WTO DISPUTE SETTLEMENT PROCEDURE: A NEW ERA IN THE DISPUTE SETTLEMENT SYSTEM

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1. Introduction

Increasing international economic interdependence is obviously becoming a growing challenge to governments that are frustrated by their limited capacities to regulate or control cross-border economic activities.[1] Many things trigger this frustration including interest rates, various fraudulent or criminal activities, product standards, consumer protection, environmental issues and prudential concerns for financial services.[2] The agreement establishing the World Trade Organization at Uruguay Round is the most important effort to address these issues. And undoubtedly, the Dispute Settlement Understanding Rules for resolving the international trade disputes is the significant feature of the WTO.

The WTO's Dispute Settlement Understanding (DSU) evolved out of the ineffective means used under the GATT (General Agreement on Tariffs and Trade) for settling Charter of the International Trade Organization (ITO). By the time of the start of the Uruguay Round Negotiation the effectiveness of GATT dispute settlement system was disagreements among members. The US Congress rejected the idea of setting up of an International Trade Organization on a par with the International Monitory fund (IMF) and the World Bank. The original GATT dispute settlement system comprised rudimentary remnants of a more thorough framework contained in the defunct Havana very seriously questioned. The prime allegations were the propensity of the contracting parties to ignore the findings of the panel and the tendency of the nations to block or delay every stage of the dispute resolution system resulting in a stalemate in a number of high profile

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1 Jackson John H., *The World Trading System: Law And Policy of International Economic Relations* (1989).

2 Croley Steven P.; John H. Jackson, "WTO Dispute Procedures, Standard of Review, and Deference to National Government", *The American Journal of International Law*, vol. 90, No.2. (Apr., 1996), pp. 193-213.

trade disputes. Several trade disputes between the European Union (EU) and the United States of America were initiated under the GATT settlement system but remained unsettled. This reflects the failure of the GATT system resulting in increasing non-confidence on the effective working of the system itself.

The World Trade Organization (WTO), and its procedures for settling trade disputes between members, has attracted considerable attention recently. Much of the attention can be attributed to prominent and contentious disputes between the United States and European Union on issues such as bananas, beef, and steel, as well as notable legal rulings that challenged U.S. environmental laws intended to protect dolphins and endangered turtles.[3] To some,

> The WTO provides an integrated dispute settlement system. The same procedures apply to disputes regarding trade whether these are goods or services, or the trade related aspects of intellectual property protection. The dispute settlement system plays a central role in the security and predictability of the multilateral trading system. It is a rule oriented system which favors mutually agreed solutions, and is designed to secure the withdrawal of inconsistent measures.[4]

In this paper an effort will be made to provide an outline of the working of GATT and WTO dispute settlement mechanisms, the compliance of the findings, the drawbacks of both of the systems and the concerns of the developing countries.

2. The GATT Dispute Settlement System

The GATT was established in the wake of the ITO's failure and contained a more limited array of measures derived from the Havana Charter for the settlement of disputes between its contracting parties. From its inception, the General Agreement on Tariffs and Trade (GATT) has provided for consultations and dispute resolution among GATT Contracting Parties, allowing a party to invoke GATT dispute articles if it believes that another's measure, whether violative of the GATT or not, has caused it trade injury. Because the GATT does not set out a dispute procedure with great specificity, GATT Parties over

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[3] The dispute over the protection of Dolphins (*United States – Restrictions on Imports of Tuna*) actually began in the early 1990s under the General Agreement on Tariffs and Trade (GATT).

[4] Stanton Gretchen Heimpel, Senior Counsellor, Agriculture and Commodities Division, World Trade Organization, The WTO Dispute Resolution System

time developed a more detailed process including *ad hoc* panels and other practices. The procedure was perceived to have certain deficiencies, however, among them a lack of deadlines, the use of consensus decision-making (thus allowing a Party to block the establishment of panels and adoption of panel reports), and laxity in surveillance and implementation of dispute settlement results. The GATT dispute settlement system was based on Articles xxii and xxiii. Article xxii deals with consultation and article xxiii deals with nullification or impairment.

