

*IMPORTANT NOTE: THIS IS A DRAFT VERSION OF A PAPER LIKELY TO BE FURTHER DEVELOPED PRIOR TO PUBLICATION IN A CONFERENCE JOURNAL. THIS IS THE APPROXIMATE VERSION OF THE PAPER AS DELIVERED AT THE CONFERENCE ON 16 MAY 2003*



**Post Conf Version**

*PCVWtodsTUCKpaper6  
Rev 220503*

**The WTO Dispute Settlement Process:  
Did We Get What Negotiators Wanted?<sup>1</sup>**

Andrew L. Stoler  
Executive Director  
Institute for International Business, Economics and Law  
The University of Adelaide

Washington, DC  
May 16-17, 2003

\_\_\_\_ // \_\_\_\_\_  
//

**Introduction**

Did we get what the Uruguay Round negotiators wanted in the Dispute Settlement Understanding? The short answer is for the most part “yes”. Also, this is true for most of the Uruguay Round’s participants and most of their key objectives. The negotiators’ objectives grew out of their governments’ unsatisfactory experiences with GATT dispute settlement and they set out to fix what was wrong with the system. In the Uruguay Round result, we got a system that is truly multilateral and at the same time works effectively and efficiently. The system today is used by developed and developing countries alike and has shown itself capable of resolving extremely

---

<sup>1</sup> In general, the author has tried in this paper to discuss the objectives in the negotiations from the standpoint of WTO DSU negotiators representing all of the main players in the Uruguay Round, although he was himself a negotiator for the United States at that time. The discussion relative to the special standard of review for antidumping has a decided American tilt to it owing to the fact that this has always been an issue more or less specific to the United States.

difficult and politically sensitive trade disputes. But there is at least one important American objective that – in practice – has turned out not to have been met (at least in the way intended) in the Uruguay Round negotiations. Another important objective that was achieved in the DSU now turns out to have backfired to an extent that the United States and certain other WTO Members are seeking to revisit their earlier achievement.

---

### Background to the Negotiations

Did we get what we wanted? What were our objectives? In order to understand the objectives of the Uruguay Round dispute settlement negotiations, we need to briefly review developments in the GATT over the period between the end of the Tokyo Round and the Punta del Este meeting. The Tokyo Round negotiations ended when STR Strauss and his European counterparts decided that they had had enough of Geneva. By late 1978, it was clear that not much more would be achieved by talking and it was time to declare victory and head home. A certain amount of propaganda was generated over the opportunities for businesses in new agreements like that for government procurement, but the fact of the matter is that not much was really achieved in many areas addressed in the Tokyo Round. Even the much-heralded NTM Codes saw their value undermined by limited membership. Lack of forward movement was particularly evident in agriculture. The Tokyo Round also did little to improve upon GATT's very general approach to dispute settlement, producing only a short 1979 "understanding" addressed to issues such as panel procedures, customary practice and aspects of transparency.

Against the background of few negotiated improvements in the GATT's trade rules, real world market conditions created an atmosphere where major trading countries were spoiling for a fight. Large surpluses of many traded agricultural commodities and the European Community's

aggressive policy aimed at off-loading its surpluses through the use of export subsidies meant non-subsidising suppliers lost market share. The early 1980's saw an increase in GATT dispute settlement actions, almost none of which were resolved to the full satisfaction of the complaining parties. Many of the cases (sugar, wheat flour, canned fruit, pasta) grew out of the Tokyo Round's shortcomings in dealing with agriculture and pitted the GATT's two biggest members against each other.

The readily apparent inadequacies of the Tokyo Round led quickly to an effort to launch a new trade round at the GATT Contracting Parties Geneva Ministerial meeting in late 1982. Of course, the effort to launch negotiations failed. At the same time, unhappiness with the way in which GATT dispute settlement procedures and the 1979 understanding had failed to produce satisfactory outcomes was generalized to the point that the 1982 Ministerial Declaration incorporated a ten-paragraph Decision<sup>2</sup> elaborating an idealized consultation and conciliation process, the proper role of panels, treatment of panel reports and recommendations and – perhaps most tellingly - agreeing that “obstruction in the process of dispute settlement shall be avoided”. Real life experience in the years to come would demonstrate that the 1982 Decision's injunction against obstruction wasn't worth the paper on which it was written.

Tinkering at the edges continued in Geneva and institutional interest by many GATT Contracting Parties kept the process of dispute settlement improvement going even outside the context of a round. In a Decision taken in November, 1984<sup>3</sup>, procedures were adopted to assist in panel composition (to stop blockage at that stage) and speed the completion of panel work. This was another small fix along the way to today's Dispute Settlement Understanding.

---

<sup>2</sup> GATT, GATT Secretariat, *Basic Instruments and Selected Documents*, 29<sup>th</sup> Supplement (Geneva: GATT, 1982-83) 13.

<sup>3</sup> GATT, GATT Secretariat, *Basic Instruments and Selected Documents*, 31<sup>st</sup> Supplement (Geneva: GATT, 1984-85) 9.

