

# The Integration of Article 25 Arbitration in WTO Dispute Settlement: The Past, Present and Future

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## Abstract

The adjudication system under the Dispute Settlement Understanding (“DSU”) is one of the major successes of the WTO. However, while the Dispute Settlement Body (“DSB”) has experienced a high level of compliance with its rulings, there have been enough failures to raise concerns about compliance. This article explores the possibility of more effective integration of the existing but underused form of arbitration under article 25 of the DSU as a means of dealing with a small number of politically difficult cases where compliance with a DSB ruling is doubtful. It challenges the predominant bias towards the WTO’s institutionalized litigation system as a one-size-fits-all solution, in the context of a review of compliance theories and historical developments during the Uruguay Round, and an analysis of the three forms of arbitration under the DSU. It ultimately explores the potential of institutionalised diversion of certain types of DSB disputes to article 25 arbitration.

## Introduction

The international trade system has been regulated for many years by two distinct processes — the legal and the political or diplomatic. The trade system established by the *General Agreement on Tariffs and Trade* in 1947 (“GATT”), which predated the World Trade Organization (“WTO”), was often criticised as being too political, and in its later years, largely ineffective for dispute resolution. One of the touted accomplishments of the WTO was the creation of a binding adjudication system under the Dispute Settlement Understanding (“DSU”)<sup>1</sup> resulting in the legalisation or judicialisation of the

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<sup>1</sup> *The Understanding On Rules And Procedures Governing The Settlement Of Disputes*, Annex 2 to *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations and Marrakech Agreement Establishing the World Trade Organization*, 15 April 1994 (“DSU”).

dispute settlement mechanism.<sup>2</sup> This legalised system has been used frequently and with great success. By the end of 2007, over 270 disputes had been subject to the WTO dispute settlement process,<sup>3</sup> resulting in 114 circulated panel decisions<sup>4</sup> and 70 circulated Appellate Body decisions.<sup>5</sup>

The Dispute Settlement Body ('DSB') has further experienced a significant rate of compliance with its rulings — experts generally suggest that 80 per cent of cases are implemented within a reasonable period of time,<sup>6</sup> and some suggest it may be as high as 90 per cent.<sup>7</sup> However, while it is generally recognised that the compliance rate with DSB rulings under this legalised system has been high, there have been enough failures with respect to implementation,<sup>8</sup> particularly in a few high profile disputes involving politically sensitive matters,<sup>9</sup> to warrant some concern. Examples of this problem are cases involving the European Communities ('EC') and the United States ('US') respecting the European ban on beef hormones in *European Communities—Measures Concerning Meat and Meat Products ('Beef Hormones')*<sup>10</sup> and the ruling in *US Tax Treatment for Foreign Sales Corporations ('Foreign Sales Corporations')*,<sup>11</sup> both of which failed to result in timely compliance with adopted rulings, despite the approval of retaliation measures.<sup>12</sup> The fact that such disputes go into areas such as health concerns or control over the tax base puts them into the category of disputes that can be described as 'deep-rooted in political complexities',<sup>13</sup> where non-compliance is more likely.

This article explores the possibility of more effective integration of arbitration as an alternative means of handling the 'handful of major, politically sensitive cases that test the limits of the system'.<sup>14</sup> It considers arbitration as an alternative for specific cases within the current dispute settlement system and as a possible middle ground between the extremes of a power-based system and a rules-based system. It considers the merit

2 See, for example Richard H Steinberg, 'Judicial Lawmaking at the WTO: Discursive, Constitutional and Political Constraints' (2004) 98 *American Journal of International Law* 247 at 247–248, 250–251; Debra P Steger, 'The Struggle for Legitimacy in the WTO' *Trade Policy Research 2003* (Ottawa: Minister of Public Works and Government Services, 2003) 111 at 120, 122, which also provides an excellent description of the tension between the diplomatic and judicial models of dispute resolution as well as the judicial and diplomatic tracks within the WTO, which has influenced the subject matter of this article.

3 Kara Leitner & Simon Lester, 'WTO Dispute Settlement 1995–2007: A Statistical Analysis' (2008) 11 *Journal of International Economic Law* 179 at 180.

4 *Id* at 186.

5 *Ibid*.

6 William J Davey, 'The WTO Dispute Settlement System: The First Ten Years' (2005) 8 *Journal of International Economic Law* 17 at 47; Debra P Steger, 'WTO Dispute Settlement: Systemic Issues' in John M Curtis & Dan Curiak (eds), *Trade Policy Research 2005* (Ottawa: Minister of Public Works and Government Services, 2006) 51 at 67.

7 Bruce Wilson, 'Compliance by WTO Members with Adverse WTO Dispute Settlement Rulings: The Record to Date' (2007) 10 *Journal of International Economic Law* 397.

8 William J Davey, 'The WTO: Looking Forwards' (2006) 9 *Journal of International Economic Law* 3 at 11; Won-Mog Choi, 'To Comply or Not to Comply? – Non-Implementation Problems in the WTO Dispute Settlement System' (2007) 41 *Journal of World Trade* 1043.

9 Steger, 'Systemic Issues' above n6 at 67.

10 *European Communities – Measures Concerning Meat and Meat Products (Hormones, Report of the Appellate Body, WT/DS26/AB/R, WT/DS48/AB/R*, 16 January 1998; and the most recent decision regarding the EC compliance in *United States – Continued Suspension of Obligations in the EC – Hormones Dispute (Report of the Panel) WT/DS320/R*, 31 March 2008.

of the diversion of a small number of ‘politically difficult’<sup>15</sup> disputes down an arbitration track. This would be somewhat similar to proposals designed to better incorporate more diplomatic solutions such as mediation and arbitration<sup>16</sup> but would operate as a mandatory substitute to the predominant system of litigation in the WTO described in this article as the ‘judicial settlement system’.<sup>17</sup> The purpose of better integrating arbitration under article 25 of the DSU in such cases would be to direct the dispute towards a timely, objective ruling that would inform the discourse around treaty obligations and push the disputing parties towards a negotiated resolution. Comparatively, the objective of the judicial settlement system seems more and more to establish a legally unimpeachable declaration of obligations to be enforced through remedies. In so doing, it potentially reduces the capacity and incentive for the parties to negotiate a mutually acceptable resolution.

In assessing the potential role of article 25 arbitration in the current system, this article suggests that the full rigour of the judicial settlement system is inappropriate for the small number of politically difficult cases in which the implementation of change is unlikely to result. The article incorporates a broad spectrum of well-developed observations about WTO dispute settlement in order to support a different direction for the reform of dispute settlement to address concerns over implementation. My ultimate objective is to contribute to the reintroduction of the broad-based form of arbitration under article 25 into the discussion over reform of the DSU. This would mark a real departure from the current discourse. Consequently, throughout the article, I necessarily address the plausibility of a new integration of the use of article 25 arbitration.

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- 11 *United States Tax Treatment for Foreign Sales Corporations, Report of the Appellate Body*, WT/DS108/ASB/RW, 24 February 2000; and see *United States – Tax Treatment for Foreign Sales Corporations’ – Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS108/ARB, 30 August 2002.
- 12 See, for example, Wilson, above n7 at 402 & 403. For a summary of the *Beef Hormones*, see <[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds320\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds320_e.htm)>. For a summary of the dispute in *Foreign Sales Corporations*, see <[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds108\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds108_e.htm)> accessed 20 January 2009.
- 13 Sungoon Cho, ‘The Nature of Remedies in International Trade Law’ (2004) 65 *University of Pittsburgh Law Review* 763 at 788. See also Naboth van den Broek, ‘Power Paradoxes in Enforcement and Implementation of World Trade Organization Dispute Settlement Reports: Interdisciplinary Approaches and New Proposals’ (2003) 37 *Journal of World Trade* 127 at 147.
- 14 Steger, ‘Systemic Issues’, above n6 at 67.
- 15 Robert E Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System*. (1993) at 361; Marc L Busch & Eric Reinhardt, ‘Testing International Trade Law: Empirical Studies of GATT/WTO Dispute Settlement’ (2004) in Daniel M Kennedy and James D Southwick, (eds), *The Political Economy of International Trade Law: Essays in Honour of Robert Hudec* (2002) 457 at 458.
- 16 As distinct from the ‘diplomatic track’ identified by Debra Steger as including arbitration, the arbitration track in this article would actually remove the option of what Steger refers to as the ‘judicial track’. See Steger, ‘Struggle for Legitimacy’, above n2 at 114. See also Claude Barfield, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization* (2001) at 113–114, who refers to a distinct arbitration track but not one that is imposed as mandatory.
- 17 The term used by the GATT Secretariat during the Uruguay Round to distinguish arbitration from the process of resolution through court-like litigation. See GATT, Negotiating Group on Dispute Settlement, *Concepts, Forms and Effects of Arbitration, Note by the Secretariat*, GATT Doc No MIN.GNG/NG13/W/20, 22 February 1988 at 3 [‘GATT, Concepts, Forms and Effects of Arbitration’].

I start by distinguishing the arbitration process from the predominant system of judicial settlement, focusing mostly on the absence of an appeal process. Next, I set out the theoretical considerations that support utilising less legalistic techniques for dispute resolution and that emphasise process over the quest for legally enforceable decisions that withstand the scrutiny of the appeal process that is so central to the judicial settlement system. Third, I consider the Uruguay Round negotiations to demonstrate that arbitration was conceived as a flexible and alternative dispute mechanism and that discussions to develop it simply ended prematurely due to certain time specific pressures that are no longer relevant. Consequently, the concept of arbitration formalised in the DSU is somewhat incoherent — article 25 provides an alternative to judicial settlement, while the other two forms of ‘arbitration’ constitute a mandatory part of the judicial settlement process. This incoherency may provide some explanation for the under-use of article 25 arbitration in the current system, which is considered in the next part.

I then consider the more regular use of two forms of mandatory ‘arbitration’ under the current DSU to demonstrate how a process from which there is no appeal has already been used in a political and diplomatic manner and yet is still accepted by the WTO members. Last, I attempt to briefly outline the case for reform of the dispute settlement that would integrate article 25 arbitration as a means of dealing with these types of dispute. This would mean some form of institutional diversion — a mechanism that would force politically difficult cases down an arbitration track, effectively removing the right of appeal. In effect, this conceptual approach is an attempt to challenge the current bias towards judicial settlement as a one-size-fits-all form of dispute resolution in all cases.

## I. Distinguishing WTO Arbitration from Judicial Settlement

The DSU itself distinguishes the predominant judicial settlement system from the secondary mechanisms of third party dispute settlement by the inclusion of ‘arbitration’ processes under articles 21.3, 22.6 and 25.<sup>18</sup> The main form of dispute resolution under the DSU is a form of ‘judicial process’<sup>19</sup> or ‘judicial settlement’<sup>20</sup> that is distinguishable from arbitration.

International arbitration between States can be distinguished from judicial settlement by several features, including:<sup>21</sup> the arbitral body is constituted to hear one particular case

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18 There are other forms of arbitrations provided for under other WTO agreements such as the *General Agreement on Trade in Services* (‘GATS’) and the *Agreement on Subsidies and Countervailing Measures*. See also Jan Bohanes & Hunter Nottage, ‘Arbitration as an Alternative to Litigation in the WTO: Observations in the light of the 2005 Banana Tariff Arbitrations’, in Y Taniguchi et al (eds), *The WTO in the Twenty-first Century Dispute Settlement, Negotiations and Regionalism in Asia* (2007) for a description of the success of the form of arbitration used in the ‘Banana Tariff Arbitrations’, albeit one that fell outside of the procedures of the DSU.

19 Joseph H H Weiler, ‘The Rule of Lawyers and the Ethos of Diplomats’ (2001) 35 *Journal of World Trade* 191 at 203. See also Eric A Posner & John C Yoo, ‘Judicial Independence in International Tribunals’ (2005) 93 *California Law Review* 1 at 10, 45, 73, referring to the ‘court-like’ adjudication system of the WTO and referring to WTO as one of several new international courts. Posner and Yoo also describe the panel system developed under the GATT system as a ‘formalized arbitration system’ at 44.

