The Review of the WTO's Dispute Settlement Understanding: Which Way?

Petros Mavroidis: I will be extremely brief in the introduction. Our mandate basically here is to discuss the first four years of dispute settlement in the WTO and to see to what extent the first four years leaves us with a feeling of satisfaction, or whether the opposite is true, or whether mixed feelings can best describe the situation.

In this context I will revert immediately to the panellists. I would like John [Kingery] in his statement to take care of at least three points, to my mind critical. We have already discussed the Appellate Body, so we don't have to spend too much time on the Appellate Body, but I think one issue to be discussed is the relationship between consultations and panel procedures. The second issue would be something like: to what extent *ad hoc* adjudicating bodies still are a viable solution in the WTO? Should we continue with the selection of panels on *ad hoc* basis, or to what extent a more permanent, more legitimate body makes sense? And the third question I would like you to answer in the first round of questions would be something like: what are the optimal limits in the adjudicating function of panels and the Appellate Body? Let us keep our comments mostly about panels, because we spoke about the Appellate Body extensively this morning. So politeness obliges us to start with Brigitte Stern, and I would like you kindly to refer especially to the position of France and the EC. Since you are from France you are familiar with the issues with respect to those three questions.

Brigitte Stern:* As a matter of fact, France has no specific and autonomous position on the WTO system of settlement of disputes. As you know, there was supposed to be a review of that system after four years and so normally that review was to be done at the end of this year. So I tried to obtain some information from the French government, and I must say it was not so easy. First I called the legal department of the Ministry of Foreign Affairs, but they said: "We are not in charge of this. It is the Directorate of the external economic relations." So I called there and they said: "No, it is not the Ministry of Foreign Affairs, it is the DREE (*Direction des Relations Economiques Extérieures*) which is a Directorate of the Ministry of Finance." So I called there and they said: "Well, you know, France has nothing to say, it is the European Communities which is in charge of this matter."

So, finally, I managed to get hold of the paper prepared by the European Communities, a discussion paper, in which there are twenty-three proposals. I am not going to speak about all the proposals but I would just like to make a few general statements concerning the proposals.

A first remark can be made here on "constitutional" questions concerning the

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distribution of power between the different organs of the European Union. As a matter of fact, the proposals were presented to the Secretariat of the WTO by the Commission of the European Community and the Council has protested because this is the prerogative of the Council of Ministers. So there was a "dispute" in the Community itself concerning the jurisdiction regarding WTO dispute settlement.

If we try to assess the WTO dispute settlement system, one thing I would like to say is to stress the improvements that have appeared since the GATT system. This improvement has happened because I think there has been a retreat of politics and a progress of law. I am not going to discuss here the content of the law. When the settlement of dispute applies, it is quite certain that we see this progress of law mainly in two aspects. One aspect is, as you all know, that a panel report cannot be refused now because of the will of the losing party. This is the famous *reverse consensus*. It is an important question—that you cannot refuse a report for political reasons.

The other main progress towards what I would call "jurisdictionalisation" of the system is of course the existence of the Appellate Body. Naturally, we have talked about this already but I think that the existence of this Appellate Body brings a certain common interpretation of the law although my neighbour Petros [Mavroidis] has said that decisions of the Appellate Body are not always coherent, I think the general legal situation is much more coherent than it was.

Then, if we try to see what the proposals are that have been made by the European Commission, I think they answer exactly some of the questions that have been already mentioned. I would like to say that we can find proposals going towards *technical improvements* and we can find a proposal which I would call a *systemic improvement*, that means a real improvement in the system.

The procedural improvements first deal, for example, with the articulation between the consultations and the panel stage. Several proposals have been presented concerning this articulation. For example, it has been said that a clear rule should exist clarifying the fact that proposals and things said during the consultation cannot be used before the panel. This seems quite natural but apparently it is not in writing so far. So this is one of the proposals of the Commission, and I would quite agree with that.

Another minor—but this is, as I said, technical—improvement concerning this articulation between consultation and panel is naturally that you cannot try to escape consultation by bringing new issues to the panel. According to the European Commission, the DSU should state clearly that legal claims raised in the request for a panel must have been the object of consultation. This also seems quite evident, but apparently it has not always been the case.

Among the technical improvements I think that you have also several proposals for improvement on what I would call "transparency questions". Naturally, the European Union is very firm on the idea that the WTO dispute settlement procedure should remain a State-to-State procedure. But at the same time all these questions of international trade have consequences on our daily lives and it is very important that

many people can also participate in the process of dispute settlement. So the essential governmental character of the dispute settlement is maintained, but at the same time some proposals suggest that, for example, there should be a broader spreading of the information provided by the Secretariat of the WTO which sometimes makes interesting studies of the points that are raised in the disputes submitted. It is suggested that such documents should be given to the parties and maybe even to the public.

Also, some proposals have been made that there could be merits involving some non-participating Members, some non-governmental organizations (NGOs), that their could be even public hearings at the Appellate Body and things like that. All these things are what I would call technical improvements.

On the other hand, the systemic improvement answers the second question that Petros [Mavroidis] has raised: whether we should go on with *ad hoc* panels or whether we should establish a permanent kind of roster. The European Commission actually seems to be in favour of such a standing Panel Body. The Commission considers that the selection of qualified panellists is, in practice, difficult and that there should therefore be a standing Body which could consist of between fifteen and twenty-four members. They think this would be an improvement because this Standing Body could have detailed rules of procedure which would be always the same and also rules of evidence, rules for fact finding and rules for technical advice.

The European Commission also suggests an alternative to the Standing Panel Body which is—I don't think it is a real alternative but I will tell you about it because it is a proposal of the Commission—that an *ad hoc* member with the nationality of the parties could be involved in the dispute. I don't know exactly what "could be involved in the dispute" means.

What are the pros and cons of a Standing Body? I am not so sure it is a good idea and I will tell you why. I think the Appellate Body fulfils the rule of unifying the approach to international trade law. If we have also, let us say, professional panellists, we will have a one-minded interpretation. I think that at the panel level it is quite important and quite interesting that many different views—people coming from very different backgrounds, from different areas, geographic or professional areas—should be involved. I think personally that the Appellate Body, as I said, fulfils the necessary role of unification of the interpretation of international economic rules.

What could be done, and I would also consider this in the category of systemic improvement, is to improve the Appellate Body.

The European Commission also presented some ideas on the Appellate Body. They think that a clear role should be given to the Plenary because, as has been mentioned several times, you can have contradictory decisions when you have different chambers. For instance, in the Iran–U.S. Claims Tribunal where you have different chambers which have sometimes different views, you have the Full Tribunal that can unify the decisions. So maybe there should be a greater recourse to the Appellate Body as a Plenary.

Also to improve the Plenary and to give it the full possibility to play its role, the time-limits before the Appellate Body, which seem to be too short, should be extended. One of the other ideas is, naturally, to also open the possibility that the Appellate Body reverse factual findings which are erroneous. We have seen that this is very limited for the moment. The interpretation of the facts and the qualification of the facts are very important issues. So I think that if the facts—not only the qualification but even the findings—are incorrect, the Appellate Body should be able to reverse the decision.