## Objectives in the Uruguay Round Negotiations

The plain fact that there was still much to do was reflected in the language in the Punta del Este Declaration outlining shared objectives in the Uruguay Round negotiations:

“In order to assure prompt and effective resolution of disputes to the benefit of all contracting parties, negotiations shall aim to improve and strengthen the rules and procedures of the dispute settlement process, while recognizing the contribution that would be made by more effective and enforceable GATT rules and disciplines. Negotiations shall include the development of adequate arrangements for overseeing and monitoring of the procedures that would facilitate compliance with adopted recommendations.”<sup>4</sup>

The language on dispute settlement in the Punta del Este Declaration was non-controversial, in part because of a general consensus that there was a problem to be addressed and in part because many participants in the Ministerial meeting were focussed on what were then considered as the “bigger” issues, such as how to negotiate rules for trade in services and ambitions for the protection of intellectual property rights.

A formal expression of U.S. objectives in the negotiation didn't appear until the enactment of the 1988 Trade Act. In Section 1101(a) of the Act<sup>5</sup>, the principal negotiating objectives of the United States with respect to dispute settlement were specified to be:

- to provide for more effective and expeditious dispute settlement mechanisms and procedures; and
- to ensure that such mechanisms within the GATT and GATT agreements provide for more effective and expeditious resolution of disputes and enable better enforcement of United States rights.

---

<sup>4</sup> GATT, GATT Secretariat, *Ministerial Declaration, Punta del Este*, (Geneva: GATT, September 1986) 20.

<sup>5</sup> United States, *United States Public Law 100 -418*, (Washington: GPO)

Gary Horlick, one of the discussants for this paper when it was delivered at the Dartmouth – Tuck Forum on 16 May 2003 was right to point out that the American desire for more effective GATT dispute settlement was dictated in no small part by American agricultural exporters that had fared so poorly in GATT cases and by the intellectual property rights community which had, after all, brought IPR issues to the GATT largely in reaction to WIPO's failure to provide effective dispute settlement and enforcement of its treaties.

The objectives of other major players in the Uruguay Round were not set out in legislation in the same way as the Americans' were. Former Commission negotiators have told me that the development of EC objectives in the negotiations was mostly a progressive and incremental process where certain sectors of DG -I (DG Trade) and the Legal Service slowly overcame resistance of other parts of DG -I and DG-VI (Agriculture). In the case of the EC, progressive persuasion was mostly associated with moving the Brussels community off the "diplomatic model" and onto the "judicial model" of dispute settlement. Like the EC, the other Quad members (Canada and Japan) do not seem to have written down their negotiating objectives at any particular point. Certainly, all the major players in the negotiations had had enough of the ineffectiveness of GATT dispute settlement and they shared a common objective of fixing the system and making it work.

By the time of the Round's launch, the United States' frustration with the lack of progress in settling GATT disputes had led to increased threats of unilateral trade action under Section 301 of the Trade Act of 1974, as amended.<sup>6</sup> Not surprisingly, Canada, the EC and Japan all agreed on a central objective: the Uruguay Round needed to produce a result that tied the Americans' hands with respect to the threat and use of unilateral trade sanctions under American law. The European

---

<sup>6</sup> United States, *United States Public Law 93 -618*, (Washington: GPO)

Community negotiators were particularly fixated on this objective and adopted a “belts and braces” approach to drafting of the DSU and related texts.

Developing countries shared this concern with respect to U.S. “unilateralism”. However, as a practical matter – and particularly in the later stages of the negotiation -- their objectives tended to focus on ensuring expedited consideration of disputes brought by developing countries and protecting themselves against the threat of “cross-retaliation” where they feared they would “pay” through restrictions on their goods trade for their inability to properly implement obligations in intellectual property or the services agreement.

As the negotiations progressed, the United States made clear that it had a number of other, more specific objectives in the area of dispute settlement. Among these objectives were:

- ensuring automaticity<sup>7</sup> in the multilateral process (through the negative consensus approach), so that losing parties would no longer be in a position to block the adoption of panel reports and authorization of retaliation would be assured;
- gaining multilateral agreement to possible “cross-retaliation” in cases of non-compliance with rulings;
- ensuring that the timeframe for resolution of disputes through the multilateral process accommodated the timetable of the domestic process in the United States under section 301;and,

---

<sup>7</sup> “Automaticity” in the process was important in order to guarantee that strict timetables would be met and that there would be no major divergence from the section 301 timeframes. The “automaticity” of the new system also guaranteed what John Jackson has called the “rule-oriented” approach to the settlement of disputes and represents the triumph in the Uruguay Round of the juridical model over the negotiating model of GATT-WTO dispute resolution.

- (very late in the game) gaining multi lateral agreement to a “ standard of review” in respect of dispute settlement actions involving antidumping.

Not surprisingly, these more specific demands on the part of the United States engendered counter objectives by America’s negotiating partners. For example, the demand for automaticity can be directly related to an interest in establishing a second level of legal review through a new Standing Appellate Body, although the United States shared the objective of creating an appellate level of review. As already noted above, developing countries sought to protect their interests against cross-retaliation and argued for leniency in respect of certain procedural deadlines.

#### How Negotiating Objectives are Reflected in the DSU Results

In 1994, anyone looking at the results of the DSU negotiation would have concluded that the main players achieved most, if not always all, of their objectives for dispute settlement. Of course, that assessment at that point in time would have relied on an examination of the texts, as opposed to the “in practice” application of the DSU procedures.

