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Enhancing the WTO's Dispute Settlement Understanding

A Working Group Report

enlightening the debate on good governance

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Group members joined and contributed to the group in their individual capacity. While all subscribe to the main arguments of the report, the views expressed in detail may not be necessarily shared by the entire membership of the working group or by the Federal Trust. As a registered educational charity the Federal Trust does not hold views of its own on this issue.

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Foreword by the Chairman

Few if any international organisations have expanded as rapidly as the WTO, both in terms of membership and of the range of issues that it seeks to resolve. Few have moved more quickly into the limelight. The WTO's predecessor until 1995, the General Agreement on Tariffs and Trade, was often seen as an obscure, rather technical institution. The WTO now gets a good deal of public attention, both from its supporters and its critics.

So it is entirely right that the Federal Trust should have turned to the WTO as the context for three of its well-regarded series of studies of good governance issues. The first WTO study, published shortly before the Ministerial meeting in Doha in November 2001, dealt with the prospects for that meeting and what should be the agenda for the global negotiation that was in the event agreed at Doha. The second is the present report on dispute settlement. The Trust is also currently exploring the possibility of convening a third group with the remit to determine what scope there is to negotiate WTO rules on the so-called 'Singapore Issues'.[1]

A study of dispute settlement is certainly timely. In recent years no trade issues have been more intractable, or as challenging to the effectiveness of the WTO, as the EU-US disputes over bananas, hormones in beef and the Foreign Sales Corporations system of tax relief. All are cases where compliance with WTO judgements has proved hard to achieve. At the same time there are doubts whether WTO dispute settlement can be used effectively by the developing countries, particularly the smaller and poorer ones. National representatives in Geneva are currently discussing what changes need to be made in the WTO rules governing dispute settlement, with a mandate to come up with recommendations by next May.

The Federal Trust and the authors of this report intend it as relevant input to the debate now gathering momentum in Geneva. We commend our conclusions, some clear-cut, some more tentative, to the negotiators. To the extent that a number of the issues covered in our report are not resolved in the current talks, we believe that they should be addressed by Governments in the longer term, either as part of the continuing Doha agenda or separately.

WTO dispute settlement will only work well if two key conditions are met. First, there needs to be, as we think there very largely is, a system of decision taking by panels and the Appellate Body which both deserves and secures respect, and whose conclusions are implemented. Second, when disputes may arise in areas where the WTO rules are unclear or incomplete, Governments must be ready to agree in the WTO on how the gaps should be filled in. It is no good Government representatives complaining that the Appellate Body, through its decisions and interpretations, is creating new WTO law if they fail to meet the need themselves.

This report would not exist but for essential help from a variety of sources. We benefited from sponsorship in particular from the UK Department for International Development, from my own and two other law firms (Covington & Burling; and Linklaters and Ashurst Morris Crisp), and from the Law Society of England and Wales. I would also like to thank APCO Worldwide's Global Trade Practice for their help in arranging a programme of meetings in Geneva. As to the report itself, I am grateful to those who gave evidence to us, as well as to the members of the Working Group, all busy people, for the advice and contributions they willingly offered. Special thanks must go to our rapporteur, Philip Marsden of Linklaters, whose skilful and elegant drafting will be evident to readers, and to Alexis Krachai of the Federal Trust, our efficient secretary and organiser, and provider of regular reassurance to his nervous chairman that a demanding timetable and publication date would be achieved.

Christopher Roberts
5 December 2002
London

[1] Competition, Investment, Trade Facilitation and Government Procurement

Summary of Recommendations

Greater Effectiveness

Compliance

- Inducing compliance with a Member's commitments is the primary and preferred result in any case where an inconsistency with the commitments has been identified. No reforms should undermine this fundamental objective of the dispute settlement process.
- Reforms should encourage the panels and Appellate Body to make more detailed suggestions and recommendations about how compliance could be achieved. These recommendations should remain non-binding.
- The need for prompt compliance is absolutely essential. Rules should be developed to require the respondent to indicate to the Dispute Settlement Body (DSB) how long compliance is expected to take.
- Following a decision, the DSB should be required to issue - at regular intervals - a public statement concerning the extent of any remaining non-compliance, the history of the case, the specific suggestions or recommendations that the panel or Appellate Body made, the deadlines that the Member has missed, itemise any recommendations made, and make a firm and authoritative statement that the relevant Member is in violation of its commitments.
- A respondent that is not in compliance with its commitments should not have its rights as a complainant in other cases suspended.

Compensation

- Where compliance is viewed to be not immediately possible, the preferred method of compensation should be to liberalise another sector, albeit outside the dispute in question.
- Any compensatory resolution of a dispute should be guided by a firm adherence to and confirmation of the principle of Most-Favoured-Nation (MFN) treatment.
- Complainants should be allowed to specify precisely the sectors in which the respondent might further open its market.
- Members should seriously consider introducing into the dispute settlement process an ability to recommend retroactive compensation, particularly where there are pervasive violations (absent good faith efforts on the part of the respondent to remedy the situation) or where the nature of the violation itself leads logically only to that solution.
- An objective assessment of the amount of the harm (and consequent compensation) involved should be made as early on in the dispute settlement process as possible.

Retaliation

- The remedy of retaliation should be maintained.
- Controls clearly need to be introduced to minimise any undue harm on 'innocent victims'.
- The level of harm created by a violation should be determined very early on in a dispute.
- The complainant should be allowed at an earlier stage than at present to list the sectors where retaliation may in its opinion be necessary.
- Retroactive retaliation should be available for pervasive violations, particularly where the complainant evidences a breach of good faith on the part of the respondent.
- Ways of facilitating joint retaliation should be encouraged.
- This is not an appropriate time to be considering allowing the Secretariat the power to collect penalties, either on behalf of Members directly or for distribution within the Organisation more broadly; perhaps as contributions to capacity-building initiatives.
- The suggestions of a truce or for decisions **in disputes** between particularly large Members to be non-binding would lead the WTO in the wrong direction.

Addressing developing country concerns

- Developing should be encouraged to do as much as they can to develop their own capacity building and expertise within their own governments so that they can effectively benefit from and enforce their rights under the WTO agreements.
- The WTO Secretariat should be encouraged to assist all Members with the distribution of pleadings but most particularly should take this 'delivery' cost off developing countries.
- Members should work to help reduce Advisory Centre on WTO Law costs to least developed countries to a minimum.
- Least developed countries should be encouraged to rely on the good offices of the WTO Director General as much as possible.
- Developed country respondents should be prohibited from refusing to mediate with complainants from least developed countries.

Timing

- Expedited procedures should be introduced for the review of services cases or situations where a preliminary review indicates that there has been a clear violation.
- Some extension of time - possibly 4-6 weeks - should be added to dispute settlement proceedings to account for the length of time of translation and other administrative duties.
- If this is viewed as undesirable, then a clear picture of the actual time that is available for dispute settlement itself is required.
- The dispute settlement process should operate on the basis of working days rather than calendar days, and include defined holiday periods.
- Some form of expedited consultation period should be introduced for existing long-running disputes, or in cases where the issue of violation is clear, but the primary question relates to the appropriate remedy.
- The 20-day period (following expiry of the 'reasonable period' for implementation) should be extended.

Special Prosecutor/Advocate General

- At this time there is no need to create a Special Prosecutor, or an Advocate General.

GATS – A Special Case?

- The *DSU* practitioners should recognise that there is more overall ambiguity in the text of the *GATS* (including specific commitments, provisions for *GATS* disciplines or additional commitments) than exists in other trade law commitments.
- Where panels are satisfied that a disputed matter falls clearly in the area where Members evidently intended to leave a degree of freedom to national agencies, the panels should defer to such agencies.
- While accepting the interpretative role inherent in the dispute settlement process, we think that further clarification by Members of *GATS* commitments would be desirable. Clarification might also extend to such wider questions as whether administrative regimes for services should normally be exempt from challenge if they meet internationally agreed standards or principles.
- When there is sufficient experience of services disputes, governments may need to reach considered decisions as to how far the *DSU* is the best vehicle for such disputes and how far they might prefer to reach bilateral or plurilateral understandings about particular problems such as standards for the 'justiciability' or 'appealability' of administrative decisions affecting services.
- Specialists in services trade, experts on particular services sectors, and those directly familiar with the application of domestic regulation should be recruited as panellists.

Improving Efficiency

Panels and the Appellate Body

- Panels should be professionalised.
- Panellists should be appointed full-time for a fixed term, and be drawn from a longer list of experts proficient in various aspects of WTO law and dispute settlement.
- It would be helpful if panellists and Members of the Appellate Body had had some form of government experience.
- The requirement that panellists not be from one of the parties should be abolished.
- Members of the Appellate Body should be appointed on a full-time basis, and be paid more in compensation for giving up their other obligations.

Deference

- There should be a greater acceptance, across the range of the WTO agreements, of the propriety of a dispute settlement panel or the Appellate Body deferring to the decisions of a national authority, where the subject in issue involves a factual assessment or when it is clear that it has been left open to interpretation by the Member.
- Individual Members should not create 'Dole Commissions' to review the propriety of DSB decisions.

The role for the General Council

- There is a need to improve the quality and detail of commitments generally, so as not to over-burden the dispute settlement system.
- The use of Article IX of the Agreement establishing the WTO should be encouraged with respect to further interpretation of the Agreements.
- Increased clarification should not, however, be implemented through an ongoing process between Rounds of 'interpretative committees' operating to clarify existing WTO obligations with binding recommendations.
- Existing Working Parties on the various subjects related to the various agreements should be tasked with producing *non*-binding interpretative guidelines so as to clarify the meaning of various ambiguities.

Non liquet and the potential for remand

- The panels and the Appellate Body should not be allowed to claim that they cannot come to a decision with respect to a particular issue that is within their competence. In difficult cases, though, it may be appropriate for a panel to recommend that the General Council address a certain issue, for example when the question at hand is clearly political.
- The Appellate Body should not be allowed to remand a dispute or issues before it to a panel.

Independent Advisory Committee

- With respect to problems that may arise relating to the operation of the *DSU* itself, a permanent Independent Advisory Committee, made up of Secretariat officials, academics and other experts should be formed, to recommend to Members various improvements to the *DSU*.

The Director General

- Resort to the offices of the Director General should be used to a greater extent.

Mediation and Arbitration

- There should be greater effort to use alternative methods of dispute resolution, or activities that can better clarify issues for the dispute settlement process itself, so long as they accelerate and do not delay settlement of disputes.

A More Acceptable Process

Transparency

- WTO hearings should be opened to the public. Appropriate limits on that access will be necessary to ensure that panel hearings are not disrupted.
- With open hearings, the panel chair will need to be well schooled in dispute settlement procedure.
- All submissions that are made to the panels and Appellate Body should be released on the WTO website without undue delay.

Civil society participation and the submission of amicus curiae briefs

Standing:

- NGOs of whatever nature should not have standing as a party or third party in dispute settlement themselves.

Intervention:

- National civil society organisations should be able to feed their comments into dispute settlement proceedings through their relevant Member. They should not participate in the

WTO dispute settlement proceedings directly, unless expressly requested by the Panel or Appellate Body.

