WTO Dispute Settlement
In the Doha Round and beyond:

A Comprehensive Enhancement
In the interest of US Foreign Trade Policy

- POLICY PAPER -

By

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Nothing is more destructive of respect for the law than passing laws which cannot be enforced."

Albert Einstein

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1. Introduction

The Dispute Settlement (DS) mechanism has been lauded as one of the great successes of the World Trade Organization (WTO) given the achievement of a *sui generis* judicialization in the framework of international relations. Exclusive and compulsory third-party adjudication and the establishment of the Appellate Body (AB) with an automatic right to review panels' decisions were the major changes brought by the WTO Agreement in 1995.

In this major achievement, unprecedented in global international relations, the United States (US) has played a leading role, especially during the Uruguay Round. Three obvious reasons come to mind[1]: (i) the US weight and influence in drafting the WTO treaty (including its dispute resolution mechanism); (ii) the US involvement, as a main party or a third party, in the large majority of WTO disputes, offering the US a tremendous opportunity to "shape the system"; and (iii) the US legal background or education of most of the lawyers in the WTO Secretariat and even many of the lawyers pleading on behalf of WTO Members other than the US (including full-fledged US private attorneys, hired mainly by developing countries).

However, the DS has also been subject to much criticism. In view of a growing internal dissatisfaction with the decisions adopted by the DS bodies (*e.g. Foreign Sales Corporations* case, *Byrd Amendment* case) and with its functioning, the US Congress directed the US Trade Representative (USTR) to address DS reform within the Doha Round negotiations in its grant of Trade Promotion Authority (TPA)[2] in 2002. A specific set of goals to be reached was laid down, mainly the following: greater transparency, greater adherence of DS panels and the DS AB to the WTO Agreements and greater compliance through enhanced enforcement mechanisms.

After 5 years of negotiations, to date no concrete progress has resulted despite the wide range of proposals tabled at the WTO specific working group. The USTR, having presented only two minor proposals, has not proved until date the leadership and initiative expected from a major architect of the current DS Understanding (DSU)[3], despite the numerous calls made by Congressmen and the importance of the DS as the vault of the international trading system.

The DS reform may be seen as a technical legalistic matter isolated from larger issues at stake. It goes well beyond that since (i) it involves significant political implications for the interplay of actors in the international trading system (*e.g.* trade wars with key commercial partners, such as the EU, Canada, Japan or even China, developing countries integration in the global trading system) and (ii) it may be an asset to gradually overcome systemic problems not easily negotiable (*e.g.* reconciliation of trade with environmental and labor standards) or even to keep the WTO moving forward in case of a Doha Round breakdown.

In this regard, this paper takes proper account of the current time constraints for the Doha Round, in particular for the US, given the expiration of the TPA at the end of 2006-beginning of 2007. In mid-April 2006, it seems rather unrealistic and even erratic to table deep transformations to the system, despite the fact that some deep changes should be welcome.

Accordingly, the structure of the policy recommendations is set in function of a short term (Doha Round) and long term agenda (Post-Doha Round) in order to implement a genuine strategy, consistent with other WTO negotiations fronts in which the USTR will be involved in parallel.

Despite the fact that the most recent trends in the US Foreign Policy have been rather unilateral, the WTO provides the best framework in these moments to prove that the US may be able to be

committed towards a multilateral organization by means of displaying a responsible leadership respectful with the rule of international law. A culture of authentic commitment, the one that is present despite some unsatisfactory results, must be displayed to regain the lost credibility in the international arena.

For that reason, if the best of the worlds for the US is a WTO working at full speed, taking into account the net gains to be made from a successful Doha Round, the key objective must be not a more political DS but a progressive move towards a better judicial DS to ensure the results achieved through negotiation.

The *leitmotiv* of the policy recommendations outlined below is therefore that it is absolutely possible, without being accused of idealistic, to reach a positive agreement for the interest of the US constituencies respectful in a major part with the mandate of the Congress in parallel with a better international trading system for all its actors. The prospect for the US Administration, taking into account the immense gains to be expected from a success of the Doha Round, must be in this regard to deliver a reasonable ambitious result on the promise of the Doha Ministerial Declaration, *the promise of a greater global economic growth and the alleviation of poverty*.

2. Legal & Political analysis in context

The accumulated experience of the US under the DSU constitutes the foundation to approach the current negotiations to review and reform the DSU. This will be the starting point to issue reasonable policy guidelines beyond the usual generic academic exercise -which has already been performed exhaustively by the scholar literature with little room for creativity-.

Therefore, the recommendations will be linked and inserted in the evolution of the negotiations, through which it is possible to determine (i) the key issues at stake for the US and the DS itself and (ii) the feasibility of the US proposals at this stage and (iii) the interplay between different proposals and the eventual political compromises to be reached in order to obtain a consensus.

To accurately set the time frame, the DSU review started already in 1997, before the Doha Round was launched. However, in contrast with the negotiations on liberalization, which have already achieved some significant milestones (*e.g.* export subsidies phase-out) towards an eventual closure of the Doha Round, the DSU review could not be concluded so far as several deadlines lapsed without tangible achievements[4]. The latest explicit development to date, the Hong Kong Ministerial Conference did not bring anything new, since it simply took note of the progress made and directed the Special Session "*to continue to work towards a rapid conclusion of the negotiations*".

It is important to note at this point that the Doha Ministerial Declaration clearly stated that the negotiations on the DSU will not be part of the single undertaking — *i.e.* that they will not be tied to the overall success or failure of the other negotiations mandated by the Ministerial Declaration[5]. As the improvement of the DS system is in the interest of all Members, it was considered inappropriate to make the DS negotiations part of the give and take of the overall negotiations. The desire to keep the DS negotiations 'separate' from the rest of the Doha Development Round, is also reflected in the time frame for them. Unlike the Doha Round, which was initially to be concluded in January 2005, the deadline for the DSU negotiations was initially set at May 2003.

In any event, despite the textual reading of the Declaration, there will likely be a linkage between the WTO landscape resulting from the Doha Round and the reforms undertaken on the DSU.

2.1 Early stage of negotiations

In early stages, the negotiations were mainly characterized by two divides – one ran between industrialized countries, mainly between the US and the European Community (EC), whereas the other pitted industrialized (among which was obviously the US) against developing countries.

The rift between industrialized countries was mostly due to the efforts of the US to strengthen the enforcement quality of the system. Being a "net complainant" in these initial years of DSU practice, and having won several "high profile" cases (such as *EC – Hormones, EC – Bananas, Canada – Magazines,* or *India – Patents*), the US became increasingly worried that the implementation of the reports would remain behind their expectations[6].

They therefore pressed forward with retaliatory measures and threats thereof, whereas the EC and Canada tried to delay the implementation of rulings. This translated into different proposals for the DSU review negotiations on the so-called sequencing issue which arose for the first time in *EC – Bananas* over ambiguities in Art. 21.5/22 DSU. The key question was whether a "compliance panel" must first review the implementation measures undertaken by a defendant before a complainant may seek authorization to retaliate on grounds of the defendant's alleged non-compliance. Whereas the US initially opposed any idea of sequencing and favored immediate retaliation, the EC and many other Members argued in favor of the completion of such a compliance panel procedure as a prerequisite to seeking an authorization to retaliate. The

EC underlined its position, *inter alia,* by bringing a case against US legislation requiring early retaliation and against its application in *EC – Bananas,* as well as by seeking an authoritative interpretation of the DSU in this respect[7]. Both attempts ultimately failed.

Another attempt by the U.S. to increase the enforcement power of WTO dispute settlement occurred when it discussed the so-called "carousel retaliation". This term refers to periodic modifications of the list of products that are subject to the suspension of concessions, and it surfaced for the first time when the *Carousel Retaliation Act*[8] of 1999 was introduced into Congress. Its purpose was to increase pressure on the EC Commission and European governments in *EC – Bananas* and *EC – Hormones* by requiring the government to periodically rotate the list of products subject to retaliation in order to maximize the effect of the sanctions. The measure was signed into law in May 2000 but has so far never been applied. Whereas the EC (supported by most other nations) sought a prohibition of carousel retaliation in the DSU review of 1998/1999, the US had sought a footnote explicitly allowing such retaliation. In a parallel development, the EC had requested consultations under the DSU on the carousel provision in summer 2000, however, without proceeding to the panel stage.

Finally, the US did not only pursue a "tough stance" on sequencing and on the carousel issue, but it also sought shorter timelines for certain steps in WTO DS[9].

The controversy between developed and developing countries was of a different nature. It mainly focused on the issue of transparency and the acceptance of so-called "*amicus curiae* briefs", with the US pressing hardest for both.

Regarding transparency, the US wanted to make submissions of parties to panels and the AB public, and it wanted to allow public observance of panel and AB meetings.

Developing countries in particular opposed such increased transparency, as they feared "trials by media" and undue public pressure. Insisting on the intergovernmental nature of the WTO, developing countries equally rejected efforts by the US and the EC to formalize the acceptance of *amicus curiae,* or "friend of the court" briefs. These briefs became an issue for the first time in 1998 when the AB decided in *US – Shrimp/Turtle* that the panel had the authority to accept unsolicited *amicus curiae* briefs. That right was subsequently confirmed in further disputes, causing outrage among many developing country Members who feared undue interference from NGOs[10].

2.2 *Impasse* in the negotiations (1999-2001)

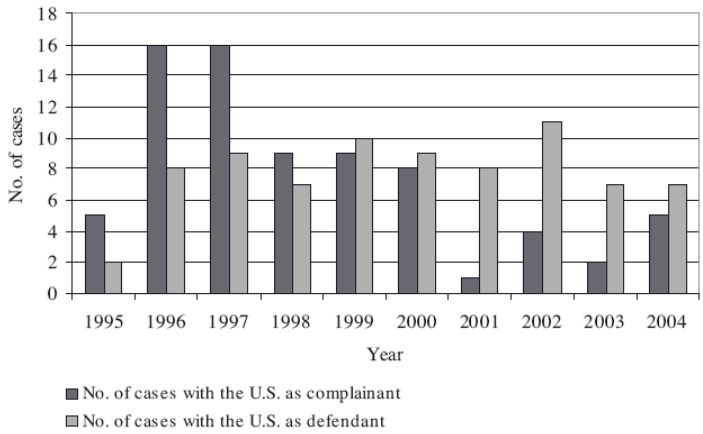
After the December 1999 Seattle Ministerial Conference had failed, the DSU review essentially remained in limbo through most of 2000 and 2001[11]. Isolated efforts of Members to change the DSU failed. However, as DSU practice moved along, negotiating positions changed behind the scenes.

