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An Anatomy of the Dispute Settlement Mechanism in WTO: Recommendations for Reform

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Abstract

The dispute settlement mechanism under the World Trade Organization is the nucleus of the multilateral trading system and is based on a systematic, elaborate and comprehensive body of rules as enumerated in the Dispute Settlement Understanding (DSU) and has been characterized as the most active international adjudicative mechanism in the world at present. Despite such praise and positive attributes, the mechanism has sometimes been subjected to criticisms due to some inherent limitations in the whole process of settlement of trade disputes between the member states. This article examines and explores these limitations of the mechanism that have found place in recent WTO literatures in addition to the success and achievement of the same. Efforts have also been made through this article to find solutions to the difficulties with the existing system and while doing so the author attempted to suggest some improvements and recommended reforms which have also been reflected and supported in the legal literature on international trade issue. It is expected that these reforms will only add to the success story of the WTO dispute settlement mechanism and will contribute towards enhancement of the efficiency of the mechanism in resolving trade disputes between member states of the WTO.

Key Words: WTO, Dispute, Settlement, System

Introduction

On 1 January, 1995, a new international economic organization came into being, resulting from the lengthy, extensive and complex Uruguay Round trade negotiation in the context of the General Agreement on Tariffs and Trade (GATT). The Uruguay Round Agreement of the GATT/WTO has been considered as 'the most important event in recent economic history'. In addition to this, the WTO has also been described as the 'central international economic institution', and states are getting more and more

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engaged with the detailed processes of the WTO, especially its Dispute Settlement Procedure. The organization has put into practice a quite remarkable set of procedures for Dispute Settlement among nations concerning trade matters.[1] As a result of the Uruguay Round of Multilateral Trade Negotiations (MTN) the dispute settlement system that has emerged under the WTO is considered as being of central importance to the WTO. **The Understanding on Rules and Procedures Governing the Settlement of Disputes** or the **Dispute Settlement Understanding (DSU)** is taken up as **Annex 2 to the WTO Agreement** and fulfills one of the key functions of the organization.

Article 3.2 of the DSU states that: *"The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system"*. While DSU is based on upon GATT practice, which evolved over the course of almost 50 years (1947-1994), it builds upon and develops the means for resolving disputes in the world trading system that previously existed under the GATT 1947.

The WTO Dispute Settlement Mechanism at a Glance

The prime object and purpose of the WTO dispute settlement system is the prompt settlement of disputes between WTO members concerning their respective rights and obligations under WTO law. As per Article 3.3 of the DSU, the prompt settlement of such dispute is essential to effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members. Further the object and purpose of the dispute settlement system is for members to settle disputes with other Members through the multilateral procedure of the DSU, rather than through unilateral action. Article 3.2 of the DSU states that the dispute settlement system aims not only to preserve the rights and obligations of Members under the covered agreements but also to clarify the existing provisions of those agreements.

Methods of WTO Dispute Settlement

The DSU provides for the following methods to settle disputes between WTO Members:

- Consultations or negotiations
- Adjudication by panels and the Appellate Body
- Arbitration
- Good offices, conciliation and mediation

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[1] Jackson, John H., "Dispute Settlement and the WTO Emerging Problems", 1 (1998) *Journal of International Economic Law*, pp. 329-351 at pp. 329-330

Jurisdiction of the WTO Dispute Settlement System

The WTO dispute settlement system has jurisdiction over any dispute between WTO members arising under the 'covered agreements'.[2] Article 1.1 of the DSU states:

> *The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding.*

The jurisdiction of the WTO dispute settlement system is compulsory in nature. A complaining Member is obliged to bring any dispute arising under the covered agreements to the WTO dispute settlement system.[3] On the other hand, a responding Member has no choice but to accept the jurisdiction of the WTO dispute settlement system. Membership of the WTO constitutes consent to and acceptance of the compulsory jurisdiction of the WTO dispute settlement system. Article 23.1 of the DSU both ensures the exclusivity of the WTO vis-à-vis other international forum and protects the multilateral system from unilateral conduct. The WTO dispute settlement has only contentious, and not advisory, jurisdiction. The WTO dispute settlement system is called upon to clarify WTO law only in the context of an actual dispute. In ***US – Wool Shirts and Blouses***[4], the Appellate Body held:

> *We do not consider that Article 3.2 of the DSU is meant to encourage either panels or the Appellate Body to 'make law' by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute.*

Access to the WTO Dispute Settlement System

Access to or use of the WTO dispute settlement system is limited to Members of the WTO. The WTO dispute settlement system is thus, a government to government dispute settlement system for disputes concerning rights and obligations of WTO Members. Each covered agreement contains one or more dispute settlement provisions and these provisions set out when a Member can have recourse to the dispute settlement system. The basis for a complaint is usually a breach of a WTO obligation. The WTO system provides for three types of complaints: **(i)** Violation Complaints **(ii)** Non-violation Complaints **(iii)** Situation Complaints.

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[2] The covered agreements, listed in Appendix 1 to the DSU, include the WTO agreement, the GATT 1994 and all other multilateral agreements on trade in goods, the GATS, the TRIPS Agreement and the DSU.

[3] Article 23.1 DSU.

[4] WTO Report of the Appellate Body on *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India,* WT/DS33/AB/R(25 April 1997), available at http://www.worldtradelaw.net/reports/wtoab/us-woolshirts(ab).pdf

In the case of a violation complaint, there is a presumption of nullification or impairment when the complainant demonstrates the existence of the violation. Article 3.8 of the DSU states:

> *In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment.*

In the case of a non-violation complaint, the complainant must demonstrate that there is nullification or impairment of a benefit or that the achievement of an objective is impeded. This is often likened to the impairment of legitimate expectations of a benefit, e.g. accruing from a lowered applied tariff, which has not been forthcoming or sustained. There are so-called "situation complaints" arising from "the existence of any other situation".

Individual, companies, international organizations and non-governmental organizations have no direct access to the WTO dispute settlement system. Private parties can get their position across with respect to a complaint in the dispute settlement system by means of an *amicus curiae* or "friend of the court" brief. Due to the inter-governmental nature of WTO dispute settlement this matter is nowhere regulated in the DSU. Instead, a practice has grown up of a limited acceptance of *amicus curiae* briefs before WTO panels and the Appellate Body, on the basis of a panel's "right to seek information" under Article 13.1 DSU, as determined by the Appellate Body in the ***US – Shrimp*** **case (1998)**[5].

Remedies for breach of WTO Law

The DSU provides for three types of remedy for breach of WTO law:

1. One final remedy, namely, the withdrawal of the WTO inconsistent measure and
2. Two temporary remedies, compensation and suspension of concessions or other obligations, commonly referred to as retaliation.

Article 3.7 of the DSU states:

> *In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements.*

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[5] WTO Report of the Appellate Body on *United States - Import Prohibition of Certain Shrimp and Shrimp Products,* WT/DS58/AB/R(12 October 1998), available at http://www.worldtradelaw.net/reports/wtoab/us-shrimp(ab).pdf

If a Member has not withdrawn or amended the WTO inconsistent measure by the end of the reasonable period of time for implementation, the DSU provides for the possibility of recourse to temporary remedies which may be compensation or suspension of concessions or other obligations under Article 22.1 of the DSU. Retaliation is very different in nature from compensation. When the reasonable period of time for implementation has expired and the parties have not been able to agree on compensation, the injured party may request authorization from the DSB to retaliate against the offending party by suspending concessions or other obligations with respect to that offending party.