I think these are some of the main aspects of the European Communities' proposals. So you see we have naturally many ideas to improve the existing system—nobody is perfect, nothing is perfect. But I think the main idea and probably the proposal that must be most discussed is the systemic change: do we juridictionalise the WTO dispute settlement system even more than it is?

Yukyun Shin:* According to the statistics as of the end of August 1988, there have been one hundred and forty-three requests for consultation involving one hundred and seven distinct matters. Thus, the requests of consultations since the inauguration of the WTO have been to the order of forty to fifty cases *per year*. When compared with the fact that about three hundred cases were brought before GATT during its entire forty-seven-year history, the consultation requests since 1995 mean that WTO Members have made extensive use of the system. An international symposium on "The Fifty Years of the GATT/WTO: Past Performances and Future Challenges" was held on 8 October 1998, in Seoul, South Korea in which the Deputy Director-General of the WTO, Dr Chulsu Kim delivered a keynote address. In this address he stated that:

> "... the dispute settlement system of the WTO is operating effectively ... As of today, about a quarter of the consultation requests have led to a mutually agreed solution, as 'out-of-court' settlements. Where dispute panels have made findings, parties found not to be in compliance with the WTO obligations have always indicated that they intend to comply with the Dispute Settlement Body (DSB) recommendations. Although the volume of cases increased substantially, the WTO dispute settlement system has coped reasonably well in meeting the tight time-periods established by the DSU. There is higher developing-country participation in the dispute settlement cases than during the GATT. It also has deterred unilateral trade measures by Members."

In particular, eight cases have been filed before the DSB so far by such countries as the United States, the European Union, Canada and Australia combined. Seven cases out of eight have been settled through consultations in one way or another. One case is still pending. However, at the end of October 1998, the United States, which had unreasonably imposed an anti-dumping duty on Korean-exported colour TV sets, declared that it would discontinue the imposition of the anti-dumping duty. Thus, it turns out that all the cases filed against Korea have been settled actually by means of consultation.

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Viewed from this aspect, the constant demand on the Dispute Settlement Body to resolve legal issues related to the WTO Agreements is becoming increasingly challenging. It is, however, of the opinion that the current dispute settlement system of WTO has problems which should be revised for the sake of more equitable and efficient functioning thereof.

Legally, Article 22 of the GATT 1994 provides that:

> "Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement."

The GATT 1994 purports, I believe, that, for preference, consultation is to be used by the WTO Member countries as a means of settling trade disputes between and among the countries concerned, instead of the country's resort to the Dispute Settlement Body of the WTO which is virtually grounded on the quasi-judicial mechanism that is to a greater extent complex and time-consuming.

Therefore, the establishment of a panel should be a secondary measure in settling trade disputes between the countries concerned. However, since my fellow panellists today in this session touched upon matters related to the panel of the DSB, I should like to put forward some comments. The first issue raised is the selection of panellists. Professor Mavroidis said that a permanent panel should be established for a more efficient functioning of the DSB. This proposal is in line with the suggestion put forward by the European Union before the WTO with regard to the review of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes. However, as a person who has come from a developing country, I have a different opinion.

It may be true that the litigating parties generally believe that the decision of a panel may be influenced by the panel's composition. The task of determining the panellists and the process towards the actual composition of a panel is indeed challenging. In many cases, the litigating parties fail to agree on the panellists of their own choice, thereby engaging the Director-General of the WTO for the appointment of panellists. In practice, some developed-country Members show a strong preference for government officials, especially Geneva-based diplomats, while other Members tend to favour scholars and practicing attorneys having a high reputation. This built-in bias among Members not only causes delays, but also frustrates the settlement objectives of the DSU in ensuring the expertise, independence and integrity of a panel. Selection of panellists from a fixed pool of candidates representing a broad range of expertise could be considered as one way of resolving this problem.

Another issue raised is the ethical standards of a panellist. Although panellists are not judges, they act in a judicial capacity when making a decision. Judicial codes of conduct regulating the behaviour of panellists based on models derived from various countries should also be considered as an issue relevant to the DSU review.

Panellists should be required to reveal any interests which may create or result in

conflict of interest. They should disclose any actual or potential conflict of interest to the Secretariat before sitting in a case. The Secretariat should also investigate whether a candidate has any conflict of interest in a particular case.

As far as I understand, there have been no cases so far which are entangled with the conflict-of-interest problem. This trend must continue for a fair functioning of the dispute settlement mechanism of the WTO.

Petros Mavroidis: Just one remark. This is not the EC's idea. The EC are free-riders here. Bill Davey in 1987, in a paper in the Fordham Journal of International Law, suggested a permanent court of first instance at the WTO. Eleven years later the EC presented it as its own idea, but this is far from being an EC idea.

Thomas Cottier:* On the first point, the relationship of consultation and adjudication in the panel system, I think it is very interesting to observe that in the private sector we have a move today away from adjudication to more mediation, consultation and negotiation. We start teaching students at law school how to negotiate and we try to develop the law of negotiations. In the WTO we have an inverse trend. In the beginning there was not much more than negotiations, and we have been moving into adjudication.

The interesting issue is how to find a proper balance between the two stages and the two modes because both are of fundamental importance. Just to recall the figures: we had about one hundred and fifty consultations and thirty-four reached the panel stage, so this is roughly about 20 per cent It would seem that some 80 per cent are being settled by trade diplomacy. This is the main job of diplomats and that is for the operation of the international system a very, very important phase in overall dispute resolution within the WTO system. How can we interface the two stages? We have not yet a clear allocation of the two functions because the panel system moved out of a conciliatory system into an arbitration-type system and we still read, for example, in Article 11 at the end: "Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution." This is outdated for the panel stage because the panel stage today is a fully legal proceeding and the parties go—you may allow me to say—for a kill. The legal teams muster all the arguments to beat the other party. We are back in the very antagonistic mode of dispute settlement, and that is clearly very different from consultation and negotiations. And the challenge we face, I think, is to clarify this relationship and to ask: how can the panel proceedings and the legal system support the consultation phase?

I would like to submit just a number of ideas. First of all, it could be contemplated whether we should reinforce the obligation to consult and start talking about an obligation to negotiate. There is a slight difference between the two because the obligation to negotiate actually requires operating with offers and requests and replies.

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Consultation goes less far. Of course, under both, you are not obliged to conclude but you have to make an effort of a different degree.

Today we sometimes see that the consultation phase is simply used as a quick and rapid *passage obligé* which is not taken seriously. The question is: should we check whether consultations or negotiations were held in good faith? Whether an adequate effort was made? Could we develop criteria to measure that? And then who should do the checking? Should it be the DSB when a request for a panel is made? The parties would have to set out: "We tried very hard, but we exhausted this avenue." Or they may, for example, say—and that should also be accepted: "Look, we have a clear-cut case. This is a most-favoured-nation violation, there is no exception to this. Here we don't want to negotiate." Or should it be examined by the panel as a preliminary issue whether the obligation to negotiate was fulfilled?

