# NEW PERSPECTIVES TO THE WTO DISPUTE SETTLEMENT SYSTEM

# RULE-ORIENTEDNESS AND NEGOTIATION-ORIENTEDNESS

**By**

**Andrey Kovsh**

**THESIS**

Submitted to

School of Public Policy and Management, KDI

in partial fulfillment of the requirements

for the degree of

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# ABSTRACT

## NEW PERSPECTIVES TO THE WTO DISPUTE SETTLEMENT SYSTEM
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Increasing international economic interdependence has obviously become a benefit as well as challenge to nation-states across the world. The pursuit of free trade has been reinforced by such movement, critically enhancing the need to establish an institution regulating the affairs of international trade. Amidst these developments of the international economy, the World Trade Organization (WTO) as a global arbiter of international trade has received renewed focus as its rulings have become automatically binding on its member countries since its inception in 1995. Among controversial issues that have emerged was the critical question of how the dispute settlement mechanism should operate. This paper will seek to analyze the dispute settlement mechanism with an emphasis on the fundamental approach that should be taken in resolving disagreements.

This thesis will survey how the current dispute settlement system works and will broadly identify its procedures as either "rule-oriented" or "negotiation-oriented". The rule-oriented approach refers to a system in which disputes are resolved through adjudication or litigation process of applying previously set rules. The negotiation-oriented approach is a mechanism that concentrates on negotiation processes for reaching a mutually agreeable resolution to trade disputes. After concluding that the current dispute settlement procedure incorporates aspects of both of these two approaches, this paper will analyze the underlying rationales and perspectives of two approaches. Also, this paper will seek to examine the efficiency of each approach through an in-depth review of the cases resolved through either kind of methods. Through these analyses this paper mainly argues that the rule-orientedness approach of the WTO dispute settlement system should continue to complement itself with the negotiation-orientedness in order to achieve its fundamental goal of reaching mutually agreed resolutions and enforcement. The paper concludes with a brief look at the future of the newly emerging idea of "principle-orientedness".

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# CHAPTER I

# INTRODUCTION

## 1.1 Background Information

With the inception of the World Trade Organization (WTO), as the successor to the General Agreement on Tariffs and Trade (GATT), the dispute settlement system became a legalistic mechanism by acquiring binding force on its Member countries.[1] The WTO, consequently, became an important international organization with a great amount of influence in international trade affairs. The issues dealt at the WTO expanded into areas such as the intellectual property, investment, the environment, and genetically modified organisms, and more. Fearful of the immense amount of influence exerted by the WTO, some argue that such issues should be managed by other specialized organizations than the WTO.[2] Amidst such controversy, it is still irrefutable that the WTO has grown to become a major international organization extensively affecting the world trade.

For the WTO, with its heightened importance and as the center of trade disputes, one of the most important matters of concern became how the WTO as a system for settling disputes functioned. A significant deal of debate as to whether the dispute settlement should operate in a diplomatic way or legalistic way existed

[1] John H. Jackson, William J. Davey, and Alan O. Sykes, Jr. *Legal Problems of International Economic Relations Cases, Materials and Text* Third Edition (St. Paul, Minn.: West Publishing, 1995), 280-290.

[2] Markus Krajewski "Democratic Legitimacy and Constitutional Perspectives of WTO Law," *Journal of World Trade* 35(1) (2001): 167-186.

since the beginning of GATT. Although the WTO dispute settlement system is a mechanism of elaborately laid out rules, it embraces both legal and diplomatic means to resolving disputes through procedures such as panel proceedings, the Appellate Body Reviews, consultations, good offices, conciliation, and mediation.

Whatever the means, however, the WTO dispute settlement system should work towards achieving its fundamental goal. The fundamental goal of the WTO, here, can be defined as obtaining mutually agreed resolution and, consequently, its enforcement. Therefore, the dispute settlement should be structured and functioned in a way to most appropriately reach a mutually agreed resolution and to enforce its rulings. For such purposes, this paper looks into the approaches that work toward achieving the WTO's goals.

### 1.2 Main Argument

The two main approaches to the dispute settlement are termed as "rule-oriented" approach and "negotiation-oriented" approach. The first "rule-oriented" approach refers to settling disputes by applying the relevant laws that were previously agreed upon by members. The second "negotiation-oriented" approach, on the other hand, refers to settling disputes without such rules but by resorting to negotiation and diplomacy between the parties involved. While the WTO has gained a significant amount of legalistic aspects, the diplomatic methods are still embedded in the WTO dispute settlement processes.

The main argument of this paper is that in order to achieve its principal

goals of deriving mutually agreed resolution and obtaining enforcement of the rulings, the WTO dispute settlement should utilize the "negotiation-oriented" methods in *conjunction with* the currently dominant "rule-oriented" procedures.

### 1.3 Structure of the Paper

In Chapter II, this paper first examines major features of the WTO dispute settlement procedure and identifies and categorizes each procedure as either legalistic (rule-oriented) or diplomatic (negotiation-oriented) methods. After explaining research methodologies which are divided into two sections of normative and empirical sections in Chapter III, the paper begins extensive analyses of the two approaches in Chapter IV. In the first section, a normative analysis of both approaches is performed by studying and comparing the pros and cons of the two approaches. In the second section of Chapter IV, an empirical analysis is performed with comparison of numbers of cases that were resolved through either the legalistic or diplomatic approaches.

Through such studies, this paper concludes by emphasizing that the legalistic nature of the current dispute settlement system should be complemented with diplomatic characteristics. In Chapter V, it also briefly touches upon the future prospects of the WTO with new shifts such as "principle-oriented" approach and concludes in Chapter VI.

# CHAPTER II

# RESEARCH METHODOLOGY

The aim of this paper is to examine and evaluate the two main perspectives of what could be considered the basis of the current WTO dispute settlement procedure. After the review of the dispute settlement procedures, it will begin the discussion of two broad perspectives, i.e. diplomatic and legalistic approaches. The focus will be placed on the arguments made *for* and *against* each approaches and analyses on them. After such assessment, it will consider some of specific arguments pertaining to the two main approaches.

Followed by the normative assessment of dominant arguments, this paper will seek to look into the practicality of each approach by comparing numbers of cases settled by either diplomatic means or legal methods of the WTO dispute settlement system. It will also compare the number of cases resolved at the panel stage *vis-à-vis* the number of cases appealed and brought to the Appellate Review and consider the compliance of the panel reports of member countries.

Through these two kinds of analyses, this paper aims to explore the question whether legalistic or diplomatic means are sufficiently used at the WTO dispute settlement process and what aspects have to be supplemented in order to achieve the goal of the WTO dispute settlement process.

# CHAPTER III

# OVERVIEW OF THE WTO DISPUTE SETTLEMENT SYSTEM

## 3.1 Why the Dispute Settlement important?

A myriad of international trade agreements at bilateral, regional and multilateral levels have been signed to address the ever-increasing international economic transactions and establish norms and rules in international trade arena.

But there is not a perfect contract in the world: none of the international trade agreements can foresee and create provisions for all the possible disputes in their negotiation stage. Especially in trading negotiations involving a number of countries with different stakes, when a deal is badly needed for political reasons, but substantive agreement cannot be reached, negotiators sometimes opt for a vague arrangement which permits conflicting interpretations.[3] Given such an incomplete coverage of future contingencies by an international trade agreement, the DSM should be viewed as a mechanism by which incomplete provisions of the agreement are completed. In addition to the problem of incompleteness, a DSM of an international agreement may effectively cope with other transaction cost such as moral hazard and opportunism.[4]

Many scholars with economic approach emphasize the importance of DSM in facilitating trade liberalization in member countries to an agreement by helping

[3] Hoekman, Bernard M. and Michel M. Kostecki, *The Political Economy of the World Trading System: From GATT to WTO.* Oxford University Press, 1995

[4] Dixit, Avinash K., *The Making of Economic Policy: A Transaction-Cost Politics Perspective.* Cambridge: The MIT Press, 1996

sustain international cooperation and codifying trigger strategies which support the most cooperative tariff level.[5] DSM helps eliminate the coordination problems that could otherwise plague countries in their attempts to choose among the multiplicity of cooperative tariffs. Bagwell and Staiger portray DSM as a permanent ion to the punishment phase, which supports the most cooperative tariff level.[6] Kovenock and Thursby combine both cooperative and non-cooperative approaches in analyzing international trade agreements: an explicit agreement may be violated at some finite, but positive, cost. The cost arises from what they call "international obligation" and is imposed upon any country violating an explicit international agreement, regardless of whether such violations are detected or punished.[7] Most international lawyers such as Hudec[8], Jackson[9], Hoekman and Kostecki[10] take a legalistic approach to DSMs, particularly supporting the WTO DSP's overall objective that:

"*DSP is a central element in providing security and predictability to the multilateral trading system. It serves to preserve the rights and obligations of Members under the covered agreements and to clarify the existing provisions of those*

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[5] Staiger, Robert W., "International Rules and Institutions for Trade Policy", *NBER Working Paper*, No.4962, 1994

[6] Bagwell , K. and Staiger, R.W., "Multilateral Tariff Cooperation During the Formation of Regional Free Trade Areas", *NBER Working paper*, No.4363, 1993

[7] Kovenock, D. and Thursby, M., "GATT, Dispute Settlement and Cooperation", *Economics and Politics*, vol.4, no.2, 1992

[8] Hudec, Robert, *GATT Legal System and the World Trade Diplomacy*, London: Butterworth, 1990

[9] Jackson, John H., *The World Trading System: Law and Policy of International Economic Relations*, Cambridge. Mass.: The MIT Press, 1991

[10] Hoekman, Bernard M. and Michel M. Kostecki, *The Political Economy of the Word*

*agreements in accordance with customary rules of interpretation of public international law* (GATT Secretariat, 1994: 405)."

