The dispute resolution mechanism of the World Trade Organisation five years after its implementation

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The WTO has never been so popular since its last 1999 meeting in Seattle![1] Many ordinary people, who never heard of it, understood how this unknown organisation plays a key role not only for international trade but also as a tool for developed and developing countries to fight between themselves into the international arena. However if this meeting – which was due to start a new round of negotiations – could be considered as a failure, this does not mean that all features of the new system are negative. Among them, the new WTO dispute settlement mechanism is probably one of the less controversial innovations, even if some amendments have been requested by developing countries.

Many international trade specialists and lawyers have regarded the World Trade Organisation as a renewal of the GATT system more than a complete change.[2] However, even if one can agree with this opinion, the new dispute resolution mechanism brought enough changes to world trade disputes to be recognised as *the WTO's most individual contribution to stability of the global economy.*[3] The new mechanism set up by the

1 Held from the 30 November 1999 until the 3 December 1999. Third WTO Ministerial Conference see http://www.wto.org/wto/seattle/english/ibs_e/ibs_e.htm.

2 See for instance Linda C. Reif 'History of the Uruguay Round' pp 2 sq; Philip Raworth 'Introduction to the Law of WTO', pp. 16 sq in *The Law of WTO. Final Text of the GATT Uruguay Round Agreements* The Practitioner's Deskbook Series Oceana Publications 1995; B Hoekman & M Kostecki *The Political Economy of the World Trade system: from GATT to WTO* Oxford University Press 1995; J Croome *Reshaping the World Trade System: A History of the Uruguay Round* WTO publications 1995; Qureshi AH *The World Trade Organization – Implementing International Trade Norms* Manchester University Press 1996; E Vermulst B Driessen 'An Overview of the WTO Dispute Settlement and its Relationship with the Uruguay Round Agreements – Nice on Paper but Too Much Stress for the System' *Journal of World Trade* 29 1995 2 pp 131sq; M. Reisman, M. Wiedman 'Contextual Imperatives of Dispute Resolution Mechanisms' *Journal of World Trade* 29 1995 1 pp 5sq. In French: H Ruiz-Fabri 'Le règlement des différends dans le cadre de l'Organisation mondiale du commerce' *Journal du droit international* 1997 3 710 sq; E Canal-Forgues *L'institution de la conciliation dans le cadre du GATT. Contribution à l'étude de la structuration d'un mécanisme de règlement des différends* Brussels Bruylant 1993.

3 Renato Ruggiero, then WTO Director-General. http://www.wto.org/wto/about/dispute0.htm.

'Understanding on Rules and Procedures Governing the Settlement of Disputes'[4] has been regarded as the establishment of a 'world trade jurisdiction' aimed to settle disputes on grounds of the rule of law.[5]

If some aspects of the new mechanism are directly inspired from the evolution of the GATT system, there was a clear intention from its drafters to make the process quicker, more legally orientated and more binding. The major changes are twofold: firstly, the memorandum clearly states rules and procedures that previously only existed under the GATT system as implied or customary rules; secondly it sets up a compulsory system of disputes settlement between WTO members offering them an option between a diplomatic or a legal solution, but forcing them to comply with the requirements of the new organs in case of deadlock.

The new system has been described[6] as an audacious one in so far as it creates a mechanism shared between classical diplomatic means through arbitration or compromise and a compulsory referral to the *Dispute Settlement Body* (hereinafter DSB) in case of disputes arising within the scope of WTO agreements.

The WTO dispute settlement mechanism has now been implemented for more than five years.[7] It was supported by many countries during the drafting process,[8] and criticised (sometimes by the same countries which supported its creation) when implemented. According to WTO members, it is an improvement on the old GATT mechanism but to which extent could it be regarded as introducing a new era in international trade dispute settlement? The aim of this contribution is to evaluate the successful character or not of the WTO dispute settlement mechanism through the analysis of its procedures and results based on case law heard or settled. There is a strong feeling amongst WTO members that the system must be really implemented and all forms of disputes must be resolved through this general framework. However, references to legal rules to settle disputes are not necessarily sufficient to find a mutually acceptable solution between the parties. In a number of cases, the DSB final decision has not been fully implemented illustrating what types of difficulties the system has to face when the dispute is not only a legal one!

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4 Annex 2 of the WTO Charter.

5 See E-U. Petersmann *The GATT/WTO Dispute Settlement System – International Law, International Organizations and Dispute Settlement* Kluwer International Law 1997; see also D Palmeter & PC Mavroidis *Dispute Settlement in the World Trade Organisation Practice and Procedure* The Hague Kluwer 1999.

6 See for instance former Director-General Renato Ruggiero's declaration op cit fn 2; E-U Petersmann at 182.

7 On the 1 of February 2000, the State-of-play of WTO disputes was the following since the 1 of January 1995: 188 complaints notified to the WTO (147 on distinct matters), 23 active cases, 31 Appellate Body and Panel Reports Adopted, 31 settled or inactive cases (source *http://www.wto.org/wto/dispute/bulletin/htm*).

8 Including developing countries who played a leading role during the drafting process of the new system. See J Croome *Reshaping the World Trade System. A history of the Uruguay Round* at 147 WTO publications 1995.

1 THE ORIGIN OF THE WTO DISPUTE SETTLEMENT MECHANISM: THE GATT SYSTEM AND ITS EVOLUTION

The WTO dispute settlement mechanism only constitutes a part of the general world trade reform initiated through the Uruguay Round[9] but has been one of its key issues. The new system can be regarded as a reaction against the inefficiency of the past one regarding the binding effect of decisions made by the GATT council. The new one is aimed at building a new relationship between WTO members based on a more equal status through a unique application of the rule of law.