20 GATT, ‘*Concepts, Forms and Effects of Arbitration*’, above n17.

only; the decision-maker is chosen by or on behalf of the parties; the parties have control over the procedure to be followed in the arbitration;<sup>22</sup> and the arbitration award is final and not subject to appeal. In examining the question of the potential advantages of arbitration, I suggest that there are two main criteria of differentiation in the WTO dispute settlement context: firstly, the principle of finality, or expressed differently, the absence of an appeal avenue; and secondly, the element of party control over process and the decision-maker. These are arguably the two basic principles underlying arbitration.<sup>23</sup> For the purpose of this article, I will focus primarily on the finality of the decision while suggesting that party control can enhance the legitimacy of the decision by compensating for the absence of the scrutiny of judicial review.

It has been said that the creation of the Appellate Body and legal review of panel decisions is the ‘most definitive move in the direction of legalism’.<sup>24</sup> There are two main disadvantages of the right of appeal, and thus judicial settlement, in cases involving politically charged issues. First, they may serve to entrench the position of the parties<sup>25</sup> and foster inflexibility within domestic political factions, creating potential hurdles to a negotiated resolution. Some proposals for reform of WTO dispute settlement in fact seek to reduce access to panels and the Appellate Body in cases where the dispute involves ‘highly divisive political content’.<sup>26</sup> Second, the added stages of appeal and various aspects of compliance review also compound the problem of an extended delay before the provision of a definitive statement of the rights and obligations of the disputing parties,<sup>27</sup> and may serve only to prolong the dispute. Conversely, eliminating the right of appeal in politically difficult cases would put the parties back on a negotiating track with the benefit of an objective interpretation around which further discussions can develop.

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- 21 Ernst-Ulrich Petersmann & Meinhard Hilf, ‘Strengthening the GATT Dispute Settlement System: On the Use of Arbitration in GATT’ in Ernst-Ulrich Petersmann & Meinhard Hilf (eds), *The New GATT Round of Multilateral Trade Negotiations* (1988) 323 at 337. See also Posner & Yoo, above n19 at 9 and Bohanes & Nottage, ‘Arbitration as an Alternative’ above n18 at 214–215.
- 22 These features are interrelated and can be conflated into one – party control over procedure and the decision-maker.
- 23 Georgios I Zekos, ‘An Examination of GATT/WTO Arbitration Procedures’ (1999) 54 *Dispute Resolution Journal* 72.
- 24 Michael K Young, ‘Dispute Resolution in the Uruguay Round: Lawyers Triumph Over Diplomats’ (1995) 29 *International Lawyer (ABA)* 389 at 403.
- 25 Amelia Porges, ‘Settling WTO Disputes: What do Litigation Models Tell Us?’ (2003–2004) 19 *Ohio State Journal on Dispute Resolution* 141 at 182, where it is noted that the chances of any settlement during Appellate Body proceedings are unlikely. See also Joost Pauwelyn, ‘The Limits of Litigation: “Americanization” and Negotiation in the Settlement of WTO Disputes’ (2003–2004) 19 *Ohio State Journal on Dispute Resolution* 121 at 124–128, which discusses the general effects of legalisation; spurred’ by the creation of the Appellate Body, where countries ‘lock in’ their legal positions thus making settlement difficult to justify to domestic audiences.
- 26 See, for example Barfield, above n16 at 113; see also Thomas J Schoenbaum, ‘WTO Settlement: Praise and Suggestions for Reform’ (1998) 47 *International and Comparative Law Journal* 647 at 649–650.
- 27 Busch & Reinhardt, ‘Testing International Trade Law’ above n15 at 478; Porges, above n25 at 145, who recognises the practice of states to delay to protect obviously illegal measures by insisting on ‘the full extent of time-consuming procedural niceties’. See also Yuka Fukunaga, ‘Securing Compliance Through the WTO Dispute Settlement System: Implementation of DSB Recommendations’ (2006) 9 *Journal of International Economic Law* 383 at 385, with respect to implementation procedures.

This article therefore draws a distinction between a ruling resulting from the judicial settlement system intended to be followed to its letter, and an arbitration ruling, which, while still final, can be used to force the parties into a negotiated resolution but without the same systemic strain on the judicial settlement system. In the case of the arbitration track, the notion of negotiating implementation measures is more in keeping with Robert Hudec's political outlook of dispute settlement as a mechanism to 'lead governments to make concessions in the wake of' rulings.<sup>28</sup>

## 2. Theoretical Considerations

### A. The Balance between Power and Rules

The first theoretical consideration underlying my approach is the role of power and rules within the WTO dispute settlement system. The push towards further legalisation of the system has arisen from an aversion to the influence of economic power within the dispute settlement system. However, despite its increasingly legalistic procedures, the WTO dispute settlement system continues to have 'elements of a power-oriented system in which conflicts are mainly resolved by negotiations and consent'.<sup>29</sup> Arbitration is a form of dispute settlement that may fall somewhere between the extremes of John Jackson's power orientation and rule orientation.<sup>30</sup> It is an option that should be explored for specific disputes where the application of rules alone is unlikely to lead to resolution.

A useful starting point is the work of legal scholar Matthew Dunne in which he reassesses, and even modernises, the fundamentals of John Jackson's paradigm of power orientation vs. rule orientation. The result is a more nuanced view of the influence of power and the role of the institution than that of the realist tradition, through the concepts of 'contextualism' and 'flexible rule orientation'.<sup>31</sup> Dunne suggests that rules do not constrain the exercise of power but rather serve to legitimate some behaviour while illegitimizing other behaviours.<sup>32</sup> In the end, the more powerful nations are still able to resist the application of norms that run contrary to their own interests, but pressures from other mechanisms induce compliance in the majority of cases.

Dunne's contextualism helps to refine the notion of power within the WTO, suggesting that outcomes of disputes are determined by a number of factors: the nature of the issue; the behaviour of the parties in question; and the context within which a

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28 As characterized in Busch & Reinhardt, 'Testing International Trade Law', above n15 at 458; see generally, Hudec, 'Enforcing International Trade Law' above n15.

29 Meinhard Hilf, 'Power, Rules and Principles – Which Orientation for WTO/GATT Law?' (2001) 4 *Journal of International Economic Law* 111 at 115; see also Steger, 'Struggle for Legitimacy' above n2 at 123, who identifies other features such as the selection over panel and its procedures as remnants of the diplomatic model.

30 John H Jackson, 'The Crumbling Institutions of the Liberal Trade System' (1978) 12 *Journal of World Trade Law* 93 at 103.

31 Matthew S Dunne, 'Redefining Power Orientation: A Reassessment of Jackson's Paradigm in Light of Asymmetries of Power, Negotiation, and Compliance in the GATT/WTO Dispute Settlement System' (2002) 34 *Law and Policy in International Business* 277 at 310–332, 336–340.

32 Id at 329. In making this point, Dunne cites regime theorist Robert Keohane. See Robert O Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (1984).

dispute arises and is contested.<sup>33</sup> While it is likely that the State with more power will be successful in a given dispute, power cannot be defined in static terms but rather must be considered in the context of the particular issue in question. Dunne uses the example of the level of commitment as an independent variable of power.<sup>34</sup> While larger countries may have less time to devote to one of many concerns or interests, a smaller, less powerful country may be much more devoted to a favourable outcome on an issue that is its primary concern.<sup>35</sup> Therefore, power can, as international lawyers would hope, be derived from the rules-based system. In the case of the WTO, contextualism helps explain how countries other than the superpowers or developed nations can exercise a form of power in disputes.

Dunne's concept of contextualism suggests that outcomes in trade disputes will always be uncertain and unpredictable to a degree as the behaviour of the parties and the reaction of the international community can never be predicted with total accuracy.<sup>36</sup> He thus rejects any simplistic equation that suggests that economic power equals victory, but proposes a 'symbiotic co-existence between power orientation and rule orientation', thus rejecting the notion that the two are mutually exclusive.<sup>37</sup> Dunne further suggests that the shift toward rule orientation is neither absolute nor evolutionary. It is more akin to a pendulum that swings from one end to the next while never reaching either extreme.<sup>38</sup> This analogy challenges any assumption that the development of the WTO dispute settlement system is linear, which necessarily moves further towards rule orientation in order to enhance compliance.

Dunne's adaptation of Jackson's paradigm provides a helpful underlying framework in which to consider and conceptualise effective reform of the dispute settlement system. While Dunne's refinement of Jackson's paradigm would not support reversion to a political or power-based system, it helps conceptualise reform as the search for the ideal balance between rule orientation and power orientation, or in the case of dispute resolution in the WTO, the right balance between the diplomatic and legalistic means of dispute resolution. However, this does not necessarily suggest a one-size-fits-all form of dispute settlement mechanism for every case, irrespective of the context. Rather, Dunne encourages consideration of the benefits of different regimes and approaches.<sup>39</sup> I suggest that the right balance requires an alternative system of dispute settlement for the smaller number of disputes involving 'non-trade concerns' that are unlikely to result in implementation based on the application of rules only.<sup>40</sup>

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33 Id at 317–321.

34 Id at 317–319.

35 Ibid. Here, Dunne uses the example of Ecuador in the Bananas dispute with the EC. Ecuador would have been much more concerned about the banana industry, a staple of its economy, while the EC would have undoubtedly had numerous other trade matters of much higher concern.

36 Id at 332–335.

37 Id at 324–325.

38 Id at 332–335.

39 Id at 335.

40 Brendan P McGivern, 'Seeking Compliance with WTO Rulings: Theory, Practice and Alternatives' (2002) 36 *International Lawyer (ABA)* 141 at 156.

## B. The Focus on Process in Fostering Compliance

The second theoretical consideration is the importance of process or secondary rules to instil compliance, over the importance of obtaining an objectively correct interpretation of treaty obligations or primary rules. Obvious reference points are the works of Thomas Franck and of Abram and Antonia Chayes, both of which provide guidance to reform by emphasising the importance of process.<sup>41</sup> The main tenet of Franck's theory is that the presence of a sophisticated system of rules, in and of itself, creates a 'compliance pull' on parties belonging to that system.<sup>42</sup> Members develop a sense of obligation from the presence of fair process and a coherent sense of principles.<sup>43</sup> This line of thought rejects the notion that compliance is dependent solely on power. Indeed such a notion has proven to be inadequate in the context of the WTO. Arguably, the most serious issue of compliance is evident upon examination of the record of conflict between US and the European Union ('EU'), as opposed to their records with less powerful countries.<sup>44</sup>

Franck's explanation of State obedience to the rules is that States perceive the rules and institutions to have a high degree of legitimacy, where those rules or institutions are created and operated in accordance with principles to which parties have consented.<sup>45</sup> The success of the WTO can be explained by a compliance pull on participating States, fostered by a belief that the institution has been created and operated based on generally accepted rules of process.<sup>46</sup> This in turn has granted the DSB a level of legitimacy. The compliance pull varies widely and so legitimacy varies in degree.<sup>47</sup> One can conclude that the higher the perceived level of legitimacy, the greater the compliance pull.<sup>48</sup>

Franck's work is often compared to that of Abram and Antonia Chayes. A common feature of the two theories is that they each clearly identify the important role of fairness in explaining compliance in international law.<sup>49</sup> The Chayes propose a cooperative mode of compliance similar to that of Franck, but emphasise the role of discourse in their 'managerial model'. Like Franck, the Chayes challenge realism, contending that it is because of the pressures of treaty regimes that States comply and not because of the

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41 In applying the basic tenets of these theories, I am guided by the application of Franck's concepts to WTO dispute settlement in Steger 'Struggle for Legitimacy' above n2 at 117–120 and by the description and review of the Chayes's theory in Harold H Koh, 'Why do Nations Obey International Law' (1996–1997) 106 *Yale Law Journal* 2599 in the context of an excellent, comprehensive review of compliance theories in international law.