New developments in the case *US – Foreign Sales Corporations* (FSC) which the US had lost and where implementation measures were now disputed, weakened in particular the US position on issues such as carousel or sequencing: after it had become increasingly clear that the US replacement legislation - *Extraterritorial Income Exclusion Act* (ETI) - would not be in compliance with the DSB recommendations, the US and the EC negotiated in September 2000 a bilateral procedural agreement on how to proceed in this case in order to bridge the gaps in the DSU on the sequencing issue[12].

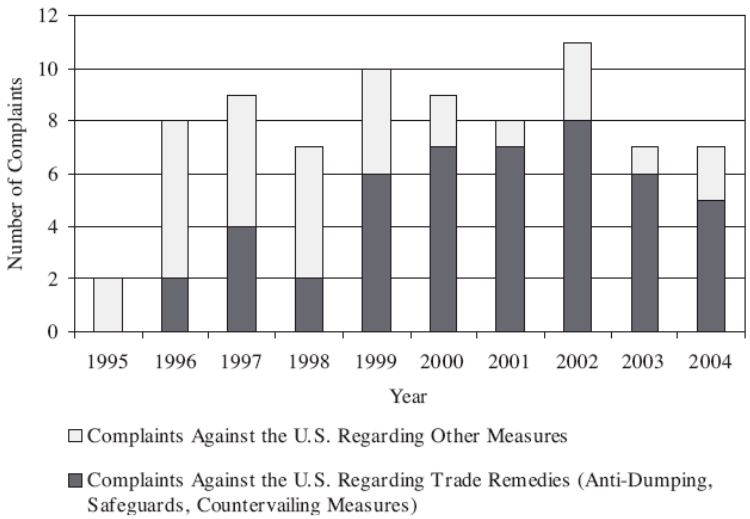
According to this agreement, a sequencing approach was adopted under which a panel (subject to appeal) would review the WTO consistency of the replacement legislation, and arbitration on the appropriate level of sanctions would be conducted only if the replacement legislation was found WTO-inconsistent. The US had now become a beneficiary of the sequencing approach (even with the possibility of subsequent appeal) which it had opposed before. In exchange for the agreement, the US had to back down on carousel retaliation although no such deal had been explicitly made part of the procedural agreement[13]. The retaliatory measures requested by the EC were several times higher than US retaliation in *EC – Bananas* and *EC – Hormones* combined[14]. The arbitrators later confirmed that the suspension of concessions in the form of 100% *ad valorem* duties on imports worth $ 4.043 billion constituted "*appropriate countermeasures*".

The *FSC* case *was* not the only case that had a weakening impact on the negotiating stance of the US: with more and more trade remedy cases – traditionally the Achilles heel of US trade policy – being brought against the U.S. and the latter losing an important part of these, the US stance changed from offensive into highly defensive (*see* Graphs 1 and 2).

Graph 1 The United States as Complainant and Defendant (1995–2004)[15]



Graph 2 The United States as Defendant: Trade Remedy and Other Cases[16]



2.3. The Doha-Mandated DSU Review Negotiations (2002–2004)

According to the Doha mandate on the DSU Review, an agreement was to be reached not later than May 2003. Formal and informal discussions were held under the auspices of the Special Negotiating Session of the Dispute Settlement Body, chaired by Peter Balas, of Hungary.

Work progressed from a general exchange of views to a discussion of conceptual proposals put forward by Members. In total, 42 specific proposals had been submitted by the deadline of the negotiations at the end of May 2003[17]. The negotiations were very comprehensive: not only did they cover virtually all provisions of the DSU, but they also included a variety of Members, including, *inter alia,* all the "Quad" Members (with submissions being made by the US, the EC, Canada and Japan) as well as developing countries of all sizes and stages of development.

Compared to the pre-Seattle stage of DSU review negotiations, negotiating positions were less clear-cut now. The most remarkable change occurred in the position of the United States, which reflected its new defensive stance in dispute settlement practice. In December 2002 the US submitted, jointly with Chile, a proposal to strengthen flexibility and member control in dispute settlement[18]. The proposal would allow the deletion of portions of panel or Appellate Body reports by agreement of the parties to a dispute, and an only partial adoption of such reports. Moreover, it calls for "some form of additional guidance" to WTO adjudicative bodies.

The gist of the submission is to transfer influence from the adjudicative bodies to the parties to disputes. The proposal was greeted predominantly with skepticism, with Members arguing that deleting parts of panel or Appellate Body reports would weaken the WTO adjudicating bodies[19].

Moreover, the move could be seen as a contradiction to earlier proposals on improving transparency as parties would be able to "bury" more controversial or groundbreaking decisions by the adjudicating bodies before the rulings were made public. The proposal may be understood as attending to the complaints from Congress that the WTO adjudicating bodies were legislating.

A large number of other proposals, only the politically relevant of which will be presented here, were submitted.

The EC called again for the establishment of a permanent panel body instead of the current system where panelists are appointed *ad hoc*, discharging their tasks on a part-time basis and in addition to their ordinary duties[20]. Opponents of the proposal argue that a permanent panel body could be more "ideological" and might engage in lawmaking[21]. They therefore feel more

comfortable with the current system which draws heavily on government officials who are familiar with the constraints faced by governments.

Developing countries submitted a variety of proposals with quite different orientations. For instance, some countries sought to strengthen enforcement by introducing collective retaliation[22]. It is meant to address the problems caused by the lack of retaliatory power of many small developing economies, such as those experienced by Ecuador in *EC –Bananas.* With collective retaliation, all WTO Members would be authorized (or even obliged under the concept of collective responsibility) to suspend concessions *vis-à-vis* a non-complying Member. Proposals for the retroactive calculation of the level of nullification and impairment and for making the suspension of concessions a negotiable instrument (Mexico)[23], for introducing a fast-track panel procedure (Brazil) [24] , and for calculating increased levels of nullification or impairment (Ecuador) [25] have a similar thrust. At the same time, the African Group questioned the automaticity of the current DS process and sought the re-introduction of more political elements[26]. China even proposed the introduction of a quantitative limitation on the number of complaints per year that countries could bring against a particular developing country[27].

By contrast to these controversial proposals, a large number of less controversial issues were integrated into a compromise text that was elaborated by the chairman. This so-called *Balas text*[28] contains modifications to all stages of the process, including improved notification requirements for mutually agreed solutions, a procedure to overcome the "sequencing issue" in Art. 21.5/22 DSU, the introduction of an interim review in the panel stage, and a remand procedure in which an issue may be remanded to the original panel in case the AB is not able to fully address an issue due to a lack of factual information in the panel report. The compromise text would also

have introduced numerous amendments in other areas, including, *inter alia,* housekeeping proposals, enhanced third party rights, enhanced compensation, and several provisions on the special and differential treatment of developing countries.

Despite the existence of a compromise proposal, the deadline for the completion of talks that had been set for the end of May 2003 was finally missed.

The new May 2004 deadline was also missed due mainly to the Cancun Ministerial Conference setback. The Chairman then suggested continuing the negotiations, however, without any new target date. The Special Negotiating Session of the DSB has been meeting in recent dates, yet without achieving any significant progress.

2.4. The Difficulties of Concluding the DSU Review

The difficulties faced by negotiators so far in their attempts to reach a successful conclusion of the DSU review negotiations may be explained with a number of reasons.

Firstly, the consensus requirement for any change to the DSU sets high hurdles, particularly as the WTO counts 148 heterogeneous Members with equally heterogeneous interests. These problems are further exacerbated in the case of the DSU review where negotiators are intending to reap an early harvest outside the larger context of the Doha negotiations and thus within a narrow area of negotiations.

Secondly, key decisions of the adjudicative bodies and Members' experience with the system have created controversial views on specific aspects of the system that have become increasingly

difficult to bridge (*e.g.* on issues such as transparency, *amicus curiae* briefs, carousel retaliation or collective retaliation – to mention but a few).

Thirdly, and of fundamental importance, there appears to be a more profound controversy regarding the overall direction the DSU should pursue, namely whether it should continue its route towards more rule-orientation and adjudication, or whether it should return to a more negotiatory and diplomatic – *i.e.* power-oriented – approach.

Fourthly, some problems of the DSU review may be explained with the difficulties of negotiating reforms to a system that is constantly in use: negotiating positions are subject to permanent change as Members continuously gather new experience due to new cases and new reports. Moreover, on-going negotiations on material WTO rules may also have a bearing on the stance of Members towards the DS system (*e.g.* the negotiations on "Rules", including trade remedies, such as antidumping or countervailing duties).

Such problems can be partly remedied by the inclusion of generous periods of transition for any change to the DSU, as suggested in the below recommendations.

2.5. Evaluation of the DS: the US perspective

Overall, the US has gained more than it has lost in the WTO DS system to date, for several reasons. One can imagine that various proxies are pertinent in order to evaluate whether the case law produced has been successful. In this regard, the snapshot periodically published by the USTR[29] on US prevailing or not in cases is not a sufficient complete picture. Since indicated by its name, the DS is more than a declaratory body: its aim is to settle disputes. Compliance is

therefore another element to take into consideration when assessing the results for the US of the system after 10 years.

First, the US has been able to effect changes in a substantial number of foreign laws, regulations, and/or practices that it considered to be restricting trade[30]. Furthermore, most of the cases that the US filed provided commercial benefits to US exporters or investors[31]. In addition, WTO rulings have upheld trade principles that are important to the US, such as the patent protection provisions of the Uruguay Round agreement on intellectual property rights and provisions in the Agreement on Agriculture to eliminate export subsidies[32].

As we see, the DS system's impact on the US should not be evaluated solely on the basis of U.S. wins and losses.

Second, some winning cases do not result in the desired outcomes. For example, the EC decided not to fully comply with two WTO decisions involving bananas and hormone-treated beef and instead faced US retaliation. Conversely, some losses are only partial, as in the case of several US antidumping orders being challenged that were maintained during some time despite an adverse WTO ruling[33].

In addition, some losing cases actually may uphold WTO principles important to the US, as in the case involving endangered sea turtles, which expressly upheld provisions that protect the conservation of natural resources, including sea turtles.

Moreover, the US derives systemic benefits from a well-functioning multilateral DS system, even if it does lose some cases.

It is important to note, however, that there have not yet been a sufficient number of WTO dispute settlement cases to fully evaluate the system[34]. The DS is still very much in the making. Although it builds on nearly half a century of the GATT *acquis*, WTO DS is less than a decade old. At most, some of the provisions of the WTO have been construed a few times. Most of the provisions of the WTO treaty have been not been construed at all. There are entire agreements in the WTO treaty that still have never been construed even once by the Appellate Body. Thus, in some respects, virtually every new case that comes before the WTO is still very much, as lawyers say, a case of first impression.

