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Global trade governance: the WTO at a crossroads

Rorden Wilkinson
Raimund Raith
Robert Howse
Kalypso Nicolaidis

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EUROPEAN SECURITY AND GLOBAL GOVERNANCE

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About the authors

Rorden Wilkinson is Professor of International Political Economy and Head of the Centre for International Politics, School of Social Sciences, University of Manchester.

Raimund Raith is Minister-Counsellor/Legal Adviser at the Permanent Delegation of the European Commission, Geneva.

Robert Howse is Alene and Allan F. Smith Professor of Law at the University of Michigan.

Kalypso Nicolaidis is Director of the European Studies Centre and Lecturer in International Relations, University of Oxford.

Foreword

by Antonio Missiroli

"It's now or never" – how many times have we heard this phrase, immortalised in one of Elvis Presley's most famous hits?

Global trade negotiations have often been portrayed as being on the brink of failure, with only a small (and rapidly closing) window of opportunity to clinch a deal. That is why the current situation in the Doha Development Round has given seasoned observers of the World Trade Organization a sense of déjà vu – they really have seen it all before.

The few remaining months between the end of 2006 and the summer of 2007 – when the Bush administration's fast-track negotiating mandate expires – will offer a last-ditch chance to achieve at least a less-than-perfect deal with the WTO framework, before the 2008 presidential campaign in the US and the next stage of Common Agricultural Policy reform (planned for 2011-12) in the EU concentrate and absorb the minds of the main trade players.

To date, the signals have been less than encouraging, as very few substantial concessions (on agriculture and other key issues) have been put on the negotiating table.

Everyone is aware that failure would undermine the overall credibility and the very functioning of the current multilateral trade order. Yet everyone (including the EU) is also preparing the ground for alternative or complementary sets of bilateral agreements. This may well be, at least in part, a negotiating tactic, or maybe not. Whatever the key players' motives, it is legitimate to consider how the whole WTO system would work without a deal.

That is why the European Policy Centre is publishing this paper now, within the framework of its European Security and Global Governance programme. In the essays which follow, Rorden Wilkinson explains the origins of today's WTO and assesses its performance to date; Raimund Raith describes how the WTO's dispute settlement system works, in theory and in practice; and Robert Howse and Kalypso Nicolaidis raise some questions about the present and future of the system itself.

An examination of the dispute settlement system is particularly important in the light of the current situation, as an increase in cases could well be one of the side-effects of a substantial failure of the current trade round.

Needless to say, neither such failure nor an increase in the number of disputes is desirable. However, assessing both the achievements so far and the potential or actual limits of the WTO system is important as it highlights just what is at stake in the months to come.

Antonio Missiroli is Chief Policy Analyst at the European Policy Centre.

The World Trade Organization and the governance of global trade

By Rorden Wilkinson

Introduction

Since it was established on 1 January 1995, the World Trade Organization has been the subject of considerable media and popular attention.

Much of this attention has focused on the drama that has come to surround WTO ministerial meetings, the disputes which have periodically erupted between member states, the tensions surrounding the election of a successor to the first Director-General, or the heated nature of trade negotiations.

It is easy to see why this might be the case. Two of the WTO's first six ministerial meetings (Seattle 1999 and Cancún 2003) collapsed in a hail of acrimony. Tensions among members have erupted over trade in cars, alcoholic drinks, grain, bananas, beef, photographic film, aircraft 'hush-kits', foreign sales corporations, anti-dumping, and steel and aircraft subsidy regimes, to name a few. The election of a successor to Renato Ruggiero, the WTO's first Director-General, resulted in "the most unexpected and horrible quarrel…ever witnessed at the WTO"[1] before a compromise was reached under which Mike Moore of New Zealand and Supachai Panitchpakdi of Thailand were elected for two consecutive non-renewable terms of three years.

The current round of negotiations (the Doha Development Agenda – DDA) has also produced its fair share of drama: the round's launch was delayed by the collapse of the Seattle Ministerial Meeting; the content, format and conduct of the negotiations have been the subject of heated debate; negotiating deadlines have consistently been missed; and the negotiations have twice broken down – in Cancún in September 2003 and during discussions in Geneva in July 2006.

All this attention has, however, obscured a clear and concise understanding of what the WTO is, what it does, how it came about, what role it plays in world trade and why it has come to be the source of such controversy.

This paper offers a concise account of the organisation, its history and the manner in which it governs global trade. It begins with an account of the

WTO's historical antecedents. This is followed by an exploration of the organisation's shape and its legal framework. The paper then briefly explores progress in the DDA before concluding.

A history of the GATT/WTO

The decision to establish the WTO was taken mid-way through the Uruguay Round (1986-1994) of General Agreement on Tariffs and Trade (GATT) negotiations. The creation of a formal organisation had not, however, been one of the initial aims of the round. Prior to that, trade had been governed by the limited set of rules encapsulated in the GATT. These dealt with the conduct of trade, the manner in which trade would be liberalised, and the settlement of disputes between contracting parties (as WTO member states were known in the GATT).

Under the GATT, contracting parties were obliged to engage in periodic negotiations (rounds) with a view to reducing tariffs and other barriers to trade. During the early GATT rounds, these negotiations were conducted on the basis of a request-and-offer system. This involved 'principal suppliers' (i.e. the biggest suppliers of exports in each sector) making requests to other contracting parties and responding to offers received. Once the contracting parties involved were satisfied that 'reciprocity' had been achieved (that is, a rough equivalence of value received for concessions offered), the results would be conveyed to all other contracting parties under the most-favoured nation (MFN) rule.

Inevitably, the fact that negotiations were organised around principal suppliers favoured the biggest trading states (the industrial countries). Non-principal suppliers would only benefit from the concessions (in terms of market access) passed on to them under the MFN rule, and a good many of these were often of little relevance. For example, a small landlocked, largely agricultural-producing, developing country would have been unlikely to benefit from greater market access in semiconductors or industrial equipment.

As both the number of contracting parties and the range of subjects under discussion increased, the request-and-offer system gave way (although not wholly) to an approach based on a formula under which tariffs and other barriers to trade would be cut in an 'across-the-board' or linear fashion. Moreover, the requirement to reciprocate was removed for Least Developed Countries (though, ironically, this robbed them of what little say they might have had in the negotiations, meaning that they could only benefit at the margins from any crumbs that might fall from the table).

The completion of the Uruguay Round changed little in the way in which trade is governed. It did, however, establish a formal organisation (the WTO) to oversee the governance of global trade, extend the commercial remit of trade governance beyond trade in goods, and put in place a more robust means of settling trade disputes.

The creation of a formal organisation was significant given that two previous attempts to establish a trade organisation had failed – immediately after the war when the Allied Powers attempted to create an International Trade Organization (ITO) and later, in 1956, when a second proposal was put forward for the creation of an Organisation for Trade Co-operation (OTC).

The significance of an extended commercial remit lay in the fact that for 47 years, the GATT provided a machinery for the liberalisation of trade in goods alone (and even then, only some goods). The Uruguay agreements extended that remit to include not only a refashioned GATT and new agreements on agriculture, and textiles and clothing, but also on services, investment measures and intellectual property rights.

The establishment of the WTO also put in place a more rigorous set of dispute settlement procedures designed to add certainty and credibility to the newly-expanded system.

That said, it is worth emphasising that the WTO's creation did not mark a sea-change in the way trade is regulated. Rather, the organisation's general purpose, core principles, legal framework and operating procedures are all continuations, adaptations, variations or developments of the previous GATT system and ideas floated during attempts to create previous trade organisations.

As such, the WTO is inextricably linked to the development of trade governance in the post-war era, and many of the current tensions afflicting the organisation arise from anomalies in the way in which it has evolved. To understand the WTO fully, it is necessary to know something of its historical antecedents.

Trade governance in the post-war era

The modern system of trade governance emerged from wartime designs for a series of institutions to promote peace and stability, and assist in the reconstruction of the global economy.

The overall plan was to create a world organisation that would build upon wartime Allied cooperation (and, with one eye on the emerging Cold War, bind the US and Soviet Union together in some kind of institutionalised relationship)[2] and extend this to the rest of the globe. This was the purpose of the United Nations.

Under the UN's umbrella, three institutions – the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (IBRD, which later morphed into the World Bank), and the ITO – were charged with the task of overseeing the reconstruction of a world economy devastated not only by war, but also by the depression and economic nationalism of the interwar period.

These institutions were to operate as a coherent ensemble, broadly along the lines that John Maynard Keynes had envisaged after the end of the First World War.[3] To facilitate industrial reconstruction, the IBRD was to underwrite the lending of private capital. To promote certainty in international payments, the IMF was to oversee a system of fixed exchange rates. To boost the reconstruction effort, the ITO was to put in place a mechanism (periodic negotiations between member states) to reduce tariffs and other barriers to trade.

Events did not, however, play out in quite the way the wartime planners had envisaged. Although the 1944 Bretton Woods Conference resulted in the establishment of both the IMF and IBRD, the operation of both organisations was initially circumscribed by the 1947 Marshall Plan.[4]

Even after the Marshall Plan had ended, significant alterations to IMF/IBRD (World Bank) operations had to be made. The World Bank, for instance, had to change tack from an institution designed largely to facilitate European reconstruction to one focusing principally on the developing world.

The ITO was more troublesome. Although the US and UK reached agreement on its basic shape in the run-up to the end of the war, the two countries were unable to agree on key aspects of its legal framework (particularly on the provisions relating to full employment, balance-of-payment crises and the UK's imperial preference system).

To make matters worse, once the negotiations were opened up beyond the US and UK to include 56 other states at the 1948 Havana UN Conference on Trade and Employment, myriad differences emerged. Clair Wilcox, a key

member of the US delegation at the time, estimated that the number of suggested amendments to the organisation's legal framework put forward at the conference was as high as 800, with "as many as 200" having the capacity to "destroy…the very foundations of the enterprise".[5]

Although the Havana negotiations finally resulted in a Charter (known as the Havana Charter) to which all but two of the participants agreed, few left the conference entirely satisfied. Indeed, of the 53 states which signed the Charter, only two – Australia and Liberia – began the process of ratifying it.[6] The rest made this contingent on the US doing the same.[7]

However, despite US President Harry Truman's repeated efforts, Congress refused to ratify the Charter.[8] Among business and political elites in the US, concerns were raised not only about the substance of the Charter, but also about the impact the proposed organisation might have on US sovereignty. These concerns mushroomed into a general consensus that the ITO was not the institution that best served US interests.[9]

In December 1950, Truman announced the indefinite postponement of plans for US participation in the ITO, stating that the Havana Charter would not be resubmitted to Congress for approval. This was followed in February 1951 with similar announcements by the UK and the Netherlands. As a result, the organisation was stillborn.

The end of the ITO did not, however, put an end to attempts to create an institution designed to govern global trade. As an addendum to the ITO negotiations, 23 governments had convened to begin the liberalisation process. Their efforts resulted in: 1) the first round of liberalisation; and 2) the drafting of the GATT itself.