42 Thomas Franck, *The Power of Legitimacy Among Nations* (1990) at 16.

43 Id at 150–182. See also Americo Beviglia Zampetti, 'Democratic Legitimacy in the World Trade Organization: The Justice Dimension' (2003) 37 *Journal of World Trade* 105 at 107–108, explaining Franck's concept of coherency.

44 See, for example van den Broek, above n13 at 145–148; Marc L Busch & Eric Reinhardt, 'The Evolution of GATT/WTO Dispute Settlement' *Trade Policy Research 2003* (Ottawa: Minister of Public Works and Government Services, 2003) 143.

45 Franck, 'Power of Legitimacy' above n42 at 19; see also van den Broek, above n13 at 152.

46 Franck, 'Power of Legitimacy' above n42 at 19.

47 Id at 26.

48 See Steger, 'Struggle for Legitimacy' above n2 at 111 for a good discussion of legitimacy by reference to the concepts of Franck and others.

49 Marco Bronckers & Naboth van den Broek, 'Financial Compensation in the WTO: Improving the Remedies of WTO Dispute Settlement' (2005) 8 *Journal of International Economic Law* 101 at 111.



threat of coercive sanctions.<sup>50</sup> While the Chayes might agree with Franck that compliance is not elicited through the threat of sanction, they emphasise the ‘iterative process of discourse’, rather than Franck’s touchstones of legitimacy or fairness, as the main thrust for inducing compliance.<sup>51</sup>

In this regard, the Chayes are more favourably disposed to compulsory conciliation as a ‘middle ground’ that lies between diplomatic solutions and binding adjudication.<sup>52</sup> This softer form of dispute settlement can fulfil the role of facilitating this iterative process of discourse and the underused methods of persuasion or ‘jawboning’.<sup>53</sup> The iterative process of discourse takes place on several levels: amongst the parties, within the organisation, and before the public.<sup>54</sup> The institution’s role is to provide the forum for management of discourse but also to generate an authoritative interpretation of obligations that create pressure towards compliance.<sup>55</sup> The managerial approach of the Chayes, like Franck’s compliance pull, thus focuses on process. This process fosters an environment where any deviation from norms requires explanation and justification.<sup>56</sup> Discourse and the act of justification reinforce those norms and ultimately engender a bias towards compliance. Reputation thus plays a prominent role as a pressure that induces conformity with rules. Non-compliance is explained not necessarily as a failure of the system but can be attributed to other factors, such as a State’s lack of capacity to implement decisions even though they are considered to be binding.<sup>57</sup> The managerial approach can thus be used to conceptualise an important purpose of a ruling in a WTO dispute — to foster further discourse around the ruling that leads to a negotiated result, whether or not the ultimate resolution conforms to the letter of the ruling.

The managerial model of the Chayes, like the contextualist approach of Dunne, is thus helpful in drawing the parameters of an appropriate role for the DSB. These theories place an emphasis on process as a means of facilitating a discourse amongst States, as opposed to a system for obtaining an objectively correct interpretation of the primary treaty obligations. They also account for the importance of reputation in the process, an element that does not necessitate a fully legalised system of judicial settlement for every case, irrespective of its nature. While the judicial settlement system has proven effective in many cases, it has not worked in every case. The system should be adjusted for the minority of situations where judicial settlement has proven unsuitable.

One of the main objectives for the increased use of arbitration under the DSU as an alternative to judicial settlement would be to produce a ruling that advances a discourse and engages the scrutiny of the WTO member States, and builds pressure towards

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50 Abram & Antonia Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995) at 2–3, 29–33; Koh, above n41 at 2634–2635, 2641.

51 Koh, above n41 at 2601–2602.

52 Chayes & Chayes, above n50 at 24–25.

53 *Id* at 25.

54 *Ibid*.

55 Chayes & Chayes, above n50 at 118, 123; Koh, above n41 at 2637, 2638.

56 Chayes & Chayes, above n50 at 118–120, 124–127.

57 *Ibid*. Also van den Broek, above n13 at 148–151.

compliance. An arbitration ruling that provides an objective interpretation of obligations equally requires the unsuccessful party to contend with the damage to reputation that necessarily flows from non-compliance. While arbitration would replace the judicial settlement process that includes appellate review, the parties must still notify the DSB of the outcome, and any WTO member ‘may raise any point relating thereto’.<sup>58</sup> A protracted appeal system is not always necessary or even helpful to foster the institutional process of discourse, or to engage the scrutiny that reinforces the norms of the WTO and creates a greater pressure towards compliance. Furthermore, the elimination of an appeal in a few politically difficult cases would reinforce the notion of the negotiated resolution and potentially reduce the energy expended on legal manoeuvring.

### 3. The Development of the Arbitration Alternative in the Uruguay Round

I next review the negotiations during the Uruguay Round to consider historical support for the use of arbitration as an alternative within the rule-oriented GATT system. There are several points that can be drawn from this review. First, there has long been a widely shared belief in the utility of arbitration within the multilateral trade system. As a result, though there may be some truth to the allegation that the present day system lacks an ‘arbitration culture’,<sup>59</sup> the lack of the use of article 25 arbitration is more likely due to a historical inertia from the Uruguay Round rather than an overriding preference for litigation, and is therefore reversible. Second, the form of arbitration eventually incorporated by article 25 was deliberately cast in broad language and conceived as a potential replacement for the predominant judicial settlement model for specific disputes. As such, its broad language, identified as a possible reason for its limited use,<sup>60</sup> nevertheless represents an historical consensus to operate as an alternative within the current general framework of the DSU. Third, the circumstances surrounding the development of the DSU during the Uruguay Round were such that the concept of arbitration was not completely distinguished from judicial settlement. This has resulted in a conceptual incoherency in the DSU. These three points suggest that although arbitration as an alternative within the WTO system has suffered from the extreme ‘pendulum swing’ towards rule orientation in the Uruguay Round, it could be reintegrated with some deliberate reconsideration.

#### A. The Initial Discourse during the Uruguay Round

At the time of the commencement of the Uruguay Round, the GATT had a fairly good compliance record.<sup>61</sup> Nevertheless, with the growing sensitivity of disputes and the increasing problem of non-compliance with panel recommendations, the Contracting Parties included dispute settlement in the new round of negotiations. The Negotiating

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58 Article 25.3 of the DSU.

59 Bashar H Malkawi, ‘Arbitration and the World Trade Organization: The Forgotten Provisions of Article 25 of the Dispute Settlement Understanding’ (2007) 24 *Journal of International Arbitration* 173 at 185–188.

60 Id at 183–185.

Group on Dispute Settlement ('Negotiating Group') focused on the 'birth defects' of the original GATT dispute system,<sup>62</sup> which included the potential of an appeal process for review of panel decisions and the need for a new system for the adoption of rulings to address the problem of report-blocking. The tension between the political or diplomatic aspects of GATT on the one hand, and the legal aspects on the other, was apparent from the outset of the Uruguay Round. While members such as the US and Canada viewed the objective of the dispute system as establishing the correct and objective legal interpretation of treaty obligations, others such as the EC and Japan envisioned a system geared towards obtaining solutions to the specific disputes in question through settlement and confidential negotiations with less emphasis on the specific legality of the obligations.<sup>63</sup>

The possibility of arbitration as an alternative form of dispute settlement was presented early in the Uruguay Round. In mid-1987, the US submitted a proposal for the improvement of the dispute settlement system,<sup>64</sup> including binding arbitration as an alternative means of resolution that would co-exist with the panel system.<sup>65</sup> The US noted that arbitration was a 'widespread and common form of dispute settlement in international trade' and could be used in lieu of the normal panel process in certain classes of disputes, such as simple issues that were taking 'too long and becoming too political'.<sup>66</sup> The proposed arbitration system excluded any approval process, but would require the consent of both parties to the dispute. A failure to implement recommendations would automatically give the aggrieved party a right to compensation or retaliation.<sup>67</sup> The US proposal thus conceived of a two-tiered system providing more than one form of third party dispute resolution for different types of cases.

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61 See, for example John H Jackson, *The World Trading System: Law and Policy of International Economic Relations* (1989) at 98–99. By 1988, 233 complaints had been made and 73 reports completed, most of which were adopted and implemented by the losing parties.

62 John H Jackson, *The Uruguay Round, World Trading Organization and Problem of Regulating International Economic Behaviour* (1995) at 9.

63 Miquel Montana I Mora, 'GATT with Teeth: Law Wins over Politics in the Resolution of International Trade Disputes' (1993–1994) 31 *Columbia Journal of Transnational Law* 103 at 128–136; Young, above n24 at 389–390; John Croome, *Reshaping the World Trading System: A History of the Uruguay Round* (1999) at 125.

64 *Improved Dispute Settlement: Elements for Consideration. Discussion Paper Prepared by United States Delegation*, GATT Doc No MTN.GNG/NG13/W/6 (25 June 1987) ('*Improved Dispute Settlement*'). See also Valerie Hughes, 'Arbitration Within the WTO' in Federico Ortino & Ernst-Ulrich Petersmann (eds), *The WTO Dispute Settlement System 1995-2003* (2004) 75, who describes the initial Uruguay Round proposals of both the US and the EC, as well as the inclusion of arbitration as an alternative dispute resolution under the Havana Charter in contemplation of the creation of the ill-fated International Trade Organization in 1947.

65 That is not to suggest that the US sought to introduce a softer form of dispute resolution. Indeed, the quest for binding arbitration was to improve upon the perceived weakness in the GATT panel system.

66 *Improved Dispute Settlement*, above n64 at 2.

67 GATT, Negotiating Group on Dispute Settlement, *Summary and Comparative Analysis of Proposals for Negotiations, Note by the Secretariat*, Revision GATT Doc No MTN.GNG/NG13/W/14/Rev.1 (26 February 1988) at 30, para 81. But see Hughes, above n64 at 77, where she describes the US proposal as intending that a party would not be 'compelled' to implement, leaving compensation or retaliation as options. Strong disapproval of this outlook on compensation or retaliation was expressed in 'The Sutherland Report' below n148 at para 241.

In September of 1987, the EC submitted its own proposal, asserting its underlying philosophy that the primary goal of dispute resolution should be a negotiated settlement and that the legal aspects ought not become the 'key element'.<sup>68</sup> The proposal also favoured the institutionalisation of the arbitration process.<sup>69</sup> The proposal noted, however, that it would be difficult to define the categories of disputes in which arbitration should be prescribed in place of the panel process but suggested that arbitration should be limited to factual issues only and not applied to situations involving questions of interpretation that would establish legal precedent.<sup>70</sup>

Both the US and the EC proposals suggested that arbitration would be useful in only limited situations, where the issues were factual or relatively easy to settle.<sup>71</sup> The exchange of proposals by the US and the EC also demonstrated that the issues of adoption of panel reports and arbitration were linked. The US position seemed to assume that any panel system might retain some inefficiency and thus strongly advocated for a more efficient alternative system of binding arbitration. The connection between arbitration as an alternative process and the problems in the panel system was reinforced by a Swiss proposal made on 18 September 1987. It suggested an arbitration process in the event that the Council failed to adopt a panel report.<sup>72</sup>

The next stage of discussions revealed an intention to explore arbitration within an institutional context, but also uncertainty as to how arbitration was distinguishable from the panel system, and thus about its place within the GATT system. In early 1988, the Negotiating Group requested the Secretariat to prepare a background paper on the concepts, forms and effect of arbitration.<sup>73</sup> The report of the Secretariat did not entirely accept that arbitration was indeed properly available under the previous GATT system.<sup>74</sup> The report distinguished the two main branches of the GATT system; the legal means of dispute settlement and the diplomatic means,<sup>75</sup> with the latter characterised by flexibility of procedures, control over disputes and avoidance of binding decisions. While the draft identified arbitration as a form of legal means of dispute resolution, it distinguished it from judicial settlement by its flexible procedures.<sup>76</sup>

A variety of members noted the virtues of arbitration as an alternative form of dispute settlement. It was described as: 'an effective means of resolving disputes' and a 'useful tool in trade policy';<sup>77</sup> an 'instrument properly adjusted to GATT working parties could — in clearly defined cases — be available to parties in a dispute';<sup>78</sup> and a system

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68 *Communication from The EEC*, GATT Doc No MTN.GNG/NG13/W/12 (24 September 1987) at 2.