For this reason, we should be careful about making sweeping generalizations about the future implications of the outcomes of the relative handful of disputes that have been resolved, thus far, in WTO DS. WTO DS is a work *in* progress of the work *of* progress, and the continued progress in improving WTO DS will be, like all progress, incremental. It will be rule by rule. It will be case by case.

3. Policy Recommendations

3.0. Principles: Leadership & Enhancement

The US should in first place assume a greater leadership in the DS reform. Until now, especially in the last stage of the Doha Round negotiations, its position has been of no drastic changes and introvert expression of concerns on substantial issues, which may be seen in contradiction with its more rule-based approach.

The US should be more proactive and table concrete proposals supported by a textual drafting (not generic concerns). This should be made without giving up the need for listening the

Congress concerns and for being consistent with the TPA mandate –there is undoubtedly a worrisome nervousness in the Congress[35] on the DS and the trade remedies-. Although it is clear that the Congress has the last word in the ratification of an eventual deal, it should not be an excuse to surrender to the usual protectionist pressures put on Congressmen.

In any case, the US should act in line with its interest of an efficient international trading system managed by the WTO. The context of the worrisome current account deficit makes market access worldwide a pressing need for the US Foreign Economic Policy. This idea of opening markets in fields such as agriculture and services should not be present only in liberalization talks but also in the DS reform negotiation, since an effective DS may be an important asset to implement the liberalization achieved in Doha or simply to carry on a progressive liberalization in the event of Doha failure.

Accordingly, the US should leave aside temptations of unilateralism, return to a power-based DS system, exacerbated control of DS decisions and a fragmented vision of public international law.

In this regard, none of the two generic options that have emerged from the negotiations – weakening adjudication or strengthening political decision-making – holds great promise if considered in isolation. Weakening adjudication is not an attractive option as Members would have to forego the achievements which the new DSU has brought for a rules-based international trading system. It would also be at odds with globalization and its increasing reliance on international transactions in economic life. Alternatively, improving political decision-making is an extremely difficult task and could result in important Members being driven out of the system, if the sacred consensus principle were to be replaced by some form of majority voting.

In this regard, following its condition of founding father of the WTO and its more rules-based DS system, it should make the DS an improved judicial mechanism in terms of transparency and enforcement and push in parallel for some checks and balances –*e.g.* compulsory mediation, partial adoption of reports- so to avoid an excessive judicial weight, which would likely undermine the DS legitimacy.

As concerns the time frame of the policy guidelines, although as noted above the DS reform is not inextricably linked to the Doha package, in practical terms the TPA mandate for issues regarding the DS also expires in April 2007. Subsequently, there is a clear time constraint which explains the structure of the following recommendations in a meaningful and feasible short term agenda (Doha Round package) with a long term agenda to address future reforms and the strategy in use of the DS in the interest of the US.

In the unlikely event of the TPA being again extended by the Congress, the long term agenda should be fully or in part incorporated into the Doha Round guidelines.

3.1. Doha Round: Short Term

I. Correct Procedural Deficiencies

The binding nature of the DSU would not be as troubling if effective procedural controls were in place to provide transparent and fair access and due process that is expected of a court. If the WTO is to retain its apparent status as a "world court" for trade, appropriate steps must be taken to protect the rights of parties-in-interest. Some of these have already put forward by the USTR (Recommendations A and B *infra*) but should be firmly defended and affirmed in the final stage of the negotiation.

In addition, this would be in clear consistency with the Congress mandate on seeking provisions providing for resolution of disputes between governments "*in a timely, transparent (…) and reasoned manner*."

a. Need for Transparency: Open Hearings and Submissions

Another principal procedural deficiency with the DSU is its lack of transparency. This is an ongoing issue that became a major concern after the debacle at Seattle. The Doha Ministerial Declaration commits Ministers "*to promote a better public understanding of the WTO*" and "*to making the WTO's operations more transparent, including through more effective and prompt dissemination of information*." Yet, proposals for real transparency in the dispute settlement system are continually opposed by many of the Members.

Numerous proposals in this area have already been made, from opening the dispute settlement hearings to the general public, to requiring parties to make their submissions public (redacted, of course, for truly confidential business information).

Unfortunately, efforts to increase transparency after the Uruguay Round have not been particularly successful.

If the system is going to continue to perform an adjudicatory function, it is essential to adopt judicial procedures. Whereas a diplomatic system requires some level of secrecy and limited access in order to encourage compromise and in recognition of the extent to which the codes are "standards" more than "rules" and to protect negotiators from public backlash, that same secrecy is destructive in a judicial environment. In such an environment, secrecy must give way to transparency in order to maintain faith in the system.

In August 2002, the United States emphasized the need for greater transparency in dispute settlement as a priority in the negotiations concerning reform of WTO dispute settlement rules and procedures.

Since in this regard the support of developed countries, especially the EC, seems guaranteed, in view of the reluctance of developing countries, the US should gain their support through its acceptance on the proposals directly related to development concerns, tabled below in section IV.

b. Real and Consistent Opportunity For Amicus Briefing

The DSU does not expressly provide for the submission of *amicus* briefs, but the AB has determined (in *US-Shrimp*) that they can be accepted. Yet, even that small step toward legitimating a "judicial" process has engendered great controversy among WTO Members.

The reaction of WTO Members to the decision to allow *amicus* briefs, as well as the decision in *EC-Asbestos* to issue "Additional Procedures" on *amicus* brief submission, is telling. Most Members complained bitterly about these developments, accusing the AB of going beyond its mandate.

This is hardly comparable to judicial activism on substantive norms. Greater access to a judicial system in the form of *amicus* briefs, such as that created in the DS, is desirable, and courts and arbitral panels both domestically and internationally have always had the authority to set their own procedural rules.

Unfortunately, the procedural rules on this subject are still in dispute (e.g. *Canada-Lumber*)[36].

Also, a considerable amount of opposition to participation by *amici* in dispute settlement proceedings has come from least developed countries (LDCs) on the assumption that *amicus* practice, presumably by non-governmental organizations (NGOs) from rich, developed countries, would more often than not be biased against the positions of LDCs[37]. This view is ill founded. The assumption that, on balance, the wide and diverse range of nongovernmental interests would consistently espouse a particular viewpoint has hardly been proven. NGOs from developed nations frequently take positions opposite that of their own governments and would have less incentive to participate in DS proceedings if their views were already accounted for. Moreover, one can anticipate greater participation from NGOs that promote the interests of LDCs and can effectively advocate positions that reflect the interests of their citizenry.

The US should note with interest the procedures proposed by the EC for handling *amicus curiae* submissions[38] and should look forward to working with them and other Members on this issue. Regarding the opposition of LDCs, the US should definitely support proposals, such as the ones explained below in Section IV, to overcome their resistance on this issue.

c. Independent and Sufficiently Staffed Permanent Panel System

It is indeed quite remarkable that WTO Members entrust matters of such great importance - matters that are hotly debated and negotiated over many months at the most senior levels of government - to an adjudicatory system based on *ad hoc* panelists.

In this regard, there is the need to support a proposal on a permanent and specialized panel system: the proliferation of disputes (a worrisome arms race dynamics between US and EU, end

of peace clause in the agricultural sector and expiration of the Multi-Fiber Agreement in the textile sector) should be faced by a stronger judicial structure.

Problems of bias and conflicts (or the appearance or suspicion of bias and conflicts) would be dealt with more readily by a small group of judges serving a reasonable term, and subject to approval or removal by a significant portion of the General Council[39].

If the system is to function as adjudicatory, permanent panelists should at least be seriously considered.

In this regard, a far reaching proposal to be supported is again a proposal by the EC[40] to move from the current system of *ad hoc* panelists to a system of permanent panelists.

Another seemingly small, but quite important reform to encourage impartial and qualified panelists is to increase the pay of panelists so that serving on a panel is not a substantial financial hardship for many of those best qualified. One prior panelist noted that a particularly complex case required a substantial commitment of time over a six-month period, all for the princely sum of about $12,000[41]. While many may wish to serve on a panel for the prestige or for the benefit of the system, creating a serious financial hardship for the best possible panelists, who certainly have the option of collecting hundreds of dollars an hour in consulting fees, can only impair the overall quality of the panelists. Given what is at stake, dramatically increasing the fees paid to panelists will have little impact on the WTO's budget, but will help to maintain and improve the quality of panelists.

Another way to improve the independence of the panels is to create independent clerks to avoid undue interference by WTO Secretariat officials.

d. Full-Time Appellate Body Members

The workload of the AB has been quite substantial since its inception. Even though the AB members judge in divisions of 3, they are being informed and participate in discussions concerning all cases submitted for appellate review. At the same time, none of the AB judges is employed full time as judge.

Irrespective of the question of conflicts that might arise from their other professional occupation, the necessary by product of the existing arrangement is that a heavy burden is placed on the shoulders of the AB Legal Affairs Division. Strict deadlines, important workload and part-time judges are not a guarantee for successful outcomes. Since the first two elements seem to be inflexible (there is no willingness to renegotiate deadlines, and after 10 years of experience we have stabilized at 7-8 cases *per* year)[42], it is high time that the WTO Membership rethinks the current arrangement and start contemplating the introduction of permanent judges for the same reasons explained above for the establishment of a permanent panel system.

e. Publication of Dissenting Opinions

The DSU currently provides that "*panel deliberations shall be confidential*" and that "*opinions expressed in the panel report by individual panelists shall be anonymous*." [43] The practice has developed such that panel decisions very rarely indicate any type of disagreement among individual panelists, although such disagreement is reportedly quite evident at panel hearings.

In fact, over fifty years of GATT and WTO jurisprudence failed to elicit even a single dissent[44]. Of course, such a system may have been more appropriate in the old diplomatic model of dispute

settlement, but it has no place in a "world trade court". In the WTO, this is another important restraint on the transparency and rational legal development of the DS process.

In domestic US law, the publication of dissents plays an important function in the development of jurisprudence. Dissents often contain a philosophy that can alter the course of legislative enactment or possibly even drive the call for a constitutional amendment.

Encouragingly, the WTO has more recently had to take cognizance of dissenting viewpoints (*e.g* in *US-German Steel CVDs*[45] the full dissenting view of an unnamed member of the panel was published as part of the panel's report)

It is apparent from the above that the publication of dissent would be a positive step forward and, in certain respects, would validate the dissenting viewpoint.

II. Enhancement of Consultations and Alternatives to Litigation

How can we give negotiations a better chance? In view of the ongoing trade wars between the US and the EC, it may be useful to distinguish the role that negotiations can play *before*, *during*, and *after* the litigation stage, as well as to deal separately with certain forms of negotiation that can be resorted to as full-fledged alternatives to litigation, including negotiations *outside* the process of DS.

