AUSSEN-
WIRTSCHAFT

WTO Dispute Settlement at Ten: Evolution, Experiences, and Evaluation

THOMAS A. ZIMMERMANN

Swiss Institute for International Economics and Applied Economic Research (SIAW-HSG), St. Gallen

Schweizerisches Institut für Aussenwirtschaft
und Angewandte Wirtschaftsforschung (SIAW-HSG), St. Gallen

published in: *Aussenwirtschaft – The Swiss Review of International Economic Relations*, Vol. 60 (2005), No. I, pp. 27-61
[ISSN: 0004-8216]

Author's Contact Details:

Dr. Thomas A. Zimmermann
E-Mail: thomas@zimmermann-thomas.de
Internet: http://www.zimmermann-thomas.de

Aussenwirtschaft, 60. Jahrgang (2005), Heft I, Zürich: Rüegger, S. 27–61

WTO Dispute Settlement at Ten: Evolution, Experiences, and Evaluation

Thomas A. Zimmermann*
University of St. Gallen

On 1 January 1995, the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) entered into force. During its first ten years, the DSU has since been applied to 324 complaints – more cases than dispute settlement under the GATT 1947 had dealt with in nearly five decades. The system is perceived, both by practitioners and in academic literature, to work generally well. However, it has also revealed some flaws. Negotiations to review and reform the DSU have been taking place since 1997 ("DSU review"), however, without yielding any result so far. In the meantime, WTO Members and adjudicating bodies managed to develop the system further through evolving practice. While this approach may remedy some practical shortcomings of the DSU text, the more profound imbalance between relatively efficient judicial decision-making in the WTO (as incorporated in the DSU) and nearly blocked political decision-making evolves into a serious challenge to the sustainability of the system. This article provides an overview of the first ten years of DSU practice, the on-going DSU review negotiations, and the challenges to the dispute settlement system.

Keywords: WTO, Dispute Settlement, DSU Review Negotiations
JEL-Codes: F02, F13, K33, K41

1 Introduction

Trade agreements on the basis of reciprocity are instruments used by governments to achieve trade liberalisation. The reciprocal exchange of market access rights which occurs through such agreements amounts to an international exchange of domestic political support between governments that helps policymakers to overcome the protectionist bias of uncoordinated trade policies. In order to protect the negotiated balance of rights and obligations from eroding – i.e. by trade restrictions which one government may introduce in violation of the trade agreement in order to enhance its political support from import-competing interests – trade agree-

* The author is research associate at the Swiss Institute for International Economics and Applied Economic Research at the University of St. Gallen (SIAW-HSG) and country relations officer for North America and the Caribbean at the Swiss State Secretariat for Economic Affairs (seco), Berne. The views expressed in this article are exclusively those of the author. The author is grateful to Jean-Max Baumer, Heinz Hauser, Matthias Oesch and Alexander Roitinger for very useful discussions on a previous study (Zimmermann 2004a). Shorter versions of this article exist in German (Zimmermann 2004b) and French (Zimmermann 2004c), available from Internet: http://www.zimmermann-thomas.de.

ments usually include dispute settlement mechanisms based on diplomatic and/or adjudicative procedures.

Such a dispute settlement mechanism is also included in the multilateral trading system. Based on the rudimentary provisions of two articles in the General Agreement on Tariffs and Trade (GATT) 1947, i.e. Article XXII on Consultations and Article XXIII on Nullification or Impairment of Benefits, dispute settlement developed gradually through evolving practice and occasional codifications thereof. With the exception of an anti-legalist phase in the 1960s, the trend went from an initially diplomacy-oriented mechanism towards a more adjudication-oriented one.

The conclusion of the Uruguay Round of Multilateral Trade Negotiations brought the establishment of the World Trade Organisation (WTO) on 1 January 1995. According to Article III.3 of the WTO Agreement, dispute settlement is one of the key functions of the WTO. The rules of the mechanism are laid down in detail in the Understanding on Rules and Procedures Governing the Settlement of Disputes (in short: Dispute Settlement Understanding; DSU) in Annex 2 of the WTO Agreement. The DSU has both incorporated the inherited concept of GATT dispute settlement, and it has codified the practices that had evolved previously into a consolidated text. In addition, it has brought important innovations (see below).

The mechanism has been used actively by Members in the first ten years of its existence. At the same time, it has been a topic of much academic interest and debate. Moreover, Members have been involved in negotiations to review and reform the mechanism since late 1997, however, without coming to an agreement so far.

This article gives an overview of the WTO dispute settlement mechanism ten years after it entered into force. *Chapter 2* briefly presents the structure of the mechanism. *Chapter 3* includes basic data on the use of the system during its first ten years and its perception in academic literature. *Chapter 4* deals with efforts of Members to further develop the DSU in the so-called "DSU Review", which has so far remained unsuccessful. *Chapter 5* concludes and attempts to give an outlook on the challenges that await the DSU in the coming years.

2 The Dispute Settlement Procedure in the DSU

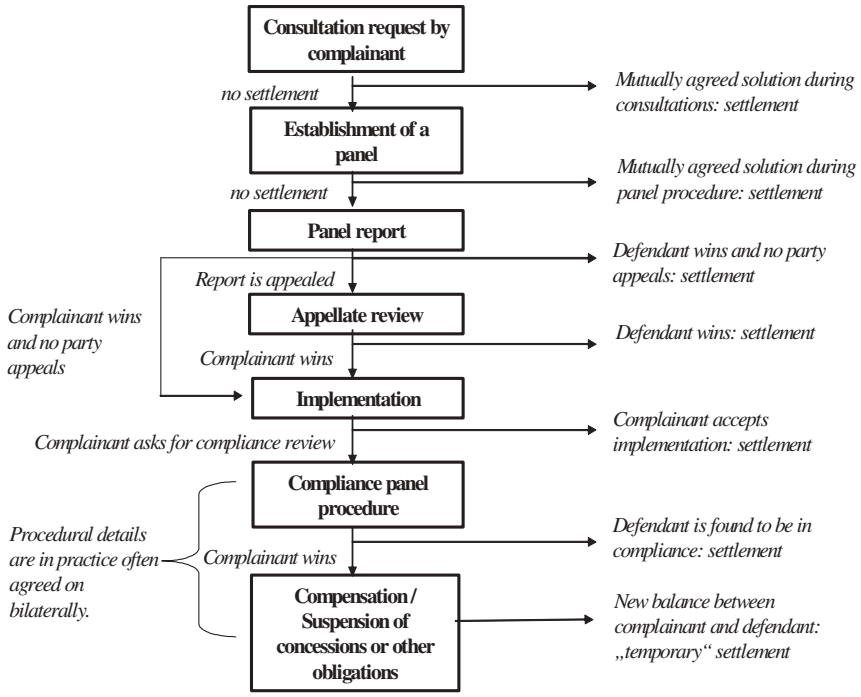
In short, the Dispute Settlement Understanding[1] provides for a procedure that starts with mandatory consultations as a diplomatic element. If the disputing governments cannot agree to a settlement during these consultations within a certain period, or if the defending party does not respond to the consultations request, the complainant may request a panel to review the matter. Panels are composed *ad hoc* and they consist of normally three specialists who engage in fact-finding and apply the relevant WTO provisions to the dispute at hand. Their findings and recommendations are published in a report against which either or both of the parties may appeal. Unless there is an appeal, the reports are adopted in a quasi-automatic adoption procedure by the Dispute Settlement Body (DSB) where all WTO Members are represented by a delegate. "Quasi-automatic" adoption means that the reports are adopted unless the DSB decides by consensus (i.e. including the party that has prevailed) not to adopt the report.

In case of an appeal, however, the Appellate Body reviews the issues of law and legal interpretations in the panel report that are subject to the appeal. The Appellate Body is a standing body composed of seven jurists, three of whom work on each case. The Appellate Body can uphold, modify or reverse the panel's findings. After this appellate review, no further recourse is possible. The DSB will adopt the report in the quasi-automatic adoption procedure described above. If it is found that a trade measure is in violation of WTO law, the defendant shall bring the measure into compliance with the covered agreements within a reasonable period of time, normally not exceeding 15 months. If the defendant refuses to comply, the complainant may ask the defendant to enter into negotiations on compensation, or may seek authorisation from the DSB to suspend concessions or other obligations (SCOO) *vis-à-vis* the defendant at an amount equivalent to the injury suffered. If the adequacy of implementation is disputed, the implementation measures are subject to further review un-

1 The text of the WTO Dispute Settlement Understanding (as laid down in Annex 2 to the Marrakesh Agreement Establishing the World Trade Organization) is available via the Internet: http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf (downloaded 5 February 2005). As a detailed discussion of the DSU procedure is beyond the scope of this article, readers are invited to consult the rich body of literature on this topic. For an introduction and a discussion of the system, see, for instance Gallagher (2002) for a detailed guide to the procedure, Jackson (2001) for an introduction, Davey (2002b), Goh and Witbreuk (2001), Feliciano and van den Bossche (2001), Hoekman and Kostecki (2001, Chapter 3), Palmeter and Mavroidis (1999), Trebilcock and Howse (1999, Chapter 3 for an introductory overview), Jackson (1998), Jackson (1997, Chapter 4), Petersmann (1997a), and Petersmann (1997b).

der the DSU. The suspension of concessions or other obligations, if authorised, normally takes the form of punitive tariffs on a defined value of the complainant's imports from the defendant. The structure of the dispute settlement mechanism (key elements only) is summarised in *Graph 1.*

Graph 1 Simplified Overview of the Dispute Settlement Procedure under the DSU



Source: Graph by the author.

The DSU as of today thus presents a codified procedure that combines elements of both political negotiation and adjudication. In today's mechanism, the political, negotiation-oriented elements include, *inter alia,* mandatory confidential consultations, tactical elements during the panel stage (establishment of panels only at second meeting where the panel request appears on the DSB agenda, possibility to suspend the panel procedures upon complainant's request, interim review), and the subordination of the entire procedure to a "political" body, as the competence to adopt panel and Appellate Body reports rests with the Dispute Settlement Body. Finally, the nature of the ultimate countermeasures, i.e. the suspen-

sion of concessions or other obligations (SCOO) in the case of non-implementation of recommendations, is negotiation-oriented and exclusively based on the political concept of reciprocity, as it can hardly be regarded as supportive of the security and predictability of a rule-oriented multilateral trading system. The special and differential treatment (S&D) of developing countries under the DSU is also a political feature.

