Scope/need for strengthening WTO rules, especially regarding, dispute settlement, institutional issues and functioning of the system in a globalising world

Dr Reinhard Quick
Head, VCI Office, Brussels, and Deputy Chair, WTO Working Party of UNICE, Union of Industrial and Employers’ Confederation of Europe

National Europe Centre Paper No. 59

Paper presented at a workshop: Australia and the European Union in the Multilateral Trade Round: Defining the Common Ground

Canberra 12 - 13 December 2002
Introduction

Twenty years ago, while I was writing my doctoral thesis on voluntary export restraints and Article XX GATT, I applied for an internship with the GATT Secretariat. At that time the GATT Secretariat was a body with few lawyers and many economists. Law did not matter that much; indeed it was difficult for a young lawyer to get accepted as a “stagiaire”. I insisted and eventually was accepted. Two years later, while studying with John Jackson I learned about the difference between power and rule-oriented diplomacy. GATT’s reliance on diplomacy did function reasonably well, even without a legal mechanism, yet there were spectacular cases of non-compliance and the system was always prone to “blackmail”.

Compared to GATT, the WTO has come a long way. Nobody would have imagined at the start of the Uruguay Round that the result of the negotiations would be a World Trade Organisation with a binding dispute settlement mechanism. We went from a power-oriented to a rule-oriented system, which until now dealt reasonably well with more than 270 dispute settlement cases.

Still, there are challenges to the system of which I would like to address four:

1. Rulemaking versus Jurisprudence
2. Dispute Settlement Avoidance
3. Implementation
4. Dispute Settlement Reform

1. The Discrepancy between Rulemaking and Jurisprudence

The biggest threat to the system consists in the ever-growing discrepancy between rulemaking and jurisprudence. Rulemaking requires consensus (144 votes), judicial decision-making 3 votes. This difference could deprive the legislator of its law making function, favour judicial “rulemaking” and eventually bring the whole system to collapse in case the WTO Members consistently refuse to implement the dispute settlement rulings. Nowhere in the WTO is the discrepancy between rulemaking and jurisprudence as evident as in the area of trade and environment. Here we have a substantial difference between the views of the overwhelming majority of the negotiators (rule-makers) and those of the Appellate Body.

Looking at the Doha mandate and in particular at § 31 (i), (ii), and (iii) it is evident that the WTO did agree on very limited trade and environment negotiations. Its members even bound their own hands in that they decided that the outcome of the MEA negotiations shall not add to or diminish the rights and obligations of Members under existing WTO Agreements, in particular the Agreement on the Application of Sanitary and Phytosanitary Measures, nor alter the balance of these rights and obligations. This is a very strange mandate indeed. The members decide to negotiate; yet they immediately state that the negotiations should not result in any changes that affect their existing rights and obligations. I have always believed that negotiations should lead to new rights and obligations. Anyway,
my point is that the membership has decided on a very limited negotiating mandate because it could not agree on how to handle the most pertinent issue of the whole trade and environment debate, namely how the WTO should treat import barriers based on non-product related process and production methods, the so-called PPMs.

The subject of PPM-based trade restrictions is real; the issue exists, as demonstrated by the Shrimps/Turtle case, or the EU ban on cosmetics tested on animals, the EU ban on furs obtained with leg-hold traps, or the European Commission’s Green Paper on Integrated Product Policy. If the negotiators cannot agree on how to handle PPMs, the issue will have to be solved by the WTO’s “judicial” system.

Since 1995 the WTO dispute settlement system has ruled on four important trade and environment cases, even including PPMs. These were

- Reformulated Gasoline Case,
- Shrimps/Turtle,
- Shrimps/Turtle Implementation, and
- Asbestos.

I cannot go into the details of those cases, for today’s purpose it suffices to show how far the WTO jurisprudence has developed the WTO law with respect to trade and environment issues. In Reformulated Gasoline the Appellate Body developed the two-tier structure of GATT Article XX, which the GATT jurisprudence did not know. To judge whether a measure is covered by GATT Article XX the Appellate Body will look firstly, at the general design of the measure and find whether it is covered by one of the paragraphs of the article; secondly, it will analyse on whether the application of the measure is in accordance with the requirements contained in the headnote of the article.