69 *Id* at 3. The EC noted, however, that a mandatory arbitration process did not require the approval of GATT Council and had always been available to the Contracting Parties.

70 *Id* at 3.

71 Hughes, above n64 at 78.

72 *Communication From Switzerland*, GATT Doc No MTN.GNG/NG13/W/8 (18 September 1987) at 3.

73 *GATT, Concepts, Forms and Effects of Arbitration, Note by the Secretariat*, GATT Doc No MTN.GNG/NG13/W/20 (22 February 1988).

74 *Id* at para 21.

75 *Id* at 3.

76 *Ibid*.

77 *Communication From Canada*, GATT Doc No MTN.GNG/NG13/W/13 (24 September 1987) at 10.

78 *Communication From The Nordic Countries*, GATT Doc No MTN.GNG/NG13/W/10 (18 September 1987) at 2.

that ‘might facilitate resolution of certain disputes basically of a factual nature’.<sup>79</sup> One member of the Negotiating Group seemed to have captured the idea that the dispute settlement system should not seek to impose a ‘one-size-fits-all’ approach to disputes:

Experience shows that disputes brought before the GATT are multifarious and often comprise trade problems that have not been fully addressed in the past [and] for which no precedents exist. The dispute settlement system in GATT should therefore be designed so as to respond adequately to the different nature of dispute cases. This suggests that the parties to a dispute should have the choice between a number of alternative and/or complementary techniques and mechanisms.<sup>80</sup>

This general sentiment envisioned a much broader conception of the utility of arbitration than that found in the initial proposals of the US and the EC. The eventual wording of article 25 of the DSU reflected this broad approach. The option for arbitration found its place in the Negotiating Group’s draft of 9 December 1988, completed shortly after the mid-term review meeting in Montreal in December of 1988.<sup>81</sup> The three articles on arbitration in the draft confirmed the utility of ‘expeditious arbitration’ as an alternative means of dispute settlement for issues that were ‘clearly defined’.<sup>82</sup> The broad wording of the draft allowed for the determination of any issue, including an issue of law, and thus marked significant progress for the integration of arbitration into the formal dispute settlement system.

### **B. The Impact of US Unilateralism on Uruguay Round Negotiations**

Unfortunately, the dynamics of the Uruguay Round made it difficult for the Contracting Parties to focus much attention on developing the proposals for arbitration after December of 1988. Since the draft presented at Montreal had left much unanswered about the panel system, the next stage of negotiations became much more focused on judicial settlement to the apparent detriment of the development of the arbitration alternative. The draft reflected a preference to retain the GATT consensus requirement, including the ability to block adoption of reports and retaliation measures.<sup>83</sup> The US disaffection with the maintenance of ‘report-blocking’ was a factor in propelling the development of its infamous domestic 301 laws that further enabled unilateral action by the US government against any perceived distortive trade practices.<sup>84</sup>

79 *Communication From Korea*, GATT Doc No MTN.GNG/NG13/W/19 (20 November 1987) at 3.

80 *Communication From The Nordic Countries*, above n78 at 1.

81 The draft was put on hold until the meeting in April 1989, although the text in the arbitration provisions that resulted from the Ministerial meeting was the same. GATT, Trade Negotiations Committee, *Meeting at Ministerial Level*, GATT Doc No MTN.TNC/7(MIN) (9 December 1988).

82 Id at 28, para E1.

83 Id at 32, para G3.

84 For a description of the legislation and its impact on the Uruguay Round, see Terence P Stewart (ed), *The GATT Uruguay Round: A Negotiating History (1986-1992) (Volume II: A Commentary)* (1993) at 2760–2763; Hudec, ‘Enforcing International Trade Law’ above n15 at 226–231; Robert Hudec, ‘Broadening the Scope of Remedies Under the WTO’ in Freidl Weiss (ed), *Improving WTO Dispute Settlement Procedures: Issues and Lessons from the Practice of Other International Courts & Tribunals* (2000) 369 at 373–377.

The stage was set for a push for a full-blown litigation system. While the 301 laws unquestionably represented a form of unilateralism that undermined the principles of the GATT system, the US justified the measures on the basis that the practice of blocking GATT reports was itself a form of unilateralism.<sup>85</sup> The US suggested that it would not be required to resort to its 301 laws as long as the GATT system dealt more effectively with disputes.<sup>86</sup> At this point, the danger of US unilateralism was taken more seriously by the Contracting Parties<sup>87</sup> as the prohibition of unilateral action became a priority for the negotiations<sup>88</sup> in the shadow of the overriding threat to the GATT system.<sup>89</sup> It was this tension that propelled the drive for a litigation system with an appeal mechanism that appears to have eventually overshadowed further development of the arbitration option.

### **C. The Drift Away from Arbitration Towards Adoption and Appellate Review**

The next stage of negotiations demonstrated the link between the Negotiating Group's consideration of arbitration and the introduction of the concept of an appeal mechanism.<sup>90</sup> The option for arbitration was addressed in the Negotiating Group's Improvements Decision of 12 April 1989 ('Improvements of 1989'),<sup>91</sup> the first attempt at regulating the option to resort to binding arbitration within GATT.<sup>92</sup> However, the attention of the Negotiating Group would soon focus more intently on developing an appeal mechanism.

The notion of a broad-based use of arbitration was apparent in the text. The use of arbitration was not restricted to factual disputes but could indeed be used for the interpretation of legal principles. The Improvements of 1989 essentially reproduced the three paragraphs on arbitration in the draft approved in Montreal: the first paragraph set out arbitration as an alternative process for any issues that were 'clearly defined'; the second confirmed that arbitration, and the procedure to be followed, were subject to the mutual agreement of the disputing parties; and the third provided that the disputing parties alone could agree to be bound by the award, and that third parties were permitted to participate, but only with the consent of the parties. Thus, while it has been suggested that the broad wording of article 25 of the DSU represents a 'textual limitation' that has restricted its use,<sup>93</sup> rather, it marked a deliberate attempt to preserve a broad use of arbitration within the new system.

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85 Croome, above n63 at 228.

86 Id at 225; Stewart, above n84 at 2762; Hudec, 'Enforcing International Trade Law' above n15 at 230–231.

87 GATT, Negotiating Group on Dispute Settlement, *Minutes of Meeting* (held on 22 September 1988) GATT Doc No C/M/224, (17 October 1988) at 28–34. See also Croome, above n63 at 225.

88 Croome, above n63 at 225; Hudec, 'Enforcing International Trade Law' above n15 at 234.

89 Hudec, 'Broadening the Scope' above n84 at 373–377; Hudec, 'Enforcing International Trade Law' above n15 at 228.

90 Stewart, above n84 at 2773.

91 GATT, Negotiating Group on Dispute Settlement, *Improvements to the GATT Dispute Settlement Rules and Procedures* (Decision of 12 April 1989) GATT Doc No L/6489.

92 Mora, above n63 at 139.

93 Malkawi, above n59 at 183–185.

Despite this progress, discussions for advancing development of the arbitration system were effectively ended fairly early in the Uruguay Round. The text that became article 25 therefore remained largely unchanged from the Improvements of 1989. The stalled development of the arbitration option was apparent in the latter part of 1989, following a Swiss proposal that sought to strengthen the arbitration provisions.<sup>94</sup> The Swiss proposal alerted the Negotiating Group that the Improvements of 1989 only had the bare bones of an arbitration system, and that the system needed to be ‘moulded to the multilateral content of the GATT dispute settlement’.<sup>95</sup> The reaction of the Negotiating Group to the Swiss proposal confirmed that arbitration was no longer a focus of negotiations.<sup>96</sup> Meanwhile, the arbitration alternative was put to little use.<sup>97</sup>

The shift in focus of the Negotiating Group was apparent in its meeting in April of 1990.<sup>98</sup> The content of the EC proposal highlighted a key issue — a commitment against unilateral measures by the US,<sup>99</sup> which was supported by many of the delegates.<sup>100</sup> It was thus clear that the focus was now on the creation of the judicial settlement system in exchange for a commitment from the US not to resort to its 301 laws. As one delegation suggested, it was apparent that the creation of an appellate review producing binding decisions could affect the choice of arbitration as an alternative in the first instance.<sup>101</sup>

## 4. Arbitration in the Current DSU

### A. The Present System

The Uruguay Round ultimately succeeded in creating a new dispute settlement process, with ‘automatic’ adoption of rulings<sup>102</sup> and a full legal appeal mechanism.<sup>103</sup> Despite the presence of the judicial settlement system as the primary method of dispute settlement, three separate procedures that are referred to as ‘arbitration’ survived into the DSU.<sup>104</sup> In particular, the arbitration conceived in the Improvements of 1989 survived as the flexible and self-contained alternative dispute mechanism found in article 25. While

94 *Communication From Switzerland*, GATT Doc No MTN.GNG/NG13/W/33 (19 July 1989).

95 GATT, Negotiating Group on Dispute Settlement, *Minutes of Meeting* (held on 28 September 1989): GATT Doc No MTN.GNG/NG13/16 (13 November 1989) at 7.

96 *Ibid.*

97 Hughes, above n64 at 79.

98 *Statement by the Spokesman of the European Community at the Meeting on 5-6 April*, GATT Doc No MTN.GNG/NG13/W/39 (5 April 1990); *Communication From the U.S.*, GATT Doc No MTN.GNG/NG13/W/40 (6 April 1990).

99 *Id.* at 1.

100 GATT, Negotiating Group on Dispute Settlement, *Minutes of Meeting* (held on 5 April 1990): *Note by the Secretariat*, GATT Doc No MTN.GNG/NG13/19 (28 May 1990) at 3.

101 *Id.* at 5.

102 Sometimes referred to as the ‘reverse consensus principle’, as rulings are adopted absent unanimous agreement not to adopt the ruling. Article 16.4 of the DSU incorporates this principle in respect to panel decisions and article 17.14 of the DSU applies it to Appellate Body decisions.

103 Articles 17.6 & 17.13 of the DSU. The Appellate Body can effectively overturn panel decisions on issues of law. The introduction of the appeal mechanism has been said to be the *quid pro quo* for the automatic adoption of rulings. See Steger, ‘Struggle for Legitimacy’ above n2 at 121–122.

104 There are other forms of arbitrations provided for under other WTO agreements. Above n18.

article 25 provides the only form of arbitration in the DSU that acts as an alternative to the judicial settlement process before panels and the Appellate Body, it has so far only been used in one case.<sup>105</sup> Nevertheless, the mere survival of this broad conception of arbitration suggests that the member States still saw the utility of having arbitration available as a true alternative dispute settlement mechanism in certain cases,<sup>106</sup> despite the more pressing need for a judicial settlement system during the Uruguay Round.

However, the different procedures described as ‘arbitration’ in the DSU also demonstrate an overall incoherency in the concept of arbitration. The other two forms of arbitration in the DSU introduced after the Improvements of 1989<sup>107</sup> developed into extensions of the judicial settlement system that can be activated unilaterally by one party. Article 21.3 of the DSU provides for arbitration to determine the ‘reasonable’ period of time to comply with a panel or Appellate Body ruling failing other methods (‘timeframe arbitration’). Article 22.6 of the DSU provides for an arbitration regarding the level of concessions that can be suspended by an aggrieved State should the offending State fail to comply or provide compensation (‘concessions arbitration’). Given that these forms of arbitration arise only after a dispute has been adjudicated, and where the remaining matter is compliance, they are not truly distinct from the judicial settlement system. They have been aptly characterised as ‘*sui generis*’ forms of arbitration<sup>108</sup> since they are unique adaptations of the concept of arbitration. They are effectively mandatory forms of dispute settlement that merely pick up where the panel dispute settlement system ends and do not provide an alternative process for dispute settlement.<sup>109</sup>

The use of these mandatory forms of arbitration may nevertheless demonstrate the potential for article 25 arbitration. In both cases, a process that at least resembles an arbitration process, and for which there is no appeal, has already been used to resolve political issues. As such, arbitration within the DSU has not been restricted to simple factual disputes only, thus overcoming the initial hesitance of certain Contracting Parties during the Uruguay Round.