Rule-oriented elements include among others the conformity and notification requirements with regard to mutually agreed solutions; the right to a panel (more generally: the removal of blocking possibilities in the process); the appellate review stage; and the prohibition of unauthorised, unilateral retaliatory action. These elements seek to secure the conformity of trade policy measures and dispute outcomes with the relevant provisions of WTO law. Other features of the system such as third party rights also support rule-orientation.

3 Experiences with the WTO Dispute Settlement System

3.1 Use of the Procedure

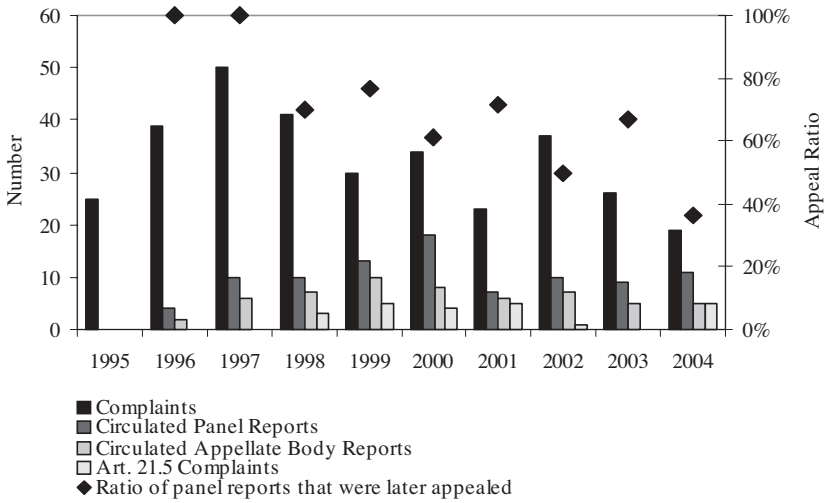
During the first ten years of its application (i.e. between 1 January 1995 and 31 December 2004), a total of 324 consultation requests was notified to the WTO.[2] Compared to the less than 300 cases submitted to GATT dispute settlement in 47 years, this number already shows that the new system is quite popular among Members. However, these numbers should not be over-interpreted: The old GATT had less Members than the WTO, and it covered fewer agreements and sectors of economic activity than the WTO.

Graph 2 shows the intensity in the use of the dispute settlement mechanism in its first ten years, i.e. until 31 December 2004. The number of complaints increased sharply in the first three years after the mechanism had come into force, and it peaked in 1997 with 50 new consultation requests in one single year. Thereafter, the number of consultation requests dropped to an annual average of 30 complaints in the period from 2000 to 2003, and further to only 20 new complaints in 2004, the lowest number since inception of the new system. The evolution of the number of panel

2 See WTO Document No. WT/DS/OV/22, and Internet: http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm.

reports circulated displays a similar pattern, yet with a certain time lag and a peak in 2000. This time lag is obvious, given the time required between the notification of a consultation request and the circulation of a panel report. Overall, the number of panel reports is much lower than the number of consultation requests. This shows that mutually agreed solutions can be found in a considerable number of disputes prior to the circulation of the panel report (consultation or panel stage). Moreover, in some cases, several separate consultation requests are dealt with by one single panel (e.g. in cases with multiple complainants), which equally contributes to the difference in numbers.

Graph 2 Use of the WTO Dispute Settlement Mechanism (1995–2004)



Note: Numbers refer to standard DSU complaints. Some of the panel reports circulated in 2004 may still become the subject of an appeal in 2005. The low ratio of panel reports appealed in 2004 must therefore be interpreted cautiously.

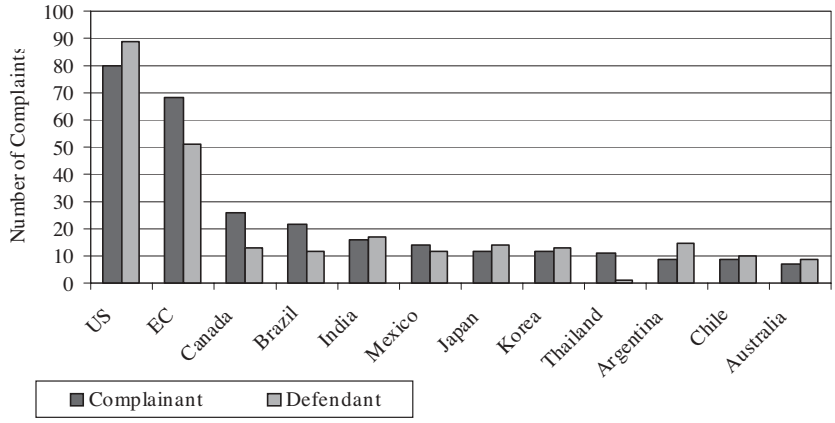
Source: Graph by the author, based on data from Internet: http://www.worldtradelaw.net (downloaded 15 January 2005).

The number of Appellate Body reports peaked in 1999. While every panel report circulated in 1996 and 1997 had been subject to an appeal, this ratio dropped to an average of below two thirds for panel reports circulated after 2000. Overall, there have been relatively few complaints under Article 21.5 DSU regarding alleged non-compliance of defendants with

panel rulings (compliance reviews). The fairly small number is in stark contrast to the public perception of these "trade wars" as they concern "high profile" cases, including *EC – Bananas*,[3] *EC – Hormones*,[4] and *U.S. – Foreign Sales Corporations*.[5]

In terms of usage by country, the United States and the European Communities (EC) have been the DSU's most frequent users by far: Together, they account for nearly half of the cases brought before the WTO (see *Graph 3*). Among developing countries, Brazil and India are the most important users of the system. Developing countries' participation in dispute settlement proceedings is generally increasing, but still on a relatively modest level, given the high number of developing countries in the WTO. The near absence of LDCs in dispute settlement activities is another salient feature: The first LDC to lodge a complaint was Bangladesh. In early 2004, the country asked for consultations with neighbouring India regarding Indian anti-dumping measures against battery imports from Bangladesh.[6]

Graph 3 Main Users of the WTO Dispute Settlement System (1995–2004)



Note: EC figures for cases where the EC is a respondent do not include DS numbers of complaints against individual EC members.

Source: Graph by the author, based on data from Internet: http://www.worldtradelaw.net (downloaded 15 January 2005).

3 WT/DS27: European Communities – Regime for the importation, sale and distribution of bananas (brought by Ecuador, Guatemala, Honduras, Mexico, and the U.S.).

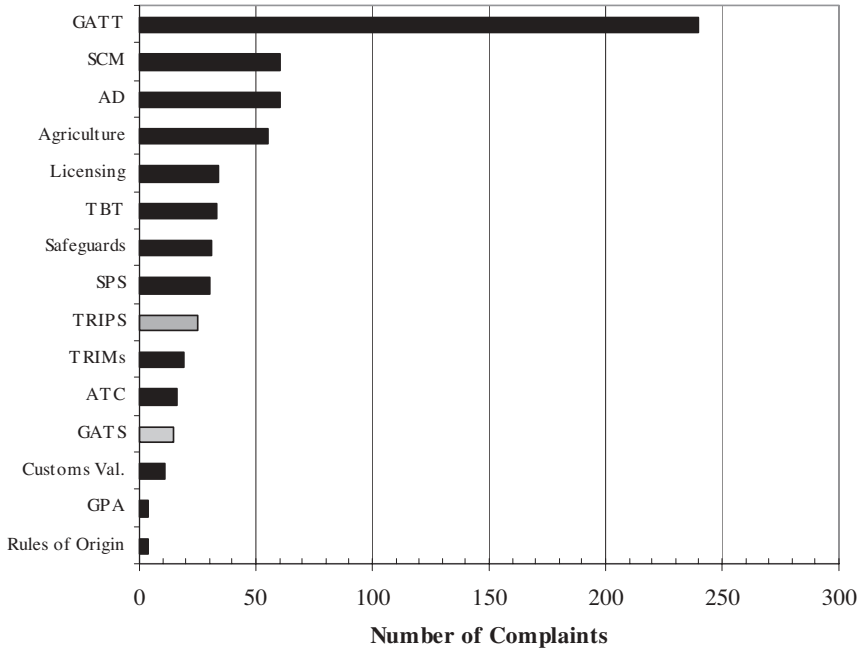
4 WT/DS26: European Communities – Measures concerning meat and meat products (hormones) (brought by the U.S.).

5 WT/DS108: United States – Tax treatment for "Foreign Sales Corporations" (brought by the EC).

6 WT/DS306: India – Anti-dumping measure on batteries from Bangladesh (brought by Bangladesh).

Regarding the subject matter, by far most disputes concern trade in goods, with the GATT being the agreement whose provisions are most often invoked in disputes. This dominance of goods trade in WTO dispute settlement becomes even more apparent when the complaints relating to the special agreements in the goods sector (in particular those dealing with trade remedies such as the Agreement on Subsidies and Countervailing Measures and the Agreement on Antidumping) are taken into account (see *Graph 4*).

Graph 4 Agreements whose Provisions were Subject to Litigation (1995–2004)



Source: Graph by the author, based on data from Internet: http://www.worldtradelaw.net (downloaded 15 January 2005).