Petersmann goes further with the contention that DSMs serve to achieve the broad goals of the agreements, i.e., the worldwide economic freedom, consumer welfare and democratic peace by restraining the over-representation of producer interests with asymmetric influence over their governments.[11]

DSMs may provide gains for a multilateral enforcement mechanism by gathering and disseminating information under uncertainty generated by the unobservable NTBs. Hungerford emphasizes this information role of DSM, depicting the central enforcement problem in sustaining international trade agreements one of monitoring. DSMs provide a renegotiating forum when a dispute erupts.[12]

But there are some counterarguments that DSM can be detrimental to trade liberalization when this information role is regarded as weak or unaffordable. Most of the past panel rulings are proved ineffective in compelling policy changes and serve just as an effective enforcer of the status quo. DSM has the effect of making potential retaliation less severe because any retaliation must be approved by both the deviating and retaliating countries under such agreements as GATT and NAFTA.[13] Countries can punish cheating only by initiating a costly investigation of foreign actions, which

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*Trading System: From GATT to WTO*. Oxford University Press, 1995

[11] Petersmann, Ernst-Ulrich, *The GATT/WTO Dispute Settlement System: International Law. International Organization and Dispute Settlement.* London: Kluwer Law International, 1997

[12] Ludema, Rodney D., "Optimal International Trade Agreements and Dispute Settlement Procedures", University of Western Ontario Working Paper, 1990

[13] Ibid.

makes potential punishment less severe, resulting in higher levels of tariff or non-tariff barriers than without DSM. This problem worsens when the investigation fails to detect all the violations. Some scholars even points out that in some cases incentives for cooperation may be reduced as resorting to a DSM limits linkage of issues and iteration of the game.[14]

Anyway, since the inception of the World Trade Organization in 1995 from what was previously the GATT, the organization has received both applauses and boos throughout the world. It collected its share of admiration as one of the most successful international organizations with a high rate of compliance[15] as well as its share of condemnation as the epitome of the devil known as "globalization." Serious concerns such that this "overreaching" organization might jeopardize their national sovereignty or modify domestic rules were also raised in both developing and developed countries.[16]

Faced with such turmoil, the Seattle Ministerial Meeting bore out to be a failure and the WTO at the time seemed to be threatened by the rampant and fierce opposition throughout the world. However, both the failure and antagonism proved two facts about the World Trade Organization. First, and somewhat ironically,

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[14] Conybeare, John A., *Trade Wars: The Theory and Practice of International Commercial Rivalry*, New York: Columbia University Press, 1987

[15] Faryar Shirzad, "Part I: Review of the Dispute Settlement Understanding (DSU): Panel 1 E: Unmasking the WTO: Access to the System: The WTO Dispute Settlement System: Prospects and Reform", *Law and Policy in International Business* (2000).

[16] William J. Davey, "Has the WTO Dispute Settlement System exceeded its Authority? A Consideration of Deference shown by the System to Member Government Decisions and its Use of Issue-Avoidance Techniques" *Journal of International Economic Law* (2001), 79.

it is now no longer deniable that the WTO is in fact an influential international organization affecting almost every one of citizens in Member countries. Resistance against the WTO came from a wide variety of interest groups ranging from agricultural sectors to industrialized sectors. Such extensiveness confirms that the WTO and the decisions made at the WTO have direct impact on the constituents. Second, precisely because of the increase in importance, the WTO is now "burdened" with more controversial matters to deal with on its table. Although some express doubts and cynicism at results of Doha,[17] it is noteworthy that numerous agendas have continuously been raised at the Conference including development issues, agriculture, the environment, investment, subsidies, least-developed countries, implementation issues, transparency, services, and dispute settlement procedures.[18] While the Member countries have differences in their opinion as to the degree of importance and priority each issue should receive one over another, it was evident that the discussion on the dispute settlement system, as one of the core subjects, has not yet seen its end.[19] Commentaries such that there should be reforms to make the dispute settlement more efficient[20] reveal that, although asserted a success of the WTO-era,[21] the legalistic aspects of the current dispute settlement procedures might not yet be

[17] Alan Wm. Wolff, "What Did Doha Do? An Initial Assessment" *Journal of International Economic Law* 5(1), 202.

[18] *Ministerial Declaration* (Doha) World Trade Organization November 20, 2001, 2-9.

[19] Jeffrey J. Schott, *"Comment on the Doha Ministerial" Journal of International Economic Law* (2002), 191-219.

[20] Ibid.

[21] J.G. Merrills, *International Dispute Settlement.* Third edition (Cambridge, UK: Cambridge University Press, 1998), 200.

complete for dealing with further disputes.

As the binding force and automatic adoption of panel reports have been implemented in the dispute settlement procedures, the debate of whether to pursue either the diplomatic or legalistic approach seemed to have subsided with a triumph on the legalistic side.[22] Thus, the dispute settlement system can be regarded as having more emphasis on the legalistic side than the previous diplomatic approach that was dominant during the GATT-era. However, it is also true that the dispute settlement system is not without diplomatic means within itself and that it still espouses the usage of such means.[23]

Thus, particularly because of the expanded scope of issues to handle and also because of the fact that the diplomatic methods have not been proven useless, it is worthwhile to delve into the subject of these approaches and examine how the WTO dispute settlement has utilized the diplomatic and legalistic methods.

### 3.2 How the Dispute Settlement System works?

The WTO Disputes Settlement System embraces both negotiation and legal processes in reaching a resolution. The procedures are divided into three major stages when a party brings a case to the WTO.[24] First, the parties enter into consultations. When no agreement is reached, then the second stage involves the

[22] Michael Young, "Dispute Resolution in the Uruguay Round: Lawyers Triumph over Diplomats" *The International Lawyer*, Summer 1995 Volume 29 Number 2, 396

[23] The Dispute Settlement Understanding requires the consultations stage establishing a panel in Article 4 in Understanding on Rules and Procedures Governing the Settlement of Disputes.

[24] A detailed outline of the panel procedures is shown in [Figure 1] at the end of this chapter.

establishment of panels and rulings by the panels. Parties, if still dissatisfied, can appeal the rulings by the panels to the Appellate Body and resolutions are again sought at this third stage. During these processes, parties have a choice to settle the disputes through good offices, conciliation, or mediation. Implementation occurs either after the panel rulings or the Appellate Body's decisions.

Although the dispute settlement procedure is labeled as the "panel process," it is apparent that the process contains further means of reaching resolutions. When the panel process and the Appellate Body Reviews can be categorized as formal panel processes, which involve decision-makings by an impartial and separate entities (the panels and the Appellate Body) through adjudicative means, there are alternatives to these formal processes (consultations, good offices, conciliation, and mediation), which are negotiation-oriented means of reaching agreed resolutions. Therefore, the panel process can be divided into two groups according to the nature of the means to reach resolutions. The first group, as shown in [Table 1], is rule-oriented procedures which are the panel process and the Appellate Body Review and the second group is negotiation-oriented procedures which are consultations, good offices, conciliation, and mediation.

**[Table 1] Classification of Dispute Settlement Procedures**

| Rule-oriented Procedures | Negotiation-oriented Procedures |
|---|---|
| Panel Process | Consultations |
| Appellate Body Review | Good offices, conciliation, and mediation |

One might argue that the division could not be so distinct or clear because stages such as consultations can be recognized as residing within the legalistic approach. However, when the parties involved in a case perform negotiations bilaterally without an impartial intermediary, it should be categorized as a means of diplomatic method. This integrated system of legal means and political means are significant in that they are reflected in the dispute settlement procedure (see [Table 1]) as well as throughout the entire-agreement (see [Table 2] at the end of this chapter). The current WTO dispute settlement panel process is described in detail as the follows.

**a. Consultations**

When a party brings a case to the WTO, the Understanding on Rules and Procedures Governing the Settlement of Disputes (the Dispute Settlement Understanding/DSU) requires the parties to enter into bilateral consultations.[25] Consultations are considered as an imperative stage during the dispute settlement process because it compels parties to examine the complaint in a formal setting.[26] It is, in effect, a prerequisite for proceeding to the adjudicative stages of the dispute settlement. By requiring consultations, the DSU encourages the parties to reach an agreement early in the dispute or at least identify common grounds and the

[25] Article 4 of the DSU.

[26] William Davey, "WTO Dispute Settlement: Segregating the Useful Political Aspects and Avoiding "Over-Legalization," in *New Directions in International Economic Law*, ed. Macro Bronckers and Reinhard Quick (The Hague: Kluwer Law International, 2000), 293-295.

controversial issues of the case.[27] However, it could be possible that a party to tries to resort to other means without a sense of urgency and prolong the process without any progress.[28] In order to prevent such situation, the DSU explicitly sets time schedules for consultations stage. Parties have ten days to respond to a request, thirty days to "enter into consultations in good faith."[29] and sixty days to reach a conclusion by the consultations process.[30] This process could be expedited in cases of urgency in which ten days are provided to enter into the consultations and twenty days to reach a conclusion.[31] The Dispute Settlement Understanding directs that the consultations occur with confidentiality of its content.[32]

It may be pointed out this consultations stage is claimed to be significant for many disputes are settled in this stage.[33] As will be analyzed later with empirical evidence, the consultation stage could be a very important "diplomatic" method continued from GATT-era to the WTO-era. In contrast, good offices, conciliation, and mediation have not been used extensively.[34]

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[27] Dietk Ullrich "No Need for Secrecy? – Public Participation in the Dispute Settlement System of the World Trade Organization" 34 *The University of British Columbia Law Review* 55 (2000), 9-10.

[28] Merrills, 201.

[29] Article 4.3 of the DSU.

[30] Article 4.7 of the DSU.

[31] Article 4.8 of the DSU.

[32] Article 4.6 of the DSU.

[33] Merrills, 202.

[34] Merrills, 204.

**b. Good offices, Conciliation, and Mediation**

Unlike the consultations stage, good offices, conciliation, and mediation stage is a voluntary process with the agreement of the parties to the dispute within the WTO dispute settlement.[35] As the consultations, the proceedings are confidential,[36] but the DSU does not require the procedure in the process, but they can be performed at all stages throughout the panel process.[37]

These methods of consensual dispute resolution differ in the degree of the intercession by a third party. When the third neutral party provides additional channels of communication and encourages further talks, it is called good offices. Mediators perform more active roles than the ones in good offices by making proposals in the negotiation processes. In conciliation, the parties accede to have the third party to evaluate the facts and legal aspects which are non-judicial.[38]

As to the individual who can conduct good offices, conciliation, or mediation, the Dispute Settlement Understanding authorizes the Director-General.[39] One notable feature of this section in the DSU is that it provides special procedures for least-developed countries. Upon the request of the least-developed member, good offices, conciliation, or mediation can be conducted after the consultations and before the establishment of the panel.[40]

When one looks at these alternative procedures, it is evident that the dispute

[35] Article 5.1 of the DSU.

