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A CRITICAL EVALUATION OF WTO's DISPUTE SETTLEMENT SYSTEM WITH RESPECT TO INTERNATIONAL TRADE DISPUTES

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Abstract
Despite debuting to little fanfare under the General Agreement on Tariffs and Trade (GATT), dispute settlement under the World Trade Organization (WTO) has been called the "back-bone of the multilateral trading system."[1]Indeed, whereas GATT dispute settlement could scarcely have seemed more flawed,[2]the WTO's Dispute Settlement Understanding(DSU) is widely touted for boosting confidence in an increasingly rules-based global economy.[3] The GATT's diplomatic norms have been supplanted by the WTO's more legalistic architecture,[4]resulting in a system in which "right preserves over might."[5] Perhaps unsurprisingly, many observes insist that a wider variety of Members-and developing countries, in particular –are achieving more favourable results in dispute settlement due to reforms introduced with the DSU and the WTO's greater clarity of law. But, unfortunately, the DSU has not been the comprehensive dispute settlement mechanism its framers had hoped to create.[6] After explain the history of dispute settlement system, this paper will discuss the current aspects and procedures of the DSU, examine the problems with these procedures, and suggest how dispute settlement system under the WTO can operate in a more effective and efficient manner.

Key Words: Appellate Body, DSU, GATT, Penal, WTO, DSU.

1.1. Introduction

The General Agreement on Tariffs and Trade (GATT),[7] reformulated and institutionalized as the World Trade Organization (WTO)[8] in 1994, has provided much of the framework through which international trade has flourished for over fifty years. The post-war philosophy of trade liberalization has also paved the way to the creation of regional trade agreements.[9] Regional and multilateral[10] trade arrangements have promoted this growth in trade with the creation of institutions and procedures, particularly dispute settlement systems, through which signatories can ensure and enforce predictable and stable business environments for their citizens. During negotiations, state actors formulate institutions and structures within the agreements to enable the dispute settlement processes which may be most effective in resolving these disputes. The primary purpose of dispute settlement systems in international trade agreements is to "guarantee respect for the agreement(s), in responding to

[1] *Moore, Michael (200). "WTO's Unique System of Settling Disputes Nears 200 Cases in 2000." PRESS/180. Geneva: World Trade Organization .*
[2] *Castel, Jean-Gabriel. ."The Uruguay Round and the Improvements to the GATT Dispute Settlement Rules and Procedures."38 International and Comparative Law Quarterly (October) 1989: 834-849.*
[3] *Petersmann, Ernst-Ulrich.(1997). International Trade Law and the GATT/WTO Dispute Settlement System. London: Kluwer.*
[4] *Jackson, John H(200). "Dispute Settlement and the WTO: Emerging Problems." In The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations. NY: Cambridge University Press.*
[5] *Lacarte-Muro, Julio and Petina Gappah. 2000. "Developing Countries and the WTO Legal and Dispute Settlement System: A View from the Bench." Journal of International Economic Law 3 (3) 395-401.*
[6] *See WTO's Defective Dispute Settlement Process, The Hindu, July 6, 2000.*
[7] *The General Agreement on Tariffs and Trade, signed in 1947, was created by the Bretton Woods meetings that took place in Bretton Woods, New Hampshire (U.S.), in 1944, setting out a plan for economic recovery after World War II, by encouraging reduction in tariffs and other international trade barriers. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat.* ***A-11,*** *55 U.N.T.S. 194 [hereinafter GAT].*
[8] *The World Trade Organization (WTO) is a global trade agency that was established through the GATT Uruguay Round Agreement signed in 1994. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, April 15, 1994, 33 I.L.M. 1125 (1994) [hereinafter Final Act]. The WTO provides dispute resolution, administration, and continuing negotiations for the seventeen substantive agreements that it enforces.*
[9] *Regional trade agreements under GATT Article XXIV have effects of trade creation as well as of trade diversion.* ***GATT,*** *supra note 1, art. XX1V.*
[10] *In the WTO context, multilateral negotiations, as opposed to plurilateral negotiations, imply the participation of all WTO members. See WTO Agreement, supra note 1, art. 11(3).*

violations and legitimate expectations under such agreements."[11] The existence of rules, however, is not the only factor determining whether a dispute settlement system is effective.

