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DISPUTE SETTLEMENT AND THE WTO

BACKGROUND NOTE FOR CONFERENCE ON DEVELOPING COUNTRIES AND THE NEW ROUND MULTILATERAL OF TRADE NEGOTIATIONS

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1. INTRODUCTION

1. Introductory and Background Remarks[1]

On January 1, 1995 the new international economic organization called the WTO (World Trade Organization) came into being as the result of the complex Uruguay Round negotiation. A very important part of this new organization (some say the central part) is the new dispute settlement procedures, particularly embodied in a document, entitled the DSU -- Dispute Settlement Understanding -- which is Annex 2 to the WTO "charter." In the opinion of many officials and non-government observers, this new dispute settlement system has been very successful in its beginning years. Of course, it is not without faults and it would be surprising if its many innovative features would all work as originally intended. At this point, towards the end of 1999, after almost five years of experience, it is appropriate to pause and reflect on the operation and effects of this new dispute settlement process. Indeed, the decisions at the final Uruguay Round Conference at Marrakesh, Morocco in mid-April, 1994, called for a review of the WTO dispute settlement procedures within four years after they came into force. It is reasonably clear that the dispute settlement procedures will be one of the topics discussed at the WTO ministerial meetings scheduled for November 30th - December 3rd in Seattle, Washington in the United States.

Particularly during the last few years, there has been considerable discussion about various perceived problems, and also about the merits, of the WTO dispute settlement process. A number of governments have developed position papers, sometimes labeled "non-papers", with a variety of suggestions. In addition, non-government personnel, private practitioners engaged in representing disputants and others, have indicated a number of potential reforms and improvement suggestions.[2]

The overall number of items that could be inventoried from these various commentaries and papers probably well exceeds one hundred. However, this paper will only outline several of these suggestions, sometimes addressing a group of suggestions under a general topic. To some extent, the comments address some of the more controversial suggestions for reform.

In general, observers feel that the dispute settlement system has performed quite well, and there seems to be not too much inclination to make any fundamental reforms at this time. However, some of these

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[1] Portions of this article build upon an article published by the author in the *Journal of International Economic Law*, Vol. 1, No. 3 (Fall 1998), pp. 329-51. In turn, that article was a revision and extension of a manuscript first presented at the WTO academic conference in Geneva on April 30, 1998, commemorating the 50th anniversary of the GATT.

[2] See *Journal of International Economic Law*, Vol. 1, No. 2 (1998) and Vol. 2, No. 2 (1999) issues devoted to dispute settlement.

ideas for fundamental reforms merit further study, and at some point in the not-too-distant future may become serious proposals.

With the understanding that this paper is not intended to be a complete inventory, and is intended only to highlight certain critiques or suggestions, the paper will proceed in three major parts. This part, the Introduction, will continue with a brief reminder of some of the historical and basic policy ideas for the dispute settlement procedures for the trade system. It will also briefly note some of the characteristics and statistics of the first five years' experience. In Part II of this paper, specific reform suggestions or topics will be taken up. Finally, in Part III the author will make a few remarks containing some of his perceptions about the new WTO dispute settlement procedures, in the context of broader "constitutional" problems of the WTO.

1. Outline of the History and Policy Assumptions

When the GATT (the General Agreement on Tariffs and Trade) was originally created at the end of 1947 in Geneva, coming into effect January 1, 1948, the GATT was not supposed to be an organization. It was designed to depend on an International Trade Organization (ITO), which never came into effect. In addition, the GATT was applied provisionally, under a Protocol of Provisional Application, pending the establishment of an ITO. But in the absence of the ITO, the GATT continued under the Protocol of Provisional Application throughout its initial history. Although the WTO has been created as an institution to replace the GATT, the GATT obligations have been incorporated in the new WTO, in Annex IA to the WTO charter.

