

The WTO Dispute Settlement System 1995–2003

Edited by

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Foreword

The WTO Dispute Settlement System 1995–2003

Since the entry into force of the Agreement establishing the World Trade Organization (WTO) on 1 January 1995 up to June 2003, the WTO Dispute Settlement Understanding (DSU) has been invoked in 295 cases leading to consultations, panel proceedings, appellate review or arbitration on complaints by WTO Members.¹ Most complaints involved developed WTO Members, notably the European Community (EC) and the United States (US), and related to GATT 1994 and to the other Multilateral Agreements on Trade in Goods listed in Annex 1 to the WTO Agreement; less than 10% of the complaints referred to the General Agreement on Trade in Services (GATS) or the Agreement on Trade-Related Intellectual Property Rights (TRIPS). In 54 cases, mutually agreed solutions were notified to the Dispute Settlement Body (DSB) pursuant to Article 3 of the DSU. In about a dozen of other disputes, the complaints were formally withdrawn. Dispute settlement panels were established in 113 cases, but actually composed in only 88 cases. Panel reports were adopted in 71 cases. Following the peak of 18 panel reports circulated in the year 2000, the launching of the Doha Development Round negotiations in 2001 coincided – as in previous GATT Rounds – with a decline in the number of panel proceedings.

In the early years of the WTO, almost all panel reports were appealed. By 2003, the frequency of appeals had decreased to 60%. Only 2% of the appellate reports completely reversed the prior panel findings; more than 80% of the Appellate Body reports modified some panel findings, less than 18% upheld the panel findings without modifications. While panel proceedings often exceeded the time period of 6–9 months prescribed in Article 12 of the DSU, the average length of appellate review proceedings remained below the maximum time period of 90 days set out in Article 17 of the DSU.

In 16 disputes, the “reasonable period of time” for implementing the dispute settlement findings was determined by arbitration pursuant to Article 21.3 of the DSU. In 14 disputes, “compliance panels” were established according to Article 21.5 and

¹ Complete lists and summaries of these cases are to be found in the regular *Overviews/Updates of WTO Dispute Settlement Cases*, WTO documents WT/DS/OV/1–14. The statistical classifications in these documents include mistakes and differ from other statistics depending on the respective classification method.

examined whether the implementing measures were consistent with the WTO obligations of the WTO Members concerned. Seven disputes led to arbitration awards on the “level of suspension of concessions or other obligations” (Article 22.4) and to subsequent authorizations to “retaliate” pursuant to Article 22 of the DSU. The option offered by Article 25 of the DSU to resort to “expeditious arbitration within the WTO as an alternative means of dispute settlement” was used in only one dispute; this arbitration illustrated the possibility of agreeing on the availability of traditional international law remedies (such as financial reparation of injury) also in the WTO context.

Even though more than 185 complaints were brought by developed WTO Members and were primarily targeted against other developed countries (more than 117), the annual share of developing countries involved in WTO disputes increased to more than 70% in the year 2001. The altogether more than 100 complaints by less-developed WTO Members reflect the increasing recourse to the DSU by developing countries. Most WTO complaints raise issues of legal interpretation of WTO rules which may also affect the legal positions and trade of third WTO Members. Hence, in contrast to the bilateral nature of most disputes before the International Court of Justice (ICJ), the regular participation of third parties in panel and Appellate Body proceedings distinguish WTO dispute settlement proceedings from judicial proceedings in the ICJ.

WTO jurisprudence remains characterized by its emphasis on the “ordinary meaning” of the text of WTO rules: most panel and Appellate Body reports rely on “textual” rather than on “systemic” and “functional interpretations” as they have been typical of the more “creative” jurisprudence of some regional integration courts like the EC Court of Justice and the European Court of Human Rights. WTO Members and the DSB tend to be critical of WTO dispute settlement findings that give the appearance of exceeding the limited mandate of WTO panels. Panel reports are usually limited to legal findings that are necessary for the settlement of the dispute at issue. Interpretations of WTO rules tend to refer extensively to previously adopted panel and Appellate Body reports. As a result of the rapidly expanding WTO jurisprudence, the legal interpretation and application of the more than 25,000 pages of WTO law and WTO commitments are becoming ever more difficult without knowledge of the already more than 160 WTO panel, Appellate Body and arbitration reports.

This complexity of WTO dispute settlement proceedings has been further increased by the fact that, since the beginning – in 1997 – of the “full review of dispute settlement rules and procedures under the WTO” mandated by the 1994 Ministerial Decision on the Application and Review of the DSU,² numerous proposals for improving and clarifying the DSU have been made and discussed in WTO bodies. Following the Doha Declaration of November 2001 and the launching of the Doha Development Round negotiations early in 2002, the DSB has held 13 formal, as well as numerous informal “special sessions” during which 42 specific proposals for improving and clarifying the DSU were made and discussed by WTO Members, touching on almost all DSU provisions.³ In his report to the WTO Trade Negotiations Committee in June 2003, the chairman of the DSB in Special Session put forward a draft legal text on proposed amendments to the DSU and on a proposed WTO decision relating to

² See the text in: *The WTO Dispute Settlement Procedures. A Collection of the Legal Texts*, WTO 1995, at 42.

³ The proposals are published in the WTO document series TN/DS/W/1 *et seq.*

legal assistance for developing countries.⁴ Yet, as most WTO Members emphasize that the DSU has generally functioned well to date and that many of the proposed reforms require further legal refinement and discussions, the Chairman's text could not be agreed upon prior to the WTO Ministerial Conference at Cancun in September 2003 and requires further work.