The GATT was only intended to be a provisional and commercially-limited agreement. The idea was that once the ITO was up and running, the GATT would be subsumed into its legal framework. As a result, the GATT lacked the elaborate commercial (and trade-related) provisions of the ITO, and it only sought to govern trade in goods. It nevertheless embodied the ITO's core principles of MFN and reciprocity. It also comprised some very modest (and notoriously weak) provisions relating to dispute settlement.

More importantly, GATT negotiations proved far less troublesome and far more satisfactory to the economic interests of the parties involved (particularly to the US). The agreement comprised those provisions for

governing trade that the US and UK could agree upon. Moreover, because the GATT was originally intended to be provisional, it had little legal compunction, its rules were more statements of principle than detailed prescriptions, and it lacked the full trappings of an international organisation.[10] Taken together, these factors ensured that the GATT satisfied those who feared any impingement on sovereignty that might come with a formal organisation.

Figure 1 – Trade negotiation 'rounds' under the GATT and WTO

1947:	Geneva, Switzerland
1949:	Annecy, France
1951:	Torquay, United Kingdom
1956:	Geneva, Switzerland
1960-1961:	The Dillon Round (Geneva)
1964-1967:	The Kennedy Round (Geneva)
1973-1979:	The Tokyo Round (Geneva)
1986-1994:	The Uruguay Round (Geneva)
2001 on:	The Doha Agenda/Development Round (Geneva)

More significantly, the GATT only sought to govern trade in some goods. It was primarily directed at liberalising trade in industrial goods, manufactures and semi-manufactures – precisely those goods in which the US had developed a comparative advantage and that Europe lacked and/or hoped to develop as the backbone of a reconstruction process.

It was not intended to be a vehicle for liberalising agricultural markets. During the interwar years, the US – and to a lesser extent the European countries – had put in place mechanisms to preserve food security and offset the distress which agricultural communities endured in this period. Any liberalisation of agriculture was politically unacceptable and at odds with a wartime hangover of the need to be self-sufficient in agricultural production.

Excluding agriculture from the GATT was not, however, without controversy. Although not formally written into GATT rules, it was pursued on a de facto basis, either by not offering (and refusing to accept requests for) concessions or through frequent applications for waivers. This proved unsatisfactory to many of the contracting parties and continued to be a source of irritation

for the duration of the GATT. Indeed, a dispute between Australia and the UK and the US over wool nearly caused the very first round to collapse.

As the 1950s progressed and the number of signatories increased, the GATT's narrow focus was compounded by the withdrawal of textiles and clothing from its remit. In response to competition from textile and clothing producers in the newly-independent world, the industrial countries (most notably the US and the UK) sought to introduce measures to protect themselves against 'market disruption' and assist domestic producers. In the first instance, this involved imposing a series of voluntary quotas that limited imports from Japan, Hong Kong, Pakistan and India. When these measures no longer proved sufficient, more substantive measures were taken to limit imports of cotton textiles.

This first occurred during the Dillon Round (1960-1) through the negotiation of the Short-Term Agreement on Cotton Textiles and then, in 1962, the Long-Term Agreement Regarding Trade in Cotton Textiles. However, as the use of synthetic fibres – largely polyester and acrylic – began to rival cotton in textile production and developments in knitting technology stimulated knitwear industries not only in South and South-east Asia but also in Eastern Europe, further trade-inhibiting measures were put into place. These initially took the form of voluntary export restraints (VERs), but were eventually codified in the 1974 Multi-Fibre Agreement (MFA).

Developing countries and the GATT

Taken together, these developments produced a commercially-restrictive form of trade governance. Trade was successfully liberalised in those areas in which the leading industrial states had a strategic interest, but barriers either remained or were erected in areas which were of interest to many agricultural-exporting and newly-independent developing states.

The problems facing developing countries in the GATT did not go unnoticed. As early as March 1955, the contracting parties adopted a resolution on "international investment and economic development". This was followed, in 1956, by a further resolution on the "particular difficulties connected with trade in primary commodities". Neither resolution, however, had an impact beyond signalling that problems existed. GATT rules were not altered, nor were remedial measures or beneficial concessions forthcoming.

This had an important impact on the politics played out in the GATT. It contributed to a growing militancy among developing countries and ensured that not one of them chose to participate in the fourth round of negotiations in 1956. During the 1960s, it also saw developing countries attempt to create a rival trade institution in the form of the United Nations Conference on Trade and Development (UNCTAD). While their efforts succeeded to the extent that UNCTAD became a formal organisation, it did not supplant the GATT.

By November 1957, the contracting parties had decided that the situation facing developing countries (in terms of the unfavourable trends in commodity trade, the widespread growth in agricultural protectionism and a lack of inward investment) was sufficiently worrying to commission a panel of experts.

This panel, in turn, produced the 1958 report on Trends in International Trade,[11] known as the 'Harberler Report' (after Gottfried Harberler, who chaired the panel). This concluded that the high incidence of trade barriers faced by developing countries, coupled with unfavourable price trends, had significantly affected their terms of trade.

The contracting parties responded by embarking upon a programme of action to address these trends through the "further reduction of barriers to the expansion of international trade". Yet while they committed themselves to exploring the "possibilities of further negotiations for the reduction of tariffs", identifying the "problems arising from the widespread use of non-tariff measures for the protection of agriculture or in support of the maintenance of incomes of agricultural producers", and rendering visible other "obstacles to international trade, with particular reference to the importance of maintaining and expanding the export earnings of the less developed countries",[12] they did not seek to alter GATT rules.

It was not until 1964 that the contracting parties agreed to an addendum to the GATT – known as Part IV (in force on a de facto basis from 8 February 1965 and formally from 1966) – to take account of the problems facing developing countries.

Part IV was not, however, the panacea developing countries had hoped for. As Srinivasan puts it, Part IV offered "little by way of precise commitments…but a lot in terms of verbiage".[13] It committed developed countries (and their developing counterparts in relation to trade between themselves) to: 1) give high priority to reducing and eliminating trade barriers for goods of export-interest to

their developing counterparts; 2) refrain from introducing or increasing customs duties or non-tariff barriers on those goods; and 3) refrain from imposing fiscal measures, or making any adjustments to existing ones, that would hamper demand for products from developing countries. However, Part IV did not compel them to do any of these things.

The issue of development was raised again during the Kennedy and Tokyo Rounds. While some modest concessions were forthcoming, it was not until the Uruguay Round that a concerted effort was made to broaden the GATT's commercial remit to include those areas of economic interest to developing countries.

Growing pains

The mid-1950s also saw renewed calls for the establishment of a formal organisation – the Organization for Trade Cooperation (OTC) – to supersede the GATT. However, the idea floundered as few considered that such an organisation would add much value (other than an expensive bureaucracy) to what the GATT was already doing. Moreover, concerns remained over the impact that such a body would have on the contracting parties' sovereign integrity.

It was not, however, outright hostility to the OTC which finally sank the organisation, although it was the absence of US ratification that sounded the death knell. As Karin Kock explains: "The general protectionist trend in and outside Congress made the spokesmen of the administration minimise the importance of the OTC, by characterising its functions as routine business, quite different from the functions which had once been assigned to the ITO. This defence in negative terms weakened the position of the administration and gave the impression that the creation of the OTC was not an urgent measure. [The result was that the] House found itself too preoccupied by other matters to take action on the proposal."[14]

The GATT's role as the primary mechanism for governing global trade was thus secured. However, the narrow way in which it had been playing this role was beginning to show signs of distress.

Although during its early years the GATT had been relatively successful in reducing barriers to trade in industrial and manufactured goods, the relatively high base from which tariffs had been cut exaggerated the degree to which trade had been liberalised. Moreover, as the general level of tariffs

decreased, so too did the ability of contracting parties to agree to further reductions. By the mid-1970s, the general level of tariff cuts had begun to stagnate.

The impact of this stagnation was amplified by the increasing use of non-tariff barriers (NTBs). Many of the industrial countries implemented elements of overt and covert protectionism (such as the adoption of quotas, licences, over-zealous health and safety checks, lengthy administration procedures and voluntary export constraints on supplier countries) in an attempt to find substitutes to replace the loss of protection from tariff reductions.

This ensured that, rather than liberalising trade, the gains made through tariff reductions were offset by NTBs. More problematically, much of the growth in NTBs disproportionately affected developing countries.

Efforts to reform the GATT were made during the Tokyo Round, with agriculture and NTBs singled out for particular attention. Tokyo was not, however, particularly successful. Although some progress was made on NTBs, the round resulted in the negotiation of a clutch of side agreements that only applied to a handful of (largely) industrial signatories.

Little progress was made in liberalising agricultural markets: the US continued to dish out lavish export subsidies to domestic producers and impose import quotas (particularly on dairy products), and European discrimination in the sector was exacerbated by the further development of the Common Agricultural Policy (CAP).

The later GATT rounds – particularly from the Kennedy Round onwards – also saw a rise in tensions between the US and the EEC (as it was then). During the early rounds, the US was willing to accept the continuation of market protection in Europe as part of the reconstruction process. However, by the time of the Kennedy Round, the EEC had become a considerable force in world trade and was negotiating with the US on a near equal footing.[15]

The outcome of the Kennedy Round bred a perception within the US Congress that the balance of concessions exchanged favoured the Europeans too greatly. This, in turn, fuelled a growing determination to extract what was deemed to be a more equitable deal in future rounds. Moreover, as the US trade deficit reached a peak during the Reagan administration,[16] American energies focused on aggressively trying to open

markets it perceived to be unfairly closed to US goods. Japan and the EEC were top of the list.

By the mid-1980s, US frustrations with progress in the GATT generated renewed pressure to address its perceived anomalies and the imbalances that had resulted from previous rounds. Initially, US pressure for a new round was met with much resistance and failed to result in the launch of negotiations at the 1982 Geneva Ministerial Meeting. It was not until 1985 that the contracting parties bowed to US pressure and agreed to a new round (launched at Punta del Este, Uruguay, in September 1986).

The Uruguay Round

The Uruguay Round progressed in what has become the established (i.e. crisis-laden) fashion. It overran (by four years); tensions were high throughout; and two ministerial meetings (Montreal in 1988 and Brussels in 1990) collapsed. The round was eventually concluded amid much controversy.

The US and European Community (EC) reached agreement only by negotiating (and renegotiating) a bilateral deal on agriculture (the so-called Blair House I and II Accords), much to the consternation of other countries. France threatened to pull out of the negotiations at the 11th hour if further concessions were not forthcoming on agriculture and services. A plurilateral deal (that is, between a small group of states) had to be struck between US, EU, Japan and Canada (the so-called Tokyo Accord) on non-agricultural market access, and negotiations continued beyond the deadline.

The round nevertheless resulted in an historic achievement. Not only did the negotiations produce a significantly extended commercial remit, they also resulted in the establishment of the WTO and with it the creation of a much-improved mechanism for resolving disputes and a trade policy review mechanism (TPRM).

