

# Enhanced Third Party Rights in the WTO Dispute Settlement Understanding

By Antonis Antoniadis\*

## Abstract

This article examines the issue of enhanced third party rights in the WTO DSU. The origin of broader participatory rights in the GATT practice is explored. Further, in the early WTO jurisprudence and in particular, in *EC–Hormones*, the Appellate Body determined the conditions under which those rights should be granted and the content thereof. Their foundation on the discretionary authority of the Panels and on considerations of due process was thereby established. This contribution focuses on *United States–1916 Anti-Dumping Act*, where the Appellate Body was offered the opportunity to elaborate on the issue in a case where claims of procedural prejudice were raised. In light of the unsatisfactory response of the Appellate Body, an analysis of the DSU provisions is undertaken and the argument that enhanced third party rights have a strong basis in the DSU is advocated. At the same time, the procedural and systemic importance of the issue is highlighted.

## 1. Introduction

After seven and a half years of operation the World Trade Organization (WTO)<sup>1</sup> is at an important crossroads. The choice of direction will be decided by two main factors: first, having been invested with the expectation that it would act as a vehicle leading to global prosperity, its success in delivering what it promised is withering, at least from the point of view of civil society. Second, a deep identity crisis is looming within the Organization, this second factor being the principal cause of the first. The identity crisis is, in itself,

\* LL.M. (Cambridge), Ph.D. Candidate (Birmingham). This article has been inspired during my traineeship at the Legal Service of the European Commission. I would like to express my admiration for its members and my thankfulness for their encouragement and support. The Alexander S. Onassis Public Benefit Foundation is financing my research and I would like to express my gratitude for that. Many thanks are due to Professor Anthony Arnull, Bernhard Jansen, Elisabetta Montaguti and Bebhinn Donnelly for useful comments on previous drafts. All the errors, omissions and pleonasms remain mine alone.

1. Marrakesh Agreement establishing the World Trade Organization, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 33 ILM 1140 (1994) (hereinafter, WTO Agreement).

caused by divergent demands from several institutional and non-institutional players. For example, academia would like to see the WTO becoming a 'linkage' Organization,<sup>2</sup> the anti-globalization movement dynamically questions its very object and purpose, the developing countries would like to increase the systemic derogations in their favour so that account is taken of their special needs and their right to development and finally, the developed countries, while wishing to increase their own prosperity by opening up the world's markets, fight in the WTO's backyard for the title of the best ambassador of the developing countries' interests.

The launch of the new Round of Multilateral Trade Negotiations at Doha, Qatar, is neither intended nor expected to resolve these fundamental philosophical issues. On the contrary, its broad agenda is fraught with matters left unresolved by the previous Round and problems raised in the course of its operation. One of those is the reform of the Dispute Settlement Understanding (DSU)<sup>3</sup> which occupies a less than prominent position on the agenda of the negotiations.<sup>4</sup> The DSU, however, has had a cardinal impact during the Organization's first years and has attracted attention for the speed with which it handles the ever-increasing number of disputes before it.<sup>5</sup> It provided a strong input in the constitutionalization of international trade by shaping the new trading regime and providing security and predictability to the system.<sup>6</sup> At the same time, its *modus operandi* represented a shift from the arbitral dispute settlement of the GATT to judicial dispute settlement.<sup>7</sup> Although it is generally acknowledged that the DSU has been working miraculously well, it is recognized that there are several shortcomings relating mainly to enforcement,<sup>8</sup> private party participation,<sup>9</sup>

2. Symposium: The Boundaries of the WTO, (2002) 96 AJIL 1-158.
3. Annex 2, Understanding on Rules and Procedures Governing the Settlement of Disputes.
4. Nikolaos Lavranos, 'Some Proposals for a Fundamental DSU Reform', (2002) 29 LIEI 73.
5. See 'Symposium on the First Three Years of the WTO Dispute Settlement System' in (1998) 32:3 *The International Lawyer*; 'Special Issue: WTO Dispute Settlement System' in (1998) 1 JIEL 175; William J. Davey, 'Supporting the World Trade Organisation Dispute Settlement System', (2000) 34:1 JWT 167.
6. Deborah Z. Cass, 'The "Constitutionalization" of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade', (2001) 12 EJIL 39.
7. John Collier and Vaughan Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures*, (OUP, 1999) at p. 103. See also an analysis on the nature of the WTO Dispute Settlement in Cottier, 'Dispute Settlement in the World Trade Organization: Characteristics and Structural Implications for the European Union', (1998) 35 CMLRev. 325 at pp. 333-350.
8. Joost Pauwelyn, 'Enforcement and Countermeasures in the WTO: Rules are Rules – Toward a More Collective Approach', (2000) 94 AJIL 335.
9. Panel Discussion at the 6th Geneva Global Arbitration Forum: Petros C. Mavroidis, Thomas Cottier, William J. Davey, Eleanor M. Fox, Gary N. Horlick, Norio Komuro and Douglas E. Rosenthal, 'Is the WTO Dispute Settlement Mechanism Responsive to the Needs of the Traders? Would a System of Direct Action by Private Parties Yield Better Results?', (1998) 32:2 JWT 147.

transparency,<sup>10</sup> etc. The concept of transparency in the DSU has two faces, the internal and the external. The latter has become the object of attention mainly because of the lack of publicity in the proceedings and the decision of the Appellate Body to accept *amicus curiae* briefs.<sup>11</sup> The Appellate Body attracted a lot of criticism for its choice to treat NGOs as *de facto* third parties.<sup>12</sup> Internally, the DSU contains several provisions that promote the dissemination of information and full participation of all the WTO Members.<sup>13</sup> In this sense, it can be argued that the widely advertised principle of transparency towards non-Members and the civil society in general, is concomitant with the principle of due process and full participation afforded to the WTO Members.