Despite debuting to little fanfare under the General Agreement on Tariffs and Trade (GATT), dispute settlement under the World Trade Organization (WTO) has been called the "backbone of the multilateral trading system."[12] Indeed, whereas GATT dispute settlement could scarcely have seemed more flawed,[13] the WTO's Dispute Settlement Understanding (DSU) is widely touted for boosting confidence in an increasingly rules-based global economy.[14] Why such starkly different views of GATT and WTO dispute settlement? The conventional wisdom is that the GATT's diplomatic norms have been supplanted by the WTO's more legalistic architecture,[15] resulting in a system in which "*right* perseveres over *might*."[16] Perhaps unsurprisingly, many observers insist that a wider variety of Members— and *developing* countries, in particular—are achieving more favourable results in dispute settlement due to the reforms introduced with the DSU and the WTO's greater clarity of law.

The 1994 signing of the World Trade organization (WTO) Agreement marked the initiation of the most far-reaching and comprehensive international agreement on trade in the history of the modern world.[17]The creation of an actual trade organization was a marked improvement over the WTO's predecessor, the 1994 GATT. Among the many improvements to the GATT, the WTO Agreement substantially changed the mechanism for dispute settlement whenever conflict arose between member states.[18] This change, was initially hailed as a great improvement over the GATT dispute settlement provisions.[19]

1.2. WTO's Dispute Settlement System

a. Principles of WTO's Dispute Settlement Understanding

'Equity, fast, effective, mutually acceptable' are the principles of the WTO's DSU is following. Disputes in the WTO are essentially about broken promises. WTO members have agreed that if they believe fellow –members are violating trade rules, they will use the multilateral system of settling disputes instead of taking action unilaterally. That means abiding by the agreed procedures, and respecting judgments. A dispute arises when one country adopts a trade policy measures or takes some action that one or more fellow-WTO members considers to be breaking the WTO agreements, or to be a failure to live up to obligations. A third group of countries can declare that they have an interest in the case and enjoy the same rights.

b. Procedure Followed by the WTO's DSU to Settlement International Trade Disputes

Dispute settlement is the central pillar of the multilateral trading system, and the WTO's unique contribution to the global economy. Without a means of settling disputes, the rule-based system would be less effective because the rules could not be enforced. The WTO's procedure underscores the rule of law, and it makes the trading system more secure and predictable. The system is based on clearly –defined rules, with timetables for completing a case.[20] However DSU is not aiming to pass judgments. The priority is to settle disputes, through consultations if possible.

c. How Long to Settle a Dispute?

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[11] *Gabrielle Marceau, The Dispute Settlement Rules of the North American Free Trade Agreement: A Thematic Comparison with the Dispute Settlement Rules of the World Trade Organization, in INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM 489, 491 (Ernst-Ulrich Petersmann ed., 1997).*

[12] *Moore, Michael (2000). "WTO's Unique System of Settling Disputes Nears 200 Cases in 2000." PRESS/180. Geneva: World Trade Organization.*

[13] *Castel, Jean-Gabriel (1997). ."The Uruguay Round and the Improvements to the GATT Dispute Settlement Rules and Procedures."38 International and Comparative Law Quarterly (October) 1989: 834-849.*

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[16] *Lacarte-Muro, Julio and Petina Gappah.(2000). "Developing Countries and the WTO Legal and Dispute Settlement System: A View from the Bench." Journal of International Economic Law 3 (3) 395-401.*

[17] *The purpose behind the WTO Agreement was to form a concrete organization that its predecessor, the GATT, did not.*

[18] *Susan Tiefenbrun(2000),"Free trade and protectionism: The semiotics of seattle".Ariz J. Int'l & Comp.L.,266-68*

[19] *Carolyn B.Gleason & Pamela D. Walther (2000), The WTO Dispute Settlement Implementation Procedures: A System in Need of Reform, 31 Law & Pol'y Int'l Bus. 709.*

[20] *WTO/Understanding the WTO-A unique contribution; retrieved from http://www.wto.org/english/thewto_e/whatis_e/disp1_e.htm on 21/06/2016*

These approximate periods for each stage of a dispute settlement procedure are target figures-the agreement is flexible, in addition, the countries can settle their dispute themselves at any stage. Totals are also approximate.

60 days	Consultation, mediation, etc
45days	Panel set up and panelists appointed
6 months	Final panel report to parties
3 weeks	Final panel report to WTO members
60 days	Dispute settlement body adopts report(if no appeal)
Total= 1 year (without appeal)	
60-90days	Appeals report
30days	Dispute Settlement Body adopts appeals report
Total= 1year 3months (with appeal)	

d. How are Disputes Settled?