The WTO's legal framework

In terms of the legal framework, the Uruguay Round resulted in the biggest expansion of trade rules since the GATT was first negotiated.

First, the negotiations updated the GATT (to produce an agreement dealing with trade in goods known as the 'GATT 1994') and incorporated this into a wider legal framework that comprised 29 legal agreements.

Second, the round resulted in two accords designed to redress the biggest anomalies of the GATT era – the Agreements on Agriculture and on Textiles and Clothing.

Third, WTO members endorsed a series of other agreements drawn up to increase transparency and introduce greater rigour into trade rules and, in so doing, further free up the flow of trade. Most notable here were the Agreements on Technical Barriers to Trade (TBT), Sanitary and Phytosanitary Measures (SPS), Preshipment Inspection, Rules of Origin, Import Licensing Procedures, Subsidies and Countervailing Measures, and Safeguards.

Fourth, Uruguay moved trade governance beyond a focus on trade in goods to cover services under the Agreement on Trade in Services (GATS) and (controversially)[17] to deal with two areas related to trade: intellectual property rights (in the form of the Agreement on Trade Related Intellectual Property Rights – TRIPs) and investment measures (with the Agreement on Trade Related Investment Measures – TRIMs).

Three points are worth noting about these legal developments.

First, and most obviously, the conclusion of the Uruguay Round significantly deepened (with the GATT 1994 and Agreements on Agriculture and Textiles and Clothing, among others) and substantially widened (with the GATS, TRIPs and TRIMs) the arena of trade governance.

Second, the move to include intellectual property rights and investment measures, in particular, changed the focus of trade governance from what were known as 'at the border' measures to those that had an impact 'behind the border'. In simple terms, this means that by requiring members to adhere to intellectual property rights' law and liberalise their domestic investment regimes (in as much as TRIMs does this), WTO rules moved from a GATT concern about getting goods into a country to changing legislation inside a country.

In terms of national sovereignty, the impact of this move has been very uneven. Much of what is required was already in place in industrial states. For developing countries, the introduction of TRIPs, in particular, required many to change or, in some cases, draw up new legislation. However, some aspects of the GATS also required countries to amend domestic legislation to enable foreign companies to compete (and provide) services on an equal

footing. This has required many of the industrial countries to adjust their services legislation accordingly.

The third and most worrisome aspect of the Uruguay Round agreement was the asymmetrical nature of the bargain struck (the "bum deal", as Sylvia Ostry has termed it).[18] While including agriculture, and textiles and clothing rectified an imbalance in the way in which the GATT had previously been deployed, and the sprinkling of development-sensitive provisions throughout the WTO's legal framework represented a step forward from the GATT era, the introduction of new rules in services, intellectual property and investment measures created a further imbalance between countries.

Whereas under the Uruguay rules, developing states could finally hope to benefit from the liberalisation of agricultural, and textiles and clothing markets, their lack of capacity and resources meant that this was not to be the case in the new areas.

The potential fruits of Uruguay were much larger for the industrial states. Not only were they the existing beneficiaries of trade liberalisation in areas covered by GATT rules, but their economic make-up also ensured that they would be the principal beneficiaries of any market opportunities presented by the liberalisation of services and investment measures, and the codification of trade-related intellectual property rights.[19]

The organisational structure

The conclusion of the Uruguay Round created an organisational structure that largely codified what had happened under the GATT.

The WTO's structure consists of a Ministerial Conference (the primary decision-making body); a General Council; a series of Councils covering each of the three main commercial areas of the WTO's activities (trade in goods, services, and trade-related aspects of intellectual property rights); a series of Committees dealing with issues such as trade and development, trade and environment, balance of payments' restrictions, and budget, finance and administration; a Director-General; and a Secretariat.

The Ministerial Conference comprises representatives of the various member states, usually at trade minister-level or equivalent. The Conference meets at least once every two years for ministerial meetings (see Figure 2 below), and has jurisdiction over all matters concerning the WTO.

Figure 2 – WTO Ministerial Meetings to date

Singapore	9-13 December 1996
Geneva	18-20 May 1998
Seattle	30 November – 3 December 1999
Doha	9-13 November 2001
Cancún	10-14 September 2003
Hong Kong	13-18 December 2005

The General Council meets more frequently than the Conference, and, in effect, oversees the organisation's operations. Again, it is composed of representatives of the member states, though normally at trade-official level. The Council acts as the executive for the Conference when it is not in session. It also oversees the functioning of the Dispute Settlement Body (DSB) and the TPRM.

The Councils for Trade in Goods (CTG), Trade in Services (CTS), and the Council for Trade Related Aspects of Intellectual Property Rights (CTRIPs) are under the direct control of the General Council. These Councils oversee the implementation and administration of the provisions laid down in the legal framework in their respective areas. The Councils themselves can establish ancillaries as they deem necessary to help them carry out their various tasks.

The WTO's day-to-day activities are handled by the Secretariat, headed by the Director-General. The Secretariat is responsible for organising meetings, preparing documentation, providing assistance in the dispute settlement process, providing legal services and publishing studies, research, trade policy reports, statistics and general information relating to the WTO's work.

Decision-making in the WTO

The conclusion of the Uruguay Round left much of the GATT's decision-making structure (and culture) in place.

Although the WTO's Establishing Agreement set out voting procedures in three instances – relating to changes proposed to the core principles of the WTO (wherein unanimity is required); the implementation of the specific provisions or

in respect of a waiver (requiring a three-quarters majority); and an amendment to the Final Act in cases relating to issues other than its core principles (requiring a two-thirds majority) – and put into place a one-member-one-vote system, governance by consensus has remained the order of the day (indeed, the call for a vote is a very rare event).

The Uruguay Round did not, however, result in the formalisation of the elite position of the GATT's dominant contracting parties. A proposal to create an Executive Committee, much along the lines of that proposed for the ITO and OTC, was flatly rejected. That said, the remnants of great-power dominance live on in the continued supremacy of the 'Quad' (the US, EU, Japan and Canada – plus India, Brazil and Australia depending on how entrenched and intractable movement forward with the trade agenda is) and the industrial states generally.

Dispute settlement

The creation of the Dispute Settlement Mechanism (DSM) was much celebrated. Yet, rather than departing wholesale from the GATT, the Uruguay provisions sought only to build upon its procedures for 'consultation' (Article XXI) and 'nullification and impairment' (Article XXIII).

The first of these, consultation, merely established the convention that when in dispute, contracting parties would first engage in bilateral negotiations. This was complemented by the nullification and impairment provision, empowering one contracting party to ask the others to preside over the settlement of a dispute and, under certain conditions, authorise the implementation of sanctions.

Until the early 1950s, disputes were handled by means of establishing working parties. These working parties were designed to bring the parties in dispute together with other contracting parties in a process of negotiation. However, from 1952 onwards, working parties were replaced by a practice of establishing 'panels' to examine the substance of a dispute.

Thereafter, the GATT's dispute settlement procedures were codified through a series of Decisions and Understandings. One of the most significant of these was the November 1979 "Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance", and the accompanying annex relating to the "Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement."[20]

The GATT dispute settlement procedures were, however, plagued by the inability of the contracting parties to enforce the recommendations of the panels. The main problem was that contracting parties were not bound by panel decisions. Rather, they were able to exercise a right of veto over panel recommendations; and they were not obliged to implement the recommendations within a specified time period.

This absence of compunction had two adverse consequences. First, countries frequently ignored – or simply failed to implement – panel recommendations and thus continued to act illegally. Second, certain states sought to use, and indeed strengthen, particular aspects of national legislation in an effort to provide an ad hoc sanctioning mechanism designed to get illegally-acting contracting parties to comply with what these states deemed to be 'correct' interpretations of GATT rules. Most notable in this category was Section 301 of the US 1974 Trade Act (Amended 1988).

The evolution of GATT dispute settlement procedures culminated in the Understanding on Rules and Procedures Governing the Settlement of Disputes (known as the Dispute Settlement Understanding – DSU) being incorporated into the WTO's legal framework. The DSU provides for panels to be set up to mediate in disputes arising between or among members; to refer disputes to an Appellate Body; and to survey the implementation of rulings and recommendations. It also enables members to take retaliatory action against states acting illegally, or to request compensation for such action.[21]

Despite these developments, and a general perception that the DSM has been functioning reasonably well, concerns have been raised that dominant states are still able to throw their weight around in the settlement of disputes.[22] Moreover, Thomas Brewer, Stephen Young, and Robert Hudec argue that developing countries are disadvantaged in using the DSM because of their relative deficiency in legal expertise and by the sheer volume of complaints brought against them since the WTO was established.[23]

The DDA

What the Uruguay Round produced then was a considerable undertaking. Yet, it was more GATT 'writ large' than a new institution. The chief aim of trade governance remained the liberalisation of trade, and negotiating rounds continue to be the primary means of achieving this.

That said, the protracted and politically-fraught nature of the Uruguay Round left few with the stomach for a new round. Pressure for one was nonetheless forthcoming. The then-EU Trade Commissioner Leon Brittan pressed member states for a 'Millennium Round' at the WTO's first ministerial meeting in Singapore (see Figure 2 above). While few of the industrial states were initially in favour (only Japan came out strongly in support and even the EU was divided on the issue), a head of steam steadily built up. This culminated in a concerted effort to launch a new round at the Seattle Ministerial Meeting.

Strong resistance to a new round was, however, prevalent among developing countries. The sheer scale of what was required in implementing the Uruguay Accords had caused a number of problems. The Least Developed Countries in particular were suffering under the weight of what was required. The asymmetry of the Uruguay deal also underpinned a reticence among developing countries to agree to a new round. Few wished to see a repeat of Uruguay, preferring instead to address the anomalies it produced.

Moreover, developing countries feared that US and EU pressure to include a link to workers' rights and environmental protection in the WTO's legal framework might be a smokescreen for a new bout of protectionism (in that trade restrictions would be put in place against countries deemed to be falling short in their levels of labour and environmental protection).[24] The result was a breakdown in the talks in Seattle and the collapse of the Ministerial Meeting amid mass demonstrations.

In the wake of Seattle, a concerted effort was made to rehabilitate the WTO's image, as well as to garner support for a new round among developing countries.[25] In order to get developing countries to the table, 'development' was placed at its heart. After much politicking, the first round under WTO auspices was launched at the Doha Ministerial Meeting in November 2001.

The deal struck to launch the DDA was not, however, without controversy.

Most controversial was a provision in the Doha Declaration dealing with the 'Singapore' issues – government procurement, competition policy, trade facilitation and investment – so-called because they were included in the WTO's work programme at the Singapore Ministerial Meeting.

At issue was the point at which the Singapore issues would become part of the negotiations. Developing countries interpreted the declaration as meaning that negotiations on these issues would begin only if an explicit consensus was

forthcoming at the following Cancún Ministerial Meeting; whereas the industrial states understood it to mean that negotiations would automatically commence in Cancún.