1.1 Key features of the GATT resolution dispute mechanism

The WTO dispute resolution mechanism is not a creation of its own but the result of an improvement of the former GATT system.[10] During the 1980s, this latter evolved to introduce a more legal approach of international trade disputes. The GATT, created in 1948 as a consequence of the failure of the *International Trade Organisation*, moved from a purely 'diplomatic and negotiated' system to a more 'legally orientated' one. However this system remained shared between 'diplomatic' and 'legal' means. Legal aspects were used to give a dispute a more objective analysis but did not lead to a compulsory decision. The *contracting parties* had a choice to adhere or not to the dispute settlement principles.[11]

Dealing with core articles XXII and XXIII of the amended GATT,[12] the dispute settlement mechanism was based on a two stage procedure:

9 Even if this contribution only focuses on the *WTO Dispute Settlement Mechanism*, the *Marrakech Agreement* signed on the 15 April 1995 establishing the World Trade Organisation is made with the WTO agreement and four annexes: annex 1A is dedicated to *Multilateral Agreements on Trade and Goods* and comprises the *GATT 1994* (including itself the *GATT 1947*) and other revised agreements from the Tokyo Round, annex 1B is dedicated to *General Agreement on Trade and Services* (GATS), annex 1C is dedicated to the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS), annex 2 is dedicated to the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU), annex 3 is dedicated to *Trade Policy Review Mechanism* (TPRM) and annex 4 to *Plurilateral Trade Agreements* (optional agreements). The *Final Act embodying the Results of the Uruguay Round of Multilateral Trade Negotiations* comprises three components: *the WTO Agreement, the Ministerial Declarations and Decisions, the Understanding on Commitments in Financial Services*.

10 For a more detailed analysis of this system and its evolution see P Pescatore, WJ Davey AF Lowenfeld *Handbook of the GATT Dispute Settlement Mechanism* Kluwer/Taxation Publishers 1991; P Pescatore 'The GATT Dispute Settlement Mechanism – Its Present Situation and its Prospects' *Journal of World Trade* 27 1993 1 pp 5 sq; E Canal-Forgues & R Ostrihansky 'New Developments in the GATT Dispute Settlement Procedures' *Journal of World Trade* 24 1990 2 pp 67 sq.

11 This system, also called '*GATT à la carte*' (E-U Petersmann at 178) allowed the parties to choose their dispute settlement between the original general GATT system or through the *Tokyo Round Dispute Settlement Mechanisms*.

12 Amended through the *Tokyo Round* 28 November 1979 '*Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance* (L/4907) with its annex *Agreed Description of the Customary Practice of the GATT in the Field of Dispute*' the Ministerial Decision of 29 November 1982 on *Dispute Settlement Procedures* the

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firstly, the parties had to investigate a possible friendly settlement through bilateral negotiations (called 'consultations'); secondly, in case of failure of this option, they had the opportunity to either require the mediation of the Director-General or call to the *High Contracting Parties*[13] for a *working group* staffed with representatives of each party. The working group had then to establish a report on the dispute.[14] As other GATT members could be interested, the report was considered as an opinion on the relevant matter but not directly and automatically enforceable. It had to be referred back to the *Council of Representatives* (the GATT Executive) for approval.[15]

Parties to a dispute requested an alternative solution to the *working group* procedure: the *panel of experts*. This option was more dedicated to the dispute resolution and only focused on a precise matter. The creation of a panel was called by the parties through the council of representatives and made up of three to five independent experts. The proceedings were closer to judicial or contentious ones than with the *working group* procedure: written and oral submissions, research for a possible friendly settlement and, in case of failure, a panel report set up on legal grounds. The report was referred back to the council of representatives, which was the only body able to give effect to the findings of the report. Practically speaking the council was able to take various measures such as making recommendations to lifting one party's obligations. Except for some contentious features, this mechanism was closer to a conciliation mechanism as the panel of experts' report was only an advisory opinion.[16]

1.2 Controversial results of the GATT dispute resolution mechanism

The panel mechanism in the GATT system has been regarded as a qualified success for several reasons. On the negative side, many panel reports were not adopted or implemented and the number of referrals dramatically increased during the past ten years of this system.[17] This led to a lengthening of the duration of the proceedings. Another criticism lied on the appointment and lack of independence of experts. Until the middle

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Decision of the High Contracting Parties 30 November 1984 on *Dispute Settlement Procedures* (L/5752), the High Contracting Parties Decision adopted in Geneva 12 April 1989 on *Improvements to the GATT Dispute Settlement Rules and Procedures*. These texts are reproduced in *Analytical Index: Guide to GATT Law and Practice* vol 2 WTO 1995 pp 632-642.

13 That is to say all GATT members.

14 Third parties were allowed to intervene as the dispute was regarded as an objective question.

15 Even though the report had no compulsory effect and was regarded as an advisory opinion.

16 Some scholars are of the opinion that the way the proceedings were handled and the parties felt bound by the report was closer to arbitration (judicial approach) than conciliation (political approach). However, this has proved to be more para-judicial conciliation than arbitration.

17 120 referrals for the last ten years, less than 100 for the thirty previous years.

1980s, the original appointment was made through representatives of the ministry of Foreign Affairs (secretaries or trade counsellors) acting through directives and recommendations of the GATT secretariat.[18] On the positive side, the number of disputes resolved through the panel mechanism increased considerably,[19] illustrating the need for such a procedure. However, one of the main defects of the GATT dispute settlement mechanism laid in the total duration of the panel of expert's procedure (an average of 13 months) and in an incomplete reliability on the system. The United States of America even changed their opinion: after having called for 'less legal rules and a more diplomatic approach', they claimed for clearer trade rules and sanctions for their violations.