Traditionally the word “necessary” contained in GATT Article XX (b) has been interpreted to mean that no alternative measure exists (either a WTO-compatible measure or a still WTO-incompatible but less trade restrictive measure than the measure applied) which achieves the same level of protection. In Asbestos the Appellate Body coupled this test with the overriding policy aim of the challenged measure. The more vital or important the common interests or values pursued, the easier it would be to accept as necessary those measures designed to achieve those ends. Alternative, less trade-restrictive measures cannot therefore be invoked to oppose the necessity of the original measure if the use of such alternative measures would call into question the attainment of the very policy aim chosen by the WTO Member.

Also the headnote underwent considerable interpretative changes. Firstly, it is worthwhile noting that the nature and quality of the discrimination (examined under the headnote) is different from the discrimination in the treatment of products which was already found to be inconsistent with one of the substantive obligations of GATT. This suggests that, in order to find a violation of a substantive provision of GATT (e.g. Article III. 4), there has to be discriminatory effect, while in order to be covered by the headnote of GATT Article XX, a WTO Member has to demonstrate discriminatory intent.
Secondly, the Appellate Body will examine whether the domestic measure allowed for some flexibility or had a coercive effect, whether an international agreement concerning the measure exists and whether there is a certain jurisdictional nexus between the measure and the value it intends to protect.

In *Reformulated Gasoline* and in *Shrimps/Turtle* the Appellate Body found that the measures were applied in such a way as to violate the standards set down in the headnote, yet in *Shrimps/Turtle Implementation* and in *Asbestos* the Appellate Body found the challenged measure to be justified by GATT Article XX (b).

If we compare rule making and jurisprudence with respect to PPMs, we are confronted with the rule makers’ inability to address the issue and the “judge’s” ability to decide on whether a unilateral measure enforcing PPMs at the border is compatible with WTO. Given the far-reaching judicial developments on trade and environment in the WTO, I can hardly understand the WTO membership’s reluctance to address all trade and environment issues through negotiations. I would even go a step further and argue that WTO members cannot ignore important political issues; on the contrary they must deal with them as otherwise the judicial system will eventually rule on them and thus increase the discrepancy. The rule-maker therefore has to assert its rule-making authority in order to establish the right balance between rulemaking and jurisprudence. Otherwise the binding dispute settlement system combined with ineffective rule making will be dangerous for the system in the long run. But how can the WTO members assert their authority as rule-makers notwithstanding the consensus rule? You will not hear from me a proposal to resort to majority voting in the WTO. Instead I would suggest that the WTO uses all those possibilities where consensus is not required, such as for example Interpretative Understandings (Article IX.2 WTO Agreement).

2. **Dispute Settlement Avoidance**

The next challenge to the system relates to the question on whether the WTO system can handle politically difficult cases and what could be done not to overload the system.

If one looks at the record and analyses the Appellate Body’s rulings the answer to the question seems clear: the system can handle politically charged cases. Overall, the results are widely accepted by the membership, even if some of them are criticised by some members or in the academic literature. The Appellate Body’s cautious approach and its insistence on a textual interpretation have, in my view, contributed to this overall acceptance. Some even argue cynically that the New Shorter Oxford English Dictionary has become the most important legal document for any WTO case being dealt with by the Appellate Body. I feel, though, that it is prudent for a newly established “court” to rely on textual interpretations and to refrain from conceptual ones. The latter only offer the members the possibility to argue that lawyers read something into the law, which the rule-makers had never intended. So far then, even politically charged cases have been handled satisfactorily. But what about a GMO case against the European Union? Could the system handle such a case? My answer is Yes. I think the system can handle such a case and I also believe that the Appellate Body would deal with the interpretations of the SPS Agreement in a legally satisfactory way. Of course we will always find examples where some will argue that a case
should not have been brought, such as *Hormones* and *FSC*. We have to note that even those politically emotional cases were accepted and we have to admit that the system even managed to avoid a *Helms-Burton* case and handled *Kodak-Fuji* in an acceptable manner.

Dispute settlement avoidance could however be strengthened by relying on early warning and on the power-oriented diplomacy remnants of the existing system.