I would like to encourage working on that front because we have an opportunity here to develop the law of negotiations. In international law that still is an underdeveloped field. We have *culpa in contrahendo*, we have the principle of good faith, but it is an area which should be developed beyond the present state.

My second aspect is: should we introduce a cooling-off period in the middle of the panel process? The panellists are by now very familiar then with the substance of the matter but their role in dispute settlement is to adjudicate. They have to say what is the law, and nothing but the law, because they will hand their report back to the political process, and the legitimacy of the panel relies upon its reasoning and nothing else. Otherwise we get on a slippery slope.

But I could imagine that, for example instead of the interim report we say: "Look, here we stop for a moment, and the Chairman of the panel is willing to offer his mediation." And then you may go into a negotiating mode and the parties may go back to the table and try to hammer out a settlement. This happened under old panels and it might happen again, but it really involves a shift of attitudes because in adjudication you go for a kill and in negotiations you have to be much more open to see what is the interest of the other party, how we can settle, and so on. You have to apply the "How-to-get-to-yes" principles, which are quite different from litigation.

The third point I would like to make is—and that is something which was proposed by Andy Shoyer: we should reinforce the value of settlements in the enforcement proceedings.[1] A settlement which was reached should actually have the same value for enforcement purposes as a decision. It should be subject to adoption by the DSB. If that is the case, third-party rights are no longer violated, which has happened before. Then it should be subject to monitoring and should be subject to cross-retaliation in the very end.

So my point on this matter is: I am a lawyer and I like litigation, but I think we

[1] Andrew W. Shoyer, *The First Three Years of Dispute Settlement: Observations and Suggestions*, 1 J.I.E.L. 277, 287 (1998).

need a proper balance and the negotiation phase is absolutely crucial and important. It has to be further developed also in legal terms.

Just briefly on point two. Whether to have a professional group of panellists: it is a question of whether you are going to introduce the remand authority. If you have remand you need at least semi-professional people who are available at any time. They need to be able to serve and take back a case and go through it again. It is essentially a question of how you shape the relationship between the Appellate Body and the panel as such. I think we could certainly do with the semi-professional circle, with a Body of people who would then be willing to serve and parties would accept that and actually allow these people to serve, so filibustering could be avoided.

On the third point just briefly: deference. Coming back to the discussion we had before, we have to distinguish two issues of deference. The first issue is: what should be the deference toward governments? The second issue: what should be the deference towards a panel? I spoke about this before and my view is that the Appellate Body often is too proactive *vis-à-vis* the panels, and that is also a reason why almost every case is appealed. If the Appellate Body has such a full workload this is partly because of the judicial policies applied.

Well, the main policy question is: do we want to develop the system into a court system, nothing but a court, with seven people making all the important decisions? Or do we want to have a system where the panels are centre stage and the Appellate Body basically reviews whether they did a good job? If that is the case you need to deploy some deference *vis-à-vis* the work of the panels.

Deference *vis-à-vis* governments is a totally different story. Here the question is: what are the political costs of deference? The *Hormones* decision by the Appellate Body knew two winners. The loser is the international system because now we have increasing calls for unilateral measures in the U.S. Congress. That may be the cost of deference. My personal view is that panellists and the Appellate Body have to look into the law, they have to have the courage to make a decision in accordance with the law and they should come out with clear results and hand them back to the political process.

David Palmeter: A number of people—Jacques Bourgeois was one of them—have already commented on the movement of the WTO from the diplomatic or negotiating mode to a juridicial or adjudicating one.

I think some of the problems that the process is facing really stem from that mix, consultations being Exhibit A. Consultations, which are part of the GATT heritage of negotiation and diplomatic settlement, are rather awkward at the start of a legalistic proceeding. They tend to become part of the tactics in the start of a dispute, rather than part of a process to settle a dispute.

One way to overcome that awkwardness, in a partial way, and to build in something of Thomas Cottier's cooling-off period, would be to eliminate the consultation requirement at the start of the process, allow a party to make a panel request

and get the panel established, and then build in time for consultations before the panel process itself starts.

That is pretty much, I think, what happens in most national litigation systems. You file your papers and start the legal process, and then you talk seriously.

The two-meeting structure of the panel process also is rather awkward. I think this grows out of diplomacy and public international law generally where the notion really is not that you have a complainant and a defendant. No one is a defendant, in theory. Both parties in theory ask the tribunal to resolve a matter, and they are viewed as equal partners in the process. That is something of a fiction that does not apply to dispute settlement in the WTO. In any event, it does create some procedural awkwardness because parties may be tempted to use the two-meeting format in a tactical way. A more legalistic approach would be to have a single meeting, or "hearing", after the written submissions are completed.

Turning to the other issues that the Chairman raised, I do not really know whether it is best to stay with *ad hoc* panels or go to something more permanent. I can see the difficulties and the burdens that the present system can impose on panellists. These cases are getting very, very big and some of them may be overwhelming. On the other hand, use of permanent panellists would change the characteristics of dispute settlement enormously and then take away some of the control that the parties have. And I am not so sure that that is a good thing.

I come from a system in the United States where we have an International Trade Commission composed of six members who decide if there is injury in trade cases. We all watch the politics of who gets on the Commission, who is nominated by the President and whether that person can get confirmed by the Senate because he or she is supported or opposed by this Member of Congress or that, this interest group or that. It is a very political nominating process. I am sure that if permanent panellists were named, a similar process would result. This probably would lead to a large number of representatives from the larger Members, which would mean not as many representatives from the smaller Members. I am not sure that would be a good idea.

Another complaint heard about the current process is that it seems that many of the panellists come from a fairly small number of smaller Members. I think there are a couple of answers to that. One is that if the United States and the EU don't like the exclusion of their nationals from panels, they can stop objecting to the inclusion of panellists from the other. That could overcome the problem. I doubt, for example, that if John Jackson or Robert Hudec were on a panel involving the United States, that they would be taking orders from the U.S. Trade Representative (USTR). In fact, they might even be kept off a panel by the USTR precisely because they would bring a not always welcome expertise to the panel's deliberations. I would, however, make a distinction between nationals who work for the government and nationals who don't. Obviously, you could not have somebody from the Mission sitting on a panel and others in the Mission presenting the case.

It has been noted that a fairly small number of panellists seems to be selected. Thomas Cottier is one of them. This may simply be a function of the fact that he is a very good panellist, that his work seems to be appreciated, and that many parties accept him as a panellist. At least, his work is appreciated by those not on the Appellate Body. But then, I don't know of any panellists whose work is particularly appreciated by the Appellate Body. At least not so far.

This being said, the change to permanent panellists may already be under way *de facto*. The frequent use of a fairly small number of panellists may amount in practice to an evolution into some kind of *ad hoc* semi-permanent body.

On the issue of deference, I have to say that I am something of a non-deference person. The Agreement that frames the issues most sharply, I think, is the Anti-dumping Agreement. In the one Panel Report published thus far, the Panel dodged the issue of Article 17.6(ii), the standard of review provision. This Article was the subject of a very learned article by John Jackson and Stephen Croley of the American Journal of International Law a couple of years ago.

