

THE WTO AT 10: GOVERNANCE, DISPUTE SETTLEMENT AND DEVELOPING COUNTRIES

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In 1995, the editors of the *Fordham International Law Journal* asked a group of lawyers to consider the role of international law in the twenty-first century. I was asked to contribute a short piece on international trade law.¹ The resulting essay comprised fewer than five printed pages, but writing it was difficult because, like most lawyers, I do not possess a crystal ball. Compared with the difficulty of opining on all of international trade law for an entire century to come, however, the task of discussing the dispute settlement system of a single organization for the coming decade should be easy. Perhaps it should be, but it's not.

The dispute settlement system has been, and no doubt will continue to be, the crown jewel of the WTO. It has come a long way from the General Agreement on Tariffs and Trade, when Robert Hudec could observe, quite accurately, that “on the tree of legal evolution, GATT’s adjudication machinery is still down at the level studied by legal anthropologists, right alongside dispute resolution ceremonies practiced by primitive societies.”² But even this system Abram and Antonia Handler Chayes could describe, also quite accurately, as “the most developed and most active system of formal dispute settlement” of all international regimes.³

It seems safe to predict that the WTO dispute settlement system will continue to be a highlight of the organization in its second decade. But beyond that what can we say? In this paper, I will address this question from four perspectives: the case load and its composition, three criticisms of the present system, the Doha Round and its possible impact, and, finally, I will comment on the instrumental value of the system to its Members.

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¹ *International Trade Law in the Twenty-First Century*, 18 *Fordham International Law Journal* 1653 (1995).

² Robert E. Hudec, *Public International Economic Law: The Academy Must Invest*, 1 *Minnesota Journal of Global Trade* 5, 6 (1992).

³ Abram Chayes, Antonia Handler Chayes, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 218 (Harvard, 1995).

1. *The case load and its composition*

We have no way of knowing what the volume of cases will be over the next decade, but if the trend of the past 11 years is any guide, the volume could be low. In the 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. Last year, however, there were only 11 requests, down from 19 the year before and 26 the year before that. The greatest number of consultation requests occurred in 1997, when 50 were made.⁴

We can only speculate as to why the trend, since 1997, has been downward. Certainly, at the start, there were disputes in the pipeline waiting for the new system to become effective. This was obviously true of the first request for consultations, filed by Singapore on January 10, 1995, almost immediately after the WTO opened for business. Singapore challenged Malaysia's prohibition of imports of polyethylene and polypropylene, and the case was soon settled.⁵

The next case filed, and the first to go through both the panel and appellate stages of dispute settlement, was *US – Gasoline*, also a pipeline case.⁶ A panel established under GATT did not issue a report, and the new case was filed under the WTO early in 1995.⁷

This backlog no longer exists, or at least it is greatly reduced, and, therefore, does not contribute much, if anything, to the current and future case load. On the other hand, the pipeline at the start of the WTO did not include trade remedy cases, such as anti-dumping and countervailing duty cases, because the Uruguay Round trade remedy agreements specified that they applied only to measures initiated after the WTO came into force.⁸ These cases have since come on stream, and constitute a significant share of the present dispute settlement agenda. Looked at from this perspective, the decline on the non-trade remedy portion of that agenda is even more pronounced.

⁴ These data are taken from the Chronological List of Dispute Cases on the WTO web site, http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm.

⁵ *Malaysia – Prohibition of Imports of Polyethylene and Polypropylene*, WT/DS1/1 (13 January 1995); Singapore withdrew its request for the establishment of a panel on 19 June 1995. http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds1_e.htm#top.

⁶ Report of the Panel, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, adopted 20 May 1996 as modified by the Appellate Body Report, WT/DS2/AB/R, DSR 1996:I, 29.

⁷ *GATT Panel to hear Venezuelan Complaint Against Clean Air Rules*, Inside US Trade, Oct. 7, 1994; *WTO Establishes First Panel to Hear Venezuela Complaint against U.S.*, Inside US Trade, April 14, 1995.

⁸ See, e.g., *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (Anti-Dumping Agreement), Art. 18.3; *Agreement on Subsidies and Countervailing Measures*, Art. 32.3.