Against the background of these considerations, the Appellate Body, in *United States–Anti-Dumping Act of 1916*,<sup>14</sup> upheld the Panel's choice not to grant Japan and the EC enhanced third party rights in each other's case. This case, which has been extensively considered in literature,<sup>15</sup> dealt with the conformity of the *United States–Anti-Dumping Act of 1916* with the WTO rules. The two separate complaints launched by the EC and Japan had the same subject, namely the conformity of the 1916 Act with Article VI of the GATT and several Articles of the Anti-Dumping Agreement. In the alternative, the EC claimed that the respondents violated Article III:4 of the GATT and Japan Article XI. Both the complainants won their principal claim and

10. W.J. Davey, 'WTO Dispute Settlement' in Antonio Pérez van Kappel and Heusel Wolfgang (eds.), *Free World Trade and the European Union: the reconciliation of interests and the review of the Understanding on Dispute Settlement in the Framework of the World Trade Organization* (Series of Publications by the Academy of European Law in Trier; Vol. 28), (Köln, 2000) at p. 57. B. Jansen, 'Selected Problem Areas in the Course of a Dispute Settlement Procedure', in *idem*, p. 61. K. Ito, 'The Dispute Settlement Mechanism in the WTO – a Japanese Perspective', in *idem*, p. 96.
11. WT/DS138/AB/R, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, paras. 39, 42; WT/DS135/9, *European Communities – Measures Affecting Asbestos and Asbestos-containing Products*.
12. See Uruguay's statement at the General Council of 22 November 2000 WT/GC/38 and Petros C. Mavroidis, 'The Meeting in Doha: Keep on Keeping On', (2002) 36:2 JWT 167 at 168. Also, A.E. Appleton, 'Amicus Curiae Submissions in the *Carbon Steel* case: another rabbit from the Appellate Body's hat?', (2000) 3 JIEL 691.
13. Article 2(1), 3(6) and of course, 10(1) DSU.
14. WT/DS136/AB/R and WT/DS162/AB/R.
15. For an analysis of the substantive aspects of the dispute see Jeffrey S. Beckington, 'The World Trade Organization's Dispute Settlement Resolution in the United States – Anti-Dumping Act of 1916', (2001) 34 Vand. J. Transnat'l L. 199; Philip De Keyser, 'Exploring WTO dispute settlement in US Anti-Dumping Act 1916: An easy case?', Harvard Jean Monnet Working Paper No. 7/99, <[www.jeanmonnetprogram.org/papers/01/013101.html](http://www.jeanmonnetprogram.org/papers/01/013101.html)>; Hiroko Yamane, 'The Anti-Dumping Act of 1916: a victory at what cost?', (2001) 7 Int.T.L.R. 12; Laurent A. Ruessmann, 'Implications of the WTO 1916 Act decision: Part 1: did the WTO outlaw the use of national antitrust rules with regard to cross-border predatory pricing', (2001) 7 Int.T.L.R. 143.

the Panel decision became the object of an appeal by the United States. The complainants cross-appealed jointly on the procedural issue of not having been granted enhanced third party rights in each other's case.<sup>16</sup> This contribution will discuss the issue of enhanced third party rights, analyze the decision of the Appellate Body in *US–1916 Anti-Dumping Act* and assess it against past GATT practice, the DSU provisions, the AB's own previous jurisprudence and the policy considerations briefly identified herein.

## 2. Enhanced third party rights

Although the concept of enhanced third party rights, found in the case law as 'additional',<sup>17</sup> 'extended',<sup>18</sup> or 'enhanced' third party rights,<sup>19</sup> is relatively common in international trade jargon, its meaning and content lie beyond any conceivable consensus in theory or practice. The importance of the matter, however, cannot be doubted and it has been argued that no other topic illustrates more clearly the distinction between a judicial and an arbitral process than the rights of third parties to intervene.<sup>20</sup>

### 2.1. GATT practice

The definition of the conditions for granting enhanced third party rights and the extent of those rights is informed by the GATT practice.<sup>21</sup> After all, the GATT panel system, although *ad hoc* and consensual, was, generally speaking, crowned with success in the adjudication of trade disputes. It was therefore decided that the World Trade Organization would be guided by past practice.<sup>22</sup> During the operation of the GATT the content of third party rights was not defined and, since there were no standard rules of procedure, the rules governing the intervention of third parties in a dispute developed *ad hoc*. Third

16. WT/DS136/R, *United States–Anti-Dumping Act of 1916* (complaint by the EC), at para. 6.36; WT/DS162/R, *United States–Anti-Dumping Act of 1916* (complaint by Japan), at para. 6.35.

17. *EC – Measures Concerning Meat and Meat Products (Hormones)*.

18. *EC – Measures Affecting the Importation, Distribution and Sale of Bananas*.

19. *US – 1916 Anti-Dumping Act*.

20. Collier and Lowe, *supra* note 7 at p. 208.

21. For an analysis of GATT and early WTO practice see: Mary E. Footer, 'Some Aspects of Third Party Intervention in GATT/WTO Dispute Settlement Understanding', in Ernst-Ulrich Petersmann (eds.), *International Trade Law and the GATT/WTO Dispute Settlement System* (Studies in Transnational Economic Law, Vol. 11), Kluwer Law International 1997 at p. 213 *ff.* Another analysis of the issue from the point of view of substantial interest and mainly connected to the *Bananas* Trilogy can be found in Chi Carmody, 'Of Substantial Interest: Third Parties Under GATT' (1997) 18 Mich. J. Int'l L. 615.

22. Article XVI:1 of the Marrakesh Agreement. Confirmed in WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, *Japan – Taxes on Alcoholic Beverages*. See also, David Palmeter and Petros C. Mavroidis, 'The WTO Legal System: Sources of Law' (1998) 92 AJIL 398 at 400–406.

party participation was reserved to all Contracting Parties that had an interest in the dispute but ‘no specific procedural form was prescribed for third party intervention’.<sup>23</sup> The content of third party rights at the time extended from submission of written statements and memoranda to participation in the oral hearing.