2.1. GATT Article XXII: Consultation

This article obliges the contracting parties to engage in consultation in the event of a dispute among them. It further extends the scope of obligation of consultation by including the scope of mediation by third parties of the staff of the GATT Secretariat. In the case of the failure of the consultation and mediation process the plaintiff may have recourse to Article xxiii. Article xxii runs as follows:

> **Para.1.** Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement.
>
> **Para.2.** The CONTRACTING PARTIES may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1. (WTO, 1999)[5]

2.2 GATT Article XXIII: Nullification or Impairment

The entire GATT dispute resolving mechanism and dissatisfaction about GATT revolves this article. It is the centre of the GATT dispute settlement system. The first part of the articles deals with the circumstances under which the GATT rules may be violated and the second part concerns the means of redress for contracting parties in the case that their benefits under GATT are nullified or impaired.

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5 *WTO The Legal Texts: the Results of the Uruguay Round of Multilateral Trade Negotiations*, Cambridge: Cambridge University Press, 1999.

Para.1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of:

a) the failure of another contracting party to carry out its obligations under this Agreement, or

b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or

c) the existence of any other situation.

the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned.

Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

Para. 2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time ... the matter may be referred to the CONTRACTING PARTIES. [They] shall promptly investigate any matter so referred to them and shall make appropriate recommendations ... which they consider to be concerned, or give a ruling on the matter as appropriate ... If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concessions or other obligation is in fact suspended, that contracting party shall then be free, not later than sixty days after such action is taken, to give written notice to the Director-General to the Contracting parties of its intention to withdraw from this Agreement. (WTO, *1999)*

Paragraph 1(b) deals with what are referred to as non-violation nullification or impairment complaints, that is, there has been no

specific violation of GATT provision. "This played an important role in dealing with government measures that distorted the outcomes of previous negotiations and paragraph (c) is, effectively, a 'catch all' provision."[6]

The main features of the second paragraph of article xxiii are:

- The dispute settlement system can be invoked on the grounds of nullification or impairment of benefits as expected under the Agreement and does not depend upon any actual breach of legal obligation.
- The power of the GATT is established, not only to investigate and recommend action but also, to rule on the matter.
- The GATT is empowered to authorize contracting parties to suspend GATT obligations to other contracting parties.

However, Article XXIII and the procedures developed in its interpretation contained a number of deficiencies in the eyes of those who favored a more adjudicative dispute settlement model. "Historically, the United States has been the most litigious member of the multilateral trading system. Aspects of the GATT dispute settlement that effectively denied the United States its GATT day in court, therefore, have particularly frustrated U.S. complainants".[7] For example, under the old GATT system, any contracting party could 'block' the creation of a panel by not agreeing to its formation. A single contracting party's ability to 'block' panel formation was based on the notion that if one contracting party did not agree, consensus was destroyed. Similarly, even where a panel had been formed and the parties had litigated the dispute before the panel; a single contracting party could 'block' the adoption of the panel report, which gave the losing party the ability to veto an adverse ruling. Again, the underlying notion was that all GATT actions, even the adoption of a panel report, had to be done by consensus. There are, of course, no analogous rules in the laws of the GATT members themselves. National laws universally require defendants to respond to

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6 Robert Read, 'Trade dispute settlement mechanisms: The WTO dispute settlement understanding in the wake of the GATT', Lancaster University Management School Working Paper 2005/012.

7 Economic Research Service/USDA, Agriculture in the WTO/WRS-98-4/December 1998, pp. 38.

accusations, and no legal system permits a losing defendant to veto an adverse verdict. Nonetheless, this was GATT dispute settlement before the Uruguay Round. The main shortcomings of GATT dispute settlement system are:[8]

- The relevant Articles were brief and did not specify clear objectives and procedures, such that settlement relied upon the creation of ad hoc processes.
- Ambiguity concerning the role of consensus, leading to the 'blocking' of adverse decisions.
- Delays and uncertainty in the dispute settlement process, given that there was no right to a panel and no hard time constraints on any aspect of the proceedings.
- Delays in and partial non-compliance with, panel rulings.

Due to these shortcomings GATT failed to resolve disputes in most of the cases that ended up with the establishment of WTO DSU. However, the GATT dispute settlement process survived for such a long-term may be, because of the long-term commitment of its members to maintaining GATT framework.

3. WTO Dispute Settlement Understanding

The Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), which went into effect on January 1, 1995, continues past GATT dispute practice, but also contains several features aimed at strengthening the prior system.