The Dispute Settlement of GATT was based on some very meager clauses in that treaty instrument and consequently the practice, as it developed over the decades, was the most significant creator of the specific attributes of the GATT dispute settlement procedure. There has always been a trend and dispute about the basic role about the GATT dispute settlement system. To oversimplify matters, based on the very meager language in the GATT concerning dispute settlement, some persons felt that the purpose of the GATT dispute settlement was simply to facilitate the settlement by government contracting parties to the GATT, of disputes between them regarding GATT matters. On the other hand, there was another body of opinion that felt that the dispute settlement procedure played a much more significant role in providing an impartial third-party judgment on vital legal questions about implementation of the GATT obligations, and in that process the reports of panel proceedings would be effective in developing a "jurisprudence" and record of practice under the GATT agreement which would then become part of the material on which governments could base interpretations of the GATT and thus have available to them greater precision, predictability, and stability of the GATT rules.

During more than four decades of the history of the GATT, the dispute settlement system gradually evolved more towards the latter view, sometimes called the "rule orientation approach." These procedures became quite sophisticated, particularly in the 1980s. They also attracted attention from other countries and interest groups that admired the procedures enough to want to become participants

in them. Thus, many nations acceded to the GATT agreement, possibly partly because of the value perceived in the dispute settlement procedures. In addition, parties interested in new subjects for the GATT, such as intellectual property and trade in services, felt there was value in these procedures.

However, despite the merit perceived in the GATT procedures, there were a number of serious faults in the dispute settlement procedures, partly due to the "birth defects" of the GATT (which was not intended to be an organization). A Uruguay Round negotiating group was charged with looking at these faults and coming up with new procedures, which it did. Thus, we have in the WTO a set of new procedures which now prevents a "blocking" of the results of the panel, and also provides for a new "appellate" process which is quite unique in international law. The overall result of these reforms, however, is to provide a measure of rigor and more automatic implementation of the results of the panel proceedings, and in some cases this had made sovereign nations uncomfortable.

Finally, to continue this "reminder," it is worth mentioning some of the policy assumptions of the dispute settlement system. The dichotomy between the viewpoints of those who felt the GATT procedures were really only intended to facilitate negotiation and settlement on the one hand, and those who urge the procedures in the direction of a "rule oriented system" continued through the history of the GATT, even though there was a major trend toward the rule orientation. This dichotomy, as well as the trend towards rule orientation, is manifest in the WTO procedures embodied in the dispute settlement system. For example, some clauses in dispute settlement system note the "central element in providing security and predictability to the multilateral trading system."[3] Other references in that document refer to "prompt settlement of situations" as being "essential to the effective functioning of the WTO."[4]

In the context of a major international economic agreement, it has been argued that a chief value of a dispute settlement system is enhancing the predictability and stability of the obligation norms of the system. This better enables the millions of non-government entrepreneurs to make business decisions of a wide variety of types (investment decisions, market penetration decisions, market access decisions, etc.). In turn, it is suggested that this reduces the amount of risk involved in cross-border transactions like these. Economists often call this process as one of reducing the "risk premium," which might be reflected in the higher rate of return on capital than would be the case if there was less risk through various human institutions that reduce that risk. Thus, the dispute settlement system could be seen as reducing this risk premium and thereby enhancing world welfare through better allocation of investment flows and better business decisions by million of entrepreneurs. Appreciation of some of these core policies, or indeed some of these core policy disputes, is thus obviously important as part of the setting

[3] WTO Dispute Settlement Understanding, article 3, para. 2.

[4] WTO Dispute Settlement Understanding, article 3, para. 3.

which the WTO must face in determining what kinds of changes should be implemented into the WTO dispute settlement system.

2. The First Five Years

The WTO Secretariat issues an extremely interesting and useful document, regularly revised, which outlines the statistics about cases and describes the various cases. This document is available on the WTO Web site and is entitled "Overview of the State-of-play of WTO Disputes." A recent version of this document notes that there have been the following numbers for certain key attributes.[5]

	Consultation Requests	Distinct Matters	Active Cases	Completed Cases	Settled or Inactive Cases
Number	179	138	29	23	37

II IMPROVING THE WTO DISPUTE SETTLEMENT SYSTEM

As indicated earlier, there have been many dozens of suggestions about improving the WTO dispute settlement system, some of these making detailed and precise suggestions which might be called "fine tuning the procedures." The following discussion will be more general, and will touch on some of the groups of "fine tuning suggestions," but also on some of the suggestions which have been more controversial.