Apart from the standard third party rights recognized in the GATT practice, enhanced third party rights were also accorded in several circumstances.<sup>24</sup> In particular, in the unadopted Panel Report on *EC–Bananas I* certain ACP countries intervening in favour of the EC were given the opportunity to attend the meetings of the Panel, make a written submission, receive all submissions of the parties and were invited to speak where appropriate.<sup>25</sup> The same treatment was reserved for third parties in *EC–Bananas II*.<sup>26</sup> In *Japan–Trade in Semiconductors*,<sup>27</sup> a Panel established at the request of the European Communities, the ‘United States became involved in the dispute as more than just an “interested party”’.<sup>28</sup> The Panel in that case exercised its discretion to grant full participatory rights to the US considering that the object of the dispute was the bilateral agreement between the US and Japan. Therefore, the presence of the US and the provision of an opportunity for it to be heard were indispensable to the proceedings.

On procedural grounds, the limits of participation for third parties seem to have been the terms of reference of the Panel. In particular, while third parties were allowed to participate ‘as necessary and appropriate’ to the workings of the Panel, this did not include raising new claims or claims that the parties could have raised but had chosen not to.<sup>29</sup>

## 2.2. *The Dispute Settlement Understanding*

The drafters of the Dispute Settlement Understanding drew inspiration from the previous GATT practice and the meaning and extent of intervention

23. Footer, *supra* note 21, at p. 215.

24. Practice started with the Panel Report on *EEC – Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region* of 7 February 1985, L/5776, p. 2, para. 1.5 (unadopted) and continued in *EEC – Member States’ Import Regime for Bananas* of 3 June 1993, DS32/R, p. 2, para. 9 (*Bananas I* – unadopted) and *EEC – Import Regime for Bananas* of 11 February 1994, DS38/R, p. 4, para. 8 (*Bananas II* – unadopted). The fact that those Panel Reports remain unadopted does not reduce the guidance they offer as already accepted by the Appellate Body in *Japan – Taxes on Alcoholic Beverages*. More analytically, Footer, *supra* note 21, at pp. 229–235. Also, Carmody, *supra* note 21, at pp. 641–647.

25. *Ibid.*

26. *Ibid.*

27. Panel Report on *Japan – Trade in Semiconductors*, BISD 35S/116, 116–117, para. 5.

28. Footer, *supra* note 21, at p. 226.

29. Panel Report on *United States – Customs User Fee*, BISD 35S/245, at 290.

was addressed and enshrined in specific procedural rules.<sup>30</sup> These rules are integrated in Article 10 of the DSU, which states:

- ‘1. The interests of the parties to a dispute and those of other Members under a covered agreement at issue in the dispute shall be fully taken into account during the panel process.
2. Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a ‘third party’) shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report.
3. Third parties shall receive the submissions of the parties to the dispute to the first meeting of the panel.
4. If a third party considers that a measure already the subject of a panel proceeding nullifies or impairs the benefits accruing to it under any covered agreement, that Member may have recourse to normal dispute settlement procedures under this Understanding. Such a dispute shall be referred to the original panel wherever possible.’

This Article reflects past GATT practice. Members, having a substantial interest in proceedings, are allowed to participate with limited procedural rights, which are restricted to attendance at the first meeting of the Panel. This provision is supplemented by paragraph 6 of Appendix 3 (Working Procedures) which provides that third parties shall be invited to present their views in a session of the first substantive meeting of the Panel especially dedicated to this and they shall be entitled to be present during the entirety of the session. At the appellate stage, third parties may make written submissions and shall be given an opportunity to be heard.<sup>31</sup> In practice, third parties fully participate during the Appellate stage. They are excluded, however, from Panel proceedings under Articles 21.3 and 21.5 DSU and from Article 22.6 DSU arbitration. It should be emphasized that in WTO practice participation of Members as third parties in proceedings has proved very popular.

At this stage, it is important to mention another form of intervention which is relevant to the considerations raised, the procedure for multiple complainants. It is very common in practice that a dispute starts with one complainant and other Members later join as multiple complainants under

30. D.P. Steger and S.M. Hainsworth, ‘World Trade Organization Dispute Settlement: The First Three Years’, (1998) 1 JIEL 199.

31. Article 17.4 DSU.

Article 9 of the DSU.<sup>32</sup> Usually, those other Members join the proceedings at the stage of consultations and multiple requests for the establishment of a Panel are made to the DSB. The DSB will join the complaints in accordance with Article 9 of the DSU which describes the procedures for multiple complainants.<sup>33</sup> It states:

- ‘1. Where more than one Member requests the establishment of a Panel related to the same matter, a single panel may be established to examine these complaints taking into account the rights of all Members concerned. A single panel should be established to examine such complaints whenever feasible.
2. The single panel shall organize its examination and present its findings to the DSB in such a manner that the rights which the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired. If one of the parties to the dispute so requests, the panel shall submit separate reports on the dispute concerned. The written submissions, by each of the complainants shall be made available to the other complainants, and each complainant shall have the right to be present when any one of the other complainants presents its views to the panel.
3. If more than one panel is established to examine the complaints related to the same matter, to the greatest extent possible the same persons shall serve as panellists on each of the separate panels and the timetable for the panel process in such disputes shall be harmonized.’

Accordingly, when, as it invariably happens,<sup>34</sup> WTO Members join the proceedings at the consultation stage the single panel requirement shall be satisfied. As a result, they enjoy the procedural rights prescribed in the second half of paragraph 2 permitting them to receive the written submissions of the other parties, to be present in the proceedings and to express their views thereon.

The relevance of Article 9 for third parties is highlighted in the circumstance that a third party considers that its rights under the covered agreements are nullified or impaired and asks for the establishment of its own Panel proceedings in accordance with Article 10(4) DSU. In exceptional circum-

32. See, *inter alia*, *United States – Reformulated Gasoline*; *Japan – Taxes on Alcoholic Beverages*; *United States – Safeguard Measures on imports of fresh, chilled or frozen lamb meat from New Zealand and Australia*.

33. There is a shortcoming in this provision in that it only provides for multiple complainants and there is no procedure for multiple defendants and their joinder in the proceedings. The issue was raised in *EC–Bananas* and there is a suggestion that it should be addressed in a future reform of the DSU. See *cf.* B. Jansen *supra* note 10 at p. 61.