This, combined with accusations that the manner in which the negotiations were conducted disadvantaged developing countries, suggestions of over-interference by the Chairs of the Conference and the negotiating committees, strong-arming and threats to withhold bilateral assistance, led to the collapse of the Cancún meeting.[26]

A notable feature of the Seattle and Cancún meetings, as well as the more general period since the WTO's creation, has been the extent to which trade politics have been carried out via coalitions. Groups of smaller countries have combined to generate greater leverage in negotiations. These coalitions – often formed by members whose economic interests are quite different – have been most notable among developing countries. Three in particular are noteworthy: the Group of 20 (G20),[27] Group of 33 (G33)[28] and Group of 90 (G90).[29]

Coalition forming has not, however, been confined solely to the global South. In addition to existing groups such as the Quad, other clusters of industrial states have also emerged. The Group of 10 (G10)[30] is the most notable of these, but groups such as the 'Friends of Ambition'[31] have also been significant. Also noteworthy is the extent to which a new North/South group has emerged – the Five Interested Parties (FIP) – which has proven to be key to brokering deals.[32]

In much the same way as in the post-Seattle era, Cancún was followed by a period of reconciliation. This eventually resulted in an agreement in July 2004 (actually agreed on 1 August) – known as the 'July package' – that moved the round forward.

The July package saw WTO members agree to: a framework agreement on agriculture and non-agricultural market access (NAMA); movement forward in the service negotiations; a commitment to continue the consultation process on the extension of the TRIPs agreement; the commencement of negotiations on one of the Singapore issues (trade facilitation) and the ejection of the remaining three from the DDA; and an extension of the overall time frame for the negotiations, with a view to their conclusion sometime after the WTO's Hong Kong Ministerial Meeting.[33]

However, progress thereafter was slow. Deadlines were consistently missed and member states arrived at the most recent Hong Kong Ministerial Meeting having scaled back their expectations.

Inevitably, the meeting was only partially successful. Although full modalities (the means by which commitments to liberalise are translated into actual cuts) for the negotiations were not forthcoming, members nevertheless agreed to modest movements forward in NAMA, agriculture and services, as well as a package of measures designed to help the Least Developed Countries.[34]

Hong Kong also set out a timescale for the rest of the negotiations, with April 2006 identified as the point at which members should agree on full negotiating modalities, and December 2006 identified as the point at which the round should be concluded.

However, the modest progress made in Hong Kong proved unable to bridge remaining differences among member states and to keep the round on track. The April 2006 deadline for the agreement of negotiating modalities agreed in Hong Kong was missed; little progress was made in the negotiations generally; and the round came to an abrupt halt in July 2006.

Inevitably, this has led to a resurgence of speculation that the DDA is increasingly moribund. The expiry of US Trade Promotion Authority (more commonly known as 'Fast Track')[35] in mid-2007 has increased this speculation and few now believe the round will be completed much before the end of the decade, if at all.

Yet, while the breakdown of the talks and the prospect of an expiry of fast-track authority is significant, the general pattern of rounds to date (which, since at least the Kennedy Round, have been as tortuous as the current negotiations) suggests that the DDA will be concluded. When fast-track authority has run out during a round in the past, renewal has not been a problem (though, of course, this is not to claim that it will be unproblematic in this case); and nearly all of the previous eight rounds have overrun, with the DDA's immediate predecessors – the Tokyo and Uruguay Rounds – doing so by some four years.

Conclusion

What this all-too-brief account of the WTO shows is that the governance of global trade has changed little since it was first put into place in the post-war era. Negotiations still form the basis by which member states agree to open their

markets, and the principles of reciprocity and MFN remain the means by which deals are arrived at and concessions distributed.

While the creation of the WTO rectified two of the anomalies of the GATT years (by bringing agriculture, and textiles and clothing into the fray), the asymmetry that resulted from the Uruguay Round and the potential for further imbalances to result from the DDA have ensured that trade politics remain acutely adversarial.

Moreover, the perceived inequities in the current system have encouraged countries to form coalitions to bolster their chances of securing a favourable deal. The heated nature of trade politics, in turn, has ensured that the DDA has only made modest progress since its launch in 2001.

Although history suggests that even the most heated of rounds eventually reaches a conclusion, it also tells us that it is likely to be some time before the DDA does likewise.

Rorden Wilkinson is Professor of International Political Economy and Head of the Centre for International Politics, School of Social Sciences, University of Manchester. He is the author of, among other things, *The WTO: Crisis and the Governance of Global Trade* (Routledge, 2006) and *Multilateralism and the World Trade Organisation* (Routledge, 2000). He is also editor of *The Global Governance Reader* (Routledge, 2005); and co-editor of *The WTO after Hong Kong* (Routledge, 2007) and *Global Governance: Critical Perspectives* (Routledge, 2002). He co-edits *the RIPE series in Global Political Economy* and the *Global Institutions Series* (both for Routledge).

Endnotes

1. Bridges, International Centre for Trade and Sustainable Development, Geneva, 3 May 1999.
2. Arnold J. Toynbee 'The International Economic Outlook', International Affairs, 23: 4, October 1947.
3. John Maynard Keynes (1920) The Economic Consequences of Peace., London: Macmillan.
4. The Marshall Plan involved the lending of large amounts of capital (up to $20 billion in the form of loans and grants) to Western Europe to assist with reconstruction. For the duration of the plan European currencies were pegged to the dollar. US producers were the principal beneficiaries of the plan as it was from them that many European states sourced goods necessary for reconstruction. Most of these goods were also shipped across the Atlantic in American merchant ships (thereby further benefiting American industry). The reduction of European tariffs on industrial goods and manufactured products under the GATT further benefited US producers as their merchandise entered European markets more competitively. See Michael J Hogan (1987) The Marshall Plan: America, Britain, and the Reconstruction of Western Europe, 1947-1952, Cambridge: Cambridge University Press.

5. Clair Wilcox 'The Promise of the World Trade Charter', Foreign Affairs, No.27: 3, April 1949. pp.47-49.
6. A 54th signature was forthcoming from Turkey, but this was delayed while the delegation waited instructions from Ankara.
7. See Richard N. Gardner (1956) Sterling-Dollar Diplomacy: Anglo-American Collaboration in the Reconstruction of Multilateral Trade, Oxford: Clarendon Press. p.369; Karin Kock (1969) International Trade Policy and the GATT 1947-1967. p.57.
8. Karin Kock (as above). p.58.
9. William Diebold Jr. (1952) 'The End of the ITO', Essays in International Finance No.16, International Finance Section, Department of Economics, Princeton University.
10. To overcome the lack of an organisational structure the signatories to the GATT used Article XXV of the GATT on 'Joint Action by the Contracting Parties'. This enabled the contracting parties (or Contacting Parties as they were referred to in this role) to act as a Committee of the whole. This form of collective governance, in turn, militated against accusations that the General Agreement was a formal organisation in the making. It nevertheless developed a quasi-organisational structure, which added to its ranks a permanent Secretariat (occupying the old ILO building on the shores of Lake Geneva), a Council to oversee GATT activities between the meetings of the contracting parties, and a series of Committees and working groups concerned with various aspects of international commerce.
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13. T.N. Srinivasan (1998) Developing Countries and the Multilateral Trading System: GATT, 1947 to Uruguay Round and Beyond, Boulder: Westview Press. p.24.
14. Karin Kock (as above). p.80.
15. See Donna Lee 'Endgame at the Kennedy Round: a case study of multilateral economic diplomacy', Diplomacy & Statecraft, Vol.12: 3, September 2001.
16. James Scott (2007) 'How the poor pays for the US trade deficit and why it matters for the DDA', in Donna Lee and Rorden Wilkinson (eds.) The WTO after Hong Kong: Progress in, and prospects for, the Doha Development Agenda, London: Routledge.
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18. Sylvia Ostry (2007) 'Trade, Development and the Doha Development Agenda', in Donna Lee and Rorden Wilkinson (eds.) The WTO after Hong Kong: Progress in, and prospects for, the Doha Development Agenda, London: Routledge.
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24. Rorden Wilkinson 'Labour and Trade-Related Regulation: Beyond the Trade - Labour Standards Debate?' British Journal of Politics and International Relations, No.1: 2, June 1999.
25. Rorden Wilkinson 'The World Trade Organisation', New Political Economy No.7: 1, March 2002.
26. Amrita Narlikar and Rorden Wilkinson 'Collapse at the WTO: A Cancún post-mortem', Third World Quarterly, No.25: 3, April 2004.
27. A group of larger developing countries comprising Argentina, Brazil, Bolivia, China, Chile, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, India, Mexico, Pakistan, Paraguay, Philippines, Peru, South Africa, Thailand, and Venezuela.
28. A group of smaller more vulnerable countries bound together by a desire to protect strategic products and to preserve a safeguard mechanism (and previously known as the Special Products and Special Safeguard Mechanism Alliance). In reality the G33's membership is fluid, the core 23 countries comprises Barbados, Botswana, Cuba, Dominican Republic, Ecuador, Honduras, Indonesia, Jamaica, Kenya, Mongolia, Nicaragua, Nigeria, Pakistan,

Panama, Peru, Philippines, Tanzania, Trinidad and Tobago, Turkey, Uganda, Venezuela, Zambia, and Zimbabwe.
29. Otherwise known as the Least Developed Countries (LDCs), African Caribbean and Pacific (ACP) and African Union group (LDC/ACP/AU). In reality the G90 comprises 64 member states: Angola, Antigua and Barbuda, Bangladesh, Barbados, Belize, Benin, Botswana, Burkina Faso, Burundi, Cambodia, Cameroon, Central African Republic, Chad, Congo, Côte d'Ivoire, Cuba, Democratic Republic of the Congo, Djibouti, Dominica, Dominican Republic, Egypt, Fiji, Gabon, The Gambia, Ghana, Grenada, Guinea, Guinea Bissau, Guyana, Haiti, Jamaica, Kenya, Lesotho, Madagascar, Malawi, Maldives, Mali, Mauritania, Mauritius, Morocco, Mozambique, Myanmar, Namibia, Nepal, Niger, Nigeria, Papua New Guinea, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Senegal, Sierra Leone, Solomon Islands, South Africa, Suriname, Swaziland, Tanzania, Togo, Trinidad and Tobago, Tunisia, Uganda, Zambia, and Zimbabwe.
30. With the exception of Mauritius a group of largely-developed net-food importing countries keen to persist with elements of agricultural protectionism. The G10 comprises Bulgaria, Chinese Taipei, Korea, Iceland, Israel, Japan, Liechtenstein, Mauritius, Norway and Switzerland.
31. A group that emerged during the Hong Kong Ministerial Meeting seeking a more ambitious approach to market access in non-agricultural market access. The group comprised Australia, Canada, Chile, Costa Rica, the EU, Japan, Hong Kong, Korea, New Zealand, Norway, Singapore, Switzerland and the US.
32. The FIP was the key broker in the July Package. It comprises Australia, Brazil, EU, India and US.
33. WTO (2004) 'Doha Work Programme: Decision adopted by the General Council on 1 August 2004', WT/L/579, 2 August.
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35. Trade Promotion Authority is the authority given by Congress to the President to negotiate trade agreements and to submit legislation to Congress for acceptance or rejection without amendment.