In this regard, the Congress mandated "*to seek provisions encouraging the early identification and settlement of disputes through consultation*".

a. Negotiations Before The Litigation Stage

Consultations *must* be requested *before* a panel can be established. In most cases, such formal DSU consultations will be preceded by informal discussions or consultations that failed to settle the dispute. As a result, formal DSU consultations are as much a final attempt to settle a dispute as a prelude to the litigation stage during which the parties can clarify their positions and fact-finding or discovery can take place. Another reason why the consultation phase remains important is that it may serve as a safety valve to let off domestic pressure to take a dispute seriously. Requesting formal WTO consultations demonstrates the resolve of the complaining WTO Member, both towards its own domestic constituency and the defendant.

Consultations, in contrast with the proposal made by the US in previous stages of negotiations, should be strengthened so as to enhance the chances of a settlement. Several elements may contribute to achieve this end.

First, it is important that consultations remain, in contrast with litigation, confidential. In addition, if either of the parties so wishes, the consultations should be held exclusively as between the two WTO Members involved, without the involvement of third parties (which is currently the practical effect of Article 3.11 of the DSU).

Second, a delicate balance must be found as between (i) the abovementioned advantages of keeping consultations confidential and purely bilateral and (ii) the need to ensure that consultations and ultimate settlements are set in the broader multilateral context of the WTO.

The latter objective is currently aimed at the following: all settlements must be notified to the WTO and must be consistent with WTO rules, in particular the rights of third parties. In addition,

Article 3.11 of the DSU provides for third parties to participate in certain consultations under certain conditions (in essence, the agreement of the defendant).

Third, to facilitate settlements it may be useful to make them subject to the WTO DS mechanism. Currently, in the event a Member does not respect a settlement, the other Member can only pursue the original case that it intended to bring in the first place (*i.e.* a complaint of a violation of WTO rules). The settlement itself is not a part of those WTO rules or "WTO covered agreements." In order to make settlements more attractive, one could, therefore, allow WTO Members to bring claims under those settlements before a WTO panel. However, a major caveat should then apply: only settlements that do *not* infringe upon the rights of other WTO Members, not a party to the settlement, can be judicially enforced[46].

Fourth, in order to facilitate both the settlement and the discovery function of consultations, Members could be advised to appoint a mediator or independent third party to assist them in coming to a settlement or in getting out the facts and arguments in the dispute. Even for big trading partners an independent fact-finder may help to bring the case forward (this could be the case especially in highly technical or scientific disputes, such as the *Genetically Modified Organisms* case). In asymmetric disputes, however, involving a big player and a developing country, for example, it may be more fruitful to appoint a mediator or independent fact-finder. Article 5 of the DSU provides for "*good offices, conciliation and mediation*" which may be requested "at any time by any party to a dispute."

However, these alternative modes can only be triggered once *both* parties agree to have them. The only exception is provided for "*cases involving a least-developed country Member*" in which the

LDC can unilaterally request that the Director-General of the WTO or the Chairperson of the DSB offer their good offices, conciliation, or mediation.

This right to have good offices, conciliation, or mediation should be extended to *all* WTO members.

b. Negotiations During The Litigation Stage

Even during the panel or AB stage, a convergence of positions may emerge under which a settlement becomes once again more likely. In many cases, however, the dispute will then have become so litigious and polarized that, although a serious window of opportunity seems to open up, no actual consultations take place. In those cases, panels or the AB could get more actively involved in facilitating a settlement by changing hats and becoming more of a mediator for a predetermined period of time. Alternatively—and perhaps better so as to avoid later claims of partiality of panel members in case the mediation fails—panels could decide to appoint a third party as mediator.

One could think, for example, of panel-appointed experts who could, in addition to explaining the evidence to the panel, also play an important role as facilitators in resolving a highly technical or scientific dispute.

Finally, it should be recalled that the so-called interim review stage—in which the panel sends out its interim findings for comments by the parties before it sends out its final report to all WTO Members—could constitute an important gateway to a last minute settlement. Sometimes the Member that is found to have lost the dispute in the interim report may, indeed, prefer to settle

the case, and also the winning party may see benefits in settling, thereby avoiding the report becoming public.

Consequently, the joint Chile-US proposal[47] on the possibility of partial adoption of reports should be upheld and vigorously pursued.

c. Negotiations After The Litigation Stage

In an increasing number of cases the dispute lingers on after the report adoption, with the defendant not changing anything (*e.g.* the *Hormone Beef Case*[48]) or enacting a new regime, which is then, once again, challenged (*e.g.* the *Bananas*[49] saga, the *Aircraft*[50] conflict and the *FSC*[51] dispute). The limited nature of WTO remedies contributes largely to these instances of non-compliance.

In addition, the sensitive nature of many of these disputes can make a judicial solution increasingly unlikely so that negotiations are often the only way out.

However, no formal structure is provided for post-litigation negotiations. The following elements may facilitate such negotiations, be they bilateral or multilateral.

First, it should be made explicit that consultations *must* be requested before bringing a so-called implementation case in which the WTO consistency of an implementing measure is examined. New implementing measures are often completely new regimes so that consultations on them are as crucial as consultations preceding standard panels.

Second, the role of the DSB as a multilateral compliance body should be enhanced. The DSB should, indeed, more actively monitor compliance and provide for both more effective sanctions

and positive incentives to achieve implementation. Lessons could be learned here from multilateral environmental or human rights monitoring systems[52].

Obtaining compliance with WTO rules should not be a burden borne only by the complainant. It should be seen as something that is in the interest of all WTO Members so that all WTO Members must be expected to actively participate in the process. In order to get a more active DSB, its decision-making rule of positive consensus ought to then be changed to, for example, three-fourths majority.

In some cases (*e.g.* the *Bananas* saga), in order to end a dispute, a waiver may be needed. In other words, full compliance should not always be an absolute must (as it is, for example, in human rights cases); if trade concessions can be realigned in such a way that all interested parties can agree to them, the WTO system should be flexible enough to accept such realignment as a settlement to the dispute. This is explicitly set out, for example, in the tariff renegotiations clause of the GATT.

Third, in cases in which litigation has not worked and negotiations have failed, thought may be given to bring in a neutral mediator pursuant to Article 5 of the DSU.

d. Negotiation or Arbitration as an Alternative to Litigation

Article 25 of the DSU provides for "*expeditious arbitration within the WTO as an alternative means of dispute settlement*." It does so, once again, only upon the agreement of *both* parties. So far, Article 25 has only been used once, and only to settle a disagreement about the amount of nullification caused by a WTO regime that was previously found to be inconsistent, hence not as a genuine alternative to normal DSU procedures.

Whereas arbitration under Article 25 of the DSU may offer an attractive alternative to the panel process in special types of cases—such as detailed scientific disputes in which the parties may want to have the case decided by scientific experts or scientific considerations or extremely urgent cases or disagreements for which no specific DSU procedures are provided, such as in the *U.S. Copyright Case*[53]—generally speaking, it does not seem that special arbitration has a bright future in the WTO.

Finally, outside the strict bounds of dispute settlement, it should be recalled that the WTO has at least two other negotiation tracks that can be used to diffuse potential disputes: (i) the WTO's Trade Policy Review mechanism, pursuant to which the WTO Secretariat conducts a general overview of the trade policies in place in a particular WTO Member. This is done every few years for the big players and less frequently for smaller players. It gives all WTO Members the opportunity to question particular policies enacted by other WTO Members. Although no legal value is attributed to these reports, they may lead to the straightening out of disagreements; (ii) the WTO has a multitude of notification requirements in place. Upon notification of a new measure, other WTO Members can then start discussions on it. Especially in those cases in which proposed legislation must be notified for comments by other WTO Members before it is actually enacted—such as under the Agreement on Technical Barriers to Trade— a good opportunity is offered to work out differences even before a concrete trade dispute arises. Moreover, any WTO Member may raise an issue of concern to any of the specialized WTO committees, composed of all WTO Members (be it the Council for Trade in Services, the Committee on Sanitary and Phytosanitary Measures, or the Committee on Technical Barriers to Trade).

Consequently, the role of WTO political bodies and committees in the diffusion, and even settlement, of disputes should not be underestimated. In this regard, the Congress has mentioned in its mandate the need to strengthen the Trade Policy Review mechanism. A possible proposal to be made in this sense, besides a better periodical release of the reports issues, could be to allow the Secretariat to receive submissions made by private parties –with standing requirements- on incompliance by WTO Members of their obligations.

III. Substantial Adjudication and Sovereignty

The position of the US on the DS reform would not be fully portrayed without paying attention to two significant matters of interest to the US that have stirred a growing concern around the DS as witnessed through the evolution of the negotiations described above: (i) the clash between sovereignty and the lack of checks and balances in the WTO between its quasi-judicial function and the absence of explicit legislative power and (ii) the standard of review applied by the DS in trade remedy cases.

a. Compulsory DS and Sovereignty: Partial Adoption of Reports

Whether binding DS can work in an international regime with sovereign actors has always been a subject of great debate and concern. An international tribunal cannot afford to deal with sovereign states in the same way in which a municipal tribunal does with private litigants. For, cooperation of the litigant States is an essential prerequisite for successful adjudication of disputes. To secure their cooperation their sovereign sensibilities have to be respected.

In the WTO, the system is characterized by a fundamental imbalance between the credence afforded WTO DS decisions, and the absence of any legislative decision-making process. WTO

decisions are routinely touted by academics, lawyers, and some governments as the "law" even though WTO dispute settlement clearly does not live up to the democratic requirements of a "law- making" body, in terms of both its institutional structure and rules of procedure.

Nevertheless, despite the requests made by some practitioners[54] to come back to a more diplomatic DS model or even to introduce, as suggested by Barfield[55], a procedure through which a group of countries (at least one third of DSB members, representing at least one quarter of total trade among WTO members) could block the adoption of a report, sovereignty concerns similar to those that are currently voiced against allegedly overreaching DS would ultimately be raised against undesired outcomes of voting procedures as they would eventually force results upon countries which the latter cannot or do not want to accept.

As a result, the most reasonable proposal at this stage of negotiations should be the one already tabled jointly by Chile and the US: leaving room to a partial adoption of reports, since the US still-existing leverage in foreign policy should give raise to downgrade the most negative consequences of DS decisions for US interest.

b. Standard of Review of US trade remedies: the reasons to defend before the Congress the preservation of the *status quo*

Although US trade remedy laws suffer from a negative image throughout international trade circles, some perspective through statistics is in order to somewhat demystify this connotation. From 1980 to 2003, of the 1510 antidumping (AD) and countervailing (CVD) duties investigations filed with the Department of Commerce and the International Trade Commission only 37% have resulted in an affirmative determination (thus imposing duties). Moreover, of the

$14 trillion dollar value of imported goods during this period, only $56 billion or 0.4% of the total has been subjected to either antidumping or countervailing duties[56].