The Institutions of WTO Dispute Settlement

There are three principal organs involved in WTO dispute settlement – the *ad hoc* Panels, the Appellate Body and the Dispute Settlement Body (DSB). The function of a WTO panel is to examine a dispute between Members and to arrive at conclusions that "will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements".[6]

The function of the Appellate Body is "to hear appeals from panel cases"[7] and to that end an appeal is "limited to issues of law covered in the panel report and legal interpretations developed by the panel."[8] The function of the DSB is to administer the rules and procedures set out in the DSU. Consequently the DSB has the authority to establish panels, adopt panel and Appellate Body reports, monitor the implementation of rulings and recommendations and to authorize the suspension of concessions and other obligations under the covered agreements.[9]

The Process of Settling a Dispute in the WTO

The first step is for a WTO Member government to request another Member to enter into consultations.[10] Such requests for consultations must be notified to the DSB.[11] Where a party has notified the DSB that it has requested consultations and these have failed, it may bring the matter before the DSB, which must establish a panel.[12] A panel is allowed up to six months to examine a case.[13] Normally the Panel holds two meetings with the parties[14]

[6] Article 11 DSU
[7] Article 17.1 DSU
[8] Article 17.6 DSU
[9] Article II:3 and IV:3 of the WTO Agreement and Article 2.1 DSU
[10] Article 4.2 DSU
[11] Article 4.4 DSU
[12] Article 6.1 DSU
[13] Article 12.9 DSU

with both written submissions and oral hearings during two successive phases. Once parties have been heard the Panel will complete the drafting of its report. The Panel will then proceed to issue its Interim Report to the parties prior to the final circulation of the report to all WTO Members.[15] The Panel Report is then circulated to all WTO Members. The DSB moves in its regular meetings to adopt panel reports within 60 days after their circulation to all WTO Members, unless a party to the dispute formally notifies the DSB of its intention to appeal the Panel's report whereupon the DSB will only move for adoption after the appeal has been heard.

If the complainant or the defendant notifies the DSB of its intention to appeal against the Panel's report within 60 days of circulation[16], the Appellate Body will normally hear the appeal and issue its ruling within 60 days from notification. The Appellate Body can uphold, modify or reverse the legal findings and conclusions of the Panel.[1] An Appellate Body ruling is moved for adoption by the DSB within 30 days following its circulation to all WTO Members.[2]

Implementation of DSB Reports

Once the DSB has adopted a Panel Report or an Appellate Body Report, the relevant Member must inform the DSB within 30 days of how it intends to implement its recommendations and rulings.[3] Where there is disagreement as to whether a Member has taken measures in order to comply with the recommendations and rulings, recourse may be made to the implementation panel under Article 21:5 DSU.

Success of the WTO Dispute Settlement System

The WTO dispute settlement system was not established out of the blue rather this system is based on and has taken on board, almost fifty years of experience in the resolution of trade disputes in the context of the GATT 1947. While quite successful in resolving disputes to the satisfaction of the parties, the GATT dispute settlement had some serious shortcomings which became acute in the course of 1980's. The most important shortcoming was that the findings and conclusions of the panels of experts adjudicating the disputes only became legally binding when adopted by consensus by the GATT Council. The responding party could thus prevent any unfavourable

[14] Article 12 DSU
[15] Article 15:2 DSU
[16] Article 16:4 DSU
[1] Article 17.13 DSU
[2] Article 17.4 DSU
[3] Article 21:3 DSU

conclusions from becoming legally binding upon it. The WTO dispute settlement system remedied this and a number of other shortcomings of the GATT dispute settlement system. Thus, the DSU is considered to be one of the most important achievements of the Uruguay Round negotiations.[4]

In contrast to the meager number of paragraphs on dispute settlement found in the GATT 1947, the new DSU has thirty-five pages of reasonably elaborate procedures. The achievements of the new text were as follows:[5]

1. It established a unified dispute-settlement system for all parts of the GATT/WTO system, including the new subjects of services and intellectual property. No longer do different subjects have different dispute settlement dispute settlement procedures. There are certain variations and embellishments on the dispute settlement procedures contained in some of the various texts of the Uruguay Round, however, the central core process is unified.
2. The text reaffirms the right of a complaining government to have a panel process initiated, thus preventing blocking at that stage. The earlier practice under GATT was vulnerable to such blocking.
3. The text establishes an appellate procedure that is a substitute for some of the council approval process of a panel report and overcome blocking of a dispute settlement panel report. It has been described as "automaticity", meaning that under the procedure it is assumed that it will be virtually impossible to block a panel report.
4. The DSU contains explicit text concerning the implementation or "compensation" phase of a dispute, when a losing party declines to adequately implement its obligations pursuant to the dispute determinations and recommendations.
5. An extremely interesting development in the DSU that tracks some of the practice of the late years of the GATT is to separate the procedures for "violation complaints" from those of "non-violation complaints". The procedure for implementing the latter is significantly different from the former, in that in the latter case a country is not obliged to perform a recommendation or bring its law and practice into consistency. Instead it