## B. Timeframe Arbitration

Timeframe arbitration arises from the requirement for prompt compliance with DSB recommendations and rulings.<sup>110</sup> Once a panel or Appellate Body decision is adopted by the DSB, the offending State is required to report to the DSB as to its intentions to comply at a meeting within 30 days after the adoption of the report.<sup>111</sup> The offending

105 *United States – Section 110(5) of the US Copyright Act – Recourse to the Arbitration under Article 25 of the DSU*, WT/DS160/ARB25/1, 9 November 2001 [‘*US Copyright*’].

106 See Mora, above n63 at 140.

107 See, for example *Communication From Canada*, GATT Doc No MTN.GNG/NG13/W/41 (28 June 1990) at 6–7.

108 Laurence Boisson de Chazournes, ‘L’Arbitrage A L’OMC’ (2003) *Revue de l’arbitrage* 949 at 953. Note the distinction of the application of the term ‘*sui generis*’ that is used to describe arbitration under ss 21.3 and 22.6 of the DSU with its use in Bohanes & Nottage, above n18, where it is used to describe arbitration outside of the DSU framework.

109 Bohanes & Nottage, above n18 at 217–218.

110 Article 21.1 of the DSU.

111 Article 21.3 of the DSU.



State will often claim that immediate compliance is not possible and will ask for a 'reasonable' period to implement the necessary change, as provided for in article 21.1. The possible changes are often divided into three categories: administrative, regulatory and legislative.<sup>112</sup>

Barring approval of the DSB or the agreement of the parties, the reasonable period of time for implementation is determined through binding arbitration to take place within 90 days of the adoption of the report.<sup>113</sup> Timeframe arbitration often centres on what 'particular circumstances' would justify extending the period for compliance. Where implementation involves legislative or regulatory change,<sup>114</sup> the arbitrator reviews the practicalities of the law-making process. Indeed, while the member has a certain discretion in choosing the means of implementation, the means selected must be within a range of permissible actions and is thus necessarily a factor considered by the arbitrator in assessing the reasonable period to comply.<sup>115</sup>

This is where the scope of the arbitrator's role involves scrutinising the State's legislative or regulatory process. While arbitrators are reluctant to accept all legislative restraints as factors,<sup>116</sup> an arbitrator must necessarily consider the nature of the changes and the legislative process to some degree. The complexity of the legislation to be changed can be a factor, even though the contentiousness of legislation is not.<sup>117</sup> As such, an arbitrator may need to decide whether the legislative challenges arise from the complexity of the legislation or the contentiousness.<sup>118</sup> Whether or not the parliamentary schedule of a particular State will be relevant will depend on the circumstances.<sup>119</sup>

Further, arbitrators may need to determine the necessity of other avenues such as a State's 'recourse to ... external processes' that are generally 'outside its domestic legal order', or practices that are standard, though not mandatory, forms of consultation.<sup>120</sup> Such assessments have become subtler in light of the evolving legal status of bodies such as the EU. The arbitrator also must take into account the special circumstances of developing countries.<sup>121</sup> In effect, the process of choosing the practical legislative

112 See, for example Hughes, above n64 at 84.

113 Article 21.3 of the DSU.

114 In light of the evolving legal status of bodies such as the EU, the arbitrators may, in fact, need to determine whether or not the proposed form of implementation is, in fact, legislative or administrative. See *European Communities – Customs Classification Of Frozen Boneless Chicken Cuts, Award of the Arbitrator under Article 21.3(c) of the DSU*, WT/DS269/13, WT/DS286/15, ARB-2005-4/21, 20 February 2006 at paras 66–67 [*EC – Frozen Boneless Chicken*].

115 *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea – Award of the Arbitrator under Article 21.3(c) of the DSU*, WT/DS336/16, 5 May 2008, paras 26–27.

116 *Canada – Term of Patent Protection, Award of the Arbitrator under Article 21.3(c) of the DSU*, WT/DS170/10, 28 February 2001 at paras 52–60 [*Canada – Term of Patent Protection*].

117 *United States – Measures Affecting The Cross-Border Supply Of Gambling and Betting Services Award of the Arbitrator Under Article 21.3(C) of DSU*, WT/DS285/13, 19 August 2005 Arb-2005-2/19, (*US Gambling*) at paras 44–48; *Canada – Term of Patent Protection*, above n116 at para 58.

118 See, for example *US Gambling*, above n117 at para 48.

119 *US Gambling*, above n117 at para 52 and *Canada Patent Term*, above n116 at paras 65–66.

120 *EC – Frozen Boneless Chicken*, above n114 at paras 52–56, 79.

121 Article 21.2 of the DSU. See also WTO, *Minutes Of Meeting Special Session of the Dispute Settlement Body* (held on 13 July 2006), WTO Doc TN/DS/M/34 at para 10.

restraints or consultative practices that are relevant for the purpose of establishing the reasonable period of time for implementation is itself a form of political choice.

Therefore, while timeframe arbitration addresses an issue that is very narrow, it goes beyond the purely factual types of issues contemplated by certain proposals in the Uruguay Round. On the contrary, while there is reluctance to make outright recommendations on the method of implementation,<sup>122</sup> it engages an assessment of the political process. Despite the apparent exclusion of ‘political factors’ as a consideration,<sup>123</sup> timeframe arbitration involves value decisions as to the feasibility and, to a limited degree, the necessity of policy changes within the offending party’s domestic system, as well as the necessity of certain forms of political consultation within that process. The arbitrator thus arguably plays a limited quasi-supervisory role over the legislative and political processes of the offending State.

Arbitration under article 21.3 establishes a precedent for a form of political decision-making through arbitration even though the decision is not subject to appeal. In most cases of timeframe arbitration, the result has been either implementation or an agreement between the parties as to the ultimate resolution.<sup>124</sup> Article 21.3 arbitration has been used to bolster the efforts for prompt implementation and to ‘[facilitate] interactions between the parties’ rather than creating overly rigid prescriptions.<sup>125</sup> The DSB acknowledges that the timeframe order by the arbitrator can be modified upon the agreement of the disputing parties,<sup>126</sup> thus emphasising the function of facilitating an iterative discourse towards resolution. Given that article 21.3 arbitration has been adopted and used frequently with little controversy,<sup>127</sup> it is possible to envision a system in which politically difficult cases that are unlikely to be resolved by the ruling of a panel or by the Appellate Body might be systematically diverted out of the litigation track to an arbitration track.

### C. Concessions Arbitration

Just as the experience of article 21.3 arbitration has seen political considerations forced into the ambit of arbitrators, decision-making pursuant to arbitration under article 22.6 has demonstrated how diplomatic decisions are already being made within the judicial settlement system. Once the reasonable period for implementation has been established, the offending State has a timeframe for making the necessary administrative, regulatory or legislative changes in order to bring its offending measures into conformity with its obligations under the WTO agreements. Where that has not happened within the timeframe prescribed by the article 21.3 award, the aggrieved State can seek mutually acceptable compensation. If the parties do not agree to a form of compensation within 20 days of the expiry of the reasonable period, the aggrieved State can seek DSB

122 See, for example Hughes, above n64 at 83.

123 *Canada – Term of Patent Protection*, above n116 at para 60.

124 Fukunaga, above n27 at 401.

125 See Fukunaga, above n27 at 403, in reference to article 21.3 arbitration.

126 *Ibid.*

127 See Hughes, above n64 at 86, though she cautions that the frequent use of s 21.3 arbitration is not necessarily indicative of confidence in the system.

approval for a suspension of concessions.<sup>128</sup> The concessions subject to suspension are those benefits that the offending State otherwise enjoys pursuant to the underlying WTO agreements.

Article 22.3 of the DSU sets out the principles for prioritising the different forms of retaliation. Article 22.4 of the DSU establishes that the proper measure of retaliation is that of equivalence to the level of nullification or impairment, a concept that is different from proportionality.<sup>129</sup> The measure for retaliation is not easily quantifiable<sup>130</sup> and must be calculated by reference to a notional effect on the damaged market. Arbitration under article 22.6 is therefore more complicated than a mere number-crunching exercise. Like the process under article 21.3, the parties are required to accept the decision as final and cannot seek a second arbitration.<sup>131</sup>

Article 22.6 has created a second precedent for arbitral rulings in the WTO that are immune from appeal, even though the arbitration may not have all the advantages attendant on arbitrations in the traditional sense. Yet article 22.6 arbitrations have not necessarily adopted the pure legal analysis suggested by the formal principles that have purportedly developed in respect of article 22.6. It has been suggested that this form of arbitration has often failed at determining a reasonable measure of equivalence or striking any form of rebalance after the trade-distorting effects of the breach, but has rather drifted towards diplomatic considerations.<sup>132</sup> One study has noted that the arbitrariness of authorisations for suspension of concessions have typically sought a middle ground between the parties' positions, thus representing diplomatic solutions rather than well-reasoned calculations based on the standards of the DSU.<sup>133</sup> I do not view this as a negative aspect of this form of arbitration. Robert Hudec has suggested that where an award has the effect of providing a reasonably objective ruling, it may well 'persuade the relevant audiences in both countries that a neutral tribunal had made an objective judgment of equivalence', therefore doing all that was 'politically necessary'.<sup>134</sup> While he was referring to the benefits of article 22.6 arbitration in a particular case, Hudec's observation can be applied more generally to the potential use of arbitration to establish a single ruling on the merits of the dispute itself that cannot be appealed.

#### **D. Issue Arbitration**

Issue arbitration under article 25, which essentially followed the framework of the arbitration text in the Improvements of 1989, more closely resembles arbitration in the traditional sense. It can be used to resolve any issue and, unlike arbitration under articles

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128 Article 22.2 of the DSU.

129 Fukunaga, above n27 at 420–421.

130 *Id* at 423.

131 Article 22.7 of the DSU. It has been suggested that the WTO might consider making arbitration awards subject to review by the Appellate Body. See, for example Steger, 'Systemic Issues' above n6 at 73.

132 Holger Spamann, 'The Myth of "Rebalancing" Retaliation in WTO Dispute Settlement Practice' (2006) 9 *Journal of International Economic Law* 31, in particular 75–76.

133 *Id* at 75–76. See also Busch & Reinhardt, 'Testing International Trade Law', above n15 at 476; Hudec, 'Broadening the Scope', above n84 at 391 for a similar conclusion with respect to retaliation decisions under the GATT system.

