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## The Controversies over the WTO Dispute Settlement System

### Introduction

The World Trade Organization (WTO) has two roles. The first is legislative, where the WTO is an international organization in which agreements are signed. The other is judiciary, where the WTO is an international adjudicator deciding trade disputes. The first one is limited to *the conduct of trade relations among Members*<sup>528</sup>. The second one is to *conduct [litigation] brought pursuant to the consultation and dispute settlement provisions of WTO covered agreements*.<sup>529</sup>

Forced compliance via binding dispute settlement should, theoretically, ensure that each member of an international organization receives all the benefits to which it is entitled, and that no country is required to make concessions to which it has not agreed and which have not been *paid for*. Dispute Settlement Understanding (DSU) of the WTO, arising from the Uruguay Round negotiations, is generally considered to be the *crown jewel* of the WTO trading system.<sup>530</sup> Much has been written about its functioning, also a few studies in Polish literature.<sup>531</sup> Since 1995,

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<sup>528</sup> Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement), Art. II.

<sup>529</sup> Dispute Settlement Understanding (DSU), Art. 1.1.

<sup>530</sup> J. Ragosta, N. Joneja, M. Zeldovich, *WTO Dispute Settlement: the System is Flawed and Must Be Fixed*, *The International Lawyer* v. 37 no. 3 (Fall 2003), p. 697.

<sup>531</sup> J.J. Michałek, J. Pietrowski, *Rozstrzyganie sporów*, [in:] J. Karczuba, E. Kawecka-Wyrzykowska (eds.), *Polska w WTO*, Warszawa 2002; R. Ostrihansky, *Nowa procedura rozwiązywania sporów w GATT*, Warszawa 1990; W. Niemiec, *Praktyka rozstrzygania sporów na forum WTO*, [in:] J. Rymarczyk, M. Wróblewski (eds.), *10 lat Światowej Organizacji Handlu*, Wrocław 2005; J. Marcinkowska, S. Stanisława-Kloc, *Procedury i zasady rozstrzygania sporów w zakresie własności intelektualnej; Porozumienie w Sprawie Zasad i Procedur Rozstrzygania Sporów*, [in:] J. Barta, R. Markiewicz (eds.), *Własność intelektualna w Światowej Organizacji Handlu (WTO)*, Kraków 1998; J. Gomuła, *Moc wiążąca orzeczeń organów rozstrzygania sporów Światowej Organizacji Handlu*, [in:] J. Menkes (ed.), *Prawo Międzynarodowe. Księga pamiątkowa ku czci prof. Renaty Szafarz*, Warszawa 2007. See also J. Kolasa, *GATT. Z zagadnień tworzenia i stosowania prawa handlu międzynarodowego*, Wrocław 1979.

almost 400 complaints<sup>532</sup> have been filled through the WTO dispute settlement system. The parties often reach a mutually satisfactory solution through consultations in accordance with the WTO Agreements without needing recourse to the panel and Appellate Body review. However, if that fails, the panels, the Appellate Body and the Dispute Settlement Body (DSB) are supposed to resolve the conflict. Only a Member that believes that its benefits have been nullified or impaired by the available measures is entitled to bring a matter before the dispute settlement system.<sup>533</sup> Furthermore, the DSB makes recommendations only when the benefits are found to be nullified or impaired by the measures.<sup>534</sup> This structure indicates the bilateral nature of the WTO dispute settlement system. However, the WTO DSU should not only be seen as a *court*. In every case, where the agreements cannot be clarified through negotiations, the dispute settlement system serves as their surrogate.

The WTO DSU system is better than its GATT predecessor. In general, the system is good and successful. However, it is not free of errors, which I will try to point out. This will be a legal analysis only, without political judgment.

Before I proceed with the analysis, the notion of *dispute* should be clarified. In international law the term *dispute* means a specific disagreement relating to a question of rights or interests in which the parties proceed by the way of claims, counter-claims, denials and so on.<sup>535</sup> In another definition, *dispute* in international law is a situation when one entity of international law demands from another one specific action or behavior and such a demand is based on the rules of international law binding for both parties and this other entity resists this action or behavior.<sup>536</sup> The term *dispute* is therefore different from the notion of *conflict*, which means a general state of hostility between the parties. The distinction is important, since opposite to the conflicts, disputes are not entirely undesirable and may have certain valuable characteristics such as

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<sup>532</sup> WTO Official Internet Website, [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_status\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm) (visited on Nov 7, 2008).

<sup>533</sup> DSU, Art. 23.1.

<sup>534</sup> DSU, Art. 19.1.

<sup>535</sup> J. Collier, V. Lowe, *The Settlement of Disputes in International Law. Institutions and Procedures*, New York 2000, p. 1.

<sup>536</sup> L. Ehrlich, *Prawo międzynarodowe*, Warszawa 1958, p. 356.

an effect of law clarification.<sup>537</sup>

In the context of the WTO Dispute Settlement system, the term *dispute* stands for a situation in which one WTO Member State adopts a trade policy or measure or takes some action, that one or more concerned WTO Members consider to be a breach of the WTO Agreements or a failure to meet obligations under such agreements.<sup>538</sup> In such situation those countries undertake steps with accordance to the Dispute Settlement Understanding. This definition is broad, because the dispute does not arise when a Member State demands ruling of a panel, but already when parties take other available steps (e.g. negotiations) to solve the disagreement between them.

### *1. The WTO disputes settlement system as a model*

Some experts postulate that the WTO disputes settlement system should serve as a model for other international organizations.<sup>539</sup> The attractiveness of this system is based on the following particularities.

The first one is the fact that the Member countries actually make use of this system. Judging by the amount of the disputes annually and the fact that not only developed countries use it, one can say that the rules do not stay on paper, but are regularly put into practice. This is something that cannot be said about most of other international organizations. For example, there is usually a small number of intergovernmental complaints among states in human rights conventions.<sup>540</sup> It can be partially explained by a common opinion that those are domestic policy problems and should be left to the government and citizens of a state. But it is also caused by an inaccessible, ineffective or unclear dispute settlement system. It is remarkable that hundreds of invocations in the GATT just as in the WTO confirm the practical experience of either federal states (like the US) or free trade areas (NAFTA, EC) that liberal trade rules are well suited for judicial interpretations and enforcement.