[4] Bossche, P.V.D., *The Law and Policy of the World Trade Organization Text, Cases and Materials,* Second Edition, Cambridge University Press, 2008, at pp. 170-171.

[5] Jackson, John H., *The World Trading System Law and Policy of International Economic Relations,* Second Edition, 1997, The MIT Press, pp. 124-126.

is obliged to negotiate for and provide compensation to redress the nullified benefits.

The WTO dispute settlement system has been operational for since last nineteen years. In this period it has arguably been the most prolific of all international dispute settlement systems. Between 1 January, 1995 and 1 December, 2007, a total of 369 disputes had been brought to the WTO for resolution. That is more than were brought to the GATT in the forty-seven years between 1948 and 1995. In almost a quarter of the disputes brought to the WTO for resolution, the parties were able to reach an amicable solution through consultations or the dispute was otherwise resolved without recourse to adjudication. The WTO dispute settlement system has been used by developed country Members and developing country Members alike.[6] This activity implies confidence in the system and places political pressure on all states to comply, because many, including the most important trading nations, are both complainants and respondents in the various trade disputes considered.[7]

The 2004 Sutherland Report on ***The Future of the WTO*** stated:[8]

The current WTO dispute settlement procedures… are to be admired and are a very significant and positive step forward in the general system of rule-based international trade diplomacy. In many ways, the system has already achieved a great deal and is providing some of the necessary attributes of 'security and predictability', which traders and other market participants need….

As stated by the Sutherland Report, the WTO dispute settlement system imposes disciplines on Members so that no unilateral trade measures should be taken without recourse to the dispute settlement procedure. Unilateral trade sanctions were a major trade issue in 1980's and early 1990's. The last time the United States initiated unilateral action was in its dispute with Japan over access to the Japanese automobile market in 1995. Since the establishment of the WTO, the United States has adopted the policy of bringing cases to the WTO rather than resorting to unilateral actions.[9]

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6 Bossche, P.V.D., *The Law and Policy of the World Trade Organization Text, Cases and Materials,* Second Edition, Cambridge University Press, 2008, at p. 169.

7 Matsushita, M., Schoenbaum, T.J. & Mavroidis, P.C., *The World Trade Organization Law, Practice and Policy*, Second Edition, Oxford University Press, 2006, at p. 104.

8 Bossche, P.V.D., *The Law and Policy of the World Trade Organization Text, Cases and Materials,* Second Edition, Cambridge University Press, 2008, at p. 308.

9 Matsushita, M., "The Sutherland Report and Its Discussion of Dispute Settlement Reforms", 8 (2005) No. 8, *Journal of International Economic Law*, pp. 623-629 at p. 623.

The WTO dispute settlement system makes an important contribution to the objective that within the WTO 'right prevails over might'. The WTO dispute settlement system offers an opportunity for economically weak Members to challenge trade measures taken by economically much stronger members. As demonstrated by the frequent and broad use of the system by developed as well as developing country members, the current system is well regarded by Members. The system works to the advantage of all Members, but it especially gives security to the weaker Members that have often, in the past, lacked the political or economic clout to enforce their rights and to protect their interests. Special dispute settlement rules and procedures for developing country Members and the Advisory Centre on WTO Law aim to help developing country Members to make use of this opportunity.[10]