Disciplining Unilateralism: In order to tie the Americans to non-unilateral behaviour, the Europeans gained agreement to DSU Article 23, which requires WTO Members to have recourse to (and to abide by) the rules and procedures of the DSU in disputes relating to “covered agreements”. As part of its “belts and braces” strategy, the EC also gained others’ agreement to two related texts that United States negotiators argued were unnecessary. First, the DSU itself was made a “covered agreement” by virtue of its listing in Appendix 1. Many hours were spent arguing about how one would proceed with a challenge of a potential violation of a procedural

agreement if there were not at the same time an infringement of a more substantive WTO obligation. Second, the EC's negotiators demanded and obtained Article XVI:4 of the Agreement Establishing the WTO. This paragraph provides for what most considered obvious: "Each Member shall ensure the conformity of its laws....with its obligations..." The Community expected this to lead to legislative amendment of the section 301 statute so that it could only be used in accordance with the multilateral procedures of the DSU.<sup>8</sup>

For their part, American negotiators also achieved their key objectives in the DSU negotiations.

"Automaticity" was incorporated as a central feature of the DSU, thanks to the "negative consensus" rules in DSU Articles 6.1, 16:4, 17.14 and 22.6. No longer is it possible to block panel establishment, report adoption, or authorization for suspension of concessions. The "automaticity" of the system was also tested in practice early on when the Bananas dispute gave rise to the famous "sequencing" issue.<sup>9</sup> However, even though many of them hated the idea that retaliation could be read as preceding a multilateral finding of non-compliance, WTO Members recognized even in that most difficult of disputes the automatic nature of the negative consensus rule's application.

---

<sup>8</sup> The basic consistency of the Section 301 statute was unsuccessfully challenged by the EC in 2000. WTO, WTO Secretariat, *Case Number 200*, (Geneva:WTO)

<sup>9</sup> The "sequencing" issue refers to the order in which WTO Members should avail themselves of the DSU provisions found in Articles 21.5 and 22.6. Article 21.5 provides for referral back to the original panel in cases where there is continued disagreement over whether measures taken to comply with panel rulings are consistent with covered agreements, thereby enabling a multilateral finding on compliance. Article 22.6 provides for automaticity in authorization of retaliatory measures where a Member has not complied within the reasonable period of time. While many believe it is reasonable to get a new panel opinion (21.5) before going for retaliatory authority (22.6), the DSU does not specify the order to follow. In the bananas case, the USA argued that lack of EC compliance was clear; that nothing in 22.6 obliged prior resort to 21.5 (for example, suppose no compliance action at all had been taken); and, that the EC could always oblige itself of 21.5 after retaliation was in place if it disagreed with the American contention that the EC was out of compliance. An eventual agreement to improvements and clarifications in the DSU text will certainly address the problem of "sequencing".

The possibility of “cross-retaliation” is also written into the DSU, although Article 22.3 places limits on recourse to suspension of concessions in sectors outside that of the original dispute. In a sense, both the United States and the developing countries were able to claim victory in the “cross-retaliation” negotiation. In fact, the developing countries obtained another concession in connection with cross-retaliation. The separate Councils for Goods, Services and TRIPS created by Article IV:5 of the Agreement Establishing the WTO are an express response to developing countries’ concern in the Uruguay Round that the possibility of cross-retaliation in the DSU would lead to regular discussion of these unconnected sectors in a single WTO body. In the light of developing countries’ expressed concerns, it is ironic that the first case of cross-retaliation authorization in the WTO came in the Bananas dispute with Ecuador obtaining authorization to retaliate against EC services and intellectual property rights interests.

Strict timetables are built into the DSU process in large part in response to the pressure from the USA to align the timing of a WTO case to the Section 301 process. In that section of the Uruguay Round Agreements Act Statement of Administrative Action addressed to the DSU<sup>10</sup>, the U.S. Administration made much of these improvements in timetables. (As an aside, it should be noted that neither the negotiators in Geneva nor the drafters of the Statement of Administrative Action considered the implications for the DSU timetable of the need to translate panel report and Appellate Body decisions into all official WTO languages).

The last minute negotiations in respect of a “standard of review” were extremely difficult. In late 1993, the American trade bar, teamed with import sensitive industries and Members of Congress to bring tremendous pressure to bear on USTR. With an effective and automatic WTO dispute settlement system in prospect, this group wanted to ensure that the U.S. antidumping

---

<sup>10</sup> United States, United States House of Representatives, *United States House of Representatives Legislation 5110* (Washington: GPO) 1015.

measures against “un fair” imports would not be second-guessed and undermined by panels and the Appellate Body. Although the United States was clearly motivated by concerns over dispute settlement outcomes in antidumping cases, U.S. negotiators for a certain period maintained that they sought an across-the-board deference to implementing authorities and a general standard of review in the text of the DSU itself. (This was a technique to increase pressure on others and was not really a goal of the American team who worried that across-the-board deference would create problems for U.S. exporters in many of the “new” agreements.) The U.S. position was seen by many (including domestic interests seeking effective protection of intellectual property rights) as very dangerous and achieved its objective of increasing others’ willingness to explore a dumping-specific outcome. The issue was eventually resolved by the incorporation of Article 17.6 into the Antidumping Agreement.

#### Some Comment on the Establishment of the Appellate Body

As already noted, agreement to an appeals procedure was a necessary trade-off for the demand that reports be automatically adopted by the DSB. At the time, it was generally felt that the Appellate Body review would guard against the automatic adoption of badly reasoned legal findings. “Old timers” in 1993 may have had at least one case in the back of their minds when agreeing to the appellate procedure.<sup>11</sup> Certainly, an objective for the Appellate Body cited by the United States at the end of the Round was that appellate review would help ensure uniform interpretation of Uruguay Round Agreements and guard against potential “bad law” resulting from the odd panel report.