Interest:

- The decisions so far taken by the Appellate Body setting out criteria with respect to the submission of *amicus curiae* briefs are satisfactory.
- There should be a clear identification of an NGO's non-national interest at issue, i.e. the international public good that it is representing (environment, etc).
- Panels should explain their decisions to reject or to not consider any brief so submitted.

Introduction

Mandate of the Working Group and Terms of Reference

This Report is a product of the Federal Trust Working Group on the Reform of the WTO *Dispute Settlement Understanding* (*DSU*). In focussing on the reform of the *DSU*, the Working Group seeks to contribute to the review process which Members of the WTO agreed should take place soon after the WTO agreements and the *DSU* came into force in 1995. The Dispute Settlement Body (DSB) began its process of review in 1997. However, following the collapse of the Seattle Ministerial Conference in November 1999, no consensus on reform was ever reached. At the Doha Ministerial Conference in December 2001, WTO Members agreed to begin negotiations with a view to improving and clarifying the *DSU*. These negotiations are taking place in special sessions of the DSB. Ambassador Peter Balas, Hungary's Permanent Representative to the WTO is chairing the talks. A number of constructive proposals and discussions have been exchanged among the WTO membership with respect to issues relating to the reform of the *DSU*. The aim of Members is to conclude the talks and agree on reforms by 1 May 2003.

The mandate of our Working Group on the WTO *DSU* stems from the belief that the WTO's dispute settlement system is the central pillar of the multilateral trading system, and that there is need for a broad-ranging and in-depth study of how the *DSU* is operating, to air expert opinions both on its successes and on areas where it needs to be improved, and to make specific recommendations in that regard. The Working Group was convened in early 2002 with an eye to shadowing the formal talks in the DSB and offering WTO Members comprehensive, expert and impartial advice with respect to how the *DSU* might be made **more effective, more efficient** and how its decisions can be seen to be **more acceptable**.

Within this broad remit, early on in its meetings the Working Group identified the following as among the questions that it should address:

1. How successful has WTO dispute settlement so far proved, notably in respect of securing satisfactory resolution of disputes and acceptance of the outcome by the losers, and of satisfying the interests of all WTO Members?
2. How can the mechanisms for dispute settlement be made more effective and more acceptable to opinion in the Member countries? Is the balance right between compliance, compensation and retaliation? What is the proper role of sanctions? Is there a greater need for diplomatic negotiation to supplement the more formal and legal processes of the *DSU*? Can better use be made of arbitration and/or the 'good offices' of the Director General?
3. Is the Appellate Body going too far in creating WTO law, which should be the task of Members? Is it right that the Appellate Body can only be overruled by a unanimous decision of the Dispute Settlement Body?
4. How can *DSU* procedures be made more responsive to the needs of WTO Members, especially developing countries which may have limited human and capital resources and in some cases be without permanent representation in Geneva? What is the role for external Counsel?
5. Has the *DSU* operated, or is it likely to operate, as effectively for disputes over services and other sectors as for disputes in trade in goods?
6. Are there sufficient/adequate opportunities for civil society participation in the *DSU* process under present rules?

Meetings, testimony and submissions

The group met nine times in London. They considered the positions of WTO Members tabled at the formal DSB talks and other relevant literature. They also invited experts to submit oral testimony and participate in discussions. Representatives of the group visited Brussels and Washington to meet with policy-makers, practitioners and other parties interested in the *DSU*. They also travelled to Geneva where they met with representatives from Missions, the WTO Secretariat and other parties. A full list of the witnesses that the group met with can be found at the back of this report in Annex B. There is also a listing of the formal Member positions submitted to the formal talks.

Contributing to the debate

The Working Group has explored the impact of the *DSU* on the resolution of trade disputes, and hereby proposes improvements to make the *DSU* more 'user-friendly' and effective, in particular for developing countries. Of course, there is considerable potential to closely examine the mechanics of the system and to make detailed suggestions as to alternative wording for various *DSU* provisions. However, the purpose of the Working Group was to leave the technical analysis - already well in hand in national capitals and at the DSB meetings - to the expert government officials. There was also a general belief amongst almost all witnesses that despite the broad mandate of the formal talks ongoing in the DSB, there was little chance of Members either wanting to or being able to agree on substantial reforms. A number of witnesses argued that despite the review process being initiated in 1997 and again in 1999, there was still not enough time for Members to agree on substantial reform by May 2003. Others argued that it would be impossible to reach a consensus amongst Members on some of the bigger, fundamental questions in any event. This was particularly relevant in those areas where issues – such as panel selection and transparency – led to a polarisation of views. Some witnesses also thought the key obstacle to the reform process would be the procedures for amendment of the *DSU* and achieving national ratification of such amendments. In particular it was argued by some that the

current negative perception of the WTO could mean that there would not be sufficient national parliamentary support for *DSU* amendments to be approved in many Member jurisdictions.

The current official review of the *DSU* is timely and welcome and will enable Members to attain consensus - and perhaps even some agreement - on actual reform. However, as the Working Group is also concerned about several issues that are unlikely to be settled in the current official review, we determined that it was also necessary

- to consider some more fundamental questions associated with the resolution of disputes;
- to make an assessment of the potential problems that the system could encounter in the future; and thus
- to identify areas where reform at a deeper but still pragmatic level would be helpful and should be considered.

The Working Group recognises that its recommendations for more fundamental reforms go beyond the areas likely to be included in any final agreement announced by the DSB in May 2003. However, our report also includes a detailed discussion of many issues that are on the DSB's reform agenda, and in particular reflects the views of various experts. It is hoped that Member officials and other interested partners will find the report's synthesis of such submissions to be interesting and pertinent to their analysis of the functioning of the *DSU*. The deeper concerns expressed to the Working Group will remain valid and as such will merit continuing consideration by WTO Members and experts alike in the coming years. To this end, this report attempts to provide a relatively comprehensive assessment of the areas where there has been success and where there is still room for improvement. It is hoped that this will contribute to an eventual acceptance among Members that reform of the *DSU* must address more than mere mechanical issues and that it should consider and attempt to forge consensus on a pragmatic means of addressing existing and potential future problems.

Review of the effectiveness of WTO dispute settlement to date

Current record

Summary of submissions

Areas of success

One of the first general areas that we discussed with all witnesses was how the *DSU* had been functioning, as a means of avoiding conflict and settling disputes and how the panels and Appellate Body had been seen to be interpreting Members' obligations. Many commentators said that the WTO commitments themselves were, in the main, complied with and that disputes were the exception. Many witnesses also argued that where disputes had occurred, the *DSU* had been operating well and had made a crucial contribution to bringing about Members' compliance with WTO commitments. Of these disputes, the vast majority have been resolved during the consultation phase; of those that went to a full Panel and Appellate Body hearing, the majority also resulted in compliance. One expert considered that a far greater percentage of WTO dispute settlement decisions resulted in compliance than the decisions of other international adjudicative bodies such as the European Court of Justice and the International Court of Justice.

Perhaps for these reasons, and due to the sharp contrast between the current *DSU* and the dispute settlement mechanism under the original *GATT*, many public officials that we spoke with felt that the official review of the *DSU* itself need only result in small, rather than drastic, reforms.

Differences of opinion

That said there was a noteworthy body of opinion from those outside the ambit of public service that suggested that the quality of panel and Appellate Body findings was increasingly unacceptable. Many witnesses argued that there was a 'free trade bias' in many reports and that the panels themselves were unable to interpret adequately the legal agreements between Members. The Working Group also heard the view that the current system of resolving disputes was unsustainable as it impinged too much on national sovereignty.

Implicit in all of these criticisms was the belief that the WTO's 'judicial' aspects were stronger than its negotiating and 'legislating' processes and somehow out of balance with them. The Working Group heard two sets of views about how this imbalance could be redressed. The first suggestion was that the judicial system ought to be weakened, for example through a return to 'non-binding' decisions, an increase in deference to the decisions of national authorities, and/or greater control on panels or the Appellate Body to prevent them from 'creating' law rather than interpreting the existing commitments. The alternative view was that the rule-making process should be enhanced in some way, for example through a decision by Members to build greater clarity into existing commitments, or through the creation of an interpretative advisory body that would supplement both the dispute settlement and negotiating processes. These specific suggestions will be addressed individually later in the report. However, it is useful to examine in more detail the concerns that were voiced, particularly by non-public sector discussants, about panels and the Appellate Body doing more than merely interpreting the commitments themselves.

The judicial creation of law?

Throughout our deliberations we heard conflicting arguments about whether dispute settlement panels and the Appellate Body were in effect resolving disputes by creating new commitments. We heard three sets of views associated with this point. Some witnesses stated that the panels and the Appellate Body were going too far in interpreting agreements and that this resulted in an unacceptable strengthening of the judicial aspects of the WTO, particularly given the negative consensus model. Others agreed that there was judicial 'over-reaching' but that this was because the existing agreements and commitments were ambiguous; thus the panels and the Appellate Body had a responsibility to 'fill in the gaps', particularly where the gap was due to an evident ambiguity, rather than resulting from a deliberate degree of freedom being left for a more 'subjective' review by individual Members' agencies. The third view was that even though there were evident ambiguities in the texts of the agreements, the panels and Appellate Body had not 'filled in the gaps' nor created law but had actually been relatively restrained in their interpretations, and had merely relied on textual analysis to try to identify the meaning of the commitments themselves.

Responding to the needs of developing countries

The majority of witnesses felt in general that the *DSU* worked well for some of the larger and more advanced developing countries and that compared to other domestic and international judicial systems the system was generally fair (flaws and all). However, witnesses argued that the most significant flaw was that while the majority of developing countries - and in particular the least developed of them (LLDCs) - had a theoretical opportunity to use the system they did not always perceive that they had access to it, or that anything beneficial would come of using it. Various reasons were offered in support of this view, the general consensus being that developing countries were impeded by financial and administrative constraints and that they feared that developed countries might punish them for bringing a case by denying them development aid or abolishing preferences. That said very few witnesses argued in favour of according developing countries 'special and differential treatment' (SDT) under the dispute settlement procedures, as they thought that the rules governing the judicial system ought to be universal whereas SDT should only be given with respect to the commitments relating to goods and services themselves.

Witnesses also told us that although many developing countries had not so far engaged in the dispute settlement process, their involvement was increasing. A significant majority of cases now involved developing countries as complainants or defendants. That said many witnesses agreed that although the operation of the *DSU* should be of considerable importance to developing countries, many regarded improved market access as far more significant.

Room for improvement

There are a range of issues discussed in this report that reflect areas where the *DSU* might be improved. However, the primary concern that almost all witnesses mentioned as crucial, was that Members actually implement recommendations to bring inconsistent measures into compliance with their commitments. In this regard, timing was also an issue, as it was agreed that justice delayed was frequently justice denied. There were two related concerns. The first was that the *DSU* must not be permitted to allow non-compliance to go unpunished. The second was that it was imperative that any settlement, while aiming to resolve the dispute in question, must lead to actual compliance with the agreed commitments, rather than some 'back room' agreement that helped obviate a particular bilateral trade problem, while allowing measures to remain inconsistent with commitments.