134 Hudec, 'Broadening the Scope', above n84 at 391.

21.3 or 22.6, does not require a previous decision from a panel or the Appellate Body. The arbitrator arguably exercises greater independence as the award does not require any formal adoption or approval by the DSB.<sup>135</sup> Indeed its ‘textual limitations’<sup>136</sup> and flexibility have left it open to criticism from advocates of WTO legalism about the contribution arbitration can make to the overall development of a consistent and cogent body of law.<sup>137</sup> On the other hand, it has also been recognised as the ‘most diplomatic procedure amongst the WTO adjudicative bodies’.<sup>138</sup>

While this is the only form of arbitration under the DSU that provides a true alternative to the litigation processes before the panels and the Appellate Body, it has so far only been used in one case: *United States — Section 110(5) of the US Copyright Act*<sup>139</sup> (*US Copyright Act*). This case involved an EC complaint that the *US Copyright Act* failed to protect the exclusive copyrights of EC right holders of music, thus causing a loss of royalties. Ultimately, the Appellate Body found that section 110(5) of the *US Copyright Act* breached article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (‘TRIPS’). Arbitration was used to calculate the level of EC benefits that had been nullified or impaired. The particular issue was whether or not it was reasonable for the EC to calculate its losses for all potentially realisable income and thus involved a very factual issue. It nevertheless demonstrates the potential of the arbitration process, since it had the effect of providing guidance to the parties for an agreement as to compensation.<sup>140</sup> The manner in which the arbitration facilitated negotiation on the issue has been described as ‘an interesting and constructive precedent’.<sup>141</sup>

Despite the potential opened up by this experiment, it has not been followed as a precedent. The parties in the *US Copyright* case used the article 25 procedure for resolving the level of nullification and impairment and thus did not stray far from the parameters of subject matter of concessions arbitration.<sup>142</sup> This is perhaps a result of the incoherency of the concept of arbitration within the DSU, despite the initial attempt of the Negotiating Group in the Uruguay Round to distinguish the concept of arbitration from judicial settlement. This incoherency may have obscured the true potential of article 25 arbitration as a possible alternative in specific disputes. It may be difficult to consider it as a true alternative when it is not carefully defined conceptually<sup>143</sup> or if it is not clearly distinguished from the judicial settlement system of disputes, at least in

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135 Article 25(3) of DSU only provides that notification of awards must be given to the DSB.

136 Malkawi, above n59 at 183–185.

137 Young, above n24 at footnote 57.

138 Pierre Monnier, ‘Working Procedures Before Panels, the Appellate Body and Other Adjudicating Bodies of the WTO’ (2002) 1 *Law and Practice of International Courts and Tribunals* 481 at 512.

139 *US Copyright*, above n105.

140 Fukunaga, above n27 at 412, 414; and see *WTO, United States — Section 110(5) Of The US Copyright Act, Status Report By The United States*, WT/DS160/24/Add.34 (11 October 2007).

141 McGivern, above n40 at 157; see also Bronckers & van den Broek, above n49, at 115, 119.

142 See Hughes, above n64 at 81; Pierre Monnier, ‘Time to Comply with WTO Rulings’ (2001) 35 *Journal of World Trade* 825 at 842.

143 Aside from the use of the term ‘arbitration’ in both mandatory and alternative processes in the DSU, the difficulties in ‘articulating the features’ of arbitration in the multilateral trade context have been noted. See, for example Mora, above n63 at 139.

practice.<sup>144</sup> Still, as has been noted, the recent success of the use of a form of arbitration under the auspices of the WTO in the ‘Bananas Tariff Arbitrations’, while outside the normal framework of the DSU, at least provides some hope for the future use of arbitration as an alternative to litigation.<sup>145</sup>

## 5. Direction of Reform

The possibility of using article 25 arbitration as a middle ground between the diplomatic and legalistic means of resolving disputes is premised on the simple notion that judicial settlement will be incapable of inducing compliance in every case and would thus merely prolong certain disputes. The compliance theories discussed earlier in this article suggest that the utility of objective decisions is primarily a pressure towards what some have termed ‘normative condemnation’,<sup>146</sup> and mutual resolution rather than to obtain enforceable judgments. This is a major difference between compliance in international law and compliance in domestic law. As a ‘court without a bailiff’, the DSB is unable to truly oversee the actual enforcement of monetary judgments or retaliation.<sup>147</sup>

While the DSU has incorporated forms of arbitration in its text, it has undoubtedly established a predominantly judicial framework for the resolution of disputes. Despite some limitations in resolving disputes, particularly those involving the US and the EU, the overall high level of compliance under the DSU regime has encouraged the notion of increasing the power of panels and the Appellate Body. The logic is simple — increasing the power of the decision-maker will engender even better compliance with its decisions. Using a similar logic, reform usually focuses on improving procedural aspects or remedies,<sup>148</sup> emphasising the effective use of retaliation or compensation as the main tools against non-compliance over the ‘ultimate remedy’ — the ‘force of community pressure’.<sup>149</sup>

Unfortunately, the current debate regarding reform of WTO dispute settlement has too often focused on procedural ‘improvements’ and broader enforcement mechanisms

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144 See Monnier, ‘Working Procedures’, above n138 at 512–514, which outlines that the procedures adopted in the US Copyright arbitration were very similar to those used in panels and concessions arbitration. See also Hughes, above n64 at 81.

145 Bohanes & Nottage, above n18, which suggests a more limited application than that proposed in this article.

146 See, for example Busch & Reinhardt, ‘The Evolution of GATT/WTO’ above n44 at 147.

147 See, for example Judith Hippler Bello, ‘The WTO Dispute Settlement Understanding: Less is More’ (1996) 90 *American Journal of International Law* 416, in which it is suggested that WTO rulings are not binding in the ‘traditional’ sense since there are no traditional enforcement powers such as a police force or injunctive relief, though this is further explained in (2001) 95 *American Journal of International Law* 984 at 986–987. See also John H Jackson, ‘International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to Buy Out’ (2004) 98 *American Journal of International Law* 109 at 123 [‘International Law Status’]. As Jackson concedes, the remedies of compensation and suspension are in some ways ‘deeply flawed’ and ‘dysfunctional’.

148 See, for example Steger, ‘Systemic Issues’ above n6. See also Peter Sutherland, et al, ‘The Future of the WTO: Addressing Institutional Challenges in the New Millennium’, *Report by the Consultative Board to the Former Director-General Supachai Panitchpakdi* (2004), Chapter VI <[http://www.wto.org/english/thewto\\_e/10anniv\\_e/future\\_wto\\_e.htm](http://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.htm)> accessed 20 January 2009, [‘The Sutherland Report’].

149 Robert Hudec, ‘Broadening the Scope’, above n84 at 399–400.

that are directed at creating more rules for governing litigation and remedies<sup>150</sup> and making the dispute settlement system more ‘judicial-like’.<sup>151</sup> Yet there is an inherent contradiction in that in a legalised judicial settlement system that relies on remedies such as retaliation for enforcement, economic power continues to act as an overriding factor.<sup>152</sup> Consequently, the pendulum can swing only so far towards rule orientation.

It has been suggested that one of the traditional motivating factors for arbitration, the enforcement of the ruling, does not apply to the WTO dispute settlement system given the presence of enforcement mechanisms within the DSU.<sup>153</sup> Conversely, I would suggest that it is the ineffectiveness of these enforcement mechanisms in specific types of WTO cases that makes article 25 arbitration a logical option, albeit for reasons other than enforceability. The remedies of compensation and retaliation found in article 3.7 have been criticised as ‘deeply flawed’ and ‘dysfunctional’.<sup>154</sup> Compensation has proved to have limited practical effect in the WTO context.<sup>155</sup> Similarly retaliation is unproven<sup>156</sup> and has been criticised as bad policy<sup>157</sup> as it requires member States to effectively punish their own citizens.<sup>158</sup> Indeed, it has been suggested that the overall objective of retaliation in the WTO is unclear.<sup>159</sup> Enforcement measures are unlikely to improve a situation where they have no effect on politicians<sup>160</sup> or where the responding party has failed to implement a recommendation for political reasons.<sup>161</sup> The weaknesses in the system of remedies suggest that the coercive force of reputation is stronger than that of retaliation,<sup>162</sup> and might therefore be a better focal point for inducing the ‘preferred course of action’<sup>163</sup> and bringing about implementation of change in politically difficult cases.

This is the disadvantage of judicial settlement in the WTO. Rather than just a binding decision, judicial settlement produces a decision that is a purportedly objective statement of obligations that is legally unimpeachable, and is to be enforced through remedies. It

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150 See, for example The Sutherland Report, above n148; Reto Malacrida, ‘Towards Sounder and Fairer WTO Retaliation: Suggestions for Possible Additional Procedural Rules Governing Members’ Preparation and Adoption of Retaliatory Measures’ (2008) 42 *Journal of World Trade* 3.

151 Davey, ‘Looking Forwards’ above n8 at 19.

152 van den Broek, above n13 at 161.

153 Bohanes & Nottage, above n18 at 227.

154 Jackson, ‘International Law Status’ above n147 at 123.

155 Fukunaga, above n27 at 412.

156 Steger, ‘Systemic Issues’, above n6 at 71, where it is suggested that even economic modelling has proven to be far too speculative in establishing the effectiveness of retaliation.

157 McGivern, above n40 at 152–153.

158 Mitsuo Matsushita, Thomas J Schoenbaum & Petros C Mavroidis, *The World Trade Organization: Law, Practice, and Policy*. (2003) at 92–93; McGivern, above n40 at 153.

159 Spamann, above n132 at 60.

160 Jidi Nzilibe, ‘Credibility Imperative – Political Dynamics of Retaliation’ (2005) 6 *Theoretical Inquiries in Law* 215 at 229.

161 Cho, above n13 at 787–788; see also Benjamin L Brimeyer, ‘Bananas, Beef and Compliance in the World Trade Organization: The Inability of the WTO Dispute Settlement Process to Achieve Compliance from the Superpower Nations’ (2001) 10 *Minnesota Journal of Global Trade* 133 at 162 for discussion on the role of politics in WTO compliance.

162 Spamann, above n132 at 78.

163 Zampetti, above n43 at 123.

leaves little room for any further bargaining or discussion. This can be counterproductive in a dispute that is politically charged by further entrenching the negotiating positions of the disputing parties, particularly where enforcement mechanisms will not motivate a change in policy. Diversion from the full-blown judicial settlement system may be the logical option in such cases.

## 6. Integration of Article 25 Arbitration through Dispute Diversion

Given the current bias towards the judicial settlement system and the under-use of article 25 arbitration, the integration of arbitration would require a deliberate process to identify the policy-charged cases in which compliance problems are more likely to arise. Once identified, these difficult cases could be automatically diverted to the arbitration track. This would, of course, require eliminating the condition of the mutual agreement of both parties in article 25.2 in these specific instances. The arbitration track would exploit the main advantages of arbitration within the WTO — the finality of the decision and the control over procedure and decision-maker. I next consider some of the potential benefits of a form of institutional diversion to increase the use of article 25 arbitration, as well as a few of the more obvious challenges.

### A. The Benefits of Diversion

#### (i) *Fostering Negotiation While Increasing Pressure Towards Resolution*

Although lacking any appeal process, article 25 arbitration nevertheless creates a process for obtaining a legitimate, objective ruling. The lack of appeal leaves room for further negotiations — an integral aspect of dispute resolution in the WTO<sup>164</sup> — while raising the stakes by engaging concerns over reputation. The iterative process of discourse described by the Chayes need not revolve around a process that seeks incessantly to produce legally unimpeachable declarations of legal obligations. The ruling itself can set the stage for further discourse as to how the losing party will respond, while at the same time engaging the scrutiny and ‘communitarian peer pressure’<sup>165</sup> of the WTO member States. Actual enforcement may be no more coercive than the political pressure to comply, even if the ruling is an arbitral award.<sup>166</sup>

Some might question the legitimacy of a decision made by arbitrators that does not withstand analytical scrutiny,<sup>167</sup> particularly through an appeal process. However, even a

164 Marc L. Busch & Eric Reinhardt, ‘Fixing What ‘Ain’t Broke’?: Third Party Rights, Consultations and the DSU’ at [9], referring specifically to the consultations stage <<http://www9.georgetown.edu/faculty/mlb66/DSU.pdf>> accessed 20 January 2009.

165 Koh, above n41 at 2642.

166 Bohanes & Nottage, above n18 at 242–243. I note that the authors are referring to a form of arbitration that they suggest may not be subject to the remedies under the DSU at all. I agree with their general notion that enforcement mechanisms under the DSU are not necessarily the only force for compliance in all cases, while disagreeing that the remedies necessarily provide the enforceability of rulings even where arbitration rulings are subject to the enforcement mechanisms in the DSU.