One possible way to read these data is that WTO Members, by and large, are complying with their WTO obligations when they enact new measures. It is impossible to document how many measures were not adopted because of WTO obligations, but it is not unreasonable to assume that the need to comply has been a factor. To be sure, WTO obligations will not always influence the policy makers. During the 2002 elections in the United States, for example, control of the Senate was at stake. Both parties made endless promises to the agricultural interests in key States, without regard to WTO obligations. The result was the 2002 Farm Bill which subsequently was found, by a dispute settlement panel and by the Appellate Body in the *Cotton* case, to be in serious non-conformity with WTO requirements.⁹ This “solve-the-political-problem-now-worry-about-the-WTO-later” attitude no doubt will capture the imaginations of politicians in a number of Member governments from time to time in the future, and will thereby contribute to the case load.

But if the backlog hypothesis is correct, and if there are fewer instances of non-trade remedy measures that are inconsistent with WTO obligations, then it seems safe to assume (or should I predict?) that the dispute settlement case load in the next decade will contain a higher proportion of trade remedy disputes than it did in the first decade. This most likely would be the case regardless of whether the overall case load continues to decline, levels off, or even increases.

This prediction is subject to a *caveat*: At this point, we don’t know what, if anything, will emerge in the way of substantive obligations from the Doha Round. It is possible that new commitments will create an “instant” backlog in the form of existing measures that might be inconsistent with obligations incurred in the Round. Whether there is a successful conclusion of the Round, and, if so, whether it creates such a backlog, remain to be seen.

2. Three criticisms of the present system

There have been many complaints about the dispute settlement system: general ones, such as it takes too long or is too costly, and specific ones, such as the so-called “sequencing”

⁹ Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267R, and Corr.1, adopted 21 March 2005 as modified by the Appellate Body Report, WT/DS267/AB/R.

problem, the Appellate Body's lack of remand authority,¹⁰ and the perceived inadequacy of the remedy available to a successful complainant.

The general complaints are more in the nature of grumbling than true criticisms. As legal systems go, the length of the WTO's dispute settlement process does not seem particularly long. To the contrary, its tight deadlines likely make it far more expeditious than most legal systems in dealing with disputes of similar complexity. That complexity, no doubt, contributes to the costs associated with the system, but again, those costs – while high – do not seem out of line with the costs likely to be incurred in other legal systems for litigation involving matters of similar complexity and importance.

It seems unlikely that negotiations in the Doha Round or in some future round would be able to mitigate either of these complaints significantly. Proposals have been made to amend the existing panel procedure in minor ways, for example, by eliminating the ability of Members to “block” a request to establish a panel at one meeting of the Dispute Settlement Body. However, proponents of this proposal do not advocate shortening the overall process; rather, they would allocate the time saved to other phases of the process, for example, to the time-pressured appellate process, which can be something of a breath-taking sprint for those involved.

In contrast to these general complaints, the more specific criticisms are more amenable to change, although it remains to be seen whether any change will be made or, in the case of remedy, whether any change *should* be made.

A. *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.¹¹

¹⁰ David Palmetier, *The WTO Appellate Body Needs Remand Authority*, 32 *Journal of World Trade* 41 (1998).

¹¹ This issue is discussed in some detail in David Palmetier and Petros C. Mavroidis, *DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION: PRACTICE AND PROCEDURE*, § 8.06 (Cambridge Univ. Press 2004).

A Member has a “reasonable period of time” within which to bring its measure into conformity, a time that can be set by agreement of the parties or by arbitration.¹² If there is disagreement between the parties as to whether the steps taken within the reasonable period of do, in fact, bring the measure into conformity, that disagreement also is subject to arbitration, and the report of the arbitrators is due within 90 days of the expiration of the reasonable period of time.¹³

If there is a determination that the Member concerned has not brought its measure into compliance, the complaining Member may request authority from the Dispute Settlement Body to suspend concessions or other obligations toward the Member in violation. This action, however, must be taken within 30 days of the end of the reasonable period of time.

That’s the problem, in a nutshell: Both deadlines run from the end of the reasonable period of time. The DSU directs the complaining Member to act within 30 days on the basis of an arbitration result that will not be reached for 90 days – 60 days after the complaining Member is supposed already to have acted on the result.¹⁴ This is the kind of thing that happens when complex documents are drafted and redrafted, around the clock, by exhausted negotiators right up until the last minute.

The very practical Members of the WTO have found a very practical solution to the problem: 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.¹⁵ While this ad hoc, case-by-case approach has solved the immediate problem, it also high-lights a larger truth about the WTO: the comparative weakness of its rule-making or “legislative” function as compared to its adjudicating function.¹⁶ Despite the fact that no Member has an interest in perpetuating the sequencing “glitch” in the DSU, and despite the fact that every Member confronted with the problem – whether complainant or defendant – has agreed to an ad hoc solution, the Members collectively have been unable to amend the DSU to fix it.