The basic point that I would make is that on facts, yes, I think the ability of panels to find facts is extremely limited. Therefore, if there is a factual record that has been prepared by a government, I would think that the burden would be on the challenging party. This would in all likelihood be a difficult burden to meet—not necessarily as a formal matter, but as a practical matter. That is just the way the world works.

On the legal standard, the situation is quite different, in my view. What is there to defer to? If national authorities reach an anti-dumping decision, they are making a decision in a case that involves national law, between two private parties, both subject to national law. That is very different from the government to government agreement which the panel construes.

The analogy that is drawn by some people urging legal deference fails, at least in the instances that I have seen. U.S. proponents of deference draw an analogy to our Court of International Trade (CIT) which reviews decisions of the International Trade Commission and the Commerce Department for compliance with the U.S. law. But the difference is, both the CIT and the agencies are applying U.S. law. The agency initially is applying the law to the facts of the case. A dissatisfied party appeals on the grounds that the agency did not do so properly. It is a doctrine of U.S. administrative law that, in general, in construing a statute applied by an agency, courts will defer to the expertise of agencies.

The point is, both the agency and the court are interpreting the same legal provisions. The situation is very different if the case moves to another level and comes to the WTO. The question no longer is whether an agency appropriately applied a particular provision of the U.S. Tariff Act. The question is whether the United States acted in a manner consistent with its obligations under a particular Article of a Covered Agreement. These are two very different questions. Consequently, in my view, the analogy the U.S. proponents of deference make to U.S. practice breaks down.

John Kingery:* For the past several months I have been working on almost a daily basis on the DSU review, so hopefully I can provide you with some observations from someone who has been watching this at first hand. I also obviously have to offer the disclaimer that what I say are my own views, not the Secretariat's views and certainly not the WTO Members' views of the process and what is happening.

To step back for just a second, let me tell you where we are in the process and that will maybe give a little bit of meaning to some of the comments on where we might go in the future. The discussions actually started in late 1997, under Ambassador Armstrong from New Zealand who was Chairman of the DSB at that time, as to how the Members wanted to organize the discussions for the review of the DSU. Unfortunately in many ways that discussion process in effect really continued until July of this year. Partly, that is because of the interruption of the Ministerial Conference which distracted the Members who, of course, are the decision-makers in this process, as they were trying to put together the Ministerial and decide what was going to come out of the Ministerial.

Nonetheless, by July we started to receive substantive comments from the Members and the idea was that Members would submit their views of the DSU, its functioning and where it should go. Then we would begin a series of discussions on an informal basis between the Members as to any possible modifications or other changes that they might see would be beneficial to the Dispute Settlement Understanding.

At the outset there was a general agreement that the dispute settlement system has been working fairly well. That is in the general comments of virtually all the Members, though obviously everyone qualifies that somewhat. It can always be improved. Some Members think it can be improved substantially, some Members think that all that is required at this time is fine tuning and claim, in fact, there is no mandate to do more than fine tuning.

The Secretariat contributed to the process at this point by compiling all these documents in a single form which was, hopefully, more useful than merely stapling one or more together. They have been organized basically along the structure of the most comprehensive of the early submissions which was by Japan. We also provided a statistical overview, some exhaustive, some might even say "mind-numbing", statistics about the panel process and consultations, what happened to the cases, who had been panellists and the results of the process.

I do not know at this point whether any of those documents as such will ever surface as formal documents because at this point everything is being done on an informal basis and this might explain one of the points made earlier by Professor Stern about the internal disagreement within the Community as to the status of their submission. My understanding, as a second-hand observer at this point, was that the EC Council felt that it was a Council decision whether to submit this paper of official positions of the European Community's or if it was merely a negotiating or discussion paper drafted by the EC Commission.

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At this point every piece of paper submitted by every Member is an informal paper, a non-paper of preliminary statements. All are subject to revision and so I think that may have been how that question was resolved but it is indicative of the overall process. It has been quite informal but there also have been quite useful discussions, I think.

We are now on Revision 3 of the compilation. There may be a Revision 4 if there is a last round of submissions. It is the assumption that the discussion will actually continue next year. There was an informal DSB meeting today actually, to consider the position of the DSB *vis-à-vis* the continuing review of the DSU.

I think it is safe to say that there will be continuing discussions next year. If you look at the terms of the decision of the Ministerial Conference at the Uruguay Round it was that there would be a review to be completed within four years but the decision to be taken by the next Ministerial Conference after that. The nature of things in most places and certainly in the WTO is that work expands to fill the time available. The next Ministerial Conference obviously does not happen until November and needs a lot of time for discussion. How much of the time between now and November will be taken up by those discussions I do not know. That was going to be a subject of discussion of Members and indeed I think Members can obviously change their mind about that during the course of the year. But I think it is safe to say that the Members at this point feel that it would be useful to continue discussion of the proposals that have been made.

Hopefully we will finish a first reading of the proposals that have been submitted this year. There is another informal DSB meeting on 8 December where we hope that the Members will wind up that first reading of the compilation of their own comments.

Given what I have told you about this process, this can provide some hints about what may come out at this point. The first substantive submissions and comments by Members really came in at the end of July. The heavy concentration of comments were submitted in October. Obviously, if you are going to do a major revision of the DSU and you want to try and complete it theoretically by the end of 1998, and certainly by some time before the third Ministerial, that is not much time to do deep substantive fundamental revisions of a treaty text like the Dispute Settlement Understanding.

Again, if you look back at the Ministerial Decision from the Uruguay Round, it did not say that this was to be a negotiation. It just said it was to be a review. Members can decide to negotiate any time they wish, but the emphasis was on reviewing the function and not a decision that there would be a renegotiation at this point. I think it is fairly important to keep that in mind.

Substantively, I think you will see the possibility in the short term of some consensus on some fairly minor points, minor relatively speaking. I think they are important to parties in the course of individual disputes, so I don't want to down-play them, but compared to some of the fundamental issues raised, particularly by the EC and to a lesser extent by the United States and by some other Members, some of these issues are relatively minor. There could be some agreement possibly on time-periods for notification of mutually agreed solutions to disputes. I think you could have some

agreement possibly on some questions like: do you need to have requests for panels at consecutive meetings? Possibly some changes to the timetables in Appendix 3 to give respondents a little bit more time compared to the complainants in filing briefs.

So you can see why these are issues which can be significant to parties in the midst of an individual dispute, but which are not necessarily what you would consider fundamental like, for instance, setting up a Standing Panel Body.

There are a number of issues which have come up which will be points of continuing discussion. Not that they are necessarily controversial in all aspects but there is certainly no indication of a consensus at this point that the Members are ready to agree on changes to treaty text or some other alteration to the current implementation of the Dispute Settlement Understanding.