167 McGivern, above n40 at 151.

decision that does not withstand the scrutiny of an appeal gives the losing State a justification it can use to persuade its domestic constituencies with respect to difficult policy change. As long as the award is not kept confidential, as occurs in many forms of arbitration, it can create pressure and political incentive to comply.<sup>168</sup> Ultimately an arbitration in specific cases would simply assist in ‘broadening the space for political debate’<sup>169</sup> within the dispute settlement system in these difficult cases. While arbitration takes place outside the formal litigation process and is not subject to appellate review, the parties must notify the DSB of the outcome, and any DSB member may raise any point relating thereto.<sup>170</sup> Decisions through arbitration would therefore still provide the benefit of a third party interpretation, a further basis for iterative discourse and the engagement of domestic political factions.

*(ii) Removing an Appeal Process That Compounds the Problem of Domestic Pressures as an Impediment to Resolution*

Diverting select cases from the judicial settlement system would have the further benefit of directing that discourse towards negotiated resolution much more quickly, precluding parties in such politically charged cases from using the legal system to delay the inevitable discussion around treaty norms.<sup>171</sup> It would reduce protracted legal manoeuvring and potentially endless litigation, which has its role in cases where compliance with a ruling is a possible or likely outcome but can be counter-productive where implementation is unlikely for political reasons. At the appeal stage, the offending State may have entrenched its position of non-compliance with its domestic audience<sup>172</sup> by fighting each battle after its original non-compliance, investing both time and expense, and making policy reversal less likely.<sup>173</sup> This is, of course, the danger of a litigation track with full appeal rights in cases where there are political pressures internal to a State that mitigate against compliance. In some cases, the impact of a ruling itself may practically force an appeal by the losing State,<sup>174</sup> as long as that possibility exists.

Institutional diversion to arbitration would preclude this. This diversion could also reduce a government’s exposure to criticism from difficult domestic factions for choosing a softer form of dispute resolution,<sup>175</sup> a dynamic that can make arbitration an unlikely alternative for resolving WTO disputes if left solely to the choice of the parties. Conversely, an arbitration ruling would be final, removing any consideration of an appeal. In some instances, it could, therefore, constitute the clear defeat that is needed to overcome domestic pressures against the policy change<sup>176</sup> and to foster compliance.

168 Bohanes & Nottage, above n18 at 236.

169 Joost Pauwelyn, ‘The Sutherland Report – A Missed Opportunity For Genuine Debate On Trade, Globalization And Reforming The WTO’ (2005) 8 *Journal of International Economic Law* 329 at 340.

170 Article 25.3 of the DSU.

171 See above n27.

172 See Pauwelyn, ‘Americanization’, above n25 at 125, 127; See also Cho, above n13 at 787–788.

173 Porges, above n25 at 168.

174 Id at 168–169.

175 Bohanes & Nottage, above n18 at 241–242.

176 Bohanes & Nottage, above n18 at 241.



*(iii) Allowing Greater Control over the Composition of the Decision-Maker*

Article 25 provides the parties with an extra element of consent over the decision-maker and the procedures to be followed.<sup>177</sup> The dimension of control over the decision-maker and the arbitral procedure provides States with more reason to both accept and defend the legitimacy of the process, potentially increasing the 'compliance pull', even where the ruling more dramatically affects internal policy in sensitive areas. The parties' ability to select the arbitrator would have some advantages over the current panel system. For example, the DSU could adopt a form of arbitration in which each party is entitled to select one of the board members, who would then be required to appoint a third party by agreement within a short designated period of time. This system could allow each party to select an arbitrator from its own jurisdiction who may have a deeper understanding of the political challenges within that particular legal system. This could act as an advantage over the current DSU panel system, which does not permit the appointment of individuals from either of the disputing States in the absence of the consent of both parties.<sup>178</sup> The type of experience that is useful in the most politically difficult cases may not be extensive knowledge of trade law and policy, treaty obligations, DSU procedures or the application of principles developed from previous decisions. Rather, experience in the political system of the disputing parties may be the most important form of experience.

**B. The Challenges of Diversion**

I next attempt to both articulate and address a few of the more obvious challenges to the concept of institutional diversion of select disputes to article 25 arbitration.

*(i) WTO Members Do Not Want Article 25 Arbitration as a Means of Resolving Disputes*

In order to improve compliance for politically sensitive cases, it is important to provide different procedures to identify and deal with those cases differently. However, even if one accepts that arbitration can act as a middle ground between political negotiations and judicial settlement, there is another important question: why would the concept of mandatory diversion to article 25 arbitration be accepted by the WTO members, given that its infrequent use suggests that they do not want to use it?

The logical explanations for the infrequent use of article 25 do not suggest any insurmountable hurdle to its further integration in politically difficult cases. Valerie Hughes, a former Director of the Appellate Body Secretariat, has described the failure of member States to take advantage of the flexibility of article 25 arbitration as 'curious'.<sup>179</sup> In offering possible explanations, she suggests that matters that are 'distinct

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177 While the disputing parties have some input in determining the decision-maker in panel procedures, it is limited by articles 8(5), (6) & (7) of the DSU. Further, there is no party input in the selection of the Appellate Body members, who are often the final decision-makers in most WTO disputes, since 68 per cent of panel decisions have been appealed. See Leitner & Lester, above n3 at 186.

178 Article 8.3 of the DSU.

179 Hughes, above n64 at 85. See also Busch & Reinhardt, 'Evolution of GATT/WTO' above n44 at 172–173, who refer to the infrequent use of article 25 as 'puzzling'.

or narrow bilateral issues', and are thus presumably appropriate for arbitration, are rare.<sup>180</sup> She also refers to the lack of an appeal process and the fact that awards may not be grounded in legal principles.<sup>181</sup> There may have been little incentive for responding parties to agree to arbitration for these reasons and thus no prospect for mutual agreement to arbitration.

While these explanations for the member States' lack of motivation to utilise article 25 arbitration undoubtedly ring true, these reservations likely arise from the momentum of bias towards the judicial settlement system. If there is indeed any widespread vision of the utility of arbitration that would restrict it to simple 'factual' disputes, this limited vision developed at a time before the experiment with a fully developed, institutionalised system for judicial settlement proved to be inadequate for certain disputes. The utility and advantages of arbitration for other types of disputes could not have been fully considered by the member parties of GATT during the Uruguay Round. It is not necessarily logical to restrict arbitration to simple disputes as contemplated by the initial proposals in the Uruguay Round. As a recent review of international arbitrations has noted, State-to-State arbitrations have addressed 'a wide range of dispute from controversies over borders and damage to property during wars to collision between ships at sea',<sup>182</sup> many of which would undoubtedly involve weighty political issues. A form of arbitration outside of the DSU has already been used in one WTO case to resolve 'a dispute of very considerable economic and political significance'.<sup>183</sup>

The widespread acceptance of the timeframe arbitration process under article 21.3 suggests that member States recognise the legitimacy of the arbitrator's role, despite the inevitable intrusion into political sovereignty. Furthermore, given the use of arbitration processes under both articles 21.3 and 22.6, member States have accepted these proceedings despite the absence of an appeal process. It may now be recognised that in certain politically difficult cases, a formal legal framework with a protracted legal appeal process may not result in a resolution that is willingly implemented by a losing party.

**(ii) *Diversion of Highly Political Disputes to Arbitration is not Feasible***

A system of institutional diversion of politically difficult cases is both logical and feasible. As discussed, several proposals in the Uruguay Round included arbitration as an alternative, and even suggested its use in specific classes of disputes. Such a proposal may presently garner widespread consideration today for a few reasons. While some continue to attribute the current direction of the DSU to US influence in drafting the WTO treaties,<sup>184</sup> this explanation for impediment to change appears to be outdated. The system is no longer under a realistic threat of US withdrawal from the system,<sup>185</sup> as it was when it sought the legalisation of the dispute settlement system and the creation of

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180 Hughes, above n64 at 85.

181 Ibid; see also Pauwelyn, 'Americanization' above n25 at 138.

182 Posner & Yoo, above n19 at 9. While it may be difficult in an historical context to clearly distinguish State-to-State arbitration from adjudication, Posner and Yoo have distinguished one from the other in the context of this statement regarding arbitration.

183 Bohanes & Nottage, above n18 at 220.

184 Malkawi, above n59 at 188.

185 Steinberg, above n2 at 267.

the Appellate Body during the Uruguay Round. As William Davey<sup>186</sup> has noted, the emergence of other potential economic superpowers such as India and China would likely mean that a rules-based system will continue to be in the best interests of the US.<sup>187</sup>

The assertion that the Americanisation of the dispute settlement process has resulted in the lack of an 'arbitration culture'<sup>188</sup> may be fair but, at most, merely identifies a trend that is subject to reversal by a swing of the pendulum. There are other aspects of the WTO culture that should simply be changed by deliberate action, particularly when that culture does not reflect the rules of the organisation.<sup>189</sup> Article 25 arbitration was included in the DSU to provide an alternative form of dispute settlement. A consideration of the developments in the Uruguay Round suggests that litigation only became a preferred method as a result of concerns during the Uruguay Round that are today of marginal significance, as neither the US nor the EU set the agenda for change anymore.<sup>190</sup> It has likely been institutional inertia pushed by the relative success of the DSB that has maintained the dominance of litigation, as opposed to an embedded consensus against the use of arbitration.<sup>191</sup> Although any form of procedural reform will undoubtedly be challenging, particularly in the current shadow of the Doha Round, exploration of an option to divert certain difficult disputes out of the mainstream litigation system is unlikely to present any threat to the existence of the WTO as a whole.

Second, articles 21.3 and 22.6 establish two forms of arbitration that are not consensual, but rather are mandatory upon the request of one party. In effect, the use of these processes illustrates how cases where compliance is an issue are already being shifted to arbitration when parties disagree as to the reasonable period for compliance, or when the successful party is forced to consider the suspension of concessions. Concessions arbitration, despite acting as an adjunct to the judicial settlement process, has arguably been guided more by diplomatic considerations.<sup>192</sup> Furthermore, it has been suggested that there is significant pressure for the Appellate Body itself to engage in conciliatory behaviour and to craft rulings to minimise the risks of damage arising from non-compliance.<sup>193</sup>

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186 Former Director of the Legal Affairs Division of the World Trade Organization.

187 Davey, 'Looking Forwards' above n8 at 17. Indeed, given the US's admonition against any tendency of the Appellate Body towards lawmaking, it is far from clear that the US would necessarily oppose a proposal to end appeals in particular cases. See *Communication From The United States*, WTO Doc No TN/DS/W/82/Add.2 (17 March 2006). See also Barfield, above n16 at 116–125, which describes the support from several different factions and groups for more diplomatic forms of dispute resolution.

188 Malkawi, above n59 at 183–188.

189 See, for example Debra P Steger, 'The Culture of the WTO: Why It Needs to Change' (2007) 10 *Journal of International Economic Law* 483 at 484.

190 *Id* at 485.

191 In fact, the US itself has recently confirmed, despite its role in establishing the Appellate Body and the legalistic direction of the DSB, that '... the purpose of the dispute settlement system is not to produce reports or to "make law", but rather to help Members resolve trade disputes among them.' See *Communication From The United States*, WTO Doc No TN/DS/W/82/Add.2 (17 March 2006). However, see Steger, 'Struggle for Legitimacy', above n2 at 113–114, footnote 5, where it is noted that during the Doha Round the tables turned and the European Communities now sought more legalistic reforms such as the professionalisation of the panel system.

192 See generally, Spamann, above n132.

These observations of the current system suggest that there is recognition of the limitations of the legal system and of the danger of trying to resolve heavily political cases within that system at the risk of adversely affecting the overall legitimacy of the DSB. It has been suggested that politics remains an integral part of the 'WTO court'.<sup>194</sup> However, for the Appellate Body to maintain the support of its members, particularly the more powerful ones, it necessarily operates within 'political constraints'.<sup>195</sup> Yet the Appellate Body is likely not a suitable body to make 'difficult political calculations'.<sup>196</sup> In effect, there is already an unspoken vetting system taking place within the legalised system, such as when the Appellate Body uses avoidance techniques for politically sensitive issues.<sup>197</sup> To the extent that any such considerations are disguised, the dispute settlement system cannot meet its full potential. Worse, any surreptitious recognition of non-legal considerations will ultimately undermine the overall integrity of the entire dispute settlement process.