34. In the totality of case law apart from the cases analyzed below.

stances, third parties that initiate their own proceedings on the same matter may be unable for technical, temporal or other reasons, to follow the pattern established by Article 9 DSU and take full advantage of the provisions encapsulated in it by joining the proceedings as multiple complainants in a single Panel. In these cases, the Panels and Appellate Body are called upon to remedy the problem and recognize the different treatment that could/should be afforded to those parties. In the exercise of this duty the Panels and Appellate Body are trying to reconcile the attributes of arbitration like confidentiality and consent of the parties with those of judicial proceedings like transparency and procedural fairness. In the context of these considerations the issue of enhanced third party rights may also arise under the normative framework of the DSU.

### 2.3. Early WTO practice

Prior to *US–1916 Anti-Dumping Act*, the Appellate Body had two opportunities to deal with the issue of enhanced third party rights. In *EC–Bananas III*,<sup>35</sup> the Panel granted broader participatory rights to all the parties intervening in the case. These included permission to observe at the second substantive meeting of the Panel and the right to make a brief statement at a suitable time.<sup>36</sup> The Panel based its decision, *inter alia*, on the following considerations:

- i) the economic effect of the disputed EC banana regime on certain third parties appeared to be very large;
- ii) the economic benefits to certain third parties from the EC banana regime were claimed to derive from an international treaty between them and the EC;
- iii) past practice in panel proceedings involving the banana regimes of the EC and its Member States; and
- iv) the parties to the dispute could not agree on the issue.<sup>37</sup>

The next case, *EC–Hormones*, is of paramount importance because of the examination of the concept of enhanced participatory rights, not strictly within the context of classic third party intervention but from the perspective of multiple but separate complainants. In that case, the United States requested the establishment of a Panel against the EC on its import regime for hormone-treated meat. During the proceedings, Canada, which had reserved its rights as a third party, requested the establishment of its own Panel proceedings. For temporal reasons, it was not feasible for the complaints to be joined in

35. For a brief statement of the facts and the consideration of the issues on third party participation see Carmody, *supra* note 21, at pp. 641–647 and 657.

36. Panel Report on *EC – Measures Affecting the Importation, Distribution and Sale of Bananas* (complaint by the USA), para. 7.8.

37. *Ibid.*



a single Panel, nevertheless, the Panels were comprised of the same panelists. Each of the complainants requested enhanced third party rights in each other's case. The Panel agreed to their request. It held a joint meeting with scientific experts and gave Canada access to all information submitted in the United States' proceeding. It also gave access to all information submitted in the Canadian proceedings to the United States and invited the United States to observe and make a statement at the second substantive meeting in the proceedings initiated by Canada.<sup>38</sup>

The EC made a claim of error in its appeal against the Panel decision. The Appellate Body, after citing Article 9.3 of the DSU, held that there were four aspects in this dispute that should be underlined, i.e., same matter, same panellists, the Panel finished both reports at the same time and, given the fact that the same panellists were conducting two proceedings dealing with the same matter, neither Canada nor the United States were ordinary third parties in each other's complaint.<sup>39</sup> It then split the issue in two dealing first with the Panel's choice to hold a joint meeting with scientific experts and second, with the broader participatory rights given to the complainants. As to the first, it concluded that it was consistent with the letter and spirit of Article 9.3. DSU to hold a joint meeting for practical purposes.<sup>40</sup> It went on to analyze the participation of the United States in the second substantive meeting of the Panel where, after citing the reasoning of the Panel, it upheld it for reasons of due process. Indeed, the second substantive meeting of the Panel in the US complaint took place before the meeting with the experts. In the Canadian complaint it took place afterwards. The Panel and Appellate Body considered, therefore, that it would be unfair for the United States to be deprived of the same opportunity to comment on the views expressed by the experts that the EC and Canada enjoyed.<sup>41</sup> The Appellate Body provided for three legal bases for those rights to be granted. First, the discretion offered to the Panel under Article 12.1 of the DSU,<sup>42</sup> second, the permissive language of Article 10 and paragraph 6 of Appendix 3 of the DSU<sup>43</sup> as was previously interpreted by the Appellate Body in *EC-Bananas*<sup>44</sup> and third, Article 9.3 of the DSU.<sup>45</sup>

38. Appellate Body Report on *EC-Hormones*, para. 150.

39. *Ibid.*, para. 151.

40. *Ibid.*, paras 152-153

41. *Ibid.*, para. 154.

42. 'Panels shall follow the Working Procedures in Appendix 3 unless the Panel decides otherwise after consulting the parties to the dispute'.

43. 'All third parties which have notified their interest in the dispute to the DSB shall be invited in writing to present their views during a session of the first substantive meeting of the panel set aside for that purpose. All such third parties may be present during the entirety of this session.'

44. *EC - Measures Affecting the Importation, Distribution and Sale of Bananas*, WT/DS27/AB/R, Appellate Body Report of 25 September 1997.

45. Appellate Body Report on *EC-Hormones*, para. 151.

It can be argued on the basis of the above that the Appellate Body's underlying policy consideration was to uphold the Panel's choice<sup>46</sup> and give the parties the right to participate fully in the second meeting of the panel without baptizing them as multiple complainants. Consequently, the Appellate Body in *EC–Hormones* opted for a teleological interpretation of the issue taking into account the case before it and the actual rights that the parties to the dispute should be accorded so as not to be procedurally prejudiced. It can be deduced from its reasoning that it based its judgment mainly on Article 10. Initially, it would seem that it was handling the case as if it were an issue of multiple complainants even though the Appellate Body later stated that '... neither Canada nor the United States were ordinary third parties in each other's complaint'.<sup>47</sup> This way, the Appellate Body has identified a category of litigants which conceptually lies between the multiple complainants and third parties and has accorded them 'additional', 'enhanced', 'extended' third party rights beneficiaries' status. The way this category is formulated does partly stand on the legal basis of the DSU but, more importantly, – the *Bananas* considerations apart – on the concept of due process.