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How does the World Trade Organization's dispute settlement system work?

By Raimund Raith

Introduction

Hardly a day goes by without major newspapers across the globe carrying stories about commercial disputes between World Trade Organization members.[1]

A significant proportion of these concern agricultural products such as illegally subsidised cotton, sugar or wheat, or relate to import restrictions imposed for phytosanitary reasons on products such as apples, hormone-treated meat or genetically modified organisms. Allegedly illegal subsidies can, of course, also spark disputes over industrial goods such as ships or large commercial aircraft.

Another important category of disputes concern the application of commercial defence instruments – such as anti-dumping, countervailing duty and safeguard measures – to industrial imports (e.g. steel products, semiconductors). Others relate to alleged discriminatory treatment of imported goods as compared to domestic products (the national treatment principle) or discriminatory treatment of imports from one WTO member as compared to goods from another (most favoured nation treatment – MFN).

Finally, there are the new issues – intellectual property protection and services – which were brought within the WTO's remit as a result of the Uruguay Round of trade negotiations.

Historic background

The 1947 General Agreement on Tariffs and Trade (GATT) introduced the first dispute settlement system,[2] which was supplemented in 1989 with new measures to improve its rules and procedures.[3]

Between 1989 and 1994, almost 200 cases were dealt with under this process, resulting in 91 panel reports, 75 of which were adopted by the contracting parties.

The greatest shortcoming of this system was that it stipulated that contracting parties had to adopt panel reports unanimously before they could become legally binding. This allowed losing parties to unilaterally block their adoption and explains why 16 of the reports submitted during this period were rejected.

As a result of the Uruguay Round of trade negotiations between 1986 and 1994, this system – which was based more on trade diplomacy than on legal/judicial considerations – was replaced by the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).

These new rules, which came into force in 1995, represented a significant shift towards a judicial system for resolving disputes between WTO members. Its basic features include:

- The creation of a permanent Appellate Body to hear appeals against panel reports on questions of law;

- The automatic adoption of panel and Appellate Body reports, even if the losing party disagrees. Reports can only be blocked if there is a 'negative' consensus to do so and this would require the consent of the winning party. This constitutes a kind of 'security valve' and has so far never been used.

How does the DSU work in practice?

Some very basic considerations

The DSU is only open to WTO members. This normally means states, but under certain conditions, separate customs territories can become members, as in the case of the European Communities (EC) and, more recently, Hong Kong China. Physical and legal persons (for example, individuals, companies, economic operators or non-governmental organisations) cannot participate in the WTO dispute settlement procedures.

There have been a few attempts by NGOs and economic operators to make their views known to panels and to the Appellate Body by means of amicus curiae briefs. While this was not foreseen in the DSU, the Appellate Body has decided that it has the authority to take note of such submissions and use them in its deliberations if it considers this to be helpful.[4]

Once adopted, panel and Appellate Body reports are not 'self-executing' in WTO members' domestic systems; i.e. they do not automatically cancel or

modify national measures deemed incompatible with WTO rules. This can only happen if the member concerned decides to act.

Furthermore, the WTO dispute settlement system only applies to the agreements listed in Appendix 1 of the DSU, which means, in practical terms, that all multilateral WTO agreements are automatically covered, but 'plurilateral' agreements are only covered if the parties involved have expressly agreed to this. So, for example, the DSU does not apply to the Agreement on Trade in Civil Aircraft.

Formal consultations: the first step

Formal consultations are the first step in the WTO dispute settlement process and are compulsory.

However, before reaching this stage, the dispute will already have been extensively discussed at the bilateral diplomatic level and/or in the WTO's sectoral bodies (its different Councils and Committees).

Typically, disputes are triggered when economic operators from one WTO member complain about allegedly WTO-incompatible measures, such as discriminatory treatment, a lack of protection for intellectual property rights, the granting of subsidies or the application of commercial defence measures, etc, in another.

Some members, such as the EC, also have their own legislation establishing a 'domestic' complaints system.[5] However, in the EC, the majority of cases are brought to the European Commission's attention in a more informal way.

It is up to the requesting member to seek consultations under either Article XXII or Article XXIII of the GATT. The former allows third parties to participate if the 'defending' member agrees;[6] while the latter does not. It is up to the requesting member to decide which option to go for, based on whether it believes that third parties might help to put additional pressure on the defending member, or feels that a purely inter partes exercise would be more productive.

Requests for consultation[7] – setting out the measures at issues and the legal basis for the complaint – must be made in writing to the member concerned, with a copy sent to the Chairperson of the Dispute Settlement Body (DSB).

It is very important for members to cast the request for consultation as broadly as possible, because the panel will only rule on issues on which consultations have already taken place. For example, in a preliminary ruling in a case involving Canadian measures relating to wheat exports and the treatment of imported grain[8] the panel found that some of the issues raised in the request for a panel had not been the subject of proper consultation and therefore refused to rule on these aspects of the complaint.

The purpose of these consultations is two-fold. The first is to clarify the basis for the complaint. This may be particularly useful if the requesting member is not fully familiar with the other party's legal or administrative system, but is less important in disputes between the EC and the US, given their extensive knowledge of each other's legal and administrative systems.

The second aim is to give the parties an opportunity to settle their dispute before moving to the next stage of the process. This goal was achieved more frequently in the WTO's early days, but has become rarer now.

These formal consultations are generally, but not necessarily, held in Geneva and representatives of the parties (including officials from national capitals) attend. The WTO Secretariat is not present at such meetings, which usually take the form of a question-and-answer exercise based on questions (often submitted in writing in advance) raised by the requesting member. Replies are usually given orally, rather than in writing.

If these consultations do not produce a settlement, the requesting member has the right to ask for a panel to be established within 60 days from the date when it lodged its original request.

However, in practice, the consultation stage lasts longer and, in some cases, has continued for several years. For example, in a dispute between the US and the EC over 'geographical indications',[9] Washington requested consultations in the first semester of 1999 but a panel request was not lodged until the second semester of 2003.

Panel process

Establishing a panel

In order for a panel to be established, the complainant has to send a written request to the DSB identifying the specific measures at issue

and providing a brief, clear summary of the legal basis for the complaint.[10]

There are often arguments over whether panel requests meet the DSU's requirements.[11] For example, in the dispute over geographical indications,[12] the EC claimed that the requests from Australia and the US did not meet the necessary requirements – a claim which the panel eventually rejected.

A panel is then established as a matter of course at the second DSB meeting at which it appears on the agenda, unless the DSB decides by consensus not to do so.

Article 7 of the DSU describes the standard terms of reference as follows: "To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document…and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)."

Once a panel has been established, any other WTO member can make itself a third party to the case,[13] whether or not it has participated in the consultations. It does not have to indicate which main party it intends to support. The EC and US have both developed the practice of being present as third parties in practically all the cases involving other WTO members.

Composition of the panel

The DSU does not provide for a permanent body to which cases are assigned. Instead, panels are created and their members appointed on a case-by-case basis. These panels usually consist of three individuals, with one of them acting as chair.[14]

Although an 'indicative' list of potential panellists does exist,[15] the WTO Secretariat plays a key role in deciding on the composition of each one. It presents nominations to the parties involved,[16] but does not have to limit itself to the names on the list. Indeed, only about half of the panellists who are appointed appear on the list at all.

If the parties cannot agree on the panellists within 20 days, they have the right[17] to ask the WTO Director-General to decide on its composition. This must be done, after consulting the parties, within ten days. About half of all panels are appointed in this way.

The DSU sets out the attributes panellists should have: they need expertise in the subject matter of the dispute, should be independent and should not be of the same nationality as the WTO members involved in the dispute.[18]

The panel's tasks

The panel's task, as described in Article 11 of the DSU, is to "assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of, and conformity with, the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution."

The panel procedure

Working procedures and timetable

Before the panel starts its work, it has to decide on its working procedures and draw up a timetable in consultation with the main parties involved.

While Appendix 3 of the DSU sets out standard working procedures, in practice these vary from panel to panel. The issues which have to be addressed range from fundamental questions about, for example, the confidentiality of the panel process and the timing of submissions and hearings, to more pedestrian clerical issues, such as the number of copies of documents required.

At this stage, the parties occasionally ask the panel to deliver preliminary rulings, and these typically concern questions relating to its jurisdiction.[19] Panels tend to be hesitant about giving these kinds of rulings at such an early stage, preferring to address them in their report at the end of the process – not least because they are usually reluctant to (partially) deny jurisdiction.

However, if a panel does decide to (partially) decline jurisdiction, it needs to do so as early as possible in order to remedy defects. One of the rare cases in which the panel did decide to rule early was in the dispute over Canadian wheat,[20] where it did find deficiencies. However, these were then rectified by the complainant, so there was only a modest delay to the procedure.

Panels are assisted in their work by WTO officials, generally from the division for legal affairs or those dealing with the issues at stake (rules, agriculture, services, intellectual property etc). Their tasks are comparable to those typically performed by law clerks or referendaires in courts of law.

First written submission by the complaining party

This document, which usually has to be submitted four to six weeks after the panel members have been chosen, sets out the complainant's case in detail, both from a factual and legal point of view.[21]

There are no comprehensive rules governing these submissions, but over time, the major players in WTO dispute settlement have developed certain ways of preparing and presenting them. They can vary in size considerably, from 50-100 pages in more straight-forward cases to several hundred pages (plus several thousand pages of annexes) in the most complex ones.

When drawing up its submission, the complaining party has to decide whether it wants to put all its arguments and facts on the table at this stage or hold some of them back until later.

This is a particularly tricky decision when the complaining party alleges that an obligation such as national treatment[22] has been violated and the defending party invokes an exceptions clause.[23] In these cases, the defendant's precise factual and legal arguments will only be put on the table later, so the complainant might be well advised not to put extensive arguments in its first written submission responding to what are, at this stage, hypothetical defences.

The complainant's submission must be delivered to the WTO Secretariat and all the other parties involved within the deadlines and in accordance with the requirements set by the panel. The EC, US and a few other industrialised countries make their submissions available to the public on the Internet, albeit at different times.

First written submission by the defendant

The standard working procedures set out in the DSU[24] give the defending party two to three weeks to submit its response after the complainant's first submission. This deadline is, however, often extended by individual panels because it is generally considered to be biased against the defending party:

the complainant can delay requesting the establishment of a panel until it has prepared its first submission, while the defendant only gets a full picture of the case against it when it sees this document.