[36] Article 5.2 of the DSU.

[37] Article 5.3 of the DSU.

[38] Ullrich, 10-11.

[39] Article 5.6 of the DSU.

[40] Article 24.2 of the DSU.

settlement mechanism promotes the usage of these negotiation-centered means in resolving disputes. It would also have been reasonable to expect more frequent uses of these means. However, to date, that has not been the case.[41]

### c. Panel Proceedings

After the consultations stage, which is perceived as the "negotiating" phase of the dispute settlement proceedings, the legalistic step is initiated with a panel being requested and established.[42] Both the panel proceedings and the Appellate Body reviews, discussed in the next section, are recognized as "quasi-judicial" stages because they mainly function as an adjudication process but also embody characteristics for consensual approaches to resolutions.[43] The terms of reference are drawn up within twenty days after the panel establishment and the panel should be composed of panelists within ten days of the establishment of the panel. If no agreement is reached on the selection of panelists after twenty days, the Director-General is provided with ten more days to select panelists and form a panel.[44] A panel report is issued to the parties to the dispute within six months from panel's composition, three months in urgency.[45] The panel report is circulated within nine months from the date

[41] Faryar Shirzad, "Part I: Review of the Dispute Settlement Understanding (DSU): Panel 1 E: Unmasking the WTO: Access to the System: The WTO Dispute Settlement System: Prospects and Reform" 31 *Law and Policy in International Business* 769 (2000).

[42] Article 6 of the DSU.

[43] Ullrich, 11-12.

[44] Article 6.7 of the DSU.

[45] Article 12.8 of the DSU.

of the panel establishment.[46] One key difference from GATT to the WTO is the adoption of the panel report after its circulation. The Dispute Settlement Body has to adopt the panel ruling within sixty days unless there is a consensus not to do so.[47] This was a move away from the adoption of rulings on positive consensus to negative consensus, where, in the former instance of the GATT, the adoption of the rulings were possible only when there was a consensus to do so, whereas, in the latter case, the rulings are automatically adopted unless there is a consensus not to do so. Therefore, before the inception of the WTO, any party, including the losing party, could prevent the adoption of a panel report whereas, currently, such possibility is eliminated with the automatic adoption of a panel report.[48]

### d. Appellate Body Review

As the WTO dispute settlement acquired the rule of automatic adoption of panel reports, it has also created a means to appeal the panel report through a mechanism called the Appellate Body Review.[49] Within sixty days, the involved party, but not a third party[50], can appeal the panel report. The significance of the Appellate Review is that the Appellate Body is standing body comprised of individuals who

[46] Article 12.9 of the DSU.

[47] Article 16.4 of the DSU.

[48] Giorgio Sacerdoti "Appeal and Judicial Review in International Arbitration and Adjudication: The Cases of the WTO Appellate Review" in *International Trade Law and the GATT/WTO Dispute Settlement System,* ed. Ernst-Ulrich Petersmann (The Hague: Kluwer Law International, 1997), 271.

[49] Merrills, 208.

[50] Article 17.4 of the DSU.

serve the Appellate Body terms.[51] The Appellate Body is composed of seven individuals, three of whom serve on one case.[52] The time limit to the Appellate Review is maximum ninety days[53] and unless a consensus not to adopt the appellate report is reached, it is also automatically adopted by the DSB.[54] As for the scope of the review, the Appellate Body is limited to examine the law and the legal interpretation by the panel, not facts.[55] In adoption, the same rule for panel reports apply to AB reports as they shall be "unconditionally accepted by the parties to the dispute" unless there is a consensus not to do so.[56]

**e. Implementation and Retaliation**

The panel or Appellate Body recommends that the violating member bring measures into conformity when they are found to be violating the GATT obligations.[57] According to Article 21, surveillance of implementation of recommendations and rulings is performed by the DSB for prompt compliance.[58] Although ambiguities still remain as to what prompt compliance means, it is an essential principle in the implementation stage.[59] Thus, the losing party is provided with a "reasonable period of time," which is "proposed by the party

[51] Article 17.1 and 17.2 of the DSU.

[52] Article 17.1 of the DSU.

[53] Article 17.5 of the DSU.

[54] Article 17.14 of the DSU.

[55] Article 17.6 of the DSU.

[56] Article 17.14 of the DSU.

[57] Article 19.1 of the DSU.

[58] Article 21 of the DSU.

and approved by the DSB" or "mutually agreed by the parties" or "determined through binding arbitration."[60]

In cases of non-implementation, as temporary measures to full implementation, parties enter into negotiations for developing acceptable compensation.[61] When no satisfactory compensation is agreed upon, the invoking party can suspend its concessions as mandated in Article 22.[62] Compensation, if agreed by the parties involved, refers to a form of recompense whereas suspension of concessions refers to countermeasures. However, since such retaliatory measures run counter to the principle of the WTO,[63] the DSU provides specific measures in order to control its effects thereby reducing the possibility of abuse which will end up thwarting the free flow international trade.

### f. Arbitration

As another alternative means of settling disputes, the DSU provides "expeditious arbitration."[64] Arbitration in dispute settlements occurs during the implementation stage under Articles 21 and 22.[65] Procedures are left to the parties to

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[59] Merrills, 212.

[60] Article 21.3 of the DSU.

[61] Article 22 of the DSU.

[62] Article 22.2 of the DSU.

[63] Merrills, 213. Retaliatory measures would reduce the overall level of free trade, which would work against the purpose of the WTO.

[64] Article 25.1 of the DSU.

[65] Merrills, 215.

be agreed upon and, thus, the WTO played a limited role in arbitration.[66] The parties are obligated to notify agreements and arbitration awards.[67]

### g. Significance of the Dispute Settlement Process

With prompt timelines and the means to appeal, the dispute settlement mechanism is currently recognized as legalistic in its nature. The dispute settlement system is therefore an adjudicative system in which disputes are resolved through resorting to previously set and agreed rules. However, within the rules-oriented system, the dispute settlement mechanism embodies both diplomatic and legalistic means in resolving disputes. In the initiation stage of a dispute, the dispute settlement mechanism, by requiring consultations stage, promotes bilateral negotiation before resorting to the adjudication process. Alternative means to resolving disputes such as good offices, conciliation, or mediation are also available and encouraged during the entire proceedings of dispute settlements.

Therefore, while recognized as an efficient legal tool for trade disputes, it is significant that the dispute settlement mechanism still incorporates diplomatic means through which it utilizes negotiating channels. Furthermore, the dispute settlement mechanism not only contains both negotiation and adjudication but also encourages the former prior to resorting to the latter. Hence, it is apparent that the dispute settlement mechanism recognizes the importance of the diplomatic ways of resolving trade frictions as well as it does the legalistic method in finding mutually agreed resolutions.

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[66] Ibid.

### 3.3 Different Types of DSMs: Negotiation vs. Adjudication

DSMs take different forms across agreement. According to Reisman and Weidman (1995), the variations in DSMs result from the differences in features of various agreements and their political context.[68] The key property of a DSM's structure under specific trade agreement is determined by five factors: (1) the scope of the economic exchanges called for in the agreement, (2) the number of participants, (3) the degree, intensity and effectiveness of internal support for and opposition to the agreement in each party, (4) the degree of resulting economic integration between the parties and (5) the power parity among the participants.

A fundamental question arising in constructing and evaluation DSMs is whether they are primarily designed to adjudicate disputes or to mediate them.[69] If the mediation is the goal, then the DSM must emphasize methods designed to encourage the contending parties to negotiate a solution to their dispute. If the adjudication is the goal, then the DSM must be able to apply the relevant rules consistently and ensure that the decisions produced by the system are implemented.

In reality, all the DSMs adopt both diplomatic methods of dispute settlement (negotiation) and legal means of dispute settlements (adjudication) in varying

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[67] Article 25.2 and 25.3 of the DSU.

[68] Reisman, M. and Weidman, M. "Contextual Imperatives of Dispute Resolution Mechanisms: Some Hypotheses and Their Applications in the Uruguay Round and NAFTA", *Journal of World Trade*, 1995

[69] Jackson, John H., William J. Davey, and Alan O. Sykes, Jr. *Legal Problems of International Economic Relations: Cases, Materials and Texts.* St. Paul, Minn: West Publishing Co., 1995

degrees and combinations. Each DSM uses specific techniques designed to fit different situations and to maximize the chances of dispute settlement by successive or alternative use of different methods.

The diplomatic means of dispute settlement are characterized by (1) the flexibility of the procedures, (2) the control over the dispute by the parties, their freedom to accept or reject a proposed settlement and to retaliate, (3) the possibility of avoiding "winner-loser-situations" with their repercussions on the reputation of the Parties, (4) the only limited influence of legal considerations, and (5) the often larger influence of the current political processes in, and relative political weight of, each party.[70]

The legal means of dispute settlement through arbitration and courts tend to be employed when the parties want to obtain rule-oriented, binding decisions in conformity with their mutually agreed long-term obligations and interests and prefer to avoid the various risks involved in diplomatic means of dispute settlement, e.g., dependence on the consent and good will of the defendant, and bilateral *ad hoc* solutions which may reflect the relative power of the parties rather than the merits of their case with weakening effect on the legal rules and their interpretations.[71]

Yarbrough and Yarbrough categorize various DSMs into four types on the basis of the role and adjudicative power of the third-party: DSM I with third-party information provision, DSM II with non-binding third-party adjudication, DSM III

[70] Petersmann, Ernst-Ulrich, *The GATT/WTO Dispute Settlement System: International Law. International Organization and Dispute Settlement*. London: Kluwer Law International, 1997

[71] Ibid.

with binding third-party adjudication, and DSM IV with third-party enforcement.[72]

DSM I is the least adjudicative system. It relies on a third party to investigate on violations and disseminate the finding. But retaliation is the only punishment and can occur unilaterally, subject to no restriction (see [Figure 2] at the and of this chapter). After a complaint, the designated third party conducts an investigation on the measure alleged as a violation. If it is found that there was no violation, the dispute ends, unless the complaining party unilaterally retaliates. Under a guilty ruling, the third party disseminates information regarding the defendant's violation to group members. If they decide to retaliate against the violator, the latter will either comply (and the dispute be settled) or resist (which leads to the continuation of the dispute or ostracism in the worst). If retaliation fails to provide a sufficient incentive for compliance or if group members fail to retaliate, the dispute continues. There always exists a possibility of unilateral retaliation without any sanction from group members, even when the third-party finds the defendant not guilty. (The examples of DSM I are medieval trade fairs and merchant guilds.)