¹² DSU Art. 21.3.

¹³ DSU Art. 21.5.

¹⁴ DSU Art. 22.6.

¹⁵ See, Palmetier and Mavroidis, note 11 above, § 8.06[3].

¹⁶ Claus-Dieter Ehlermann, *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 *Journal of World Trade* 605 (No. 4, August 2002).

The Members of the WTO clearly should remedy this awkward “glitch” in the system and are likely to do so, as I have noted, if the Doha Round concludes successfully, and if that conclusion makes any changes in the Dispute Settlement Understanding.

B. *Remand*

In many municipal legal systems, an appellate court that reverses a finding of a court of first instance may remand the case back to the lower court for further proceedings consistent with the appellate court’s decision. This is an efficient and expeditious way of handling cases at that stage. But the WTO Appellate Body lacks this authority, and this lack can result in a complaining Member’s going through the entire dispute settlement process without receiving a decision on its claim.¹⁷

The problem can arise when panels practice “judicial economy” and refrain from deciding issues that do not have to be decided to resolve the immediate dispute. Judicial economy is a praiseworthy practice. It economizes on judicial resources. By avoiding rulings on issues that do not need to be decided to reach a conclusion on the issue before a panel, judicial economy reduces the intrusiveness of the process. It is a less expansive approach to judicial decision-making, one that seems particularly appropriate to bodies reviewing measures taken by sovereign governments. But without remand at the appellate level, judicial economy can lead to undesirable results.

A simple example will illustrate the problem. Suppose a Member claims that another Member’s measure is inconsistent with Article I and Article III of GATT 1994. If a panel were to find that the measure is inconsistent with Article I, it could practice judicial economy and decide that a determination on the Article III claim is unnecessary. If the panel’s decision were then appealed and its finding of an Article I violation were reversed, the question arises: What happens to the Article III claim?

This problem has arisen in a number of cases. The Appellate Body has attempted to cope with it by a practice it calls “completing the analysis.” If factual findings of the panel permit, the Appellate Body itself goes on to decide the issue left undecided by the panel, in this example, the

¹⁷ David Palmetier & Petros C. Mavroidis, note 11, above, § 6.06; David Palmetier, *The WTO Appellate Body Needs Remand Authority*, 32 *Journal of World Trade* 41 (1998).

Article III claim.¹⁸ If, the factual record does not permit the Appellate Body to complete the analysis, however, the complaining Member is left with the choice of dropping the claim or starting the entire panel process anew.¹⁹

While the Appellate Body's practice of completing the analysis is usually the better alternative, it is not, from a juridical viewpoint, an altogether desirable solution. The Appellate Body's completion of the analysis is really a *de novo* decision, which itself lacks the benefit of appeal. There is no second, more focused, look at the issue by a group of individuals who did not make the initial decision – and that second, more focused look by a different group is probably the major benefit of an appellate process. The Appellate Body's decisions are superior to those of a panel, after all, not because the Appellate Body is necessarily composed of superior people, but because it is composed of different people. As former Justice Robert H. Jackson of the United States Supreme Court once said of his tribunal:

Whenever decisions of one court are reviewed by another, a percentage of them are reversed. That reflects a difference in outlook normally found between personnel comprising different courts. However, reversal by a higher court is not proof that justice is thereby better done....We are not final because we are infallible, but we are infallible only because we are final.²⁰

As with the sequencing problem, the Appellate Body's lack of remand authority is a short-coming that the Doha Round negotiators should fix. Unlike the sequencing problem, however, there seems to be little if any likelihood that this will occur.

C. *Remedy*

Criticism of the adequacy – or complaints of the inadequacy – of the self-help legal remedy offered by the WTO dispute settlement system centers on the fact that the remedy is designed to bring non-complying Members into compliance, not to make commercial interests whole, and that the available remedy is based on countermeasures, which disadvantages

¹⁸ See, e.g., Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R, adopted 30 July 1997.

¹⁹ Panel Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Second Recourse to Article 21.5 of the DSU by New Zealand and the United States*, WT/DS103/RW2, WT/DS113/RW2, adopted 17 January 2003, as modified by the Appellate Body Report, WT/DS103/AB/RW2, WT/DS113/AB/RW2, para. 110.

²⁰ *Brown v. Allen*, 344 U.S. 443, 540 (1953) (concurring).

developing country Members and Members with small domestic markets because they rarely have sufficient commercial power to be able to use countermeasures effectively.²¹ While all of these points are true, it is unlikely that the WTO's remedy regime will be changed in the next decade – nor, in my view, should it be changed.