Consequently, although trade remedy laws can be legitimately viewed as suspect on economic grounds as well as "at best" a second-best result, it is difficult to argue against the proposition that, if there is any country justified in using trade remedies, it is the US. The AD and CVD, and specially the safeguards –rarely used despite their less damaging character for trade- may be considered legitimate instruments to act as a safety valve to reach further liberalization in successive rounds.

Concerning specifically the DS review of these duties, the last trends, consisting of US duties being reversed by the AB, seem to suggest, according to several commentators[57], that the deference to national administering authorities on both factual and (especially) legal/interpretative issues expected from the WTO -according to the proper reading of the WTO agreements- is absent from the DS bodies.

This outrage in the domestic political scene is undue and disproportionate. Suffice to check how NAFTA panels, dealing with the US –not an internationally agreed standard of review- internal standard of review, reached the same adverse findings for the US as the WTO (*e.g.* in the *softwood lumber* cases[58]).

In addition, the reliance on AD and CVD measures has unintentionally created a "monster of sorts".

Recently, there has been a proliferation of antidumping laws enacted by developing countries. Accordingly, US exports are increasingly facing antidumping proceedings and are being

imposed antidumping duties in many developing countries that already have higher than average tariffs. The administration of the laws and investigations are much less transparent, more arbitrary and "less justified" in countries which already have relatively high trade barriers. What is particularly worrisome is that, unlike China, Japan, Korea and Russia, which arguably have lower production costs and higher state intervention and protected industries conducive to a finding of dumping or subsidization, US exporters are now one of the most targeted groups, even though it would seem unlikely that US domestic industry would be selling goods below the costs of production or being subsidized at such a rate warranting countervailing duties[59].

As a result, a US position with a vision should be, in light of the foreseeable wave of AD and CVD imposed on US exports, to keep the DS as a guardian of the market access for US exports. The fact that the US will not yet favor in the Doha Round (i) the introduction of retroactive remedies; (ii) the shortening of deadlines for DS proceedings or (iii) the suppression of retaliation as the only available remedy for the resolution of disputes, leaves room for a US efficient breach of the DS decisions, which should be enough to bring peace to the Congress concerns.

In any case, in this particular issue, the present administration must exercise leadership both at home and abroad to avoid the trade remedy issues becoming a high point in the agenda.

IV. Doha Round: The Development Commitment

Taking into account the specific development orientation of this round, developing countries should be given a special attention, particularly the LDCs. A clear support for their progressive integration in the DS system is present through the following recommendations, which are not

only in their interest but also for the sake of facilitating consensus on US proposals and key interests.

a. Improving the Rights of LDCs to Effective Representation: Increased Funding & Technical Assistance

The lack of availability of top-flight counsel, or ability of LDCs to pay for such counsel, should be urgently addressed.

A number of proposals have been offered to improve LDCs participation in the WTO dispute settlement process. Venezuela proposed the establishment of a trust fund to finance the hiring of defense counsel to assist developing countries in dispute settlement proceedings before the WTO[60]. The UN Conference on Trade and Development (UNCTAD), recognizing the importance of the dispute settlement process to LDCs, proposed an extensive training program for individuals from LDCs[61].

These are important efforts that should be zealously pursued, although the support by the US for Venezuela's proposal should not be limited to defense counsel. After all, the inability to enforce rights is equally deleterious to the inability to defend them.

Technical assistance should be pursued both through US Bilateral Aid programs and directly through the support for the tasks undertaken since 2001 by the Advisory Center on WTO Law[62]. US should accede to the founding treaty and provide increased financial support to its limited resources.

Another problem that often arises for developing countries (in particular those that do not have a permanent representation at the WTO) is a lack of resources to conduct consultations, an exercise that mostly takes place in Geneva. Subsequently, support by the US should also be given to the LDC Group proposal[63] suggesting that in disputes involving least-developed country Members it should be possible to hold consultations in the capital of that Member, rather than in Geneva.

b. New remedies for LDCs: Monetary Compensation

In this field, one of the major obstacles for LDCs for a full integration in the DS system is the lack of market power to enforce favorable decisions. Although the US should plainly reject the proposals tabled to allow collective retaliation (Mexico, African Group), since it might lead to polarization and escalation into trade wars, the US could take the lead in a significant initiative to support the existence the existence of monetary fines (if not generalized at least available for LDCs when winning plaintiffs). Taking into account the size of the LDCs economies, it should not create a major risk for the US and would certainly grant a positive attitude towards the US commitment to development through trade.

3.2. Post-Doha Round: Long Term

I. Success in Doha

In the event the Doha Round ends with a successful outcome –not only proclaimed as such but objectively so-, the WTO will be mature in my view to start thinking on introducing a second and decisive step in achieving the rule of law in the system: judicial enforcement. There is no law without remedy. Retaliation equals in basic law education to the absence of law. And despite the fact that the current system may be seen as benefiting large countries such as the US, it would

certainly proved flawed and unuseful in case there is the need to enforce the achievements of the Doha Round in terms of market access for US exporters. Retaliation could lead in that scenario to a proliferation of trade wars due to the emergence of new big trading partners such as China, India, Brazil, etc.

This will undoubtedly be the ground to justify domestically the need for reforming the DS in the long run. In any event, it must be noted that the TPA mandate already foresees –although the current political moment is not adequate to request the Congress such a support- the introduction of "*penalties as a mean of encouraging compliance*".

a. Enforcement: Financial and Tariff Compensation

Although the system so far has proven quite effective, it suffers from significant flaws. If no agreement on compensation (trade concession) is reached the only practical remedy for sanctions of the WTO DS consists of allowing the complainants to impose tariff measures. The present tariff sanction system is questionable for several reasons[64]:

- it is counterproductive because it leads to trade contraction and, hence goes against the very trade liberalizing principles of the GATT/WTO;
- retaliation does not bring relief to the exporters injured by the WTO-illegal measures;
- trade retaliation damage also innocent bystanders (external side-effects);
- existing remedies are unwieldy; the more trade of a country is affected by WTO-illegal measures, the more difficult it is to find imports that can be restricted without hurting consumers.

A much more efficient and easier retaliation instrument than tariffs would be direct transfers from the government of the non-complying country to the government of the country having got

the authorization of compensation by the WTO. The latter government could than easily redistribute the received transfers to the companies which suffered the concrete loss.

This "financial compensation" is not a novel idea: reparation by governments of injury for which they can be held responsible is part of the tradition of public international law. It was already proposed in the GATT in 1966[65] and was also proposed more recently in the WTO but did not collect sufficient consensus. Such a transfer or financial compensation scheme has several advantages over the present tariff-ridden retaliation system. It solves more or less all the problems inherent in the retaliation system by tariffs. This method of retaliation would come closer to the ideal of "rebalancing" because there would be no negative external and distorting effects as with a tariff. The DSU would have to be amended in accordance with this proposal.

There are other suggestions put forward to be an alternative to financial compensation or penalties. Some relevant voices plead for tariff compensation. The defendant could choose between a financial compensation and tariff compensation in other sectors not involved in the dispute.

Compensation could come in the form of a temporary lowering of the respondent's import barriers on some other products, which should be offered on a most-favored-nation (MFN) basis. Instead of the restrictive effect of retaliation to both countries involved in the trade dispute, compensation in this form would simply mean trade liberalization. The concept of compensation would not only favor the complainant but also third countries and by granting compensation, the respondent would gain greater control of procedures. In practice, however, compensation is hardly ever offered because it is very difficult for countries to find and offer compensatory reductions of trade restrictions.

II. Unsucessful Doha Round: Reform on the Move

According to the more recent news[66], there is a growing concern that the US Administration has given up its political expectations of a successful round. If these interpretations come true, the WTO will likely enter in a political *impasse* of unknown consequences.

In any case, the real significance of the DS as a dynamic system is that when negotiations on the DS review have been stalled, practical solutions have been found to some of the problems in what could be called a "DSU reform in practice". It includes practical actions both by Members and by the adjudicating bodies to further develop the system and to come to terms with the problems in its application, as the following examples show.

Firstly, the *sequencing* problem has been overcome by the conclusion of bilateral agreements between the Members during the implementation stage. These agreements allow Members to overcome the gaps and contradictions in the DSU text in a practical way. Whereas there has not yet been a consensus to adapt the DSU text to this evolving practice, Members have adapted to the bilateral agreements and no longer appear to consider the sequencing issue as a pressing concern.

Secondly, with regard to *amicus curiae* briefs, the AB has *de facto* developed a very pragmatic approach, despite initially strong opposition from mostly developing countries. On the one hand, the AB displays a general openness towards the acceptance of *amicus curiae* briefs. On the other hand, it does not appear to accord decisive weight to these submissions in its decisions – at least not explicitly. This approach gives adjudicating bodies a maximum of flexibility while it respects the concerns of Members who are against such briefs.

Thirdly, on a related matter, the AB has found a response to the concerns of many Members who held that the acceptance of *amicus curiae* briefs gave NGOs an edge over Members, as the latter had to cope with restrictive requirements on third country participation. It relaxed these requirements by adopting new working procedures in late 2002 which give third parties the possibility of attending oral hearings even if they had not made a written submission prior to the hearing, as the old rule had required.

As these examples show, Members and adjudicating bodies manage to adapt the dispute settlement system to changing circumstances without changing one single provision of the DSU. DS practice has thus brought some amount of DSU reform, without facing the problems of political renegotiations of the DSU text. In other terms, the system seems to build once more on its historic strength, which is to evolve with a certain degree of flexibility and in a pragmatic spirit. We should not be surprised if, as in the past, these elements of evolving practice were to be codified into a new or modified text at a later date.

As a result, in case of Doha Round failure, the US will need to devote as much, if not more, resources to the DS if they want to keep the WTO alive waiting for better times.