In its submission, the defending party will try to rebut the complainant's factual and legal allegations and/or invoke a defence which may justify a measure which, on the face of it, violates a WTO agreement.

A typical example of this is a violation of the 'national treatment' provision contained in Article III of the GATT, which can be justified if it meets the conditions for one of the exceptions set out in Article XX. Brazil recently used this defence in a dispute over retreated tyres,[25] where the Brazilian government is seeking to justify its ban on imports on public health and environmental grounds.

Submissions by third parties

Third parties have the right (but are not obliged) to make written submissions to the panel.[26] These are normally due one week after the defendant's submission has been received.

While third parties often only have a systemic interest in the outcome of a dispute between other members (for example, how a particular aspect of WTO law is interpreted), they may have a fundamental economic interest in the outcome of some cases.

A telling example of this was the case brought against the EC by Australia, Brazil and Thailand,[27] where the economic interests of a great number of African, Caribbean and Pacific (ACP) sugar-producing countries were directly affected. This prompted Ministers, including one Deputy Prime Minister, from ACP countries to attend the first hearing.

First substantive meeting between the panel and the parties

Panel hearings are similar to those in a court of law, but with one important difference: they are held behind closed doors and only the parties to the dispute, panel members and WTO staff are allowed to attend.

Third parties to the dispute are only admitted to the part of the hearing specifically earmarked for their oral presentations. There has only been one case so far – challenging the retaliatory measures imposed by the US and Canada in

the dispute over hormone-treated meat[28] – in which the panel decided to open the hearings to the public after a joint request by all the main parties involved.

The hearing begins with oral presentations by the complainant and the defendant. There are no time-limits on these presentations.

The hearing's centre-piece is a question-and-answer session led by the panel, which, depending on the panellists' personalities, can develop into a real 'US-style' cross-examination. However, parties can stipulate that their oral replies are provisional and give definitive replies in writing following the hearing.

At the end of the hearing, each party has the right to make a short closing statement.

Written questions from the panel and rebuttal submissions

Shortly after the hearing, the panel sends a list of questions to the parties involved, giving them a set deadline to respond in writing, which is often the same as that set for the parties to send in their 'rebuttal' submissions. Written replies and rebuttal submissions have to be filed by both parties at the same time, usually two to three weeks after the first hearing.

Second panel hearing

One to two weeks after the rebuttals have been filed, a second panel hearing takes place. This follows the same format as the first: parties make opening statements and reply to questions from the panel. However, third parties are not present at this hearing.

Ideally, the second hearing should build on the results of the first, but focus on issues and arguments which were not fully discussed then, taking into account the answers given following the first hearing and the subsequent rebuttal submissions. The closing statements give the parties an opportunity to provide the panel with a comprehensive description of their respective readings of the arguments and facts of the case.

In some cases, second hearings can be uneventful, giving the impression that the panel has already made up its mind. In others, they can be extremely lively and determine the outcome of the case. In some instances, panels send further written questions to the parties after the second hearing.

Preparation of the panel report

Very often, the panellists capitalise on their collective presence in Geneva to start drafting their report immediately after the second hearing. These reports, written with the assistance of the designated WTO staff, begin with a description of the issues at stake, followed by the panel's findings and conclusions.

The first, descriptive, part sets out, somewhat exhaustively, all the factual and legal arguments that were presented to the panel by the parties, including arguments which will not feature in the report's findings and conclusions.

This section can take various forms. Traditionally, WTO staff copy extensively from the parties' submissions, replies to questions, oral statements, etc. In other cases, this part can be very short, with parties' submissions attached to the report as annexes. All the parties receive a draft of this descriptive section for comments.[29]

The panel's findings and conclusions are the centre-piece of the report. Here, the panel addresses all the relevant factual and legal arguments put forward by the parties, and assesses the facts and legal interpretation of the rules to explain its conclusions. Occasionally, a panel may decline to rule on a specific claim or issue raised by the parties if it deems that this is not necessary to reach its conclusions (a practice known as 'judicial economy').

Once the panel has completed this section, an 'Interim Report' is sent to the main parties for comments. They can ask for a further meeting with the panel to discuss its comments, although in practice this happens very rarely. It is also rare, but not unheard of, for panels to modify their conclusions as a consequence of the comments received from parties.

The panel is required to address all the parties' comments in the 'interim review' section of its final report, which comes between the descriptive section and the findings and conclusions.

The final report is sent to the parties involved first and remains confidential at this stage. However, eventually (once it has been translated), it is made public and sent to all WTO members, as well as being published on the WTO's website.[30] This step also triggers the 60-day period allowed for parties to seek adoption of the report by the DSB or to lodge an appeal.

Adoption of panel reports by the DSB

A party to the dispute – usually the one which considers that it has won – tables the panel report for adoption at a DSB meeting. It is then adopted automatically unless there is a consensus (including, of course, the winning party) not to do so.

Adoption transforms the panel's report into DSB recommendations or rulings, and triggers the implementation phase in cases where the losing party is required to take action to rectify a wrong. Of course, if the complaint is unsuccessful or the illegal measure no longer exists by the time the panel report is adopted, the defendant does not have to take any action.

Appellate Body

Following the entry into force of the WTO Agreements in 1995, the DSB established a standing Appellate Body (AB).[31] This is made up of seven individuals appointed by the DSB for a four-year term, renewable once.[32]

The qualities they need and the duties they have to perform are listed in Article 17.3 of the DSU, which reads: "The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government. The Appellate Body membership shall be broadly representative of membership in the WTO. All persons serving on the Appellate Body shall be available at all times and on short notice, and shall stay abreast of dispute settlement activities and other relevant activities of the WTO. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest."

While AB members are required to be "available at all times and on short notice",[33] they only serve on a part-time basis and many of them continue their other jobs and activities.

The AB sits in 'divisions' of three members to hear cases, but the other members are involved in the deliberations on them. This is an unusual situation and would render judgments void in some legal systems on the grounds that only judges who have heard a case can participate in the deliberations on it.

Probably the most significant feature of the AB process is its speed. Under DSU rules,[34] proceedings should be concluded within 60 days from the date

the notice of appeal was filed. However, as a fallback, the rules provide for an absolute deadline of 90 days. In practice, it is this deadline which the AB normally meets and, on the very rare occasions when it has exceeded it, this was done with the agreement of the parties.

This time frame is particularly tight given that it includes the time needed to translate the reports into the other two WTO languages, and contrasts sharply with the time – often several years – that the European Court of Justice takes to rule on appeals.

The AB's workload has varied greatly over time. While only four appeals were filed in 1996 and just five in 2004, 2000 was a 'record' year with 13 and there were ten in 2005. However, the sheer number of appeals is, of course, not the only determinant of the actual workload: the complexity of the appeals and the number of parties involved are also important factors.

As foreseen in the DSU,[35] the AB has drawn up its own working procedures and modified them several times. The present version[36] became applicable on 1 January 2005.

Appeals can only be made in relation to questions of law (as opposed to questions of fact), which means that there is no de novo review by the AB. The DSU does not currently foresee the possibility of the AB going back to the panel to ask it to look at facts which may be relevant for the AB's legal analysis but which were not dealt with during the panel process.

This has occasionally led to situations in which the AB could not deal with all questions raised by the appeal. In these cases, the only option open to a complainant would be to launch a new dispute settlement procedure to address the outstanding issues. To date, this has never happened.

Only parties to the dispute can appeal.[37] Third parties or other WTO members cannot do so and, while the AB procedure allows third parties to participate in hearings, only those who were present at the panel stage are eligible to do so.

Appellate procedure

To challenge a panel ruling, a party must file a 'notice of appeal' with the AB Secretariat, an administrative entity which exists solely to service the AB and operates separately from the rest of the WTO Secretariat.

The required content of the notice of appeal is spelt out in the AB's Working Procedures.[38] In practice, it is a concise document rarely consisting of more than a few pages.

Seven days after lodging the appeal, the appellant has to make its full submission to the AB.[39] In this document, which can exceed 100 pages, its case must be made in full because, unlike during the panel stage, there is no opportunity for a second submission.

The party appealed against can itself also file a notice of appeal (often referred to as a 'cross-appeal'), but must do so within 12 days of the original notice of appeal.

The appellant's submission is due on day 15, the appellee's submission by day 25 and the AB hearings are held between 35 and 45 days after the date of the notice of appeal – in other words, within the first half of the 90-day appeal period.

AB hearings differ from panel hearings in a number of ways. They are more structured, there is a time limit on parties' opening statements (approximately 20-30 minutes), and the AB usually asks the parties a long list of questions to which they must reply hic et nunc (once and for all) – they cannot confirm or correct their answers in writing afterwards.

AB hearings can be very inquisitorial and last for several days. (The hearing on the US Omnibus Appropriations Act[40] lasted for three full days, addressing around 250 questions prepared by the AB.)

As mentioned above, the AB operates outside the WTO Secretariat structure and relies exclusively on its own Secretariat to prepare cases, hearings and reports. AB reports tend to be much shorter than panel reports, mainly because they refer back to these for the facts. That said, they can still run to several hundred pages.

There is no interim review at the AB stage and reports are not given to the parties involved in advance. They are issued to the parties and to all WTO members in the three official languages and put on the WTO website simultaneously.

AB reports can either confirm panel findings and conclusions or modify them in part or completely. Like panel reports, they have to be adopted by the DSB to become recommendations and rulings with legal force.

An AB report must be put on the DSB agenda (typically by the 'winning' party) and adopted within 30 days of its circulation (this often requires a special DSB meeting to be convened). It is then adopted automatically unless there is a consensus not to do so.

Implementation

No 'direct effect'

DSB recommendations or rulings do not generally have a 'direct effect' in WTO countries, although members can stipulate that this should happen.[41] This means, in practical terms, that a member whose laws or other measures have been found to be at variance with its WTO obligations must take the necessary action to rectify the wrong. This is referred to as 'implementation'.

'Prompt' compliance

As to the timing of implementation, the DSU establishes the principle of "prompt compliance".[42] This does not, however, necessarily mean immediate compliance. Rather, a 'reasonable' time frame for doing so, established in accordance with the procedures laid down in the DSU[43], has to be respected.

The time frame depends on the type of measure involved (for example, modification of a statute, government regulation, presidential decree or decision by a customs official) and members have a large degree of discretion over which kind of measure to choose. The complexity of the measure is also taken into account, but the degree of political controversy it might generate is not.

The time frame can either be established by agreement between the parties[44] or through binding arbitration.[45] In practice, both are used equally frequently.

'Reasonable' periods of time range from just a few months to more than 15 months. That said, there have been cases where full implementation occurred prior to, or around the same time, as the DSB adopted the panel/AB report. A good example was the US-Steel Safeguards' case,[46] where the US President revoked a WTO-incompatible safeguard measure between the time the AB report was issued and its adoption by the DSB.