The second reason is related to the goals and methods of the organization itself—it concerns other international organizations in the

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<sup>537</sup> J. Collier, V. Lowe, *The Settlement...*, p. 1.

<sup>538</sup> K. Sarhan, *The ABCs of WTO Dispute Settlement*, *Dispute Resolution Journal*, Nov 2005–Jan 2006, p. 72.

<sup>539</sup> E. Petersmann, *The GATT/WTO Dispute Settlement System*, London, 1997, p. 56.

<sup>540</sup> *Ibidem*, p. 63.

economy, trade and business sector. Since the WTO is focused on liberalization of market access barriers, complaints and open disputes seem to be a natural way of solving problems. However, most similar organizations concentrate on the harmonization of laws<sup>541</sup> (e.g. International Telecommunications Union, Civil Aviation Organization, World Intellectual Property Organization, etc.). Therefore, some governments view neither these organizations nor their dispute settlement mechanisms as appropriate framework for negotiating and enforcing liberal international trade rules.

## *2. Flaws caused by lack of precision*

There are still relevant imperfections in the WTO disputes settlement system. Some observers claim that the greatest malfunctions are: undesirably (for the injured party) long timetables to conform with the treaties by a Member in breach and not strict enough incentives and sanctions to help achieve the implementation objective of prompt compliance.<sup>542</sup> Other experts question if the current system is able to solve the biggest problems in the modern world trade system, including proper implementation of rulings on agriculture by the EC and the very controversial cases on genetically altered foods, in which the US and a relatively new member of the WTO, China, are most interested.<sup>543</sup>

The DSU was designed to correct the most relevant faults of the GATT dispute settlement system—possibility of permanent evasion of complying with the rulings by a losing party without suffering negative consequences of such actions. Three regulations were designed to address this issue. The first one contains procedures and guidelines for establishing a compliance deadline (or *reasonable period of time*, for coming into compliance).<sup>544</sup> The second is the compliance review; procedures to be used when there is a disagreement over whether the losing Member has complied with the DSU ruling.<sup>545</sup> The third regulation are the procedures for the suspension of concessions if the losing party

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<sup>541</sup> *Ibidem*.

<sup>542</sup> C. Gleason, P. Walther, *The WTO dispute settlement implementation procedures: a system in need of reform*, Law and Policy in International Business v. 31 no. 3 (Spring 2000), p. 713.

<sup>543</sup> E.g. WTO DS320.

<sup>544</sup> DSU, Art. 19.1 and 21.3.

<sup>545</sup> DSU, Art. 21.5.

failed to implement the WTO rulings or otherwise satisfy the winning party by its implementation deadline.<sup>546</sup>

In their application, all three regulations have been plagued by disagreements over interpretation. The tension over the *reasonable period of time* is centered on both the exact length of this period and what is required of the losing party while it is underway. Two following regulations are even more controversial. For example, in the review matter there is no clear understanding about when it should be undertaken or what procedures it should entail. In case of suspension of concessions, again, the language of the treaty leaves room for different interpretations of when it may be requested, which gives the Members an opportunity to delay the WTO's actions. For example, in the *EC-Bananas* case<sup>547</sup> the EC managed to oppose the implementation for a very long time. It was possible mostly because of the lack of precision of the DSU Article 21.5 and its conflict with DSU Article 22.6. In other words, if a losing party wishes to use its reasonable time merely as a tool for buying several months of additional time to evade its obligations, nothing in the DSU text prevents this result.

Article 21.5 states that, *where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel*. The problem is that the DSU provides no other explanation of precisely what the phrase *these dispute settlement procedures* entails, when those procedures may or must be invoked, and who may invoke them.

The conflict between DSU Articles 21.5 and 22.6 occurs in the following situation. The Article 22.6 provides that when a losing party has neither implemented the WTO ruling within the compliance period nor negotiated mutually acceptable compensation within 20 days after the *reasonable period* expires, *the DSB, upon request, shall grant authorization to suspend concessions or other obligations within 30 days of the expiry of the reasonable period*, unless there is a consensus to do otherwise or the losing party refers the requested suspension amount to arbitration. If the amount is referred to arbitration, Article 22 instructs the

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<sup>546</sup> DSU, Art. 22.2.

<sup>547</sup> WT/DS27/R (May 22, 1999) and WT/DS27/AB/R (Spt 9, 1997).

original panel, if available, to determine whether the request is *equivalent to the level of nullification or impairment* and to issue its determination within 60 days after the expiration of the reasonable period. Upon issuance of the arbitrators' decision, the DSB, upon request, must authorize a suspension of concessions consistent with the decision. Hence, as written, Article 22 makes allowance for the *negative consensus* rule only in accordance with a specifically delineated timetable. How the DSU drafters intended that timetable to be reconciled with the timetable of a potentially protracted compliance review pursuant to Article 21.5 is not clarified in the text.<sup>548</sup>

Despite the deadlines, a full dispute settlement procedure still takes a considerable amount of time, during which the plaintiff suffers continued economic harm if the challenged measure is indeed inconsistent with WTO regulations. No provisional measures (interim relief) are available to protect the economic and trade interests of the successful plaintiff during the dispute settlement procedure. Moreover, even after prevailing in dispute settlement, a successful plaintiff will receive no compensation for the harm suffered during the time given to the respondent from the other side for its legal expenses.<sup>549</sup>

### 3. *The WTO common law*

According to some critics,<sup>550</sup> the risk that the DSB might adopt judicial activism and abuse its binding nature to create WTO's *common law*, to which the Members never agreed, has been realized in a series of decisions. The main reason for this tendency is that the WTO DSU has essentially evolved from the previous *diplomatic* GATT model, so it does not contain procedural protections that are essential to due process and transparency in the binding judicial environment. It refers to the panel, arbitration and Appellate Body proceedings. The *common law* of the WTO DSU is controversial even to lawyers familiar with and used to the common law system. For example, American attorneys point out the lack

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<sup>548</sup> C. Gleason, P. Walther, *The WTO dispute settlement...*, p. 721.