3.3. Strategy in use of the WTO Dispute Settlement

I. Trade wars with the EC: Recourse to Alternative Settlement of Disputes

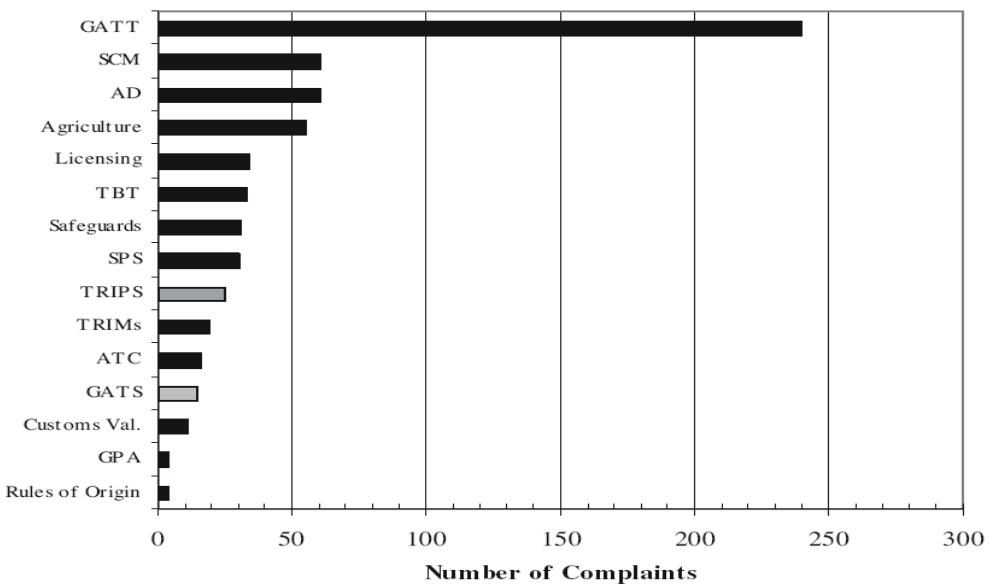
As mentioned above regarding the increased recourse to consultations and negotiations, the US should assume its systemic responsibility by exercising restraint in bringing politically difficult cases to adjudication, especially to avoid the worrisome arms race dynamic with the EC.

Although the *FSC* case has initially been considered a sensible setback in monetary terms and raised a lot of political discontent in the US Congress, efforts should be made to settle at the highest political level this case, whose impairment amount after the latest developments and the approval of the Extraterritorial Income Act has been reduced to $700 million, an amount concerning mainly Boeing and intrinsically connected to the dispute on Airbus subsidies by the EC[67]. It does not make sense to keep tensions on both issues since a reasonable trade off could be achieved between both cases.

II. Increased use of other strategic WTO Agreements for the US: GATS & TRIPS.

Taking into account that the number of disputes in which a violation of the GATS or the TRIPS Agreement was argued has been relatively low to date (2% and 4% of the cases respectively, *see* Graph 3 below), the US should increasingly focus on these, since they are agreements of strategic commercial interest for its industries, specially the first, in light of the need of further services liberalization in the framework of the Doha Round.

Graph 3 Agreements whose Provisions were Subject to Litigation (1995–2004)[68]



III. New DS targets: China and emerging developing countries

The US should use all available tools, including recourse to DS, to hold trading partners accountable of their commitments, specially, given its growing integration in and profit from the WTO legal framework, China.

In this regard, U.S. Trade Representative Rob Portman announced 20 days ago that the US requested WTO dispute settlement consultations with China due to its unfair treatment of U.S. auto parts:

> "*As a mature trading partner, China should be held accountable for its actions and be required to live up to its responsibilities*"[69].

The US brought the only previous WTO case against China. That dispute, involving China's tax rebate on semiconductors, was resolved during the consultation phase. A second dispute, involving China's antidumping duties on kraft linerboard, was resolved on the day the US was to initiate the dispute, following notice to China that the dispute would be filed.

This new target strategy[70] should be mantained and extended to other emerging developing countries, such as India and Brazil.

In any case, emphasis should always be put on the fact that these disputes are not raised in a political level but more at a technical level, to avoid unnecessary diplomatic frictions.

IV. Enforcement of Labor and Environmental Standards Through Litigation

Following the Congress concern on labor and environmental issues[71], and despite the high difficulties in seeking explicit provisions in the WTO Agreements to introduce labor and environmental standards as an exception to trade disciplines, the case-law of the WTO increasingly promotes a broad and flexible approach to the definition of the general exception clauses. Importantly, the evolutionary approach adopted for the interpretation of environmental norms in the *Shrimp/Turtle* case, should support arguments seeking the recognition of the modern-day status of labor and environmental norms and standards, especially the internationally agreed.

Moreover, despite the reluctance of the US institutions to have an inclusive and not fragmented vision of public international law, the USTR should take into account in its litigation roadmap the statement made by the WTO AB in another US case[72], laying down that:

> "(…) *WTO law cannot be read in clinical isolation from public international law.*"

4. Conclusions

The first ten years of dispute settlement practice under the DS have confirmed the usefulness of the WTO DS system: except for recent examples of sensitive slowdown in the US interest (*e.g. FSC*, *Byrd*) which is yet too early to interpret, the mechanism has been used actively, and the perception by both US practitioners and academic observers has generally been positive.

The US Administration should have the vision to see that a defensive approach to the DS is not in the best interest of its country. Taking into account the fact that the WTO holds an

unprecedented compulsory DS in the international arena, it is an extraordinary opportunity to prove that the US is internationally committed to the rule of law, in accordance with its historic domestic commitment to such principle. That said, the improvements to be made to the WTO DS system in its litigation dimension should go together, both in reforms and use of the system, with a growing awareness of its limitations and the need to emphasize the systemic responsibility of Members not to undermine the DS credibility and legitimacy by strengthening the institutional capacities of the WTO and the alternative political settlement of disputes.

Whereas such a gradual and eclectic approach may not satisfy the more ambitious observers who would favor clear reforms in either direction – *i.e.* rapidly towards more adjudication and rule-orientation or back to power-orientation and diplomacy – this eclecticism appears at least as a feasible and reasonable option.

And, if judged in the light of past experience with the gradual evolution of the system, it also appears to be the most promising approach: the current DS is the fruit of five decades of gradual development, which was not even free of setbacks. There is no reason to assume why such gradualism should not be adequate for the future as well. If Members and adjudicating bodies continue to assume their responsibilities for the system, the DS should continue to remain an attractive forum for dispute settlement. If Doha succeeds, the DS will be the ultimate guardian of the achievements. If Doha fails, it could be the engine through which multilateral liberalization of trade still makes progress until the next adequate momentum for further WTO developments.

5. Selected Bibliography

Books and Articles

Anderson, Kym, *Peculiarities of Retaliation in WTO Dispute Settlement*, CEPR Discussion Paper Series, No. 3578, October 2002.

Bagwell, Kyle, Staiger, Robert, W., *The Economics of the World Trading System,* MIT Press: Cambridge and London, 2002.

Bagwell, Kyle, Mavroidis, Petros, C., Staiger, Robert, W., *The Case for Tradable Remedies in WTO Dispute Settlement,* World Bank Policy Research Working Paper, No. 3314, May 2004., *available at* http://ideas.repec.org/p/wbk/wbrwps/3314.html

Bagwell, Kyle, Staiger, Robert, W., *National Sovereignty in an Interdependent World,* NBER Working Papers, No. 10249, 2004a, *available at* http://ideas.repec.org/p/nbr/nberwo/10249.html

Barfield, Claude, FREE TRADE, SOVEREIGNTY, DEMOCRACY: THE FUTURE OF THE WORLD TRADE ORGANIZATION (American Enterprise Institute Press, 2001).

Besson, Fabien, Mehdi, Racem, *Is the WTO Dispute Settlement System Biased Against Developing Countries? An Empirical Analysis*, Paper presented at the 2nd International Conference On: "European and International Political & Economic Affairs", Athens, May 27-29, 2004.

Bown, Chad P., "*Trade Disputes and the Implementation of Protection under the GATT: An Empirical Assessment*", Journal of International Economics, Vol. 62, No. 2, March 2004, 263-294.

Breuss, Fritz, "*WTO Dispute Settlement in Practice – an Economic Assessment*", in: F. Breuss, St. Griller, E. Vranes (Eds.): The Banana Dispute – An Economic and Legal Analysis, Springer: Wien-NewYork, 2003, 131-184.

Breuss, Fritz, "*WTO Dispute Settlement: An Economic Analysis of four EU-US Mini Trade Wars – A Survey*", Journal of Industry, Competition and Trade, Vol. 4, No. 4, December 2004, 275-315.

Breuss, Fritz, *EU-US Trade conflicts and WTO Dispute Settlement*, European Integration Papers, vol. 9 (2005), *available at* http://eiop.or.at/eiop.

Bronckers, Marco, van den Broek, Naboth, "*Financial Compensation in the WTO: Improving the Remedies of WTO Dispute Settlement*", 8 J. INT'L ECO. L. 101 (2005).

Busch, Marc L, Reinhardt, Eric, *Developing Countries and General Agreement on Tariffs and Trade/World Trade Organization Dispute Settlement*, 38 JOURNAL OF WORLD TRADE 719 (2003)

Charnovitz, Steve, *WTO Dispute Settlement as a Model for International Governance,* in ECONOMIC GLOBALIZATION AND COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL AGREEMENTS *(*Ed. Kluwer Law International, 2003).

Diego-Fernandez, Mateo, *Compensation and retaliation: a developing country's perspective*, Working Paper for Columbia Law School Seminar, November 8, 2005.

European Commission, *General Overview of Active WTO Dispute Settlement Cases Involving the EC as Complainant or Defendant, 10 June 2005*, Brussels, 9 June 2005.

Holmes, Peter, Rollo, Jim, Young, Alasdair R., *Emerging Trends in WTO Dispute Settlement*, World Bank Policy Review Working Paper 3133, Washington, September 2003, *available at* http://ideas.repec.org/p/wbk/wbrwps/3133.html

Horn, Henrik, Mavroidis, Petros, C., Nordström, Hakan, "*Is the Use of the WTO Dispute Settlement System Biased?",* CEPR Discussion Paper, No. 2340, London, December 1999.

Howse, Robert, *The most dangerous branch? The limits and role of the judicial power in the WTO*, in T.Cottier and Petros C. Mavroidis, THE ROLE OF THE JUDGE IN INTERNATIONAL TRADE REGULATION: EXPERIENCE AND LESSONS FOR THE WTO (Univ. Michigan Press, 2003).

Hudec, Robert, *The Judicialization of GATT Dispute Settlement*, in IN WHOSE INTEREST? DUE PROCESS AND TRANSPARENCY IN INTERNATIONAL TRADE (Michael M. Hart & Debra P. Steger eds., 1992).

Keck, Alexander, *WTO Dispute Settlement: What Role for Economic Analysis? A Commentary on Fritz Breuss*, 4 JOURNAL OF INDUSTRY, COMPETITION AND TRADE 365 (2004).

Kennan, John, Riezman, Raymond, "*Do Big Countries Win Tariff Wars?*", 29 INT'L ECO. REV. 81 (1988).

Kohler, Wilhelm, "*The WTO Dispute Settlement Mechanism: Battlefield or Cooperation? A Commentary on Fritz Breuss*", 4 JOURNAL OF INDUSTRY, COMPETITION AND TRADE 317 (2004).

Mavroidis, Petros, C., *Remedies in the WTO Legal System: Between a Rock and a Hard Place*, in: M. Matsushita, P.C. Mavroides, T.J. Schonbaum (Eds.): THE WTO LAW AND PRACTICE, London, 2001.