Prior to the commencement of the Uruguay Round negotiations, there was a general consensus among the GATT Contracting Parties that the dispute settlement system required reform. This was stated very clearly in the Punte del Este Declaration:

> To assure prompt and effective resolution of disputes to the benefit of all contracting parties, negotiations shall aim to improve and strengthen the rules and procedures of the dispute settlement process, while recognizing the contribution that would be made by more effective and enforceable GATT rules and disciplines. Negotiations shall include the development of adequate arrangements for overseeing and monitoring of the procedures that would facilitate compliance with adopted recommendations.[9]

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8 Supra note 6.

9 GATT *Ministerial Declaration, Punta del Este*, Geneva: GATT, 1986.

The two approaches of the declaration seems to be that the EU, Japan and other developing countries wanted to put a restriction on the frequent use of unilateral sanction by U.S.A while U.S.A was looking for a rule oriented automatic system for smooth, less time consuming process.[10]

Whatever be the individual aspirations behind the demand of improvements in the GATT dispute settlement system, the establishment of the WTO dispute settlement system, to some extent, proves to be a more effective and substantial dispute resolving procedure.

3.1 The Main Provisions of the WTO Dispute Settlement Understanding:[11]

The Dispute Settlement Understanding (DSU) establishes rules and procedures that manage various disputes arising under the Covered Agreements of the Final Act of the Uruguay Round. All WTO member nation-states are subject to it and are the only legal entities[12] that may bring and file cases to the WTO. The DSU created the Dispute Settlement Body (DSB), consisting of all WTO members, which administers dispute settlement procedures. It provides strict time frames for the dispute settlement process and establishes an appeals system to standardize the interpretation of specific clauses of the agreements. It also provides for the automatic establishment of a panel and automatic adoption of a panel report to prevent nations from stopping action by simply ignoring complaints. Strengthened rules and procedures with strict time limits for the dispute settlement process aim at providing security and predictability to the multilateral trading system and achieving a solution mutually acceptable to the parties to a dispute and consistent with the covered agreements. The basic stages of dispute resolution covered in the understanding include consultation, good offices, conciliation and mediation, a panel phase, Appellate Body review, and remedies.

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10 Stoler, A.L. "The WTO dispute settlement system: Did we get what the negotiations wanted?", paper presented at the International Bar Association Conference, Future Directions in WTO dispute Settlement, Geneva, 16 March, 2006 mimeo.

11 The full text of the Dispute Settlement Understanding is available at <http://www.wto.org/wto/dispute/dsu.htm>.

12 WTO member means any state or separate custom territory possessing full autonomy in the conduct of its external commercial relations that has accepted or acceded to the WTO (for example Chinese Taipe).

3.1.1 Consultation

If country 'X' believes that another member is not complying with its obligations under a WTO agreement that is to have "infringed upon the obligations assumed under a Covered Agreement"[13] it may request consultations. In case of a request for consultation the respondent generally respond within 10 days and enter into consultation within 30 days. If the dispute is not settled within 60 days from the date of receipt of the request to consult, the complainant may request a panel. However the complainant may request an early panel if the respondent fails to respond within 10 days or enter into consultation within 30 days or if the disputants agree that the consultations have been unsuccessful.

3.1.2 Good Offices, Conciliation and Mediation

Article 5 is concerned with the provisions of good offices, conciliation and mediation procedures to resolve trade dispute between the parties. Unlike consultation in which "a complainant has the power to force a respondent to reply and consult or face a panel",[14] the good offices, conciliation and mediation are voluntary measures that depend on the mutual understanding of the parties. No specific rules or any specific time frame is mentioned. Any party may initiate or terminate them at any time.

The scope of good offices, conciliation and mediation reinsures that the WTO DSU gives importance on the fact that the parties involved in the dispute must come to a solution no matter what is the procedure. If consultation, good offices, conciliation and mediation fail to settle the dispute, the contracting party may request the formation of panel.

3.1.3 Establishing a Dispute settlement Panel (Arts. 6, 8, 12, 15)

Where a panel has been requested, the DSB[15] must establish it at the second DSB meeting at which the request appears as an agenda unless at that meeting the DSB decides by consensus not to establish a panel.

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13 Dillon Jr., Thomas J. "The World Trade Organization: A new legal order for world trade?", *Michigan Journal of International Law* 16 (1995), p. 381.