Analysis and Recommendations

To the Working Group, the *DSU* and the commitments that it enforces are, if you will, part of a legal contract amongst the Members. It is only sensible that a dispute settlement mechanism become involved in interpreting the terms of that contract, which in this case are the commitments themselves. However, the Working Group finds that there is a fundamental difference between a dispute settlement mechanism that is used to interpret what has been agreed, and thereby extend the WTO *acquis*, and a dispute settlement mechanism that is viewed as extending the area of agreement itself (enhancing market access). We reject the latter interpretation. The dispute settlement system is designed for two purposes: to settle disputes, and ensure the predictability and certainty of commitments that have been agreed. It is not to add anything - other than clarification - to what has been provisionally agreed. Where the agreements contain the kind of ambiguity that can be resolved through legal interpretation, then it is only appropriate for the dispute settlement panels and the Appellate Body to try to clarify that ambiguity. However, where any perceived or real 'gap' in a commitment is due to a decision by Members to leave themselves a degree of freedom in interpreting a commitment, then the dispute settlement system should not be seen to substitute its legal analysis for the subjective and expert opinion of the authorities of an individual Member.[2]

Of course, it must be appreciated that a Member's commitment to liberalise a market, on the one hand, and its decision to retain protectionist or discriminatory measures, on the other, are going to reflect different political choices and different constituencies that will always exist in tension with one another. Some of the most difficult disputes that panels and the Appellate Body have had to grapple with have been due to these inherent tensions. Even for a legal mechanism as rigorous as is the *DSU*, it is difficult to resolve disputes that are based on fundamentally different approaches and interpretations by Members of the commitments that they have made to each other. Reform of the *DSU* itself will not be able to resolve fundamental differences of opinion about the precautionary principle, the tax treatment of Foreign Sales Corporations, or even about the balance between compliance, compensation and retaliation. However, these kinds of difficulties need to be considered in any analysis of the functioning of the *DSU*, so that Members can ensure that dispute settlement itself does not 'break down' under the weight of such problems.

Furthermore, in its corrective enforcement capacity, the *DSU* can only be seen to operate effectively when there are measures that are found to be inconsistent with WTO commitments. This means that there is a natural limitation to the *DSU*. After all, there are many ways that Members' commitments can be nullified or impaired without triggering a violation, or even a non-violation (NVNI) or situation complaint. One-off denials of a right of access, or of a licence requested by an exporter or investor, may fall short of being a sufficient trigger for formal consultations under the *DSU*. But the *DSU* is not the only mechanism that governments can use to address impediments to market access.

At the same time, however, the *DSU* and the WTO Agreements that it enforces are not merely part of a legal mechanism. Just as principles of contractual interpretation and of public international law are not the only relevant considerations in settling trade disputes between Members, there are many means both more and less subtle than the law that can be used to enforce a contract. The *DSU* is an important mechanism for communicating the concerns of Members, along with their different perspectives and interests. That said, a Panel decision will only be implemented where there is political support for compliance with WTO commitments, or when any resistance to it is outweighed by concerns about the threat of retaliation from the complaining party.

This is where we find that the dispute settlement system at the WTO is most in need of serious reform. While the WTO itself is a rules-based system, and while these rules themselves are what ensure that Members with small economies are allowed the same legal parity with their larger trading partners, this parity is only as strong as the legal mechanism itself. That mechanism may afford smaller Members equal recourse to remedies (as the current *DSU* surely does). However, if their economic size does not truly afford them an equal ability to enforce compliance or retaliate, they will have little incentive to use the system in the first place. These aspects receive detailed consideration in the report. It is not enough to have a legal mechanism

[2] This will be discussed further in the sections on the *GATS* and on deference below at pages 23 and 25 respectively.

that is only truly effective in the hands of the larger economies. Even though there have been notable successes of Members with small economies prevailing in WTO dispute settlement, and actually seeing a respondent Member with a large economy comply with its commitments, the reality is still that smaller economies have less leverage when it comes to enforcing their rights. The challenge is thus not just to increase the awareness and knowledge of the *DSU* in the smaller and developing economies, but also to convince them that any victory of theirs will be more than pyrrhic. Smaller and developing economies need to be convinced of the efficacy of the WTO dispute settlement system, and of those areas where they may be able to use it to truly 'punch above their weight'. At the same time, their governments too have an obligation to ensure that they can at least use the system effectively. This means that they will need to invest to some extent in internal capacity-building, in terms of both recruiting trade officials and trade lawyers and building a more general recognition among their own officials of the rights and obligations that accrue to them as Members of the WTO. Indeed, there is room for far more technical assistance to the least developing countries to help them to prepare adequately for the negotiations themselves, so that they appreciate more fully the nature of the process, the commitments that they are making, the reforms that they may need to implement, as well as how to use the dispute settlement process itself. Indeed, it could be argued that the more recognition there is of commitments themselves within all Members, the more they are likely to be in compliance with their commitments, and the less that cases are likely to be brought against them in the first place.

In the following sections we consider submissions from our expert witnesses, and make recommendations on many of the above issues. As indicated, our primary focus is to contribute to an ongoing reform process of enhancing dispute settlement. The three broad themes that we cover below in our suggestions for reform relate to making dispute settlement **more effective** and **more efficient** as well as how it can be seen to be **more acceptable**.

Suggestions for Reform

Greater Effectiveness

In terms of increasing the effectiveness of dispute settlement at the WTO, we believe that the primary focus should be to increase the prospect of compliance with WTO commitments and with the decisions of the DSB. While we have heard some arguments about how to encourage compliance by amending aspects of the decision-making procedures relating to compliance itself, in the main the comments that we received focussed on how reform of the other remedies (i.e, compensation and retaliation) might help to induce compliance itself.

Inducing compliance

Summary of submissions

On a number of occasions the Working Group heard the argument that the *DSU*'s record of inducing compliance was generally good, apart from a few highly politicised and high profile cases. As indicated above, the argument was made - and we believe it to be a fair one - that compared to other international tribunals the *DSU* had an extremely good record in terms of Members bringing their measures into compliance with their commitments. That said some witnesses were anxious to point out that there were situations where the manner in which a dispute was indeed settled did not result in compliance as such. In particular it was argued that settlements between the complainant and respondent might not necessarily always completely remove an inconsistent measure. This would particularly be the case if the matter were resolved between the parties on a non-MFN basis.

Analysis and Recommendations

The Working Group agrees that inducing compliance with a Member's commitments is the primary and preferred result in any case where an inconsistency with the commitments has been identified. No reforms should undermine this fundamental objective of the dispute settlement process.

Reforms should be considered, however, that would encourage the panels and Appellate Body to make more detailed suggestions and recommendations about how compliance could be achieved. However, we believe these recommendations should remain non-binding, as it is likely that anything else would be seen by several Members as an inappropriate and unacceptable 'intrusion' on national sovereignty. However, an opportunity or perhaps even a requirement for a panel to make such recommendations would at least provide the respondent with some guidance, and perhaps a degree of added strength when trying to push through the necessary implementation domestically. It would also help to demonstrate that the panellists had not just carefully considered whether, for example, the measure or situation in question was in or was not in compliance with WTO commitments, but had also fully appreciated the nature of the violation, its impact on trade, possible solutions to bring about compliance, and the kinds of difficulties that a respondent Member might face in bringing a non-conforming measure into compliance.

The Working Group is also of the opinion that such recommendations that are made in announcing the initial decision should also be repeated and referred to specifically in any subsequent notices that the DSB makes in reporting on the extent to which the respondent has complied with the decision.

Prompt compliance

A number of witnesses put the argument that the rules on managing the implementation of a panel report were so vague that a respondent was able to drag out its implementation process over a number of years. The Working Group also heard examples of Members making 'cosmetic' amendments that maintained the inconsistency of a measure, simply to delay compliance or the threat of retaliation.

The Working Group is of the opinion that the need for prompt compliance is absolutely essential, and that delay is one of the greatest problems, not just due to the maintenance of the inconsistent measure, but also with respect to the credibility of the WTO system as a whole. While the timelines for dispute settlement may well result in a fast 'hearing', delay in implementation (other than that inherent in exhausting legitimate appeal and other procedural rights) is perceived by many to mean that the slim chances of a timely remedy do not merit initiating a complaint in the first place. This is the wrong message to send to traders from all countries, and more particularly the wrong message to send to governments who may therefore feel encouraged to accede to protectionist demands and introduce or maintain measures or practices that are inconsistent with their WTO commitments.

We have heard various ideas on which firm deadlines for compliance we believe may both add some value and also be possible to implement. The 'reasonable period' in which a respondent must comply with a decision of the DSB must not be allowed to differ too much from case to case. **We encourage the development of rules that would require the respondent to indicate to the DSB how long compliance is expected to take.** In terms of enforcing such a 'compliance time-line', we note that the DSB currently reviews on a monthly basis whether or not a Member has brought its measures into compliance with its commitments. However this, is not sufficient. **We believe that, in addition, the DSB should be required to issue a public statement to the membership, as well as to the media, with respect to whether compliance has been implemented or not, and if not, to detail the history of the case, set out the specific suggestions or recommendations that the panel or Appellate Body made, specify the deadlines that the Member has missed, itemise any recommendations made, and make a firm and authoritative statement that the Member is in violation of its commitments.**

Suspension of the right of complaint

Summary of submissions

On a number of occasions the Working Group heard the proposal that if a respondent Member failed to comply with a ruling, or to compensate for that failure through other market-opening means, then it should be barred from being able to request consultations or to initiate further complaints under the *DSU* itself. The witnesses who made this proposal agreed that this could induce compliance amongst regular 'users' of the *DSU* system and that it would serve as a less trade-restrictive alternative to retaliation. However, even its proponents agreed that while such a proposal might be theoretically practicable, it was likely to prove politically impossible and even undesirable. Certainly no wellspring of support for such suspension of rights of complaint was identifiable in the group of government officials to whom we spoke. Suspension of rights might actually work against its goal of inducing compliance by 'permitting' a Member to decide that the benefits of not complying with its obligation in a particular case may outweigh the need to use the dispute settlement system in others. Indeed, in an extreme case, such suspension might result in a Member choosing to simply withdraw from the WTO itself.

Analysis and Recommendations

The Working Group does not believe that complainant rights should be suspended. In addition to the concerns already raised above, the Working Group is of the view that by denying the respondent a right of complaint, important violations about which that Member might have initiated consultations will not come to WTO Members' attention (other than through the Trade Policy Review Mechanism, which does not address complaints about non-compliance in as focussed a way as does dispute settlement). Similarly, if enough Members (or a large Member) are denied a right of complaint, a systemic lack of faith in the dispute settlement system may develop. Most obviously, of course, if the Member in question is content to lose its right of complaint, then the sought-after compliance may well never come about, even though the Member in question will still benefit from its fellow Members' commitments.

We now turn our attention to the alternative methods to induce compliance that were mentioned to us, namely the other remedial options of compensation and retaliation.