By comparison to this traditional realm of GATT law, the "new issues" – i.e. trade in services (GATS) and trade-related intellectual property rights (TRIPS) – have not yet been frequent subjects of WTO disputes, and their statistical importance in dispute settlement seems to decrease even further: A modest 25 complaints have been brought under the TRIPS, only five of which were brought in the five-year period 2000–2004. Never-

theless, it should be noted that one particularly "high profile" case – a dispute between the U.S. and the EC on the one hand, and India on the other, regarding patent protection of pharmaceutical and agricultural chemical products – ranges among these disputes.[7] Similarly, there have not been frequent disputes under the GATS: Of the 14 complaints that have been brought under this agreement, only five were lodged in the five-year period 2000–2004. Here as well, disputes included a prominent case of both political and economic importance, i.e. a U.S. complaint against Mexican measures affecting telecommunications.[8]

3.2 Perception in Scholarly Literature

The WTO dispute settlement system has attracted a remarkable amount of academic attention. It has been reflected by a myriad of scholarly publications on the system from a variety of disciplines and on a variety of aspects. In addition to monographs and edited volumes, both established and new periodical publications which have emerged over the last few years (such as the Journal of International Economic Law and the World Trade Review) devote considerable space to articles on WTO dispute settlement. Among academic disciplines, legal scholars were the first to analyse the system, showing from early on an interest in the legal interpretations of panels and, in particular, of the Appellate Body, as well as in the systemic aspects of the new procedure.

In this literature, the system received a particularly warm, if not enthusiastic, welcome. According to BHALA (1999), a sizeable portion of this literature is "characterised by a near irrational exuberance … about the new adjudicatory system". The DSU has been called a "crown jewel" and a "core linchpin" of the multilateral trading system.[9] HUDEC (1998) noted that trading nations granted an "unprecedented degree of power to a legal tribunal" to enforce the obligations under the WTO Agreement. The DSU has also been hailed as a model for other international organisations, and it has brought forth a debate on the "constitutionalisation" of international trade law.[10]

---

7 WT/DS50: India – Patent protection for pharmaceutical and agricultural chemical products (brought by the U.S.); WT/DS79: India – Patent protection for pharmaceutical and agricultural chemical products (brought by the EC).

8 WT/DS204: Mexico – Measures affecting telecommunications services (brought by the U.S.).

9 See BHALA (1999), p. 856 ff for quotations.

10 See, for instance, the many contributions by PETERSMANN, including PETERSMANN (1999, 1998a, 1998b, 1997). For an overview of the debate, see DUVIGNEAU (2001).

Specifically, the quasi-automaticity in the establishment of panels as well as in the adoption of panel and Appellate Body reports was among the most-lauded elements. This quasi-automaticity removed blockage possibilities for losing defendants that had existed in dispute settlement under the old GATT. The introduction of precise time-limits was equally seen as a highly positive step. From a legal point of view, the introduction of an appellate review mechanism and the institution of a permanent Appellate Body composed of highly-qualified lawyers were greeted as particularly important contributions towards improved legal quality of decisions and as a further step towards the rule of law in trade matters.[11] More generally, this appellate review system was greeted as a model for other areas of international public law.

HUDEC (1999, pp. 4 and 9) has warned, however, not to overstate the differences between the new DSU and the former procedure under the GATT. With regard to the removal of blocking possibilities, HUDEC holds that blockage did not play too prominent a role in GATT practice either, as there was a community consensus that every Member should have a right to have its claims heard by an impartial third-party decision-maker. Moreover, GATT dispute settlement had already become a more judicial instrument in the late 1970s and 1980s, where the cornerstones were laid for the later evolution towards the DSU. As HUDEC (1999, p. 11) argues with regard to the success of dispute settlement in the 1980s, an international legal system does not require rigorously binding procedures to be generally effective but requisite political will can achieve much. As to this author, stringent procedures by themselves are not likely to make a legal system effective unless they are buttressed by sufficient political support. He cautioned, therefore, that even the new system would not lead to 100% compliance. As under the GATT, countries would be unable or unwilling to comply in specific cases under WTO dispute settlement rules as well. The system would accordingly have to learn to live with legal failure.

Indeed, legal literature began to take these problems into account towards the end of the 1990s as implementation problems surged in a number of high profile cases, including, *inter alia, EC – Bananas, EC – Hormones,* and *U.S. – Foreign Sales Corporations.* In these cases, the refusal of defendants to implement the DSB recommendations triggered the suspension of concessions or other obligations (SCOO) by the complainant government under authorisation from the Dispute Settlement Body.

11 See, for instance, the many contributions by JACKSON or PETERSMANN.

More commonly known under terms like "retaliation" or "sanctions", the SCOO itself has become the focus of much criticism: by suspending concessions or other obligations, the complainant government usually harms its own economy (as it curbs previous trade which, presumably, was in the economic interest of both parties) as well as individual economic actors in both countries who are not responsible for the defendant government's failure to implement the DSB recommendations properly. Similar to any other import restriction, the SCOO weakens the competitiveness of the complainant's domestic industries, including its exporters, because it shuts out competitive raw materials or intermediate products. It may also promote rent-seeking behaviour in the complainant's newly-protected industries and undermine their long-term competitiveness. On a general level, the SCOO reduces the predictability of trade conditions which the WTO is normally set to preserve, as every concession and trade rule can be revoked as part of a SCOO. Moreover, developing and small countries have difficulties in using the SCOO as they usually lack the market size to make a credible retaliatory threat. The difficulties faced by developing countries were illustrated in Ecuador's complaint against the EC non-compliance in the *Bananas* case. Retaliation may also have a negative impact on third countries, for instance, if their industries supply inputs to industries in the defendant country. Finally, the SCOO has a problematic psychological connotation as it creates the erroneous impression that trade restrictions would make a country better off.[12] In addition to implementation problems in cases that were subject to an Article 21.5 compliance dispute, the actual degree of market opening as a consequence of "implemented" DSB rulings has been questioned as well.[13]

Other problems identified with the new procedure include the often poor respect of the deadlines laid down in the DSU, the lack of a remand procedure which would allow the Appellate Body to remand certain issues back to the panels for further factual clarification, and the problems of developing countries wishing to participate more actively in the system. More recently, some quite strong criticism has been spelt out on the jurisprudence of the Appellate Body in trade remedy cases. The gist of this criticism is that the adjudicating bodies are exceeding their authority and are legislating instead of adjudicating, that they are not showing sufficient

12 For a discussion of the SCOO, see, *inter alia,* CHARNOVITZ (2003, 2001), ANDERSON (2002), HUDEC (2000), and MAVROIDIS (2000). A critical view of the current focus on retaliation from an industry perspective is included in UNICE (2001).

13 See ZIMMERMANN (2001) for a discussion of implementation measures in WT/DS31: Canada – Measures prohibiting or restricting importation of certain periodicals (brought by the U.S.).

deference to Members' trade policy decisions, and that the system is biased towards trade liberalisation.[14] However, for the time being, strong criticism may be considered a minority view in literature. And, as some observers hold, "it is not always clear that some of the harshest critics of WTO jurisprudence, many of whom have advocacy roles related to a variety of special interests, have the best interests of the overall WTO system in mind."[15]

Yet, there is a real concern about what some commentators perceive to be an imbalance between relatively effective legal decision-making by the adjudicating bodies and ineffective political decision-making by the political bodies of the WTO.[16] Unlike the lengthy search for compromise at the negotiating table, the quasi-automatic architecture of the DSU allows complainants to exact decisions on politically highly sensitive issues from the dispute settlement system. It is therefore hardly surprising that the DSU is the forum of choice for governments that perceive their position to be in accordance with WTO rules. The danger associated with such a trend is that Member governments that see their interests insufficiently safeguarded might be driven out of the system. This would be particularly problematic if large Members with "systemic weight" were to retreat from the system.

There are currently two strands in DSU literature that seek to strike a balance between the relative success and well-functioning of the dispute settlement system with its adjudicative bodies on the one hand, and the weakness of the consensus-based political decision-making at the WTO on the other. One school of thought – probably the minority point of view – seeks to re-strengthen political control of WTO dispute settlement and to weaken its adjudication character.[17] According to BARFIELD (2001), for instance, the WTO should adopt a less rigid, more flexible dispute settlement system. Specifically, the author suggests, *inter alia,* mandatory recourse to political dispute resolution in highly-politicised disputes and the re-introduction of a blocking mechanism. In addition, BARFIELD recommends that the U.S. should continue to deny direct effect to WTO provi-

14 See, for instance, GREENWALD (2003), MAGNUS, JONEJA and YOCIS (2003), RAGOSTA, JONEJA and ZELDOVICH (2003), WILSON and STARCHUK (2003), as well as RAGOSTA, JONEJA and ZELDOVICH (no year specified).

15 See CONSULTATIVE BOARD (2004), p. 55.

16 See, for instance, EHLERMANN (2002b).

17 See BARFIELD (2002, 2001). An earlier contribution to the discussion from a critical perspective is HIPPLER BELLO (1996).

sions, and he calls for increased congressional oversight as a means of increasing the democratic accountability and legitimacy of the WTO.

Other authors, however, oppose any effort to weaken the adjudicating system and argue in favour of focussing reform efforts on improved political decision-making.[18] For instance, SCHOTT and WATAL (2000) propose the establishment of a small, informal steering committee with roughly 20 seats, distributed according to both the value of foreign trade and the goal of achieving global geographic representation – an approach similar to the composition of the Boards governing the IMF and the World Bank. Such a structure would still allow the continuation of decision-making by consensus, as the proponents explicitly abstain from suggesting proportional or weighted voting. Accordingly, the main strength of the proposal lies in facilitating the preparation of decisions and the search for a consensus.

Focussing more narrowly on the problem of "legislative response" to decisions by adjudicating bodies, COTTIER and TAKENOSHITA (2003) base their suggestions on the diagnosis that both the amendment and the interpretation of provisions in the multilateral trade agreements are virtually impossible: Members whose interpretation prevailed in a panel or Appellate Body proceeding will usually not agree to the interpretation of the losing party. Therefore, consensus is illusory, and a three fourths majority (if voting ever happens) is extremely difficult to achieve. Similarly, attempts to amend the agreement are likely to fail as well unless the negotiations take place in a wider context (i.e. in a trade round) where the points at issue can be traded. This, however, is a lengthy process. The authors wish to facilitate the conditions for legislative response, not least in order to liberate the Appellate Body from what they perceive as extreme judicial restraint and to allow it to make "forward-looking, purposing interpretations and clarifications".[19] The authors therefore suggest a transition towards voting. However, current membership structures would not allow voting along the lines of a "one state = one vote" formula as the 24 industrial member countries, corresponding to 79% of GDP, would only have 16,8% of the votes. Based on a calculation of voting weights and related power assessments, the authors propose a weighted voting model that uses trade shares, GDP, market openness, population variables and basic votes.