There are cases such as ***US – Restrictions on Imports of Cotton and Man-made Fibre Underwear, (1997)***[11] and ***EC – Trade description of Sardines (2002)***[12], in which developing country Members respectively challenged trade measures of the USA and the European Communities and prevailed over them.[13] In addition, for virtually the first time in GATT/WTO history, developing countries have brought cases against other developing countries.[14] Another optimistic indication is the general spirit of compliance with the result of the dispute settlement procedures. Even the major powers have indicated that they will comply with the mandates of the dispute settlement reports when they are finalized and formally adopted.[15]

Problems with the Existing System

The WTO dispute settlement system deserves high praise although there have been some criticisms raised against the process. The principal criticisms regarding the process may be summarized as follows:

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10 Bossche, P.V.D., *The Law and Policy of the World Trade Organization Text, Cases and Materials,* Second Edition, Cambridge University Press, 2008, at p. 308.

11 WTO Report of the Panel on *United States - Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/R (8 November 1996), available at http://www.worldtradelaw.net/reports/wtopanelsfull/us-underwear(panel)(full).pdf

12 WTO Report of the Appellate Body on *European Communities – Trade Description Of Sardines*, WT/DS231/AB/R (26 September 2002), available at http://www.worldtradelaw.net/reports/wtoab/ec-sardines(ab).pdf

13 Matsushita, M., "The Sutherland Report and Its Discussion of Dispute Settlement Reforms", 8 (2005) No. 8, *Journal of International Economic Law*, pp. 623-629 at p. 624.

14 Jackson, John H., "Dispute Settlement and the WTO Emerging Problems", 1 (1998) *Journal of International Economic Law*, pp. 329-351 at p. 341.

15 Jackson, John H., "Dispute Settlement and the WTO Emerging Problems", 1 (1998) *Journal of International Economic Law*, pp. 329-351 at p. 340.

1. Some argue that the Appellate Body has overstepped the boundary assigned to it and in fact made law instead of interpreting law. If the Appellate Body makes a mistake, there is no mechanism to correct it. Thus, there are no effective "checks and balances" operating within the WTO.[16]

2. One of the most controversial issues in the WTO context is the question of transparency. It has been argued that the written submissions and information provided to panels should be disclosed to the public. The procedures or panelist selection are also currently closed to the public. Scant attention is being paid to the transparency in the implementation phase which is crucial in evaluating the overall accomplishment of the system.[17]

3. Under the DSU, panels are obliged to submit their legal analysis for comments by the parties. A party may submit a written request to the panel to review specific aspects of this report prior to its adoption. It has been argued that such an interim review might turn into an unnecessary obstacle in expeditious processing of the disputes when there is an appellate procedure.[18]

4. Because of the fact that the overwhelming majority of the panel decisions being appealed, some observers have argued that the major drawback of the DSU is the inability of the Appellate Body to decide whether a request for appeal is suitable, therefore making the appellate proceedings automatic in practice. Again, the Appellate Body has no authority to remand a case back to the panel for further proceedings.[19]

5. The letter of the DSU pays special attention to the least developed countries and the developing countries by providing special rules applicable exclusively to them. Practical use of these rules remains

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[16] Matsushita, M., Schoenbaum, T. J. & Mavroidis, P. C., *The World Trade Organization Law, Practice and Policy*, Second Edition, Oxford University Press, 2006, at p.132.

[17] Fudali, C. "A Critical Analysis of the WTO Dispute Settlement Mechanism: Its Contemporary Functionality and Prospects", 49 (2002) *Netherlands International Law Review*, pp. 39-80 at p. 54.

[18] Fudali, C. "A Critical Analysis of the WTO Dispute Settlement Mechanism: Its Contemporary Functionality and Prospects", 49 (2002) *Netherlands International Law Review*, pp. 39-80 at p. 55.