Another interesting feature of the GATT dispute settlement system lay in the range of possible measures available against a contracting party in case of violation of its obligations. Under article XXIII: 2, three types of remedies where made available: recommendations, rulings and suspension of obligations. If a decision-making power was granted to the GATT General Council, this power was rather dedicated to find a mutually acceptable solution than adopting a sanction against one party.[20] The GATT system was aimed primarily to reset normal trade relations by asking one of the parties to withdraw its measures, when conflicting with GATT obligations, or to behave accordingly to its commitments. Even a suspension of obligations as a cross-retaliation measure was aimed at restoring the normal situation.

The GATT dispute resolution system was in fact a victim of its incomplete evolution and transformation. If the twofold mechanism of 'diplomatic and legal approach' was not really challenged as it left open an option to settle disputes between the parties, the binding effect of panel reports was too difficult to reach to make the system efficient. To reach it, the *Council of Representatives* had to adopt it through the so-called procedure of 'positive consensus', which means that the report would only be binding if all members from the *Council of Representatives* would accept it. One refusal could consequently lead giving the panel report the simple status of a legal opinion. On a practical point of view, many reports were not adopted, especially when the trade dispute involved a high degree of political considerations. One of the best examples in that regard is probably the *Banana* case involving South American producing countries and the European Community regarding the imports and licensing system of bananas on the european market. This dispute started under the GATT system and led to two panel reports that were never adopted.[21]

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18 This appointment procedure has been changed from the middle of the 1980s leading to the appointment of non-governmental experts.

19 See E-U Petersmann, *The GATT/WTO Dispute Settlement System* at 95–106 giving examples of panel reports between 1982 and 1994.

20 See E-U Petersmann *The GATT/WTO Dispute Settlement System* at 74.

21 *European Communities, Imports and Sales of Bananas into Member States* DS 32/R (not adopted) DS 38/R (not adopted).

The GATT system called for its own reform. This was partly done through the decision taken on 12 April 1989 on the improvement of rules and proceedings of the GATT dispute settlement mechanism that prepared the *WTO Understanding on Rules and Procedures Governing the Settlement of Disputes* of 1994. During the negotiation process started in 1987, an agreement was quickly reached between the parties regarding procedural improvements to be made,[22] especially the duration of the procedure. However, some other features of the dispute settlement remained highly controversial, especially the debate over the legal or diplomatic approach of the new dispute settlement mechanism.[23] This explains why the new system could be regarded as a renewal of the former one although directly linked to it.

2 THE NEW SYSTEM: THE DISPUTE SETTLEMENT UNDERSTANDING

The very reason for a renewal of the system is to be found through the necessary linkage between the WTO agreement and its annexes on one hand and the dispute resolution mechanism on the other hand. WTO members have to accept a package-deal including the WTO agreement plus the first three annexes. As the DSU is part of this system, a member state has to accept it.[24] This seems similar to the previous GATT system except that the new DSU entrenches compulsory mechanisms imposed on member states in case of deadlock of a dispute resolution.

The new mechanism can be described as using the same features for the first stage procedure than the GATT system except the proceedings cannot be blocked or delayed anymore. Then the second original aspect lies in a possible rehearing of the case on legal issues by the Appellate Body. This system is still managed by a general body representing member states, the *Dispute Settlement Body (DSB)*, but acting on the basis of the inverted principle called the 'negative consensus': only a unanimous vote against the adoption of a panel of experts' report can lead to its rejection.[25]

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22 See J Croome *A History of the Uruguay Round* at 147–148.

23 See J Croome ib id at 149 *'Some Countries led by the United States but supported by Canada and others, saw the task of dispute settlement as being to establish right and wrong: to deliver a legal judgment with which the losing party ought obviously to comply . . . Other Countries, however, with the European Community and Japan prominent among them, saw dispute settlement under article XXIII as essentially an extension of the conciliation process under article XXII, with the aim less on reaching legal judgments than to overcome a particular trade problem'*.

24 See article II:2 of the WTO Agreement: *the Understanding on Rules and Procedures Governing the Settlement of Disputes in Annex 2 is an 'integral part of this agreement, binding on all Members'*.

25 This rule inverts the one applied under the GATT system. It makes it nearly impossible to oppose a report from a panel or the appellate body as one of the parties (the losing one) will probably oppose the final report. This makes the DSB decisions merely formal. Only a completely unconvincing report could lead all members to reject it.

2.1 Object and objectives of the system

The WTO dispute settlement mechanism is characterised by three main principles deriving directly from its status:[26] subsidiarity, diversity, balance.

Firstly, this mechanism is governed by the idea of subsidiarity meaning that any friendly solution (*mutually acceptable solution*)[27] must be preferred to a legal or conventional settlement.[28] This can be illustrated through the 'consultations' procedure which purpose is to avoid a discussed matter to becoming a dispute. This can also be checked through the panel and the appeal procedures.[29] a panel or the Appellate Body must promote the promotion of a mutually acceptable solution.[30] Only in case of failure, will they make their own recommendations. The DSU system is still based on the idea of conciliation.[31] This can be regarded as a mixed system, half conciliatory/half contentious where political aspects are still included.

Secondly, the dispute settlement system is an exclusive and unitary one[32] but with several alternative procedures. This principle is clearly stated in article 23.1 of the DSU. Any other types of dispute resolution, including the ordinary ones in public international law are unsuitable (including the ICJ). This also means for instance that any unilateral measure is not WTO compatible. Another feature confirming this exclusive character is to be found in article 5 of the DSU offering parties wishing to settle their dispute through appropriate offices, mediation or conciliation of the Director-General.[33] These procedures can be used separately or jointly with the panel of experts system. However they should preferably be initiated during the consultation proceedings before the establishment of a panel of experts. The exclusive character of the dispute settlement does not prevent the possibility to refer to arbitration.[34] This arbitration process must be expeditious, based on mutual consent of the parties and refer to clearly defined issues. All traditional features of arbitration are applicable: the process should be led on a legal basis and the parties must abide by the arbitration award.