14 Ibid., p. 382.

15 "The DSB is simply a special meeting of the General Council in its dispute settlement role and is composed of all General Council Members present at the DSB meeting"(Dillon, Jr., supra note 13, p. 363). The DSB oversees the application of the DSU.

Panels shall be composed of well-qualified governmental and/or non-governmental individuals with a view to ensuring the independence of the members, and whose governments are not the parties to the dispute, unless the parties to the dispute agree otherwise. Three panelists compose a panel unless the parties agree to have five panelists.

The Secretariat proposes nominations for panels that the parties shall not oppose except for compelling reasons. If the parties disagree on the panelists, upon the request of either party, the director-general in consultation with the chairman of the DSB and the chairman of the relevant council or committees shall appoint the panelists.

The panel's working procedures usually involve the submission of written arguments and evidence by the parties, and two meetings at which the parties may present oral arguments and questions to each other (Art. 12). In addition, the panel provides an opportunity for interested third parties to submit their written and/or oral arguments. Besides, the panel may seek information from any source that they consider pertinent. For example, in considering disputes alleging violation of the Agreement of the Application of Sanitary and Phytosanitary Measures (the SPS Agreement),[16] the panel should seek advice from relevant technical and scientific experts. These experts are to be selected in consultation with the parties to the dispute, and their advice may be sought either on an individual basis or through the establishment of an expert review group.

After considering written and oral arguments, the panel issues the descriptive part of its report (facts and argument) to the disputing parties. After considering any comments, the panel submits this portion along with its findings and conclusions to the disputants as an interim report. Absent further comments, the interim report is considered to be the final report and is circulated promptly to WTO Members. A panel must generally circulate its report to the disputants within six months after the panel is composed, but may take longer if needed. The period from panel establishment to circulation of the report to all Members should not exceed nine months. In practice, panels have increasingly failed to meet the six-month deadline.

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16 Article 11.2 of the Agreement on the Application of Sanitary and Phytosanitary Measures.

Within sixty days after the report is circulated to the members, the report shall be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adapt the report

3.1.4 Appellate Body Review

The DSB establishes a standing Appellate Body to hear the appeals from panel cases. It is often argued that "with the adoption of DSU for the first time in GATT practice it is possible to appeal against panel reports".[17] The Appellate body shall be composed of seven members, three of whom shall serve on any one case.[18] Those persons serving on the Appellate Body are to be "persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered Agreements generally".[19] This body shall consider issues of law covered in the panel report and legal interpretations developed by the panel. However, the members of the Appellate Body do not serve for life rather the members have only four years term.

The appeal can be made by any of the parties to the dispute and has to be submitted to DSB within a period of sixty days. Within 60 days of being notified of an appeal (extendable to 90 days), the Appellate Body must issue a report that upholds, reverse, or modifies the panel report. An appellate report is to be adopted by the DSB, and unconditionally accepted by the disputing parties unless the DSB decides by consensus not to adopt it within 30 days after circulating it to members.

3.1.5 Implementation of Panel and Appellate Body Reports

Thirty days following the adoption of the panel and any Appellate Body reports the member, who has lost a dispute, must inform the DSB how it will implement the WTO ruling. However, if it is impracticable to comply immediately with the ruling the member will have a reasonable time to do so. That period will be either the time that proposed by the member and approved by the DSB; or absent approval, the period mutually agreed by the disputing parties within

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17 For details see, Petersman E.U., *The GATT/WTO Dispute Settlement System*, London, The Hague and Boston, 1997, pp. 186.

18 See Art. 17, para. 1: "Persons serving on the Appellate Body shall serve in rotation."

19 See ibid., para. 3.

45 days after the date of adoption of the report; or failing agreement, the period determined by binding arbitration.

3.1.6 Compensation and Suspension of Concessions

If defending party fails to comply with the WTO recommendations and rulings within the compliance period, the party must, upon request, enter into negotiations with the prevailing party on a compensation agreement within 20 days after the expiration of this period; if negotiations fail, the prevailing party may request authorization from the DSB to retaliate. If requested, the DSB is to grant the authorization within 30 days after the compliance period expires unless it decides by consensus not to do so. The defending member may request arbitration on the level of retaliation or whether the prevailing member has followed DSU rules in formulating a proposal for cross-retaliation; the arbitration is to be completed within 60 days after the compliance period expires. Once a retaliatory measure is imposed, it may remain in effect only until the violative measure is removed or the disputing parties otherwise resolve the dispute.