### 3. The United States – 1916 Anti-Dumping Act

#### 3.1. *The panel report*

The factual background to the case began on 4 June 1998 when the EC requested consultations with the US that led to the establishment of a Panel on 1 February 1999. Japan reserved the right to participate as a third party in the proceedings. Japan requested the establishment of its own Panel proceedings on 4 June 1999. In WT/DS136 (EC's complaint), the first substantive meeting of the parties took place on 13–14 July 1999, the second on 14–15 September 1999, the interim Report was issued on 20 December 1999 and the Final Report on 14 February 2000. In WT/DS162 (Japan's complaint), the first substantive meeting of the parties took place on 3–4 November 1999, the second on 8–9 December 1999, the Panel issued its interim report on 28 February 2000 and its Final Report on 31 March 2000. In the course of these proceedings the EC sent a letter to the Chairman of the Panel requesting enhanced third party rights in Japan's proceedings on 25 August 1999 and Japan followed suit on 2 September 1999.

In *US–1916 Anti-Dumping Act* (complaint by the EC)<sup>48</sup> Japan requested

46. It seems that it sympathized with the Panel's choice not to hold the meeting with the scientific experts twice and two times the same cumbersome procedure of arguments based on an incomprehensible scientific jargon.

47. Appellate Body report on *EC–Hormones*, para. 151.

48. WT/DS136/R, at paras. 6.29–6.36.

enhanced third party rights. In particular, it requested to receive all documents and be present at the second substantive meeting of the Panel.<sup>49</sup> The Panel, after referring to the objections of the USA to the request, declined the application but promised to reconsider.<sup>50</sup> The reasoning the Panel followed was that although nothing in the DSU provides for the granting of enhanced third party rights 'neither Article 10 of the DSU nor any other provision of the DSU prohibits panels from granting third party rights beyond those expressly mentioned in Article 10'<sup>51</sup> and that indeed, enhanced third party rights formed part of the discretion of the Panel under Article 12.1 of the DSU.<sup>52</sup> It went further to analyze its own discretion and the reasons that led it to its decision citing the following factors:<sup>53</sup> First, as a statement of principle, it stated that the DSU differentiates between main parties to the dispute and third parties. Second, enhanced third party rights were granted only in specific circumstances, which are (drawing its conclusions from *EC-Hormones*):

- i) two panels being composed of the same panellists;
- ii) two panels dealing with the same matter;
- iii) highly technical and factually intensive nature of the cases;
- iv) due process.

Points i) and ii) were not found to be decisive because, if they were, rights should be granted in all cases where the same matter is subject to two or more complaints with the same Panel composition. The Panel then stressed that the case before it did not involve the consideration of complex facts or scientific evidence,<sup>54</sup> and made no statement as to whether there were any considerations of due process except that 'respecting due process *vis-à-vis* Japan did not require the participation of Japan in the second substantive meeting of the panel'.<sup>55</sup> Moreover, it stated that 'none of the parties requested that the panels harmonize their timetables or hold concurrent deliberations in the procedures ...'<sup>56</sup> and that '... the provisions of Article 9 of the DSU, in particular Article 9.3 which addresses the situation of this Panel and the Panel requested by Japan on the same matter (WT/DS162) are of limited assistance in the present issue'.<sup>57</sup> In conclusion, the Panel found 'no reason to grant enhanced third party rights to Japan in these proceedings'.<sup>58</sup>

49. *Id.* para. 6.29.

50. *Id.* para. 6.31.

51. *Id.* para. 6.32.

52. *Id.* Citing also in support the Appellate Body Report on *EC-Hormones* para. 154.

53. *Ibid.*, para. 6.33.

54. *Id.* para. 6.34.

55. *Id.* para. 6.35.

56. *Id.*

57. *Ibid.*, at note 310.

58. *Ibid.*, para. 6.35.

In *US–1916 Anti-Dumping Act* (complaint by Japan)<sup>59</sup> the EC’s application to be granted enhanced third party rights bore the same conceptual and procedural content as Japan’s. The Panel declined it using more or less the same reasoning. However, there is one paragraph in its report that resurrects the argument of due process and makes the omission of proper scrutiny by the Panel manifest. At para. 6.28 of the Report the Panel stated:

‘However, whenever the claims and arguments of the parties raise issues identical to those addressed by the Panel in WT/DS136, we will apply the same reasoning as has been applied by the Panel in WT/DS136.’

Taking into account the chronology of the dispute analyzed above, the first and second substantive meetings of the Panel in WT/DS162 took place when the Panel was preparing its interim report in case WT/DS136.<sup>60</sup> Accordingly, if the Panel did what it admitted having done in the preceding paragraph, the arguments Japan made in support of claims identical to the EC’s were in vain since its case had been decided earlier. Even more, it was more to the detriment of the US as respondent, because its arguments in defence of the 1916 Anti-Dumping Act were not taken into account since those claims had already been decided. This scenario can become even worse if, supposing that the Panel took into account the arguments of the US when it was writing its report on the complaint by the EC, the latter has been unable to respond on those. In a nutshell, the Panel completely failed to acknowledge the considerations of due process epitomized above. This is surprising since the factual particularities of the case pose much a greater risk for procedural prejudice than *EC–Hormones*.

### 3.2. *The Appellate Body decision*

The EC and Japan jointly<sup>61</sup> appealed against the decision of the Panel not to grant them enhanced third party rights in each other’s case. They asked the Appellate Body to reverse the Panel’s findings and reasoning, in particular with respect to the proper interpretation of Article 9.3 of the DSU.<sup>62</sup> According to them, this case was identical to *EC–Hormones*<sup>63</sup> in three respects: i) the two proceedings dealt with the same matter, ii) the same panellists

59. WT/DS162/R, *United States–Anti-Dumping Act of 1916* (complaint by Japan).

60. In fact, the second substantive meeting of the Panel in WT/DS162 took place on 8–9 December 1999 and the interim report in WT/DS136 was issued 11 days later.

61. From that moment on Japan and the EC have coordinated and functioned as multiple complainants (Appeal, Article 21.3 DSU arbitration).