---

<sup>11</sup> In a 1981 case involving Spanish measures affecting the sale of soybean oil (L/5142), the panel so botched the legal reasoning in the case that the United States, which had brought the dispute, argued against adoption of the panel report, not merely because its complaint had not prevailed but on systemic grounds of avoiding the incorporation into GATT jurisprudence of “bad” GATT law..

Although the Standing Appellate Body was created as an institution by Article 17 of the DSU, an important post-Uruguay Round negotiation preceded the selection of the first seven persons for service on the Body. While DSU Article 17.3 specifies that membership in the Appellate Body shall be broadly representative of membership in the WTO, both the United States and the European Communities started from the position that they should each have two representatives on the Appellate Body. When other WTO Members made it clear they would never agree to this, the U.S., and later the EC, backed off their position. Both wanted assurances however, that the views of their own nominated Appellate Body members would not be ignored in any particular dispute.

To get this result, USTR Kantor and EC Trade Commissioner Brittan in their representations to DSB Chairman Kenyon demanded that the Appellate Body be mandated to consider disputes “en banc”. That position, of course, flew in the face of the text of the agreement and could not be formally agreed. However, as a matter of practice, the Appellate Body, once constituted, did adopt a collegial approach which provides in all cases for an “exchange of views” involving all seven Members. No doubt partly as a result of its recognition of the kind of sensitivity manifested by the USA and EC in 1995, the Appellate Body has never produced a report reflecting a dissenting view. It could be argued that this apparent unity of view has added weight to the authority of the Appellate Body to act as the final arbiter in the automatic process the negotiators wanted to establish in the Uruguay Round.

#### Did We Get What Negotiators Wanted in the DSU?

Any consideration of whether WTO Members actually got what they wanted has to go back once again to the roots of the Uruguay Round negotiation and then compare the present system – in practice – to the pre-1995 period. In general, the GATT system didn’t work. True,

there were instances of panel reports actually being adopted and implemented, but these were rare. Starting already with the Tokyo Round, years of effort were put into developing a more effective dispute mechanism. In 1982, 1984, 1989 and in the final outcome of the Uruguay Round, negotiators repeatedly sought procedures that would work efficiently and effectively and that would finally make it possible to resolve a large number of difficult problems that were not able to be settled under the GATT.

In a paper delivered recently in Geneva, the EC Commission's chief trade lawyer, Eric White, opined that

“The WTO Dispute Settlement system is a remarkable achievement. The WTO has succeeded in creating a frequently used compulsory dispute settlement system producing binding results that can be enforced. Nowhere else in international law are all these characteristics combined.”<sup>12</sup>

This is quite a positive assessment after slightly more than eight years of practical experience with the system. And this statement is more credible coming from the legal representative of one of the system's main users. It is a widely shared view. Many people, myself included, would agree with Mr. White.

One also cannot help but be impressed by the statistics. As of late February, 2003, 281 disputes involving 228 distinct matters had been brought to the WTO<sup>13</sup>. The system has been resorted to by 43 different WTO Members (counting the EC 15 as one). Moreover, notwithstanding the highly publicized cases on non-compliance, such as Bananas, Beef Hormones and the United States FSC case, the vast majority of disputes brought to the DSU have been resolved positively through out-of-court settlements or eventual compliance with panel and Appellate Body recommendations. Furthermore, in nearly all of the non-compliance cases, the

---

<sup>12</sup> Eric White, Remarks at the International Bar Association Conference in Geneva. *Future Directions in WTO Dispute Settlement*, March 2003.

<sup>13</sup> WTO, WTO Secretariat, Legal Affairs Division, *E-mail with statistics* (Geneva: WTO)

losing party has promised eventual action to come into conformity with its obligations. And the system works for developing countries as well as for developed countries. In 2002, just under half of the panels established were at the request of developing countries (8 of the 18 requests for panels came from developing countries, out of which five were against developed countries). Clearly, there is no other international dispute resolution system in place that can begin to compare its record in settling state-to-state disputes with the record already established by the WTO's DSU.

***Where negotiators got what they wanted...***

*American Unilateralism*

Those who sought an end to American unilateral use of section 301 appear to have achieved their objective. Since the WTO entered into force in 1995, there have been no instances where the United States, in addressing matters dealt with in "covered agreements", has acted outside the multilateral procedures of the WTO's DSU. The European Community, of course, didn't achieve its objective of seeing a change in the section 301 legislation itself and unsuccessfully challenged the statute in the WTO. This doesn't change the fact that the effective objective of subjecting section 301 to multilateral discipline was met through the DSU negotiation.

*"Automaticity"*

Since the entry into force of the new DSU, there have been no cases where Members have blocked panel establishment, adoption of panel and Appellate Body reports or authorization of suspension of concessions. Efficiency in the modern DSB has replaced the non-productive drama of the old GATT Council. No longer do we see three-day meetings full of recrimination and no result. Today it is not unusual for three new panels to be established and two reports

adopted in a single one-hour meeting of the WTO's DSB. And automaticity has brought with it the intended sense of security and credibility that the system lacked under the GATT.