In DSM II with non-binding third-party adjudication, the third-party goes further than DSM I by recommending a remedy (see [Figure 3] at the and of this chapter). If the measure under investigation is found guilty, the third party suggests a recommended remedy to the dispute. The dispute ends when the defendant complies with the remedy. But its noncompliance brings about retaliation. If the retaliation fails to provide a sufficient incentive for compliance

[72] Yarbrough, B.V., and Yarbrough, R.M., "Dispute Settlement in International Trade: Regionalism and Procedural Coordination" in Mansfield, E.D. and Milner H.V. (eds.), *The Political Economy of Regionalism*, Columbia University Press: New York, 1997

or if the plaintiff fails to retaliate, the dispute may continue. The possibility of unilateral retaliation in the case of the third-party's not-guilty finding still exists since the third party adjudication is non-binding.

An example of DSM II is NAFTA Chapter 20, which is designed to address all the disputes but antidumping and countervailing duty cases. The NAFTA Chapter 20 panels as a third party issue a report and recommendations for a resolution, but the report can be overridden by a party to the dispute. Because compliance is not mandatory, there is no appeal procedure. Retaliation serves as the only recourse for a party who disagrees with the report and cannot otherwise negotiate an acceptable settlement. The dispute settlement procedure of the old GATT Article XXII and XXIII prior to WTO (Dispute Settlement Understandings) also resembles this type of non-binding third-party adjudication system. The defending nation has reserved a veto power to block the establishment of a panel, adoption of a panel report, and GATT's authorization of retaliation. Meanwhile, the complaining party was able lo retaliate unilaterally as a punishment without GATT's intervention.

DSM III empowers the third-party with stronger binding adjudicative ability, a great leap forward from the two DSMs above (see [Figure 4] at the and of this chapter). It makes illegitimate unilateral retaliation taken after a not-guilty finding. Since multilateral legitimate retaliation always enforces compliance, the defendant has no choice but to follow when demanded. As a safety valve for non-compliance, the defendant is given the right to appeal against the panel's guilty finding. These procedures contain the expansion of the dispute and end all the disputes raised under this type of mechanism.

The WTO DSU (Dispute Settlement Understanding) and NAFTA Chapter 19 procedures are good examples of DSM I I I type. The WTO DSU procedures are a substantial improvement from the former GATT DSP with far shortened time limits, elimination of the defendant's veto power in establishing the panel, and shift from positive consensus to negative consensus in adopting a panel report. A narrowly defined appeal procedure and a more powerful function in monitoring and enforcing compliance make the DSU more adjudicative. More importantly, retaliation is authorized in nearly automatic way across multiple agreements in cases of noncompliance with the panel ruling.

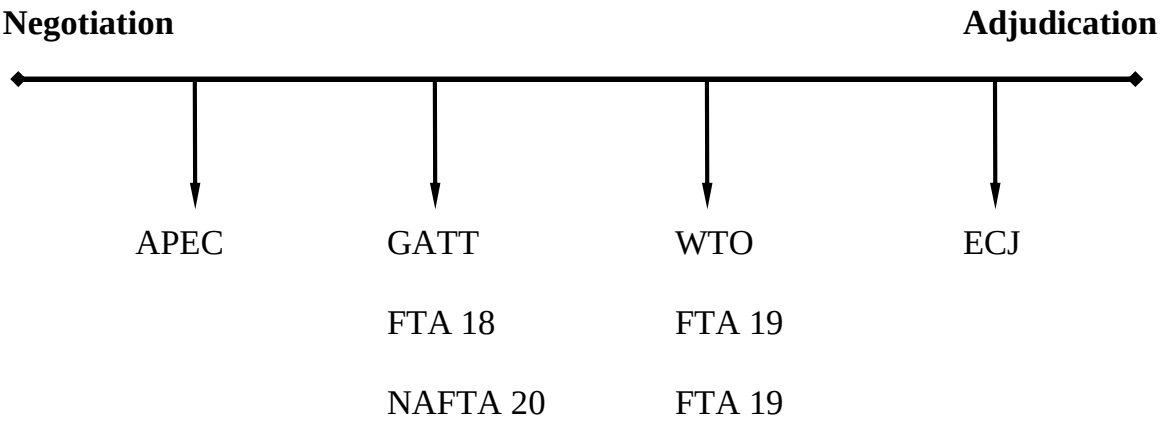
NAFTA Chapter 19 procedures for antidumping (AD) and countervailing duty (CVD) investigations also belong to the DSM III type. The NAFTA Chapter 19 binational panel serves as a third party with binding adjudicative authority. Appeal against such binding panel reports is possible under an Extraordinary Challenge Committee with narrowly specified conditions. In addition, Chapter 19 contains provisions to prevent a party from interfering with the panel process itself. Charges of such interference go to a special committee that, should it find evidence of interference, can authorize retaliatory suspension of Chapter 19 procedures or of other NAFTA benefits.

DSM IV is the most adjudicative system, approximate to domestic legal system (see [Figure 5] at the and of this chapter). It differs from DSM III in a sense that it ensures third-party enforcement and replaces parties' right to retaliate with punishment. As in DSM III, all the disputes brought to DSM IV end without escalation of the dispute. The states' never-decreasing interest in national

sovereignty makes this type of DSM IV hard to achieve in international stage. Despite such constraints, the European Community has successfully developed its community law and court to the level of DSM IV with the introduction of majoritarian decision making and an authoritative legal system to enforce decisions so made. The Community law enforced by the European Court of Justice (ECJ) is reminiscent of a domestic constitutional order with direct effect in the domestic law of member states. Suits alleging violation of Community law, therefore, can be brought in domestic courts. If individuals believe national law or a member state's behavior to be inconsistent with Community law, they may either petition through domestic courts for rulings from the ECJ or request the European Commission to petition the ECJ directly for a ruling. Either route can establish the supremacy of Community law.

In summary, all of the DSMs vary along the continuum spanning negotiation dedication as Figure 6 shows.

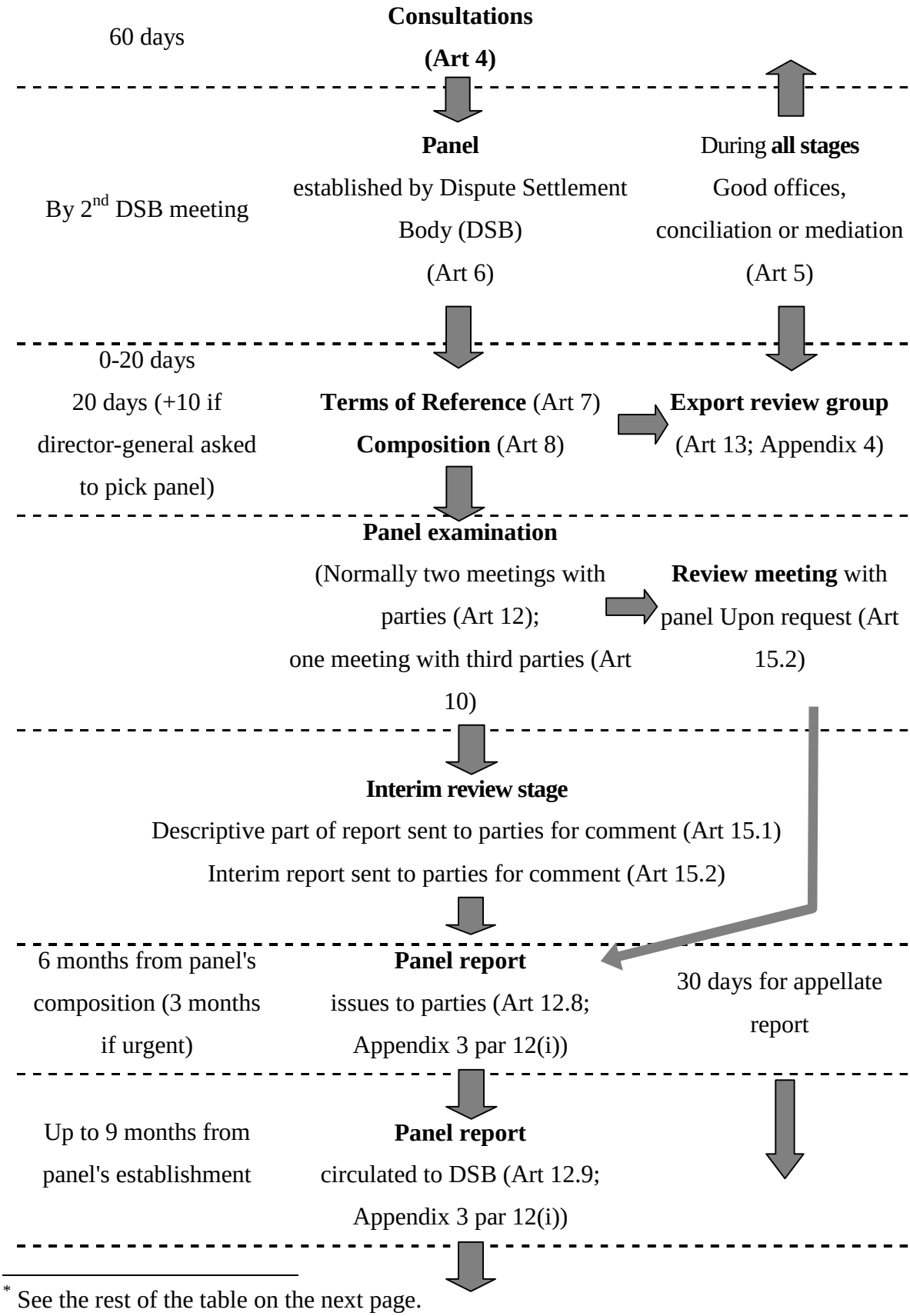
**[Figure 6] The continuum between Negotiation and Adjudication**