Transparency is one of the issues that comes up. Transparency is, as we are all aware, a fundamental point raised by the United States. The term "transparency" itself of course can mean anything. It tends to lose any precision of meaning the more it is repeated and it means a lot of different things to different people. The developed countries seem to be much more interested at this point in changes to what they would call increased transparency. The developing countries have been much more leery of this and have raised two points, I think, of concern. One is that there is a concern that had been expressed that there is not enough "internal" transparency at this point, that some Members do not understand the process. They cannot see through it themselves, either as non-participating Members in a dispute or even sometimes as Members involved directly in the dispute, either as the parties or as third parties.

The second thing that is raised by many developing countries is practical transparency. That is: it is all fine to say that we should open all hearings to the public, but the reality is that a farm group or an environmental group from the United States or Europe is more likely to attend a meeting than a farm group or an environmental or other group from, say, India or the Philippines or Indonesia or Latin America. So in the mind of many developing countries there is a question of the practical effects of transparency. Who can take advantage of it?

I guess it is not a point of disagreement as much as a point of concern at this stage of the discussions. But having said that, there is not a consensus, to say the least, that panel or Appellate Body meetings will be thrown open to the public any time soon.

One of the other major issues that has come up under transparency of course is the question of *amicus curiae* submissions. Again, transparency is such a flexible term at this point that it is hard to see exactly what one puts within the category. This has been highlighted by the recent Decision in the *Shrimp/Turtle* case by the Appellate Body. Their interpretation of Article 13 of the DSU is that panels have the authority to receive *amicus* submissions or submissions by interested persons other than governments. This has, I think it is safe to say, generated significant amounts of controversy on both sides of the issue as to whether this is an appropriate interpretation or whether the WTO should go further in this regard.

There has been a lot of talk also about the speedier dissemination of documents. I don't think that this is directly a DSU issue. However, it is involved because obviously if you have such things as open public submissions, as the United States has proposed, that can have a significant impact on what needs to go into panel reports, how quickly it can therefore be translated and how quickly they can be disseminated to the public.

On the question of consultations, there is a lot of support for strengthening the process without a lot of consensus on what that means. I think one can begin with the observation that there is an increasing juridical nature of the WTO process. There is a break-down of viewpoints on two sides. One group of course thinks that this increasingly juridical process inhibits appropriate consultations. In that view, they take consultations to mean negotiations. Others think that the increasingly juridical nature of the process actually promotes the settlement of the disputes by putting specific timetables and definitive results at the end of the process if you do not negotiate.

There have been some discussions on how to make these consultations more useful. One interesting proposal—I think it is now public—was that the Members should consider the idea of allowing parties to submit written questions of a factual nature during a consultation and require written answers. This would be the beginning of an interrogatory process, but in a more rudimentary form. Indeed, the proposal is not a detailed idea. It is more of a theoretical idea for discussion and has generated some interest. That obviously would be quite a radical change in the consultation process and has generated some very interesting discussions between the Members. It is safe to say that this will be a more longer-term issue for the Members to consider.

A lot of the comments submitted by the Members need to be understood in this context. They were presented as some very detailed, technical, short-term possibilities for reform as well as some other issues that Members should consider for the long-term. Presumably people in the academic and business communities as well as other parts of society will also give some added thought to some of these more fundamental issues, such as changing the fundamental nature of consultations by making them a fact-finding process as well as a negotiating process. And to go to the next step, the idea of introducing something like a Standing Panel Body requires full and thorough discussion.

I won't go into detail on the EC proposal for a Standing Panel Body since Professor Stern talked at some length about it. It is obviously not a general point of consensus among the Members on the more fundamental proposals and was not intended by the Commission to be a change which would happen in the near term. But it has been provided by the Commission as the vehicle for some broader-ranging discussions of the nature of the panel selection process, and has been a useful catalyst for discussion about who panellists are and what the nature of a panel is meant to be. It is a major, major step to go from an almost *ad hoc* construction of panels focusing on trade experts and trade diplomats to a permanent pseudo-judiciary that will change the nature of dispute settlement quite a bit.

There has also been a lot of discussion about third-party rights. I think there is a general agreement that there needs to be some more work on third-party rights. Indeed one of the points raised by many Members is: if we are going to go down the road to transparency, particularly as proposed by the United States, and allow submissions by non-governmental persons, then at the very least one has to change the structures for permitting the participation in cases by Members.

A number of Members have stated that it is unacceptable to them even in theory for non-governmental organizations to have more direct input into panel deliberations than the signatories to the treaty itself, and they have made that point rather forcefully.

There are also some questions that have come up in recent cases as to whether you should have the ability to join a case as a co-defendant. This has come up in a recent dispute. In particular, I think everyone is aware of the case that was brought by India against Turkey having to do with certain policies that Turkey had implemented. Turkey has responded by saying that the measures were part of a customs union agreement with the European Community. This has focused some discussion on this question which in a way I think one could consider an anomaly within the DSU: namely, that you have a lot of provisions for co-complainants but no provision for co-respondents.

There has been discussion about remand authority of the Appellate Body and an interesting point is the idea of permanent panellists which may be tied up with this remand authority. I think too the idea of panellists may also be tied up with some of the proposals for a more rigorous working procedure and preliminary rulings functions of panels. It is very difficult for three trade diplomats, even with the assistance of legal advisers, to rule quickly and expeditiously before the first meeting on preliminary motions and certainly procedural issues which they have no experience with. This is particularly true considering that a lot of these panellists have never met each other before the first meeting.

So I think this question of panel structure and who are the panellists is tied up not only with the possibility of remand authority by the Appellate Body but the question of procedural rulings.

The final point I would like to raise which is one of the long-term issues which will be discussed—nothing will be decided by the Members, they have made it pretty clear in the short term—is the question of implementation. We are all aware of the dispute at the moment between, the United States and the European Community, with a number of Members lined up on either side as to how to deal with the question of implementation regarding Articles 21.5 and 22 of the DSU. This is a very fundamental point and I think you could safely say that it will not be resolved in the three and one-half weeks left in 1998. There are a number of cases where this question of the implementation is ripe at the moment. That may mean that it will be difficult to negotiate on these Articles right now. So this may be an issue on which, ironically, as its prominence has increased at the moment, the ability to possibly settle it at the moment

has possibly decreased. This is one issue that the Members have made clear will require a good deal of further discussion. It will continue on into 1999, and I am in no position to even guess as to whether there will be a recommendation for the Ministerial Conference in November on an issue like that.

Finally, there have been a lot of comments on the resources needed for developing countries to effectively participate in the process, particularly in light of the increasing juridical nature of it. This is particularly true if it becomes even more juridical as some have proposed. There is a general feeling—I think among the developed countries as well—that something needs to be done to assist developing countries to effectively participate in the process, be it more resources, be it some sort of outside structure, etc. There is consensus that something needs to be done. It may not need to be done within the context of the DSU Review, but I think that has clearly come out as a result of the comments.

Obviously my comments must be at a certain level of generality, given that most Members' submissions are still confidential, but I hope this has provided a little bit of insight as to what is going on and what may happen in the next year.