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26 See article 3 *General Provisions* of the DSU.

27 See article 4 *Consultations* of the DSU.

28 See E-U Petersmann *The GATT/WTO Dispute Settlement System* at 182 and the comparative table of *Political methods of dispute settlement* and *Legal methods of dispute settlement*.

29 See Article 12 *Panel Procedures* of the DSU.

30 See Article 19. This text also applies to the Appellate Body.

31 However, one of the main differences with the GATT system lies in the inverted procedure for the adoption of the reports of panels of experts. Knowing that the reports are to be adopted, the parties will probably not have the same attitude.

32 See E-U Petersmann *The GATT/WTO Dispute Settlement System* at 178.

33 Actually, the WTO Director-General is not the only one to be able to offer these facilities. Article 5.6 of the DSU provides: '*The Director-General may . . . offer good offices, conciliation or mediation with the view to assisting members to settle a dispute*. This allows for an extensive interpretation including the appointment by the parties of any other person on whom they agreed to settle their disputes through this mean.

34 Article 25. According to I Brownlie *Principles of Public International Law* OUP 5 ed 1998 at 705 "*In recent times the distinction between arbitration and judicial settlement has become formal . . . The contrasts are principally these . . . there is more flexibility than there is in a system of compulsory jurisdiction.*"

Thirdly, the WTO dispute system is balanced in its results. The violation of an obligation by one party will lead to the withdrawal of an advantage granted to the other. The aim is to preserve members obligations and to compensate losses in case of violation of the agreements. The dispute settlement mechanism is open to any form of diminution of commercial advantages. However, in such cases the withdrawal is never compulsory. This illustrates how the ideas of 'compromise' and 'balance' are central to this mechanism. Moreover, sanctions to the violation of an agreement are not primarily aimed at granting compensation to the winning party but to re-establish normal trade relations between them.[35] It also has to be noted that according to the DSU, no interim measures can be granted. That will encourage the parties to bargain if an urgent solution is needed.

The idea of balance entrenched in the DSU is not contradictory with the reinforcement of a more legal approach of international trade disputes. Legal procedures are used as a means to avoid a deadlock between parties. The legal approach of the DSU is a progressive one: only if all non-legal means have failed, will the rule of law be the reference to settle a dispute. This could be observed for instance when one compares a panel report with an appellate body report. Although the appellate body is only allowed to deal with legal arguments, a panel of experts may use legal and non-legal arguments in its findings.

The rule of law is therefore at the core of WTO dispute settlement, not to compensate violations of WTO obligations but to preserve the balance of the system. It must be added that if international customary or conventional rules of interpretation are applicable to WTO disputes,[36] the DSB should normally be limited to the implementation of existing rules and is not allowed to create rules adding or retrenching members' rights or obligations.[37]

2.2 The scope of the WTO dispute settlement mechanism

The scope of the new system has been defined by the DSU in three ways namely: temporal, material and personal.

Firstly, the new system has only been applicable after the entry into force of WTO agreements. Only complaints lodged after the implementation of the WTO Charter have been examined under the new system.[38] A

35 Only interim compensation can be awarded until the withdrawal of the challenged measure. Article 23.1 states however: "When members seek the redress of a violation . . ." This could include compensation.

36 See for the 1969 Vienna Convention on the Law of Treaties and for instance: *Venezuela & Brazil v United States (Standards for Reformulated and Conventional Gasoline)* WT/DS 2 & 4 (Appellate Body 1996 at 19); *United States v India (Patent Protection for Pharmaceutical and Agricultural Products)* WT/DS 50 (Appellate Body 1997 at § 46); *Canada & United States v European Community (Measures affecting Livestock and Meat (Hormones)* WT/DS 26 & DS 48 (Appellate Body 1998 at § 124).

37 See articles 3:2 and 19:2 of the DSU, see also *United States v India (Patent Protection for Pharmaceutical and Agricultural Products)* WT/DS 50 (Appellate Body 1997 at § 46).

38 See for instance: *The Philippines v Brazil (Measures affecting desiccated Coconut)* WT/DS 22 (Appellate Body 1997 at 23) where the Appellate Body reminded that according to the principle set out in article 28 of the Vienna Convention, there cannot be a retroactive implementation of the new system except if previously agreed by the parties.

number of dispute settlements initiated under the GATT system were examined under a transitional one but with a twofold limit. In the first instance, a dispute heard under the GATT system cannot be re-examined under the WTO one: the rule *non bis in idem* applies.[39] In the second instance, some GATT members preferred to withdraw their complaints under the former system to restart the same proceedings under the new one.[40] This illustrates the continuity and the complementarity of the two systems.

Secondly, the material scope of the WTO understanding is based on the idea of unity. This means that the strength of the new system derives from the application of the dispute settlement mechanism to any dispute referred in the framework of WTO agreements. Unlike the previous GATT system where the parties chose to adhere or not to adhere to the various agreements of the Tokyo Round, the new dispute settlement system is unified[41] Strictly speaking, this will include the multilateral trade agreements, such as goods, services, intellectual property, the WTO general agreement and the understanding itself. Only commercial policies are out of the scope of the Convention.

The understanding is also applicable to other optional plurilateral trade agreements included in annex 4. However, the DSU will only be applied between parties to these agreements. There are also some specific procedures considered as sensitive areas or politically difficult. This is for instance the case of agreements related to dumping or subventions.