Mavroidis, Petros, C., *Legal eagles? A look into 10 years of AB case-law*, Columbia University Conference, WTO at 10, Working Paper, at 30, available at http://www.sipa.columbia.edu/wto.

Ortino, Federico, Petersmann, Ernst-Ulrich (Eds.): THE WTO DISPUTE SETTLEMENT SYSTEM 1995-2003, Studies in Transnational Economic Law, Vol. 18, Kluwer Law International: The Hague-London-New York, 2004.

Palmeter, David, Mavroidis, Petros, DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION: PRACTICE & PROCEDURE (Cambridge University Press: Cambridge, U.K., 2004).

Pauwelyn, Joost, Enforcement and Countermeasures in the WTO: Rules are Rules – Toward a More Collective Approach, 94 AM. J. INT'L L. 335.

Pauwelyn, Joost, *The Limits of Litigation: "Americanization" and Negotiation in the Settlement of WTO Disputes, 19* OHIO ST. J. ON DISP. RESOL. 121 (2003).

Petersmann, Ernst-Ulrich, *Foreword: The WTO Dispute Settlement System 1995-2003*, in: F. Ortino, E.-U. Petersmann (Eds.): THE WTO DISPUTE SETTLEMENT SYSTEM 1995-2003, STUDIES IN TRANSNATIONAL ECONOMIC LAW, Vol. 18, Kluwer Law International: The Hague-London-New York, 2004, xvii-xx.

Ragosta, John, *Unmasking the WTO - Access to the DSB System: Can the WTO DSB Live Up to the Moniker "World Trade Court"?* 31 LAW & POL'Y INT'L BUS. 739 (2000).

Ragosta, John, Joneja, Navin, and Zeldovich, Mikhail, *WTO Dispute Settlement: the system is flawed and must be fixed*, 37 INT'L L. 697 (2003).

Rodrik, Dani, *"Political Economy of Trade Policy"*, in: Gene, M. Grossman, Kenneth Rogoff (Eds.): Handbook of International Economics, Vol. III, Elsevier, Amsterdam-Lausanne-New York-Oxford, Shannon-Tokyo, 1995, 1457-1494.

Sek, Lenore, *Trade retaliation: the "carousel" approach*, (Ed. US Congress Research Service, 2002).

Smis, Stefaan and Van Der Borght, Kim, The EU-US Compromise on the Helms-Burton and D'Amato Acts, 93 Am. J. Int'l L. 227 (1999).

Staiger, Robert W., *International Rules and Institutions for Trade Policy,* in: Gene, M. Grossman, Kenneth Rogoff (Eds.): HANDBOOK OF INTERNATIONAL ECONOMICS, Vol. III, Elsevier, Amsterdam-Lausanne-New York-Oxford, Shannon-Tokyo, 1995.

Van den Bossche1, Peter, *The Doha Development Round Negotiations on the Dispute Settlement Understanding,* WTO Conference *New Agendas in the 21st Century*, Working Paper, Taipei, November 2003, *available at* http://www.worldtradelaw.net.

Zimmermann, Thomas A., *WTO Dispute Settlement at Ten: Evolution, Experiences, and Evaluation*, 60 SWISS REV. INT'L. ECO. REL. 27 (2005)

Newspaper Articles

FINANCIAL TIMES, *Challenge to Beijing at WTO*, March 31, 2006.

FINANCIAL TIMES, *Personnel changes raise doubts about US commitment to Doha round of trade talks*, April 19, 2006.

INSIDE US TRADE, *EU poised to reinstate FSC retaliation*, February 24, 2006.

Jon Entine (American Enterprise Institute for Public Policy Research), *Let them eat precaution: Beyond the WTO decision on GMOs*, NATIONAL REVIEW ONLINE, February 8, 2006.

John Vidal, *America's masterplan is to force GM food on the world*, THE GUARDIAN, February 13, 2006.

Press Releases, Speeches and Statements

Alan Wolff, *Major Problems with WTO Dispute Settlement*, Speech at the *Global Business Dialogue*, Washington D.C., September 26, 2002.

International Chamber of Commerce, *Proposals for improvement to the Dispute Settlement Understanding*, March 7, 2003, available at http://www.iccwbo.org/policy/trade.

James Bacchus, *Open Doors for Open Trade: Shining Light on WTO Dispute Settlement*, Remarks to the National Foreign Trade Council, Mayflower Hotel Washington D.C., 29 January 2004, *available at* http://www.worldtradelaw.net/articles/bacchusopendoors.pdf.

John Magnus, *WTO Dispute Settlement and Trade Remedies: Did We Get What Negotiators Wanted?*, presented at the Dartmouth-Tuck Forum on International Trade and Business, *Managing Global Trade: The WTO – Trade Remedies and Dispute Settlement,* Washington, DC, May 16, 2003, *available at* http://www.dbtrade.com/publications/did_we_get_what.htm.

Max Baucus (Ranking Member of the U.S. Senate Committee on Finance), *Baucus comments on WTO Ruling on U.S. Tax Law,* Press Release, October 3, 2005.

Max Baucus (Ranking Member of the U.S. Senate Committee on Finance), *Baucus welcomes reports of WTO Decision on EU's genetically modified organisms moratorium*, Press Release, February 7, 2006.

OXFAM, *WTO: Loaded against the poor*, Position paper, 2002, *available at* http://www.oxfam.org.

State Department Press Release, *Senator Baucus on WTO Dispute Settlement Negotiations (Democrat views system now tilted unfair against the U.S.)*, April 16, 2002.

Susan S. Westin (Associate Director, International Relations and Trade Issues, National Security and International Affairs Division) *U.S. Experience in Dispute Settlement System: The First Five Years*, Testimony Before the Subcommittee on International Trade, Committee on Finance, U.S. Senate, 20 June 2002, *available at* http://www.gao.gov/cgi-bin/getrpt?GAO/T-NSIAD-00-86.

US Trade Representative Press Release, *United States proposes greater openness for WTO Disputes*, August 9, 2002.

US Trade Representative Press Release, *United States proposes flexibility reforms in WTO Dispute Settlement*, , December 16, 2002.

US Trade Representative Press Conference, *Meeting with Pascal Lamy, EC Trade Commissionner*, March 3, 2003.

U.S. House of Representatives Press Release, "*Rep. Spratt criticizes WTO Decision on Anti-Dumping remedy, calls on Administration to strike back*", January 16, 2003.

US Official Documents

Annual Report of the President of the United States on the Trade Agreements Program 2005, *available at* http://www.ustr.gov.

US Trade Policy Agenda 2006, *available at* http://www.ustr.gov.

USTR Dispute Settlement Update, November 15, 2005, *available at* http://www.ustr.gov

USTR *Report on U.S. - China Trade Relations: Entering a New Phase of Greater Accountability and Enforcement, available at* http://www.ustr.gov.

US International Trade Commission, *Import Injury Investigations* (1980-2003), *available at* http://www.usitc.gov/trade_remedy/USITC_Stat_Report-11-04-PUB.pdf.

Report to the Congress Transmitted by the Secretary of Commerce (Revised version), *Executive Branch Strategy Regarding WTO Dispute Settlement Panels and the Appellate Body*, December 30, 2003, available at htpp://www.senate.gov.

WTO Disputes
(All documentsare available at http://www.wto.org)

Brazil—Export Financing Programme for Aircraft, WT/DS46, July 21, 2000.

Canada—Measures Affecting the Export of Civilian Aircraft, WT/DS70, August 2, 1999.

Canada—Export Credits and Loan Guarantees for Regional Aircraft, WT/DS222, February 17, 2003.

Communication by the EC to the General Council, Request for an Authoritative Interpretation Pursuant to Article IX.2 of the Marrakesh Agreement Establishing the World Trade Organization, WT/GC/W/143.

European Communities – Measures Concerning Meat and Meat Products (Hormones), T/DS26.48/AB/R, 13 February 1998.

European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU: Decision by the Arbitrators (USA case), WT/DS27/ARB, 9 April 1999.

European Communities – Measures Concerning Meat and Meat Products (Hormones) – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU: Decision by the Arbitrators (USA case)", World Trade Organization, WT/DS26/ARB, 12 July 1999.

European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R, 5 April 2001.

United States –Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, 20 May 1996.

United States – Import Prohibition of Certain Shrimps and Shrimp Products, WT/DS58/AB/R, 6 November 1998.

United States – Tax Treatment For "Foreign Sales Corporations", WT/DS108/AB/R, 20 March 2000.

United States – Anti-Dumping Act of 1916, WT/DS136/R/DSR 2000:X 4593, DSR 2000:X, 4831 (Panel); WT/DS136.162/AB/R, DSR 2000:X, 4793

United States – Section 110(5) of the U.S. Copyright Act, Recourse to Arbitration Under Article 25 of the DSU, Award of the Arbitrators, WT/DS160/ARB25/1, November 9, 2001.

United States – Tax Treatment for "Foreign Sales Corporations", Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement: Decision of the Arbitrator, WT/DS108/ARB, 30 August 2002.

United States--Preliminary Determinations With Respect To Certain Softwood Lumber from Canada, WT/DS236/R, September 27, 2002.

United States – Continued Dumping and Subsidy Offset Act of 2000, WT/DSD217.234/AB/R, 27 January 2003

United States – Continued Dumping and Subsidy Offset Act of 2000, Recourse to Arbitration by the United States und Article 22.6 of the DSU: Decision by the Arbitrator, WT/DS217/ARB/EEC, 31 August 2004.

WTO Documents

WTO, *Doha Ministerial Declaration*, WT/MIN(01)/DEC/1, Doha, 20 November 2001.

WTO, *World Trade Report 2003*, Geneva, 2003.

WTO, *World Trade Report 2005*, Geneva, 2005.

WTO Special Session – Negotiations on Improvements and Clarifications of the DSU

Communication by the European Union, TN/DS/W/1, March 13, 2002.

Proposal by Ecuador, TN/DS/W/9 and TN/DS/W/33

Proposal by the Least Developed Countries (LDC) Group, TN/DS/W/17, October 9, 2002.

Proposal by the African Group, TN/DS/W/15, and TN/DS/W/42.

Proposals by Mexico, TN/DS/W/23, Geneva, November 4, 2002 and TN/DS/W/40

Proposal by Chile and US, TN/DS/W/28, December 23, 2002.

Proposal by Brazil, TN/DS/W/45.

Communication from the European Union, TN/DS/W/38, January 23, 2003.

Chairman Text, Compilation of Draft Text Proposals, JOB(3)10/Rev.3, Geneva, 17 March 2003.