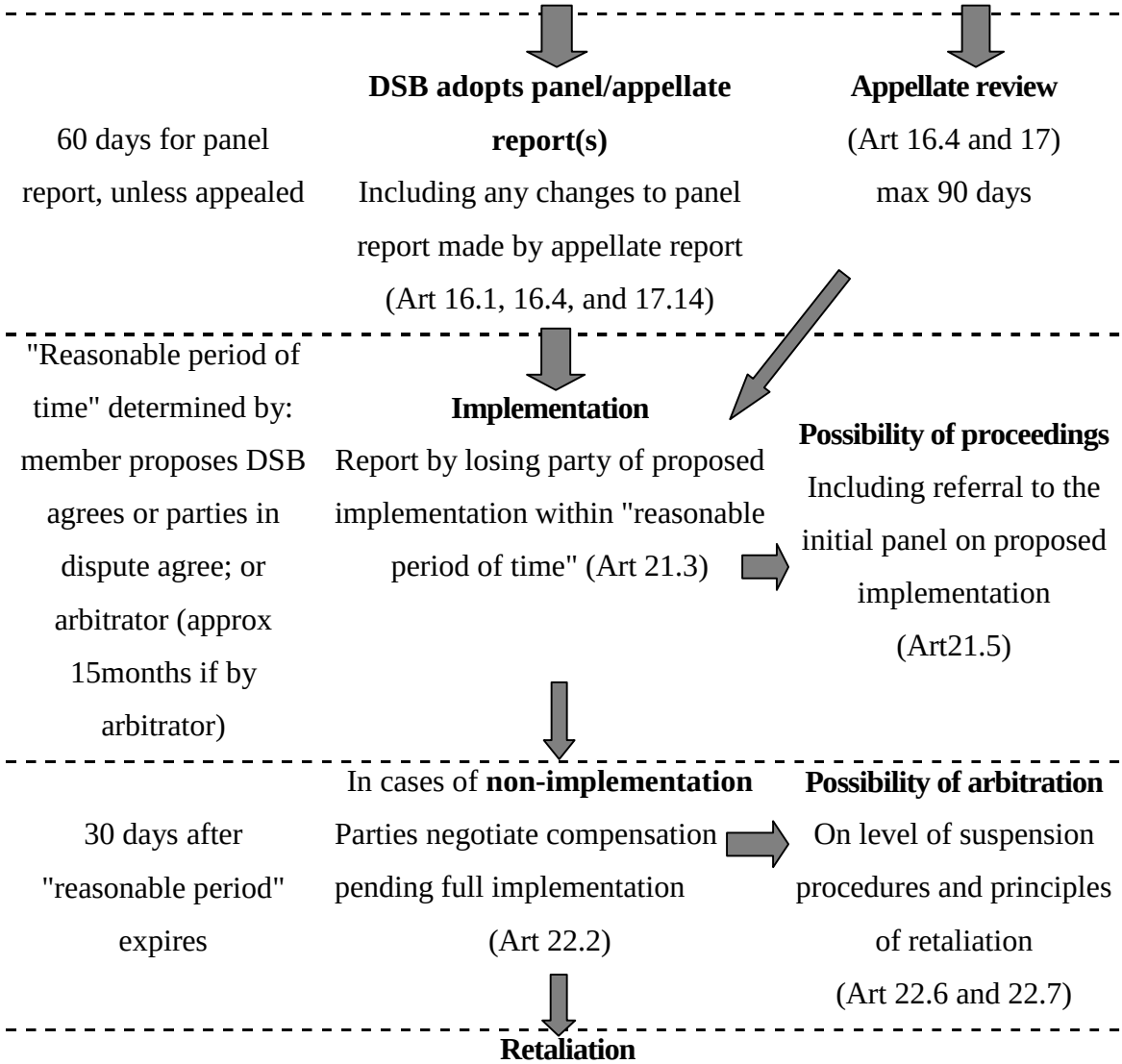

Most of the regional trade agreements such as Asia-Pacific Economic

Cooperation (APEC) have mere conciliation/negotiation provisions for disputes due to lack of consensus on a formal legalistic panel. At the other extreme lies the European Court of Justice, which provides the most adjudicative DSM, close to a domestic court system.

**[Figure 1] The Panel Process***




* See the rest of the table on the next page.


60 days for panel report, unless appealed
DSB adopts panel/appellate report(s)
Including any changes to panel report made by appellate report (Art 16.1, 16.4, and 17.14)
Appellate review
(Art 16.4 and 17)
max 90 days
"Reasonable period of time" determined by: member proposes DSB agrees or parties in dispute agree; or arbitrator (approx 15months if by arbitrator)
Implementation
Report by losing party of proposed implementation within "reasonable period of time" (Art 21.3)
Possibility of proceedings
Including referral to the initial panel on proposed implementation
(Art21.5)
30 days after "reasonable period" expires
In cases of non-implementation
Parties negotiate compensation pending full implementation
(Art 22.2)
Possibility of arbitration
On level of suspension procedures and principles of retaliation
(Art 22.6 and 22.7)
Retaliation
If no agreement on compensation, DSB authorizes retaliation pending full implementation
(Art 22.2 and 22.6)
Cross-retaliation
Some sector, other sectors, other agreements
(Art 22.3)

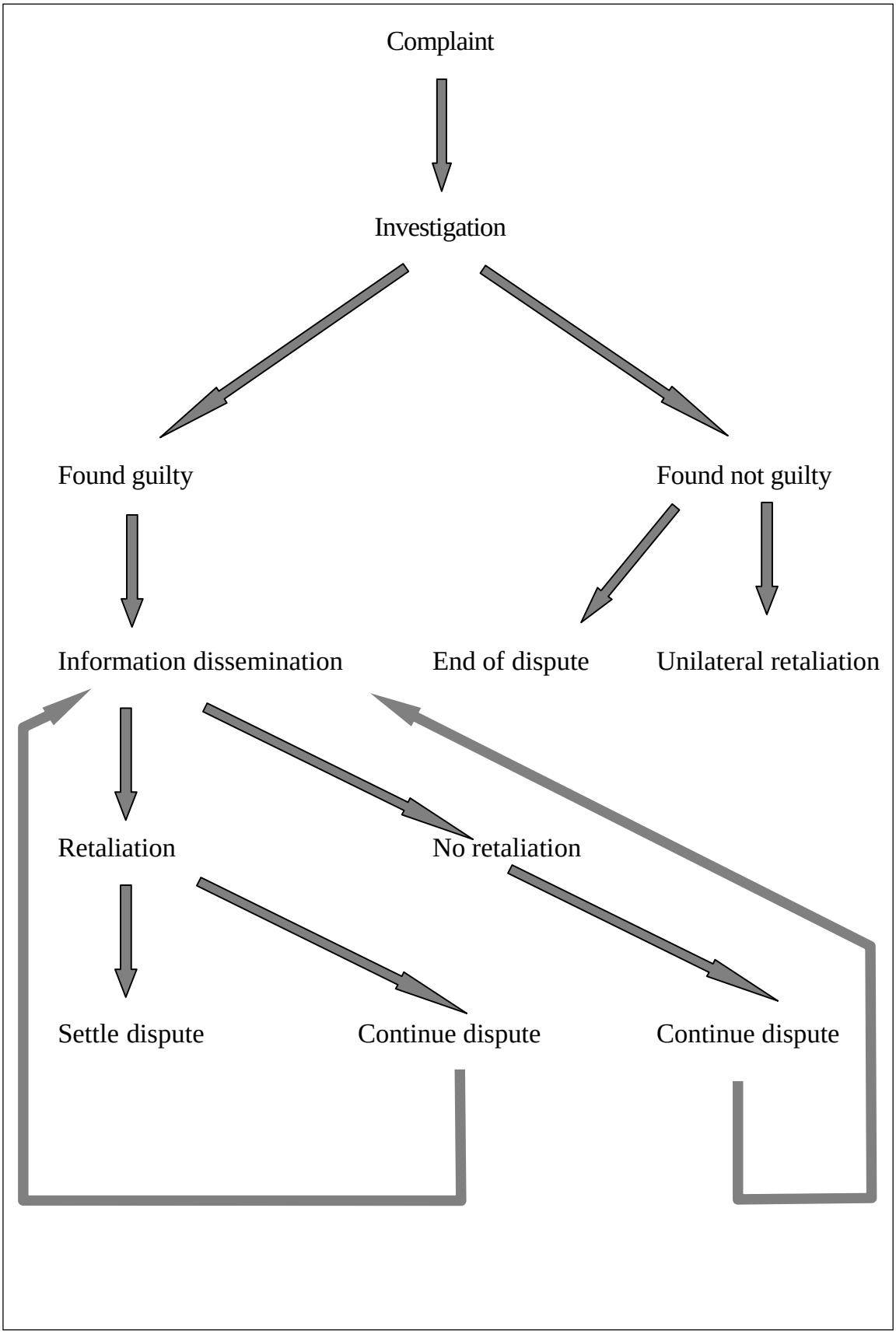
**[Table 2] The Integrated WTO System of Legal and Political Means**[73]

| Legal Methods of the WTO | Political Methods of the WTO |
|---|---|
| Panel Procedure *(Arts. 6-16, 18, 19)* | Consultations *(Art. 4)* |
| Appellate Review Procedure *(Arts. 17-19)* | Good offices *(Art. 5, 24)* |
| Rulings by Dispute Settlement Body on Panel and Appellate Reports *(Arts. 16, 17)* | Conciliation *(Arts. 5, 24)* |
| Private international arbitration *(e.g. Art. 4 of the Agreement on Preshipment Inspection)* | Mediation *(Arts. 5, 24)* |
| Domestic court proceedings *(e.g. Art. X of the GATT, Art. 13 of the Anti-Dumping Agreement, Art. 23 of the Agreement on Subsidies, Arts. 32, 41-50 of the TRIPS Agreement, Art. XX of the Agreement on Government Procurement)*[74] | Recommendations by<br>- Panels *(Art. 19*<br>- Appellate Body *(Art. 19)*<br>- Dispute Settlement Body *(Arts. 16, 17)* |
| | Surveillance of Implementation and Recommendations and Rulings *(Art. 21)* |
| | Compensation and Suspension of Concessions *(Art. 22)* |