[19] Fudali, C. "A Critical Analysis of the WTO Dispute Settlement Mechanism: Its Contemporary Functionality and Prospects", 49 (2002) *Netherlands International Law Review*, pp. 39-80 at pp. 58-59.

unsatisfactory as there are still problems in finding sufficient number of experts available and in inadequate legal assistance.[20]

6. Panels and the Appellate Body have the authority to accept written briefs submitted by individuals, companies or organizations, commonly referred to as the amicus curiae briefs which has been controversial and criticized by most Members. There are two main reasons for the antagonism of many Members, especially developing country Members. First Members fear that the need to consider and react to amicus curiae briefs will take up scarce legal resources and will further bend the procedures in favour of Members with more legal resources. Secondly, developing country Members note that the most vocal and best funded NGOs often take positions that are unfriendly to the interests and policies of developing country members. To date, WTO Members have been unable to adopt any clear rules on amicus curiae briefs.[21]

7. In some cases a WTO Member may have may only have ten days to formulate an objection to the panel report. Such a short time may often prove to be insufficient to effectively prepare the written explanations of objections. The Appellate Body will generally have 60 days to issue its report although it may extend this period to 90 days. Even this prolonged period may occasionally be difficult to respect in view of the complex legal issues involved in many proceedings. Most notably in the ***EC-Hormones***[22] case, the Appellate Body was unable to finish its report before the 90 days deadline.[23]

8. The current system of remedies in the WTO provides Members with a choice between trade compensation and retaliation. There is a problem in that trade compensation is only possible with the consent of the non-complying country and thus often remains theoretical, while retaliation has the disadvantage of requiring the complaining Member to 'shoot

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[20] Fudali, C. "A Critical Analysis of the WTO Dispute Settlement Mechanism: Its Contemporary Functionality and Prospects", 49 (2002) *Netherlands International Law Review*, pp. 39-80 at pp. 65-66.

[21] Bossche, P.V.D., *The Law and Policy of the World Trade Organization Text, Cases and Materials,* Second Edition, Cambridge University Press, 2008, at pp. 191, 195.

[22] WTO Report of the Appellate Body on *EC Measures Concerning Meat and Meat Products (Hormones),* WT/DS26/AB/R (16 January 1998), available at http://www.worldtradelaw.net/reports/wtoab/ec-hormones(ab).pdf

[23] Fudali, C. "A Critical Analysis of the WTO Dispute Settlement Mechanism: Its Contemporary Functionality and Prospects", 49 (2002) *Netherlands International Law Review*, pp. 39-80 at pp. 68-69.

itself in the foot' by restricting imports and thus its own industrial users, importers and consumers. The current system also does not provide for effective reparation of damages suffered by the Member and private party concerned and these problems are more urgent for developing countries.[24]

9. In the dispute settlement practice, compensation and retaliation are generally viewed as temporary measures in case of non-compliance. If recommendations are not implemented, the prevailing party may be entitled to seek compensation or the authority to suspend concessions previously granted to that WTO Member. As a result of these benevolent rules, the implementation of WTO decision depends to a large extent on voluntary compliance. The limited repercussions for disobedience could be interpreted as giving an opportunity to disregard the panel or the Appellate Body recommendations.[25]

10. Retaliation is only called for when the respondent has failed to implement the recommendations i.e. has filed to take a WTO consistent implementing measure. The complainant and the respondent may disagree on whether such implementing measure exists or whether it is WTO consistent. To resolve such disagreements, the DSU provides for the Article 21.5 procedure. However, due to sloppy drafting of the DSU, there is a conflict between the timeframe for this Article 21.5 procedure and the timeframe within which authorization for the suspension of concessions and other obligations must be requested and obtained from the DSB. Pursuant to Article 22.6, the authorization for retaliation must be granted by the DSB within 30 days of the expiry of the reasonable period of time. It is clear that it is not possible to obtain authorization for retaliation within thirty days, in cases where the complainant must first submit the disagreement on implementation to an Article 21.5 compliance panel. The problem of the relationship between these two procedures remains, and a change to the DSU is required to resolve the problem.

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[24] Bronckers, M. and Broek, N., "Financial Compensation in the WTO: Improving the Remedies of WTO Dispute Settlement", 8 (2005) *Journal of International Economic Law*, pp. 101-126 at p. 101.

[25] Fudali, C. "A Critical Analysis of the WTO Dispute Settlement Mechanism: Its Contemporary Functionality and Prospects", 49 (2002) *Netherlands International Law Review*, pp. 39-80 at p. 72.