Disputes over implementation/compliance

Where the losing party has introduced measures to implement DSB recommendations and rulings, and the winning party contests their conformity with WTO rules, the DSU provides for an 'expedited dispute settlement procedure'.[47]

This is almost identical to an ordinary DSU dispute settlement procedure: it begins with consultations and a panel request, and, if available, the original panellists will remain on the case. This panel report[48] may also eventually be appealed to the AB.

There have also been instances where more than one such procedure was launched on the same case after the subsequent implementation measures had been scrutinised. One recent example was the case against the US over the tax treatment of Foreign Sales Corporations (FSC)[49], where two such procedures were subsequently launched and both went to appeal.

Alternatives to implementation: compensation or retaliation

A party whose measure has been found to be WTO-incompatible has two – temporary – alternatives to implementation.[50]

First, it can agree to compensate the other party for the "nullification or impairment" it is suffering because prompt action was not taken to correct the wrong. In practice, this option is very rarely used.

However, in one case – involving the US Section 110 Copyright Act[51] – the US paid more than €3 million to a European collecting society, which collects licensing fees on behalf of copyright and related rights owners, in compensation for the economic losses suffered by EU rights-holders because their rights were inadequately protected in the US. This was the first and only ever case in which monetary compensation has been granted.

The second option is to suffer the consequences of retaliation; i.e. a suspension of concessions. This usually takes the form of an increase in the tariffs on certain products originating from the losing party's territory.

The winning party must obtain DSB approval before retaliating; it cannot do so unilaterally.[52] While, in principle, this is automatic, the losing party may refer the

matter to binding arbitration if it considers that the level of retaliation exceeds the level of nullification or impairment[53] suffered by the requesting party.

Members of the original panel usually carry out this arbitration, and must do so within 60 days. There is no right of appeal against their decision, and the DSB does not adopt it officially, as it has legal effect ipso facto.

Good practical examples of how arbitrators assess the balance between the retaliatory measures imposed and the nullification or impairment suffered can be found in the awards made in the cases involving the US Continued Dumping and Subsidy Offset Act (the so-called Byrd Amendment)[54] and the US Section 110 Copyright Act.[55]

Retaliation is, in fact, relatively rare, as increasing import duties on certain products can also have a negative economic impact on the country which imposed these measures. This is because they push up the price of the products in question domestically and if these are imported by local companies to be used as components in producing other goods, could make them less price-competitive.

That said, there have been a number of cases where parties – particularly the US and the EC – have resorted to retaliation. The EC (and a few other WTO members) currently have retaliatory measures in place against the US in the US-Byrd Amendment case. The US and Canada have also imposed retaliatory measures on the EC in the hormones dispute.[56]

However, in this case, the EC has now launched panel proceedings against the US and Canada on the grounds that these measures are no longer justified. The panel report on this case is likely to provide some clarification of the post-retaliation phase of DSU dispute settlement.

How has the DSU worked in practice over the last ten years?

During the WTO's first decade, from 1995 to 2004, more than 300 cases were launched through requests for formal consultations. About half resulted in the creation of panels and eventually led to 89 panel reports – of which 59 were the subject of appeals.

The EC and the US are by far the most active participants in the dispute settlement system: the EC was a complaining party in 33 of these cases and a respondent in 28; and the figures for the US were 35 and 57 respectively.[57]

The statistics show that the chances of a complaining party winning its case – at least in part – are significantly higher than the chances of the responding party mounting a (completely) successful defence. It is very rare for complainants to lose cases altogether, although it does happen from time to time, as in the dispute over US anti-dumping measures on oil tubular goods from Mexico, where Mexico's complaint was rejected entirely on appeal.[58]

Effectiveness and appreciation

The DSU is frequently referred to as the WTO's 'crown jewel' and there is a broad consensus that it has worked well over the past ten years.

The track record of implementation by members – including the EC and US 'elephants' and the developing countries – is excellent, even in the most politically sensitive and economically important cases.

For example, the US eventually implemented the FSC rulings and recommendations in full[59] (albeit significantly after the 'reasonable period of time' laid down had elapsed), bringing decades of litigation to a conclusion.

The EC also implemented the WTO's rulings fully within the specified time frame in the sugar case[60] brought by Australia, Brazil and Thailand, which resulted in a radical overhaul of the entire EC sugar regime, including its treatment of imports from Africa, Caribbean and Pacific (ACP) countries.

The case brought by the US and EC against India over patent protection for pharmaceutical and agricultural chemical products[61] sparked enormous domestic political controversy – and contributed to the fall of a government – and yet India complied fully with the WTO ruling within the specified time frame.

The DSU has also allowed small and even very small developing-country WTO members to prevail over one or other 'elephant'.

In a case involving US measures affecting the cross-border supply of gambling and betting services,[62] the tiny Caribbean island state of Antigua and Barbuda, with less than 70,000 inhabitants, prevailed – at least in part – against the mighty US. Similarly, Peru was able to score a victory over the EC in a dispute over the description of sardines for trade purposes.[63]

That said, there are a few cases in which the 'reasonable period of time' elapsed a long time ago and the parties concerned have not implemented - or even attempted to implement - DSB recommendations or rulings

All of these are cases in which the US was the loser. For example, in the dispute over the Section 110 Copyright Act,[64] the US took no further action to implement the ruling after the initial compensation agreement lapsed; and in the so-called 'Havana Club' case,[65] the AB/panel reports were adopted in 2002 but their findings have not been implemented to date.

DSU review

Of course, no set of rules is so perfect that it could not be improved, and this applies to those set out in the DSU as well.

As a consequence, a review process has been under way since 1999 and this has since been merged into the negotiations on the Doha Development Agenda which began in 2002. However, despite almost continuous work over the past seven years, it has not as yet produced any tangible results.

The major topics addressed in these negotiations include:

- Sequencing: this concerns the relationship between challenges to the way WTO rulings have been implemented[66] and retaliation,[67] as the timing of the two actions is not clearly set out in the DSU. Theoretically, a victorious complainant could go directly to retaliation without first asking the panel to decide whether DSB recommendations have been fully implemented. In practice, parties now tend to reach agreements amongst themselves to settle this issue;

- Post-retaliation: this concerns the issue of how to proceed if a party suffering (originally legitimate) retaliation now considers that the conditions which justified this no longer exist;

- Remand: this concerns the possibility for the AB to send a case back to the panel to clarify factual points which were not established in its report but have become relevant to the appeal;

- Panel composition: this relates to the concerns raised by some WTO members that the panel composition process is overly burdensome. They are calling for a more structured way to find more 'professional' panellists;

- Procedures: a range of other issues under discussion include the treatment of highly confidential information, calls for enhanced transparency (including open panel meetings), and so-called special and differential treatment for developing and least-developed WTO members.

The chances of changes to the DSU being agreed and, if so, when, will in all likelihood depend on developments in the (currently-stalled) Doha Round negotiations.

Raimund Raith is Minister-Counsellor/Legal Adviser at the Permanent Delegation of the European Commission, Geneva. Mr Raith is also Dr. Jur. LL.M. (University of Michigan), a Member of the New York Bar and a lecturer at the Europa-Institut of the Saarland University. The views expressed are those of the author and cannot be attributed to the EU institutions.

Endnotes

1. There are presently 149 Members and 31 applications (Russia is the single most important one) pending, see WTO web-site www.wto.org
2. Articles XXII and XIII.
3. Decision on Improvements to the GATT Dispute Settlement Rules and Procedures (12.4.1989, BISD 36S/61).
4. A good description of the various relevant considerations and precedents can be found in the Appellate Body report concerning the case 'EC-Trade Description of Sardines AB-2002-3 (DS231)', paras 153 et seq.
5. Trade Barriers Regulation OJ N° 228 1997 p.1.
6. Article 4.11 DSU.
7. Under Article 4.4 of the DSU.
8. See panel report WT/DS/276/R paras 4.6 et seq (all WTO panel and Appellate Body reports are available in English, French and Spanish at www.wto.org
9. DS174.
10. Article 6.1 DSU.
11. Set out in Article 6.2 DSU.
12. DS174-290.
13. Article 10 DSU.
14. Article 8.5 DSU.
15. Article 8.4 DSU.
16. Article 8.6 DSU.
17. Under Article 8.7 DSU.
18. Article 8.1-3 DSU.
19. Article 6.2 DSU.
20. DS276.
21. Article 12.6 DSU.
22. Article III GATT.
23. Article XX GATT.
24. Appendix 3 para 12 (a) (2) DSU.
25. DS332.
26. Article 10 DSU.
27. DS265-266-283.

28. DS320-321.
29. Article 15.1 DSU.
30. www.wto.org
31. Under Article 17.1 DSU.
32. The current AB members are: Georges Abi-Saab (Egypt); Luiz Baptista (Brazil); A.V. Ganesan (India) – current chairman; Merit Janow (US); Giorgio Sacerdoti (EC/Italy); Yasuhei Taniguchi (Japan) and David Unterhalter (South Africa).
33. Article 17.3 DSU.
34. Article 17.5 DSU.
35. Article 17.9 DSU.
36. As contained in document WT/AB/WP/8.
37. Article 17.4 DSU.
38. Rule 20.
39. Rule 21.
40. DS176.
41. The approach of the Court of Justice of the European Communities is well illustrated in its judgments in joint cases C-300 and C-392/98 Dior v. Assco.
42. Article 21.1 DSU.
43. Article 21.2 DSU.
44. Article 21.3 (b) DSU.
45. Article 21.3 (c) DSU.
46. DS248.
47. Article 21.5 DSU.
48. Pursuant to Article 21.5 DSU.
49. DS108.
50. Article 22.1 DSU.
51. DS160.
52. Article 21.6 DSU.
53. The issue of so-called cross-retaliation (Article 22.3 DSU) will be left aside for the purposes of this presentation.
54. DS234.
55. DS160.
56. DS26/48.
57. More statistical data can be found in B.Wilson (2005) 'The WTO dispute settlement system and its operation: a brief overview of the first ten years' in B.Wilson, R. Yerxa Key Issues WTO Dispute Settlement (eds)., Cambridge. p. 15 et seq.
58.DS282/AB-2005-7.
59. DS108.
60. DS268.
61. DS50/79.
62. DS285.
63. DS231.
64. DS160.
65. DS176.
66. Article 21.5 DSU.
67. Article 22 DSU.

Afterword

By Robert Howse and Kalypso Nicolaidis

Together, the two studies presented in this paper provide a very useful tour d'horizon on how we got to where we are today in the field of international trade governance.

Rorden Wilkinson provides a comprehensive overview of multilateral trade negotiations over the last half century. He argues that the governance of global trade has changed little since it was first put in place in the post-war era, despite the move from the General Agreement on Tariffs and Trade (GATT) to the World Trade Organization, the growing assertiveness of the developing countries, and the increasing infringement of trade governance on the sovereign jurisdiction of nation states.

Raimund Raith then provides a lucid overview of the WTO dispute settlement system. His analysis brings home the fact that dispute settlement has changed fundamentally since the early decades of GATT and must now squarely face challenges that were not foreseen even during the Uruguay Round.