18 See EHLERMANN (2003, 2002a, 2002b), JACKSON (2002), STEGER (2002b), as well as COTTIER and TAKENOSHITA (2003).

19 COTTIER and TAKENOSHITA (2003), p. 175.

Whereas most of the literature on WTO dispute settlement originates from the legal discipline, the mechanism has also become the topic of a growing body of theoretical[20] and empirical[21] literature in economics and political science. By and large, this research appears to confirm that the differences between dispute settlement under the old GATT and the new WTO should not be overrated. They explain the functioning of the system mainly with "soft" factors such as the reputation costs of non-compliance; normative pressures of rulings; the inherent exchange of information; the stability which the WTO dispute settlement system yields to the multilateral trading system by allowing governments to deviate from agreed rules against payment of compensation in its broadest sense; flexibility; and the provision of a renegotiation mechanism. These theoretical and empirical contributions thus underline the importance of the (political) concept of reciprocity: dispute settlement has to safeguard the negotiated balance of rights and obligations as well as to prevent (and remedy, if necessary) the nullification or impairment of benefits accruing under these agreements. It is the balance of political support which governments have exchanged in trade negotiations that needs to be protected if the system is to work. The findings of these studies are thus in line with the basic thrust of the political economy of international trade relations.

4 Attempts to Reform the DSU: The DSU Review Negotiations

The accumulated experience of WTO Members with dispute settlement under the DSU constitutes the foundation of the current negotiations to review and reform the DSU. This DSU review started already in 1997. However, it could not be concluded so far as several deadlines lapsed without tangible achievements. The last deadline missed so-far had been set for May 2004. As part of the so-called "July package" adopted on 1 August 2004, the mandate to continue the negotiations has been renewed, however, without a new deadline being set.

Despite their lack of success, the discussions are of interest as they track the evolution of country interests and negotiating positions in the dispute

20 See, for example, Rosendorff (2004), Rosendorff and Milner (2001), Ethier (2001), Hauser (2001), Bütler and Hauser (2000), Maggi (1999), Bagwell and Staiger (1999), Hauser and Martel (1997), Mitchell (1997), and Kovenock and Thursby (1997).

21 See, for example, Guzman and Simmons (2002), Busch (2000), Busch and Reinhardt (2003a, 2003b, 2000), Reinhardt (2001, 2001a, 2000, 2000a), Hudec (1999), Sevilla (1998, 1997), and Hudec (1993). An excellent overview is Busch and Reinhardt (2002), also embarking upon the methodological problems that researchers face when dealing empirically with the DSU.

settlement system. Moreover, they point to opportunities perceived for improvements to the system and to the general degree of satisfaction with the system. The latter is of particular importance in a "member-driven organization". Whereas a full account of the negotiating process and of the many heterogeneous proposals submitted by Members would be beyond the scope of this paper,[22] a brief summary of the stages of the negotiations process and of the major proposals received shall be given.

4.1 The Initial Stage of DSU Review Negotiations (1997–1999)[23]

Negotiations in the early stages took place under a 1994 Ministerial Declaration and were supposed to conclude by the Third Ministerial Conference, i.e. by the Seattle meeting. Several Members participated in these largely informal negotiations (*inter alia* the European Communities, Canada, India, Guatemala, the United States, Venezuela, Hungary, Korea, Argentina, Japan) as a range of issues was discussed. Yet, the negotiations were mainly characterised by two divides – one ran between industrialised countries (mainly between the U.S. and the EC) whereas the other pitted industrialised against developing countries.

The rift between industrialised countries was mostly due to the efforts of the United States to strengthen the enforcement quality of the system. Being a "net complainant" in these initial years of DSU practice, and having won several "high profile" cases (such as *EC – Hormones, EC – Bananas, Canada – Magazines,* or *India – Patents*), the United States became increasingly worried that the implementation of the reports would remain behind their expectations. They therefore pressed forward with retaliatory measures and threats thereof, whereas the EC and Canada tried to delay the implementation of rulings. This translated into different proposals for the DSU review negotiations on the so-called sequencing issue which arose for the first time in *EC – Bananas* over ambiguities (or even contradictions, as some may argue) in Art. 21.5/22 DSU. The key question was whether a "compliance panel" must first review the implementation measures undertaken by a defendant before a complainant may seek authorisation to retaliate on grounds of the defendant's alleged non-compliance. Whereas the U.S. initially opposed any idea of sequencing and favoured immediate retaliation, the EC and many other Members argued

22 A comprehensive discussion of the DSU Review is included in the first part of Ortino and Petersmann (2003) and in Zimmermann (2004a).

23 For a detailed discussion and further references, see Zimmermann (2004a), pp. 79–91.

in favour of the completion of such a compliance panel procedure as a prerequisite to seeking an authorisation to retaliate. The EC underlined its position, *inter alia,* by bringing a DSU case against U.S. legislation requiring early retaliation[24] and against its application[25] in *EC – Bananas,* as well as by seeking an authoritative interpretation of the DSU in this respect.[26] Both attempts ultimately failed.

Another attempt by the U.S. to increase the enforcement power of WTO dispute settlement occurred when it discussed the so-called "carousel retaliation". This term refers to periodic modifications of the list of products that are subject to the suspension of concessions, and it surfaced for the first time when the "Carousel Retaliation Act of 1999" was introduced into Congress. Its purpose was to increase pressure on the EC Commission and European governments in *EC – Bananas* and *EC – Hormones* by requiring the government to periodically rotate the list of products subject to retaliation in order to maximise the effect of the sanctions. The measure was signed into law in May 2000 but has so far never been applied. Whereas the EC (supported by most other nations) sought a prohibition of carousel retaliation in the DSU review of 1998/1999, the U.S. had sought a footnote explicitly allowing such retaliation. In a parallel development, the EC had requested consultations under the DSU on the carousel provision in summer 2000, however, without proceeding to the panel stage.[27]

Finally, the U.S. did not only pursue a "tough stance" on sequencing and on the carousel issue, but it also sought shorter timelines for certain steps in WTO dispute settlement.

The controversy between developed and developing countries was of a different nature. It mainly focused on the issue of transparency and the acceptance of so-called "*amicus curiae* briefs", with the United States pressing hardest for both. Regarding transparency, the U.S. wanted to make submissions of parties to panels and the Appellate Body public, and it wanted to allow public observance of panel and Appellate Body meet-

24 WT/DS152: United States – Sections 301–310 of the Trade Act of 1974 (brought by the EC).
25 WT/DS165: United States – Import measures on certain products from the European Communities (brought by the EC).
26 WT/GC/W/143: Request for an Authoritative Interpretation Pursuant to Article IX.2 of the Marrakesh Agreement Establishing the World Trade Organization (Communication by the EC to the General Council).
27 WT/DS200: United States — Section 306 of the Trade Act of 1974 and amendments thereto (brought by the EC).

ings. Developing countries in particular, but also some industrialised countries, opposed such increased transparency, as they feared "trials by media" and undue public pressure.[28] Insisting on the intergovernmental nature of the WTO, developing countries equally rejected efforts by the U.S. and the EC to formalise the acceptance of *amicus curiae,* or "friend of the court", briefs. *Amicus curiae* briefs are unsolicited reports which a private person or entity submits to an adjudicative body in order to support (and possibly influence) its decision-making. These briefs became an issue for the first time in 1998 when the Appellate Body decided in *U.S. – Shrimp/Turtle*[29] that the panel had the authority to accept unsolicited *amicus curiae* briefs. That right was subsequently confirmed in further disputes, causing outrage among many developing country Members who feared undue interference from NGOs.[30]

4.2 The "Limbo" in the DSU Review Negotiations (2000-2001)[31]

After the December 1999 Seattle Ministerial Conference had failed, the DSU review essentially remained in limbo through most of 2000 and 2001. Isolated efforts of Members to change the DSU failed. However, as DSU practice moved along, negotiating positions changed behind the scenes. New developments in the case *U.S. – Foreign Sales Corporations* which the U.S. had lost and where implementation measures were now disputed, weakened in particular the U.S. position on issues such as carousel or sequencing: After it had become increasingly clear that the U.S. replacement legislation (Extraterritorial Income Exclusion Act; ETI) would not be in compliance with the DSB recommendations, the U.S. and the EC negotiated in September 2000 a bilateral procedural agreement on how to proceed in this case in order to bridge the gaps in the DSU on the sequencing issue. According to the Agreement, a sequencing approach was adopted under which a panel (subject to appeal) would review the WTO consistency of the replacement legislation, and arbitration on the appropriate level of sanctions would be conducted only if the replacement legislation was found WTO-inconsistent. The U.S. had now become

28 On the issue of transparency, see, for instance, WAINCYMER (2000) who discusses the various facets of transparency. See ZIMMERMANN (2004a), pp. 157 ff for an introductory discussion and further references.

29 WT/DS58: United States – Import prohibition of shrimp and shrimp products (brought by India, Malaysia, Pakistan, Thailand).

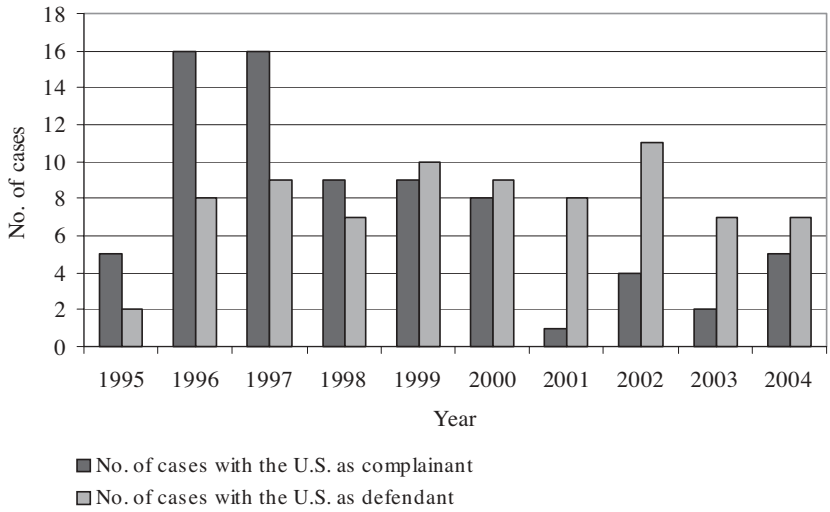
30 On the *amicus curiae* issue, see, for instance, UMBRICHT (2001), MAVROIDIS (2001), MARCEAU and STILWELL (2001). For further references, see also ZIMMERMANN (2004a), pp. 163 ff.