End References

[1] Joost Pauwelyn, *The Limits of Litigation: "Americanization" and Negotiation in the Settlement of WTO Disputes, 19* OHIO ST. J. ON DISP. RESOL. 121, 122 (2003).
[2] Trade Act, 19 U.S.C. § 3801 (2002), Sec. 2102 "Negotiating Objectives".
[3] WTO, *Understanding on Rules and Procedures Governing the Settlement of Disputes*, *available at* http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm#Top
[4] The last deadline missed so-far had been set for May 2004. As part of the so-called "July package" adopted on 1 August 2004, the mandate to continue the negotiations in the framework of the Doha Round launched in 2001 has been renewed, however, without a new deadline being set.
[5] Peter Van den Bossche1, *The Doha Development Round Negotiations on the Dispute Settlement Understanding,* WTO Conference *New Agendas in the 21st Century*, Working Paper, Taipei, November 2003, *available at* http://www.worldtradelaw.net.
[6] Thomas A. Zimmermann, *WTO Dispute Settlement at Ten: Evolution, Experiences, and Evaluation*, 60 SWISS REV. INT'L. ECO. REL. 27 (2005), at 41.
[7] Communication by the EC to the General Council, WT/GC/W/143: *Request for an Authoritative Interpretation Pursuant to Article IX.2 of the Marrakesh Agreement Establishing the World Trade Organization*.
[8] Trade and Development Act (P.L. 106-200) (2000).
[9] Thomas A. Zimmerman, *supra* note 6, at 43.
[10] *Ibid*.
[11] Peter Van den Bosschel, *supra* note 5, at 13.
[12] Thomas A. Zimmerman, *supra* note 6, at 44.
[13] *Ibid*.
[14] The respective amounts were $ 191.4 million in *EC – Bananas* and $ 116.8 million in *EC – Hormones.*
[15] Graph by Thomas A. Zimmerman, *supra* note 6, at 44, based on WTO data: WT/DS/OV/22 and Internet: http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (downloaded 15 January 2005).
[16] Graph by Thomas A. Zimmerman, *supra* note 6, at 45, based on WTO data: WT/DS/OV/22 and Internet: http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (downloaded 15 January 2005).
[17] Peter Van den Bosschel, *supra* note 5, at 15.
[18] *See* TN/DS/W/28 (U.S., Chile) for the conceptual proposal, and TN/DS/W/52 (U.S., Chile) for the textual proposal.
[19] Thomas A. Zimmerman, supra note 6, at 46.
[20] *See* TN/DS/W/1, No. I (EC).
[21] John Ragosta, Navin Joneja and Mikhail Zeldovich, *WTO Dispute Settlement: the system is flawed and must be fixed*, 37 INT'L L. 697 (2003), 739.
[22] See TN/DS/W/15, No. 6, and TN/DS/W/42, No IX (both submitted by the African Group) as well as TN/DS/W/17 (LDC Group).
[23] *See* TN/DS/W/23 and TN/DS/W/40 (both submitted by Mexico).
[24] *See* TN/DS/W/45 and TN/DS/W/45/Rev.1 (Brazil).
[25] *See* TN/DS/W/9 and TN/DS/W/33 (both submitted by Ecuador).
[26] *See* TN/DS/W/15 and TN/DS/W/42 (both submitted by the African Group).
[27] *See* TN/DS/W/29, No. 1, and TN/DS/W/57, No. 1 (both submitted by China).
[28] *See* TN/DS/9.
[29] *Available at* http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/asset_upload_file816 _5696.pdf.
[30] Susan S. Westin (Associate Director, International Relations and Trade Issues, National Security and International Affairs Division) *U.S. Experience in Dispute Settlement System: The First Five Years*, Testimony Before the Subcommittee on International Trade, Committee on Finance, U.S. Senate, 20 June 2002, *available at* http://www.gao.gov/cgi-bin/getrpt?GAO/T-NSIAD-00-86.

[31] *Ibid*.
[32] *Ibid*.
[33] *Ibid*.
[34] James Bacchus, *Open Doors for Open Trade: Shining Light on WTO Dispute Settlement*, Remarks to the National Foreign Trade Council, Mayflower Hotel Washington D.C., 29 January 2004, *available at* http://www.worldtradelaw.net/articles/bacchusopendoors.pdf.
[35] The then-chairman of the Senate Finance Committee--the leading U.S. lawmaker responsible for trade matters--publicly touted WTO dispute settlement as nothing more than a "kangaroo court." The United States Mission to the European Union, *Senator Baucus Assails Record of WTO Dispute Panel Rulings* (Sept. 26, 2002), *available at* http:// www.useu.be/Categories/WTO/Sept2602BaucusRecordWTORulings.html
[36] *United States--Preliminary Determinations With Respect To Certain Softwood Lumber from Canada*, WT/DS236/R, September 27, 2002.
[37] *See* discussion in John A. Ragosta, *Unmasking the WTO - Access to the DSB System: Can the WTO DSB Live Up to the Moniker "World Trade Court"?* 31 LAW & POL'Y INT'L BUS. 739 (2000), 756.
[38] *See* Communication from the European Union, TN/DS/W/1, 13 March 2002.
[39] *See* John A. Ragosta *et al.*, *supra* note 21, at 739.
[40] *Communication from the European Union*, TN/DS/W/1, March 13, 2002, at 3, and *Communication from the European Union*, TN/DS/W/38, January 23, 2003, at 3.
[41] *See* John A. Ragosta *et al., supra note* 21, at 740.
[42] Petros C. Mavroidis, *Legal eagles? A look into 10 years of AB case-law*, Columbia University Conference, WTO at 10, Working Paper, at 30, available at http://www.sipa.columbia.edu/wto.
[43] DSU, *supra* note 3, art. 14 (1), (3).
[44] *See* John A. Ragosta *et al*., *supra* note 21, at 740.
[45] Report of the Panel, *United States--Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/R (July 3, 2002)
[46] *See* Joost Pauwelyn, *supra* note 1, at 133.
[47] *Supra* note 18.
[48] *European Communities—Measures Concerning Meat and Meat Products*, WT/DS26, January 16, 1998.
[49] *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS16 (Sept. 28, 1995), WT/DS27 (Sept. 9, 1997), WT/DS105 (Oct. 25, 1997), WT/DS158 (Jan. 25, 1999).
[50] *Canada—Export Credits and Loan Guarantees for Regional Aircraft*, WT/DS222, February 17, 2003; *Canada—Measures Affecting the Export of Civilian Aircraft*, WT/DS70 (Aug. 2, 1999); *Brazil—Export Financing Programme for Aircraft*, WT/DS46 (July 21, 2000).
[51] *United States—Tax Treatment for "Foreign Sales Corporations,* WT/DS108, April 25, 2003.
[52] *See* Joost Pauwelyn, *supra* note 1, at 137.
[53] U.S. copyright legislation inconsistent with the TRIPS agreement was found to have nullified EC benefits (*i.e.*, royalties) worth €1,219,900 per year. *United States—Section 110(5) of the U.S. Copyright Act, Recourse to Arbitration Under Article 25 of the DSU, Award of the Arbitrators*, WT/DS160/ARB25/1, November 9, 2001, para. 5.1, at 34.
[54] *See* John A. Ragosta *et al*., *supra* note 21 and Alan Wolff, *Major Problems with WTO Dispute Settlement*, Speech at the *Global Business Dialogue*, Washington D.C., September 26, 2002.
[55] Claude Barfield, FREE TRADE, SOVEREIGNTY, DEMOCRACY: THE FUTURE OF THE WORLD TRADE ORGANIZATION (American Enterprise Institute Press, 2001), at 127. *See* also Robert Hudec, *The Judicialization of GATT Dispute Settlement*, in IN WHOSE INTEREST? DUE PROCESS AND TRANSPARENCY IN INTERNATIONAL TRADE 16, 23 (Michael M. Hart & Debra P. Steger eds., 1992), at 31.
[56] US International Trade Commission, *Import Injury Investigations* (1980-2003), *available at* http://www.usitc.gov/trade_remedy/USITC_Stat_Report-11-04-PUB.pdf.
[57] *See* John A. Ragosta, *supra* note 21, Alan Wolff, *supra* note 54, and John Magnus, *WTO Dispute Settlement and Trade Remedies: Did We Get What Negotiators Wanted?*, presented at the Dartmouth-Tuck Forum on International Trade and

Business, *Managing Global Trade: The WTO—Trade Remedies and Dispute Settlement,* Washington, DC, May 16, 2003, *available at* http://www.dbtrade.com/publications/did_we_get_what.htm.

[58] NAFTA Chapter 19 Extraordinary Challenge Committee Decision, *In the Matter of Certain Softwood Lumber Products From Canada*, No. ECC-2004-1904-01USA (August 10, 2005), *available at* http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA_Chapter_19/USA/ue2004010e.pdf.

[59] There is empirical evidence that suggests countries that face antidumping duties are more likely to retaliate against those countries that imposed the duties by initiating antidumping investigations against their exporters. *See* Bown and Blonigen, *Antidumping and Retaliation Threats*, NEBR Working Paper, November 2001, *available at* http://people.brandeis.edu/~cbown/papers/ad_retaliation.pdf.

[60] *See* Comments on the Review of the Dispute Settlement Mechanism by Venezuela, Feb. 24, 1998.

[61] U.N. Agency Outlines Proposal for WTO Dispute Settlement Training, Daily Rep. for Executives (BNA), January 27, 2000, at A-3.

[62] For more information on the Advisory Center of WTO Law, s*ee* http://www.acwl.ch.

[63] See Proposal by the LDC Group, TN/DS/W/17.

[64] *See* Bronckers, Marco, van den Broek, Naboth, *Financial Compensation in the WTO: Improving the Remedies of WTO Dispute Settlement*, J. INT'L. ECO. L., Vol. 8, No. 1, March 2005, 101-126.

[65] *See* Fritz Breuss, *EU-US Trade conflicts and WTO Dispute Settlement*, European Integration Papers, vol. 9 (2005).

[66] FINANCIAL TIMES, *Personnel changes raise doubts about US commitment to Doha round of trade talks*, April 19, 2006.

[67] *See* Inside US Trade, February 24, 2006, *available at* http://www.insideustrade.com.

[68] Graph by Thomas A. Zimmerman, *supra* note 6, at 34, based on WTO data: WT/DS/OV/22 and Internet: http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (downloaded 15 January 2005).

[69] FINANCIAL TIMES, *Challenge to Beijing at WTO*, March 31, 2006.

[70] USTR issued its top-to-bottom review of US-China trade policy on February 14, 2006 in a report entitled, "U.S. - China Trade Relations: Entering a New Phase of Greater Accountability and Enforcement." The report can be found at http://www.ustr.gov.

[71] *See* subparagraph 11 of the Negotiating objectives of the TPA.

[72] *United States - Standards for Reformulated and Conventional Gasoline, Appellate Body Report* (WT/DS2/AB/R), May 20, 1996.