The criticism tends to assume a parallel between the international legal system of WTO dispute settlement and municipal legal systems. It overlooks the fact that the WTO applies to *governments* – governments that both established it and control its activities. And governments, as Robert Hudec has reminded us, “simply are not private litigants; they are governments – complex institutions known the world over for their inability to behave like rational beings.”²² Perhaps governments should want a more effective – or, more accurately, more draconian – remedy, but they do not. It is important to understand, I believe, that the remedy that exists in the WTO is the remedy that Member governments found they were willing to accept as successful complainants – no doubt because they were unwilling to commit themselves to providing more as unsuccessful defendants. To quote Hudec once again, “The fact that governments wanted the freedom to disobey was the starting point from which the GATT legal system had to build.”²³ That remains the case under the WTO.²⁴

While developing countries and small economies can have difficulty taking advantage of the self-help remedy of the WTO, this is true of most of international law generally, not just the WTO. Monetary damages have been suggested as an alternative to self-help, but it is far from clear that this remedy would be any more advantageous to those that are unable to take effective action under self-help remedies.²⁵ The monetary damages that a large economy Member might

²¹ See, e.g., Niall P. Meagher, *Representing Developing Countries in WTO Dispute Settlement Proceedings* in Mavroidis & Berman (eds) (Cambridge University Press, forthcoming); Rene Guilherme S. Medrado, *Renegotiating Remedies in the WTO: A Multilateral Approach*, 22 *Wisconsin International Law Journal* 323 (2004).

²² “*Transcending the Ostensible*”: *Some Reflections on the Nature of Litigation Between Governments*, 72 *Minnesota Law Review* 211 (1987) reprinted in Robert E. Hudec, *ESSAYS ON THE NATURE OF INTERNATIONAL TRADE LAW* 117, 118 (Cameron May 1999). 218.

²³ Robert E. Hudec, *Broadening the Scope of Remedies in WTO Dispute Settlement*, in Friedl Weiss (ed) *IMPROVING WTO DISPUTE SETTLEMENT PROCEDURES: ISSUES & LESSONS FROM THE PRACTICE OF OTHER INTERNATIONAL COURTS AND TRIBUNALS* 370 (Cameron May, 2000).

²⁴ E.g., “The United States maintains that it has the right not to comply with WTO rulings,” UNITED STATES GENERAL ACCOUNTING OFFICE, *Report to the Chairman, Committee on Ways and Means, House of Representatives*, WORLD TRADE ORGANIZATION: ISSUES IN DISPUTE SETTLEMENT at 16 (August 2000). The European Court of Justice has taken a similar view: *Portuguese Republic v. Council of the European Union*, C-149/96, 23 November 1999.

²⁵ See, e.g., Marco Bronckers & Naboth van den Broek, *Financial Compensation in the WTO: Improving the Remedies of WTO Dispute Settlement*, 8 *Journal of International Economic Law* (101) (2005); World Trade

have to pay to a smaller Member or to a developing country may seem trivial to the larger Member, while the same amount, if due to the larger Member, could be a devastating financial blow to a developing country.

It is important to note, when it comes to remedy, that many developing countries have handicapped themselves even further than size or wealth alone would require. The self-help remedy of the WTO, as you know, is suspension of *concessions*, and the effectiveness of that remedy depends almost entirely on the magnitude of the concessions to be suspended.

Through most of the history of GATT and the WTO, however, developing countries were effectively excused from the obligation of making significant concessions. They therefore find themselves having limited concessions available to suspend. The widely-held idea that the policy of excusing developing countries from the rigors of trade negotiations actually helped them has been subject to trenchant criticism,²⁶ but whether it has helped or not, one consequence has been to limit their ability to take effective self-help measures. Concessions that were never made cannot be suspended.

4. *The instrumental value of the system*

Much of the criticism of suspension of concessions as a WTO remedy stems from the view that it is not severe enough. Stronger sanctions, it is argued, will promote more rapid and complete compliance.²⁷ Certainly sanctions can contribute to compliance. It would not be unreasonable to assume that the inability of Members to delay or even block sanctions in the WTO, as they could in GATT, has led both to greater compliance and to a “scorched earth” policy in defending against claims in the WTO. Nevertheless, the value of sanctions in inducing compliance probably is overstated in the context of any legal system, and, in particular, in the context of the legal system for dispute settlement in the WTO .

Organization, THE FUTURE OF THE WTO: ADDRESSING INSTITUTIONAL CHALLENGES IN THE NEW MILLENNIUM, *Report by the Consultative Board to the Director-General Supachai Panitchpakdi*, para. 243 (WTO 2004).