31 For a detailed discussion and further references, see ZIMMERMANN (2004a), pp. 92–99.

a beneficiary of the sequencing approach (even with the possibility of subsequent appeal) which it had opposed before. It is believed that, in exchange for the agreement, the U.S. had to back down on carousel retaliation although no such deal had been explicitly made part of the procedural agreement. The retaliatory measures requested by the EC were several times higher than U.S. retaliation in *EC – Bananas* and *EC – Hormones* combined.[32] The arbitrators later confirmed that the suspension of concessions in the form of 100% *ad valorem* duties on imports worth 4.043 bn USD constituted "appropriate countermeasures".

US – Foreign Sales Corporations was not the only case that had a weakening impact on the negotiating stance of the U.S.: With more and more trade remedy cases – traditionally the Achilles heel of U.S. trade policy – being brought against the U.S. and the latter losing most of these, the U.S. stance changed from offensive into highly defensive (see *Graphs 5* and *6*).

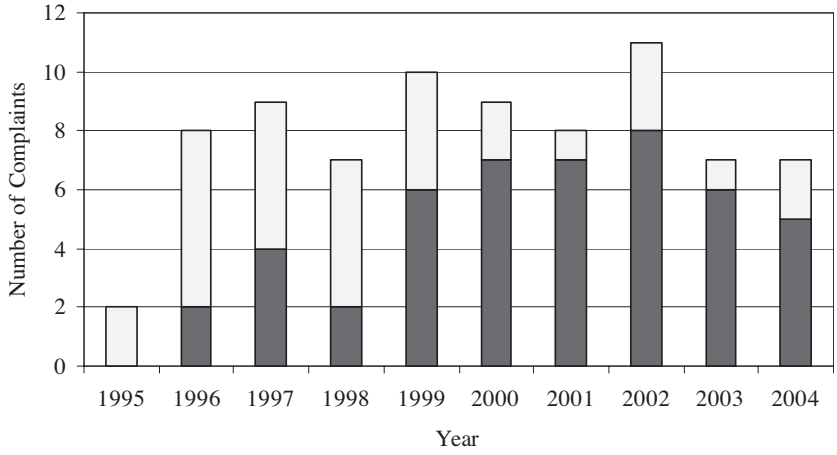
Graph 5 The United States as Complainant and Defendant (1995–2004)



Source: Graph by the author, based on WTO data: WT/DS/OV/22 and Internet: http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (downloaded 15 January 2005).

32 The respective amounts are USD 191.4m in *EC – Bananas* and USD 116.8m in *EC – Hormones.*

Graph 6 The United States as Defendant: Trade Remedy and Other Cases



Source: Graph by the author, based on WTO data: WT/DS/OV/22 and Internet: http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (downloaded 15 January 2005).

As attempts to move the DSU review forward in 2000 and 2001 proved to be unsuccessful, the DSU review only returned to the fore at the Fourth Ministerial Conference in Doha in November 2001. The Doha Ministerial Declaration committed Members to negotiate on improvements to and clarifications of the Dispute Settlement Understanding.

4.3 The Doha-Mandated DSU Review Negotiations (2002–2004)[33]

According to the Doha mandate on the DSU Review, an agreement was to be reached not later than May 2003. Formal and informal discussions were held under the auspices of the Special Negotiating Session of the Dispute Settlement Body, chaired by PÉTER BALÁS of Hungary. Work progressed from a general exchange of views to a discussion of concep-

33 See also Paragraph 47 of the Ministerial Declaration, Adopted on 14 November 2001 (WT/MIN(01)/DEC/1). For a detailed discussion and further references, see Zimmermann (2004a), pp. 100–109.

tual proposals put forward by Members. In total, 42 specific proposals had been submitted by the deadline of the negotiations at the end of May 2003. The negotiations were very comprehensive: Not only did they cover virtually all provisions of the DSU,[34] but they also included a variety of Members, including, *inter alia,* all the "Quad" Members (with submissions being made by the EC, the U.S., Canada and Japan) as well as developing countries of all sizes and stages of development.

Compared to the pre-Seattle stage of DSU review negotiations, negotiating positions were less clear-cut now. The most remarkable change occurred in the position of the United States, which reflected its new defensive stance in dispute settlement practice. In December 2002 the U.S. submitted, jointly with Chile, a proposal to strengthen flexibility and member control in dispute settlement.[35] The proposal would allow the deletion of portions of panel or Appellate Body reports by agreement of the parties to a dispute, and an only partial adoption of such reports. Moreover, it calls for "some form of additional guidance" to WTO adjudicative bodies. The gist of the submission is to transfer influence from the adjudicative bodies to the parties to disputes. The proposal was greeted predominantly with scepticism, with Members arguing that deleting parts of panel or Appellate Body reports would weaken the WTO adjudicating bodies. Moreover, the move was seen as a contradiction to earlier proposals on improving transparency as parties would be able to "bury" more controversial or groundbreaking decisions by the adjudicating bodies before the rulings were made public. The proposal was understood as attending to the complaints from Congress that the WTO adjudicating bodies were legislating.

A large number of other proposals, only some of which can be presented here, were submitted. The EC called again for the establishment of a permanent panel body instead of the current system where panellists are appointed *ad hoc*, discharging their tasks on a part-time basis and in addition to their ordinary duties.[36] Opponents of the proposal argue that a permanent panel body could be more "ideological" and might engage in lawmaking. They therefore feel more comfortable with the current system

34 For an overview, see Zimmermann (2004a), pp. 111–155 on stage-related proposals and pp. 157–193 on horizontal proposals.

35 See TN/DS/W/28 (U.S., Chile) for the conceptual proposal, and TN/DS/W/52 (U.S., Chile) for the textual proposal. For a discussion of this proposal, see Ehlermann (2003). See also the critical remarks in Consultative Board (2004), p. 56, which obviously refer to the U.S.-Chilean proposal.

36 See TN/DS/W/1, No. I (EC), and Attachment, No. 7.

which draws heavily on government officials who are familiar with the constraints faced by governments.[37]

Developing countries submitted a variety of proposals with quite different orientations. For instance, some countries sought to strengthen enforcement by introducing collective retaliation.[38] It is meant to address the problems caused by the lack of retaliatory power of many small developing economies, such as those experienced by Ecuador in *EC – Bananas*. With collective retaliation, all WTO Members would be authorised (or even obliged under the concept of collective responsibility) to suspend concessions *vis-à-vis* a non-complying Member. Proposals for the retroactive calculation of the level of nullification and impairment and for making the SCOO a negotiable instrument (Mexico),[39] for introducing a fast-track panel procedure (Brazil),[40] and for calculating increased levels of nullification or impairment (Ecuador)[41] have a similar thrust. At the same time, the African Group questioned the automaticity of the current dispute settlement process and sought the re-introduction of more political elements.[42] China even proposed the introduction of a quantitative limitation on the number of complaints per year that countries could bring against a particular developing country.[43]

By contrast to these controversial proposals, a large number of less controversial issues were integrated into a compromise text that was elaborated by Ambassador PÉTER BALÁS of Hungary. This so-called BALÁS text[44] contains modifications to all stages of the process, including improved notification requirements for mutually agreed solutions, a procedure to overcome the "sequencing issue" in Art. 21.5/22 DSU, the introduction of an interim review in the panel stage, and a remand procedure in which an issue may be remanded to the original panel in case the Appellate Body is not able to fully address an issue due to a lack of factual information in the panel report. The compromise text would also have introduced numerous amendments in other areas, including, *inter alia,*

37 The proposal has been discussed intensely in scholarly literature. See, for instance, PETERSMANN (2002), pp. 14–15, and STEGER (2002a), pp. 63–64, for brief introductions. Support for the idea is expressed, to varying degrees, by BOURGEOIS (2003), COTTIER (2003, 2002), and DAVEY (2003, 2002b). A more cautious approach is contained in CARTLAND (2003), HECHT (2000), and in SHOYER (2003).

38 See TN/DS/W/15, No. 6, and TN/DS/W/42, No IX (both submitted by the African Group) as well as TN/DS/W/17 (LDC Group). For a discussion on collective retaliation, see PAUWELYN (2000).

39 See TN/DS/W/23 and TN/DS/W/40 (both submitted by Mexico).

40 See TN/DS/W/45 and TN/DS/W/45/Rev.1 (Brazil).

41 See TN/DS/W/9 and TN/DS/W/33 (both submitted by Ecuador).

42 See TN/DS/W/15 and TN/DS/W/42 (both submitted by the African Group).

43 See TN/DS/W/29, No. 1, and TN/DS/W/57, No. 1 (both submitted by China).

44 See TN/DS/9.

housekeeping proposals, enhanced third party rights, enhanced compensation, and several provisions on the special and differential treatment of developing countries.

Despite the existence of a compromise proposal, the deadline for the completion of talks that had been set for the end of May 2003 was finally missed. While many smaller trading nations would have favoured coming to a conclusion on a limited package of issues, both the EC and the U.S. preferred negotiations to continue, and to address those (of their) concerns that had been left out in the BALÁS text.

Members subsequently agreed to extend the deadline for the review until the end of May 2004. However, the review negotiations did not re-gain their previous momentum. The failure of the Fifth Ministerial Conference held in Cancún, Mexico, in mid-September 2003 caused a further setback to overall negotiations under the Doha mandate which also affected DSU review negotiations. The May 2004 deadline was missed again. The Chairman then established a brief report on his own responsibility to the Trade Negotiations Committee. He suggested continuing the negotiations, however, without any new target date.[45] In the subsequent decision adopted by the General Council on 1 August 2004 on the Doha Work Programme – the so-called "July Package" – the General Council took note of the above-mentioned report and the continuation of negotiations according to the Doha Mandate along the lines set out in the Chairman's report was decided.[46]

The Special Negotiating Session of the DSB met two more times in October and November 2004, yet without achieving any significant progress.[47] Negotiations will continue in 2005 with six dates being reserved for further meetings before the summer break.