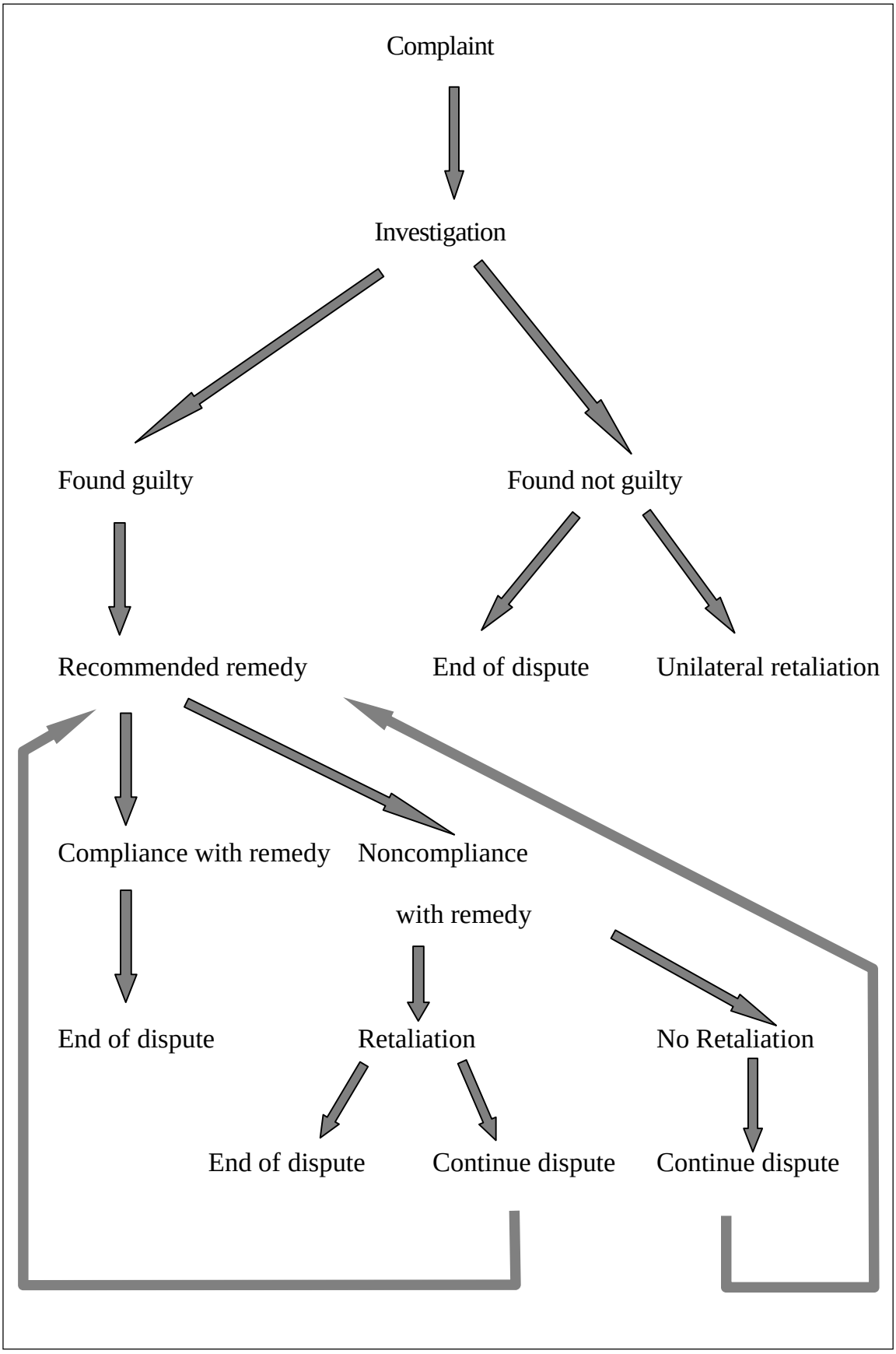
[73] Ernst-Ulrich Petersmann, "International Trade Law and the GATT/WTO D.S. System 1948-1996" in *International Trade Law and the GATT/WTO Dispute Settlement System*, ed. E.U. Petersmann (Hague, Kluwer Law International, 1997), 60.

[74] These articles are legal methods of the WTO because through these articles, the DSU requires judicial proceedings in domestic settings and rule of domestic law to fulfill the WTO obligations.

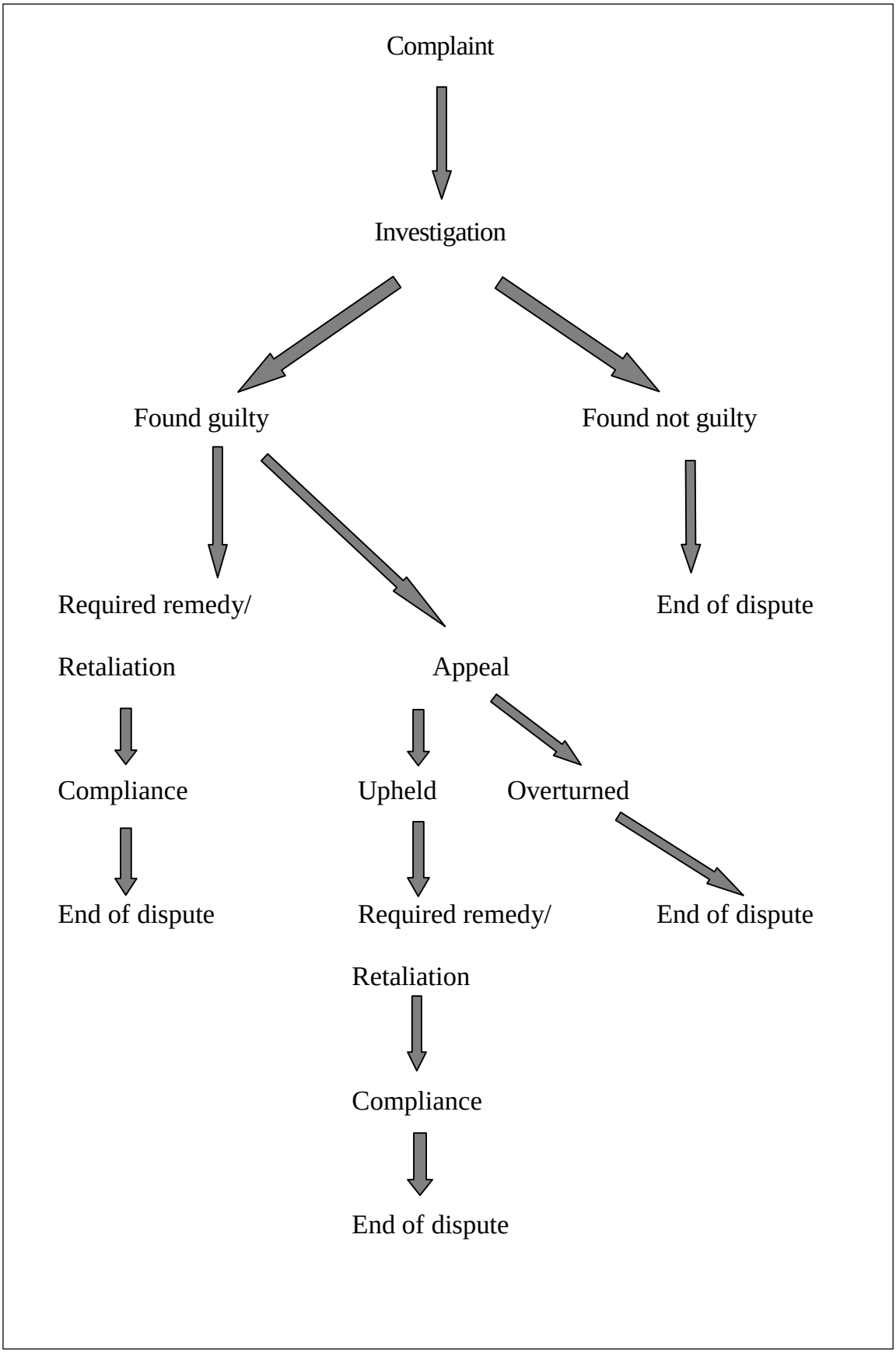
**[Figure 2] DSM I (third-party information provision)**