Compensation

Analysis and Recommendations

The Working Group agrees that compensation is rightly placed as the next best remedy after compliance. We note the difficult issues that arise with respect to compensation, including quantifying the amount due, the requirement that any compensation be offered on an MFN basis, and the problem of on-going non-compliance and hence a need for on-going compensation (or even retaliation). More generally, we appreciate the fact that in choosing market opening compensation over compliance, the respondent usually has to convince another sector to become more open to foreign competition than it had expected, while the complainant has to convince its complaining industry to accept that it will receive no remedy in the short-term but that another sector will reap the benefits of its efforts. We also recognise that to avoid some of these problems it may sometimes be tempting to provide for financial compensation. But financial compensation raises its own problems, some general to the entire issue of compensation (namely quantification and the MFN-requirement) and others unique (for example the prospect that a payment from a respondent's treasury is not going to be as effective in inducing compliance as is a market-opening solution that is specific to a particular sector). Financial compensation could also come to be reckoned as a necessary 'overhead' of WTO membership, and thus undermine what should be occurring, which is that Members should be complying with their commitments, rather than paying for violations.

The Working Group is agreed however that the option of compensation is far preferable to that of retaliation, and that if such a 'safety valve' is not provided in the system, then retaliation is likely be relied upon more frequently, with an increased likelihood of a resulting protectionist spiral. While retaliation may be rare, the pain and harm that it causes can still be severe. The fact that retaliation harms 'innocent victims' can reduce support for trade liberalisation. **Other methods of redress clearly need to be considered. However, in considering the suggestions below, an eye must always be kept on how they will help to induce compliance (where compliance is still possible). Throughout the operation of the *DSU*, compensation must only be viewed as an alternative to compliance where for one reason or another compliance is not going to happen.** That said, once a Member has made a commitment to liberalise a sector, it ought not to be allowed to then state that it finds compliance with its commitments to be 'impossible'. However, on the rare occasion when after the ratification of an Agreement it becomes not immediately possible for a Member to comply with its commitments, then and only then should compensation be viewed as a viable alternative.

Market opening compensation

Analysis and Recommendations

The Working Group agrees that where compliance is viewed to be not immediately possible, the preferred method of compensation is to liberalise another sector albeit outside the dispute in question. As has been identified above, a respondent may experience difficulties, domestically, with implementing a decision to open up another sector, just as the complainant may find it difficult to accept such an offer. Then there are other problems.

On the usual assumptions, the market opening should be available on an MFN-basis. Yet it is as difficult to see how an MFN approach would provide the complainant with an effective and complete remedy as it is to see how offering *only* the complainant better market access would satisfy other Members whose industries may still be harmed by the measure provoking the original dispute. Of course, where that measure does no more than protect the respondent's market from the complainant's products or those of competitors, then compliance itself would only have benefited those products or competitors. It follows that in such a case there is less reason for compensation to be offered on an MFN basis, where compliance is viewed as not immediately possible. In most cases, however, the measure in question will be less specific, and there would be the seemingly intractable problem mentioned above.

Witnesses' views on the MFN issue were mixed. Some witnesses argued that MFN was a key underpinning of the multilateral trading system and should not be undermined. Many cited some WTO Members who had recently come out strongly in favour of MFN. In contrast some witnesses argued that MFN compensation may not be so ideal as in many cases a respondent might find accepting retaliation much cheaper than MFN compensation.

While these are difficult issues, the Working Group is agreed that any resolution should be guided by a firm adherence to and confirmation of the principle of Most-Favoured-Nation treatment. While this may result in a market opening measure that is less targeted at the problem than might be hoped, it has to be remembered that the market opening compensation being contemplated is not actually directed at removing the inconsistent measure; it is directed at ensuring that the dispute between the parties is resolved in accordance with the maintenance of the predictability and certainty of the WTO system. As MFN is one of the most important corner stones of the WTO system, it should not be amended or altered lightly.

The Working Group has also considered where some reform of matters relating to compensatory remedies may actually be helpful in inducing compliance. One of the main aspects in this regard is making the respondent - and other Members - more aware of the injury caused by the respondent's violation. In that regard, **we recommend that more specific compensation be explored as an option, i.e. the complainant could specify precisely the sectors in which the respondent might further open its market**. This would serve two purposes - it would provide a remedy that is more relevant to the interests of the injured party (albeit not in the sector where the original violation occurs), and it may also be more likely to lead to the specification of a sector where the respondent feels more 'pain' and thus is more likely to be led towards compliance, rather than compensation.

We view with favour the prospect of retroactive compensation, particularly where there are pervasive violations or where the nature of the violation itself (e.g. a subsidy or an anti-dumping duty) leads logically only to that solution. (Also, in such cases, for example, no issue of MFN treatment would arise.) While it is not clear how retroactivity would operate for market-opening compensation, we believe that it should be explored for financial compensation. In that regard, however, we believe that **neither the individual panels and the Appellate Body nor the DSB itself should be granted the power to order retroactive compensation, until there has been a firm agreement among the Members to that effect.**

We also believe, however, that while retroactive remedies may, generally, be necessary to address pervasive violations, they would be inappropriate where the respondent is still acting in good faith. Such an example may be where it is reasonable to believe that a Member genuinely thinks that its measures are in compliance with its commitments, as opposed to - for example - a situation where that is no longer credible, or where the issue of inconsistency is clear, and the only question is the extent of the injury.

Also, when compensation is a likely outcome, we believe that there is an obvious need for an objective assessment of the amount of the harm (and consequent compensation) involved, and that this assessment should be made as early on in the dispute settlement process as possible. The parties will then be able to better evaluate their options and identify what settlement may be appropriate, but always with the hope that the final decision will be to remove a trade-barrier rather than simply compensate for maintaining it.

Financial compensation

Summary of submissions

We heard several comments on this issue. Most witnesses agreed that financial compensation could prove difficult for a variety of reasons but that further work should be done to assess its viability as a useful remedy. Some witnesses argued that financial compensation would not offer enough incentive to countries to comply and that it could open the way to developed countries, in particular, to simply buy their way out of complying. Others disagreed, citing the fact that this remedy could be a useful means of recourse for developing countries that lacked the economic weight or political will to threaten retaliation, let alone retaliate, against a developed country.

By far the most frequently cited problem associated with compensation, however, was how to quantify the amount owing to a successful complainant, especially in cases involving trade in services. A number of witnesses agreed that economic experts would have to work in close co-operation with panels if this idea was to be viable. Witnesses also raised the problem of whether compensation should be offered to the State or directly to the damaged industry.

The Working Group also heard the suggestion that any compensatory amount should be given to the WTO

Secretariat to help support its technical assistance and capacity-building programmes. A number of witnesses retorted that WTO Members would never accept such a rule and that even if they did the idea of compensatory payments going into the system might impinge on the perceived neutrality of the DSB, which would benefit indirectly from this income.

Analysis and Recommendation

The Working Group is agreed that financial compensation should continue to be available, but should be available on an MFN basis where that is feasible.

The threat of retaliation

Summary of submissions

The majority of witnesses recognised that retaliation was an option of last resort, and that it was very rarely used. Given its nature, however, they also recognised that its threat was more likely to lead to compliance, and that while it would be difficult to determine which cases were settled due to there being a 'Damoclean' sword of retaliation hanging over the dispute, the number was likely to be significant.

Witnesses also recognised the obvious deficiencies of retaliation, including the fact that it is a market-closing solution rather than a market-opening one, and that in its operation it will always harm 'innocent victims'. Another criticism was that retaliation was increasingly futile in the global economy as most industries now have close working relationships, contracts and supply chains with international counterparts. Retaliation can thus damage Members' domestic industries by reducing demand for primary product exports and increasing the price of essential imports. That said, many witnesses argued that the threat of retaliation should not be removed, as it concentrates the minds of the representatives of governments like no other remedy, and the WTO dispute settlement system needed such a definite threat.

More significantly perhaps many witnesses argued that retaliation was not a viable means for developing countries to obtain recourse from developed countries because the small size of their markets means that their impeding of their own imports through retaliation would not reduce demand for the developed country's exports significantly enough to bring about compliance. Some witnesses also argued that this course of action might ultimately damage a developing country as trade restrictions may further reduce their access to the exports of developed countries that they may need to improve their own industries. Others also raised the important point that developing countries were reluctant to use retaliation because they feared they might lose their special preferences and development aid.

We heard two suggestions to help developing countries overcome these obstacles. The first was to provide a special and automatic option for developing countries to choose in which sectors and when to retaliate, thus maximising the potential for them to have any effect. The second suggestion was to encourage the use of collective retaliation. Some witnesses even went so far as to argue in favour of universal retaliation by all Members because a country that introduces an illegal measure is in effect offending against the whole system, not just a single Member or group of countries.

Others were also concerned about the harm that retaliation between developed countries can cause to the international trading system as a whole, let alone the markets of the parties in question. They thus suggested the idea of a trans-Atlantic 'truce', or an agreement between the EU and US that decisions in cases between them should be non-binding.

Others suggested that in all disputes perhaps a system of fines was more appropriate than retaliation. With fines, at least any harm to 'innocent victims' would he significantly reduced, although the pain of the fine would have to be borne by the economy of the fined party, and thus would catch even more 'innocent victims', albeit to a lesser extent.

Analysis and Recommendations

In the opinion of the Working Group, the threat of retaliation is essential to induce compliance. There is no better way of focussing the mind of parties, or of putting pressure on governments to actually comply with a DSB decision, than through the threat of retaliation, particularly against 'innocent' sectors. As such, **the remedy of retaliation should be maintained. In particular, it should not be withdrawn for disputes between particular parties, as this would damage the credibility and effectiveness of the WTO system as a whole.** Indeed, any introduction of truces or non-binding decisions would simply lead to a proliferation of such 'agreements', with if not a complete return to the system under the *GATT*, then at least a substantial dilution of the effectiveness of the *DSU*.

What is problematic about retaliation is how it is implemented. Controls clearly need to be introduced to minimise any undue harm on 'innocent victims', for example. Without trying to minimise its effectiveness in inducing compliance, we have the following suggestions:

An early assessment of the effects of the injury and the expected level of retaliation

As discussed above with respect to compensation, **the level of harm created by a violation should be determined very early in a dispute.** Again, this is to help focus the minds of the parties and to allow them to appreciate the alternatives that are possible to them. Of course, in calculating the injury, difficult factual questions will arise, relating not only to direct damage but also potential damage that a measure may be causing, and how that should be factored into any estimate of retaliation. This is clearly an issue that Members should consider very carefully, and if possible agree to address before implementing.

Publication of retaliation list

In addition, **it would be helpful if the complainant was allowed, at an earlier stage than at present, to list the sectors where it thinks retaliation may be necessary.** This should not be any earlier than the issuance of the first panel report, as at any time before that, any damage will be purely speculative and the publication of such a retaliation list would cause undue harm to the sectors in question. Nevertheless, without prejudice to the respondent's rights of appeal, it would seem sensible for the complainant to be able to issue its retaliation list (or demand for compensation, if it is so minded) as soon as it has received an affirmative decision from a panel on its complaint. The Working Group does not think that such an amendment to the *DSU* would be agreed easily, or that it would in all cases lead to compliance by the respondent. However, such a reform might offer significant benefits, and thus should be considered.