<sup>549</sup> *A Handbook on the WTO Dispute Settlement System*, WTO Secretariat Publication prepared by the Legal Affairs Division and the Appellate Body, Cambridge 2004, p. 117.

<sup>550</sup> J. Ragosta, N. Joneja, M. Zeldovich, *WTO Dispute Settlement...*, p. 707.

of checks and balances<sup>551</sup> so valued in the American Constitution.<sup>552</sup> Speaking of exceeding its discretion by the institutions of the WTO dispute settlement system and creating a common law, one of the experts wrote that the Appellate Body, by disregarding the negotiated standard of review in antidumping cases, has *effectively revised the Uruguay Round Anti-Dumping Agreement*.<sup>553</sup>

Even though the DSU Article 3.2 provides that *recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements*, the panelists inevitably create or change laws, if some regulations include gaps, omissions, and inconsistencies. Such issues are fundamental to democratic institutions and, in this case, the law *made by a court* is not subject to review by the legislature.<sup>554</sup> This is important with regard to the negative consensus rule,<sup>555</sup> since the rulings are adopted almost automatically. In this context, the negative rule doctrine should be regarded as a double-edged sword.

But this issue is even more important in the following matter. What can be actually done, if the dispute settlement resulted in the creation of laws that would have never been accepted by the parties in negotiations? Only the Ministerial Conference or the General Council of the WTO *can enact clarifications* or interpretations of treaty rules. Interpretations can be adopted only with the support of three-quarters of the overall WTO membership<sup>556</sup>, and such interpretations may not amend the treaty—a change that would be subject to more stringent procedures. To date, no attempts to utilize new interpretations or clarifications to resolve

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<sup>551</sup> A. T. Mason, D.G. Stephenson Jr., *American Constitutional Law*, New Jersey 2005, p. 81.

<sup>552</sup> *Ibidem*.

<sup>553</sup> D. Tarullo, *The Hidden Costs of International Dispute Settlement: WTO Review of Domestic Anti-Dumping Decisions*, 34 *Law & Pol’y Intl’L Bus.* 109, 172 (2002).

<sup>554</sup> The lack of checks and balances discussed above.

<sup>555</sup> The general rule for the Dispute Settlement Body is to make decisions by consensus. In this case, consensus occurs when no WTO Member at the meeting formally objects to the proposed decision. (DSU, Art 2.4). Therefore, contrary to the GATT, in the WTO the blocking of the dispute settlement’s judgment by a losing party is no longer possible.

<sup>556</sup> WTO Agreement, Article IX:2.

ambiguities in the new WTO rules have been successful.<sup>557</sup>

The process of amending the rules is even more complicated.<sup>558</sup> In most cases, amendments can be proposed by the Ministerial Conference and adopted with the vote of two-thirds of WTO Members. However, if the amendment is determined to affect the rights and obligations of Member states, then Members opposed to the amendment are not bound by it unless three-quarters of the overall WTO membership votes to give them the option of either accepting the amendment or withdrawing from the WTO. Furthermore, amendments to certain rules—those involving WTO decision-making, most favored nations (MFN) status, tariff schedules, and dispute settlement, for example, must be enacted by consensus, which is defined as no individual Member publicly dissenting.

It is not odd that the Members give up some sovereignty in entering an international agreement (which is an obvious matter in international law). However, regarding the paragraphs above, it may be considered odd that the extent to which the Members give it up is actually unknown precisely.

The question of the *common law* is even more problematic, if we add the fact that the preceding decisions of the Appellate Body affect the following ones to such an extent that one can consider them as a pure application of the *stare decisis doctrine*<sup>559</sup>. A clear example of this is the *US-Steel Plate*<sup>560</sup> case, which exclusively relies on the determination of the *EC-Bed Linen*<sup>561</sup> case. Another example of the great power of the Appellate Body is the *Shrimp-Turtle*<sup>562</sup> case, in which the Appellate Body's interpretation of its role and of the text that theoretically binds it was revolutionary. According to the Appellate Body, the terms of the negotiated agreements could *evolve* into something that presumably none of the original parties to the agreement ever anticipated. The problem is

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<sup>557</sup> J. Ragosta, N. Joneja, M. Zeldovich, *WTO Dispute Settlement...*, p. 714.

<sup>558</sup> WTO Agreement, Article X.

<sup>559</sup> Lat. *Let the decision stand*, principle that a question once considered by a court and answered must elicit the same response each time the same issue is brought before the courts; Encyclopaedia Britannica Online Academic Edition, <http://search.eb.com/eb/article-9069452>, visited on Nov 7, 2008.

<sup>560</sup> WTO DS206.

<sup>561</sup> WTO DS141.

<sup>562</sup> *US-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998).

not the possible practical usurpation of the power by the Appellate Body. The problem is that there are no regulations whatsoever in the WTO dispute settlement system/process that prevent it.

A similar situation, but regarding both a panel and the Appellate Body, was in the *Australia-Automotive Leather*<sup>563</sup> case. The panels completely disregarded the consensus of the plaintiff, the respondent, and third parties involved, and reached their own interpretation of certain provisions.

Some experts criticizing the conduct of the DSU institutions have concurring opinions on the disadvantages of this trend. They state that among many examples of the Appellate Body's decisions not based on the WTO agreements, only those deserve condemnation which impinge on the policy concerns of the Members.<sup>564</sup> In other words, filling a gap in the system by reasonable interpretation methods is admissible, but not results of over-interpretation contrary to the legal text. Decisions on burden of proof or judicial economy<sup>565</sup> are examples of commonsense extrapolations to make the dispute settlement system work that can be easily justified, even though there are no such regulations in the WTO agreements. However, the Appellate Body's conclusion that it can receive *amicus briefs*<sup>566</sup> goes far beyond a mere gap filling.

#### 4. *The private counsel controversy*

Due to lack of WTO rules concerning private counsel, some Members assumed that such counsel would not be permitted<sup>567</sup>, as it was in the GATT. Others reasoned that since the process became significantly more judicial, the parties should be represented as they would be in any other court of law.<sup>568</sup> In spite of concerns that the WTO is not equipped to

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<sup>563</sup> WTO DS126.

