CHAPTER VI

The WTO dispute settlement system

213. The current WTO dispute settlement procedures - constructed with painstaking, innovative, hard work during the Uruguay Round - are to be admired, and are a very significant and positive step forward in the general system of rules-based international trade diplomacy. In many ways, the system has already achieved a great deal, and is providing some of the necessary attributes of "security and predictability," which traders and other market participants need, and which is called for in the Dispute Settlement Understanding (DSU), Article 3.

214. On the other hand, the WTO dispute settlement system may be at a crucial, and perhaps somewhat delicate, point in its brief history. In our appraisal and recommendations regarding the WTO dispute settlement system, we are strongly motivated by several general principles. First, while there are some grounds for criticism and reform of the dispute settlement system, on the whole, there exists much satisfaction with its practices and performance. Second, in appraising ideas for reform or improvement, the most important principle is to "do no harm." Caution and experience are needed before any dramatic changes are undertaken.

A. MOVING THE SYSTEM TO NEW LEVELS OF EFFICIENCY AND EFFECTIVENESS

215. Regarding dispute settlement, the GATT had only three short paragraphs of treaty text, partly because it was anticipated that the extensive chapter regarding disputes in the International Trade Organization (ITO) charter would be the umbrella to provide the necessary dispute settlement institutions. During GATT's early years there was some debate about whether the GATT dispute settlement clauses were designed only to promote resolution through diplomatic negotiation. However, over the decades the system evolved gradually, through trial and error and the benefit of actual experience, into a relatively highly refined dispute settlement procedure.

216. By the early 1980s, these GATT procedures began to be held up as a model, and new interest groups saw them as attractive for achieving their goals. Services sector and intellectual property interests seeking new multilateral agreements through the GATT's Uruguay Round were, at least partly, motivated by the dispute settlement procedures and the relative success of those procedures in enhancing treaty rule compliance.

217. But the GATT dispute settlement system was beset by "birth defects". In particular the consensus rule of decision making which had developed through practice over decades meant that essential steps in the dispute settlement procedure were always threatened by a single "blocking vote" by a respondent to a complaint. These steps included, crucially, the establishment of a panel after a request from a complainant, and the "adoption" of a panel report. A respondent who desired to avoid a panel process, or who had "lost" in the panel, could prevent any legal effect. Likewise there were a number of ways in which a government could obstruct the dispute procedures, including making it difficult to select the panellists. By the beginning of the Uruguay Round trade negotiation in 1986, it was clear that something had to be done about these failings.

218. The Uruguay Round negotiators therefore designed the current DSU. They agreed upon substantial reforms, while retaining as much as possible the essentials of the GATT procedure. The DSU created strong deadlines and a fallback procedure whereby the WTO Director-General can appoint the members of a panel if no agreement is reached in a reasonable time. It eliminated the possibility of blocking the setting up of a panel. And most significant, it created a "reverse consensus" procedure for adopting a panel report. That means that such

adoption occurs automatically unless there is "consensus" against. No longer could the losing parties block adoption of reports, alone. It is generally expected that virtually every WTO dispute settlement final report will be adopted.

219. The balancing element in the DSU was the creation of a right to appeal which can be exercised by any disputant after the first level panel report is final and before it is adopted. To consider any such appeal, the DSU established an Appellate Body consisting of seven persons who would be retained on a part-time basis. From these seven, a "division" of three is selected to handle each appeal. A collegiality procedure developed whereby all seven Appellate Body members discuss each case. The final report of the Appellate Body then also goes to the Dispute Settlement Body (DSB) which automatically adopts it through the "reverse consensus process".

220. A further element in the political balance that made possible the emergence of this high level of automaticity in WTO dispute settlement proceedings was acceptance by all WTO Members to refrain from making their own binding unilateral judgments on whether other parties have acted inconsistently and acting upon any such judgments. This restraint is crucial to ensuring that the multilateral trading system allows the force of law and process rather than the force of economic power to determine the treatment of trade difficulties.

B. SO FAR SO GOOD - THE SYSTEM HAS WORKED

221. By most accounts, and most measures, the operation of the dispute settlement system in the WTO has been a remarkable success. As of 17 September 2004, there had been a total of 314 complaints brought by Members of the WTO. This is a rate many times the average during the history of the GATT for dispute settlement complaints. It is clear that the Members find it useful to utilize the new system as a tool for enhancing their trade diplomacy and securing solid and reasonably timely responses to practical trade problems.