Petros Mavroidis: I have one question for the members of the panel but it would request a very brief response by each one of you, not more than ninety seconds, and then we can perhaps revert to the audience. I start with your first observation. I think you said correctly, we have something like twenty-one panel reports but one hundred and thirty-seven or one hundred and forty-three requests for consultation. So the question is: what happened with the remaining one hundred and twenty something cases? Everybody here favours settlement outside of WTO, that is fine. I don't—and later I will tell you why.

We have an Article 3.6 which says: "We request WTO Members whenever they settle outside the WTO to notify the solution and any party can make a request about any point relating to the solution." What I say is that all notifications are inadequate. Even the Chairman of the DSB a year and a half ago in a statement said: "This is unacceptable, this system does not function." But my problem is: I cannot see how you can remedy the situation because governments are sums of interest, they are not private parties. If I am a government and I represent the textiles industry and if the domestic lobby does not mean very much to me, I would settle the issue with somebody prepared to do something for me on the automobile industry which might represent something much more interesting to me. Public choice explained those things a long time ago.

Now, can you see—but please a brief response—an effective 3.6, or should the answer be searched for in a different field, something like challenge procedures in the GPA or TRIPS where private parties can arrange questions before national adjudicating bodies?

David Palmeter: I think you could have an effective remedy if the Members wanted to have an effective remedy.

Yukyun Shin: I wonder why you are raising this question. My impression is that not to litigate before a panel or the Appellate Body of the WTO is better than to argue before a panel or the Appellate Body. On the other hand, you touched upon the consultation provided in Article 22 of the GATT 1994 as a means of settling a dispute between the countries concerned. As I said earlier, the GATT 1994 is designed to settle a dispute preferably through consultation with good will, actually out of the WTO body, in an effort to minimize the number of cases to be filed before the DSB of the WTO. You should, however, abide by the provision that the countries which do consult have a mandatory obligation to notify the WTO of the result of the consultation.

Brigitte Stern: Well, I can just present two ideas in response to your question. One possible way to have the settlements better known to the WTO is what was suggested earlier, to make the settlement embodied in a report. So the settlement would be a decision of the WTO with all the positive consequences on implementation that it can have. I think that is quite important.

Another road to explore might be to favour and insist upon settlement inside the WTO, and here maybe I would like to disagree with my neighbour. If I understood correctly what he said, he said: "You should separate more clearly consultation and panel", and he suggested that at the panel level you should not be able to still go to the parties and say: "Let us find a solution". I don't think that trying to find a solution even at the panel level is outdated. You think that once you are out to kill you go to the end. I don't think so. There is always a time to stop and try to find a settlement. So either embody the settlement in a WTO ruling or panel report or put emphasis on settlement inside the WTO.

Petros Mavroidis: Before I revert to Thomas, I shall make the question even more difficult. I think that if you do this you give actually more incentive to big markets to do everything outside the WTO. To me the perfect example is voluntary export restraints (VERs). You have an Article stating that VERs are illegal but what does it mean? If you go out into the market I am sure—I mean there is evidence from at least one economist in the States—that VERs exist. To me this is a statement which is fine at the formal level but substantially means absolutely nothing because, of course, governments presenting producers' interests have an incentive to conclude VERs, and of course the WTO does not provide a credible threat against the conclusion of VERs; a mere interdiction means nothing.

Thomas Cottier: I think we have to study carefully to what extent the sort of government failure which could be remedied by introducing private party action against

such settlement. But that should be done rather on a case-by-case or area-by-area discussion and not over-broadly, because of its implications for the international system.

As to settlement, I think parties are always free to settle outside the WTO: informal consultations can be held, and confidential settlements can be reached. A third party which is negatively affected by an agreement detrimental to its interest, can bring in a separate complaint and go through all the motions. Once you have notified your dispute, I think you are within the system and then there should be transparency. In the Mid-Term Review of the Uruguay Round, the provision was introduced that these agreements have to communicated, that you have to notify these agreements. That was not the case before. If today the practice of notification is not sufficient, well maybe that could be remedied. You would hand in the full text and the suggestion that these agreements should be part of the enforcement mechanism would actually made them fully part of the system. In accordance with the principles of international law any third party detrimentally affected could actually intervene and defend its interest against the enforcement of such agreements.

John Kingery: A couple of points here in response to the question of mutually agreed solutions to disputes. As I said, there seems to be an emerging consensus on the idea of clarifying the treaty language on mutually agreed solutions to require some sort of prompt notification, but nothing is finalized yet.

One suggestion for the second step—other than just have a treaty language saying that you should promptly notify, or notify within a certain period of time—would be a sunset clause. That is: your case disappears if it has not been either prosecuted or the agreement notified after a certain period of time. That leads to two problems which have been identified. Namely: *who* notifies? If it is mutual notification then one could argue: "Well, the defending party has an incentive to drag it out and the complaining party's case goes away if they wait long enough." I don't know how serious that one was because the complaining party can always continue on with a panel.

Another somewhat related problem is *what* is notified? One particular comment that was made was that sometimes you can have mutually agreed solutions which are broader in nature than the WTO rights at issue. This would have implications not only for putting it in writing and bringing it into the system, but it would also raise fundamental questions if that agreement then became an enforceable right within dispute settlement, as Professor Cottier has suggested.

Thomas Cottier: Petros asked us to raise some of the more fundamental constitutional issues of the system and I just want to add one more element which I would like to see discussed. This is the issue of legislative response. In all national systems where you have strong courts you also have the possibility of legislative response. Democratic institutions like parliaments can intervene and change the law, the case-law even of courts. We do not have this at this stage in WTO because the negotiating process

is much too cumbersome, really functioning only during WTO's rounds, but in between them it is difficult to make progress.

We have the instrument of authentic interpretation and I wonder whether that instrument should not be further developed in order to bring about a check on the check, which is the Appellate Body and the panels. We need a circle in the system, and we have not closed the ring.

Yukyun Shin: Let me answer the question raised by Mr Chairman. His question is why a number of countries have tried to settle disputes outside of the WTO body. I think there are a couple of reasons for a country to resort to consultation. The first reason is the financial reason. A number of developing countries have faced a financial problem in both the public and the private sector. Actually, it is burdensome for a developing country to bear the legal costs required in settling a case before a panel or the Appellate Body of the WTO. It is true that to hire a top-notch trade attorney from the United States or one of the European countries who is versed in GATT/WTO matters costs several million U.S. dollars for a case. Thus, the financial problem is the first reason.

The second reason is the lack of legal expertise about the WTO matters on the part of the developing countries. Most of you here are from the developed countries, which are familiar with GATT/WTO matters. However, the situation in a developing country is quite different from that of the developed country in terms of the understanding of and familiarity with the GATT/WTO and the WTO matters and legal practicing before the GATT/WTO. It is not entirely a wrong story that a developing country which has been strongly influenced in many aspects by the developed countries represented by the United States and the European countries is quite vulnerable to political and economic pressure coming therefrom.

In particular, the political élite and administrative leadership in a developing country have been vulnerable to the pressure coming from a developed country, such as say, the United States. It may also be true that the interests of the political élite and the administrative leadership in a developing country have been sometimes at odds with the welfare of local citizens and the interest of the domestic private sector.