<sup>564</sup> D.M. McRae, *Comments on Claus-Dieter Ehlermann's presentation on 'The role and record of dispute settlement panels and the Appellate Body of the WTO'*, *Journal of International Economic Law*, v. 6 no. 3 (September 2003), p. 710.

<sup>565</sup> *Ibidem*.

<sup>566</sup> A.T. Mason, D.G. Stephenson Jr., *American Constitutional Law*, p. 31.

<sup>567</sup> J. Pearlman, *Participation by Private Counsel in World Trade Organization Dispute Settlement Proceedings*, 30 *Law & Pol'y Int'l Bus.* 399, 401 (1999).

<sup>568</sup> N. Campbell, C. Bennett, *The Contribution of WTO Appellate Review to a Rule-Based World Trading System*, *Can. Int'l Law.*, June 2000, p. 7.

handle ethical issues that accompany the use of non-governmental counsel, the Appellate Body decided to defer to the sovereignty of the WTO Members and permit private attorneys to represent parties in trade disputes.<sup>569</sup> The argument supporting this decision was that it is a step towards a *real* judicial procedure and a move away from the diplomatic roots of the dispute settlement process. On the other hand, this created a large body of non-governmental persons who are not bound by any WTO code of ethics to gain access to privileged government trade secrets.

It should be remembered that the WTO proceedings are generally closed to the public because the government secrets revealed during the hearings are regarded as too sensitive to be disclosed. It is possible that some governments would not participate in the DSU without these extreme safeguards.<sup>570</sup> Furthermore, as the American Bar Association has pointed out, private lawyers participating in such proceedings are not subject to any effective disciplines for misconduct or breach of obligations of confidentiality or conflicts of interest and that the lawyer's domestic bars may not be able or willing to exercise effective discipline.<sup>571</sup>

The precedent case allowing private attorneys to represent parties in the dispute was the *EC-Bananas* case. The panel denied admission of the private attorney, stating that *private lawyers may not be subject to disciplinary rules such as those that applied to Members of governments, and that their presence in panel meetings could give rise to concerns about breaches of confidentiality*. The panel also noted concerns that smaller states may not have sufficient financial resources at their disposal to procure legal expertise. The Appellate Body overruled the panel's ruling, stating that they *[found] nothing in the WTO Agreement, the DSU or the Working Procedures, nor in customary international law or the prevailing practice of international tribunals, which prevents a WTO Member from determining the composition of its delegation in Appellate Body proceedings*.

The WTO does have rules of conduct and they do include the confidentiality obligation. The Working Procedures<sup>572</sup> provide the

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<sup>569</sup> P. McCalley, *The Dangers of Unregulated Counsel in the WTO*, Georgetown Journal of Legal Ethics, v. 18 no. 3 (Summer 2005), p. 975.

<sup>570</sup> *Ibidem*, p. 978.

<sup>571</sup> *Ibidem*.

<sup>572</sup> *Working Procedures for Appellate Review*, WT/AB/WP/5 (2005).

following: *Each covered person shall at all times maintain the confidentiality of dispute settlement deliberations and proceedings together with any information identified by a party as confidential... and shall not use such information... to gain personal advantage or advantage for others. [...] All covered persons... shall disclose any information they could reasonably be expected to be known to them at the time which... is likely to affect or give rise to justifiable doubts as to their independence...*

The only problem with this regulation is that the private attorneys are not *covered persons*. The term encompasses those sitting on a panel, in the appeals process, arbitrators, and expert witnesses.<sup>573</sup> The problem is not only theoretical. In the case *Brazil Aircraft*,<sup>574</sup> Canada gave confidential Brazilian documents, regarding the aircraft industry, to private attorneys. It turned out though, that the Canadian government is not the law firm's only client interested in the information contained in the documents. The firm also represented a Canadian aircraft manufacturer. When this news became known, it turned into a scandal. Ultimately, there were no negative consequences for the Canadian government or the law firm.<sup>575</sup> In that case, reconciliation was possible. However, one can imagine a situation in which a Member does not abide by the WTO ruling, effectively negating the panel's judgment. The difference between such behavior and other possible non-conformations with the treaties is that in such a case the moral authority would be on the side of the protestor.

In sum, over strong objections, the WTO affirmed private counsel before the DSB. However, with that decision, the WTO deferred the responsibility to regulate such counsel to local governments. The WTO does possess the tools to do it by itself; for example, including private attorneys as *covered persons* or developing a separate code of conduct for them. However, the Members are somewhat reluctant to use them.

##### *5. Dispute settlement system's independence*

I did not intend to touch political issues in this paper. However, I cannot avoid mentioning the matter of influence of certain Members on

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<sup>573</sup> P. McCalley, *The Dangers...*, p. 981.

<sup>574</sup> WTO DS46.

<sup>575</sup> P. McCalley, *The Dangers...*, p. 982.

the work of panels or the Appellate Body.

The principle of negative consensus and the introduction of a standing Appellate Body as the final arbiter on WTO disputes have removed practical authority over the dispute settlement process from the Member states and enhanced the level of independence of the system from the parties. However, according to some surveys, decisions made by the Appellate Body show a practice of allowing political considerations to take precedence over legal reasoning when choosing whether to rule against a politically powerful Member. Those examinations conclude that the Appellate Body seems to be reluctant to make strong and unequivocal adverse rulings against powerful WTO Members<sup>576</sup>. Such results are shown by surveys based on qualitative research<sup>577</sup>—examinations of particular decisions. Some experts also point out that the Appellate Body members are selected through a process in which the powerful Members may veto candidates whom they assess as likely to engage in inappropriate or undesired lawmaking.<sup>578</sup> Therefore, the Appellate Body is suspected of acting in the shadow of threats to rewrite DSU rules that would weaken their position. It may also be suspected of possible defiance of its decisions by powerful Members.

Those were the conclusions of the qualitative researchers. The quantitative surveys<sup>579</sup> show exactly opposite results.

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<sup>576</sup> G. Garrett, J. McCall Smith, *The Politics of WTO Dispute Settlement*, paper presented to the Annual Meeting of the American Political Science Association, 1999, <http://www.yale.edu/leitner/pdf/1999-05.pdf> (visited Nov 6, 2008), p. 44.