222. One of the interesting facets of this record of complaints is a much greater participation of developing countries than was the case in the GATT dispute settlement system. Of course, the major trading powers continue to act either as complainant or respondent in a very large number of cases. Given their large amount of trade with an even greater number of markets, it could hardly be otherwise. Yet developing countries - even some of the poorest (when given the legal assistance now available to them) - are increasingly taking on the most powerful. That is how it should be.

223. Another interesting statistic is the fact that less than half the complaints actually go on to a panel process. The remaining cases undoubtedly include a number of complaints that are settled, but also some complaints that are merely dropped or otherwise disposed of. The formal dispute system was always intended to encourage negotiated settlement "out of court". At the same time, the complaint process is a "learning process" for participating countries. Sometimes parties appear to be able to predict from the already extensive jurisprudence of the WTO what would be a likely outcome, and this can lead to settlements.

224. Thus far, overall there have been 81 cases in which there have been adopted reports. Of these 56 have been appealed, leading to both an adopted Appellate Body report and the non-appealed or appellate-upheld portions of the first level panel report. This leaves 25 final un-appealed first level panel reports adopted, which is 31% of the total. Although at the beginning, virtually every case was appealed, more cases are now being completed without appeal. Again, this suggests that the jurisprudence of the WTO has provided a measure of

predictability. This can lead governments to foresee what might be the chances of appeal, and to refrain from that expensive activity if their chances are not very great, or the matter is not that important to them.

225. These 81 cases for which reports are adopted, and reports whose adoption is pending, amount to more than 27,000 pages of jurisprudence. In the opinion of many impartial observers (whose opinions are not constrained by particular advocacy roles) this jurisprudence is extraordinarily rich and detailed for a body in existence only ten years. There is no doubt that this jurisprudence will have an effect on general international law broader than the borderlines of the WTO system. In addition, it is having the effect of illuminating certain key WTO treaty obligation questions, and providing some rule stability by resolving ambiguities, all with creditable and elaborately reasoned opinions.

C. WTO JURISPRUDENCE IS BREAKING IMPORTANT NEW GROUND

226. The dispute settlement jurisprudence of the WTO has provided important insights on many dozens of particular legal issues. A few of these are worth summarizing here. They are chosen to illustrate the work of the dispute settlement system, and the approach of the panels and Appellate Body towards very complex and delicate international law issues; they do not, therefore, represent any comprehensive review of the overall jurisprudence.

Standard of review and deference

227. Often central to the jurisprudence is the delicate question of the extent to which the WTO international procedures should give deference to Members' governmental decisions, a question which certainly engages issues of "sovereignty" as discussed in Chapter III. These national decisions often involve a view of a government about how to resolve the ambiguities or gaps that inevitably occur in a massive multilateral treaty that has been negotiated by over 100 Members. The deference question comes up in several different ways, one of which focuses on what is termed the "standard of review".

228. With the exception of the Anti-dumping Agreement, the treaty text of the Uruguay Round Agreement is not explicitly subject to a deferential standard of review. There is no very explicit language for a general standard of review approach of the WTO dispute settlement system towards Members' decisions. However, the Appellate Body has relied heavily on Article 11 of the Dispute Settlement Understanding, which calls for a panel to make "an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements…".

229. The Appellate Body has taken a similar view of the basis for consideration of appeals, sometimes based on other phrases of the DSU. On the other hand, it is recognized that language of DSU[33] Article 3 may suggest a more deferential approach when it says: "recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements." Language in the Uruguay Round text regarding anti-dumping measures has a more explicit reference to a standard of review criteria applicable just to that text, and it is argued that this criteria requires more deference to Members' decisions. These issues are quite controversial, and it is not the role of our Consultative Board to give a legal opinion on them, except to note that there are good faith arguments on various sides of the controversies. Later, we address some suggestions for an enhanced role for the Dispute Settlement Body in relation to future cases that raise controversial issues.

[33] Understanding on Rules and Procedures Governing the Settlement of Disputes [hereinafter DSU], Annex 2 to Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, at Article 3.2.