²⁶ See Robert E. Hudec, DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM (Trade Policy Research Centre, 1987).

²⁷ See, e.g., Marc L. Busch & Eric Reinhardt, *Testing International Trade Law: Empirical Studies of GATT/WTO Dispute Settlement*, in Kennedy & Southwick (eds.) THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW: ESSAYS IN HONOR OF ROBERT E. HUDEC 457, 478 (Cambridge 2002).

The view that stronger sanctions will promote compliance in the WTO, like the view that suspension of concessions is an inadequate remedy, is largely based on what I believe is an erroneous assumption that the WTO legal system is the same as a municipal legal system. The assumption is erroneous because, as we've already noted, the WTO involves governments, not individuals. As individuals, we cannot escape living where someone else makes the rules that we must follow, even if we have democratically elected that someone else. Even in democracies, people may disagree strongly with some of the laws, and some may feel they have little or no stake at all in the legal system. They obey, to the extent they do obey, mainly out of fear of sanctions.

However, governments are not individuals. They can easily and properly avoid the imposition of WTO law, either by not joining in the first place, or by withdrawing if they do join and come to believe membership no longer is in their interest. Governments join the WTO and voluntarily subject themselves to its requirements solely because they believe it is in their interest to do so. This is particularly true of large, developed country Members, like the European Union or the United States, that are most immune from the effective sting of suspension of concessions except, perhaps, when it is the other that is doing the suspending.

But these Members are faced with a problem. The benefits they hope to obtain from the WTO would be threatened if the WTO itself were threatened, and the WTO itself would be threatened if those large Members consistently defied its dispute settlement system. They cannot both have the system and its benefits and consistently defy it, regardless of their relative immunity to effective sanctions.

To be sure, the WTO legal system – like any legal system – does not require complete compliance. Moreover, the WTO legal system – like any legal system – does not enjoy complete compliance either. But the WTO system – again, like any legal system – requires substantial compliance if it isn't to degenerate into lawlessness. That, I believe, is the sanction that truly motivates large developed country Members of the WTO when they are required to comply with an adopted panel finding in favor of a developing country or smaller Member.

The United States, the European Union, and other larger trading entities, to be sure, have some flexibility, some leeway, in ignoring some aspects of WTO law in a particular case. They can delay compliance; they can compensate indefinitely; they can shrug off suspended

concessions. They can get away with quite a bit. But the extent to which they can do so is not unlimited. Every step they take in the direction of non-compliance does some damage, however minor, to the dispute settlement system and to the WTO. Since developed country Members have a strong interest in preserving that system, they have a strong incentive to limit the use of the extra-legal flexibility they may enjoy by virtue of their size and wealth. As long as this is the case, the comparative inability of developing country Members to impose sanctions will not be a major impediment to their ability to benefit from the dispute settlement system. The record of compliance in the WTO's first decade, I would submit, supports this view.

5. *Conclusion*

The WTO dispute settlement system has become the most active and productive dispute settlement system in the entire field of public international law. It is truly remarkable that nearly 150 governments agreed to subject themselves to the compulsory jurisdiction of tribunals whose decisions are legally binding. No doubt the motives for this are many, but among them would have to be confidence in the integrity of the system and the competence of those who administer it; the limited subject matter jurisdiction (trade and commerce, not war and peace); and a remedy that, historically, has been justified simply as an attempt to rebalance concessions and restore the status quo.²⁸ This combination of motives seems to have led Member governments to conclude that, for them, the system's benefits outweigh its costs.

The system certainly can be improved, but those who would advocate for a more perfect system would do well to keep in mind Robert Hudec's words regarding the GATT legal system, words that are equally applicable to the WTO:

...it is not the legal bond *per se* that holds GATT law together. It is, rather, the convergence between what GATT law does and what governments need. The viability of the GATT legal system ultimately rests on maintaining that convergence.²⁹

²⁸ See, generally, David Palmeter and Stanimir Alexandrov, "Inducing Compliance" in *WTO Dispute Settlement*, in Kennedy & Southwick, note 27 above, at 646.

²⁹ Hudec, *Thinking About the New Section 301: Beyond Good and Evil*, in Jagdish Bhagwati and Hugh T. Patrick (eds), *AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM* 113, 132 (University of Michigan Press, 1990); reprinted in Robert E. Hudec, *ESSAYS ON THE NATURE OF INTERNATIONAL TRADE LAW* 153, 174 (Cameron May, 1999).