4.4 The Difficulties of Concluding the DSU Review

The difficulties faced by negotiators so far in their attempts to reach a successful conclusion of the DSU review negotiations may be explained

45 See TN/DS/10.
46 See WT/L/579.
47 See "DSU Review: Members Discuss May Proposal, Dispute Settlement Data", in: *BRIDGES Weekly Trade News Digest,* Vol. 8, No. 36, 27 October 2004; and *BRIDGES Weekly Trade News Digest,* Vol. 8, No. 41, 1 December 2004.

with a number of reasons: Firstly, the consensus requirement[48] for any change to the DSU sets high hurdles, particularly as the WTO counts 148 heterogeneous Members with equally heterogeneous interests. These problems are further exacerbated in the case of the DSU review where negotiators are intending to reap an early harvest outside the larger context of the Doha negotiations and thus within a narrow area of negotiations. Secondly, key decisions of the adjudicative bodies and Members' experience with the system have created controversial views on specific aspects of the system that have become increasingly difficult to bridge (e.g. on issues such as transparency, *amicus curiae* briefs, carousel retaliation or collective retaliation – to mention but a few). Thirdly, and of fundamental importance, there appears to be a more profound controversy regarding the overall direction the DSU should pursue, namely whether it should continue its route towards more rule-orientation and adjudication, or whether it should return to a more negotiatory and diplomatic – i.e. power-oriented – approach.[49] Proposals with both orientations have been submitted, as the non-exhaustive list of examples in *Table 1* show.

Fourthly, some problems of the DSU review may be explained with the difficulties of negotiating reforms to a system that is constantly in use: Negotiating positions are subject to permanent change as Members continuously gather new experience due to new cases and new reports. Moreover, on-going negotiations on material WTO rules may also have a bearing on the stance of Members towards the dispute settlement system (e.g. the negotiations on "Rules", including on anti-dumping). Such problems can be partly remedied by the inclusion of generous periods of transition for any change to the DSU.

Finally, despite the criticism that is occasionally voiced, there seems to be a general sense of satisfaction with the system. As the CONSULTATIVE BOARD (2004, p. 56) holds with regard to the lack of success of the DSU review to date, "… an important underlying concern is, or should be, to not 'do any harm' to the existing system since it has so many valuable attributes."

---

48 See Article X.8 of the WTO Agreement.

49 For the purpose of this article, rule-orientation is understood as the heavy reliance on procedural and material rules for the settlement of trade disputes. In such a setting, relatively much power and independence are granted to adjudicative bodies, and the results of the adjudicative process are not subject to political review. By contrast, negotiations and political power play a stronger role for the outcome in a power-oriented dispute settlement procedure. In such a setting, disputing parties enjoy a large amount of control and flexibility whereas less power is granted to adjudication bodies. Rule-orientation and power-orientation as basic concepts for the settlement of international trade disputes were introduced into the literature by JACKSON (1978). For a short overview, see JACKSON (1997), pp. 109 ff. For a critical comment, see DUNNE III (2002).

Table 1 Power Orientation versus Rule Orientation in the Doha Round DSU Negotiations

Proposals strengthening rule orientation	Proposals strengthening power orientation
• Strengthened notification requirements for mutually acceptable solutions and written reports on the outcome of consultations; • Compliance reviews of mutually agreed solutions; • Reduced time frames; • Creation of a professional permanent panel body (PPB); • Terms of appointment of the Appellate Body; • Regulating sequencing and implementation; • Prohibition of carousel retaliation; • Strengthening enforcement and the cost of non-compliance; • Strengthening third party rights; • Increasing external transparency.	• Automatic lapse or withdrawal of consultations/panel requests; • Calls for separate opinions by individual panelists/Appellate Body Members; • Flexibility during appellate review: interim review and the suspension of the appellate procedures; • Deletion of findings from reports; • Partial adoption procedures; • Additional measures of special and differential treatment of developing countries; • Extension of time-frames by agreement of the parties; • Obliging adjudicating bodies to submit certain issues to the General Council for interpretation.

Source: Table by the author; for more information see ZIMMERMANN (2004a), pp. 204–213.

4.5 The "DSU Review in Practice"

As negotiations on the DSU Review are stalled, practical solutions have been found to some of the problems in what could be called a "DSU reform in practice". It includes practical actions both by Members and by the adjudicating bodies to further develop the system and to come to terms with the problems in its application, as the following examples show.

Firstly, the sequencing problem has been overcome by the conclusion of bilateral agreements between the Members during the implementation stage. These agreements allow Members to overcome the gaps and contradictions in the DSU text in a practical way. Whereas there has not yet been a consensus to adapt the DSU text to this evolving practice, Members have adapted to the bilateral agreements and no longer appear to consider the sequencing issue as a pressing concern.

Secondly, with regard to *amicus curiae* briefs, the Appellate Body has *de facto* developed a very pragmatic approach, despite initially strong oppo-

sition from mostly developing countries. On the one hand, the Appellate Body displays a general openness towards the acceptance of *amicus curiae* briefs. On the other hand, it does not appear to accord decisive weight to these submissions in its decisions – at least not explicitly. This approach gives adjudicating bodies a maximum of flexibility while it respects the concerns of Members who are against such briefs.

Thirdly, on a related matter, the Appellate Body has found a response to the concerns of many Members who held that the acceptance of *amicus curiae* briefs gave NGOs an edge over Members, as the latter had to cope with restrictive requirements on third country participation. It relaxed these requirements by adopting new working procedures in late 2002 which give third parties the possibility of attending oral hearings even if they had not made a written submission prior to the hearing, as the old rule had required.[50] Similarly, the Appellate Body only recently adopted new working procedures requiring more precision in notices of appeal. It thus catered for a long standing concern of some Members who had called for increased precision of notices of appeal but were unable to reach such a modification through the DSU review negotiations.[51]

As a final example, the establishment of an Advisory Centre on World Trade Law (ACWL) has remedied some of the resource constraints that developing countries face in the more sophisticated legal settings of the new dispute settlement system. This international organisation, which is independent from the WTO, provides legal training, support and advice on WTO Law and dispute settlement procedures to developing countries, in particular LDCs. ACWL services are available against payment of modest fees for legal services varying with the share of world trade and GNP per capita of user governments.[52] The Centre thus serves to a certain degree as a substitute for other institutions such as, for instance, a special fund for developing countries – a proposal that has been brought into the DSU review negotiations by developing countries.

50 These modifications were introduced into document WT/AB/WP/7 (meanwhile replaced by WT/AB/WP/8). See also "WTO Appellate Body Braces for Criticism For Easing Rules on Third Party Participation"; in: *WTO Reporter,* 10 October 2002; "WTO Appellate Body Chair Offers To Discuss Appellate Review Rules"; in *WTO Reporter,* 23 October 2002; and "Appellate Body to Clarify Working Procedures on Role of Third Parties", in: *Inside US Trade,* 15 November 2002.

51 WT/AB/WP/8. The new procedures entered into force on 1 January 2005.

52 For more information on the ACWL, see Internet: http://www.acwl.ch, and in particular http://www.acwl.ch/e/quickguide_e.aspx (downloaded 5 February 2005).

As these examples show, Members and adjudicating bodies manage to adapt the dispute settlement system to changing circumstances without changing one single provision of the DSU. Dispute settlement practice has thus brought some amount of DSU reform, without facing the problems of political renegotiations of the DSU text. In other terms, the system seems to build once more on its historic strength, which is to evolve with a certain degree of flexibility and in a pragmatic spirit. We should not be surprised if, as in the past, these elements of evolving practice were to be codified into a new or modified text at a later date.

5 Conclusions

The first ten years of dispute settlement practice under the DSU have confirmed the usefulness of the system: Except for a recent slowdown which is yet too early to interpret, the mechanism has been used actively, and the perception by both practitioners and academic observers has generally been positive. Nevertheless, the intense use of the mechanism has also revealed certain problems in its practical application. Guided by their own experiences and interests, Members have been attempting to improve the mechanism through several rounds of DSU review negotiations since late 1997. So far, all these attempts have been unsuccessful. While negotiations are going on under the Doha Mandate, there is no clear deadline and, subsequently, insufficient impetus for their conclusion. In the mean time, Members and adjudicating bodies have managed to resolve some of the practical issues through a further development of dispute settlement practice without amending the DSU text.

The major challenge for the DSU is not so much whether the multitude of technical questions in the DSU review negotiations can be resolved through an agreement but, rather, how well suited the DSU is to overcome the more fundamental concern – notably that there is an unsustainable imbalance between political and judicial decision-making in the WTO.

None of the two generic options that are being discussed to remedy the situation – weakening adjudication or strengthening political decision-making – holds great promise if considered in isolation. Weakening adjudication is not an attractive option as Members would have to forego the achievements which the new DSU has brought for a rules-based international trading system. It would also be at odds with globalisation and its increasing reliance on international transactions in economic life.

Alternatively, improving political decision-making is an extremely difficult task and could result in important Members being driven out of the system, if the sacred consensus principle were to be replaced by some form of majority voting. Sovereignty concerns similar to those that are currently voiced against allegedly overreaching dispute settlement would ultimately be raised against undesired outcomes of voting procedures as they would eventually force results upon countries which the latter cannot or do not want to accept.