Retroactive Retaliation

Retroactive retaliation should be available for pervasive violations, particularly where they evidence a breach of good faith on the part of the respondent. As discussed above, **a decision to allow the dispute settlement process to include this remedy should be made by Members as a whole.**

Fines and the option of universal retaliation

The Working Group is of the opinion that it is highly unlikely that the Members would introduce either a system of fines, or allow for universal retaliation. Joint retaliation would of course be feasible when there are multiple complainants, and where they might find that by coordinating their retaliation, compliance might be more likely**. Any ways of facilitating this should be encouraged.**

In contrast we are concerned that fines would not be effective in inducing compliance. Furthermore, given the recent concerns that have been voiced about the supposed monolithic power of the 'WTO' and the alleged non-accountability of its decisions and its staff, **we do not believe that this is an appropriate time to be considering allowing the Secretariat the power to collect penalties, either on behalf of Members directly or for distribution within the Organisation more broadly, perhaps as contributions to capacity-building initiatives.**

Truces and non-binding decisions

We also believe that the suggestions of a truce or for decisions in disputes between particularly large Members to be non-binding would lead the WTO in the wrong direction. Some believe that the degree of retaliation that is possible between such economies may jeopardise the trading system itself. The Working Group are of the opinion that removing retaliation, and its harm, in this manner would also remove a credible and powerful threat from the system, and thereby return Members to a situation where they would have to rely on moral suasion to remove what are equally damaging and inconsistent measures in the first place.

Enhancing the effectiveness of developing country participation

Summary of submissions

All witnesses that addressed developing country concerns agreed that less (LDC) and least developed (LLDC) countries should be assisted in their efforts to use the *DSU*. Some concern was expressed that the current emphasis on short training courses for developing country lawyers and legal advisers, while extremely helpful, was not enough. More needed to be done to ensure that the capacity was self-sustaining, and indeed self-provided. A number of witnesses suggested it was more important to first help developing countries to understand their own rights and obligations and to determine the impact of other countries' trade policies on their own economies. At the heart of this argument was the belief that trade policy was in effect an extension of domestic policy and that therefore equal emphasis, at a minimum, should be placed on educating officials across a developing country government and helping them to improve their understanding of private sector needs.

When asked who should take the lead in providing technical assistance and capacity building a number of witnesses thought that the WTO Secretariat had an important role to play in this area but that further assessment was needed to clarify what its actual responsibilities ought to be. A number of witnesses also felt that both academia and the private sector ought to play more prominent roles.

Analysis and Recommendations

In making its recommendations about developing country issues, the Working Group distinguishes between the larger developing countries that are active and frequent users of the *DSU* and those LLDCs that have simply not yet developed the capacity to appreciate the benefits of the system, let alone the ability to use it. While appreciating the clear need for more publicity of the sources of potential advice that might be available to LLDCs, the Working Group noted that the Advisory Centre on WTO Law and the ability of private counsel to participate in proceedings had both helped LDCs and LLDCs to participate more fully in the *DSU* system. That said, many LLDCs could neither afford the Advisory Centre nor private lawyers, nor could they necessarily recognise an issue where the *DSU* might be relevant. Equally, the concerns about parity with respect to the legal remedy remain: i.e. even if a LLDC felt it was worth it to bring a case, knew how to do it, could afford to do it and won, it might still not have the economic weight to gain redress. **The Working Group** appreciates that these are all difficult issues. However, it **recommends that LLDCs do as much as they can to develop the expertise within their own governments as this is essential for them to benefit from the commitments that the WTO already affords them.** Once they have the capability to recognise a WTO issue, then many LLDCs will still need help in being freed from litigation costs. **There is clearly room for greater**

involvement of the WTO Secretariat in assisting all Members to distribute pleadings but most particularly to take this 'delivery' cost off developing countries.

While we recognise that a more substantial reduction of their costs is crucial to LLDCs' participation in the system, the Working Group recognises that no one solution will resolve this very difficult problem. **A combination of actions is required. In particular, we recommend that Members**

- **work to help reduce the Advisory Centre on WTO Law's costs to least developed countries to a minimum;**
- **encourage least developed countries to rely on the 'good offices' of the WTO Director General as much as possible;**
- **prevent a developed country respondent from refusing to mediate when such is requested by a least developed country; and**
- **ensure that least developed and other developing countries understand that they too have a concomitant obligation to their rights under the WTO system, and indeed an important bolstering of such rights, is an obligation on their part to invest in their own capacity-building, so that they can effectively benefit from and enforce their rights under the WTO agreements.**

Advisory Centre on WTO Law

Summary of submissions

The majority of witnesses agreed that the Advisory Centre on WTO Law was a welcome initiative with an important role to play. However, dissenting views were heard from those who felt that the Centre's fees were too high for the smallest and poorest developing countries. We also heard a number of conflicting viewpoints about what the specific role of the Centre ought to be. Some witnesses argued that it should not become a litigation specialist but instead concentrate on supporting developing countries during consultation and mediation processes. A number of witnesses also pointed out that even with the best intentions the Advisory Centre was unable to resolve a number of problems faced by developing countries. Most significant was the fact that no matter how well equipped or supported developing countries may be, many were still reluctant to bring cases against developed countries, as they were conscious of losing their special preferences and development aid. Other problems that could not be solved by the Centre included a distinct lack of communication between developing country representations in Geneva and their respective national governments, and a lack of knowledge about the impact of trading partners' policies.

Timing matters

Summary of submissions

Witnesses generally agreed that the problem of timing was a common concern for Members and that a balance had to be found between efficiency and practicality. That said there was a majority view that 'justice delayed was justice denied', particularly in cases involving developing countries. There was a general view that the system had been successful in sticking to reasonable timeframes. Some witnesses even argued that the system was one of the quickest dispute resolution systems in the world.

We also heard a number of witnesses explain that there was a belief that the Appellate Body was finding it difficult to complete their reports within the 90-day deadline. The problem cited by witnesses was not the process of appeal; rather the time required to translate reports. Witnesses also argued that over the years the Appellate Body's job had become more difficult because appeals were more complex and panel reports themselves were much longer.

Analysis and Recommendations

A number of proposals exist for ways of reducing the delays that still exist in the system. While the Working Group does not believe that the existing timelines should be shortened, there are some other related aspects that are worth exploring.

Interim relief

A proposal for some form of interim relief, or injunction pending a final decision has frequently been suggested as a potential means of speeding up the settlement of disputes, and redressing a perceived wrong during the litigation process itself. While the Working Group accepts that measures that are inconsistent with commitments can cause severe damage to business interests, and in some cases could prove fatal to a company if allowed to remain in place for the full length of the dispute settlement process, it remains the case that a review of the facts is needed before any penalties can be applied, interim or not. Instead, **we recommend introducing expedited procedures for the review of services cases or situations where a preliminary review indicates that there has been a clear violation.**

Timeliness of review

The Working Group agrees that there needs to be greater recognition of the very short time that panels have to make their decisions; translation requirements in particular, appear to take up a disproportionate amount of the available time. If panellists have insufficient time to consider a case, then this will impact on the quality of their decisions, or at least harm the clarity and extent of their reasoning. **The Working Group therefore recommends that there be some extension of time - possibly 4-6 weeks - to cater for time for translation and other administrative duties. If this is viewed as undesirable, then a clear picture of the actual time that is available for dispute settlement itself is required.** At the very least, **it seems sensible to operate on the basis of working days rather than calendar days. In addition, defined holiday periods would also be sensible**, and certainly would not reduce in any way the expectation of the parties of a hearing within a fixed time.

Of course, in many cases a dispute will have been discussed in consultations between the parties for several years prior to becoming the subject of WTO consultations. The Working Group does not think however that this is a

sufficient reason to shorten the consultation period. First, even if parties have been in bilateral talks, the consultation period is already quite short as it is. Second, in many cases parties who have not been in bilateral talks previously may require some initial period of consultation in order to resolve their dispute. **The Working Group would only suggest that Members consider some form of expedited consultation period for existing long-running disputes, or for cases where the issue of violation is clear but the primary question relates to appropriate remedies.**

Timeliness of remedy

The Working Group is concerned that there may be an increasing likelihood of delay in the implementation of decisions. This can be due either to the perceived waning of political support for the WTO in some quarters, or the increasing requirement in some Members of approval by the legislature in order to bring a measure into compliance**. Our main suggestion in this regard is - as stated above - to increase the 'embarrassment' factor of non-compliance, by requiring the DSB to issue public statements detailing those situations where implementation is overdue.**

At the same time, however, the Working Group is concerned that the 20-day period (following expiry of the 'reasonable period' for implementation) allowed for the parties to agree on compensation is too short. While the violation and the amount of 'injury' may well be clear by this time, and while the parties may have already been in detailed discussions concerning what kind of compensation might be appropriate if compliance is not possible, we believe that the brevity of this negotiating period in particular may impede the prospect of negotiation.

Introduction of an Advocate General or Special 'Prosecutor'?

Some witnesses have proposed that an Advocate General or other such prosecutor should be introduced into the dispute settlement process to initiate proceedings against violations, in general, and in particular when affected Members are reticent or unable to bring a complaint. The Working Group appreciates the benefits that such an office might bring, but believes that it is not necessary. Dispute settlement should only be initiated where there is a clearly identifiable economic interest at stake. As things stand it is at present possible for cases to be brought without evidence of injury, or without a strong and well-defined business interest. **Expanding the scope of dispute settlement still further to catch all violations is not necessary. Similarly, creating a position of an official advocate to speak for Members who are unable or unwilling to develop the expertise necessary to litigate is not advisable.** It would certainly not help them to become more familiar with the commitments and the dispute settlement procedures themselves, which is necessary for them to benefit fully from membership.

GATS - A special case?

Summary of submissions

A number of witnesses gave evidence about the *DSU's* state of preparedness for disputes under the *GATS*. The general consensus was that it was too early to tell, both because WTO Members have so far given relatively few *GATS* commitments and because there has only been one dispute (still pending) centrally related to internationally traded services. Some witnesses raised the general question whether a dispute settlement system originally developed in the GATT for disputes over trade in goods could readily be transposed to the very different field of services. Many others referred to the nature of the *GATS* (as both a trade agreement and an investment agreement) and the consequent role of domestic regulation in determining market access for services, which were far more subject to regulation deep within a Member's borders, rather than to the frontier barriers classically affecting flows of goods. It was recognised that all these issues might intensify as services took an increasing share of world trade.