Settling disputes is the responsibility of the Dispute Settlement Body which consists of all WTO members[21]. Unless it decides by consensus *not* to do so, the DSB will (1) approve requests to establish panels, (2) adopt panel and Appellate Body reports, and (3) if requested by the prevailing Member in a dispute, authorize the Member to impose a retaliatory measure where the defending Member has not complied. In effect, these decisions are virtually automatic. Given that panel reports would otherwise be adopted under the reverse consensus rule, WTO Members have a right to appeal a panel report on legal issues. The DSU creates a standing Appellate Body to carry out this added appellate function. The Appellate Body has seven members, three of whom serve on any one case.

The WTO dispute settlement process consists of three broad stages: (1) consultations; (2) panel and, if requested, Appellate Body review; and (3) if needed, implementation. In conducting their work, WTO panels and the Appellate Body are guided by Article 3.2 of the DSU, which provides that the WTO dispute settlement system "serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law," adding that "recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements." In an early WTO dispute settlement proceeding, the WTO Appellate Body confirmed that the "general rule of interpretation" set out in Article 31 of the Vienna Convention on the Law of Treaties constitutes an interpretative rule under international law for purposes of Article 3.2. Article 31 generally states that a treaty or other international agreement "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."[22]

Following are the steps in a WTO dispute settlement proceeding, with the applicable DSU articles for each.

First Stage (Consultation (Article 4) up to 60 days)

Under the DSU, a WTO Member may request consultations with another Member regarding "measures affecting the operation of any covered agreement taken within the territory" of the latter. If a WTO Member requests consultations with another Member under a WTO agreement, the latter Member must enter into consultations with the former within 30 days.[23]

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[21] *According to Art.2 of DSU*

[22] *VCLT, art. 31.1. In addition to the text of the agreement, including its preamble and annexes, the "context" for purposes of interpretation under the VCLT includes "(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty." VCLT, art. 31.2. In addition, Article 31.3 of the VCLT provides that treaty interpreters are to take the following into account together with the context of a treaty: "(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties." Article 32 of the Convention permits the use of "supplementary means of interpretation" in order to confirm the meaning determined under Article 31 or when the interpretation under Article 31 "(a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."*

[23] *Once the WTO is notified that a request for consultations has been made, the dispute will be assigned a number.*
Disputes are numbered in chronological order. The prefix WT/DS, followed by the assigned number, is then used to designate WTO documents issued in connection with the dispute. For example, the dispute between the United States and China, China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audio Entertainment Products is DS363, with the U.S. request for consultations sent to China on August 10, 2007, numbered WT/DS363/1, and the WTO Appellate Body report issued on December 21, 2009, numbered WT/DS363/AB/R.

If the dispute is not resolved within 60 days, the complaining Member may ask WTO director-general to mediate or try to help in any other way a panel. A complaining member may request a panel. A panel may be requested before this period ends if the defending Member has failed to enter into consultations or if the disputants agree that consultations have been unsuccessful.

Second Stage (Establishing a Dispute Panel (Articles 6, 8) up to 45 Days for Panel to be appointed plus 6 Months for the Panel to Conclude)
The WTO Member requesting a panel must do so in writing and "identify the specific measures at issue and provide a brief summary of the legal basis for the complaint sufficient to present the problem clearly." Under GATT and now WTO dispute settlement practice, a Member may challenge a measure of another Member "as such," "as applied," or both.[24]

The panel is ordinarily composed of three persons. The WTO Secretariat proposes the names of panelists to the disputing parties, who may not oppose them except for "compelling reasons"[25]. If the disputing parties fail to agree on panelists within 20 days from the date that the panel is established, either disputing party may request the WTO Director-General to appoint the panel members.

Panel Proceedings (Articles 12, 15, Appendix 3)
Before the First Hearing: Each side in the dispute presents its case in writing to the panel.

First Hearing: the case for the complaining country and defence: The complaining country or countries, the responding country and those that have announced they have an interest in dispute, make their case at the panel's first hearing.

Rebuttals: The countries involved submit written rebuttals and present oral arguments at the panel's second meeting.

Experts: If one side raises scientific or other technical matters, the panel may consult experts or appoint an expert review group to prepare an advisory report.

First Draft: The panel submits the descriptive(factual and argument) sections of its report to the two sides, giving them two weeks to comment. This report does not include findings and conclusions.

Interim Report: The panel then submits an interim report, including its findings and conclusions, to the two sides, giving them one week time to ask for a review.

Review: The period of review must not exceed two weeks. During that time, the panel may hold additional meetings with the two sides.

Final Report: A final report is submitted to the two sides and three weeks later, it is circulated to all WTO members. If the panel decides that the disputed trade measure does break a WTO agreement or an obligation, it recommends that the measure be made to conform with WTO rules. The panel may suggest how this could be done.