1. Efficiency of the Panel Process

Now that the dispute settlement process has been launched and is perhaps drawing to the end of its "shakedown cruise," it becomes apparent that there are a number of specific fine tuning measures that could be undertaken to improve the process, both as to its efficiency (measured by time and cost), and as to its fairness and credibility in the eyes of the public. Some of these measures involve the various time limits that are embodied in the procedure. For example, it has been suggested that plaintiffs

[5] Overview of the State-of-play of WTO Disputes, available at the WTO Web site <www.wto.org/wto/dispute/bulletin.htm> (visited September 21, 1999), labeled "as of September 1, 1999").

or complainants have a great advantage in the procedure, since they can prepare extensively, but once they actually start a procedure by tabling the necessary documents, the respondents have an extremely limited amount of time to respond intelligently to the complainants' allegations.

There are a number of other suggestions -- some regarding the "consultation period" which is required at the beginning of the procedure, including questions of whether third parties who feel potentially impacted by the possible results of a disputant case have the opportunity to participate in the consultations or otherwise have access to some of the information of a particular case. Although the DSU has formal provisions for certain "third parties" who have somewhat more limited access to information and inputs than do the disputants themselves, these provisions have been criticized and various suggestions for reforming them have been made. Another problem noted is that the system lacks a smooth way to achieve "preliminary rulings" which may effect whether a case can or should be brought at all. Almost the only credible and definitive way to do this is to create a panel before such rulings can be achieved. It is suggested that this is relatively wasteful if a preliminary ruling might be such that no panel is authorized. It has also been suggested that the timing of the adoption of a report, whether at the end of the first-level panel process, or the report of the Appellate Body after an appeal has been taken, could be altered to give somewhat more flexibility to the disputants. Another problem is the lack of any interim relief measures in the procedures, which might be particularly desired for cases of some urgency, such as those that might effect pending near-term major business or governmental decisions or involve such things as perishable goods or dangers to the environment. Without interim relief, any relief must await the total end of the process, which could be several years after the start of the procedure.

One of the background problems that impinges on all these fine tuning and other suggestions is the lack of a definitive set of rules of procedure for the first-level panel processes. Participants, such as governments (particularly those that might be relatively new to the procedure) and counsel that have been retained by governments to represent them or assist their representation, sometimes find it baffling to try to figure out just what some of the procedures are. These procedures can be guided to some extent by practice, but it has been suggested that there is a strong need for a definitive set of rules of procedure which arguably could be formulated by a process under the supervision of the Dispute Settlement Body (DSB). This body must make decisions by "consensus," which sometimes makes it difficult to achieve some of the reforms needed.

2. Convening a First-Level Panel

The process of convening the first-level panel has been worrisome to a number of observers, partly because the process depends on ad hoc participation of voluntary panelists and the process gives to the disputing parties a large measure of autonomy to determine what the panel will be, although if they fail to come to an agreement the Director-General is authorized (and has done so) to step in and impose a panel. There have been a number of suggestions that the first-level panel personnel and convening

process should be improved, possibly by establishing a permanent roster analogous to that which exists for the Appellate Body.
Various proposals have been put forward, for example, to create a more or less permanent roster of people who agree to hold themselves ready to serve for certain terms (such as four years), could be composed. Assuming that such a roster might have twenty or thirty persons on it, there might be a way to rotate and develop a process of selection that might be more efficient and less heavily influenced by disputants' predictions of their concerns about how a particular panelist's choice might be predicated, even if that panelist is impartial and fair. Such a process could provide that, in certain circumstances, the system could go outside the permanent roster for panelists.