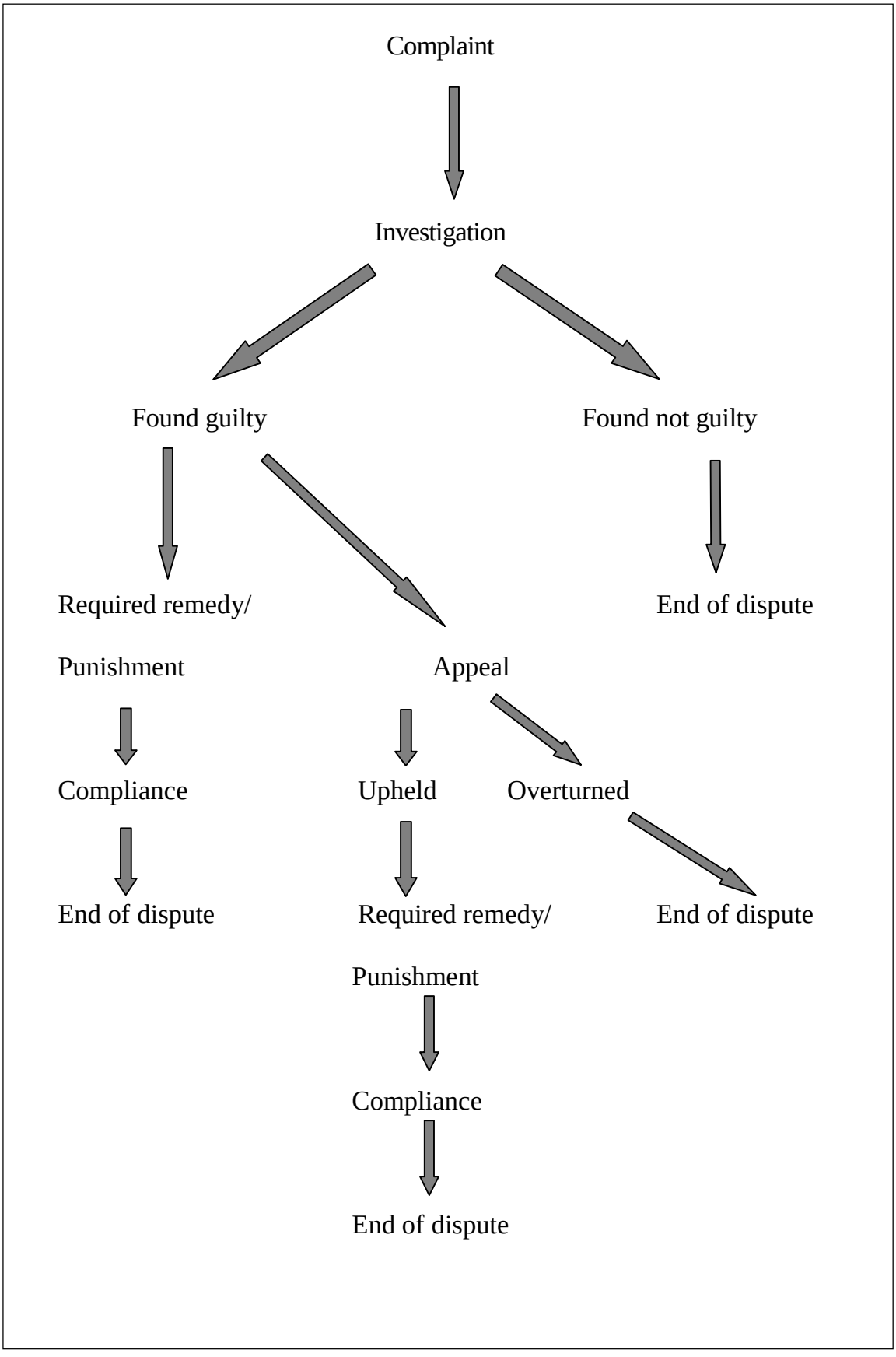
**[Figure 3] DSM II (non-binding third-party adjudication)**



**[Figure 4] DSM III (binding third-party adjudication)**



**[Figure 5] DSM IV (third-party enforcement)**



# CHAPTER IV

# ANALYSIS OF THE APPROACHES TO THE DISPUTE SETTLEMENT SYSTEM

## 4.1 Perspectives on the WTO's Dispute Settlement System

Although it may seem too simplistic, the main approaches to the WTO dispute settlement can be categorized into two groups.[75] The first one is a power or negotiation-oriented approach which refers to settling disputes through the usage of negotiation, and mediating disputes by encouraging parties to reach an agreement.[76] The second approach is a rule-oriented approach where disputes are settled by applying relevant rules and implementing results of the adjudicative process. As noted by one scholar, though neither of the extreme of the power-oriented approach nor the rule-oriented approach is ever reached in reality,[77] there have been unceasing discussions as to which one of these approaches the WTO dispute settlement should pursue.

Whether to prefer one approach from the other, however, depends what the fundamental goal of the WTO is. The dispute settlement procedure involves finding out whether a member country has violated the GATT rules and ultimately stopping the alleged violation. Therefore, though finding out the violation is not less important, the principal goal of WTO dispute settlement must be set enforcement of rulings.[78] As

[75] Jackson, Davey, and Sykes, 333.

[76] Jackson, Davey, and Sykes, 327.

[77] John H. Jackson, *Restructuring the GATT System* (London: Pinter Publishers, 1990), 52.

[78] Jackson, Davey, and Sykes, 328.

a result, consideration on the approaches of the dispute settlement should be centered on how efficiently the implemented approach can achieve the goal.

Some argue that diplomatic methods are more efficient for trade dispute settlement whereas some favor legalistic methods. The differences in their opinion are observed in this section followed by prominent scholarship and its criticisms. In considering two broad perspectives, this paper will describe the two as a "rule-oriented approach" and "negotiation-oriented approach." While the first approach will be designated as the "rule-oriented approach," a more specific examination of this approach will be performed in which a "rule-oriented approach" will denote a narrower implication within the broad approach. The second term "negotiation-oriented approach" refers to the "diplomatic" or "power" oriented approach.

### 4.1.1 Rule-Oriented Approach

#### a. What is a "Rule-Oriented" System?

A "rule-oriented" approach refers to settling disputes by applying relevant norms or rules that parties have previously agreed.[79] Within this system, settling disputes involves adjudication and implementation of the decisions.[80]

First, those who support this adjudicative system advocate that the rule-oriented system has clear and set rules that provide predictability in international trade dispute settlements.[81] When such predictability exists, the system can provide

[79] Jackson, Davey, and Sykes, 333.

[80] Jackson, Davey, and Sykes, 328.

[81] Meinhard Hilf, "Power, Rules and Principles-Which Orientation for WTO/GATT Law?"

stability because participants can predict the outcomes of the adjudication processes. Predictability and stability are important in international affairs where millions of transactions are performed by various participants.[82] Second, the rule-oriented system can provide consistency and transparency because previously set rules are applied in this system. The system produces consistent outcomes according to clearly set rules which, in turn, also contribute to producing predictability. Third, the effectiveness of the rule-oriented system resides in the fact that the system requires time limits to settling disputes[83] as the DSU does. In this way, the possibility that an alleged violator continues its wrong practice by prolonging the dispute settlement is considerably reduced. Fourth, some argue that the rule-oriented system promotes better compliance because it induces members to follow the rules which they themselves have agreed upon. When the party does not comply with the rulings, it will be labeled as a rule-violator, which is detrimental in international relations, and such embarrassment, more likely, will not be the only punishment it will have to suffer.[84] Fifth, the rule-oriented system is more beneficial for developing countries.[85] When compared to a negotiation/diplomacy-oriented system, the rule-oriented system involves less power struggle in dispute settlements. Therefore developing countries, usually the

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*Journal of International Economic Law* (2001) Oxford University Press, 116.

See [Table 3] at the end of the chapter for pros and cons of the "rule-oriented" approach.

[82] John H. Jackson, The Jurisprudence of GATT and the WTO (Cambridge, UK: Cambridge University Press, 2000), 8.

[83] Michael J. Trebilcock and Robert Howse, *The Regulation of International Trade* Second Edition (London and New York: Routledge, 1995), 54.

[84] Jackon, Davey, and Sykes, 332.

[85] John H. Jackson, *Restructuring the GATT System*, 49-53.

less-powerful when confronted by a developed country, can worry less about their relative power positions. Sixth, this system is capable of identifying and sanctioning cheating.[86] When previously set rules exist, it is easier to distinguish cheaters from rule-abiders by referring to those rules. When no such rules exist, however, it will be harder to identify let alone penalize violators. Seventh, one can avoid real "trade warfare" when rules exist within a system because the rule-oriented system produces reciprocity based on fair trade.[87] When parties believe the rules exist based on reciprocity, trade warfare is unlikely to be invoked and "playing by the rules" becomes the norm in trade disputes. Eighth, the rule-orientedness in a system reduces domestic pressure for more protectionist measures[88] whereas domestic political pressures can have an effect on the international policy outcomes when the system is based on negotiated basis with domestic interested players influencing the negotiators.[89]

Although argued as preferable to the negotiation-oriented approach for above reasons, some argue that the rule-oriented system has limitations. First, this approach is considered rigid and immutable.[90] Because of its inflexibility, the rule-oriented system is often incapable of meeting the needs of safety valves when the outcomes of the system are deemed to be illegitimate.[91] Illegitimate outcomes, here, refer to those that are unable to be applied for special reasons such as extreme economic problems of the violating party. Second, it is argued that this rule-oriented system is less

[86] Trebilcock and Howse, 55.

[87] Young, 390

[88] Young, 391.

[89] Young, 390 and Jackson, *Restructuring*, 52.

[90] John H. Jackson, *The World Trade System* (Cambridge, Mass.: The MIT Press), 339.

[91] Trebilcock and Howse, 54.

effective in the sense that it cannot induce application and implementation.[92] Whereas the goal of the WTO dispute settlement is determined to be enforcement, adjudication itself does not provide obligatory requirement to adhere to the rulings. If and when non-compliance frequently occurs, it will have a devastating effect on the system itself. Third, some argue that one weakness of this system rests on the fact that trade disputes are inherently secret.[93] Trade disputes were settled by diplomatic means and it has been important to keep them secret, for one, to conclude the negotiation as soon as possible, and two, to prevent spilling-outs of issues to other sectors of the involved countries' international affairs.[94] Fourth, such adjudicative system "poisons the atmosphere" by increasing the hostility between countries involved in the dispute settlement process.[95] Legal disputes are described as either "triumph" or "defeat" (win vs. lose) situation and not as "settled." Although law is "meant" to be unemotional and detached, such features do not apply to those involved who often become antagonized.[96] Such undesirable environment would not work to benefit the system as a whole as much as it would the individual participants. Fifth, it is possible that "wrong" cases might be brought to the dispute settlement system.[97] Here, "wrong" cases refer to those brought to the WTO for unavoidable violation and/or those cases

[92] Young, 408.

[93] J.H.H. Weiler, "The Rule of Lawyers and the Ethos of Diplomats Reflections on the Internal and External Legitimacy of WTO Dispute Settlement" *Journal of World Trade* 35 (2) (2001), Kluwer Law International, 195.

[94] Weiler, 195.

[95] Jackson, Davey, and Sykes, 330-332.

[96] Weiler, 198.

[97] Jackson, Davey, Sykes, 330-331.

relating to issues not yet settled at the WTO. These cases generate enough controversy, some argue, which in so doing can undermine the whole WTO system.[98] Sixth, transparency, which entails publicity, could lead to connecting of other issues with the trade dispute affair, which would not be desirable. When issues other than the trade dispute at hand get involved in the settlement process, it could domestic opposition that could impede efficient settlements of disputes.

Despite such criticisms, some argue for more rule-oriented system m order to heighten the benefits of the positive aspects discussed above. An argument in the direction for more rule-orientedness is what is termed "constitutionalism."