In 1995 the “Transatlantic Business Dialogue” (TABD) was established. TABD deals with transatlantic trade and investment issues and adopts business proposals on how to address these issues. One of the proposals was to establish an Early Warning system to avoid transatlantic trade disputes and to discuss, at an early stage, ways and means to solve the problem or to alleviate the tensions. Business has repeatedly asked for a trade policy assessment of draft legislation and for consultations with governments whose industries might be potentially affected by the draft legislation. A good example of early warning and early consultation is the EU’s White Paper on Chemicals Policy. Given the ever growing global interdependence governments should get involved in the legislative process of other governments and present their views on the draft legislation at an early stage; this, in order to avoid a conflict once the legislation is adopted. The European Commission has received several submissions by third governments on its white paper and has accepted to hold internet-consultations with all stakeholders once the new draft chemicals legislation has been completed but not yet adopted as official legislative proposal. Such an exercise is burdensome but it shows the Commission’s willingness to consider the arguments put forward by third parties including those relating to the European Union’s WTO obligations.

Further steps to avoid official WTO dispute settlement are included into the WTO’s Dispute Settlement Understanding. WTO members can and should really exhaust the consultation phase provided for by DSU. Consultations are not a necessary evil on the way to a judicial dispute resolution; they offer the possibility of a diplomatic solution to the problem. As with every new system members want to use it and sometimes tend to forget the advantages of the old system. Yet I believe that Members will recognise the benefits of a diplomatic solution since the politically charged cases are very often decided on very technical grounds and might not always result in a clear cut judicial Yes or No. A diplomatic solution means give and take yet WTO members, just like individuals, are unable to agree and must be told by the “judge” what their rights and obligations are.

WTO members can and should use the DSU provision on good offices, mediation and conciliation. Yet they really do not use them. May-be a more “political” WTO director general would be more easily accepted as a mediator.

In conclusion I can say that the system provides for possibilities to find diplomatic solutions. The WTO membership just needs the political will to make use of them.
3. Implementation

In the past the GATT contracting parties could block the adoption of a panel report. Today the WTO members can block its implementation. Indeed the area of implementation represents a fundamental challenge to the whole dispute settlement system.

I would like to discuss three points: (a) should members have a choice? (b) Do retaliatory measures work, and (c) what can be done to make implementation happen?

The DSU seems to leave the membership a choice: they can implement, they can offer compensations, or they can accept retaliatory measures. Such choice, however, is not equitable, since they favour rich over poor countries. A country, which cannot afford to offer compensation, or cannot face retaliatory action, has no alternative but to implement, whilst another country might have the luxury to choose between the alternatives. The alternatives to implementation are no substitutes for compliance with the WTO obligations.

At the end of the Uruguay Round, the common view was that retaliatory measures were necessary to induce compliance with the rulings. Retaliatory actions would be short-lived, since business and industry affected by the measure would exert such a pressure on the legislator that it would eventually have no choice but to implement. Practical experience shows, however, that retaliatory measures do not necessarily compel implementation. The hormones case clearly demonstrates that industry can exert whatever pressure possible without having any influence whatsoever on the legislator’s willingness to implement the dispute settlement ruling. If the Commission is introducing legislation to bring the European Communities into compliance with its SPS obligations it is not because the European industry has exerted any pressure, it is more because the EC does not want to be seen as not respecting its WTO obligations; and even if the Commission proposes draft legislation it is by no means certain whether the European Parliament will adopt it: the legislator may consider the issue solved since the price of non-compliance is paid by business. Pressure by business will probably be successful only in big cases, namely if the damage caused by the WTO-incompatible action is important and the retaliatory action therefore has to cover a whole range of products, such as the possible retaliatory measures the EU is entitled to apply against the US in the FSC case.

The Bananas case also showed another weakness of the system. Small WTO members are often in no position to take retaliatory action, since they depend on the imports and therefore cannot increase their price through retaliation. They can only exert political pressure.

Retaliations are mercantilist in nature, injure the innocent and aggravate trade tensions. The DSU’s mercantilist remedy is contrary to the basic idea of the WTO, namely to liberalise trade, and to provide transparent and predictable conditions for business. The system needs to establish a hierarchy favouring implementation. Retaliatory action should only be taken as the very last resort.
The DSU already mentions other possibilities than sanctions. A WTO member can offer compensations. Compensations open borders, they do not close them, yet they require a courageous government as it must reduce trade barriers in the amount of the damage caused by the WTO-incompatible measure. Suppose that the US loses the steel safeguard case. Do you think that it would offer compensations to the affected WTO-members on automobiles and chemicals? I do not think an answer is needed to this hypothetical case.