The legal system should, however, be as immunised as possible from political influences lest its credibility as a legally objective decision-maker be seriously undermined.<sup>198</sup> A two-tiered system involving arbitration of politically difficult cases would assist, where practically required, in maintaining some transparent separation of the purely legal considerations of the judicial settlement system and the arbitration track proceedings that apply legal considerations in a more political context. In some ways, weakening the independence of the decision-maker in the politically difficult cases may enhance the chance of the long-term survival of the overall system of dispute settlement.<sup>199</sup>

### (iii) *The Diversion of Disputes from Judicial Settlement Represents a Return to GATT*

Admittedly, introducing a system of diversion would represent a slight swing back towards the diplomatic aspects of the old GATT system. While the previous panel system under GATT has been described by some as a form of formalised arbitration system,<sup>200</sup> the use of an arbitration track directed at a negotiated resolution would not represent a return to the GATT system for any class of dispute.

193 Geoffrey Garrett & James McCall Smith, *The Politics of WTO Dispute Settlement*, particularly at [3–4] <[www.yale.edu/leitner/resources/docs/1999-05.pdf](http://www.yale.edu/leitner/resources/docs/1999-05.pdf)> accessed 20 January 2009.

194 Jacqueline Krikorian, 'Plane, Trains and Automobiles: The Impact of the WTO "Court" on Canada in the First Ten Years' (2005) 8 *Journal of International Economic Law* 921 at 967.

195 Steinberg, above n2 at 268–270.

196 Steinberg, above n2 at 274, generally referring to practical limitations on expansive judicial lawmaking. See also Barfield, above n16 at 113.

197 Steinberg, above n2 at 268–269

198 Weiler, above n19 at 193–194. Weiler refers to the danger of persistence of diplomatic practices within the legal context that may undermine the rule of law and the benefits arising from the judicial settlement system. See also Steger, 'Struggle for Legitimacy', above n2 at 140–41, who emphasises the importance of keeping the diplomatic and judicial tracks separate, though rejecting any notion of creating a 'hybrid version of the judicial track'.

199 Posner & Yoo, above n19 at 74.

200 See, for example Posner & Yoo, above n19 at 44.

First, irrespective of the decision of the Secretariat as to the appropriate track for a dispute, parties could not block the establishment of a panel or arbitrator and thus avoid the issuance of an objective ruling by a third party, as they could before 1989. Second, while the nature of an arbitration ruling would be more directed at generating a negotiated settlement, it would nevertheless be issued in the context of a fully institutionalised setting. It would, therefore, be distinct from the ad hoc arbitration with limited institutional scrutiny arguably available under the previous GATT regime.<sup>201</sup> Finally, this would not represent a retreat to a power-oriented system to the disadvantage of developing countries. Most of the politically difficult cases are disputes involving developed countries, and in particular, transatlantic disputes between the superpowers.<sup>202</sup> Furthermore, the forms of power that developing countries can derive from the rules-based system described by Dunne would be engaged equally by an institutionalised arbitration system that does not entail an appeal. It may be that arbitration is in fact more accessible to the poorer members of the WTO.<sup>203</sup>

*(iv) It is Too Difficult to Identify the Political Risk Cases*

A process of diverting disputes at the WTO would require a way for identifying policy — charged, problematic or high-risk cases. It has been argued that trade decisions themselves are inherently political,<sup>204</sup> thus raising a key question: how can one determine whether a case is politically difficult?

The history of WTO dispute settlement has demonstrated that certain disputes can be distinguished from others as ‘politically charged’,<sup>205</sup> a designation that is amenable to definition and identification.<sup>206</sup> These cases could be identified by a vetting process engaged at the consultations stage, since it is designed to identify the impugned measure and the issues.<sup>207</sup> One proposal for reform has suggested the expansion of the consultations process for better information exchange,<sup>208</sup> while others have encouraged a more active role for the Secretariat in the consultations process or even as

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201 GATT, ‘*Concepts, Forms and Effects of Arbitration*’ above n17. At pages 8–10, the Secretariat discusses the possibility that ad hoc arbitration was always available under the GATT system but ultimately seeks the members’ clarification on this issue.

202 Benjamin L. Brimeyer, above n161 at 167; Steinberg, above n2 at 267, 275; see also Wilson, above n7; Malkawi, above n59 at 187.

203 See, for example Malkawi, above n59 at 188.

204 Young, above n24 at 408.

205 Busch & Reinhardt, ‘Fixing What Ain’t Broke’ above n164 at 13; see also McGivern, above n40 at 141, who refers to the ‘highly politicised’ disputes where there is non-compliance.

206 Porges, above n25 at 155, where such cases are defined as ones with ‘low stakeholder involvement or with overwhelmingly strong governmental direction, where the stakes are sometimes symbolic’. See also Helen Sullivan, ‘Regional Jet Trade Wars: Politics and Compliance in WTO Dispute Resolution’, (2003) 12 *Minnesota Journal of Global Trade* 71 for an interesting discussion of the political, and even cultural, pressures behind the regional aircraft dispute between Brazil and Canada. Given the nature of these pressures, it would not have been difficult to address them in the context of an in-depth candid briefing process at the consultations stage.

207 Porges, above n25 at 157.

administrative support for arbitrations.<sup>209</sup> An increased involvement of the Secretariat in the consultations process would create an opportunity to more carefully assess the parties' positions. During the consultations process, the Secretariat could require briefs describing the main issue and the complaining party's proposal for possible resolutions, as well as the defending State's recitation of any political challenges to comply. Introduction at this stage has the advantage of focusing on the breach, while also identifying the potential solutions as administrative, legislative or regulatory. This process could require the responding party to make a written proposal for outlining the possibilities of changing the impugned policies should it be unsuccessful.

This approach is neither heretical nor without some point of reference in the DSU. It has been suggested that the 'political dimension' of a dispute should be assessed on a case-by-case basis for the purposes of determining whether it is suitable for arbitration.<sup>210</sup> A vetting system at the consultations stage is merely one method of doing so. Furthermore, article 21.3 of the DSU already requires the losing party to inform the DSB of its intentions for implementation within 30 days after the adoption of the ruling. This is obviously a time period within which a State is unlikely to be able to navigate domestic pressures or legislative restraints in proposing solutions as to the potential of legislative changes in difficult cases. If a member State is expected to do so immediately after a ruling, it seems equally plausible that it can put forward some form of plan at the consultations stage. This step would assist in assessing the political aspects of the dispute and permit a meaningful assessment of the risk of non-compliance.

## Conclusion

While the dispute settlement system under the WTO and the GATT has been relatively successful in the field of international adjudication, history has proven that neither the political aspects of the previous GATT system nor the legalistic mechanisms of the WTO can efficiently resolve each of the myriad of disputes that are referred to the WTO dispute settlement system. Arbitration may be the best-suited instrument in a few politically difficult cases. As a result of the multifaceted nature of the Uruguay Round negotiations, while arbitration was seen as a useful alternative to the litigation system, the concept did not fully ripen prior to the creation of the WTO. However, the collective compulsion to 'improve' procedures and remedies to address compliance issues, rather than promoting negotiations that are informed by objective rulings, can be counterproductive. In considering reform to the DSB, one cannot assume that further legalism and more litigation will result in greater compliance.<sup>211</sup>

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208 Id at 180–181. Indeed, it has been suggested that the consultations process under the current system can become a *pro forma* exercise, in some cases lasting no more than an hour. See Porges, above n25 at 160–161; Donald McRae, 'What is the Future of WTO Dispute Settlement?' (2004) 7 *Journal of International Economic Law* 3 at 9.

209 Bohanes & Nottage, above n18 at 244.

210 Bohanes & Nottage, above n18 at 241–242.

211 Busch & Reinhardt, 'Evolution of GATT/WTO' above n44 at 176–177.

Arbitration under article 25 may offer an effective alternative rule framework for specific cases, one that lies somewhere between the fragile diplomatic basis on which GATT was originally based, and the unbridled legalism following the creation of the WTO. In this middle ground, the element of reputation is still engaged, but with a lesser risk of damaging the reputation of the judicial settlement system achieved through the successes of the DSB. This is important. Just as every departure from the rules weakens respect for the rule-oriented system,<sup>212</sup> every instance of non-compliance with WTO rulings undermines the legitimacy of the adjudication system, particularly when that ruling purports to provide an objectively correct interpretation of WTO obligations through a legal appeal system. Institutional diversion redirecting the politically difficult cases away from the judicial settlement system may therefore serve to 'protect the judicial integrity'<sup>213</sup> of the WTO legal system. When confronted with policy-driven disputes that may be difficult to resolve, the preservation of the integrity of the adjudication system alone is a worthy objective.

The concept of diversion of disputes to arbitration may well appear to be heretical to those proponents of the legalised dispute settlement system of the WTO or to those who have witnessed first hand the successes of that system. There are undoubtedly many challenges for implementing a system of diversion, not the least of which is the danger that such a proposal may go much further than mere 'fine-tuning'.<sup>214</sup> Experts have warned that any undertaking to make improvements to the current system should be taken with caution.<sup>215</sup> Indeed, it is important to ensure that any reform does not overreach and jeopardise the legitimacy of the system as a whole. In particular, protections would be required to minimise any bias, or perception of bias, towards developed States over developing States or to States demonstrating a weaker respect for panel or Appellate Body rulings over those that are more compliant. Further, any amendment of the DSU would be challenging given the state of negotiations in the Doha Round. Nevertheless, if the time is still ripe to consider enhancing retaliation rules because of the 'changed reality' of the WTO (as has been suggested),<sup>216</sup> then surely there is room to consider alternative means of handling difficult disputes.

There is much research that would be required in this and other respects before moving the concept of diversion to article 25 arbitration beyond its current fledgling State. There are many other possibilities that would place the current dispute settlement system in a different position on the spectrum of rule orientation vs. power orientation. Should the WTO adopt or adapt a body of institutional arbitration rules to avoid any

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212 Jackson, *The World Trading System*, above n60 at 85.

213 Cho, above n13 at 784; see also Barfield, above n16 at 113.

214 Busch & Reinhardt, 'Fixing what Ain't Broke', above n164.

215 Krikorian, above n194 at 967; Busch & Reinhardt, 'Fixing what Ain't Broke', above n164.

216 Malacrida, above n150 at 51; see also Ngangjoh H. Yenkon, 'World Trade Organization Dispute Settlement Retaliatory Regime at the Tenth Anniversary of the Organization: Reshaping the 'Last Resort' Against Non-compliance' (2006) 40 *Journal of World Trade* 365 at 384, where it is suggested that the proposal for 'Preauthorized Contingent Financial Commitment' might be considered within the Doha Round negotiations.

protracted negotiations over rules,<sup>217</sup> and if so, which ones and which elements? Could arbitration also be used, as some have suggested, to determine a form of mandatory financial compensation in politically difficult cases involving complaints from developing States?<sup>218</sup> Could the arbitration system be used to generate non-binding advisory opinions<sup>219</sup> that would be effective in engaging normative condemnation in these cases? I suspect that, to the extent that the proposal in this article is considered by experts in this area, it would generate much criticism but, hopefully, further debate and research. I would welcome this attention and suggest that the current discourse for reforming and improving the dispute settlement system would only benefit from any consideration or discussion of this option.

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217 Bohanes & Nottage, above n18 at 245–6.

218 See, for example Bronckers & van den Broek, above n49 at 126, who conclude that the use of financial compensation would benefit all WTO members but particularly developing countries. See also Barfield, above n16 at 130–2, which calls for mandatory compensation for non-compliance.

219 See, for example Barfield, above n16 at 117, which proposes a modified form of blocking system that would render certain decisions non-binding, albeit in the context of the judicial settlement system.