11. The fact that many cases have been brought to the system leads to the criticism that the system is being overused and some of the proposals for DSU reform involve exhorting Members to exercise restraint in resorting to dispute settlement.[26]

Need for Reform of the Existing System

The WTO system for resolving trade disputes between WTO Members has been a remarkable success in many respects. However, the current system can undoubtedly be further improved.[27]

Negotiations on the further improvement of the WTO dispute settlement system have in one form or another been conducted ever since 1998. In May 2003, the Chair of the Dispute Settlement Body circulated a document, commonly referred to as the Chairman's Text, which contained proposals for reform on a significant number of issues, including[28]:

i extension of third party rights;

ii. improved conditions for Members seeking to join consultations;

iii introduction of remand and interim review in appellate review proceedings;

iv. problems concerning the suspension of concessions or other obligations;

v. enhancement of compensation as a temporary remedy for breach of WTO law;

vi. strengthening of notification requirements for mutually agreed solutions; and

vii. strengthening of special and differential treatment for developing country Members.

In the absence of a sufficiently high level of support, other proposals by Members were not included in the Text which includes, accelerated procedures for certain disputes, a list of permanent panelists, increased control of Members over Panel and Appellate Body reports, treatments of amicus curiae briefs, collective and monetary retaliation etc.[29] Members have

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[26] Mcrae, D., "What is the Future of WTO Dispute Settlement?", 7 (2004) *Journal of International Economic Law*, pp. 3-21 at p.5.

[27] Bossche, P.V.D., *The Law and Policy of the World Trade Organization Text, Cases and Materials*, Second Edition, Cambridge University Press, 2008, at p. 316.

[28] Bossche, P.V.D., *The Law and Policy of the World Trade Organization Text, Cases and Materials*, Second Edition, Cambridge University Press, 2008, at p. 309.

[29] Bossche, P.V.D., *The Law and Policy of the World Trade Organization Text, Cases and Materials*, Second Edition, Cambridge University Press, 2008, at p. 309.

generally welcomed the Chairman's Text but were unable to agree to the proposals for reform it contained. Certain Members had conceptual problems with some of these proposals or objected to the fact that other proposals had been excluded from the Text. New proposals have been tabled since the circulation of the Text in 2003. To date Members have not been able to reach agreement on the reform of the DSU.

Improvements suggested by the Sutherland Report

"The Future of the WTO", most commonly known as the Sutherland Report, which is a report on the future of the multilateral trading system, including recommendations on reforms and it was prepared by the Director-General's Consultative Board. The reforms proposal as suggested by the Report may be summarized as follows[30]:

- The WTO is not equipped with the power to coerce the non-complying parties to comply with its requirements by means used by domestic courts. The Report states that, to allow governments to buy out their obligations by providing compensation or enduring suspension of obligation creates major asymmetries of treatment in the system as it favours the rich and powerful countries which can afford such 'buy outs' while retaining measures that harm or distort trade. One proposed solution to this is to allow monetary compensation from the party required to comply with a report, to substitute for compensatory market access measures by the winning aggrieved disputant. According to Mitsuo Matsushita, a monetary compensation is a much better approach than suspension of concessions.
- As noted by the Sutherland Report, critics argue that the Appellate Body has been making law rather than interpreting law and is too pro-liberal trade and neglects state sovereignty. The Report suggests that a more constructive approach might be to occasionally select particular findings for analysis by an impartial expert group of the DSB, so as to provide a constructive criticism of the report. This relates to the issue of 'checks and balances' in the WTO governance. The idea is not to create a super Appellate Body but to provide constructive criticism to the reports of the Appellate Body without any power of overruling them.
- The Appellate Body can uphold, modify or reverse findings of the panel but the provision of remand is lacking. The Report suggests that the

[30] Matsushita, M., "The Sutherland Report and Its Discussion of Dispute Settlement Reforms", 8 (2005) No. 8, *Journal of International Economic Law*, pp. 623-629 at pp. 624-627.

opportunity for the Appellate Body to remand a case to the first level panel should be clarified.