The general scope of the DSU does not prevent the application of specific rules included in defined (and often technical) agreements (like textiles and clothing, sanitary and phytosanitary measures).[42]. These specific rules get priority on general DSU rules[43] establishing a hierarchy between the two. However these derogations are aimed to facilitate disputes settlement with qualified technical expertise (for example the field of subventions or financial services) or to provide specific mechanisms (in case of dumping for instance) that will increase the efficiency of the dispute resolution.

There is however a possible competition between general DSU rules and those specific rules, which can generate some difficulties or clashes. The chairperson of the DSB has to decide which rule is applicable (within 10 days) but special rules have the priority over general rules.[44]

Thirdly, the personal scope of the DSU is limited to interstate disputes. As a consequence of the unity principle mentioned above, each WTO member is party to the DSU. Two remarks should be made. Firstly, only a

39 Article 3.11 of the DSU.

40 See for instance *India v Poland (Import Regime for Automobiles)* WT/DS 19 (mutually agreed solution 1996); *Venezuela & Brazil v United States (Standards for Reformulated and Conventional Gasoline)* WT/DS 2 & 4 (Appellate Body 1996).

41 See E-U Petersmann *The GATT/WTO Dispute Settlement System* at 178.

42 The special or additional rules and procedures contained in the covered agreements are listed in the appendix 2 of the DSU.

43 Article 1.2 of the DSU.

44 Article 1.2 of the DSU.

member state is entitled to refer a dispute in the framework of the DSU.[45] Secondly, special procedures may be applied to disputes between a developed country and a developing country: article 5 on good offices, mediation and conciliation, article 6 on the establishment of panels, article 12 on panel procedures. These procedures are completed by a possible extension of deadlines for consultations or for the establishment of the panel report and by the compulsory obligation to state reasons in the panel report why a specific or more favourable regime is granted to a developing country. An even more favourable regime is granted to the least-developed countries. A dispute has preferably to be settled through good offices, mediation or conciliation. The panel mechanism is regarded as the last chance option, and developed countries are asked to refrain from using the dispute settlement mechanism when it involves a least developed country.

2.3 New Features of the DSU procedure

The new features of the new system are based on two main ideas: a decision-making process close to a compulsory mechanism; a more clearly codified procedure especially regarding time limits.

The Dispute Settlement Body (DSB), staffed with WTO general council members, is the central organ of the new system. In all types of settlement, including those made under specific agreements, the DSB plays the key-role by making decisions through the principle of consensus.[46] This rule should have been closed to the former GATT system if article 16.3 and 16.4 would not have inverted the consensus-making process for the adoption of panel reports.[47] This change is a major one and probably the key explanation of the efficiency of the new system. Even if appealed, the panel reports are not threatened anymore by a possible non-adoption and deadlock when one of the parties wanted to oppose the panel report. Actually, if the word 'consensus' is still used, on a practical point of view chances for the DSB to oppose either a panel report or an appellate body report are very limited. This derives from the negotiation process and could be seen as a compromise between those who wanted a more judicial

45 Meaning the 'Federal Clause' (ie a provision of a treaty only binds the federation and not the states belonging to the Federation) does not apply. However, member states can be represented by private persons acting on their behalf during the proceedings (see *Ecuador, Guatemala, Honduras, Mexico and the USA v the European Communities (Regime for the Importation, Sale and Distribution of Bananas)* (WT/DS 27) (Appellate Body 1997 at § 11sq).

46 Article 2.4 of the DSU.

47 Article 2.4 note 1 provides: *'The DSB shall be deemed to have decided by consensus on a matter submitted for its consideration, if no member present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision'* but the combination of article 16.3 and 16.4 creates what has been called the 'negative consensus' meaning that the adoption of a panel report could only be rejected in case of full agreement of all WTO members. As article 16.3 provides that the views of parties to a dispute shall be taken into consideration and fully recorded, the adoption of a report will be quasi-automatic, except in case of appeal.

approach of international trade disputes[48] and those who protected the consensus principle as the only acceptable one.[49]

The second DSU key aspect lies in the procedures applicable to disputes. Formerly, international trade disputes were seen as only being resolved through diplomatic and non-compulsory rules. The new architecture of the system has been made through a better codification of applicable rules, especially regarding time limits applicable to each stage of the procedure.[50] This timetable is not only the result of lessons and criticisms from the GATT system but has been codified through the DSU as a compulsory system. It will take a case in the new system, depending on a possible appeal procedure, between one to a maximum of two years.

Following the time limits reshaping, another key feature is the creation of a new independent organ in charge to review panel reports if requested by a party. The appellate body is not just the duplication of the panel of experts or a kind of 'super panel of experts' it is also an independent body in charge to review on exclusively legal grounds the panel report. This is similar to a rehearing of the case in the judicial sense. According to the number of panel reports modified through this procedure, this new feature can be regarded as a guarantee for the parties to get their arguments reheard on a more jurisdictional approach.

The above are the key features of the new system. Their application could be described through the different stages of the procedure.

3 PHASES OF THE DISPUTES SETTLEMENT SYSTEM

The presentation of the dispute settlement mechanism can be divided into three phases:[51] consultations, panel report and appeal and implementation of the DSB decision. Each one shares common principles but is implemented within its specific aim.

3.1 First stage procedure: Consultations and panel report

The first stage procedure can be described as the most diplomatic one. If a dispute is to be settled, all non-contentious means should be used to avoid a deadlock and the parties always have the possibility of reaching an acceptable solution through mediation, conciliation or arbitration. Innovations for the first stage procedure are mainly twofold: precise time limits and reshaping of procedures regarding competence, expertise and impartiality of the experts.