### *Cross-Retaliatio*

Cross-retaliation, it turns out, seems to be a non-issue in the post-Uruguay Round period. Developed countries have not availed themselves of cross-retaliation possibilities to beat up poorer WTO Members and to date only little Ecuador has obtained cross-retaliation authority. Of course, the reason cross-retaliation has not been an issue could be related to the fact that those WTO Members most susceptible to the threat of cross-retaliation have tended to react to "lost" dispute settlement cases by bringing their offending practices into conformity with their obligations under the WTO. If this suspicion is true, then cross-retaliation as a concept will have made a valuable contribution to the "lawfulness" of the WTO system.

### *Timeframes for Dispute Settlement*

Certainly when compared to notorious GATT cases like the US-EC Oilseeds dispute, which dragged on for years, modern disputes adjudicated under the DSU are resolved in a much more timely fashion. The U.S. objective in the negotiation was to see a period from the establishment of a panel to DSB adoption of its report of not more than nine months. In practice, a time frame as short as that has not been possible. According to the WTO Secretariat, the average time from establishment of a panel to circulation of the report to members has been 363 days. In a number of difficult cases, the timeframe has actually stretched to well over 500 days.<sup>14</sup>

### *Standing Appellate Body*

---

<sup>14</sup> Some panel processes lasting more than 500 days include the cases of EC Asbestos (663 days), Chile Alcoholic Beverages (574 days), Japan Film (531 days). WTO, WTO Secretariat, Legal Affairs Division, *E-mail with statistics* (Geneva: WTO).

Judged against objectives and expectations in the negotiations, I think there is no doubt that the Appellate Body has proven to be a remarkable success story. If our objective was uniformity in interpretation of the Uruguay Round Agreements, then that objective has certainly been met through the operation of the Appellate Body to date. As James Bacchus, Chairman of the Appellate Body, pointed out in remarks delivered in Geneva in March 2003, “in nearly sixty appeals there has never once been a dissent by any Member of the Appellate Body to the conclusions or recommendations in any Appellate Body report”. This is not to say that there have not been some strong criticisms of Appellate Body reasoning and findings in particular cases (more on this later). Institutionally, however, I think there is no question that the negotiators got what they wanted in the Appellate Body. Again, as Bacchus points out, “in nearly eight years, there has never once been a suggestion by any Member of the WTO that the Appellate Body is anything but independent and impartial in reaching and rendering [its] judgements in dispute settlement.” For a new institution that has had to operate in an often highly charged political atmosphere, this is a real achievement.

*....and where (at least American) negotiators did not get what they wanted*

#### *Standard of Review*

One important area where a considerable number of vocal commentators clearly doubt whether negotiators got what they bargained for is related to the “standard of review” protection negotiated for antidumping at the very end of the Round. This was a critical objective for American negotiators. If the United States had not been seen to have achieved a meaningful standard of review for antidumping, it would have been quite possible for Congress to have rejected the results of the Uruguay Round. So what did the United States think it obtained and what did it get.

What U.S. negotiators thought they obtained is clear from the language of the Administration's Uruguay Round Statement of Administrative Action (URSAA). In that document, the Administration told the Congress:

“Article 17.6 contains a special standard of review, which is analogous to the differential standard applied by U.S. Courts in reviewing actions by Commerce and the Commission. It provides that:

- a WTO panel may not re-evaluate the factual findings of the national authorities if the national authorities' determination was objective and unbiased, even though the panel might have reached a different conclusion; and
- where the language of the Agreement may be interpreted in more than one way, a panel must confirm a determination by national authorities that conforms to one of the permissible interpretations of the Agreement.

Article 17.6 ensures that WTO panels will not second-guess the factual conclusions of the agencies, even in situations where the panel might have reached a conclusion different from that of the agency. In addition, 17.6 ensures that panels will not be able to rewrite, under the guise of legal interpretation, the provisions of the Agreement, many of which were deliberately drafted to accommodate a variety of methodologies.”<sup>15</sup>

In their paper delivered in Geneva in mid-March, Paul Rosenthal and Jeffrey Beckington express the view that the United States negotiators – in practice – achieved nothing on standard of review in the Uruguay Round.<sup>16</sup> Although Article 17.6(ii) is drafted in such a way as to lead one to believe that there must be at least some instances of “...more than one permissible interpretation...”, Rosenthal and Beckington stress that panels and the Appellate Body have time and time again found that there is only one way to interpret the provisions of the Antidumping Agreement at issue, making 17.6(ii) nothing more than a dead letter. Their paper contains several examples of cases where panels quite obviously decided to substitute their judgment for that of national authorities in ways that were certainly not anticipated by the American Uruguay Round

---

<sup>15</sup> United States, United States House of Representatives, *House Document 102 -316, Uruguay Round Trade Agreements, Texts of Agreements, Implementing Bill, Statement of Administrative Action, and Required Supporting Statements* (Washington: GPO, September 27, 1994) 148.

<sup>16</sup> Paul C. Rosenthal and Jeffrey S. Beckington, Paper delivered at the International Bar Association Conference in Geneva, *Dispute Settlement Before the World Trade Organization in Antidumping, Countervailing and Safeguard Actions: Effective Interpretation or Unauthorized Legislation?* March 21, 2003.

negotiators or the drafters of the URSAA language describing the standard of review for the benefit of the U.S. Congress.

The Rosenthal and Beckington view is shared by Cunningham and Cribb<sup>17</sup> who hold that WTO Panels and the Appellate Body have routinely ignored Article 17 and substituted their view for that of national implementing authorities. They conclude that the U.S. never should have expected panels and the Appellate Body to interpret the standard of review language in the way American negotiators intended and ascribe the difference in approach in part to the civil law background of many in the WTO community.