62. WT/DS136/AB/R and WT/DS162/AB/R Appellate Body Report on *US–1916 Anti-Dumping Act*, para. 38.

63. WT/DS26/AB/R and WT/DS48/AB/R, *EC–Measures Affecting Meat and Meat Products (Hormones)*, paras. 150–154.

were serving in both disputes and iii) the proceedings were held concurrently.<sup>64</sup> In addition, if the matter was simply one of the Panel's discretion according to Article 12.1 DSU this discretion should be exercised on the basis of principles reflected in Articles 9 and 10 of the DSU, taking account of the need to respect due process.<sup>65</sup> The response of the United States was that the European Communities and Japan were not prejudiced in this case since they had prevailed in every substantive argument before the Panel.<sup>66</sup> In addition, it more or less reiterated the arguments accepted by the Panel in both cases with an emphasis on the issue of concurrent deliberations.<sup>67</sup>

The Appellate Body started by citing the rules relating to third party participation in the Panel proceedings namely Article 10 DSU and paragraph 6 of Appendix 3.<sup>68</sup> It then went on to dismiss Article 9 and in particular 9.3 of the DSU as irrelevant since it does not address the issue of the rights of third parties in such proceedings, but the procedure for multiple complainants.<sup>69</sup> Without any further analysis it stated: 'Under the DSU, as it currently stands, third parties are only entitled to the participatory rights provided for in Articles 10.2 and 10.3 and paragraph 6 of Appendix 3.'<sup>70</sup>

While it seemed that the Appellate Body limited itself to a restrictive yet dogmatic interpretation of the provisions, it went on to analyze its discretionary powers under the DSU in an attempt to reconcile the DSU with its previous jurisprudence. Accordingly, after citing Article 12.1 DSU it recited excerpts from the Panel reasoning distinguishing thereby the present case from the one in *EC-Hormones* because the latter entailed consideration of complex facts or scientific evidence and the timetable was harmonized while the former did not.<sup>71</sup> It then quoted itself in *EC-Hormones*<sup>72</sup> and said that this matter falls within the discretionary authority of the Panel, which 'is, of course, not unlimited and is circumscribed, for example, by the requirements of due process'.<sup>73</sup> It concluded by saying that in the present cases the European

64. WT/DS136/AB/R and WT/DS162/AB/R, Appellate Body Report on *US-1916 Anti-Dumping Act*, para. 38.

65. *Ibid.*, para. 39.

66. *Ibid.*, para. 42. Nevertheless, the United States do not refer to potential prejudice suffered by them as pointed out above.

67. *Ibid.*, para. 43. See also on the issue of concurrent deliberations *US-1916 Anti-Dumping Act* (complaint by Japan) paras 6.27, 6.33.

68. *Ibid.*, paras 140-143.

69. *Ibid.*, para. 144.

70. *Ibid.*, para. 145.

71. *Ibid.*, para. 148.

72. *Ibid.*, para. 149. *Supra* note 63, at para. 154: 'Although Article 12.1 and Appendix 3 of the DSU do not specifically require the Panel to grant ... ['enhanced' third party rights] to the United States, we believe that this decision falls within the sound discretion and authority of the Panel, particularly if the Panel considers it necessary for ensuring to all parties due process of law'.

73. *Ibid.*, para. 150.

Communities and Japan have not shown that the Panel exceeded the limits of its discretionary authority.<sup>74</sup>

#### 4. Comment

##### 4.1. Understanding the Appellate Body's reasoning

Even on the basis of a cursory look at the Appellate Body's reasoning in this case, its analysis looks unsatisfactory. The Appellate Body unfortunately limited itself to a compilation of citations.<sup>75</sup> It is acknowledged that although the Panel and Appellate Body practice does not have the function of *stare decisis* in the WTO legal system it provides guidance for future cases.<sup>76</sup> It is obvious both from the Panel and Appellate Body reports that the cross-appellants based their arguments on this kind of precedent, the *EC–Hormones* case. The Appellate Body expressly referred to it in its reasoning and it may be of assistance in understanding the reasoning behind this case. What the Appellate Body did in this case was to take up the underlying policy consideration employed by it (in a different composition) in the *EC–Hormones* case and elevate it into a statement of principle. While in *EC–Hormones* the statement of principle was to safeguard the procedural rights of the parties and observe due process<sup>77</sup> and the policy consideration the economy of effort,<sup>78</sup> in this case, the policy consideration – since the Panel's choice was upheld – became the statement of principle. Indeed, because of this distortion, it is perceived that the reason for granting enhanced third party rights to Canada and the US in each other's cases was complex scientific evidence and the like.<sup>79</sup> By reasoning in this way the Appellate Body failed to take into account

74. *Id.*

75. Out of the 12 paragraphs of its decision only in paras 144 and 150 does it actually say something. But again, in those paragraphs it just speaks aphorisms on the irrelevance of Article 9 and the inability of EC and Japan to show that the Panel did not respect due process at the exercise of its discretion.

76. John H. Jackson, *The World Trading System*, (MIT Press, 2nd Edition, 1997) pp. 122–124. This is confirmed in WTO practice already from *Japan–Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R WT/DS11/AB/R, at p. 24 where the Appellate Body declared that the rulings of the Panels and Appellate Body, although not binding, create legitimate expectations. Probably this is the reason that third-party intervention became so popular. It can be submitted that one of the basic reasons for the big players (EC, US, Japan and Canada) to intervene is so as to help shape the law they will be bound by in the future. For an excellent analysis see David Palmeter and Petros C. Mavroidis, 'The WTO Legal System: Sources of Law', (1998) 92 AJIL 398.

77. For a presumption that due process is an essential element of the WTO Dispute Settlement see Cottier, *supra* note 7 at p. 370.

78. *Supra* note 46.

79. *US–1916 Anti-Dumping Act* (complaint by Japan), at para. 6.34 and *US–1916 Anti-Dumping Act* (complaint by EC), at para. 6.34.

either considerations of due process or calls for internal transparency. It dismissed the case in a very brief fashion when, at least, obvious issues of procedural fairness<sup>80</sup> should have been addressed.