<sup>577</sup> *Qualitative research—An unstructured, exploratory research methodology based on small samples that provides insights and understanding of the problem setting*—see N.K. Malhotra, *Marketing research*, Pearson Education 2007, p. 143.

<sup>578</sup> R.H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional and Political Constraints*, 98 *American Journal of International Law* (2004), p. 275.

<sup>579</sup> *Quantitative research—A research methodology that seeks to quantify the data and, typically, applies some form of statistical analysis*—see N.K. Malhotra, *Marketing research*, p. 143.

Disputes 1995–2004

		Complainant	Won	Lost	Win%	Respondent	Won	Lost	Win%
US	Panel	24	22	2	92	67	13	54	19
	AB	17	13	4	76	55	7	48	13
EC	Panel	26	25	2	92	19	4	15	21
	AB	18	15	3	83	16	7	9	44
TOTAL	Panel	138	113	25	81	138	25	113	18
	AB	102	80	22	78	102	22	80	21

Source: J. Maton, C. Maton, *Independence under Fire: Extra-legal Pressures and Coalition Building in WTO Dispute Settlement*, Journal of International Economic Law v. 10 no. 2 (June 2007), p. 329.

Are the data provided in the table indicative of a pattern of bias in panels or Appellate Body rulings? The numbers for both US and EC are surely insufficient for drawing any conclusions.

Nevertheless, further investigation was conducted.<sup>580</sup> The regression analyses in studies over different forms of parties' influence on the independent panels and Appellate Body included such factors as difference in welfares, difference in previous use of the system, difference in third party numbers and EC/US against third-country win ratio. The only apparent significant result is that greater experience of the dispute settlement mechanism on the part of the plaintiff increases the percentage of arguments won by the plaintiff in panel proceedings.<sup>581</sup> There is nothing suspicious about this. Greater experience in dispute settlement is a question of practical capacity. If a state has participated in a greater number of disputes, their trade ministries and personnel will have greater experience with the system, and hence greater skills at dealing with it, both personally and institutionally. It is interesting to note that this trend is absent in Appellate Body results, suggesting that it has less impact there. There is no reliable evidence to suggest that either body supports richer or more powerful states against others, or that they defer to larger coalitions of states on any issue.

Comparing the results of both qualitative and quantitative researchers, one can say that even though in some individual cases extra-legal influences and pressures on either a panel or the Appellate Body may have occurred, it cannot be considered common practice. Judging by

<sup>580</sup> J. Maton, C. Maton, *Independence under Fire: Extra-legal Pressures and Coalition Building in WTO Dispute Settlement*, Journal of International Economic Law v. 10 no. 2 (June 2007), p. 329.

<sup>581</sup> *Ibidem*, p. 329.

statistical evidence, the independence of the WTO dispute settlement system seems to be guaranteed. Nevertheless, it would not cause any harm to strengthen the legitimacy of the DSU by establishing standing panel(s) or decreasing Members' influence on tenure of the Appellate Body members.

#### 6. *Unanimous decisions in reports*

Up to this point, there has been almost no dissent in World Trade Organization (WTO) dispute settlement reports. Fewer than 5% of panel reports and 2% of Appellate Body reports contain separate opinions of any kind.<sup>582</sup> The WTO is in fact actively discouraging dissenting opinions. In 105 standard panel decisions to December 2006, there were only six dissenting opinions.<sup>583</sup> Referring to the Appellate Body, there have been 66 decisions and only a single opinion styled as a dissent and one other separate opinion labeled as concurrence.<sup>584</sup>

WTO jurists are overwhelmingly declining to put forth differing opinions, even though there are provisions in the WTO rules specifically permitting panelists and Appellate Body members to do so. The DSU provides that *opinions expressed in the panel report by individual panelists shall be anonymous*<sup>585</sup> and the same regulations refer to the Appellate Body reports.<sup>586</sup> This language makes clear that separate opinions are permitted at both the panel and Appellate Body. The Appellate Body Working Procedures are much less encouraging though. Working Procedures Rule 3.2 provides: *The Appellate Body and its divisions shall make every effort to take their decisions by consensus. Where, nevertheless, a decision cannot be arrived at by consensus, the matter at issue will be decided by a majority vote.*

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<sup>582</sup> M.K. Lewis, *The Lack of Dissent in WTO Dispute Settlement*, Journal of International Economic Law, v. 9 no. 4 (December 2006), p. 896.

<sup>583</sup> *Ibidem*.

<sup>584</sup> The term 'dissent' is used here to mean 'the explicit disagreement of one or more judges of a court with the decision passed by the majority'. *Black's Law Dictionary*, 6th edition, St Paul, MN, 1990), p. 472. A concurrence is used here to indicate an opinion in which a judge agrees with the conclusions or results reached by the majority but provides different reasoning or views in reaching the same result. *Ibidem*, p. 291.

<sup>585</sup> DSU, Art. 14.3.

<sup>586</sup> DSU, Art. 17.11.

The lack of dissenting opinions is especially striking when compared with the practices of other international judicial bodies. For example, the International Court of Justice has been criticized for having ideological fractions amongst its judges, a factor that has undoubtedly led to a high level of dissent.<sup>587</sup> In the International Tribunal for the Law of the Sea, there have been separate or dissenting opinions in every dispute for which a decision has been issued.<sup>588</sup> Under North American Free Trade Agreement in 14 of 51 cases to date, there have been separate or dissenting opinions from the decisions issued by the Chapter 19 and Chapter 20 panels.<sup>589</sup> The experience of the ICJ, ITLOS, and NAFTA show that the WTO's high rate of unanimous decisions is the exception rather than the rule in international dispute resolution. The political nature of the ICJ and to some extent ITLOS could provide explanation why those tribunals experience a much higher rate of dissent. The NAFTA tribunals, however, resolve disputes that have similarities regarding trade with the WTO's disputes.