Consultation is the first step of the dispute settlement.[52] Consultation is a preliminary requirement to the establishment of a panel of experts,[53]

48 Mainly the United States and Canada.

49 Mainly the European Union, Japan and developing countries.

50 See See E-U Petersmann *The GATT/WTO Dispute Settlement System* Table 14 at 184.

51 Three stages procedure because the implementation phase of the report is included in the DSU. This stage still seems to be the weakest one of the dispute settlement.

52 Article 4 of the DSU.

53 Article 6 of the DSU.

illustrating once again the importance of the conciliation procedure. When one party requires consultations, the other one has ten days to reply and thirty days to implement them.[54] Remaining silent for one party is not anymore a way to escape or delay the procedure.

Consultations are not only a formal requirement[55] but allows a better analysis of the admissibility of the case and frames its legal basis. For instance, if the request is too vague or not sufficiently determined, a redefinition of the case can be requested. This happened in a case involving Brazil and Canada regarding the financial programme of aircraft products.[56]

Consultations also allow the participation of third countries to the procedure, provided the parties to the dispute agree on their involvement (veto power). Third countries must however have a substantial trade interest in order to be involved in such a consultation.[57]

Consultations cannot be used to delay the dispute settlement. If the deadline[58] is reached without a mutually acceptable solution, the panel mechanism can be activated.

Since 1995, a number of consultations led to a dispute settlement without further intervention.[59] Consultations are also directed to keep confidential the reasons of the settlement: if the result has to be communicated to the DSB, the content of consultations remains confidential. This should favour a solution through consultations.

The establishment of a panel of experts is a second step. Its creation does not emanate from a mutual demand from both parties but from the complaining party.[60] The establishment of the panel is decided by the DSB at its first meeting after the demand.[61] The request shall include the challenged specific measures and provide a brief summary of the legal basis of the complaint. Actually the complaining party will decide upon the content of the demand: it can define the terms of reference,[62] which determines the mission to be fulfilled by the panel.[63]

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54 Except if provided or accepted otherwise by the parties.

55 They must be notified to the dispute settlement body.

56 *Canada v Brazil (Export Financing Programme for Aircraft)* WT/DS 46 (Appellate Body 1999).

57 This actually happened when Australia and New Zealand asked to be involved in the discussions related to the *hormones* case (*Canada & United States v European Community (Measures affecting Livestock and Meat (Hormones)* WT/DS 26 & DS 48 (Appellate Body 1998) and when the EU asked to be involved in the consultations between the USA and Japan regarding the *sound records* case *(United States and the European Communities v Japan (Measures concerning Sound Recordings)* WT/DS 28 – WT/DS 42 (mutual agreement 1997).

58 It can be a 30 days deadline, a 60 days one or a specifically defined one (by the parties themselves).

59 See the complete list at http://www.wto.org/wto/dispute/bulletin.htm.

60 Article 6.1 of the DSU.

61 There is a possibility for the DSB to reject by consensus the establishment of the panel, but as a matter of fact, the working process of the consensus (the negative consensus) is theoretical, as at least the complaining party would oppose such a decision.

62 Standards terms of reference define the ordinary mandate granted to the panel but the applicant may ask for special terms of reference meaning the mandate can be extended if requested.

63 A panel is not entitled to reshape the established terms of references and cannot modify the arguments of the parties: see *Ecuador, Guatemala, Honduras, Mexico and the USA v*

[continued on next page]

The establishment of a panel usually consists of three experts.[64] A major change within the DSU lies in the request for impartiality of the experts. This was adopted in reaction against former GATT practices. Article 8.1 of the DSU states that experts shall be officials or individuals of a member state, well-qualified and recognised for their competencies in the field of international trade. Article 8.2 provides that *panel members should be selected with a view to ensuring independence of the members, a sufficiently diverse background and a wide spectrum of experience*. The independence of experts has been regarded as a key guarantee regarding the reliability of the panels system. Moreover experts shall not have, except if agreed otherwise by the parties themselves, the nationality of one of them.[65] The DSB secretariat holds an indicative list of experts. The secretariat is also allowed to make propositions of experts that parties to the dispute shall agree within twenty days.[66] In case of disagreement, the Director-General will, within ten days, appoint the panel.

Regarding the mission of the panel of experts, a mandate is usually granted through 'standard terms of reference'[67] but the parties are allowed, within twenty days, to redefine these terms and grant the panel special terms of references. Terms of references are compulsory but the parties are able to modify them. This confirms the negotiated role granted to the panel of experts.

Third parties with a substantial interest in the dispute are allowed to intervene through written communications. They are informed of the first communications of the parties and may join the complaint and participate to the panel's work. This is a new feature of the DSU. According to cases and disputes since 1995, such a feature will play a key role in the development of the DSU practice.[68]

In keeping with the same idea of rationalisation, everything is made to facilitate the junction of complaints related to the same matter. Several junctions have already been made.

Rules of procedure are set out in Appendix 3 of the DSU. As with other features of the new system, they are clear but flexible.[69] The first rule is represented by the establishment of a timetable giving deadlines for

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the European Communities (Regime for the Importation, Sale and Distribution of Bananas) (WT/DS 27) (Appellate Body 1997 at § 144).

64 Five if requested.

65 This principle applies in the case of a custom union, which means a serious reduction of possibilities of choices.

66 They are also allowed to make their own propositions.

67 As provided in article 7.1 *Terms of References of Panels* of the DSU. Standard terms of references could be compared to the framework in which the DSB will operate. These terms will give a picture of the dispute to avoid the panel from broading the dispute.

68 The intervention of third parties in dispute resolutions can actually transform the balance of the system, as some WTO members (mainly developing countries) are scarcely involved in these proceedings. Acting as third party gives them an opportunity to intervene without having to initiate the whole process.

69 Article 12.1 . . . "unless the panel decides otherwise after consulting the parties to the dispute".

written communications and answers to communications.[70] This will ensure no delay in the panel's work.