This book builds upon the earlier book by members of the International Trade Law Committee (ITLC) of the International Law Association (ILA) on *International Trade Law and the GATT/WTO Dispute Settlement System*.⁵ The more than 65 international lawyers, judges, legal advisers and academics from all over the world who collaborate in the ITLC, have made the analysis of WTO law and policies one of the priorities of their regular conferences and publications. The 12 contributions to Part I of this book describe and analyze the *Doha Development Round Negotiations on Improvements and Clarifications of WTO Dispute Settlement Procedures* up to June 2003. The 14 contributions to Part II on *WTO Jurisprudence and Dispute Settlement Practice* examine the progressive development of WTO dispute settlement procedures and the clarification of WTO rules through the jurisprudence of WTO dispute settlement panels, the Appellate Body and arbitration in the WTO. By covering both the "rule-making" as well as the "(quasi)judicial" activities in the WTO dispute settlement system, the book takes into account the dialectic interrelationships between the "legislative" and the "(quasi)judicial" branches of the WTO. The comprehensive practical experience of the contributors to this book – as WTO arbitrators, members of the WTO Appellate Body, WTO panelists, legal advisors in the WTO or in the EC, legal advisors of governments or of non-governmental organizations involved in WTO dispute settlement proceedings, or as independent academics in developed as well as in less-developed countries – offers diverse legal perspectives which will help readers to better understand the complexity of the rules, procedures, practices and problems in the ever more expanding WTO dispute settlement system. In spite of the broad scope of this book, not all of the areas of WTO jurisprudence covered in our previous book could be analyzed in the same detailed manner in this volume.⁶

I am particularly grateful to my former doctoral student and assistant at the European University Institute (EUI) at Florence, Dr. Federico Ortino, for his help in editing this book. Most of the contributions to Part I of this book were discussed – with WTO ambassadors, other WTO negotiators and academic experts – at our annual conference on *Preparing the Doha Development Round: WTO Negotiators Meet the Academics* at the EUI and its Robert Schuman Centre for Advanced Studies in Florence in September 2002. Most of the other book contributions were finalized in spring 2003, in some cases with due regard to the previous discussions of WTO jurisprudence in our ITLC meetings at New Delhi in April 2002 and at the University of Stellenbosch (South Africa) in March 2003. The book is dedicated to the memory of the late Professor Robert E. Hudec whose pioneering publications on GATT and WTO jurisprudence have inspired many of the contributors to this book. We miss his

⁴ The report by the chairman, together with the proposed amendments to the DSU, is reproduced in Annex II to this book.

⁵ E.U. Petersmann (ed), *International Trade Law and the GATT/WTO Dispute Settlement System* (Kluwer Publishers 1997) 704 pages.

⁶ This is true especially for the already more than 20 WTO panel reports on anti-dumping measures, some of which had been analyzed in the contributions by J. Bourgeois, G. Horlick and P.A. Clarke to our previous book (above note 5, at 283–324).

kind and generous friendship, his relentless curiosity and humor, and his commitment to the promotion of social welfare through international trade and trade law.

Prof. Dr. Ernst-Ulrich Petersmann
European University Institute, Florence (Italy),
Chairman of the International Trade Law Committee of the ILA.

List of Abbreviations

AB	Appellate Body
ACP	African-Caribbean-Pacific
AJIL	American Journal of International Law
ASEAN	Association of East Asian Nations
ATC	Agreement on Textile
BISD	Basic Instruments and Selected Documents of the GATT
BoP	Balance of Payments
CAFE	Corporate Average Fuel Economy
CARICOM	Caribbean Common Market
CFCs	Chlorofluorocarbons
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECR	European Court Reports
EEA	European Economic Area
EEC	European Economic Community
EFTA	European Free Trade Association
EJIL	European Journal of International Law
EU	European Union
FAO	United Nations Food and Agriculture Organization
FDI	Foreign Direct Investment
FTAA	Free-Trade Area for the Americas
GATS	General Agreement on Trade in Services
GATT 1947	GATT concluded in 1947
GATT 1994	GATT incorporated into the WTO Multilateral Agreements on Trade in Goods
IBRD	International Bank for Reconstruction and Development
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
ICSID	International Center for the Settlement of Investment Disputes
ILC	International Law Commission
ILM	International Legal Materials
ILO	International Labour Organisation

IMF	International Monetary Fund
IPRs	Intellectual Property Rights
ISO	International Standard Organisation
ITC	International Trade Center (UNCTAD/WTO)
ITU	International Telecommunications Union
JWT	Journal of World Trade
JIEL	Journal of International Economic Law
LDCs	Least Developed Countries
MERCOSUR	Mercado común del Sur (Southern Common Market)
MFN	Most Favoured Nation
MTN	Multilateral Trade Negotiations
NAFTA	North American Free-Trade Agreement
NGO	Non-governmental Organization
NT	National Treatment
OAS	Organisation of American States
OECD	Organisation for Economic Cooperation and Development
PPM	Process and Production Methods
PSI	Preshipment Inspection
S&D	Special and differential treatment
SCM	Subsidies and Countervailing Measures
SPS	Sanitary and Phytosanitary Measures
TBT	Technical Barriers to Trade
TMB	Textiles Monitoring Body
TNC	Transnational Corporation
TPRM	Trade Policy Review Mechanism
TREMs	Trade Related Environmental Measures
TRIMs	Trade-Related Investment Measures
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNEP	United Nations Environmental Programme
UNCTAD	United Nations Conference on Trade and Development
USTR	United States Trade Representative
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organisation

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