230. Apart from these references to the DSU, the Appellate Body, from the very beginning of its existence, has indicated through statements in its reports that it is quite cognizant of the need for deference to Members.[34]

The power of precedent

231. It is generally agreed that the strictest type of precedent, as utilized in many common law jurisdictions[35] is not applicable in international proceedings: indeed, it is not applicable in most legal systems of the world. However, it is quite clear that some degree of "precedent" concepts motivates the WTO dispute settlement processes (as well as most other international law tribunals process). This reliance on prior cases, while not always determinative, and certainly not totally binding on subsequent panel cases, nevertheless provides a degree of consistency which, in turn, enhances the predictability of the whole system. That is called for by the DSU, when it stresses the goal of providing "security and predictability." In addition, the Agreement Establishing the WTO requires that the WTO "shall be guided by the decisions, procedures and customary practices followed by the contracting parties to GATT 1947…".[36] This "guidance clause" is extremely important, and represents a desire on the part of the drafters of the Uruguay Round text to continue the general practices and jurisprudence of the predecessor organization, GATT, i.e., to follow the GATT "acquis."

232. The elaborate use of precedent by the Appellate Body and first level panels, including precedent from GATT panel reports, can easily be seen upon reading any of the current WTO jurisprudence.[37] The precedent concepts used in the WTO jurisprudence is, thus, centrally important to the effectiveness of the WTO dispute settlement procedure goals of security and predictability.

General international law in WTO jurisprudence

233. From the very first case, the Appellate Body has made it quite clear that the WTO is part of the general international legal landscape for world affairs. It notes that it is required, in its process of interpreting the WTO Uruguay Round text, to follow the customary rules of general public international law regarding interpretation of treaties. The Appellate Body indicates that those customary rules are well expressed in the text of the Vienna Convention on the Law of Treaties, even though that convention is not, itself, ratified by all Members of the WTO.

234. There is, nevertheless, some controversy about the degree to which general international law should be utilized in the jurisprudence and determinations of the WTO dispute settlement system. Clearly, it seems to be the case that international law will have relevance, but that there are also risks about pushing that relevance too far. It can be argued, for example, that particular norms, notably in the DSU "remedies" procedures (Articles 21 & 22) of the system, provide special legal norms (sometimes technically referred to as *lex specialis*), which would "trump" customary international law. Once again, there is a possibility of further elaboration of some of these concepts as the jurisprudence evolves.

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[34] Examples include: "Japan - Taxes On Alcoholic Beverages", WT/DS8, 10, & 11/AB/R, 4 October 1996, page 22, "WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgments in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world"; and "EC - Measures Affecting Livestock and Meat (Hormones)", WT/DS26 & 48/AB/R, 16 January 1998, paragraph 165, "We cannot lightly assume that sovereign states intended to impose upon themselves the more onerous, rather than the less burdensome obligation by mandating conformity or compliance with such standards, guidelines and recommendations. To sustain such an assumption and to warrant such a far-reaching interpretation, treaty language far more specific and compelling than that found in Article 3 of the SPS Agreement would be necessary."

[35] This is generally referred to as *stare decisis*.

[36] Marrakesh Agreement Establishing the World Trade Organization, at Article 16.1.

[37] A recent first level panel report contains over 5,800 footnotes, most of which are references to prior cases, and the case report includes a list of the 54 cases actually cited and relied upon. See "US—Definitive Safeguard Measures on Imports of Certain Steel Products", WT/DS248/R, WT/DS248/AB/R, adopted 10 December 2003.

235. The customary international law rules of interpretation are, themselves, sometimes questionable when applied in the context of very detailed and intricate economic obligations of the WTO. There are many different techniques that can be used for interpreting a treaty, and the Appellate Body has utilized many of the rules that are necessary.

The role of non-trade policies in WTO cases

236. In general the WTO dispute settlement system mandates that the focus of the cases be upon the WTO Uruguay Round texts, and the jurisprudence of the GATT and the WTO. Nevertheless, the Appellate Body has, on occasion, been forced to confront strong arguments that its interpretation should not be totally confined to embellishing trade policies, but on the contrary, it must weigh, or balance, such policies in certain situations against other kinds of policies, such as environmental protection. This is an area that the jurisprudence will need to develop further.[38]

D. THE EMERGING PROBLEM OF COMPLIANCE - MONETARY COMPENSATION FOR THE POOREST?

237. In recent years, as more and more dispute settlement cases reach the stage of adopted reports, attention has naturally been shifted towards the procedures that can occur at the end of the process, particularly those relating to "enforcement" or "compliance" inducing measures. These fairly new procedures (which were not included in the GATT treaty texts and understandings) provide for a reasonable time period for governments to implement the adopted report of the Appellate Body or panels. There is a provision for arbitrating the standard length of time, and there is also a provision in the DSU for the "winning parties" to challenge whether the "losing party" has adequately performed under the requirements of the adopted panel.[39]