A second rule lies in respect of procedural principles. The procedure before the panel must be contradictory and inquisitorial allowing the panel to lead the preparatory inquiries of the case, the parties to be heard and their reply to each other.[71] A panel of experts is also entitled to ask for further information or technical opinions and even refer technical questions to other experts or group of experts.[72]

Two other main rules characterise the procedure before the panel. The first one is transparency: each party (even third party) must be able to obtain the relevant information from the other party.[73] The second one, in contrast to previous one, is confidentiality.[74] The conciliation between the two rules leads to a respect for confidentiality but with the obligation to provide a minimum information that can be communicated to the public. Appendix 3 of the DSU provide a balance of these two antagonists principles protecting rights of the parties (including third parties) while granting the panel means close to those belonging to a jurisdiction.

Once hearings have taken place, the panel will issue the descriptive sections (factual and arguments) of its draft report to both sides, giving them an opportunity to comment. This draft report does not include findings and conclusions.[75] The interim report will be issued later on after a set period of time, integrating findings and conclusions of the panel. The parties will then have a short period of time[76] in which to make written submissions on aspects of the interim report they want to have reviewed before the writing of the final report.[77] The interim report can be followed by an attempt to continue with the conciliation process. Moreover, the complaining party can ask for a suspension of the work done by the panel of experts if it feels that a mutually acceptable solution can be reached.[78]

This interim stage review could be compared to a mixing of conciliation and arbitration procedures. The panel system tries to keep the discussion open between the parties, knowing that it will issue a proposed solution in case of failure. It could be compared to a conciliatory body able to become an arbitral tribunal. However, this is not completely true as the parties are still able to refer non-legal arguments.

The final report will vary according to the existence or the lack of a mutually acceptable solution. In the first case, the final report will simply

70 Appendix 3 provides a precise calendar and time limits for the different steps of the procedure. But the parties themselves, as stated above, can amend this calendar.

71 In case of several complainants, article 9 of the DSU provides the possibility for the unique panel to draft several distinct reports for each complainant (even in the case of a joint complaint).

72 Rules are however strict as set out in appendix 4. Nothing can apparently prevent a panel of experts to refer some questions to NGOs as experts.

73 Appendix 3.10 of the DSU.

74 Article 14 and appendix 3.3 of the DSU.

75 Article 15.1 of the DSU.

76 Usually one week.

77 Article 15.2 of the DSU.

78 See Article 19 of the DSU.

summarise the dispute and state that a mutual agreement has been reached. In the second case, the report will include the descriptive sections as well as the findings and conclusions of the panel of experts.

The report of the panel must be adopted by the DSB. The panel of experts must deliver its report within six months. The DSB adopts it at least twenty days after the report has been distributed to DSB members but with a deadline of sixty days. This clearly means that the report must be adopted, provided the adoption is made under the process of negative consensus (solution which will be very difficult to reach as at least one of the parties will normally accept the report as it will be in its favour). The only way to avoid an immediate decision by the DSB is for one party to appeal the panel report before the appellate body as set up in article 16.4 of the DSU.[79]

3.2 Second stage: The appeal mechanism

The appeal mechanism is a brand new feature of the DSU. Its duration is between sixty and ninety days and is probably the more judicial aspect of the new system as the appellate body only reviews panel reports on a legal basis.

The first innovation lies in the creation of a permanent appellate body. Members are appointed by the DSB on proposals made by the Director-General of the WTO, the chairperson of the DSB and the chairpersons of the general council and the sectors councils. It is staffed with seven members appointed for four years, renewable once. These members broadly represent the diversity of WTO membership. They are completely independent (from any government) and their competencies must be recognised.[80]

The appellate body only reviews the panel report on legal issues.[81] As article 17.6 provides, only issues of law and legal interpretations developed by the panel are reviewable. The powers of the appellate body are similar to those granted to a Court of Appeal: the decision held will substitute the panel report. However, the appellate body cannot interfere with the descriptive part of the report. Only the legal reasoning held by the panel of experts through its report can be challenged. This will obviously encourage the panel of experts to be sure of their legal reasoning and justifications of their decisions. Since 1995, a number of cases heard by panel reports have been appealed.[82] It appears from its 'jurisprudence' that the appellate body is often obliged to rebuild or to reinterpret the legal reasoning of the panel reports.[83] This however does not mean a

79 In which case, the adoption of a decision by the DSB is suspended.

80 The first seven members was appointed in 1995. They are nationals from: the USA, New Zealand, Germany, Egypt, the Philippines, Uruguay, Japan. Of the seven judges, three had a two years mandate because of a turnover every two years.

81 Article 17.6 of the DSU.

82 26 reports circulated at the end of 1999.

83 See for instance *European Communities, Canada and United States v Japan (Taxes on Alcoholic Beverages)* WT/DS 8 WT/DS 10 WT/DS 11 (Appellate Body 1996 at 34).

change in the final decision but mainly a reshaping of legal arguments demonstrating the weakness of some panel reports.

Only the parties to a dispute are entitled to challenge the panel report before the appellate body. However, third parties are entitled to make written submissions once the appeal is lodged if they demonstrate a substantial interest in the procedure.[84]

Like the other stages of the dispute settlement, the appeal procedure is characterised by a precise timetable and guarantees of confidentiality, impartiality and integrity. Specific rules for the appeal procedure have been set up.[85]

Only three members of the appellate body sit for an appeal. There are no specific rules regarding the manner of designating members, which means that a national can participate as member of the appellate body until there is no possibility for the other party to appoint an *ad hoc* member like before the International Court of Justice (ICJ).