The Report becomes a Ruling: The report becomes the Dispute Settlement Body's ruling or recommendation within 60days unless a consensus rejects it. Both side can appeal the report.

Adoption of Panel Reports/Appellate Review (Articles 16, 17, 20)
Within 60 days after a panel report is circulated to WTO Members, the report is to be adopted at a DSB meeting unless a disputing party appeals it or the DSB decides by consensus not to adopt it. Article 17.6 of the DSU limits appeals to "issues of law covered in the panel report and legal interpretations developed by the panel." Within 60 days of being notified of an appeal (extendable to 90 days), the WTO Appellate Body (AB) must issue a report that upholds, reverses, or modifies the panel report.

[24] *Appellate Body Report, (nited States—Anti-dumping Act of 1916, paras. 60-61, WT/DS136/AB/R, WT/DS162/AB/R (August 28, 2000).*
[25] *Art. 8.6*

Implementation of Panel and Appellate Body Reports (Article 21)

In the event that the WTO decision finds the defending Member has violated an obligation under a WTO agreement, the Member must inform the DSB of its implementation plans within 30 days after the panel report and any AB report are adopted. If it is "impracticable" for the Member to comply immediately, the Member will have a "reasonable period of time" to do so. The Member is expected to implement the WTO decision fully by the end of this period and to act consistently with the decision after the period expires.[26] Compliance may be achieved by withdrawing the WTO-inconsistent measure or, alternatively, by modifying or replacing it.[27]

Compliance Panels (Article 21.5)

Either disputing Member may request that a compliance panel be convened under Article 21.5 of the DSU in the event the disputants disagree as to whether the defending Member has complied. The disagreement may have do with whether a compliance measure exists, or whether a measure that has been taken to comply is consistent with the WTO decision in the case. The DSU provides that, wherever possible, the original panel should be re-convened to hear the compliance dispute. A compliance panel is expected to issue its report within 90 days after the dispute is referred to it, but it may extend this time period if needed. Compliance panel reports may be appealed to the WTO Appellate Body and both reports are subject to adoption by the DSB.

Compensation and Suspension of Concessions (Article 22)

If the defending Member fails to comply with the WTO decision within the established compliance period, Article 22 permits the prevailing Member to request that the defending Member negotiate a compensation agreement. If such a request is made and agreement is not reached within 20 days after the compliance deadline expires, or, more likely, if negotiations have not been requested, the prevailing Member may request authorization from the DSB to retaliate, that is, suspend concessions or obligations owed the non-complying Member under a WTO agreement. Article 22 requires the DSB to authorize the request within 30 days after the compliance deadline expires unless the DSB decides by consensus not to do so, or the defending Member requests that the retaliation proposal be arbitrated.

1.4. Criticisms of WTO's Trade Dispute Settlement System

1. Sanctions are unfair to, and unworkable for, most developing countries. Sanctions are a tool for the economically powerful. Sanctions also run counter to the WTO's ethos. It is there fore unacceptable to retain sanctions as the ultimate method of enforcement.
2. Lack of transparency: Lack of transparency is a critical issue for the credibility of the WTO dispute settlement system. In practice, amicus curiae brief do little to contribute to transparency, but not satisfactory. The result is that the WTO has neither adequate transparency in terms of the openness of its dispute settlement processes to public observation nor adequate provisions for any amicus or intervener process.
3. Although withdrawal of DSU rights is fair for all members, it is, on its own. a blunt instrument to ensure compliance and gives no political leeway. It is therefore unacceptable as the only enforcement mechanism. It undermines the legittmacy of the system.
4. Undesirable long time table: There are relevant imperfections in the WTO dispute settlement system. Undesirably long timetables to confirm the treaties by a Members in breach is one of them. Despite the deadlines, a full dispute settlement procedure still takes a considerable amount of time, during which the plaintiff suffers continued economic harm if the challenged measure is indeed inconsistent with WTO regulations.
5. No Interim relief: Under WTO'S DSU there is no provisional measures are available to protect the economic and trade interest of the successful plaintiff during the dispute settlement procedure.
6. No chance claim cost of expenditure: Moreover, even after prevailing in dispute settlement, a successful plaintiff will receive no compensation for the harm suffered during the time given to the respondent from the other side for its legal expenses.[28]
7. Regarding Review: In the review matter there is no clear understanding about when it should be undertaken or what procedures it should entail.