Readers of the URSAA description of the standard of review language in Article 17 who have also read the language of the Antidumping Agreement itself will note that the language in the URSAA is not a word-for-word repetition of the language used in the Agreement. In particular, the second “bullet” point, intended to describe Article 17:6(ii) omits any reference to “customary rules of interpretation of public international law” or that the panel must first find that the relevant provision of the Agreement “admits of more than one permissible interpretation”. It’s not really only a question of whether the language of the Agreement “may be interpreted in more than one way”.

Did the United States really get nothing at all on standard of review? Is it impossible for a panel or the Appellate Body to read Article 17 of the Antidumping Agreement in a way that gives deference to the judgment of administering authorities? Does the drafting of the URSAA reflect a misunderstanding of what was negotiated in the Round or was it perhaps even written in a way designed to convince Congress that negotiators obtained more than was really the case?

---

<sup>17</sup> Richard O. Cunningham and Troy H. Cribb “Dispute Settlement Through the Lens of “Free Flow of Trade” A Review of WTO Dispute Settlement of US Antidumping and Countervailing Duty Measures”, , *Journal of International Economic Law* , March 2003

Debra Steger, the former Director of the Appellate Body Secretariat in the WTO, takes issue with the arguments advanced by Rosenthal and Beckington. In her view, Article 17.6(ii) was not written so as to set a “reasonableness” standard for administering authorities, but rather another way of saying that when an action by national authorities is examined by the panel, that action must be found to be consistent with the provisions of the Antidumping Agreement when interpreted in accordance with the Vienna Convention on the Law of Treaties. Steger argues that an interpretation can only be considered “permissible” when it is “consistent” with the Agreement’s provisions. She would add that it would be far more likely that panels and the Appellate Body would show deference to the actions of national authorities in these cases if those authorities took more care in their reasoning, made more frequent use of WTO jargon and were more careful to afford due process to all parties in a proceeding.<sup>18</sup>

There have, of course, been many other commentators on the standard of review issue over the years. It’s not really clear that Rosenthal and Beckington disagree with Steger, because they actually seem to be focusing on two different issues. Rosenthal and Beckington appear to be arguing (like the URSAA drafters) that there are intentionally unclear provisions of the Agreement and that it may be reasonable to consider more than one interpretation as consistent with the Agreement and therefore permissible. Steger is really saying the same thing – but with the important addition that consistency has to be judged in the light of the Vienna Convention and not merely reasonableness in the face of a lack of clarity.

---

<sup>18</sup> Debra Steger, *Informal comments on Paul C. Rosenthal’s paper*, March 2003.

James P. Durling, in his recent paper addressed to these issues<sup>19</sup>, agrees with Debra Steger and emphasizes that because of the need to apply the interpretative rules of the Vienna Convention to Article 17.6, the article provides for much less deference than one might think. He makes the point that Vienna Convention rules are designed to encourage just a single permissible interpretation of treaties. He concludes that, in this context and seen against the range of decisions taken in respect of antidumping dispute cases over the years, the criticism of panels and the Appellate Body is unfair because they are in fact doing exactly what they should be doing.

Whichever view one takes, one thing seems clear. If the U.S. negotiators really wanted the kind of deference suggested in the URSA language, then the United States, at least, did not get what it wanted out of the standard of review. The perceived need to negotiate the language of Article 17:6 was a direct result of pressure put on American negotiators to shield Commerce and the USITC from exactly the kinds of adverse rulings cited in the Rosenthal -Beckington paper.

***...and where we got what we wanted but no longer want it***

*“Automaticity” and “Legislating” through the Judiciary*

Earlier in this paper, I explained that gaining “automaticity” in the dispute settlement system of the WTO was a key objective of the United States in the negotiations. The U.S. negotiators (and some from other countries as well) wanted a dispute settlement system with hard procedural time periods and guarantees against blocking by defendant countries. The DSU that resulted from the Uruguay Round met this objective and the negative consensus rule means that

---

<sup>19</sup> James P. Durling, “Deference, But Only When Due: WTO Review of Antidumping Measures”, *Journal of International Economic Law*, March 2003.

adoption of panel and Appellate Body reports and the eventual consequent authorization of retaliatory action cannot now be blocked. To the extent that the system is seen today as efficient and effective, the perception can be linked more or less directly to its automaticity.

Of course, the desire to see an automatic system was also directly related in the early 1990s to the widespread feeling in Washington that most often USTR was likely to be on the winning end of a WTO dispute, dealing on the other end with recalcitrant European agricultural subsidizers or developing countries reluctant to live up to their obligations in difficult areas once transitional periods had expired. I think it is also pretty clear that nobody expected to see a repeat of the Spanish Soy Oil case make it to the floor of the Dispute Settlement Body for automatic adoption. Even if a panel were to produce another such result, the post-Uruguay Round period had an Appellate Body that guaranteed that badly reasoned “issues of law” and/or incorrect “legal interpretations developed by the panel” would not survive appellate review. The creation of the Appellate Body gave comfort to all sides, because even those who eventually lost a dispute settlement case would at least be in a position to rely on sound and acceptable legal reasoning to explain back home why they had lost the case in Geneva. Additional solace was provided by the DSU’s Article 3.2 that specifies that “Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.”