3.1.6 Arbitration (Art. 25)

Members may seek arbitration within the WTO as an alternative means of dispute settlement to facilitate the solution of certain disputes that concern issues that are clearly defined by both parties. Those parties must reach mutual agreement to arbitration and the procedures to be followed. Agreed arbitration must be notified to all members prior to the beginning of the arbitration process. Third parties may become party to the arbitration only upon the agreement of the parties that have agreed to have recourse to arbitration. The parties to the proceeding must agree to abide by the arbitration award. Arbitration awards shall be notified to the DSB and the Council or Committee of any relevant agreement where any member may raise any point relating thereto.

4. Achievements of the WTO DSU

> The WTO Dispute Settlement System is a remarkable achievement. The WTO has succeeded in creating a frequently used compulsory dispute settlement system producing binding results that can be enforced. Nowhere else in international law are all these characteristics combined.[20]

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[20] Supra note 10.

The main areas where the WTO DSU offers improvements are, first, a contracting party may no longer block the formation of a panel because the rule-requiring consensus has, in effect, been stood on its head. The rule contained in article 6 effectively makes dispute settlement automatic upon the filing of the complaint because; after all, there can be no consensus not to establish a panel without the complaining party. Thus, the new rule maintains the traditional GATT notion of consensus decision-making, but makes it meaningless in practice. The new 'automatic' rule effectively marks a move from the consensus model to the litigious model.[21] Similarly, a single party can no longer block panel reports. Adoption of panel reports is now automatic within 60 days from when the report is circulated unless a party has appealed; and, in cases of appeal, automatic after the completion of the appeal process. Moreover the DSU makes it clear that the function of the panels is to decide.

The function of panel is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, "a panel should make an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making recommendations or in giving the rulings provided for in the covered agreements".[22]

Most importantly it has established a unified settlement system that covers all the WTO agreements.

5. Criticisms of the Existing WTO DSU

With all its achievements WTO DSU has raised several issues concerning the smooth and effective functioning and involvement of the members, in the process.

5.1 Sequencing

The problem that has become known as 'sequencing' results from a conflict in the provisions of the Dispute Settlement Understanding dealing with the time available to a Member, whose measure has been found to be inconsistent, to bring that measure into conformity – and with the time within which the successful complaining Member must act to secure its remedy if the measure is not brought into conformity.

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21 Supra note 7, at pp. 39.

22 Article 11 of the WTO DSU.

This issue first manifested itself during the compliance phase of the U.S.-EC dispute over the EC's banana import regime. Article 22 of the DSU allows a prevailing party to request authorization to retaliate within 30 days after a compliance period ends if the defending party has not complied. Article 21.5 provides that disagreements over the adequacy of compliance measures are to be decided using WTO dispute procedures, 'including whenever possible resort to the original panel'; the compliance panel's report is due within 90 days and may be appealed. The DSU does not integrate Article 21.5 into Article 22 processes, nor does it expressly state how compliance is to be determined so that a prevailing party may pursue action under Article 22.

Some Scholars have identified the possible solution to this sequencing problem. According to them, an exchange of letters between the parties delaying the suspension of concessions requirement until after the determination as to whether the steps taken by the Member concerned do or do not bring its measure into compliance.[23] While this ad hoc, case-by-case approach has solved the immediate problem, it also highlights a larger truth about the WTO's weakness of its rule-making function as compared to its adjudicating function.[24] Despite the fact that no Member has an interest in perpetuating the sequencing problem in the DSU, and despite the fact that every Member confronted with the problem, whether as complainant or as defendant, has agreed to an ad hoc solution, the Members collectively have been unable to amend the DSU to fix it.

5.2 Compositions, Function and Competency of the WTO Panels

Membership in the WTO panel is generally made up of trade lawyers and the WTO secretariat. Besides, DSB does also provide the panel with the ability to call on outside experts as needed.[25]However reliance of the DSU on the part-time non-professional experts has raised concerns among the Members. The one reason may the rapid growth in the number of cases and the consequent workload. In the

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23 For details see, Palmeter David and Petros C. Mavroidis, *Dispute Settlement In the World Trade Organization: Practice and Procedure*, Cambridge University Press, 2004.