Leo Palma:* First, on the point of mutually agreed solutions, during the relevant discussions in the Dispute Settlement Body, the informal sessions, we were the ones who made the point that what may be ideal for us—to try to establish a rule giving a deadline for governments to provide mutually agreed solutions—may be difficult to enforce in the outside world because the resistance by one party could have been based on a phone call from a President of a powerful country saying: "If you don't stop that case we will file a case against you on human rights", or mutually agreed solutions to that effect. The agreed solution may not necessarily have anything to do with the trade measure which is the subject of a dispute. And so to that extent the proposal of the EC

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in that regard, the Sunset provision, was attractive to us because it addressed the consequences of not notifying anything.

But probably another solution which also is along the same lines as the EC in addressing the consequences, is simply to say: no course of action or defence could be based on a mutually agreed solution in a subsequent proceeding. If it had not been previously reported, in which case it could be one party interested in notifying it, it could be both. In any case, we address the consequences: no course of action or defence in a subsequent proceeding, and that measures be based on a non-unified mutually agreed solution, aside from the Sunset clause.

The other point is relationship between consultation and adjudication. One of the ideas that has come up which appeals to us is that instead of focusing on the procedural aspects of the nature of consultations, specificity, etc., one particular proposal is to let the start of the process be the filing of a complaint before they actually set up a panel—anyway there is a theoretical panel with mandatory and plenary jurisdiction—and then once the complaint is filed, whether the parties want to settle or not is up to them. No one can compel them to settle.

But to us what is attractive in that proposal is that it has a beneficial consequence because as a developing country we see the WTO process becoming more technically legal. For example, it has almost become *de rigueur* for parties to start out a case on 6.2 and as you say, whether the request for consultation or request of the establishment of a panel was specific enough. So it has become standard for parties to litigate on that technical legal point, much to the disadvantage of developing countries. But if we start out with a complaint, no one can dispute that the panel in any case has mandatory and plenary jurisdiction. So you do away with disputes on 6.2.

Geoffrey Hartwell:[*] Two points if I may. The first is that I would like to underline very much what has just been said by a colleague behind me because it seems to me very important to remember that a settlement really can be no source of jurisprudence. It is only useful to the people who actually made the settlement and it certainly cannot possibly in logic bind anybody else.

And the second thing was this: Professor Cottier suggested earlier that remand power requires a semi-professional or Standing Panel structure and I would beg leave to question that proposition. The English Arbitration Act of 1996, following the practice before that, gives the court power to remit an arbitral reward to the original tribunal. The presumption is that remission will be given in preference to any other remedy where it is possible.

In practice, that seems to create no difficulties, even where an international group of arbitrators has to be reconvened. And if that is right—just drawing the analogy—then perhaps there is nothing in the remand power that requires a different approach to the creation of panels. It also seems to me, with respect, that the danger of a closed list of

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that kind is that it can be seen as leading to a measure of covert control by administrators. But that is something perhaps I should not speculate about further.

Thomas Cottier: My statement was mainly nurtured by practical considerations. If you are an *ad hoc* panellist you can plan your work and you can say: well, this will involve my time for the next three to four months. If I am under remand power I don't know whether I have to come back and serve again and look into the case again. Perhaps it is not so much a problem for people living here, but if you have panellists living, for example, in Australia or in New Zealand, it is just getting very, very difficult as a practical matter. I believe the remand authority is practically the only way to reach satisfactory solutions upon appeal. If we look for example at the *Hormones* case where the Appellate Body turned around the burden of proof but while leaving the evidence as it was, this is a case which should have gone back to the same Panel. But that would mean, well, here you go again for another three or four months, and if you have a full job next to it you have to think whether you can do the case in the first place.

Brigitte Stern: Maybe I will answer to what you said on the settlement. You said it is not a good idea to integrate a settlement into a report. Well, first of all there have been some precedents. For example at the Iran–U.S. Claims Tribunal this has happened but, of course, it was in order to be able to enforce the settlement on the Iranian funds deposited with the Tribunal.

I am not so sure, well it is true that as you say, it is not really a precedent that can be relied on. It is for sure not a jurisdictional precedent, but you cannot completely set aside the idea that it could be a factual precedent and if many settlements, for example, use the same kind of reasoning this could give way to a new customary rule or customary interpretation. So this is the answer.

Cherise Valles:* I have two questions that I would like the views of the panellists on. The first concerns the Interim Review stage. As we all know, the purpose of the Interim Review is to give the parties to a dispute a chance to review the panel's report before it is made public. This provides an opportunity to correct errors in the report and, sometimes, depending on the outcome of the findings, even to settle the case before the report is made public. There are certain problems associated with Interim Review. For example, sometimes even if there are errors in the panel report, parties choose not to bring them to the attention of the panellists in the hope of appealing the report on those specific grounds. There is often no change between the Interim Report and the Final Report. Therefore, my question is: do you see merit in removing the Interim Review stage and perhaps allocating some of the time provided for interim review to the earlier part of the proceedings, such as the period for submissions to the panel?

My second question concerns the possibility of intervening at the Appellate Body

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stage without having been a third party at the panel stage. As we know, Article 17.4 of the DSU provides that third parties that have notified their substantial interest in a matter at the panel stage can make submissions to the Appellate Body. Parties frequently do not know if there will be larger systemic issues involved in a case that will need to be addressed at the Appellate Body level. However, the Article 17.4 requirement has sometimes led to needless litigation, since in order to preserve their rights to file submissions or to be heard at the Appellate Body level, parties will participate as third parties at the panel level. Therefore, my question is: do you think there is merit in removing this obligation to participate at the panel level and to allow parties to participate at the Appellate Body should they see the need? I think that such a change may also address the concerns of certain developing counties that the cost of litigation in the WTO is becoming increasingly higher and that the cases are becoming too complex. Those are my two questions. Thank you.

John Kingery: On the Interim Review, one interesting suggestion that has been made is that the current two-step process be combined into one. That is, that the issuance of the descriptive part and comments on that descriptive part followed by an Interim Report and comments on the Interim Report, be combined.

Now, some of the criticism of that is that: "Well, this is a good period of time for people to try and settle cases." But I do not think there is anything that happens in that regard after the descriptive part comes out. Why would it induce anyone to settle? The nature of the descriptive parts now is that it does not give any hint at all of what the panel is thinking. It is simply a total, or near total, restatement of the parties' arguments.

So, surprisingly, this suggestion has not generated much discussion among Members. I personally wish it had because it is a source of time for reallocation and lack of time is a problem in the proceedings. It reminds me of the U.S. budget process now where you cannot increase spending in one area unless you indicate where you are going to cut spending somewhere else. In a way we are in that position with the Dispute Settlement Understanding. You cannot increase time in one place unless you can take it from another place. That is obviously a thing that concerns many people. In fact, going back to the previous issue of remand authority as well, it is the time consumption which is a significant problem.

I think no one is particularly happy with the whole Interim Review process, but I can safely say that there is no consensus as to how to solve the problem.