Why do the panelists not dissent? The possible explanations for this phenomenon are numerous:

a) The primary reason the dispute settlement jurists have emphasized consensus appears to be out of a desire for legitimacy and a belief that speaking as one voice will prove their independence.<sup>590</sup>

b) Another reason, going along with the first one, seems to be a desire of the Appellate Body to be seen not only as independent, but also as competent and credible.<sup>591</sup>

c) Threat of implementation problems in dispute settlement may be another cause, although this has not been articulated in any of the writings of former members of the Appellate Body.<sup>592</sup>

d) Working Procedures 4.1.–4.3., which clearly emphasize the *collegiality* of the Appellate Body.

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<sup>587</sup> D.P. Steger, *Improvements and Reforms of the WTO Appellate Body*, [in:] E. Petersmann, F. Ortino (eds.), *The WTO Dispute Settlement System 1995–2003*, Hague 2004, p. 45.

<sup>588</sup> D.M. McRae, *The WTO in International Law: Tradition Continued or New Frontier*, 3 JIEL 27 (2000), p. 39.

<sup>589</sup> M.K. Lewis, *The Lack of Dissent...*, p. 902.

<sup>590</sup> *Ibidem*, p. 904.

<sup>591</sup> *Ibidem*.

<sup>592</sup> *Ibidem*, 905.

e) The DSU defines the Appellate Body and panels very much in institutional rather than individual terms. That is why decisions themselves are styled as reports rather than opinions.

f) Although many consider the Appellate Body essentially to be a court of last resort, notably it is not called *court*. Decisions are issued in reports and are not called decisions, judgments, or opinions. If the Appellate Body was an administrative organ, dissenting opinions would be less appropriate than if it was a judicial one.<sup>593</sup>

h) It is possible of course that the high percentage of unanimous opinions is due to actual unanimity among the Appellate Body. This seems somewhat improbable because of the comments of Appellate Body members suggesting there have been areas of disagreement.<sup>594</sup>

i) Judges on international tribunals are often appointed for relatively short fixed terms, which are then renewable, as is the case with the Appellate Body members, who serve four-year terms with the possibility of one renewal. Hence, the reappointment issue may play a significant role in members' behavior.

j) A final factor presumably minimizing the number of dissents at the panel level is the strong influence of the Secretariat, which provides assistance to panels not just on administrative matters but also on the substantive issues raised by a dispute.

But why should dissent in the dispute settlement be encouraged? What benefits to the system do they bring? The realistic possibility that a fellow jurist will dissent forces the majority to contend with alternative viewpoints<sup>595</sup>, which results in better decisions taken by panels and the Appellate Body. Dissenting opinions can provide useful reference points for later jurists re-examining the issues under consideration and draw attention to the weaknesses or flaws in a majority opinion.<sup>596</sup> Furthermore, dissenting opinions can highlight ambiguities in the law itself, and in so doing, prod the drafters to amend the law as needed.

Dissenting opinions as useful reference points for later jurists are especially important if, over time, the number of difficult cases is likely to

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<sup>593</sup> *Ibidem*, p. 911.

<sup>594</sup> J. Bacchus, *Table Talk: Around the Table of the Appellate Body of the World Trade Organization*, 35 Vand J Transnatl L 1021 (2002), pp. 1029–1030.

<sup>595</sup> A. Lynch, *Dissent: The Rewards and Risks of Judicial Disagreement in the High Court of Australia*, 27 Melb UL Rev 724 (2003), p. 726.

<sup>596</sup> M.K. Lewis, *The Lack of Dissent...*, p. 908.

increase. When the Appellate Body revisits old issues, it would be particularly useful to have a record of any past disagreements regarding interpretation, scope, or application. Such a record would permit – indeed require – the Appellate Body to reconsider the fundamental issues and the original result.<sup>597</sup> In addition to later panels and the Appellate Body benefiting from access to previous dissenting opinions, WTO Members would also benefit from having serious differences of opinion or interpretation made transparent. Ready access to alternative visions of the same issue would, again, increase the ability of the WTO Members to amend WTO Agreements in order to overrule panel or Appellate Body reports.<sup>598</sup>

In sum, *keeping the lid on dissents may ultimately erode the strength of the dispute settlement system and hinder the ability of the WTO Members to make appropriate changes to the Agreements.*<sup>599</sup> The dissenting opinions that have been expressed have had a clear impact on the dispute settlement. Those few dissenting opinions that have been published demonstrate that, out of the six panel reports featuring dissenting opinions to date, two were reversed at the Appellate Body level on the grounds raised in the dissent and in a third case the Appellate Body also partially agreed with the dissenter's points.<sup>600</sup> 50% of the arguments raised in dissenting opinions at the panel level were adopted in whole or in part on appeal by the Appellate Body, which illustrates beyond any doubt that dissenting opinions can and do make a difference.

The *consensus at all costs*<sup>601</sup> mentality does not serve the dispute settlement system well. The Working Procedures should be amended to eliminate the negative consequences for writing separately by removing any perceived link between specific opinions and potential tenure on the Appellate Body or by establishing standing panel(s). The panelists and Appellate Body members should be encouraged to speak their mind.

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<sup>597</sup> W.J. Brennan Jr., *In Defense of Dissents*, 37 *Hastings Law Journal* 427 (1986).

<sup>598</sup> M.K. Lewis, *The Lack of Dissent...*, p. 931.

<sup>599</sup> *Ibidem*, p. 896.

<sup>600</sup> *Ibidem*, p. 928.

<sup>601</sup> *Ibidem*, p. 931.

### 7. Rebalancing retaliation problem

It is generally assumed<sup>602</sup> that trade retaliation under the WTO performs some kind of ‘rebalancing’ by allowing the injured Member to suspend ‘concessions and obligations’ of the violating Member on a level equivalent to the level of ‘nullification and impairment’ suffered by the injured Member.<sup>603</sup> That is a common misconception according to some observers.<sup>604</sup> The WTO arbitration decisions do not succeed in their goal of providing for retaliation that will affect trade in the same amount as the WTO-inconsistent measure at issue. The reason for that is the lack of any sensible comparison mechanisms with which equivalence for purposes of ‘rebalancing’ could be evaluated.<sup>605</sup>

How could the system be improved? Arbitrators should pay greater attention to the current DSU Article 22.4, which states: *the level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment*. This article is especially important in connection with the Article 22.7: *The arbitrator acting [...] shall not examine the nature of the concessions or other obligations to be suspended but shall determine whether the level of such suspension is equivalent to the level of nullification or impairment*. Some experts have advocated that DSU reform should bring in a *parallel panel of economic experts, a kind of economists’ jury, to rule on the economic issues of the case within the legal framework set by the arbitrators*.<sup>606</sup> This would improve establishing the rebalancing retaliation, because even though it is settled by the *judicial* branch of the WTO, this process concerns not only legal matters, but first and foremost the trade and economic issues.