For the time being, only incremental steps by a variety of actors therefore seem to be feasible and desirable to remedy the situation:

- Members should assume their systemic responsibility by exercising restraint in bringing politically difficult cases to adjudication.
- Adjudicating bodies should continue their current approach to dispute settlement, based on judicial restraint and the avoidance of "sweeping statements".
- Selective multilateral political elements could be built into the dispute settlement procedure without altering the basic architecture of the DSU (e.g. by allowing the DSB to decide by consensus not to adopt specific findings or the basic rationale behind a finding in a report.).
- Members should explore alternative political decision-making mechanisms more actively. Indeed, the WTO Community has become aware of the problem as the recent report by a "Consultative Group" to the Director General shows. The report has a clear focus on institutional issues, including on decision-making.[53]

Whereas such a gradual and eclectic approach may not satisfy the more ambitious observers who would favour clear reforms in either direction – i.e. towards more adjudication and rule-orientation or back to power-orientation and diplomacy – this eclecticism appears at least as a feasible option. And, if judged in the light of past experience with the gradual evolution of the system, it also appears to be the most promising approach: The current DSU is the fruit of five decades of gradual development, which was not even free of setbacks. There is no reason to assume why such gradualism should not be adequate for the future as well. If Members and adjudicating bodies continue to assume their responsibilities for the system, the DSU should continue to remain an attractive forum for dispute settlement.

53 See CONSULTATIVE BOARD (2004).

References

ANDERSON, KYM (2002), Peculiarities of Retaliation in WTO Dispute Settlement, *World Trade Review* 1 (2), pp. 123–134.

BAGWELL, KYLE and ROBERT W. STAIGER (1999), An Economic Theory of GATT, *American Economic Review* 89 (1), pp. 215–248.

BARFIELD, CLAUDE E. (2001), *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization,* Washington, D.C.: The AEI Press.

BARFIELD, CLAUDE E. (2002), WTO Dispute Settlement System in Need of Change, *Intereconomics – Review of European Economic Policy* 37 (3), pp. 131–134.

BHALA, RAJ (1999), The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy), *American University International Law Review* 14, pp. 845–956.

BOURGEOIS, JACQUES H.J. (2003), Comment on a WTO Permanent Panel Body, *Journal of International Economic Law* 6 (1), pp. 211–214.

BÜTLER, MONIKA and HEINZ HAUSER (2000), The WTO Dispute Settlement System: A First Assessment from an Economic Perspective, *Journal of Law, Economics and Organization* 16 (2), pp. 503–533.

BUSCH, MARC L. (2000), Democracy, Consultations and the Paneling of Disputes Under GATT, *Journal of Conflict Resolution* 44 (4), pp. 425–446.

BUSCH, MARC L. and ERIC REINHARDT (2000), Bargaining in the Shadow of the Law – Early Settlement in GATT/WTO Disputes, *Fordham International Law Journal* 24 (1-2), pp. 158–172.

BUSCH, MARC L. and ERIC REINHARDT (2002), *Testing International Trade Law – Empirical Studies of GATT/WTO Dispute Settlement,* in: DANIEL L.M. KENNEDY and JAMES D. SOUTHWICK (eds.), *The Political Economy of International Trade Law – Essays in Honour of Robert E. Hudec,* Cambridge: Cambridge University Press, pp. 457–481.

BUSCH, MARC L. and ERIC REINHARDT (2003a), *The Evolution of GATT/WTO Dispute Settlement,* in: JOHN M. CURTIS and DAN CIURIAK (eds.), *Trade Policy Research 2003,* Ottawa: Department of Foreign Affairs and International Trade, pp. 143–183.

BUSCH, MARC L. and ERIC REINHARDT (2003b), *Transatlantic Trade Conflicts and GATT/WTO Dispute Settlement,* in: ERNST-ULRICH PETERSMANN and MARK A. POLLACK (eds.), *Transatlantic Economic Disputes – The EU, the US, and the WTO,* Oxford: Oxford University Press, pp. 465–485.

CARTLAND, MICHAEL (2003), Comment on a WTO Permanent Panel Body, *Journal of International Economic Law* 6 (1), pp. 214–218.

CHARNOVITZ, STEVE (2001), Rethinking WTO Trade Sanctions, *American Journal of International Law* 95 (4), pp. 792–832.

CHARNOVITZ, STEVE (2003), *The WTO's Problematic "Last Resort" Against Noncompliance,* Internet: http://www.worldtradelaw.net/articles/charnovitzlastresort.pdf (downloaded 10 September 2003), updated version of an article published in *Aussenwirtschaft* 57 (4), 2002, pp. 409–439.

CONSULTATIVE BOARD (2004), *The Future of the WTO – Addressing institutional challenges in the new millennium,* Report by the Consultative Board to the Director-General Supachai Panitchpakdi, Geneva: World Trade Organization, Internet: http://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf (downloaded 5 February 2005).

COTTIER, THOMAS (2002), *Proposals for Moving from Ad Hoc Panels to Permanent WTO Panelists,* in: ERNST-ULRICH PETERSMANN (ed.), *Preparing the Doha Development Round – Improvements and Clarifications of the WTO Dispute Settlement Understanding,* Florence: European University Institute, pp. 40–52.

COTTIER, THOMAS (2003), The WTO Permanent Panel Body – A Bridge Too Far?, *Journal of International Economic Law* 6 (1), pp. 187–202.

COTTIER, THOMAS and SATOKO TAKENOSHITA (2003), The Balance of Power in WTO Decision-Making – Towards Weighted Voting in Legislative Response, *Aussenwirtschaft* 59 (2), pp. 171–214.

DAVEY, WILLIAM J. (2002a), *A Permanent Panel Body for WTO Dispute Settlement – Desirable or Practical,* in: DANIEL L.M. KENNEDY and JAMES D. SOUTHWICK (eds.), *The Political Economy of International Trade Law – Essays in Honour of Robert E. Hudec,* Cambridge: Cambridge University Press, pp. 496–527.

DAVEY, WILLIAM J. (2002b), *The WTO Dispute Settlement System,* in: GARY P. SAMPSON and W. BRADNEE CHAMBERS (eds.), *Trade, Environment, and the Millennium,* 2. edition, Tokyo/New York: United Nations University Press, pp. 145–174.

DAVEY, WILLIAM J. (2003), The Case for a WTO Permanent Panel Body, *Journal of International Economic Law* 6 (1), pp. 177–186.

DUNNE III, MATTHEW S. (2002), Redefining Power Orientation: A Reassessment of Jackson's Paradigm in light of Asymmetries of Power, Negotiation, and Compliance in the GATT/WTO Dispute Settlement System, *Law and Policy in International Business* 34, pp. 277–342.

DUVIGNEAU, JOHANN L. (2001), Die Konstitutionalisierung des WTO-Rechts – Zur juristischen Diskussion über Verfassungsstrukturen im Bereich des Handelsvölkerrechts, *Aussenwirtschaft* 56 (3), pp. 295–325.

EHLERMANN, CLAUS-DIETER (2002a), Six Years on the Bench of the "World Trade Court" – Some Personal Experiences as Member of the Appellate Body of the World Trade Organization, *Journal of World Trade* 36 (4), pp. 605–639.

EHLERMANN, CLAUS-DIETER (2002b), Tensions Between the Dispute Settlement Process and the Diplomatic and Treaty-Making Activities of the WTO, *World Trade Review* 1 (3), pp. 301–308.

EHLERMANN, CLAUS-DIETER (2003), Reflections on the Appellate Body of the WTO, *Journal of International Economic Law* 6 (3), pp. 695–708.

ETHIER, WILFRIED J. (2001), *Punishments and Dispute Settlement in Trade Agreements,* Economic Policy Research Unit (EPRU) Discussion Paper No. 2001-14, Copenhagen: University of Copenhagen.

FELICIANO, FLORENTINO P. and PETER L.H. VAN DEN BOSSCHE (2001), *The Dispute Settlement Process of the World Trade Organization – Institutions, Process and Practice,* in: NIELS M. BLOKKER and HENRY G. SCHERMERS (eds.), *Proliferation of International Organizations – Legal Issues,* The Hague: Kluwer, pp. 297–350.

GALLAGHER, PETER (2002), *Guide to Dispute Settlement – A Handy Guide to Bringing a Case Before the WTO,* Geneva: The WTO and The Hague: Kluwer Law.

GOH, GAVIN and TRUDY WITBREUK (2001), An Introduction to the WTO Dispute Settlement System, *University of Western Australia Law Review* 30 (1), pp. 51–74.

GREENWALD, JOHN (2003), WTO Dispute Settlement – An Exercise in Trade Law Legislation?, *Journal of International Economic Law* 6 (1), pp. 113–124.

GUZMAN, ANDREW and BETH A. SIMMONS (2002), To Settle or Empanel? An Empirical Analysis of Litigation and Settlement at the World Trade Organization, *Journal of Legal Studies* 31 (1), pp. 205–235.

HAUSER, HEINZ (2001), *Die WTO-Streitschlichtung aus einer Law and Economics Perspektive,* in: HARTMUT BERG (ed.), *Theorie der Wirtschaftspolitik – Erfahrungen, Probleme, Perspektiven,* Berlin: Duncker und Humblot, pp. 79–111.

HAUSER, HEINZ and ANDREA MARTEL (1997), Das WTO-Streitschlichtungsverfahren: Eine verhandlungsorientierte Perspektive, *Aussenwirtschaft* 52 (4), pp. 525–560.

HECHT, JAMES C. (2000), Operation of WTO Dispute Settlement Panels – Assessing Proposals for Reform, *Law and Policy in International Business* 31 (3), pp. 657–664.

HIPPLER BELLO, JUDITH (1996), The WTO Dispute Settlement Understanding – Less Is More, *The American Journal of International Law* 90 (3), pp. 416–418.

HOEKMAN, BERNARD M. and MICHEL M. KOSTECKI (2001), *The Political Economy of the World Trading System – From GATT to WTO,* 2. edition, Oxford: Oxford University Press.

HUDEC, ROBERT E. (1993), *Enforcing International Trade Law – The Evolution of the Modern GATT Legal System,* Salem, N.H.: Butterworth Legal Publishers.

HUDEC, ROBERT E. (1998), *The Role of the GATT Secretariat in the Evolution of the WTO Dispute Settlement Procedure,* in: JAGDISH BHAGWATI and MATHIAS HIRSCH (eds.), *The Uruguay Round and Beyond – Essays in Honour of Arthur Dunkel,* Berlin et al.: Springer, pp. 101–120.