238. If non-performance continues, there is an opportunity provided in the DSU for the winning parties to demand "compensatory measures". Under GATT and now WTO rules, compensatory measures have traditionally not been monetary payments ("cheque in the mail"). On the contrary, such measures have generally been additional market access measures by the party called upon to correct its failure to fulfil its WTO obligations. (The idea of monetary payments is discussed below.) Absent agreement on such compensation by adding to market access, the winning parties may take measures that would suspend obligations regarding the losing party; a response which is sometimes informally called "retaliation".

239. We have now had a considerable amount of this "post-judgment activity" under the relevant measures of the DSU.[40] Difficulties with the treaty text and the practices involved are becoming more apparent. The DSU treaty text itself is not completely consistent within its different parts, and this has led to the view that something needs to be done about "sequencing"; meaning how a challenge on whether the response of the losing party has been adequate and can operate consistently with the provisions allowing the winning party to take countermeasures. Clearly, this problem deserves some attention, even if the matter has been partly resolved by a developing practice of the disputing parties agreeing on the sequencing approach applying to their particular case. Some careful observers suggest that leaving this matter to agreement between disputants contains a risk that such agreement may not be found in certain troublesome cases. Most observers feel that it is generally clear which changes to the DSU are appropriate to resolve the sequencing problem, but that the consensus requirement for any DSU changes have greatly inhibited what should be an easy resolution to the problem.[41]

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[38] One of the most detailed examinations of this problem arises in the Appellate Body report in the "Shrimp-Turtle" case: "US - Import Prohibition of Certain Shrimp and Shrimp Products", Report of the Appellate Body, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998).

[39] DSU Articles 21 and 22.

[40] As of 17 September 2004, there have been 15 referrals to an Article 21.5 DSU compliance panel.

[41] As of 17 September 2004, there have been 12 cases of a sequencing agreement. For example, "US - Shrimp", WT/DS58/16; US - FSC, WT/DS108/12; and "EC - Bed-Linen", WT/DS141/11.

240. As noted above, when compliance is not forthcoming, and compensatory measures are not agreed, the fallback temporary measures of "suspension of obligations" or what some call "retaliation" can occur. The problem is that retaliation goes against the underlying objective of the WTO system generally to promote rather than restrict international trade. The somewhat relaxed, even complacent resort to such damaging trade action is becoming serious. Also, there are worries, in particular, that some countries, including some of the major trading partners, such as the US and the EU, are acting in a recalcitrant manner, and not taking measures that would effectively, and in a timely manner, fulfil their obligations.

241. It has even been argued by some that a WTO Member finding itself in a losing position in the WTO dispute settlement system has a free choice on whether or not to actually implement the obligations spelled out in the adopted Appellate Body or panel reports: the alternatives being simply to provide compensation or endure retaliation. This is an erroneous belief. There is an underlying obligation, which although not 100% explicitly clear in the DSU language, can be seen through a careful analysis of the total DSU and some dozens of treaty text clauses, to require measures to bring the governmental activities complained of into consistency with the rules of the WTO.[42]

242. **To allow governments to "buy out" of their obligations by providing "compensation" or enduring "suspension of obligation" also creates major asymmetries of treatment in the system. It favours the rich and powerful countries which can afford such "buy outs" while retaining measures that harm and distort trade in a manner inconsistent with the rules of the system.** In turn that can only diminish the extent to which companies, trading and investing, can rely on the rules to provide market predictability.

243. For poorer WTO Members, especially the least-developed countries with their narrow participation in world trade, the "buy out" attitude can nullify the value of their pursuing dispute settlement cases. These countries normally cannot effectively use the weapon of retaliation without imposing damage on themselves and on the goals of trade liberalization. **One proposed solution is to allow monetary compensation from the party required to comply with a dispute settlement report, to substitute for compensatory market access measures by the winning aggrieved disputant. Some experimentation in this regard could be useful, but great care must be exercised to be sure that monetary compensation is only a temporary fallback approach pending full compliance, otherwise the "buy out" problems will occur.** In addition, monetary compensation will in some cases face enormously difficult "valuation" problems, and may often ignore the rights of third parties, and damage the goals of security and predictability of a rules-based system for market participant future activities. "Valuations" would have to consider not only effective losses, but also potential gains that are nullified or impaired.