A related aspect of this is the worry that the current procedures do not provide that the Appellate Body can "remand a case" to the first-level panel. Some argue that such remand is not permitted; others argue that it is only a case that remand is inefficient as lengthening the time for completion of the case, as well as raising a number of questions about to whom a remand could be sent. If there were a relatively stable roster of first-level panelists, presumably such panelists could, when they are called into the membership of a particular panel, hold themselves ready to receive remands also. As it now stands, the first-level panel is generally discharged after it issues its report, although sometimes the members have been willing to be convened again for later ancillary questions.

3. Use of Private (Non-Governmental) Counsel for Representation of Advocacy Assistance; Costs of the Proceeding

For some time, there has been controversy about whether governments should be entitled to hire private counsel of their choosing to represent them or assist them in their dispute settlement cases. It has always been permitted that private counsel could be hired to assist a government, but there have been instances under the GATT and early WTO cases when such private counsel have not been permitted to be present at a hearing or to speak or to represent their client government. This issue now seems to be resolved in favor of the sovereign member disputant's choice to hire private counsel. In that case, however, there may develop some questions about ethical or appropriate conduct rules. Ideas about these "rules" could be approached in different ways, including voluntary codes or commentary from authors as suggestions which might influence how governments relate to their private counsel. More attention may be needed to this question. In addition, the WTO should develop methods to reduce the cost burden on developing countries of participation (as either complainant or respondent) in the dispute proceeding.

4. Problems of Factual Evidence and Evaluating Scientific Opinions

Partly because of limited resources, but also because the dispute settlement rules do not give much guidance, there is a perception that the dispute settlement process in the WTO is woefully inadequate when it comes to evaluating detailed and complex sets of facts. There has also been some

concern about how panels, particularly first-level panels evaluate some very difficult and complex scientific evidence about certain issues involved in a case (for instance, in the *Beef-Hormones* case or the *Shrimp-Turtle* case). Clearly, more attention is needed, although it is very difficult to state at this time what specific rules or principles should be suggested. Possibly this would be an area where some sort of a "commission of legal experts" could be convened to make a study and provide some thoughts about reform.

5. Implementing the Results of a Panel Procedure

One of the most difficult areas of the current procedure has been the question of implementing the result of a panel ruling, whether at the first-level panel report, unappealed, or after an Appellate Body report has been adopted. The *Banana* case was the case which most deeply engaged some of the problems of the DSU regarding implementation. But there are other problems in the implementation process which have been faced. This has led to considerable discussion in the WTO Councils and the DSB, quite a bit of diplomatic interchange, and a variety of suggestions for reforming the DSU to resolve some of the problems that exist. The following are some of those problems:

1. The Question of a "Reasonable Period of Time" for Implementing a Panel Report

The DSU Article 21, Paragraph 3 (Article 21.3) provides for binding arbitration on the question of what can be the reasonable period of time. There have been several of such arbitrations that have generally been successful in resolving some of the problems, but often focusing on a rather strong presumption of a 15-month period. Some observers have argued that this is either too short or too long, but in any event should be adapted more to particular circumstances, such as whether legislation is required in a particular member's constitution. Special attention could be given to the problems and costs of these questions for developing countries.

2. Compensation or Performance

There has been some controversy about an important interpretive question of the DSU concerning "compensation". When a government is mandated to change its activities by an appellate procedure report, can it freely choose, instead of fulfilling the report's request for such change, to accept or provide "compensatory measures"? It is the view of this author[6] that although the DSU is not free from ambiguity on this point, the general thrust of the DSU likely to be accepted by a panel process if it is confronted with this question, is that compensation is only a fallback in the event of non-performance, and compensation does not relieve the responding party which has been called by the panel process to change its obligations from doing so.

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[6] See Jackson, John. "Editorial Comment: The WTO Dispute Settlement Understanding - Misunderstandings on the Nature of Legal Obligation," 91 *American Journal of International Law*, pp. 60-64, 1997.