HUDEC, ROBERT E. (1999), The New WTO Dispute Settlement Procedure: An Overview of the First Three Years, *Minnesota Journal of Global Trade* 8 (2), pp. 1–53.

HUDEC, ROBERT E. (2000), *Broadening the Scope of Remedies in WTO Dispute Settlement,* in: FRIEDL WEISS (ed.), *Improving WTO Dispute Settlement Procedures – Issues and Lessons from the Practice of other International Courts and Tribunals,* London: Cameron May, pp. 345–376.

JACKSON, JOHN H. (1978), The Crumbling Institutions of the Liberal Trade System, *Journal of World Trade* 12 (2), pp. 93–106.

JACKSON, JOHN H. (1997), *The World Trading System – Law and Policy of International Economic Relations,* 2. edition, Cambridge, Mass.: The MIT Press.

JACKSON, JOHN H. (1998), *Designing and Implementing Effective Dispute Settlement Procedures – WTO Dispute Settlement,* in: ANNE O. KRUEGER (ed.), *The WTO as an International Institution,* Chicago and London: The University of Chicago Press, pp. 161–179.

JACKSON, JOHN H. (2001), *The Role and Effectiveness of the WTO Dispute Settlement Mechanism,* in: SUSAN M. COLLINS and DANI RODRIK (eds.) (2001): *Brookings Trade Forum 2000,* Washington D.C.: Brookings Institution Press, pp. 179–219.

JACKSON, JOHN H. (2002), Perceptions about the WTO trade institutions, *World Trade Review* 1 (1), pp. 101–114.

KOVENOCK, DAN and MARIE THURSBY (1997), GATT Dispute Settlement and Cooperation, *Economics and Politics* 9 (1), pp. 95–98.

MAGGI, GIOVANNI (1999), The role of multilateral institutions in international trade co-operation, *American Economic Review* 89 (1), pp. 190–214.

MAGNUS, JOHN R., NAVIN JONEJA and DAVID YOCIS (2003), *What Do All These Adverse WTO Decisions Mean?,* GULC Trade Update, 30 January 2003, Internet: http://www.dbtrade.com/publications/gulc_trade_update.pdf (downloaded 5 February 2005).

MARCEAU, GABRIELLE and MATTHEW STILWELL (2001), Practical Suggestions for Amicus Curiae Briefs Before WTO Adjudicating Bodies, *Journal of International Economic Law* 4 (1), pp. 155–187.

MAVROIDIS, PETROS C. (2000), Remedies in the WTO Legal System – Between a Rock and a Hard Place, *European Journal of International Law* 11 (4), pp. 763–813.

MAVROIDIS, PETROS C. (2001), *Amicus Curiae Briefs Before The WTO: Much Ado About Nothing,* Jean Monnet Working Paper 2/01.

MITCHELL, SHANNON K. (1997), GATT, Dispute Settlement and Cooperation – A Note, *Economics and Politics* 9 (1), pp. 87–93.

ORTINO, FEDERICO and ERNST-ULRICH PETERSMANN (eds.) (2003), *The WTO Dispute Settlement System 1995–2003,* Studies in International Law Vol. 18, The Hague: Kluwer Law International.

PALMETER, DAVID and PETROS C. MAVROIDIS (1999), *Dispute Settlement in the World Trade Organization – Practice and Procedure,* The Hague: Kluwer.

PAUWELYN, JOOST (2000), Enforcement and Countermeasures in the WTO – Rules are Rules – Toward a More Collective Approach, *American Journal of International Law* 94 (2), pp. 335–347.

PETERSMANN, ERNST-ULRICH (1997a), *International Trade Law and the GATT/WTO Dispute Settlement System,* The Hague: Kluwer.

PETERSMANN, ERNST-ULRICH (1997b), *The GATT/WTO Dispute Settlement System – International Law, International Organizations and Dispute Settlement,* Leiden: Brill Academic Publishers.

PETERSMANN, ERNST-ULRICH (1998a), How to Promote the International Rule of Law? Contributions by the World Trade Organization Appellate Review System, *Journal of International Economic Law* 1 (1), pp. 25–48.

PETERSMANN, ERNST-ULRICH (1998b), Editorial – From the Hobbesian International Law of Co-Existence to Modern Integration Law – The WTO Dispute Settlement System, *Journal of International Economic Law* 1 (2), pp. 175–198.

PETERSMANN, ERNST-ULRICH (1999), Dispute Settlement in International Economic Law – Lessons for Strengthening International Dispute

Settlement in Non-Economic Areas, *Journal of International Economic Law* 2 (2), pp. 189–248.

PETERSMANN, ERNST-ULRICH (2002), *Additional Negotiation Proposals on Improvements and Clarifications of the DSU,* in: ERNST-ULRICH PETERSMANN (ed.) (2002), *Preparing the Doha Development Round: Improvements and Clarifications of the WTO Dispute Settlement Understanding,* Florence: European University Institute, pp. 125–139.

RAGOSTA, JOHN A., NAVIN JONEJA and MIKHAIL ZELDOVICH (no year specified), *WTO Dispute Settlement – The System Is Flawed and Must Be Fixed,* Internet: http://www.dbtrade.com/publications/wto_dispute_settlement_is_flawed.pdf (downloaded 10 September 2003).

RAGOSTA, JOHN A., NAVIN JONEJA and MIKHAIL ZELDOVICH (2003), You Be the Judge, *Foreign Affairs* 82 (3), pp. 170–171.

REINHARDT, ERIC (2000a), *Aggressive Multilateralism – The Determinants of GATT/WTO Dispute Initiation, 1948–1998,* Manuscript, Internet: http://userwww.service.emory.edu/~erein/research/initiation.pdf (downloaded 10 September 2003).

REINHARDT, ERIC (2000b), *To GATT or Not to GATT – Which Trade Disputes Does the U.S. Litigate?,* Manuscript, Internet: http://userwww.service.emory.edu/~erein/research/tg.pdf (downloaded 10 September 2003).

REINHARDT, ERIC (2001a), Adjudication without Enforcement in GATT Disputes, *Journal of Conflict Resolution* 45 (2), pp. 174–195.

REINHARDT, ERIC (2001b), *Tying Hands Without a Rope – Rational Domestic Response to International Institutional Constraints,* in: DANIEL W. DREZNER (ed.) (2003), *Locating the Proper Authorities – The Interaction of Domestic and International Institutions,* Ann Arbor: University of Michigan Press, pp. 77–104.

ROSENDORFF, B. PETER (2004), *Stability and Rigidity: Politics and Design of the WTO's Dispute Settlement Procedure,* Internet: http://www rcf.usc.edu/~bpeter/papers/dspv11.pdf (downloaded 5 February 2005).

ROSENDORFF, B. PETER and HELEN V. MILNER (2001), The Optimal Design of International Trade Institutions – Uncertainty and Escape, *International Organization* 55 (4), pp. 829–858.

SCHOTT, JEFFREY J. and JAYASHREE WATAL (2000), *Decision-Making in the WTO,* Policy Brief 00-2, Washington D.C.: Institute for International Economics.

SEVILLA, CHRISTINA R. (1997), *A Political Economy Model of GATT/WTO Trade Complaints,* Jean Monnet Working Paper No. 5/97, New York University School of Law.

SEVILLA, CHRISTINA R. (1998), *Explaining Patterns of GATT/WTO Trade Complaints,* Working Paper 98/1, Weatherhead Center for International Affairs, Harvard University, Internet: http://www.ciaonet.org/wps/sec01 (downloaded 26 May 2003).

SHOYER, ANDREW W. (2003), Panel Selection in WTO Dispute Settlement Procedures, *Journal of International Economic Law* 6 (1), pp. 203–209.

STEGER, DEBRA P. (2002a), *Improvements and Reform of the WTO Appellate Body,* in: ERNST-ULRICH PETERSMANN (ed.), *Preparing the Doha Development Round: Improvements and Clarifications of the WTO Dispute Settlement Understanding,* Florence: European University Institute, pp. 53–66.

STEGER, DEBRA P. (2002b), Review of Claude E. Barfield (2001): Free Trade, Sovereignty, Democracy – The Future of the World Trade Organization, *Journal of International Economic Law* 5 (2), pp. 565–570.

TREBILCOCK, MICHAEL J. and ROBERT HOWSE (1999), *The Regulation of International Trade,* 2. edition, London: Routledge.

UMBRICHT, GEORG C. (2001), An "Amicus Curiae Brief" on Amicus Curiae Briefs at the WTO, *Journal of International Economic Law* 4 (4), pp. 773–794.

UNICE [UNION OF INDUSTRIAL AND EMPLOYERS' CONFEDERATIONS OF EUROPE] (ed.) (2001), *Update of UNICE Discussion Paper on WTO Dispute Settlement System,* 31 May 2001, Brussels: UNICE.

WAINCYMER, JEFFREY (2000), Transparency of Dispute Settlement Within the World Trade Organization, *Melbourne University Law Review* 24 (3), pp. 797–838.

WILSON, DAVID and LYNN STARCHUK (2003), *Judicial Activism in the WTO – Implications for the Doha Negotiations,* Manuscript, 13 September 2003, Internet: http://www.johnstonbuchan.com/pubs/trade/Judicial%20Activism%20in%20the%20WTO.pdf (downloaded 16 September 2003).

ZIMMERMANN, THOMAS A. (2004a), *What Direction Should the DSU Take? Negotiations and Proposals to Review and Reform the WTO Dispute Settlement Understanding,* Doctoral thesis No. 2919, University of St. Gallen, Bamberg: Difo-Druck.

ZIMMERMANN, THOMAS A. (2004b), Zehn Jahre WTO-Streitschlichtung: Eine Zwischenbilanz, *Die Volkswirtschaft* 77 (12), pp. 63–66.

ZIMMERMANN, THOMAS A. (2004c), L'OMC: un bilan intermédiaire après dix ans de règlement des différends, *La Vie Economique* 77 (12), pp. 63–66.

ZIMMERMANN, THOMAS A. (2001), Gewährleisten umgesetzte WTO-Streitschlichtungsurteile offene Märkte? Eine Betrachtung am Beispiel des Zeitschriftenfalles, *Aussenwirtschaft* 56 (3), pp. 359–390.