Disputes over services were commonly thought to be potentially complex as many services have public policy significance and so are supervised by national regulatory authorities. Some witnesses were concerned that the *DSU* would have to embrace cases that were effectively about the operation of regulations which could be seen as both trade-distorting barriers yet also perfectly valid examples of national regulation (standards of service delivery for instance, or rules on qualifications or financial standing of service suppliers). Faced with such two equally compelling concerns - market access and aspects of the public interest – might panels and the Appellate Body face awkward and controversial choices between favouring the most market-opening solutions, on the one hand, and 'creative' and possibly intrusive interpretations of the relevant regulatory interest, on the other? Witnesses also thought that market access for services (including the different 'modes') might raise quite different sensitivities from those relating to goods. For instance, a services provider who has incurred the sunk costs of an investment in commercial presence (*GATS* Mode 3) may be particularly reluctant to encourage its home government towards a dispute with its host country, despite discriminatory treatment.

We discussed with some witnesses whether services disputes could encounter unexpected difficulty with types of measure different from those affecting goods. In particular, market access for services might be restricted by 'episodic' administrative decisions (such as refusal of a licence) rather than by a continuing administrative 'course of conduct' of the kind often bearing on goods (such as a discriminatory customs regime). Some witnesses considered it difficult, if not impossible, for the *DSU* to respond to 'episodic' decisions or to the cumulatively adverse effects of discretionary regulation. Conversely, others were concerned that the *DSU* could emerge as the forum of choice for challenging individual administrative

acts, leading to greater scrutiny of Members' regulatory decisions and a worsening burden on the *DSU* system itself. Witnesses also pointed to the problem of putting a value on a denial of access in services cases because services flows were hard to measure and might operate through various *GATS* modes (substitutable, perhaps, for one another). A few witnesses hazarded that the *DSU* may not therefore be appropriate for such disputes.

There was a common view that services disputes would involve more technical and sector-specific matters than goods disputes, so that panel members would need more expertise. There was also concern that the vagueness of many specific commitments in *GATS* schedules (which often depend on detailed domestic regulatory measures for their implementation) must draw panels and the Appellate Body into interpreting Members' domestic law. In contrast, some witnesses - particularly from governments - pointed out that despite similar fears, panels had proved able to interpret the *SPS Agreement's* provisions without undue difficulty. Many witnesses concluded that despite concerns about whether the *DSU* could tackle the complexities of services, it would probably succeed, over time, in managing them effectively.

Analysis and Recommendations

Although specific commitments on trade in services are individual to a Member and relatively clear the Working Group thinks that ***DSU practitioners* should recognise that there is more overall ambiguity in the text of the *GATS* (including specific commitments, provisions for GATS disciplines or additional commitments) than in other trade law commitments**. We appreciate that panels have been able to interpret ambiguous provisions and make difficult decisions. However, the various 'services' agreements contain provisions that are not always clear as to the degree of freedom to be accorded to national agencies (for financial services, the 'Prudential Carve-out' provides a large, but ultimately undefined, degree of freedom in the area of prudential regulation). In such circumstances, a panel's task will not be easy. But where panels are satisfied that a disputed matter falls clearly in the area where Members evidently intended to leave a degree of freedom to national agencies, the panels should defer to such agencies.

Nonetheless, we remain concerned about the task facing panels, and the fact that, in services cases, panel decisions will bear directly on both domestic regulation and on the commercial strategies of business enterprises themselves, in entering markets or building market share, as opposed to having a more limited and conventional impact on their product flows. The dispute settlement system needs to avoid becoming further burdened with interpreting too much ambiguity in controversial areas. Thus, **while accepting the interpretative role inherent in the dispute settlement process, we think that further clarification by Members of *GATS* commitments would be desirable. Clarification might also extend to such questions as whether administrative regimes for services should normally be exempt from challenge if they meet internationally agreed standards or principles.**

We also remain concerned about how to address 'episodic' administrative decisions or discretionary legislation that can adversely affect trade in a service, whether or not implying a violation or nullification or impairment more generally. This services-related problem is likely to become more acute with time. It raises questions that cannot be tackled until their key features are more clearly identifiable. At that point, **when there is sufficient experience of services disputes, governments may need to reach considered decisions as to how far the *DSU* is the best vehicle for such disputes and how far they might prefer to reach bilateral or plurilateral understandings about particular problems such as standards for the justiciability or appealability of administrative decisions affecting services.**

Given that disputes can involve both goods and services (some already have) there needs to be some commonality of skills in the qualifications required for panellists. Nonetheless, there is a need to build more services expertise within the dispute settlement process. **Specialists in services trade, experts on particular services sectors, and those directly familiar with the application of domestic regulation should be recruited as panellists.**

Improving the efficiency of the process

Interpreting Issues - Role of the panels and the Appellate Body

Summary of submissions

A number of witnesses agreed that one of the key issues associated with the efficiency of the review process was ensuring that panels comprised Members with an adequate level of expertise. The majority felt that panel members should have more experience in administering trade policies and domestic regulation. As they would thus be aware of the constraints within national legislative processes, such experience may help to ensure that their decisions and recommendations are more likely to be implemented. Other witnesses disagreed about the degree of 'domestic regulatory' experience that was needed. They felt that panellists should have an integrated understanding of cross-cutting policy issues, especially in the area of services which impact on a variety of policy concerns.

The Working Group also heard arguments about the need for full-time professional panellists. Many witnesses commented that the existing system of *ad hoc* panellists was unpredictable and that having full-time members may increase the likelihood of panels considering precedent during their deliberations and could speed up proceedings by eliminating much of the 'gaming' that often goes on at the stage of panellist-selection.

The Working Group also heard testimony about how panellists are selected. The main concern amongst witnesses was that it was imperative that panellists be of sufficient calibre but that this was made difficult by countries continuing to make demands about the nationality of panellists. The majority of witnesses argued that this problem would never go away, as countries would always try and select panel members who might be more sympathetic to their case. Some witnesses suggested this problem could be resolved by agreeing that the Director General and/or Chairman of the DSB should appoint panellists, perhaps with some consultation with the partners in the case of major objections.

Analysis and Recommendations

To date, there are strong differences of opinion about the quality and sufficiency of the reasoning of panels and the Appellate Body, with academics and government officials generally being satisfied, and trade lawyers generally being dissatisfied. We are concerned about the clarity of some of the reasoning that is used in reports, and that there is a perception, however unfair it may be, that much of it reflects the views of over-worked and quite junior Secretariat staffers, or of WTO panellists or members of the Appellate Body believing (privately) that they have a 'market access' agenda, rather than a truly interpretive function. We do not endorse this perception, but note that it exists. While textual interpretation is an appropriate form of reasoning for a panel or Appellate Body charged with interpreting the rights and obligations of Members, more should be done by the adjudicators to explain the rationale for the findings themselves.

The Working Group is of the opinion that making panels professional would increase the robustness and quality of decisions; would be likely to add to the creation of a body of true precedent; and would reduce any undue influence on the part of Secretariat officials whose role should be a supporting one. **While appreciating the reasoning behind the requirement that panellists not be from one of the parties, the Working Group is of the opinion that this requirement should be abolished.** There are too many potential harms caused by the neutrality requirement, both in terms of delay due to attempted 'gaming' and the reduced expertise due to the limited roster of panellists from which to choose. **Panellists should be appointed full-time for a fixed term, and be drawn from a longer list of experts proficient in various aspects of WTO law and dispute settlement procedure. The Working Group agrees that it would be helpful (although does not go so far as to make this a necessary requirement) if panellists - as well as Members of the Appellate Body - have had some form of government experience.** This would enable them to appreciate and advise on issues of implementation, may help them better to resolve areas where they should or should not defer to the decision of a national authority, and may lead to decisions that Members will find to be more acceptable. That said, as permanent and full-time professional panellists they should no longer be allied with any particular government.

With respect to the role of members of the Appellate Body, the Working Group recommends that they be appointed on a full-time basis, and that they be paid more in compensation for giving up their other obligations. This would further guarantee that panellists with the necessary expertise continue to be available.

The Working Group also urges Members to consider the possible benefits of implementing a process whereby a request could be made to panellists to evaluate the consistency with WTO commitments of measures that a Member proposes to enact.

Deference to the decisions of Members' authorities

Summary of submissions

The Working Group heard testimony on the question of whether the *DSU* should defer to national authorities. The general consensus was that it was difficult for Members to agree on a common position on this issue, because they would most likely prefer a deferential stance when they are respondents and a less deferential stance when they are complainants. Even if some Members are more usually

one rather than the other, it was thought unlikely that even they could agree either way on the issue. Thus an objective rule would appear to be necessary. On a similar topic the Working Group also heard some testimony in favour of the United States introducing a panel of U.S judges to report on the acceptability of panel findings and their potential effect on United States' trade laws. Proponents of these so-called 'Dole Commissions' felt that having such a review would add to the credibility of the WTO decisions, at least in the U.S. Most witnesses, however, considered such bodies to be unnecessary and more likely to weaken the credibility of the *DSU* still further.

Analysis and Recommendations

On deference, the Working Group recognises that this is a sensitive issue, with strong arguments on either side. Overall, **the Working Group recommends that there be a greater acceptance, across the range of the WTO agreements, of the propriety of a dispute settlement panel or the Appellate Body deferring to the decisions of a national authority, where the subject in issue involves a factual assessment or where it is clear that freedom has been left for interpretation by the Member.** As such, in their assessments of the facts of a matter, panels should determine whether the national authorities' establishment of the facts was proper and whether the authorities evaluation of those facts was unbiased and objective. If that is the case, then even where the panel might have reached a different conclusion, it should not overturn the decision of the national authority. We are also agreed that panels and Members of the Appellate Body should not undertake a *de novo* review of economic assessments made by Member authorities but can review whether the national authority made an objective determination of the facts.

Furthermore, we agree that panels should interpret the WTO Agreements in accordance with customary rules of interpretation of public international law. Where a panel finds that a provision of an agreement admits of more than one permissible interpretation, it should find that the national authorities' measure is in conformity with the agreement in question, so long as it rests upon one of those permissible interpretations.

Where the agreements contain the kind of ambiguity that can be resolved through legal interpretation, then it is only appropriate for the dispute settlement panels and the Appellate Body to try to clarify that ambiguity.

The Working Group rejects the proposal that individual Members create 'Dole Commissions'. These would fundamentally undermine the multilaterally agreed system of dispute settlement. We thus reject proposals for any domestic courts to review the propriety of WTO dispute settlement decisions. While such bodies *may* add to the domestic acceptability of WTO decision-making in some countries (and even this is doubtful), the systemic problems that arise from multiple national bodies reviewing the reasoning of dispute settlement decisions far outweigh any possible benefits.

What role for the General Council?

Analysis and Recommendations

The Working Group is convinced that there is a need to improve the quality and detail of commitments generally, so as not to over-burden the dispute settlement system. At present, there does not appear to be any effective way of clarifying commitments between Rounds, other than through dispute settlement. At the same time, panels and the Appellate Body need to be very careful to ensure that they are not seen to be over-reaching when they make such interpretations. Simply repeating, like a mantra, that the decisions are not intended to add or take away from the commitments themselves is not enough. Allegations that have been made about undue law-making by the panels and the Appellate Body reveal the clear need for some form of increased multilateral rule-making and/or clarification.