24 Ehlermann Claus-Dieter, "Six Years on the Bench of the 'World Trade Court' – Some Personal Experiences as a Member of the Appellate Body of the World Trade Organization," 36(4) *Journal of World Trade* 605 (August 2002).

25 Article 13; Appendix 4 of the DSU.

first 11 years of the WTO's existence (1995 through 2005, inclusive), 335 consultation requests were made, an average of slightly more than 30 per year.[26]

The question is whether the huge volume of cases can be resolved by the part-timer only. Many suggest there should be a permanent body composed of experts for that purpose.[27]

Another question is, to what extent WTO panels and the Appellate Body have competence to decide legal questions not directly relating to a covered agreement.[28] A particular question may involve questions of general public or private international law in addition to questions of interpretation of GATT or other covered agreement. The dispute brought by the European Community against the United States concerning the US Helms-Burton legislation imposing economic and diplomatic sanctions on persons and companies that 'traffic' with certain property in Cuba. "This dispute concerns not only legal question arising under the GATT, such as the scope of the article xxi 'Security Exceptions', but also questions of general public international law, such as whether the US legislation exceeds norms relating to jurisdiction, economic coercion and non-intervention".[29] Do the DSB have the authority to resolve the questions not directly related to covered agreement? Article 11 of the DSU authorizes the panels and the Appellate Body to make other findings as will assist the DSB in making the recommendation or in giving the ruling provided for in the covered agreements. But this is an implied power that needs improvements.

5.3 Equity of Remedies and the Developing Countries

The founding principles of the GATT and WTO multilateral framework are non-discrimination, reciprocity and transparency. Nevertheless, the WTO DSU is argued to be biased in favor of the leading industrialized countries, notably the EU and the United States, at the expense of developing countries.

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26 website:<http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm.>

27 Foe details see, Cottier, T. 2003. "The WTO permanent panel body: A bridge too far?", 6(1) *Journal of International Economic Law*, pp. 187-202.

28 As Article 2 of the DSU clearly states the principal covered agreement is the General Agreement on Tariffs and Trade (GATT) 1994.

29 Schoenbaum Thomas J.: "WTO Dispute Settlement: Praise and suggestions for reform," 47(3)*The International and Comparative Law Quarterly*, Jul., 1998, pp. 652.

"Of the 235 cases brought to the WTO between 1995 and 2001, some 66 percent were initiated by industrialized countries and 34 percent by the developing countries. The least-developed countries however, were not involved in any cases at all".[30]

And the recent date on the cases brought to the WTO up to April 10, 2007 reiterates almost the same cases. The table below will give a glimpse of this statement.[31]

Countries	No. of cases as complainant	as respondent
USA	88	99
European Union	76	58
India	17	19
Pakistan	03	02
Srilanka	01	---
Bangladesh[32]	01	---

The reason may be the greater economic and political leverage in international trade matters, the greater resources at their disposal to fight complex and costly cases and their greater propensity for selective but substantial retaliatory action.

And in reality if this is the reason the developing country will never be able to get the benefit of this system. In terms of equity between members, it is clear that rights of retaliation, while available to all members are generally not feasible for all except the major economies.[33]

However, though in a small scale, the developing countries are trying and using the DSB to resolve trade dispute but the least developed countries are constrained by the financial and intellectual resources required fighting DSU cases, whether as plaintiffs or respondents. And the less use of the WTO DSU by the least-developed countries, no doubt, is a cause for some concern.

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30 Park, Y.D., and Panizzon, M. (2002), "WTO dispute settlement 1995–2001: A statistical analysis", *Journal of International Economic Law*, vol. 5, no. 1, pp. 221-44.

31 World Trade Organization, rue de Laussane 154, ch-1211 Geneva 21, Switzarland.

32 Bangladesh was complainant against India in 2004 (DS 306) concerning certain anti-dumping measures imposed by India on import of batteries from Bangladesh. The dispute was settled at the consultation centre.

33 Joan, H., "WTO Dispute Settlement: Managing the agenda after Seattle", paper present at the Fifth Annual Conference on the International Trade Education and Research of the Australia APEC Study Centre, Melbourne, 26-27 October 2000.