4.2. *Enhanced third party rights and the DSU – Is there a margin for discretion?*

The name awarded to broader participatory rights is deceiving and is partly to blame for some misunderstandings on the nature of the obligations incumbent upon the Panels in the exercise of their discretion. Indeed, because of the emphasis on ‘third party’ the analysis usually starts from Article 10 DSU and proceeds to the assessment of the content of those rights against Article 10.3 DSU and Appendix 3 paragraph 6. The Panels, on the basis of their Article 12.1 DSU discretion, may grant extended rights when the requirements of due process and the interests and rights of the parties so dictate. The discretion is exercised in accordance with past GATT practice and early WTO jurisprudence culminating in the Appellate Body Report on *EC–Hormones*.<sup>81</sup> In particular, Article 10.3 clarifies that third parties ‘shall’ submit their observations during the first substantive meeting of the Panel and will be heard during that meeting. The language used in this Article regarding their submissions however, is not prohibitive towards third parties receiving the submissions made by the main parties at subsequent meetings.<sup>82</sup> In accordance with the negotiating history of the provision and in particular with the Improvements Decision,<sup>83</sup> which was adopted during the mid-term review of the Uruguay Round negotiations, the corresponding provision reads:

‘3. At the request of the third contracting party, the panel may grant the third contracting party access to the written submissions to the panel by those parties to the dispute which have agreed to the disclosure of their respective submission to the third contracting party.’

This however, represents a limited understanding of enhanced third party rights since it only mentions the entitlement to the written submissions of the parties at the second substantive meeting with the Panel and in addition, it requires their consent. This interpretation is consistent with the DSU for

80. *See supra*.

81. Appellate Body Report on *EC–Hormones*, para. 154.

82. F. Weiss, ‘Optimising the Dispute Settlement Procedure (a European Position)’, in Antonio Pérez van Kappel and Heusel Wolfgang (eds.), *Free World Trade and the European Union: the reconciliation of interests and the review of the Understanding on Dispute Settlement in the Framework of the World Trade Organization* (Series of Publications by the Academy of European Law in Trier; Vol. 28), Köln 2000, at p. 85.

83. General Agreement on Tariffs and Trade: Decisions Adopted at the Mid-Term Review of the Uruguay Round, 8 April 1989, 28 ILM 1023 (1989).

ordinary third parties but does not effectively address the issues raised in cases like *EC–Hormones* and *US–1916 Anti-Dumping Act*.

In this category of cases the starting point should be Article 9 DSU. In its ordinary practice, when more than one Member of the Organization request the establishment of a Panel on the same matter they act as multiple complainants. This is subject to procedural limitations; a single Panel should be established wherever feasible<sup>84</sup> and when more than one panel is established, to the greatest extent possible, the same members shall serve as panellists and the timetable shall be harmonized.<sup>85</sup> The broader participatory rights enjoyed by every multiple complainant include the right to receive the written submissions of the other multiple complainants and to be present when any one of the other complainants presents its views to the panel.<sup>86</sup> It is difficult to see why Article 9 DSU should not apply directly in *US–1916 Anti-Dumping Act*. The wording of Article 9 is supportive of this thesis. First, its language is permissive as to the single panel requirement.<sup>87</sup> Second, the stress is put on the procedural rights of the parties ('rights which parties to the dispute would have enjoyed'). Third, there is no time constraint for its application. In fact, the only requirement is that more than two Members request the establishment of a Panel on the same matter.<sup>88</sup> Fourth, the timetable harmonization in multiple-Panel situations is informed by the provision 'to the greatest extent possible'.<sup>89</sup> Most importantly, the content of multiple complainants' rights is also identified in Article 9.2 of the DSU and this is identical to the rights accorded in the *EC–Hormones* case.

The grant of Article 9.2 DSU rights can be arrived at from a different route. In particular, Article 10.4 DSU codified the GATT process followed in cases where the Contracting Parties, already third parties to a dispute, discovered that benefits under the GATT Agreement were nullified or impaired due to the measure under scrutiny and opted to initiate their own proceedings.<sup>90</sup> This is the key provision in an analysis of cases of 'parallel but not joined complaints'.<sup>91</sup> There have been some doubts as to whether the phrases 'already

84. Article 9.1 DSU.

85. Article 9.3 DSU.

86. Article 9.2 DSU.

87. Panel Report on *India–Patent Protection for Pharmaceutican and Agricultural Chemical Products* (complaint by the EC), at para. 7.14.

88. *Ibid.*, at para. 7.16. See also A. W. Shoyer, 'The First Three Years of the WTO Dispute Settlement: Observations and Suggestions', (1998) 1 JIEL 277, at p. 293 where he proposes, influenced by the NAFTA, that a third party not joining the case within the time limit provided should refrain from initiating its own proceedings.

89. It is doubtful whether timetable harmonization means simultaneous adjudication as the Panel in *US–1916 Anti-Dumping Act* suggests.

90. E.g. *United States–Restrictions on Imports of Sugar* where the EEC participated as third party to the proceedings and later on it initiated its own in *United States–Restrictions on the Importation of Sugar and Sugar-containing products under the 1955 Waiver*.

91. Cottier, *supra* note 7, at footnote 50.



the subject of a panel proceeding' and 'original panel' in Article 10.4 meant that the Panel should have issued its report but the Panel in *India–Patent* put those doubts to rest and gave a broad interpretation to the temporal aspect of the provision.<sup>92</sup> It is important to note that Article 10.4 provides that 'that Member shall have recourse to normal dispute settlement proceedings'. The sentence 'normal dispute settlement proceedings' certainly refers to the DSU. Accordingly, and since Article 9 forms part of the normal dispute settlement proceedings of the DSU, Article 9.2 rights should be granted to the third party promoted to multiple complainant status. As far as the limitations are concerned, since Article 10.4 provides for its own limitations in this case which includes only resort to the original panel, the third party is relieved from timetable harmonization.