The Working Group encourages the increased use of Article IX of the Agreement establishing the WTO with respect to further interpretation of the Agreements. It also recommends however that **any increased clarification that is required should not be implemented through an ongoing process of 'interpretative committees' operating between Rounds to clarify existing WTO obligations with binding recommendations.** This is unlikely to be fruitful, given the nature of the multilateral process to date, the natural need of a sense of urgency (that a Round provides) in order to agree text, and the frequent need to balance various interests against one another. A role for the membership, pursuant to Article IX, is more appropriate. That said, **we see value in existing Working Parties on various subjects related to the various agreements being tasked with producing non-binding interpretive guidelines so as to clarify the meaning of various ambiguities, which Members, panels and Appellate Body members can apply or ignore.** Such non-binding guidance might at least help to find a balance between the need for interpretation on the one hand and the alleged problems of panellists and Appellate Body members over-stepping their interpretive mandate, on the other. (If these suggestions above are not feasible, then there is even more need to introduce professional panel members as discussed above.)

With respect to problems that may arise relating to the operation of the *DSU* itself, we recommend the formation of a permanent Independent Advisory Committee, made up of Secretariat officials, academics and other experts who can recommend to Members various improvements to the *DSU*. This Committee could function independent of any Round, as improvements in adjudicative procedure can and should be made independently of negotiations on other issues in any event. Members would adopt the amendments themselves under the procedures currently available.

Non liquet and the potential for remand

Analysis and Recommendations

The Working Group is of the view that the panels and the Appellate Body should not be allowed to claim that they cannot come to a decision with respect to a particular issue that is within their competence. In difficult cases, though, it may be appropriate for a panel to recommend that the General Council address a certain issue, for example when the question at hand is clearly political. This is a fairly common process in other courts. Sufficient controls need to be imposed, however, to ensure that the issue does not lie there unaddressed for an unreasonably long period of time.

The Working Group does not recommend that the dispute settlement process introduce a process by which the Appellate Body can remand a dispute or issues in it to a panel.

The role of the Director General

Summary of submissions

Witnesses were split between those who wanted a limited role for the Director General and those who supported an enhanced role. The Working Group heard the argument that over the past few years the position of Director General had been weakened and that this trend had to be reversed before s/he could play a more important role in resolving disputes. On a number of occasions witnesses accepted that their views were shaped by their perception of the sitting Director General.

Analysis and Recommendation

The Working Group is of the opinion that while resort to the offices of the Director General is not a panacea for all problems that may arise during dispute settlement proceedings, if it can be used to a greater extent, then this should be welcomed.

Mediation and arbitration

Summary of submissions

The majority of witnesses saw arbitration and mediation as important parts of the dispute settlement process. However many accepted that these alternatives were not used as often as they might because on many occasions Members not only felt that they had strong cases but they were also put under pressure by powerful special interests to go straight to the panel stage. Witnesses also agreed that it would be difficult to mandate that Members participate in mediation and conciliation as countries had to be willing participants in the process. That said we also heard arguments asserting the fact that the early years of the *DSU* had been characterised by a rush to litigate but that the current trading environment was characterised by more high-level diplomacy and mediation.

A number of witnesses raised the point that mediation and arbitration were theoretically an ideal mechanism for developing countries to use because they had limited capacity to participate fully in proceedings. However many claimed that the political reality of the trading system meant that during any process developing countries could suffer unwelcome pressure and threats from developed countries to drop cases brought against them.

Analysis and Recommendation

The Working Group encourages alternative methods of dispute resolution, or activities that can better clarify issues for the dispute settlement process itself, so long as they accelerate and do not delay settlement of disputes.

A More Acceptable Process

Transparency - Open hearings

Summary of submissions

Nearly every witness agreed that transparency in the system was a key issue that needed resolving. However many accepted that finding a solution to the many questions associated with this would be difficult because the *DSU* involves both judicial and diplomatic aspects and the former encourages transparency whilst the latter does not.

Those who were reluctant to open the system to public scrutiny supported the views of some developing countries. Their main concerns concentrated on the belief that panels would be pressured to consider issues (such as social and environmental concerns) that were not relevant to the legal issues at stake. They were also anxious about the possibility of panel meetings being disrupted by public protests.

Those in favour of increased transparency argued that the above arguments were not sufficient to justify keeping meetings closed and that developing countries' concerns about transparency were largely logistical. In response to the claim that meetings could be disrupted some argued that observers could follow cases over closed-circuit television and that any disturbances could be met by offenders being expelled from meetings.

Other witnesses also rejected the argument that the inter-governmental nature of the *DSU* required that privacy be maintained, citing the fact that other international courts were open to the public. They also argued that if commercially sensitive information was being discussed it would be self-evidently reasonable for meetings to go into closed session.

Analysis and Recommendations

We commend the proposals of many Members to open WTO hearings to the public. However appropriate limits on access will be necessary to diminish the likelihood of panel hearings being disrupted. Other likely reasonable restrictions should also apply (e.g. for reason of resource constraints, concern to protect confidential information or for security reasons). **With open hearings, though, we note that there will be greater need for the Panel Chair to be well schooled in dispute settlement procedure.** We also believe that fears that open hearings may themselves reduce the possibility of a settlement are exaggerated; in any judicial environment, what deals that are struck are done so in chambers or corridors rather than the courtroom. **There is no reason to believe that opening proceedings to the public will diminish the opportunities for such an 'out-of-court' settlement. We also recommend that all submissions that are made to the panels and Appellate Body be released on the WTO website without undue delay.**

Civil Society participation and the submission of *amicus curiae* briefs

Summary of submissions

The majority of witnesses felt that this issue was the most controversial question currently being considered in the talks on the reform of the *DSU* and that it had the potential to develop into a major argument between developed and developing countries. The various arguments cited by witnesses concentrated on three main questions. Should NGOs have the opportunity to submit *amicus curiae* briefs? If so, what selection and filtering procedures should exist to manage submissions? What effect would NGO participation have on developing countries and the burden felt by the system as a whole?

Views on the first question were split between those who argued that NGOs should make their submissions directly to and through their national governments and those who felt that NGOs had a role to play in dispute settlement as many could present views reflecting the broader public interest. The strongest arguments against submission of *amicus curiae* briefs came from or on behalf of developing countries that were concerned that the majority of NGOs who were able to contribute submissions were located in the 'north' and therefore espoused developed country public concerns associated with environmental protection, labour rights and animal welfare. This led to concerns that these issues would be discussed in panels and more generally in the WTO, which many witnesses thought would ultimately damage the interests of developing countries.

We also heard arguments that there was considerable potential for the system to be flooded by NGO submissions thus overwhelming the already limited administrative capacity of developing countries. There was also concern that allowing *amicus curiae* briefs to be submitted directly to panels would lead some governments to ignore their responsibilities to civil society. Others also questioned the rationale of allowing self-appointed bodies to participate in an intergovernmental system.

On the other hand there were also arguments in favour of allowing NGO submissions. These included the assertion that many 'northern' NGOs do not promote developed country public interest viewpoints but addressed broader public interest issues of concern to the whole world. In particular, it was argued that some NGOs operating on a global basis were exclusively concerned with the global issues that were sometimes neglected by national governments but still worthy of consideration by panels.

When questioned about the potential for overwhelming the system with submissions a number of witnesses argued that it was unlikely that a large number of briefs would be submitted at any one time. Even then, many witnesses argued, any additional burden would be an acceptable price to pay, as such submissions would enhance the credibility of the system.

Finally, between these two polarised sets of views there was a group of witnesses who appreciated both sides of the argument. They concluded that *amicus curiae* had a positive role to play but only in limited circumstances. As a result they supported both a filtering process for submissions and a continuation of the Appellate Body's practice of accepting specific submissions that only concentrated on legal issues. Some suggested that the filtering process should only allow submissions from NGOs who operated at the global level.

Analysis and Recommendations

It is the view of the Working Group that NGOs of whatever nature should not have standing as a party or third party in dispute settlement themselves. After all the rights and obligations under the WTO agreements accrue to the Members alone and for this reason the disputes should remain between Members. This does not preclude NGO participation in the process, however.

We believe that national civil society organisations should be able to feed their comments into dispute settlement proceedings through their relevant Member. They should not participate in the WTO dispute settlement proceedings directly, unless expressly requested by the panel or Appellate Body.

However, we recognise that many issues related to the interpretation and application of WTO commitments will impact on important non-trade issues. As such, it is beneficial for panellists, Appellate Body members and Members themselves to appreciate the wider implications of their decisions and measures. This is particularly the case if submissions from non-Members may cast fresh light on the issues. **For this reason, we do not oppose the decisions so far taken by the Appellate Body setting out criteria with respect to the submission of *amicus curiae* briefs.**

We believe that it is appropriate for the 'judicial' system to set down the guidelines for the acceptance of submissions. However while 'the court' is likely the most appropriate body to determine what it will hear, it should not be seen to be drafting or amending its own procedures excessively.

The guidelines on *amicus curiae* briefs are generally satisfactory. Our main concern is that the pleadings should be accepted only from 'interested' third parties. Interest need not be limited to trade, obviously, but must have a clear relationship to the issues at hand. To allow submissions from non-interested parties could jeopardise the legitimacy of the dispute settlement process and lead to diffuse and abstract judgements**. Thus, there should be a clear identification of the NGO's non-national interest at issue i.e. the international public good that it is representing (environment, etc)**

In addition, due process would suggest that panels should explain their decisions to reject or to not consider any brief so submitted.

Conclusion

This concludes the Federal Trust's report. With dispute settlement playing an increasingly important role in the multilateral trading system, and the system itself having to deal with difficult cases that will surely arise, particularly relating to trade in services and to the balance between trade and other aspects of public policy, the need to ensure that its mechanisms are more than adequate to the task will only increase. The members of the Working Group thank the many witnesses that gave so generously of their time in the consideration of how the *DSU* is functioning, and how it can be improved to address both the current problems and the impending future pressures. We look forward to discussing our recommendations with experts and representatives of Members and to contributing to the further improvement of this crucial instrument for enforcing world trade agreements.

Annex A

A brief description of the Dispute Settlement Understanding

The World Trade Organisation's *Dispute Settlement Understanding (DSU)* is the mechanism by which WTO Members resolve trade disputes between themselves, with respect to, *inter alia*, compliance with their commitments to open their markets and how foreign goods and services will be treated once they have 'crossed the border'. The *DSU* was introduced in 1995, at the same time that the WTO Agreements succeeded the original *General Agreement of Tariffs and Trade (GATT*) of 1947. The purpose of the dispute settlement system under the WTO agreements is to use clearly defined rules and timetables to resolve disputes, thus supporting the rules-based system and enhancing the predictability and structure of the multilateral trading system. It does this in particular by ensuring that Members comply with their commitments to open their markets, and bring any measures that are inconsistent with those commitments into compliance. While the settling of disputes is the ultimate responsibility of the Dispute Settlement Body (DSB), which is comprised of all of the Members of the WTO, much of the burden falls on individual panels of experts and the Members of the Appellate Body.