244. Proposals have been put forward that in some circumstances losing parties should reimburse legal process costs of a successful complainant. This proposal also has some merit, but must be thought through to avoid burdens on poorer countries, which could inhibit their access to the dispute settlement procedures in cases, which, although not clear, involve a reasonable argument regarding a troublesome ambiguity in the treaty texts.

245. It is possible, of course, that effective compliance will not really depend so much on the specific remedies - including retaliation or compensation - contained in the DSU, but more on the general attitudes of WTO Members, particularly the very large and powerful among them. Those attitudes reflect a willing-

[42] See, e.g., John H. Jackson, "Editorial comment: International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to 'Buy Out'?" American Journal of International Law 98 (January 2004): 109-125.

ness - or lack of it - to support the credibility and fair operation of the dispute settlement system. Thus it is extremely important that the major players follow a policy of conforming to the obligations outlined in WTO panel or Appellate Body reports in cases brought against them. It is important for the system to maintain the political support and confidence of all WTO Members, and to be viewed as fair and rigorously impartial by all stakeholders. It should be noted that for some countries, compliance is regular and satisfactory when a government can act without obtaining legislation from a parliamentary body, but compliance is sometimes delayed or difficult when legislation is required. This suggests that governments which have this problem need to seriously consider institutional changes in executive-legislative relationships to avoid this risk to appropriate good faith compliance.

E. CRITICISMS OF WTO JURISPRUDENCE

246. It is not always clear that some of the harshest critics of WTO jurisprudence, many of whom have advocacy roles related to a variety of special interests, have the best interests of the overall WTO system in mind. Nevertheless, the criticisms need to be examined and understood and, in some cases, they may warrant some accommodation.

247. As mentioned above, one of the areas of criticism has been the degree of deference that the WTO dispute settlement system shows to Members' decisions. Another criticism is that gap-filling is not an appropriate role for the dispute settlement system. This view is itself open to criticism since every juridical institution has at least some measure of gap-filling responsibility as part of its efforts to resolve ambiguity. On the other hand, it can also reasonably be argued that WTO obligations should generally be the product of negotiations among Members, not juridical proceedings. In recent years, Members have successfully negotiated very little: the Doha Round, it is to be profoundly hoped, will eventually correct the imbalance between law-making and any tendency towards creative law enforcement through the dispute settlement system. Likewise, improvement in the various decision-making processes of the WTO to avoid what sometimes appears to be stalemate situations or other inability to act (sometimes attributed to the consensus rule), would considerably diminish the incentive to bring situations to the dispute settlement system, rather than work out agreed solutions though the diplomatic process.

248. Another criticism is that the dispute settlement system is too biased, in preferring "pro-liberal trade" approaches to alternatives, even when certain important national government goals are at stake. In such cases, critics would argue that there has to be more of a fair balancing. Indeed, there may be some measure of validity in this criticism, but it needs to be carefully appraised in a context not too weighed down by special interest advocacy.

249. One area of endeavour in the jurisprudence that has engendered a great deal of criticism is the "trade remedies" area. This generally is considered to embrace the agreements on anti-dumping, countervailing duty and subsidies, and safeguards. A fairly large number of those cases (approximately 53% of the disputes) have been decided in the last four or five years. It is hardly surprising that this field of trade policy would engender the most tension and controversy in the WTO jurisprudence, since it often involves national decisions designed to assist constituent interests of some importance to governments. Safeguard actions, for instance, are generally designed to soften the rigor of liberal trade policies, and to provide an exception that would give some temporary adjustment relief to domestic interests that find imports to be rising and causing significant injury. Generally, panels and the Appellate Body urged rigorous procedural requirements in the use of these trade remedies, in order to prevent their

usage for protectionist or purely political purposes. But some notions of balancing this rigor with the policy goals of the trade remedy (especially for safeguard measures) seem worthy of consideration.

250. The DSB might be able to play a more constructive role than it has in the past, with respect to criticisms of the jurisprudence. It is important that the DSB not take any actions which would inject a political or diplomatic change into the results of any particular dispute settlement case. To do so could seriously undermine the credibility, rigor, and intense reasoning of the system. Furthermore, a certain amount of the discussions in the DSB about a report sent to it for adoption tend to be a rehash of advocacy positions, and expressions of dismay by one side or the other about issues which they had advocated and had not been adopted.