But what happens when you’re on the losing end of a dispute<sup>20</sup>, both the panel and the Appellate Body have developed a legal interpretation of a provision of a covered agreement that you both disagree with and cannot explain, and you’re faced with the automatic adoption of the reports by the DSB? In today’s DSU, you’re in a much worse situation than the United States faced in the Spanish Soy Oil case. There is no way to bury the outcome.

---

<sup>20</sup> This situation could also arise when you’re on the “winning” end of the dispute and disagree profoundly with the legal reasoning of the panel and Appellate Body.

Furthermore, since its creation, the Appellate Body has more or less taken the position that it does not have the option to “punt” in the face of what some would regard as an unclear legal situation. It has refused to say “we cannot solve this dispute” and pass the buck back to the Members. Members of the Appellate Body I have talked to over the years have left me with the clear impression that they believe WTO Members’ objective in crafting the DSU as they did was to ensure that there would never be a non -outcome to a dispute involving a covered agreement. In the context of the negotiations, I think this is probably right. In 1993, negotiators that had seen disputes go on for years with no light at the end of the tunnel wanted assured outcomes.

Today, we find ourselves in the situation of asking not “ is this the outcome wanted?” but rather “is this an approach to WTO dispute settlement we still want?” Clearly, many commentators on the subject have answered “no”. The problem is seen as most acute where the “automaticity” of the DSU is combined with a perception that panels and the Appellate Body are “legislating” to fill in the gaps of certain agreements and thereby adding to or diminishing the rights and obligations of Members.

John Greenwald is clearly of the view that panels and the Appellate Body have not abided by the DSU’s injunction against adding to or diminishing rights and obligations provided for in the covered agreements. In his paper recently published in the *Journal of International Economic Law*,<sup>21</sup> Greenwald argues that in cases involving trade remedies, the policy-making bent of panels and the Appellate Body has led them to “(1) read language out of an applicable agreement, (2) read language into an agreement that is nowhere to be found in the text, and (3) interpreted the applicable agreement in a manner that is unreasonably restrictive”.

---

<sup>21</sup> John Greenwald, “WTO Dispute Settlement: An Exercise in Trade Law Legislation?”, *Journal of International Economic Law*, March 2003.

The AEI's Claude Barfield clearly believes that the tendency of panels and the Appellate Body to "legislate" in unclear areas is a serious fault of the WTO's Dispute Settlement Understanding. Rosenthal and Beckington, in their March, 2003 paper delivered in Geneva, give a number of examples where they believe panel and Appellate Body decisions in respect of the causation standard for safeguards and antidumping create obligations not contemplated in the covered agreements and also extremely difficult to meet. These authors warn that something has got to change in the approach of the panels and the Appellate Body or there is a substantial risk that support for the WTO, at least in the United States, will disappear. Barfield, on the other hand, puts forward a proposed fix – and the fix requires revisiting one of the key American objectives for the Uruguay Round dispute settlement negotiations – the notion of "automaticity" in the DSU. Barfield's specific recommendation is that political flexibility should be reintroduced in the system and it should be made possible once again to block adoption of panel or Appellate Body reports containing bad WTO law. Barfield's notion would be that adoption should be "blockable" if at least one third of the Members, representing at least one quarter of total trade opposed adoption. Alternatively, the DSB might allow bad law to stand for the parties to the dispute yet take action to prevent this bad law from becoming a part of WTO jurisprudence and adversely affecting the interests of third parties.<sup>22</sup>

While I have some sympathy with Mr. Barfield's arguments and even his suggestion, there are technical aspects to this proposal that I would find difficult to reconcile with notions of equity in the WTO system. The EC itself accounts for well over a quarter of world trade, but all of Africa doesn't account for even 2 percent of global commerce. On the other hand, the Africans account for well over 1/3 of the WTO's membership. What we can already see is that the EC,

---

<sup>22</sup> Claude E. Barfield, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization*, (The AEI Press, 2001), 127.

acting with its ACP allies could easily block the adoption of reports in the DSU. But how would Brazil, or Australia or even the USA go about building a blocking minority – particularly if the area addressed in the dispute were one like an antidumping action where the vast majority of WTO Members have a knee-jerk hostility to the American position?

Barfield, Rosenthal and Beckington are not lone voices on the wind. In 2003, the concerns they and many others have expressed are gaining real traction. This is clear from the joint United States-Chile proposal<sup>23</sup> put forward in the context of the negotiations to improve and clarify the DSU. Both the Americans and the Chileans have had some bad experiences in the DSB with what they consider to be counterproductive “legislating” by the Appellate Body and panels. The essence of the joint proposal is that something has to be done to prevent “automaticity” in the DSU from producing bad law and new obligations through gap-filling in the dispute settlement process. The “something” they propose is to give parties to a dispute more control over the work of a panel and allow them to obtain deletion from prospective judgements of findings that are not necessary or helpful to resolving a dispute.

In their joint paper, the U.S. and Chile refer specifically to two types of situations where the “automaticity” of the existing DSU should be revisited. The situations are “gap filling” which is seen as improperly adding to or diminishing Members’ rights and obligations and “situations in which legal concepts outside the WTO texts have been applied in a WTO dispute settlement proceeding, including asserted principles of international law other than customary international law rules of interpretation”. It seems that the creation of the DSU with its safety valve of the Appellate Body didn’t really solve the kind of problem the USA faced in Spanish Soy Oil after

---

<sup>23</sup> WTO Dispute Settlement Group, *Negotiated Proposal, tabled, TN/DS/W/28* (Geneva: WTO). WTO, Dispute Settlement Group, *Negotiated Proposal, tabled, TN/DS/W/52* (Geneva:WTO). Available on WTO website.

all. “Automaticity” was probably the single most important objective of the American team in the original DSU negotiations. So, we got what we wanted, but we don’t want it any longer.