The trend towards using legal proceedings to resolve disputes (known as 'judicialisation') in global trade governance may be the most significant revolution in today's trade world. Nevertheless, while Mr Wilkinson may underestimate the changes that have brought the WTO to the brink of tearing itself apart, Mr Raith may overestimate the reach and impact of its Dispute Settlement Understanding (DSU).

Indeed, it could be argued that political negotiations, on the one hand, and judicial settlement, on the other, have long constituted two alternative avenues for decision-making in trade governance; and that, faced with political stalemate, judicialisation is increasingly superseding political bargaining as the major way of reaching decisions in this area.

It is fitting then that Mr Wilkinson's paper, which concludes on the political uncertainties surrounding the Doha Development Agenda (DDA), is followed by Mr Raith's paper, which discusses ways of making a very active – if not necessarily activist – dispute settlement system more efficient and legitimate. Deadlock on one side, fine-tuning on the other. But how far can this logic be taken?

How serious is the crisis?

Mr Wilkinson's paper may underestimate the gravity of today's crisis in the governance of international trade for three reasons.

First, he provides an account of the evolution of the GATT/WTO regime that is largely self-contained or self-referential. In this account, phenomena such as the post-war reconstruction of Europe, the cold war, the transformation of information technology, the creation of global financial markets and the collapse of the gold standard, energy politics, colonialism and its legacy, the rise and fall of the Washington Consensus,[1] and the evolution of international law on environmental protection and human rights, play virtually no (or a minimal) role in explaining the trajectory of the global trading system and the challenges it has faced in the past, as well as those before it now.

It is almost as if he conceives of the multilateral trade regime as an island that is cut off – or at least very distanced – from today's turbulent and fast-paced world of global politics and economics.

It is ironic that Mr Wilkinson's paper begins by offering the promise of high drama in the WTO, yet by the end, even if one is persuaded that the WTO is facing serious problems, in a sense these problems do not seem very interesting – and are certainly removed from the most pressing real world problems and challenges of today: energy security, global warming, the rise of China and the much-feared 'clash of civilisations'.

Second, a great deal of the trade game is no longer played in the WTO 'courtyard'. Whether in traditional sectors or in new areas such as intellectual property rights, regional or bilateral free trade agreements now cover almost the entire globe.

Indeed, it is precisely because both the EU and the US have been able to negotiate 'TRIPS plus' deals with many developing countries (in contexts where asymmetries of power are obviously greater) that they have allowed multilateral rules to include many of the safeguards demanded by the very same developing countries.

Formal multilateral deals are not only increasingly difficult to achieve; they are also less relevant. In this new world, structural power, be it material or conceptual, is more of a determinant than ever. In addition, networking and

informal bargains between all the agents of globalisation – from government officials, businesses and NGOs to transnational institutional actors (such as standardisation agencies) – now have a significant impact on the process.

Third, and perhaps most importantly, the tension between developed and developing countries – or perhaps more accurately between the EU and the rest – is not simply about asymmetric bargains and the relative costs of concessions made on each side.

It is clear that developing countries' current positions in the Doha Development Round (DDR) reflect, in part, the deep suspicion inherited from the asymmetric outcome of the Uruguay Round. This is particularly evident if we contrast the gains made by developed countries on the 'new issues' with those made by developing countries in traditional areas such as agriculture and textiles.

However, the real tension is between two very different visions of what global trade governance ought to be about.

For the EU, the time has come to export some of its own approaches to the WTO. Trade liberalisation ought to be about agreed-upon principles and rules to govern transborder exchanges that are legitimate as norms, and thus defendable as something other than concessions made by some members in return for gains in other areas. Proponents of this vision often advocate the 'constitutionalisation' of the WTO; that is, a global pact on global economic governance which would be stable over time and protected from political vagaries. The Singapore agenda mentioned by Mr Wilkinson was designed to offer a first step in this direction.

For most other WTO members, however, this is not what multilateral trade governance should be about. Negotiations are about exchanging concessions on the basis of the expected impact of market-access provisions. Everyone needs to be reassured that they will be net winners, so principles alone will not suffice.

There are, however, at least two radically different versions of this 'bargaining' option: that of the US, which wants to play the game as the hegemon it is; and that of most developing countries, which believe that the DDR ought to be about rebalancing the system to correct for the lopsided deals made in the Uruguay Round.

What we have seen with the DDA, however, is that while the first approach has been rejected by a wide range of WTO members, the second is

becoming increasingly unmanageable because of the growing number of veto-wielding players and coalitions involved.

The collapse of the DDR may yet be avoided by some clever political trick, but there is virtually no chance that the negotiations will achieve any significant degree of liberalisation in the sectors that matter most to developing countries, much less that the rules of the current system will be rebalanced in a pro-development fashion.

If this is true, the dispute settlement system may indeed become the forum of choice for playing out trade conflicts in the years to come. While this is not particularly desirable, its full import needs to be considered.

Jurisprudence in global trade

Mr Raith's paper analyses the way the procedure works, but it does not address the substance of DSU jurisprudence; that is, the legal interpretations generated by the system (except to the extent necessary to elucidate the procedures themselves). For him, the main goal of the system is to settle disputes efficiently, and he therefore focuses on a factual analysis of compliance with rulings.

This is, of course, a legitimate perspective to consider, but according to the DSU, the goal of the system is not only to settle disputes but also to clarify WTO laws. In other words, a jurisprudential mandate is built in, and any comprehensive analysis and evaluation of the dispute settlement system would have to consider the jurisprudence that it generates and its implications for the WTO's legitimacy, for domestic governance, and for international order more generally.

If this is the case, it may be more important for the DSU to generate legitimate decisions in the eyes of a broader public than simply to produce efficient decisions in the eyes of experts in the trade community.

In this regard, perhaps the most significant gap in Mr Raith's analysis is that he does not systematically consider the issue of transparency, nor the role played by non-governmental actors in the dispute settlement system.

Despite the controversy it generated at the time, Mr Raith does not discuss the Appellate Body's decision that it could consider unsolicited amicus curiae briefs which were not attached to government submissions, or its earlier ruling that panels could consider such briefs.

It is true that, to date, amicus submissions have not generally played a major role in cases, but there have been important exceptions. In the biotech case brought by the US against the EU, for instance, Washington was sufficiently concerned about the potential impact of certain amicus submissions that it addressed them at length in its written pleadings.

To his credit, Mr Raith does mention the decision to open up the hearing to the public on the retaliatory measures imposed on the EU in the hormones dispute. But he does not discuss the legal basis for this, nor whether something similar could be done at AB level.

He also mentions that some industrialised countries have made their written pleadings available to the public. This perhaps understates the trend in that direction, as some developing countries have recently done the same – for example, Peru in the sardines case against the EU, and Antigua in the case against the US over the cross-border supply of gambling and betting services. Thus it appears that the DSU might become a forum of choice for exchanging arguments and putting public pressure on litigants.

Why then does the EU continue to insist that its submissions must remain secret until the first panel hearing? This makes it more difficult for non-governmental actors to participate as amici in a timely fashion, as an amicus brief should ideally be written knowing all the arguments in order for it to be pertinent and not redundant.

EU officials have argued that, in fact, developing countries favour this cautious stance, as they view northern non-governmental organisations (NGOs) with suspicion and are concerned about their ability to match NGOs' resources. But this is questionable given that the views of these NGOs are generally closer to those of developing countries than to those of the EU, and in any case, developing countries have already begun to make their arguments available to outside parties.

The nature of the panel reports raises a further question about transparency which requires more examination. These reports are generally far lengthier and more technical than those in domestic courts. If students at leading US law schools often find them inscrutable, how can the 'educated' public concerned about issues of globalisation possibly understand them?

The length of the ruling in the biotech case against the EU (around 1,000 single-spaced pages) in itself makes informed public discussion of this

hugely important and sensitive issue largely impossible. If making the WTO more democratic means, in part, creating a framework which enables it to respond to the reactions, criticisms and concerns of actors outside its remit, then such considerations become crucial.

Mr Raith's comparison of the role of the legal secretariat in panel proceedings to that of judicial clerks in domestic tribunals is, in one respect, misleading, since traditionally it is the secretariat which writes the explanations of judgments in panel proceedings. These are then largely imposed on the panelists, who often do not have any legal background to speak of and are ill-placed to second-guess legal experts.

This practice is outrageous from the perspective of judicial independence, and has been challenged in cases where law professors have been appointed to panels. But it still happens. Does this mean that the basic liberal principles of separation of powers cease to apply at the global level?

Ultimately, do Appellate Body decisions matter? Mr Raith suggests that, in general, adopted WTO rulings do not have 'direct effect' in domestic legal systems. This is too wide a generalisation.

'Direct effect' needs to be defined more precisely. Sometimes, it is used to mean giving private actors affected by rulings the possibility of taking action to 'enforce' them in domestic legal systems. This is far too narrow a view of the concept.

Many WTO members have national legislation in place implementing WTO rules. For example, in areas such as trade remedies, domestic courts may well be guided by the relevant rulings of the panels and Appellate Body in interpreting and applying such legislation. Furthermore, many domestic legal systems require that international law be respected and, in some instances, give it equal status with the national constitution.

Global trade – who wins?

Finally, has the DSU which was established by the Uruguay Round mitigated the power asymmetries in global trade politics?

The examples Mr Raith gives of developing countries' victories over 'elephants' such as the EU and the US must be taken with a grain of salt.

Certainly, Antigua – the nominal plaintiff in the US gambling case – triumphed over Washington. But it is well known that US gambling industry interests were behind that complaint. As for Peru's victory in the sardines case against the EU, what can or cannot be called a sardine is hardly a burning issue for European public opinion, and losing that one cost the EU very little. The cotton and sugar cases, which represented major victories for some developing countries, had the backing of Brazil – a very large and competent WTO litigator.

In summary, we believe there is little reason to be satisfied or complacent about the capacity of small developing countries to use the dispute settlement system for their benefit.

However, this, in the end, may be where hope for the DDR could still lie. Dispute settlement-based global law is still a long way off providing a stable equilibrium around which actors' expectations can happily converge. As a majority of WTO members contemplate the challenges ahead, without further political clarification of current international trade law, they might well conclude that bringing politics back into the process remains the only democratically legitimate and functionally sound option open to them.

Robert Howse is Alene and Allan F. Smith Professor of Law at the University of Michigan. Kalypso Nicolaidis is Director of the European Studies Centre and Lecturer in International Relations, University of Oxford.

Endnote

1. The phrase "Washington Consensus" was coined by John Williamson in 1990 "to refer to the lowest common denominator of policy advice being addressed by the Washington-based institutions to Latin American countries as of 1989".

Mission Statement

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European Policy Centre
Résidence Palace
155 Rue de la Loi
1040 Brussels
Tel: 32 (0)2 231 03 40
Fax: 32 (0)2 231 07 04
Email: info@epc.eu
www.epc.eu