[26] *E.g., Appellate Body Report, United States—Measures Relating to Zeroing and Sunset Reviews, Recourse to Article 21.5 of the DSU by Japan, paras. 153-158, WT/DS322/AB/RW (August 18, 2009).*
[27] *Ibid. para. 154*
[28] *'A Handbook on the WTO Dispute Settlement System': WTo Secretariat Publication prepared by the Legal Affairs Division and Appellate Body, Cambridge 2004,p.117.*

8. In case of suspension of concessions, again, the language of the treaty leaves room for different interpretations of when it may be requested, which gives the Members an opportunity to delay the WTO's actions.
9. Political influence: According to some surveys, decisions made by the Appellate Body show a practice of allowing political considerations to take precedence over legal reasoning when choosing whether to rule against a politically powerful Member. Those examinations conclude that the Appellate body seems to be reluctant to make strong and unequivocal adverse rulings against powerful WTO Members.[29]Even Appellate Body members are selected through a process in which the powerful Members may veto candidates whom they assess as likely to engage in inappropriate or undesired lawmaking.[30]
10. No dissent opinion in WTO'DSU: There has been almost no dissent in World Trade Organization dispute settlement reports. Fewer than 5% of panel reports and 2% of Appellate Body reports contain separate opinion of any kind.[31]Keeping the lid on dissents may ultimately erode the strength of the dispute settlement system and hinder the ability of the WTO Members to make appropriate changes to the agreements.[32]
11. Sanctions are unfair to, and unworkable for, most developing countries. Sanctions are a tool for the economically powerful. Sanctions also run counter to the WTO's ethos. It is there therefore unacceptable to retain sanctions as the ultimate method of enforcement.

1.5 Suggestions to Strengthen the WTO's Dispute Settlement System

1. With respect to remedies:
    a. The WTO remedies for non-implementation should incorporate the possibility of substituting fines or damages as a remedy in lieu of suspension of concessions.
    b. Some degree of retroactivity, so as to help encourage compliance with the reasonable period of time[33].
    c. Some adjustment mechanism to increase the level of sanction over time, so as to preclude non-compliance from becoming an acceptable status quo position.
2. With respect to improving compliance of WTO's dispute settlement decisions: three changes in particular should be given serious consideration. The WTO remedies for non-compliance should incorporate
    a. The possibility of substituting fines or damages as a remedy in lieu of suspension of concessions
    b. Some degree of retroactivity, so as to help encourage compliance within the reasonable period of time, and
    c. Some adjustment mechanism to increase the level of sanctions over time, so as to preclude non-compliance from becoming
3. Public Access: The nature and value of the dispute settlement must be sold to a wide public and political audience.
4. Moving from Ad-hoc to permanent panelists: As already recommended by the EC and its member states are of that changing the way panelists are selected and providing a more permanent basis for their work is likely to lead faster procedures and increase the quality of the panel report.
5. More generally, the Working Procedures could be more developed, on the experienced gained so for, in order to ensure increased consistency in the way panels conduct the proceedings.

1.6. Conclusion

The WTO dispute settlement system seems a permanent part of the international economic law landscape and it is difficult to conceive of the multilateral trading system without it. After all , the dispute settlement system has been one of the success stories of the WTO. Of course, there are criticisms and there are many proposals in the context of DSU reform . But no government is currently calling for the abolition of WTO dispute settlement. Indeed, many proposals for reform are calling for quicker, more effective dispute settlement.[34] Modifications may be on the horizon, but surely the future of WTO dispute settlement is assured.

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[29] G.Garrett, J. McCaii Smith, The Politics of WTO Dispute Settlement, paper presented to the Annual Meeting of the American Political Science Associayion,1999, http://www.yale.edu/leitner/pdf/1999-05.pdf(visited on Nov.10,2015)
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[34] See http://docsonlie.wto.org,TD/DS/W.*

Reform is an urgent necessity for the continued stability and predictability of the entire regime. It may not come about quickly but the warning signals are there already. Many in the large industrial countries are now becoming uncomfortable with tariff sanctions and proposing alternatives.

The DSU itself is indeed a milestone in the history of international legal relations. It defined a benchmark for other international organizations and shows how systems can be crafted to constrain sovereign and equal states legally. In the present age of globalization, states are willing to trade part of their sovereignty for benefits of received from coordinated efforts and international governance. Shallow integration is being followed by deep integration, which ranges from consultation, to coordination and harmonization, to coordination. The points of friction between these members of the international community are also increasing by the same degree. In such a world, states need to devise new ways to resolve their disputes on the international stage. With an improved and reformed institutional compliance mechanism, the DSU will take another giant step towards strengthening the rule of law in international relations.

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