1. Determining Adequacy of Performance

A particularly difficult problem is the relationship of DSU Articles 21.5, 22.2 and 22.6. This has led to extremely sharp disagreements in the *Banana* case and thus some variety of proposals for resolving them. It does seem to many that there must be some kind of a multilateral dispute settlement-type determination (perhaps analogous to the binding arbitration for "a reasonable period of time") to make some of the determinations called for in Articles 21.5 and 22.2.

4. Amount of Compensation

There are important questions about the level of "suspension" that is proposed by way of "compensation," and how that should be measured. Here too the DSU calls for an arbitration, although there are still some ambiguity and practicality problems about that.

Overall, there seems to be plenty of indication that a fairly serious revision of the DSU text in Articles 21 and 22 is advisable to alleviate the problem created by ambiguities, gap, and the lack of consistency in the various legal clauses.

There could also be some attention overall to the level of implementation witnessed by the dispute settlement process. In general, it appears the implementation has been quite good, including implementation by some of the most powerful members of the organization, in the face of panel determinations on behalf of complainants who are non-powerful member states.

6. The Public Role of the WTO Dispute Settlement Process and Related Questions of the Criticisms of "Civil Society"

There are some extremely important issues (which have some long-term systemic and fundamental implications) about the operation and credibility of the dispute settlement process, both with respect to views of member-state governments and views of non-government observers, including those that come under the rubric "civil society", often in the form of non-government organizations. Roughly these can be lumped into two categories: transparency and participation.

With respect to transparency, there is a concern about the amount of secrecy and confidentiality involved in the WTO dispute settlement processes. There have been some strong recommendations, for example, that panel hearings be open to observers, not only member government observers, but non-government observers generally, including possibly the press. Recognizing that these recommendations do not include participation or the right to speak in the dispute settlement proceedings, it would seem that the added transparency of opening these hearings to public view (which could also solve some of the problems of access to information by WTO members themselves) could create a welcome addition to the credibility of the procedures. This is strongly resisted by some

governments, and this is an issue that needs more careful thought and discussion. It involves some resource implications (costs of providing access to the hearings, etc.).

With respect to participation, the issues are somewhat more difficult. There is not much inclination to give a right of participation in the dispute settlement panel processes to non-government participants, with the possible exception of amicus-type advocacy papers (or briefs). The Appellate Body has ruled that the broad language of the DSU permits a first-level panel to receive and examine communications from non-governmental organizations, sometimes called "amicus curiae" briefs. This does not impose an obligation on any first-level panel to receive or look at such communications. Because of this possibility, however, the non-government organizations or civil society participants will likely want more opportunity to present viewpoints that they think are essential to the increasingly important procedures of the WTO. Thus the WTO will find itself under considerable pressure to respond by making such opportunities available in one form or another. Again, this has considerable implications for resources for the dispute settlement process.

One possibility would be to formulate a series of "regulations" as to when, why and how such non-government communications could or should be received by panels. These "regulations" could be deemed adopted by any first-level panel in formulating procedures for a particular case, unless otherwise explicitly indicated with reasons. Likewise, it is important to assure that all parties to a dispute have easy access to any communications which are accepted by a panel. Web publication is one way to make that relatively inexpensive. How a panel processes and assimilates the arguments in non-government communications is an issue that would also have to be addressed. Obviously, staff help is likely to be used extensively in this situation, and maybe there would need to be page limits or other limitations on which communications will be accepted. Some international organizations have rosters of NGOs which have certain rights to send communications or otherwise receive information, and the WTO could consider comparable measures.

III. Emerging Constitutional Problems of the WTO -- Some Reflections

Every human institution has to face the task of how to evolve and change in the face of conditions and circumstances not originally considered when the institution was set up. This is most certainly true of the original GATT, and now of the WTO. With the fast-paced change of a globalizing economy, the WTO will necessarily have to cope with new factors, new policies, and new subject matters. If it fails to do that, it will sooner or later, faster or more gradually, be "marginalized." This could be very detrimental to the broader multilateral approach to international economic relations, pushing nations to solve their problems through regional arrangements, bilateral arrangements, and even unilateral actions. Although these forms other than multilateral can have an appropriate role and also can be constructive innovators for the world trading system, they also run considerable additional risks of ignoring key components and the diversity of societies and societal policies that exist in the world. In other words, they run a high risk of generating significant disputes and rancor among nations, which can inhibit or debilitate the advantages of cooperation otherwise hoped for under the multilateral system.