Thomas Cottier: Could I just add one remark? I would support the idea of deleting the Interim Report for three reasons. First of all, the Interim Report is used by the winning party to make the Report public and make it more difficult for the panel to come back to it. That has been my experience. The second experience is that parties make an enormous effort to put each and every detail once argued into the Report, which is extremely burdensome to the Secretariat. And the third experience is that a

losing party has no interest in improving the Report and render it more difficult to challenge in the appeal.

The Interim Report was introduced before the Appellate Body idea was discussed. It was necessary in the one-stage system but I don't think it makes much sense in a two-stage system. So I would actually encourage changing this device into a sort of cooling-off period where you really bring people back to a negotiating mood, if they want. This does not happen if the parties painstakingly read the Report to see whether something might be in it which they should still take issue with.

David Palmeter: The issue of Members intervening at the Appellate Body level that had not participated at the panel is intriguing. In principle, I would see no problem with it, provided it could be done in a way that is fair to all of the parties to the dispute. One of the problems is that the Appellate Body's time-frame is so compressed that if Members who had not been involved were to come in and file briefs or submissions with the Appellate Body, the disputants could find themselves having to respond to arguments from thirty different Members in a very short period of time.

Yukyun Shin: I will make a remark with respect to the lady's [Cherise Valles] question. I think the matter is also connected with the loophole in the current WTO Understanding on Rules and Procedures Governing the Settlement of Disputes. Let me put it like this. A party to a dispute submits numerous written documents. Normally, parties provide the panel with the first submission, the written version of their first oral presentation, the second written submission (rebuttal documents) and the written version of the second oral presentation. A party involved in a WTO dispute should have the right to sufficiently examine the other side's evidence and provide comments thereon.

Accordingly, all documentary evidence must be submitted by no later than the time when the second written submission is due. If one party submits all of its evidence by the time the second written submission is due, and the other side presents new evidence at the time of second oral presentation, the latter will have the advantage of having had the time to review the evidence for several weeks, while the party which receives the new evidence on the date of the second oral hearing will have a much shorter period to evaluate and criticize the new evidence.

In the event that a party submits new evidence at the time of the second hearing, the other side should have sufficient time to review and comment on the new evidence. Currently, there is no provision which specifically addresses these concerns in the DSU.

Otto Genee:* I would like to come back to the issue of compliance because it is crucial for the credibility of the system John already referred to it but at the same time it will be difficult for parties to look at this with a cool head and a clear mind given the

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topical case at hand. But it is obvious that there is a problem when we talk about Article 21.5, follow-up panel, when there is a disagreement between the parties whether the defendant has clearly compiled with the ruling, in relation to Article 22, DSU, the authority to retaliate. Obviously the drafters of these Articles did not do a proper job I think we should not put John Kingery on the spot. Maybe Thomas Cottier will have a job within six months, being the Chairman of the original panel in a certain case, so perhaps our panel today could give us the benefit of their wisdom on how the system should work, how we should have a proper way to deal with these issues.

Petros Mavroidis: You see, before we put John on the spot, there is a very easy way to avoid all these problems. When you go to the panel you quantify your damage and you say: "Please give me 5 million dollars back" and you put the panel on the spot. They cannot avoid the issue. The only panel which avoided the issue is the *Guatemala* Panel Report, but you have an obligation in public international law to address all claims by the parties. If you do that you don't have a 21.5 problem. John.

John Kingery: I will avoid any comments at all on the current disagreement over interpretation of Articles 21.5 and 22. However, from a lawyer's perspective, the language of 21.5 in particular could be straightened out. Now these disputes along these procedures have been obviously a major point of contention. I noticed that the Community when speaking of it often refers to these "normal dispute settlement procedures". Just the fact that that word "normal" is added shows the possibility for disagreement as to what it means. I do not know what the original negotiators meant, but it is unfortunate that they left it so ambiguous that two parties such as the United States and the EC could be in the position where they are at now. That would be a suggestion for the DSU Review that 21.5 simply spell out what is supposed to happen and something in a little bit more detail than "these dispute settlement procedures".

Arthur Appleton: A quick question for John. The Appellate Body would seem to be in a very good position to assess the strengths and weaknesses of the system now. To what extent are the Members participating formally or informally in the DSU Review?

John Kingery: On the question of Appellate Body input, there has not been direct participation up to this point. I think it is safe to say that on an informal basis the Appellate Body some time in the New Year [1999] will provide some observations. I do not know how in-depth those comments will be or the form they will take. But I think it is safe to say that there will be some informal input from them and it is important given their truly unique perspective on the whole system. Again, this goes back to my recounting the procedural steps. It has been compressed into such a small amount of

time that a lot of things that other people thought were going to happen in 1998 did not. The Members simply ran out of time.

Alan Shilston:* The thought that has been going through my mind during our deliberations is why it should be thought that private dispute resolution should inevitably be conducted by litigators, especially those trained and practising in the Anglo-American confrontational tradition. Surely on the global mercantile scene we need healers not hired guns?

Speaker Professor Cottier of counsel, a member of the U.S. law firm Baker & McKenzie in Geneva produced in my mind a feeling of both admiration and dismay. Admiration for being frank in stating his priorities as a (presumably U.S.-trained) lawyer, yet dismayed by the consequences of his mindset. Remarks like: "going for the kill", "I'm out to win", "I'm a lawyer", "I like litigating!" to my mind display all the wrong signals as to what WTO dispute resolution procedures should be all about. As one of our German lawyer colleagues observed: "I have been saying for the last twenty-five years that litigators give arbitration a bad name. Arbitration is being run in the fashion of proceedings in the State courts."

My general belief is that once a litigator, always a litigator. The confrontational attitude and Anglo-Saxon approach to private dispute resolution neutralizes a more conciliatory attitude and cross-culture approach towards the civilised resolution of disputes.

We need lawyers of a different mindset and possessed of social skills and objectives in the practice of private dispute resolution. Litigators who enjoy the fight should confine their activities to the public courts.

Thomas Cottier: What I was trying to say this morning is that we all find ourselves in different roles and situations, and when you are in a negotiating mode your methods and your approaches to the problem are different than when you are in litigation. So when you are defending, for example, a party, then your mandate is to muster all the arguments you can actually find to make your case. And you will do this on the procedural level, you will do this on a substantive level and your goal is to convince the panel that you are right.

What I am saying is: when you are in this mode of fighting you cannot, at the very same time be also in a mode of negotiation, mediation and consultation. So what we have to do is to separate the phases and interface them in a meaningful way. My statement in favour of encouraging developing the consultation phase, even of encouraging an obligation to negotiate, should prove that I believe that the negotiating mood is very, very important, but I am saying honestly that once you are in a litigating mood this is a very different story. I do believe that we should very much seek to settle disputes by negotiations in the first place and that we should only refer to adjudication

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when we cannot succeed in negotiations, or when we have a very clear-cut case where your entitlements are apparent. I think we have to find an appropriate allocation of these different modes and that was my point. I do believe that the juridification of the system has been very beneficial. It has given more rights to smaller countries. They can better defend their interests than before and as an instrument of last resort it is very important, but we have to maintain a culture of finding negotiating settlements in the first place.