reflections on Practice and Doctrines*, Presentation at the 37th Leiden-London Meeting (June 27, 1998).

80. See Rudolf Ostrihansky, *Chambers of the International Court of Justice*, 37 INT'L & COMP. L. Q. 30, 43 (1988) (noting that the extent of the parties' influence on the composition is controversial); Lukas H. Meyer, *The Ad Hoc Chambers: Perspectives of the Parties and the Court*, 27 ARCHIV DES VÖLKERRECHTS 413, 413-41 (1989).

81. DSU, *supra* note 4, art. 6.2.

82. See WTO Appellate Body Report on EC-Regime for the Importation, Sale and Distribution of Bananas, Sept. 9, 1997, WT/DS27/AB/R, para. 142 [hereinafter Sale and Distribution of Bananas] (recommending that a panel carefully review the complaining party's documents that initiate a proceeding); Patent Protection, *supra* note 64, para. 95.

erations. Claims not spelled out at this stage cannot be entertained as they would not be within the terms of reference.⁸³

This issue of determining the actual facts and claims in the request for the establishment of a panel would be better dealt with in a preliminary phase, where clarification and additional fact-finding could take place. Apart from several WTO Members, the Appellate Body also repeatedly requests that the panel be able to deal with such matters as its jurisdiction and fact-finding.⁸⁴

E. THE APPELLATE BODY

The European Communities also discuss a number of issues, such as increasing the membership of the Appellate Body and the transparency in the selection of Appellate Body Divisions. Currently, the Plenary seems to be involved in every case. Therefore, the European Communities also propose a special role for the Plenary.⁸⁵ According to the suggestion, the Plenary would rule on cases that the Appellate Body considers sufficiently important. This decision could be made by the President of the Appellate Body or by a Division. The President or the Division could consider the importance of the case *proprio motu* or at the request of a party.

Several submissions raise an issue that relates to the possibility of conferring remand authority on the Appellate Body. The issue concerns the problem faced by the Appellate Body when a new decision on the facts is required because the Appellate Body decision is based on a different interpretation of the law, or on the basis of a different legal reasoning than that of the panel, or on procedural mistakes.⁸⁶ In such cases, it would be appropriate to send the case back to the original panel rather than having the Appellate Body decide on the basis of the facts described in the panel report, facts that may not be adequately described in the light of the new legal reasoning. Panels do

83. See Patent Protection, *supra* note 64, paras. 85-96.

84. See Sale and Distribution of Bananas, *supra* note 82, para. 144 (noting that panels should be allowed to make preliminary determinations based upon the initial written submissions of the parties to a dispute); Patent Protection, *supra* note 64, para. 95.

85. See EC Discussion Paper, *supra* note 60; Jansen, *supra* note 72.

86. See David Palmeter, *The WTO Appellate Body Needs Remand Authority*, 32 J. WORLD TRADE, Feb. 1998, at 41, 41-44.

not deal with all legal claims, nor do they exhaustively investigate all possibilities of legal reasoning. The principle of judicial economy, as applied by the panels, results in reports that only address claims and issues only as far as necessary to reach a decision. According to the current DSU procedure, the Appellate Body must either decide itself without real legal basis for this authority or send the case to the DSB, which could establish a new panel. The Appellate Body has never sent a case back to the DSB. This raises questions about the role of the panels when the Appellate Body substitutes the panel decision with a *de novo* decision of its own. Is the panel stage then merely preparatory before the adjudication by the Appellate Body? Is it, moreover, equitable that parties can only benefit from an appeal when the decision is taken by a panel and not when the decision is taken by the Appellate Body, even though its decision was *de novo*?

CONCLUSION

It would be premature to draw any conclusions from the current debate. The proposals may be numerous, but they only constitute the views of a minority of the WTO Membership that may or may not represent the general view. Moreover, it is quite possible that new issues will appear in the near future in cases currently before WTO Panels or the Appellate Body. As the proposals of the WTO Members vary widely and only a few issues return in many proposals, it will take until the end of the Review before any clarity as to the likely changes can be expected.