In addition, also perhaps inevitable to human institutions and particularly to treaty negotiations involving over 130 participating nations or entities, is the fact that in many places in the Uruguay Round and WTO treaty there are gaps, and considerable ambiguities. These are beginning to emerge in the discussions about the dispute settlement procedures of the new WTO.

How can these many issues be considered and dealt with in the current WTO institutional framework? First of all, it has to be recognized that there is a delicate interplay between the Dispute Settlement process on the one hand, and the possibilities or difficulties of negotiating new treaty texts or making decisions by the organization that are authorized by the Uruguay Round treaty text, on the other hand.

What are the possibilities of negotiating new text or making decisions pursuant to explicit authority of the WTO charter? Clearly these possibilities are quite constrained. In the last months of the Uruguay Round negotiations, the diplomatic representatives at the negotiation felt it was important to build in a number of "checks and balances" in the WTO charter, to constrain decision-making by the international institution which would be too "intrusive on sovereignty." Thus the decision-making clauses of Article IX and the amending clauses of Article X established a number of limitations on what the membership of the WTO can do.

Apart from formal amendments, one can look at the powers concerning decisions, waivers, and formal interpretations. But in each of these cases, there are very substantial constraints. Decision-making (at least as a fallback from attempts to achieve consensus) is generally ruled by a majority-vote system, but there is language in the WTO (Article IX, Paragraph 3) as well as the long practice under the GATT, that suggests that decisions cannot be used to impose new obligations on members.[7] Waivers were sometimes used in the GATT as ways to innovate and adjust to new circumstances, but that process fell into disrepute and caused the negotiators to develop Uruguay Round texts that quite constrain the use of waivers, particularly as to the duration of waivers and also subjecting waivers to explicit revocation authorities. The GATT had no formal provision regarding "interpretations," and thus the GATT panels probably had a bit more scope for setting forth interpretations that would ultimately become embedded in the GATT practice and even subsequent negotiated treaty language. However, the WTO addresses this issue of formal interpretations directly, imposing a very stringent voting requirement of three-fourths of the total membership. Since many people observe that often a quarter of the WTO membership is not present at key meetings, one can see that the formal interpretation process is not an easy one to achieve.

[7] Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, opened for signature April 15, 1994, Marrakesh, Morocco, 33 I.L.M. 1140-272 (1994), Articles IX:2, X:3, X:4, and Annex 2 Dispute Settlement Understanding Article 3.2.

Some observers feel, however, that in some contexts the technical requirements of consensus (not unanimity)[8] may not always be so difficult to fulfill.

Given these various constraints, it would be understandable if there was a temptation to try to use the Dispute Settlement process and the general conclusions of the panel reports regarding interpretation of many of the treaty clauses which have ambiguity or gaps. However, the Dispute Settlement Understanding itself in Article 3, Paragraph 2, warns against proceeding in this direction too far, by saying "Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements." The emerging attitudes of the Appellate Body reports seem to reinforce a policy of considerable deference to national government decision-making, possibly as a matter of "judicial restraint" ideas such as that quoted from the DSU Article 3, and otherwise expressed by various countries who fear too much intrusion on "sovereignty" (whatever that means). The provision of an explicit power of "formal interpretation" with a supermajority requirement in the WTO charter also arguably constrains how far the Dispute Settlement system can push the idea of its report rulings and recommendations becoming "definitive."

In short, there are indications that the Dispute Settlement system cannot and should not carry much of the weight of formulating new rules either by way of filling gaps in the existing agreements, or by setting forth norms which carry the organization into totally new territory such as competition policy or labor standards.