At the time the *DSU* was introduced many national representatives and outside observers thought that the ultimate purpose of the system was to not make rulings but to resolve disputes quickly and amicably through the processes of consultation, mediation and arbitration. To a large extent, consultations still play a pivotal role in resolving the majority of disputes. However, mediation and arbitration have been relied upon to a much lesser extent than anticipated. Even where consultations have been requested, a great many disputes still go to a 'full hearing' on the merits, with a Dispute Settlement Panel being formed to analyse and rule on the issues. As well, almost all of the Panel rulings have been appealed to the Appellate Body. Combined, this displays a much greater penchant on the part of Members for 'litigation' of the issues than had previously been the case under the panel system of the original *GATT* regime.

Of course, there are many reasons for Members to prefer to have a full hearing of the issues, not the least of which is the automaticity of the *DSU*'s timetables for resolving disputes, and the fact that the decisions of the DSB are adopted in accordance with 'negative consensus' (i.e, they are adopted unless there is a consensus against adoption). This is the precise opposite of the dispute settlement system that was in operation under the original *GATT*.

The procedures and timetables for resolving a dispute through a panel are set out in detail in the *DSU*. The first stage involves a period of consultation between the parties that can last up to 60 days. If consultations fail to bring about an amicable result the complainant can request that the DSB establish a panel to consider the case. The defendant may block this request only once; a panel has to be established after the DSB meets for a second time to consider such a request. Once established the selection of panel Members can take up to 45 days after which they are given up to 6 months to consider a case (3 months if a case involves perishable goods). The procedures for submissions to panels are also set out in detail in the *DSU*. In sum, they include

Stage 1 - Before the first hearing the complainant(s) and respondent present their respective arguments in writing.

Stage 2 - At the first hearing, both sides make their case.

Stage 3 - Each side is then given the opportunity to submit written rebuttals and also present their oral arguments.

Stage 4 - If either side refers to scientific or technical matters the panel can consult experts or appoint an expert review group to prepare an advisory report.

Stage 5 - The panel submits the descriptive sections of its report and gives both sides two weeks to comment.

Stage 6 - The panel submits an interim report containing their findings and recommendations. It offers each side one week to request a review.

Stage 7 - Any review requested by a party must not exceed two weeks. During this time the panel is able to hold additional meetings with the parties.

Stage 8 – A final report is first circulated to the parties and then to all WTO Members three weeks later. If the Panel concludes that a measure violates a WTO commitment, or otherwise nullifies or impairs the benefits that other Members may reasonably expect to accrue from that commitment, then the Panel can recommend how the measure in question should be changed to conform with WTO rules.

Stage 9 – The final report becomes a ruling unless there is a consensus vote in the DSB rejecting it. At this time both sides can request an appeal.

Stage 10 – Appeals

Appeals are based on points of law such as legal interpretation. They do not re-examine existing or new evidence. A panel of three experts drawn from a permanent seven-Member Appellate Body hears each appeal. The appeal can uphold, modify or reverse a panel report finding. Appeals normally last approximately 60 days with an absolute maximum of 90 days.

Incorporating all these stages means that no more than one year (15 months with an appeal) should have been spent resolving a dispute. Implementation, of course, can take much longer.

Implementation

If a country has been found to have introduced a measure that does not comply with its WTO obligations, then it should quickly bring its measure back into line with WTO rules. This is called compliance. At a DSB meeting that is held within 30 days of a report's adoption, the respondent Member must state how it intends to comply. If quick compliance proves to be impractical then the Member is given a 'reasonable amount of time' to do so. If it fails to act during this time it has to enter into negotiation with the complainant in order to agree on a mutually acceptable form of compensation. In many cases this is tariff reduction in an industry of particular interest to the complainant. This period of negotiation cannot last for more than 20 days, after which if no compensation can be agreed upon the complaining party can ask the DSB for permission to retaliate by imposing limited trade sanctions. Ideally these sanctions should be imposed in the same sector as the original dispute. However, if this is impractical or ineffective, sanctions can be imposed in a different sector covered by the same WTO agreement. If this is also ineffective then sanctions can be taken under another agreement. The DSB should grant this authorisation within 30 days unless there is a consensus vote against the request. Sanctions should be applied in such a way as to minimise damage to a sector unrelated to that of the original dispute, while also offering the complainant the most effective means of recourse.

Annex B - List of witnesses

The group met with and received verbal testimony from

Roderick Abbott	*then* Deputy Director General, DG Trade, European Commission
Timothy Abraham	Director, International Trade Policy, UK Department of Trade and Industry
Kerry Allbeury	Legal Affairs Officer, World Trade Organisation
Dr. Arthur Appleton	Attorney at Law, Lalive and Partners, Geneva
Claude Barfield	Coordinator of Trade Policy, American Enterprise Institute, USA
Paulo Barzotti	DG Trade, European Commission
Professor Jacques Bourgeois	Partner, Akin Gump Strauss Hauer and Field LLP
Daniel Brinza	Assistant U.S. Trade Representative, Monitoring and Enforcement, USTR
Professor Claus-Dieter Ehlermann	Senior Counsel, Wilmer, Cutler and Pickering
Richard Cunningham	Partner, International Trade, Steptoe & Johnson
Pornchai Danvivathana	Permanent Mission of Thailand to the World Trade Organisation
Michael Davenport	Consultant, formerly at the Commonwealth Secretariat
Mateo Diego-Fernandez	Counsellor, Permanent Mission of Mexico to the World Trade Organisation
Shaun Donnelly	Principal Deputy Assistant Secretary, Bureau of Economic and Business Affairs, Department of State, United States
Everett Eissenstat	Chief Trade Counsel, Committee on Finance, Minority Staff, United States Senate
Phil Evans	Senior Policy Adviser, The UK Consumers Association
Simon Farbenbloom	Counsellor, Australian Permanent Mission to the World Trade Organisation
Ignacio Garcia-Bercero	Head of Unit, Dispute Settlement and Trade Barriers Regulation, DG Trade, European Commission
John D. Greenwald	Partner, International Trade Practice, Wilmer, Cutler & Pickering
Gary N. Horlick	Partner, International Trade Practice, Wilmer, Cutler & Pickering
Valerie Hughes	Director, Appellate Body, World Trade Organisation
Professor John Jackson	Professor of International Economic Law, Georgetown University Law Center
Guy de Jonquières	World Trade Editor, The Financial Times
Pieter Jan Kuijper	Principal Legal Adviser, Legal Services, European Commission
Jeff Lang	Counsel, International Trade Practice, Wilmer, Cutler & Pickering
Thea Lee	Assistant Director for International Economics, AFL-CIO, USA
Yayoi Matsuda	First Secretary, Permanent Mission of Japan to the International Organisations of Geneva.
Brendan McGivern	Counsellor, Permanent Mission of Canada, Geneva
Neil McMillan	Deputy UK Permanent Representative to the International Organisations in Geneva
Claudia Orozco	Consultant and Co-founder of the Advisory Centre on WTO Law
Ambassador Hugo Paemen	Senior Adviser, Hogan and Hartson LLP
Sheila Page	Group Coordinator, International Economic Development Group, Overseas Development Institute, UK
David Palmeter	Partner, International Trade Practices, Sidley, Austin, Brown and Wood LLP
Timothy Punke	Trade Counsel, Committee on Finance, Majority Staff, United States Senate
M. Koteswara Rao	First Secretary (Legal), Permanent Mission of India to the World Trade Organisation.
Frieder Roessler	Executive Director, Advisory Centre on WTO Law
Professor Jim Rollo	Co-Director, Sussex European Institute, University of Sussex
Charlotte Seymour-Smith	International Trade Department, UK Department for International Development
Ivan Smyth	Legal Adviser, UK Department of Trade and Industry
Rachel Shub	Office of the United States Trade Representative, Geneva
Andy Stoler	*then* Deputy Director General, World Trade Organisation
Celso de Tarso Pereira	Permanent Mission of Brazil to the World Trade Organisation
Rachel Thompson	Associate Director, Global Trade Practice, APCO Worldwide

ANNEX C

Formal submissions to the DSB talks

The group reviewed position papers from the following countries that were submitted to the formal negotiations ongoing in special sessions of the Dispute Settlement Body (DSB).

In reverse chronological order

Mexico - 31 October 2002 *(WTO document reference TN/DS/W/23)*

Japan - 28 October 2002 *(TN/DS/W/22)*

Jamaica - 20 October 2002 *(TN/DS/W/21)*

Zambia on behalf of the LDC group - 9 October 2002 *(TN/DS/W/17)*

India on behalf of Cuba, Honduras, Indonesia, Malaysia, Pakistan - 9 October 2002 *(TN/DS/W/19)*

India on behalf of Cuba, Honduras, India, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe - 7 October 2002 *(TN/DS/W/18)*

Paraguay - 25 September 2002 *(TN/DS/W/16)*

United States - 22 August 2002 *(TN/DS/W/13)*

Republic of Korea - 11 July 2002 *(TN/DS/W/11)*

Australia - 8 July 2002 *(TN/DS/W/8)*

Equador - 8 July 2002 *(TN/DS/W/9)*

Philippines and Thailand - 21 March 2002 *(TN/DS/W/3)*

Thailand - 20 March 2002 *(TN/DS/W/2)*

European Union - 3 March 2002 *(TN/DS/W/1)*

About the Federal Trust

The Federal Trust is a London based, independent think tank committed to enlightening the debate on good governance. It is registered as a charity for purposes of education and research. It acts as a forum that explores issues of governance at national, continental and global level. Founded in 1945 on the initiative of William Beveridge to study democratic unity amongst states and peoples, it provides a platform to debate often-controversial issues.

The Federal Trust remains politically non-partisan, and it has no allegiance to any political party. It enjoys corporate, institutional, academic and individual support. The Federal Trust is able to draw on a wide variety of intellectual resources. Its distinguished Patrons and Advisory Board members are high-profile individuals from various backgrounds and professions. Research Fellows and staff combine expertise in diverse disciplines including law, finance, economics and politics. It also attracts a broad range of high-level external experts who participate in its activities and projects, thus allowing the Trust to reflect differing ideas and perspectives. The Trust helped to establish the Trans-European Policy Studies Association (TEPSA) in 1974, a network of like-minded institutes from all the countries of the enlarging European Union. It also has close links with think tanks in non-EU countries. The Federal Trust runs a number of projects on issues relating to its main concerns encompassing various aspects of international economic policy, political co-operation, international citizenship and good governance at the European and global level.

Its project work involves setting up working groups providing a forum of debate for experts from a wide range of backgrounds, organising conferences and seminars with high-level speakers from academia, business and finance, civil society, the media, government and politics and developing an extensive publishing programme on topics close to its research concerns.

The Federal Trust's Working Group on the Dispute Settlement Understanding is the Trust's second group to examine aspects of the multilateral trading system. The first followed the preparations for the Doha Ministerial Conference and made recommendations to WTO members on the coverage of a new round of trade negotiations. The Trust is currently exploring the possibility of convening another group with the remit to determine what scope there is to negotiate WTO rules on the so-called 'Singapore Issues'.

This report forms part of the Trust's wider programme on the international trading system and the WTO. For further details about this and future studies please contact Alexis Krachai on +44 (0)20 7735 4000 or at alexis.k@fedtrust.co.uk

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