As a result, the Panels have no actual discretion to accord the rights referred to in Article 9.2 of the DSU to parties to the dispute that are not ordinary third parties.<sup>93</sup> Especially when due process considerations are raised, the Panels should grant those rights to the parties. The content of third party rights and the Panel's discretion in favour of according full participatory rights in those cases can also be influenced by a look at other international tribunals, namely the International Court of Justice,<sup>94</sup> the NAFTA Court<sup>95</sup> and the European Court of Justice<sup>96</sup> where full procedural rights are guaranteed to the intervening parties and their model could prove very helpful in a potential reform of the DSU.

## 5. Conclusions

It can be opined on the basis of the above that the methodology of the involvement of third parties in proceedings should go as follows: when a request for the establishment of a Panel is made by a WTO Member, any other

92. Panel Report on *India–Patent Protection for Pharmaceutical and Agricultural Chemical Products* (complaint by the EC) at para. 7.20.

93. Appellate Body Report on *EC–Hormones*, at para. 151.

94. Already from the Appellate Body Report on *United States–Standards for reformulated and conventional gasoline*, WT/DS2/AB/R and regularly thereafter the Appellate Body refers to the International Court of Justice as a source of inspiration. Indicatively on the issue of third party rights see Nick Covelli, 'Public International Law and Third Party Participation in WTO Proceedings', (1999) 33 *JWT* 125. Also in this context, David Palmetier, 'The Need for Due Process in WTO Proceedings', (1997) 31 *JWT* 51.

95. Gabrielle Marceau, 'NAFTA and WTO Dispute Settlement Rules: A Thematic Comparison', (1997) 31 *JWT* 25. In accordance with Article 2013 of the NAFTA Treaty third party rights include the right to attend the right to attend all hearings and to make written and oral submissions.

96. Article 37 of the Court's Rules of procedure allows full participatory rights to the intervening parties. See R. Plender, 'Procedure in the European Courts', (1997) 267 *Recueil des Cours* 1 at p. 67.

Member with an interest in the dispute may intervene as a third party. The procedural rights accorded to third parties are limited to those specifically prescribed in Article 10.3 and Appendix 3 paragraph 6 DSU. They can be extended if the Panel so decides in the exercise of its discretion. If a third party opts to initiate its own proceedings, it will be joined to the proceedings in a single panel whenever feasible. The procedural rights accorded to the third party elevated to multiple complainant status are those prescribed in Article 9.2 and extend to the availability of all written submissions, presence in all meetings with the Panel and the right to present its views to the Panel. The procedural rights to be enjoyed by a third party in the eventuality that it initiates its own proceedings on the same matter, but its joinder in a single Panel proves unfeasible, should be extended to the same rights provided for in Article 9.2 DSU whose correct interpretation suggests that those parties are also multiple complainants for the purposes of Article 9. Eventually, if the analysis of Articles 9 and 10 DSU is correct, the term 'enhanced third party rights' becomes partly superfluous and redundant and should be complemented with the term 'rights of multiple but separate complainants'.

The DSU is prone to this interpretation and it is regrettable that the Appellate Body distinguished *EC-Hormones* on the issue. The matter will increasingly reveal its systemic importance, especially in cases involving many complainants.<sup>97</sup> An ongoing dispute between the United States and the rest of the world on the former's decision to impose tariffs on steel products<sup>98</sup> will evince the defects of the Appellate Body reasoning. Until now, in the dispute initiated by the EC,<sup>99</sup> Korea, Japan,<sup>100</sup> Switzerland, Norway, China<sup>101</sup> and New Zealand<sup>102</sup> were joined as multiple complainants in a single Panel. Two more Members, Brazil<sup>103</sup> and Mexico have already joined consultations. If and when they request the establishment of a Panel, it may not be feasible for them to be joined in the single Panel already established neither to harmonize the timetable. In this case, they should be granted the broader participatory rights enshrined in Article 9.2 DSU.

Reiterating the policy considerations set out in the introduction, the role of the Appellate Body in resolving the identity crisis looming in the WTO becomes fundamental. The contentious problems should be resolved with due regard to the intellectual underpinnings of the multilateral trading system and

97. No solution is found in the case of multiple defendants where the DSU is silent. See Allan Rosas, 'Joinder of Parties and Third Party Intervention in WTO Dispute Settlement', in Friedl Weiss (ed.), *Improving WTO Dispute Settlement Procedures: Issues and Lessons from the Practice of Other International Courts and Tribunals* (Cameron May, 2000).

98. *United States-Definite Safeguard Measures on Imports of Certain Steel Products*.

99. WT/DS248

100. Decision by the Dispute Settlement Body, 14 June 2002.

101. Decision by the Dispute Settlement Body, 24 June 2002.

102. Decision by the Dispute Settlement Body, 8 July 2002.

103. DS/WT258.

the legal texts. If norm elasticity is employed to open up the Dispute Settlement to non-Members, it is imperative to do so for WTO Members with a presumed substantial interest in the dispute. Also, if full participation of the WTO Members in its proceedings is the objective, it can be achieved by means of procedural flexibility especially where the wording of the provisions so dictates. Generally speaking, it is a systemic paradox that the NGOs – whose importance as expression of international civil society's input in global governance is ever-increasing – are afforded the maximum possible consideration<sup>104</sup> while the Members of the Organization are not granted the possibility of attending a hearing of a Panel on a dispute directly affecting their interests.<sup>105</sup> However, in an era of transition in the formulation of global governance the calls for democracy and transparency are very timely. The openness to everybody of all decision-making (including jurisprudential) should be guaranteed. In this vein, a modest proposal would be the amendment of the DSU so as to allow third parties to have full access to all documents, attend all stages of the proceedings and make submissions,<sup>106</sup> while a more ambitious proposal should aspire to make the WTO Dispute Settlement public.

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104. <[www.wto.org/english/forums\\_e/ngo\\_e/ngo\\_e.htm](http://www.wto.org/english/forums_e/ngo_e/ngo_e.htm)>.

105. The same line of reasoning seems to be supported by Chi Carmody *supra* note 21, at note 10 with reference to the relevant literature on the topic.

106. Including 21.3, 21.5 and 22.6 DSU and in line with the relaxed stance on *amicus curiae*.

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