251. **A more constructive approach might be to occasionally select particular findings for in-depth analysis by a reasonably impartial, special expert group of the DSB, so as to provide a measured report of constructive criticism for the information of the WTO system, including the Appellate Body and panels.** Such a report could be presented to the DSB for information, or conceivably could be adopted by the DSB. In an extreme case, perhaps the report could go so far as to recommend that the DSB and General Council take measures under Article IX of the Agreement Establishing the WTO, for a "definitive interpretation" of the treaty text.

252. Even a report presented or adopted for information only could have an important effect on the thinking of the Appellate Body members and the panellists for future cases. However, it would be important that these not have an impact on the instant case, for reasons to be mentioned in the next section.

F. REFORM PROPOSALS SINCE MARRAKESH

253. The Marrakesh Ministerial meeting of the Uruguay Round decided on a review of the dispute settlement system after the fourth year of its existence. Over the past several years several hundred proposals have been tabled. Much time has been devoted to their consideration but consensus on a package of changes to the system has eluded Members. In the Doha Round, reform of the dispute settlement procedures was set to be taken up separately from the rest of the negotiations. Again, the work has so far proved inconclusive.

254. There are, however, **a number of viewpoints expressed by governments and non-government observers that suggest a general sense of satisfaction with the dispute settlement system.** That has led to the suggestion that there does not exist a strong political incentive to reform the system. Indeed, as expressed at the beginning of this chapter, **an important underlying concern is, or should be, to not "do any harm" to the existing system since it has so many valuable attributes.**

255. **Some of the ideas for reform would create a sort of "diplomatic veto" or the opportunity for specific disputants to "nullify" or change aspects of the final adopted report following a full dispute settlement procedure.** To inject the opportunity for political or diplomatic activity to interfere with the basic result so carefully arrived at by the relatively intense dispute settlement procedures, would shift the emphasis away from reasoned advocacy, with all sides having an equal and fair opportunity to present their arguments and ideas. It would undermine and bring discredit on the procedures, and in some ways, would be a regression towards some of the very important problems in the GATT era, such as the opportunity for losing parties to block the adoption of a report. For these reasons, **the Consultative Board would strongly advise against any such measures as part of a reform package.**

256. There are a number of other reforms, however, which do deserve serious attention, although there may not be a high priority to achieve them soon. We have mentioned some ideas in paragraphs above; in addition, it has been suggested, for example, **that the opportunity for the Appellate Body to "remand" a case to the first level panel should be clarified.** Clearly, one of the problems would be that since first level panels are appointed ad hoc for the instant case only and are generally discharged when their report is forwarded to the DSB, there might not be an entity in existence to which a remand could proceed. Nevertheless, **the principle is worth pursuing, especially if remands can be achieved without adding delays to the already quite lengthy process.**

257. Another proposal is for a roster-type of arrangement, somewhat similar to the Appellate Body procedure, for designating the membership of first level panels. Such a roster would not need to provide "100% staffing" of the panels. It could be of a size that, even in a peak caseload period, at least one member from the roster would be on each panel. The remaining panellists could be provided using procedures now in existence. **Thus, a combination of roster and ad hoc appointments might serve the institution very well and ease somewhat the particular problems that have been witnessed in a few of the panel selection procedures.** One serious question regarding the roster idea for first level panels, however, addresses the procedures by which the roster persons will be appointed. There exists considerable worry that the usual diplomatic and political processes might not produce the best calibre individuals the tasks require. Thus, **thought is needed about a possible small apolitical body of experts who would examine applications and produce a list of nominees who meet carefully set out criteria. This body could then work with the DSB in finalizing the roster.** This is just one suggestion, among several.

258. Other reform proposals have given some attention to the Appellate Body, raising the question whether the Appellate Body should have more members, given that its caseload has sometimes been heavy. It has also been suggested that the Appellate Body members be considered full-time, rather than part-time, as they are currently retained. These proposals involve various pragmatic and resources questions, and the Consultative Board can see arguments on both sides. Probably more experience with the still new dispute settlement system is needed before some of these changes are made. The DSU might be changed to allow some flexibility for a later decision of the DSB (or the General Council) on these matters, after such experience has been obtained.