### Conclusions

The WTO dispute settlement system is a remarkable achievement. It is not hyperbole to call it the “jewel in the crown” of the multilateral system. In terms of dealing effectively with important state-to-state disputes, it has no equal in the modern world. The sheer caseload processed by the system over the past eight years is amazing and with few exceptions, actions brought under the DSU have led to successful resolution of the problem at issue. In the Uruguay Round, which was really the culmination of around 15 years of work toward improving the system, most countries achieved most of their important objectives. In nearly all areas, the negotiators got what they wanted.

Certainly, the DSU is not perfect. Few things are in life. Practical experience has enabled us to identify a number of faults since the WTO came into being and an effort is being made in the current DSU negotiations on improvements and clarifications to correct these faults. I think it is clear from the context of the Uruguay Round negotiations that none of the negotiators intended to create the confused situation surrounding the so-called “sequencing” issue. The negotiation was all about multilateralism and the objective would have been multilateral determination of non-compliance. The current DSU negotiations are also offering delegates the opportunity to consider new ways of possibly enhancing the process in WTO, for example, through the potential creation of a permanent body of professional panels. Views are mixed as to whether innovations of this type would really improve the DSU’s operation.

The strongly held perceptions surrounding the standard of review issue are worrying and I think it is clear that proponents of the standard of review in the United States, at least, did not

get what they had hoped to achieve in the Uruguay Round. That said, Debra Steger suggests that all is not lost on this score and has hinted at ways in which U.S. implementing authorities might behave slightly differently and in turn find greater deference to their actions. Steger's view is supported by Cunningham and Cribb who wrap up their paper<sup>24</sup> with a list of constructive suggestions on how the American "batting average" could be improved at the WTO in cases involving antidumping and countervail.

In the area of "automaticity", there is no doubt that we obtained what we actually wanted in the Uruguay Round. The context, however, is different now than it was in late 1993 and it seems that "automaticity", at least in some areas, may not be what some of us want in the future. Having lived through the bad days when dispute settlement was regularly blocked by losing parties, I think we need to be very careful here. I would not agree with Claude Barfield that blocking minorities (or even blocking majorities) should be introduced into the DSB equation. Apart from being difficult to conceptualise in an equitable format, that approach would be way too dangerous and far too liable to abuse for the wrong reasons. I believe that automaticity has to be protected in the DSU.

If the problem is, as some have suggested, that panels and the Appellate Body are straying into areas where they are not wanted and "gap-filling" behind the "legislature" in ways that parties to a dispute object to, then I think there are other ways to deal with the issue. John Greenwald thinks that the cure for the problem could be as simple as judicial restraint – through a conscious effort by panels and Appellate Body members to stick to neutral interpretations of WTO law and disregard their natural policy-making bent. If that can't be achieved, Greenwald

---

<sup>24</sup> Cunningham and Cribb

argues that dissent should be encouraged and that perhaps the WTO bureaucracy should be cut out of the picture (which suggests the policy-making bent is encouraged by the Secretariat).<sup>25</sup>

So-called “party control” mechanisms along the lines of those suggested by the United States and Chile might be another acceptable way to deal with the problem – but it would clearly need to be on the basis of both (or all) parties to a particular dispute agreeing fully on how to “control” the panel outcome. After all, the point of WTO dispute settlement has never been to build huge piles of case law<sup>26</sup> – particularly through going beyond what is needed to resolve a particular dispute. The point of dispute settlement in the WTO has to remain assisting Members to resolve their differences however they decide to do that (so long as third parties are not negatively affected and the solutions are consistent with the covered agreements).

The system isn’t perfect and we don’t yet have everything the way we want it. But we need to be careful in our reactions to problems – particularly when the gravity of the problem in a particular case might be generalized in ways that are not really warranted. Compared to where we were at the start of the Uruguay Round, what we’ve got in place in Geneva today looks damn good and goes a long way toward achieving our shared objectives for dispute settlement in the WTO. In the 1947 GATT, two-thirds of Contracting Parties could approve amendments of the dispute settlement provisions in GATT Articles XXII and XXIII. There are good reasons why Article X of the WTO Agreement requires a positive consensus to amend the Dispute Settlement Understanding.

A final comment is in order. The rise of the judicial model of dispute settlement that is the object of much of this paper and the center of most comments made these days about the DSU

---

<sup>25</sup> Greenwald 123.

<sup>26</sup> The enormous amount of material that has been produced in connection with the large number of cases addressed since 1995 could easily give another impression.

should not be allowed to obscure the fact that the diplomatic model for dispute resolution has not been rendered obsolete or impractical. Resolving disputes through consultation and negotiation remains an option and I would say it should probably be the preferred option given the time and expense associated with pursuing dispute resolution through the judicial model. In fact, some of the concerns cited in this paper relative to the loss of party control, “gap -filling” and automaticity are not issues in a negotiated solution. The WTO Secretariat has even tried to facilitate “out of court” settlements by promulgating procedures designed to facilitate WTO Members’ recourse to DSU Article 5’s “Good Offices, Conciliation and Mediation” provisions. We should not lose sight of the fact that there is more than one route to dispute settlement in the WTO.

Adelaide, Australia

May 2003