A further alternative which could be envisaged, and which has been proposed by European business, would be a payment of compensation to the injured WTO member. If a country decides not to live up to its international obligation society as a whole should pay the price for not-respecting international law. A national parliament therefore might accept this liability and allocate a budget line for financial contribution to the injured country for as long as the nullification or impairment continues. A yearly budget line covering WTO nullification and impairment-payments might also become an incentive for the national parliament to bring its law into compliance with its international obligations. Financial compensations also have their shortcomings, since they are nothing else but an “indulgence-fee”, and they cannot be offered by poor countries.

A third, and politically even more remote, possibility would be the introduction into the domestic legal system of a private right of action against WTO-violations. In other words, if WTO law were directly applicable in a national court private parties could become the attorneys for WTO-compliance. Some academics do argue in favour of direct application, nevertheless this suggestion is not seriously discussed in the political arena.

In conclusion there are some alternatives to retaliatory measures yet all of them have their shortcomings. In order for the dispute settlement system to be successful the rule must be implementation, implementation, and implementation. All other measures can only be accepted as provisional measures on the way towards WTO-compliance. The DSU should therefore make clear that WTO-members have the obligations to comply with the dispute settlement rulings. Commissioner Lamy summarised the situation in a poem, which he presented at the Cincinnati TABD CEO conference in November 2000:

“Be aware when you legislate
Consult before you litigate
Check compliance before you retaliate
And comply at any rate.”

3. Dispute Settlement Reform

Under this item I will not deal with all the issues, which are currently negotiated in Geneva. I would like to address the issue of transparency, which I consider another challenge to the system. I would like to raise 3 issues, namely (a) access to submissions, (b) public hearings and (c) *amicus curiae* briefs.

When it comes to transparency my suggestions are not much different from those of some of the more radical NGOs. Yet I have a different approach to WTO than they. I do not think that it is a secret organisation and I do not think that it takes decisions behind closed doors in an undemocratic fashion. However, when it comes to dispute
settlement, I strongly believe that the WTO needs to open its “corridors” to the public. If we understand the dispute settlement system as a “judicial” instead of a “diplomatic” system, our internal rules for transparency in the domestic legal process should also apply to the WTO process. One could make a distinction between the panel stage and the appellate stage, since one could argue that at the panel stage the members should be given the possibility to find an amicable solution to the problem. Yet at the appellate stage full transparency should apply to documents and hearings. Hearings should be public and documents should be made available on the web. If the EU’s suggestion to establish a permanent panel body is accepted, then the panel process will have judicial features more than diplomatic ones: it should therefore be fully transparent.

As to the issue of *amicus curiae* the *asbestos case* demonstrates how vehemently an issue can be debated in the WTO. The rules seem quite clear: a panel has discretion to accept unsolicited information; or a WTO member can add unsolicited information to its submission with the consequence that it becomes an integral part of the submission. It seems to me that the Appellate Body considers having the same rights to accept unsolicited information as a panel. Yet when the Appellate Body drafted some rules on how to handle *amicus curiae*-submissions in the *asbestos case* the WTO membership rebelled. Interestingly enough the members did not exert their rule-making authority and drafted the rules themselves nor did they decide whether *amicus curiae*-submissions were acceptable or not; they only reprimanded the Appellate Body for its activity. Frankly speaking I am very astonished by this behaviour. If the legislator is of the view that the “judge” has exceeded its authority it should adopt a law defining the boundaries within which the judge should move; it should not interfere politically in an actual case. Given the fact that cases of unsolicited information do exist, I think the negotiations need to clarify when and how such information should be accepted and become part of the proceedings. The present situation, notwithstanding the reprimand from the General Council, is not acceptable. Developing countries object that they cannot handle too much transparency, that they hardly have the means to deal with disputes and that they cannot possibly comply with a system that introduces even more rights to third parties. Whilst I believe that these concerns should be taken serious, I would rather make the WTO’s judicial process more transparent and provide developing countries with the necessary capacity to deal with new transparency requirements than reject the claim for more transparency thereby giving the critics more reasons for their criticism.

Conclusions

- DSU Reform will be agreed upon; it will not be a radical reform, it will merely consolidate current practices.

- The Appellate Body, so far, has carefully interpreted the law without exceeding its role. Lawmakers nevertheless should however not be complacent; they have to assert their rule making authority since otherwise the judiciary will have no choice but to “make the rules”.

- There is no alternative to implementation of dispute settlement rulings. Without implementation the dispute settlement system will collapse.