Often proposed changes are compulsory monetary compensation<sup>607</sup> or contingent liberalization requirements.<sup>608</sup> Both of them would have to

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<sup>602</sup> H. Spamann, *The Myth of 'Rebalancing' Retaliation in WTO Dispute Settlement Practice*, Journal of International Economic Law, v. 9 no. 1 (March 2006), p. 31.

<sup>603</sup> DSU, Art. 22.7.

<sup>604</sup> H. Spamann, *The Myth...*, p. 31.

<sup>605</sup> *Ibidem*.

<sup>606</sup> *Ibidem*, p. 77.

<sup>607</sup> M. Bronckers, N. van den Broek, *Financial Compensation in the WTO: Improving the Remedies of WTO Dispute Settlement*, 8 JIEL (2005), p. 101.

<sup>608</sup> R.Z. Lawrence, *Crimes & Punishments? – Retaliation under the WTO*,

be agreed upon between the Members and cannot be introduced without amendments of the treaties. What is also crucial is that there should be a possibility to appeal Article 22.6 decisions to the Appellate Body to assure more consistency<sup>609</sup>. Furthermore, a suggestion to shift the burden of proof from the respondent to the complainant should be taken into account.<sup>610</sup>

#### 8. *The question of equal access to the DSU*

Some experts claim that the developing countries encounter obstacles in using the WTO dispute settlement system. One of the reasons is the cost—no country will enter the litigation if the cost of such proceedings exceeds possible benefits.<sup>611</sup> Hence, smaller and poorer countries, with smaller volume of trade, are more likely to tolerate WTO-inconsistencies. Moreover, developing countries are often unable to recognize and take advantage of potential complaints because they lack experts.<sup>612</sup> It is a large disadvantage in comparison with the developed countries, in which the private sector is highly vigilant in monitoring its own market access rights and where there is an effective mechanism in place for public-private interaction.<sup>613</sup> The experts at home are one problem, but the delegates at the WTO are also an issue. Many of the developing countries do not have full-time representation in the WTO, and most of those which do are not sufficiently staffed.<sup>614</sup>

A third cost-related factor here is so-called *political economic cost*. It reflects the negative consequences of the developing countries, which

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Washington, DC: Institute for International Economics, 2003; and [http://bookstore.iie.com/merchant.mvc?Screen=PROD&Product\\_Code=372](http://bookstore.iie.com/merchant.mvc?Screen=PROD&Product_Code=372) (visited on October 20, 2008), Chapter 5.

<sup>609</sup> H. Spamann, *The Myth...*, p. 77.

<sup>610</sup> *Ibidem*, p. 79.

<sup>611</sup> C.P. Brown, *Participation in WTO Dispute Settlement: Complaints, Interested Parties, and Free Riders*, 19:2 World Bank Econ. Rev. 287, 297 (2005).

<sup>612</sup> M.L. Busch, E. Reinhardt, *Testing International Trade Law: Empirical Studies of GATT/WTO Dispute Settlement*, [in:] D.L. Kennedy, J. Southwicks (eds.), *Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec*, 2002, p. 477.

<sup>613</sup> G.C. Shaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation*, 8 Journal of International Economic Law (2003).

<sup>614</sup> C. Michalopoulos, *The Developing Countries in the WTO*, 22:1 World Econ. (1999) p. 117.

risk denial of assistance in development from the Members against which they complained.<sup>615</sup>

But do those hurdles really occur in practice? Is access to the dispute settlement system limited for the developing countries? Experience has shown beyond any doubt that the developing countries use the new DSU more often than they used the GATT system.<sup>616</sup> However, the share of the developing countries in the total number of cases brought before the DSU did not change much.<sup>617</sup>

The question is: does that prove that the access to the system is unequal? The surveys show that the participation of a country in international trade disputes is proportional to their volume of trade.<sup>618</sup> Other similar analyses support this opinion. For example, the likelihood of encountering a disputable trade measure *is proportional to the diversity of a country's export over products and partners*.<sup>619</sup> There are factors unrelated to development status that are better predictors of DSU usage than development status itself.<sup>620</sup> Therefore, there is no evidence of injustice in this case.

The lack of evidence proving unequal access to the WTO DSU does not prove its perfect equality. One should keep in mind that the surveys themselves are imperfect, which makes it more difficult to determine the facts. *The distribution of disputable measures is unobservable, since only a subset of all potential disputes arrive at the*

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<sup>615</sup> C.P. Brown, B.M. Hoekman, *WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector*, 8 J. Int'l Econ. L. (2005), p. 863.

<sup>616</sup> T. Stostad, *Trappings of Legality: Judicialization of Dispute Settlement in the WTO, and its Impact on Developing Countries*, Cornell International Law Journal, v. 39 no. 3 (Fall 2006), p. 811.

<sup>617</sup> *Ibidem*, p. 811.

<sup>618</sup> P. Holmes, *Emerging Trends in WTO Dispute Settlement: Back to the GATT?*, World Bank Policy Research Working Paper Series No. 3133, 2003, p. 2.

<sup>619</sup> H. Horn, *Is the Use of the WTO Dispute Settlement System Biased?*, Center for Econ. Pol'y Res., Discussion Paper Series No. 2340, 1999, p. 2.

<sup>620</sup> E. Reinhardt, *Aggressive Multilateralism: The Determinants of GATT/WTO Dispute Initiation, 1948–1998*, prepared for delivery at the 1999 Annual Meeting of the International Studies Association, Washington D.C., Feb 17–20, <http://userwww.service.emory.edu/~erein/research/initiation.pdf> (visited 20 Oct 2008), p. 19.