In addition, as noted above, there are many procedural questions. One of the geniuses of the GATT and its history was its ability to evolve partly through trial and error and practice. Indeed the Dispute Settlement under GATT evolved over four decades quite dramatically -- with such concepts as "*prima facie* nullification," or the use of "panels" instead of "working parties," becoming gradually embedded in the process -- and under the Tokyo Round Understanding on Dispute Settlement became "definitive" by consensus action of the Contracting Parties.

But the language of the DSU (as well as the WTO "charter") seems to greatly constrain some of this approach compared to the GATT. DSU Article 2, Paragraph 4, states "Where the rules and procedures of this understanding provide for the DSB to take a decision, it shall do so by consensus." The definition of consensus is then supplied in a footnote, and although not identical with "unanimity," provides that an objecting member can block consensus. Likewise, the WTO charter itself provides a

[8] WTO Agreement Article IX, footnote 1, defines consensus as follows: "The body concerned shall be deemed to have decided by consensus on a matter submitted for consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision."

consensus requirement for amendments to Annexes 2 and 3 of the WTO. It will be recalled that Annex 2 is the DSU and the Dispute Settlement procedures. Thus the opportunity to evolve by experiment and trial and error, plus practice over time, seems more constrained under the WTO than was the case under the very loose and ambiguous language of the GATT, with its minimalist institutional language.

Thus we have a potential for deadlock, or for an inability to cope with some of the problems that will be facing and are already facing the new WTO institution.

Perhaps the WTO can develop somewhat better opportunity for explicit amendment, using the two-thirds (and three-fourths in substance cases) power of amendment in the WTO charter. Perhaps also, some of the decisions that are possible by the WTO membership at its ministerial meeting or various council meetings can "creep up on" some of the issues and decide them in a way that certain small steps of reform can be taken. These decisions will become part of the "practice under the agreement" referred to in the Vienna Convention on the Law of Treaties. What are some other possibilities? With respect to the Dispute Settlement details and potential changes in procedures, it may be possible to work within the "consensus rule" to make some changes in Annex 2 (the DSU). It at least appears that this does not require national government member approvals of treaty text amendments, and thus avoids some of the elaborate procedures of national government ratification of treaties, etc. The question of such consensus relates to at least two different kinds of decisions: changes in the text of the DSU; and decisions by the DSB (Dispute Settlement Body) which could involve incidental or interstitial and ancillary procedural rules, assuming that they are not inconsistent with treaty provisions of the DSU. Again of course, the consensus rule apparently applies. There may be a few situations where basic small and relatively unimportant decisions can be made as a matter of practice of the administration of the Dispute Settlement system, such as decisions about how to interpret time deadlines, or the form of complaints that should be filed, or the development of a relatively uniform set of procedural rules about activities of panels and panel members, translations, documentation, etc. Even then, there is at least some likelihood that an objecting member could force an issue to go to the DSB and that member could dare block consensus.

It might be feasible to develop certain practices about consensus that would lead member nations of the WTO to "self restrain" themselves from blocking a consensus in certain circumstances and under certain conditions. In other words, the General Council, or the DSB (General Council acting with different hats) might develop a series of criteria about consensus concerning certain kinds of decisions, which would strongly suggest to member states that if these criteria are fulfilled, they would normally refrain from blocking the consensus. Perhaps this could develop a bit like the practice in the European Community history and jurisprudence of the "Luxembourg Compromise," where it has been understood that governments would refrain from exercising their potential veto against a measure in certain circumstances, unless the measure involves something of "vital interest" to the nation member involved. While not pursuing the analogy too far, one might see something similar develop in the context of the WTO. A "vital national interest" declaration could be in practice a condition for blocking consensus, but a practice could develop to subject such declarations to inquiry, debate, and criticism.

Possibly with some approach to provide constraints on blocking a developing consensus, the risk of the consensus requirement creating stalemate and inability to evolve and cope with new problems in the global economy could be minimized. These criteria could be developed through resolutions of the General Council or the DSB, in the form of "recommendations to members" and might provide the relatively informal practice which nevertheless could be effective over time.