Suspension of concession in the form of retaliation is often considered as an effective mode of compliance of the DSB decision under the WTO system. Even the developed countries believe that a much stronger suspension system should be introduced to deal with non-compliance. It is often presumed that the inability of an individual state to block the panel formation and also the suspending of the concession is another step to compel the defying state. But it still remains a question. The most developed countries like USA, EU etc, can only take retaliation measures. The developing countries and the least developed countries are not in a position to impose such sanctions against the powerful members of the WTO due their lack of resources. Besides national law plays a vital role in such actions. Thus in the WTO in many cases only the major states can use sanctions and the weaker one comply with the WTO mainly out of fear of sanctions.

It does not mean that the developing countries do not have any way out. To remain in the WTO is not compulsory. The states which feel that WTO is no more beneficial to them they can withdraw themselves from the WTO. And if a large portion of its members decides to quit WTO it will become a threat to the existence of the WTO. When the existence of WTO is under threat the desires of the states, which opted to benefit from the WTO, will be under threat. It is important to note that the withdrawal from WTO is not that simple. Because it might be damaging to members of developing and least developed countries, stopping tariff on the withdrawal member's export and flight of foreign investment. Even then the combined effort from the developing and least developing countries may bring some changes in the strategies of the most developed countries. So it is very important to make a balance between the members so that no one feels threatened by the members having strong financial strength.

6. WTO and Private Party Access

Under Article xxiii of GATT 1994, a WTO member has 'standing to sue' if it 'should consider' that its right to a trade benefit is being nullified or impaired. Restrictive conditions are also absent from the DSU, which only cautions members to bring complaints if a dispute proceeding would be 'fruitful'.[34] Thus WTO members have broad discretion to bring case. In the Banana case the Appellate Body upheld the right of the United States to complain to the DSB about EC import

[34] DSU, Art. 3:7.

restrains on bananas, although the United States is not a banana exporter.[35]

Thus the interpretations of the Articles and the practices of the DSB makes it clear that the third parties have no direct access to WTO dispute settlement procedure but can raise a question before the WTO DSB if it can successfully persuade a WTO member. The rights of the third parties are virtually left with the discretion of the member state. Although there are no WTO standards to determine when a WTO member may raise a private party's case, such criteria do exist under municipal laws in certain countries. Examples of this are, in the United States, section 301 of the Trade Act of 1974 and, in the European Union, Council Regulation (EC) no.3286/95.

"Perhaps, access by private parties to the WTO would not create difficulties rather would bring several advantages including : reducing trade tensions, building support for the WTO and encouraging the resolution of the problems by objective means rather than through economic and political tugs of war".[36]

However, it is also desirable that the WTO members in raising a third party question will act reasonably, so as not to make the DSU ineffective or meaningless.

7. Conclusion

The dispute settlement system is crucial to ensure the implementation of the WTO agreements. And it has become the most active and productive dispute settlement system in the entire field of public international law. It is remarkable because 150 states agreed to subject themselves to the compulsory jurisdiction of tribunals whose decisions are final. At present there are 31 observer governments including Russian Federation, Ukraine, Iraq, and Iran. Some opines that the success of the WTO dispute settlement mechanism has surpassed expectations. But this is not always the reality. It is true that the WTO DSU is a significant improvement over its GATT predecessor. The WTO Agreements are agreements among sovereign states and the enforcement of panel decisions depend ultimately on the willingness of the member countries to play by the rules, to accept judgments even adverse judgments, where dispute arise. The question

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35 Supra note 29, p. 653.

36 Ibid, p. 655.

is no more confined in whether the members have an effective means to vindicate their rights rather whether members whose practices have been successfully challenged under the improved dispute settlement procedures will live up to their obligations.

> In many ways, the DSU provisions on remedies, especially the temporary measures of compensation and suspension, are deeply flawed, and even dysfunctional. WTO members are questioning whether they really contribute to the effectiveness of the system, especially as regards their usefulness in promoting the critical and central goal of compliance, which maximizes the broader security and predictability goals of the institution.[37]

From the analysis of the WTO dispute Settlement System it is easily understandable that few changes have to be brought to make the system more accurate, effective and acceptable to all of its members which include: establishment of panels and the Appellate body, encouraging the use of non adjudicative dispute settlement procedure, clear authorization of the panels to decide issues of public international law, introducing some mechanisms to ensure the compliance of the panel decision by all members irrespective of their political and financial status.

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[37] Jackson John H., "International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to 'Buy Out'?", 98(1) *The American Journal of International Law*, (Jan., 2004), pp. 123.