WTO.<sup>621</sup> By comparing the distribution of complaints with the distribution of disputable measures, we cannot precisely determine whether there are any biases in the tendency to bring complaints to the DSU. That is because we do not know to what extent the Members are affected by disputable trade measures.

Furthermore, even those who claim that access to WTO DSU is not equal agree that the power disparity would be even greater without the DSU.<sup>622</sup> Total elimination of powerful nations' greater power to violate international obligations without suffering serious consequences is an utopian idea. Therefore, the most important question in determining how far the DSU will be amended to bring the WTO closer to a real legal system is whether powerful nations would regard it to be in their long-term interest to give up some of their ability to get away with violations of their obligations.<sup>623</sup> Nevertheless, some authors suggest a very original solution to balance nations' powers in the WTO disputes. There are propositions to consider establishing a mechanism to allow countermeasures to be imposed collectively.<sup>624</sup> It would provide access to an effective remedy to weaker Members prevailing in a dispute, but economically unable to take Member-to-Member countermeasures.

### 9. Legitimacy concerns

One of the concerns about the WTO dispute settlement system's future is the matter of its legitimacy. If Members accept a transformation of the system, so it would resemble domestic models of third-party dispute settlement, it should result in better transparency of the proceedings to the public.<sup>625</sup> The litigation process could be enhanced by the addition of alternative forms of dispute resolution as an integral part of the procedure (e.g. mediation).

The lack of trust from the Members may nevertheless have severe

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<sup>621</sup> H. Horn, *Is the Use...*, p. 4.

<sup>622</sup> C.M. Vazquez; J.H. Jackson, *Some reflections on compliance with WTO dispute settlement decisions*, Law and Policy in International Business, v. 33 no. 4, 2002, p. 567.

<sup>623</sup> *Ibidem*.

<sup>624</sup> J. Pauwelyn, *Enforcement and Countermeasures in the WTO*, 94 Am. J. Int'l. L., 2000, p. 335.

<sup>625</sup> D.M. McRae, *What is the Future of WTO Dispute Settlement?*, Journal of International Economic Law, v. 7 no. 1 (March 2004), p. 21.

consequences for the WTO dispute settlement system. The government may turn to bilateral and regional agreements instead of using the DSU. It would tremendously weaken the whole WTO if the agreements stay on paper but could not be enforced.<sup>626</sup> The failure of the Cancun round<sup>627</sup> of negotiations shows that such a threat cannot be entirely excluded.

The practice of the dispute settlement procedures shows many achievements of the system. The DSU is used frequently and commonly by both developed and developing countries.<sup>628</sup> Notwithstanding some highly publicized exceptions, there is a high rate of compliance with WTO rulings.<sup>629</sup> The agreements are interpreted in compliance with the Vienna Convention on the Law of Treaties and the substantial body of jurisprudence emerged from the decisions of panels and the Appellate Body.

However, none of these achievements is undisputed. For example, the output of the panels and Appellate Body is often criticized because it allegedly exceeds their interpretative functions contrary to Article 3.2 of the DSU.<sup>630</sup> But any analysis of the success or failure of the system has to look more broadly at its strengths and weaknesses not only in its rights, but also in the context of trade agreements. Even though the WTO dispute settlement is often under attack for some minor defects, it is, in fact, widely regarded as successful.<sup>631</sup> No government is currently calling for the abolition of WTO dispute settlement and its future is assured.<sup>632</sup>

It is very interesting how important dispute settlement systems have become in major international trade agreements. For instance, the European Court of Justice sitting in Luxemburg pays a lot of attention to such laws.<sup>633</sup> The DSU represents a decided move of the GATT/WTO

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<sup>626</sup> D.M. McRae, *What is the Future...*, p. 21.

<sup>627</sup> The 5<sup>th</sup> WTO Ministerial Conference, which was held in Cancun (Mexico), September 10–14 2003, was the first one that ended without reaching a consensus by the Members.

<sup>628</sup> D.M. McRae, *What is the Future...*, p. 4.

<sup>629</sup> *Ibidem*, p. 5.

<sup>630</sup> J. Greenwald, *WTO Dispute Settlement: An Exercise in Trade Law Legislation?*, 6 JIEL (2003), p. 113–124.

<sup>631</sup> D.M. McRae, *What is the Future...*, p. 6.

<sup>632</sup> *Ibidem*.

<sup>633</sup> J.H. Jackson, *The WTO as an International Organization*, Chicago 1998,

dispute settlement system toward litigation. This is not an obvious tendency in the modern international organizations. It does not mean however that the diplomatic aspect was eliminated in this area. First, because the system is a consequence of the diplomatic effort—the application of negotiated rules. Second, because the *possibility of litigation and the ability to foresee the outcomes based on agreed rules become part of the diplomatic process itself, factors that diplomats take into account in their dealings with one another.*<sup>634</sup>

The settlement of a dispute is a triumph of both: diplomatic efforts and rules-based litigation, as there is no possibility anymore of blocking the process of dispute settlement. The WTO dispute settlement is therefore efficient—it assures both the resolution and its enforcement and is relatively short in time. There are unfortunately still some possibilities of delaying it and sometimes remedies do not represent enough threat to discourage Members from nonconforming with the treaties. The system is just as efficient as the Members allow it to be, by granting limited authority and tools. The states seem to give priority to peaceful and diplomatic measures to bring conformity with the treaties in the future, over justice in terms of judicial approach (e.g. the lack of compensation for past harms).

The Members continue to search for a way to improve the system. The negotiations in this matter set off at the Fourth Ministerial Conference in November 2001 in Doha, Qatar. They proceed however surprisingly slowly. In May 2004 the Members again agreed to extend negotiations on the review of the DSU, beyond the original deadline of 31 May 2004. These negotiations are ongoing<sup>635</sup> and due to a couple of time extensions so far, there is no way to predict when they are going to end and what exactly effect they will bring. Hopefully, the Members will consider the flaws and controversies detected in practice so far.

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p. 179.

<sup>634</sup> D. Palmeter, P. Mavroidis, *Dispute Settlement in the World Trade Organization*, Hague 1999, p. 175.

<sup>635</sup> M.K. Lewis, *The Lack of Dissent...*, p. 926.