The other features of the appeal procedure are described in the working procedures documents implementing the general rules set up in articles 11, 17.10 and 18 of the DSU: all sessions and works of the appellate body are confidential as well as written communications between the parties. The appellate body drafts its report considering all information and declarations. The reports of the appellate body are anonymous. Dissenting opinions are not allowed.

Like the panel report, the appellate body report has to be adopted by the DSB to become a binding decision. The report is adopted within thirty days of its distribution except if there is a negative consensus against it.[86] That clearly means that if the panel report is modified or reversed by the appellate body report, the last one will be compulsory.

The appellate system under the DSU is close to a judicial review in its nature. Meanwhile the panel report is conciliation orientated, while the appellate report is more arbitration orientated. Due to the quasi-automatic adoption of the reports by the DSB, the second stage procedure can be qualified as a more legal approach to the trade dispute. However, that does not mean a better result for the parties, as the appellate body will only review legal aspects of the dispute.

The activity of the appellate body during the five past years demonstrates how WTO members considers legal procedures as a safety guard of their interests. Amongst the cases heard, most of them succeeded to find a settlement. Actually, the appeal stage could be compared to a confirmation of the interpretation on the trade agreements. This does not mean these interpretations cannot be critised.

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84 See Article 17.4 of the DSU.

85 Working procedures drawn up by the appellate body adopted on the 15/02/96 and amended on the 28/02/97.

86 There is however little chance to reach such a consensus for the reasons mentioned earlier regarding the panel report.

3.3 Third stage: Implementation of the report

The last – but not least – new feature of the DSU can also be compared to the execution of judicial decisions. To become efficient, the new system has to monitor the effects of the DSB decisions. According to the DSU practice for the five past years, the implementation phase is not only the conclusion of the dispute settlement mechanism, but a means for unsatisfied parties to continue to oppose the decision held by the DSB.

Article 21 of the DSU sets up direct rules for the implementation of the DSB decisions: Within 30 days after the adoption of the decision, the member concerned shall inform the DSB of its intention in respect of the implementation of the recommendations and rulings. When difficulties to comply with the decision are encountered, the state must do it in a reasonable period of time. This period shall be either proposed by the losing party and approved by the DSB or agreed between the parties within a forty-five day period. If no acceptable solution merges from this procedure, a compulsory arbitration[87] must take place within ninety days from the adoption of the report by the DSB.[88]

The DSB has the duty to monitor the implementation of its decision. If, after six months following the decision ordering the implementation of the report, the member does not comply or incorrectly complies, the DSB has to put the item on the agenda and the member concerned must report the situation and the reasons for non-compliance. This monitoring procedure will last until full compliance with the decision has been reached.

The final feature of the DSU implementation system is represented by the sanction available against a member for non-compliance with DSB decisions.[89] Compensation is not regarded as a normal result for a dispute and only interim compensation is regarded by the DSU as acceptable.

Article 22.2 stipulates the possibility in case of failure of compliance with the decision to enter into negotiations with other parties to find a mutually acceptable compensation. In case of a further failure within twenty days, the other party may request authorisation from the DSB or suspend concessions or other obligations covered by the agreement. This suspension must respect the principle of proportionality and is regarded as the ultimate means to enforce the original decision. Such a request to the DSB will be automatically enforceable[90] as the rule of 'negative consensus' also applies. Only a review on the level of the suspension of the concessions will become possible through an arbitration held by the Director-General or by the original panel of experts.

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87 See for instance *European Communities (Regime for the Importation, Sale and Distribution of Bananas)* WT/DS27/ARB (Arbitration 1999).

88 Alltogether, the length of the procedure must not exceed 15/18 months. In case of difficulties, the panel of experts can be referred to within 90 days and they will act under the DSB procedure.

89 Article 3.7 of the DSU.

90 Authorised within 30 days after the deadline of the 'reasonable period of time'.

Such sanctions must not conceal the real difficulty for the implementation of the DSB decisions. If such sanctions are held, the dispute settlement system could be regarded as half a success. Moreover, it is unclear if the efficiency sought through the implementation phase will be sufficient to convince losing parties to comply with the decisions. Moreover the equality principle between WTO members will probably lose its strength when sanctions strike developed and developing countries.

Since 1995, the implementation of a number of DSB decisions showed how the final settlement of a legal decision could still be highly political. The *Banana* case or the *Beef meat (hormones)* case opposing the United States of America and the European Union illustrated this situation. In the *Banana* case, the settlement of the dispute nearly went to a deadlock and the implementation phase generated a new dispute into the dispute.[91]

To conclude, the DSU can be regarded as a progress in so far it is not regarded as the only way to settle international trade disputes. The idea of balance is central to the system. Provided that any member state feels it is a progress, it can be regarded as a success.

However, one must not hide some possible difficulties in the future. Cases like the *Banana* case or the *Beef meat* case illustrated[92] how developed countries could be reluctant to accept a final settlement when not only their trade but also their political interests are threatened. The WTO dispute settlement system cannot resolve all kinds of dispute including political ones. On the other hand, developing countries and least developed countries could consider the system as biased if it is unable to support their policies and to defend their own interests. Some developing countries have widely used the system[93] since 1995, and recorded some successes against developed countries,[94] while most of the developing or least developed countries are absent from the dispute settlement system. For example, no African countries initiated a dispute for the first five years.

The WTO dispute system works better than its predecessor but it would be a mistake to consider it as a miracle solution for all kinds of international trade disputes! This does not prevent the coexistence of political or diplomatic settlements with legal settlements.

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91 See *http://www.wto.org/press/dsweb.htm*
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92 See ref fn 32 & 59.

93 Like India, some Asian Countries or Central or South American Countries.

94 See *Costa-Rica v United States (Restriction on Imports of Cotton and Man-made Fibre Underwear* WT/DS 24 (Appellate Body) 1997.

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