- The amicus curiae brief has been one of the most controversial issues in the dispute settlement system of the WTO. On this, the Report states that with regard to amicus briefs, the Consultative Board agrees with the procedures already developed for acceptance and consideration of the submissions of this type. However, those involved in these proceedings see important need to develop general criteria and procedures to appropriately handle such submissions.
- According to the Consultative Board in the Sutherland Report, the degree of confidentiality of the current dispute settlement proceedings can be seen as damaging to the WTO as an institution. Thus, it was recommended that the first level panel hearings and the Appellate Body hearings should generally be open to the public.

Some Recommendations

In addition to the aforementioned observations of the Sutherland Report the following reforms may be recommended:

- The Doha Development Agenda emphasizes the importance of capacity building of developing country Members as regards international negotiations and dispute settlement. Each developing Member may establish a WTO Centre, pool expertise and resources together and promote research and training programme.[31]
- For future panels and Appellate Body, there will be difficult issues regarding conflicts between WTO rules and principles incorporated in environmental and food safety agreements. It seems necessary to consider and formulate some interpretive principles in respect of the relationship of the WTO agreements to environmental, biodiversity and other international agreements which deal with non-trade values.[32]

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[31] Matsushita, M., "The Sutherland Report and Its Discussion of Dispute Settlement Reforms", 8 (2005) No. 8, *Journal of International Economic Law*, pp. 623-629 at pp. 628-629.

[32] Matsushita, M., "The Sutherland Report and Its Discussion of Dispute Settlement Reforms", 8 (2005) No. 8, *Journal of International Economic Law*, pp. 623-629 at p. 629.

- Another possible reform would involve the greater participation of NGOs in the dispute settlement system which may assist in increasing the transparency of the system.[33]
- An effective legal aid system in the form of securing professional assistance by competent lawyers as well as by providing professional training for representatives of the WTO members should be established.[34]
- Achieving prompt compliance should be major goal of the dispute settlement mechanism.[35]
- Financial compensation can help to compensate injured members and industries and can contribute to more effective compliance.[36]
- Members overburden the dispute settlement system as a result of their inability to agree on rules governing politically sensitive issues concerning international trade such as public health, environmental protection, taxation, foreign and development policy, industrial policy etc. To preserve the effectiveness and efficiency of the whole system, the Members will need to improve the ability of the political institutions of the WTO to address the major issues confronting the multilateral trading system.[37]

Conclusion

The Sutherland Report correctly mentions that the WTO dispute settlement process has been highly successful and suggests that, while there are some grounds for criticism and reform of the system, there is much satisfaction with the system and the most important principle is to 'do no harm' to it. Therefore, the best policy should be to maintain the existing system with some reforms as proposed however, there should be no fundamental change of the structure of the dispute settlement system.[38]

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33 Fudali, C. "A Critical Analysis of the WTO Dispute Settlement Mechanism: Its Contemporary Functionality and Prospects", 49 (2002) *Netherlands International Law Review*, pp. 39-80 at p. 78.

34 Fudali, C. "A Critical Analysis of the WTO Dispute Settlement Mechanism: Its Contemporary Functionality and Prospects", 49 (2002) *Netherlands International Law Review*, pp. 39-80 at p. 79.

35 Fudali, C. "A Critical Analysis of the WTO Dispute Settlement Mechanism: Its Contemporary Functionality and Prospects", 49 (2002) *Netherlands International Law Review*, pp. 39-80 at p. 79.

36 Bronckers, M. and Broek, N., "Financial Compensation in the WTO: Improving the Remedies of WTO Dispute Settlement", 8 (2005) *Journal of International Economic Law*, pp. 101-126 at p. 101.

37 Bossche, P.V.D., *The Law and Policy of the World Trade Organization Text, Cases and Materials*, Second Edition, Cambridge University Press, 2008, at pp. 310, 311.

38 Matsushita, M., "The Sutherland Report and Its Discussion of Dispute Settlement Reforms", 8 (2005) No. 8, *Journal of International Economic Law*, pp. 623-629 at p. 623.

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