259. Several additional suggested dispute settlement reforms relate to the very important subject of how the WTO should relate to civil society and non-governmental entity participation. This subject is more broadly discussed in Chapter V. But two issues are especially significant for the dispute settlement system, namely the issue of opening parts of the dispute settlement procedures to public view or attendance, and the issue of how the dispute settlement system should handle so-called *"amicus curiae"* briefs (or similar submissions of views to a case procedure).

260. **First, with regard to *amicus* briefs, the Consultative Board agrees generally with the procedures already developed for acceptance and consideration of appropriate submissions of this type.** The DSU already provides ample authority in its Article 13 for first level panels to exercise their discretion about this. Likewise, for different legal reasons, the Appellate Body has authority to regulate this matter, and in practice, has been operating on a case by case basis. **However, those intimately involved in these proceedings see important need to develop general criteria and procedures at both levels, to fairly and appropriately handle**

amicus **submissions, balancing worries about resource implications with fairness and a general recognition that such submissions can in some instances improve the overall quality of the dispute settlement process. The Consultative Board agrees that such procedures should be developed.**

261. The issue of opening parts of the dispute settlement proceedings, particularly the so-called "hearings" for public view (but not public participation) is more complex, partly because the current DSU text prevents such approach in most cases. Thus, amendment of the DSU will be needed, and this requires consensus, which can be blocked by any WTO Member. **Our recommendations about consensus in Chapter VII are thus importantly linked to our recommendations here. The Consultative Board feels that the degree of confidentiality of the current dispute settlement proceedings can be seen as damaging to the WTO as an institution.** This Board accepts the view of many participants in the system that many public observers would be favourably impressed with the processes.

262. **Thus, the Consultative Board recommends that, as a matter of course, the first level panel hearings and Appellate Body hearings should generally be open to the public.**

263. **This new practice would be susceptible to a motion by a panel (or Appellate division) or by a disputing party, arguing there is a "good and sufficient cause" to exclude the public from all or part of a hearing.** The need to protect confidential information, such as "business confidential" matters would be one example of such cause. **Furthermore, at least in the early years of this new policy, the Board would recommend that when any disputing party for reasons such party gives in writing as "good and sufficient," that view shall be treated as determinative.** This could alleviate some anxieties about this transparency, but it would be hoped that the presumption would be established that open hearings should be the prevailing norm. However it is achieved, such additional transparency should serve to reinforce a positive public view of the dispute settlement system. Certainly, it should counteract the deliberately mischievous image sometimes promoted of a mechanism that is both secretive and conspiratorial.

264. Closely related to the prior paragraphs are several final points that should be made. First, it is self-evident that the better informed are diplomats and government officials on the fundamentals of international dispute settlement the better. This goes rather further than a good understanding of procedures. **A broader understanding of the role of "rule orientation" in treaty implementation, as well as the general approaches that virtually all juridical institutions, national and international, take to their work would sometimes be welcome**. Thus, the resolution of ambiguities, a certain amount of limited gap-filling, the need for various interpretation techniques are all part of the natural scenery of dispute settlement. They come together in providing predictability and security to enterprises in the market. **The WTO Secretariat should encourage and facilitate technical assistance in this area.**

265. Second, **the nature and value of the dispute settlement system must be sold to a wide public and political audience.** Clearly, in the last several years, the amount of criticism of the system and the results it generates has intensified. But, much of this criticism - which often is sharp but not necessarily balanced or informed - stems from relatively one-sided, advocacy-related positions. **It is important that the system be better understood, not only by the diplomats, public officials and legislators that have to engage in it, but also by the general public** who provide the constituencies that are being served by the system.

266. Consequently, the WTO as an organization, and its officials working directly in dispute settlement activities, have some obligation to educate as well as administer. Some of the efforts of the Secretariat to inform the public, such as the reasonably elaborate explanatory and bibliographical materials on the WTO website, are very welcome.

267. **Further constructive efforts along this line, perhaps including some by expert groups appointed by the WTO or by the DSB, would be welcome**.

268. Finally, it is interesting to note how extensively the WTO dispute settlement system is being treated in literature from non-governmental sources. There is an enormous amount of scholarly and policy-centered literature about the dispute settlement system. This is evidence of the general and public interest in the subject, and in the recognized importance and, perhaps, value of the system. Individual cases are debated at length (similar to attention received by decisions of national courts). This activity, either of scholars or of intelligent and pointed argumentation by other perceptive observers, can play a constructive and complementary role in support for a rules-based institutional framework for international trade, just as similar activity plays such a role within nations.