**b. Constitutionalism**

Constitutionalism put forth by Professor Ernst-Ulrich Petersmann and other supporters, calls for more "constitutional functions" of the WTO law. [99] Constitutionalism links human rights law to GATT/WTO law and emphasizes the needs for building legitimate constituency at the WTO.[100]

The need for "constitutionalization" of the WTO dispute settlement system can be observed as twofold. First, constitutionalization is argued for by maintaining that it is adequate to link the human rights law with the GATT/WTO law.[101] The principle of human rights law lies in the pursuit of individual freedom and equal

[98] Ibid.

[99] Ernst-Ulrich Petersmann, "The WTO Constitution and the New Millennium Round" in *New Directions in International Economic Law*, ed. Marco Bronckers and Reinhard Quick, (The Hague: Kluwer Law International, 2000), 130.

[100] Petersmann, 117-130.

[101] Petersmann, 130.

opportunities, which coincides with the objectives of the WTO law.[102] In order to establish constitutional democracy, countries derive its legitimacy by protecting human rights which are mainly non-discrimination, rule of law, and individual freedom.[103] It is asserted that because WTO laws also pursue similar principles of non-discrimination and extension of individual freedom, such legal principles lead to "transnational extension of constitutional democracy."[104]

Second, one main institutional change from GATT to the WTO requires such constitutionalization, namely, the transformation from "negative integration" to "positive integration."[105] As the WTO evolved into a system of positive integration, the member countries can no longer avoid obligates by merely refraining from prohibited practices (as the concept of negative integration) but have to alter or their domestic laws or craft new laws in order to comply with the WTO requirements (with positive integration). [106] Such international harmonization necessitates building legitimate political constituency in the WTO because the harmonization process will be impeded by doubts in the existence of democratic legitimacy of the WTO.[107] Since it is impossible to "undo" the process of inevitable harmonization of international trade laws, it is necessary to build democratic legitimacy, which bases the domestic legal systems of the member countries. Therefore, when such constitutional democratic institutions are built into the WTO system, it would produce the effect of

[102] Ibid.

[103] Petersmann, 117-130.

[104] Petersmann, 130.

[105] Petersmann, 119.

[106] Petersmann, 112-113.

[107] Petersmann, 118.

strengthening the rule-oriented system.

Some, however, express serious concerns and doubts to such pursuit of constitutional legitimacy at the WTO. First, as argued by one scholar, the WTO's current system exercises binding force of its rulings but lacks considerable amount of democracy in the institution, which is translated as a legitimacy gap.[108] However, unlike domestic constitutions, it is very difficult to obtain such democratic legitimacy in the WTO laws because of the inherent nature of international trade relations; being without a central governing authority whether it be democratic or not.[109]

Therefore, it is argued that the harmonization can pose a threat to domestic constitutions of the member countries.[110] Another problem of the above-discussed "constitutionalism" that is pointed out is that the advocates assert their arguments on a too narrow definition of "human rights" in the context of the "public choice theory", thus emphasizing the individual's right to import and end up overlooking the fact that constituents do not always prefer protectionism.[111] In sum, the WTO dispute settlement system does not yet meet the criteria to move towards "constitutionalism" because of its legitimacy gap due to its lack of "democratic legitimacy"[112] and narrow view of "individual rights."[113]

Positioned at a farther end of the spectrum toward the rule-based system, "constitutionalism" is pursued by those who try to augment the individual human

[108] Krajewski, 180-183.

[109] Ibid.

[110] Krajewski, 168.

[111] Krajewski, 179-180.

[112] Weiler, 183.

[113] Krajewski, 170-185.

rights on an international level. However, legitimacy gap caused by the lack of institutional democracy hinders further development of constitutionalism.

### c. Rule-Oriented Approach

A less extreme approach on the "rule-oriented" side than constitutionalism is the concept of what is referred to as "Rule-oriented Approach" put forth mainly by Professor John H. Jackson.[114] Although identical terms of the "rule-orientedness" are used, the one discussed earlier indicates one of the broadly divided rule-negotiation dichotomy, whereas, in this section, it refers to what Professor Jackson specifically terms "rule-orientedness" within the overall approach.

The first feature to be noted in the rule-oriented approach is that this approach is differentiated from "rule of law" or "rule-based" system.[115] In this sense, rule orientation is also distinguished from constitutionalism. The rule-oriented approach suggests more flexibility to the system in contrast to "rule-based" system[116] but does not center on negotiation as in the "negotiation-oriented" system, therefore placing itself somewhere between these two ends of the spectrum, while shifting to the "rules" side. The reason for such fluidity is that the "rule-oriented" approach does not endorse a complete exclusion of negotiation in approaching dispute settlements. Rather, the point is on the negotiation or settlement of disputes but only that it specifies an approach to such negotiation. Therefore, with the "rule-oriented" approach, dispute settlements are performed through both application of rules and the use of negotiation.

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[114] Jackson, *The Jurisprudence of GATT and the WTO*, 8.

[115] Ibid.

[116] Jackson, Davey, and Sykes, 333.

Second, while the procedural aspect of the 'rule-oriented' system can be described as a rule application, the emphasis of this approach is found in the perception of participants to the dispute settlement process. Proponents of this approach suggest that the essential factor in dispute settlements is what the participants perceive as "bargaining chips". [117] In a dispute settlement process with no previously agreed-upon rules, the involved parties perceive their relative "power positions"[118] as their basis for negotiating and deriving resolutions.[119] Thus, in such situations, the party in a relatively lower power position would have to confront the other party who can utilize this situation and make "implicit or explicit threats" or "flex its muscles" upon the weaker party.[120] The negotiators would also have to deal with domestic influence [121] which usually and probably will endorse more protectionist measures. However, when both parties know that there are certain rules to be applied, when the settlement comes to an impasse, the participants pay attention to the rules and the predicted outcomes.[122] This is the feature that would make the dispute settlement system more efficient and predictable.

The third feature of the "rule-oriented" approach pertains to today's international economic situation. It is undeniable that there are millions of international transactions which are driven by market mechanisms in today's

[117] Jackson, Davey, and Sykes, 334.

[118] Jackson, *The Jurisprudence of GATT and the WTO*, 9.

[119] Jackson, Davey, and Sykes, 332.

[120] Jackson, *The Jurisprudence of GATT and the WTO*, 9.

[121] Ibid.

[122] Jackson, *The Jurisprudence of GATT and the WTO*, 8.

integrated and decentralized world.[123] The least wanted, for that reason, is ambiguity and unpredictability caused by negotiations resolved through relative power positions. It is asserted that the rule-oriented system provides predictability and credibility in the world trading system particularly full of interdependence and intricacy with numerous participants.[124] The ability to predict outcomes of dispute settlements by rule-oriented approach and the reliability on such system creates stability to further investment and operation of markets.[125]

Though it may be true that the history of civilization proves a move away from a power-oriented system toward a rule-oriented system and that it is natural that a human institution such as the GATT/WTO also does,[126] some issues such as sovereignty or differences of culture between member countries subsist in spite of the existence of strong argument for the "rule-orientedness". Some argue that despite the increase of participation of non-governmental organizations accompanied by the revolution in communication, sovereignty still resides with the governments and that the dispute settlement process as rule-oriented as it is, should not become more rigid.[127] Therefore, the need to examine another approach to dispute settlement rises, which could supplement the shortcomings of the "rule-oriented" approach.

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[123] Ibid.

[124] Jackson, Davey, and Sykes, 335.

[125] Jackson, *The Jurisprudence of GATT and the WTO*, 8.

[126] Jackson, Davey, and Sykes, 335.

[127] Claude E. Barfield "Free Trade, Sovereignty, Democracy: The Future of the Word Trade Organization." *Chicago Journal of International Law* 403 (2001): 6-7.

### 4.1.2 Negotiation-Oriented Approach

At the other side of the spectrum lies what can be termed a "negotiation-oriented" approach. Here, the "negotiation-oriented" approach is identical to dispute settlements through "diplomacy" [128], "power" [129], and "pragmatism".[130] With the "negotiation-oriented" approach, disputes are resolved usually by bilateral negotiations between countries. Historically, the GATT system leaned more on this less legal and rigid approach dominated by negotiated outcomes.[131] When negotiation was the main means of settling disputes under GATT, the legal system was seen as a part of a continuous process *within* the diplomatic procedure.[132] The WTO dispute settlement moved itself away from the diplomatic approach through the Uruguay Round negotiations and towards the rule-orientedness. [133] Nevertheless, the dispute settlement mechanism does not embrace the rule-oriented approach as its sole method but integrates various features of deriving negotiated outcomes. Thus, an analysis of the "negotiation-oriented" approach is valuable in understanding the means in achieving the WTO's principal goal of dispute settlements and enforcement.[134]

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[128] Trebilcock and Howse, 54.

[129] Jackson, *The Jurisprudence of GATT and the WTO*, 120.

[130] Robert Hudec "GATT or GABB?" in *Essay on the Nature of International Trade Law,* (London: Cameron May, 1999), 83.

[131] Robert Hudec "A Diplomat's Jurisprudence" in *Essays on the Nature of International Trade Law*, 75.

[132] Ibid.

[133] Young, 391.

[134] William Davey, "WTO Dispute Settlement: Segregating the Useful Political Aspects and Avoiding "Over-Legalization,"" in *New Directions in International Economic Law*. ed.

This section examines the arguments for and against the "negotiation-oriented approach" and analyzes the strengths and weaknesses in settling disputes through the diplomatic approach.

Advocates of the negotiation-oriented approach assert that disputes are settled in a mutually advantageous manner by negotiation.[135] The biggest and strongest support for this argument is that trade disputes are closed and internal matter in their nature.[136] The objective of a dispute settlement, whatever the mechanism it uses, is to resolve disputes in the most swift and efficient way.[137] In conjunction with the main objective, the aim is to prevent spill-overs of the dispute into other areas of international relations.[138] Therefore, trade disputes are at best when left to quietly settled negotiation processes rather than relatively more open adjudication process.

Another principal reason for preferring the diplomatic way of dispute settlements is flexibility.[139] The need for flexibility in trade disputes has its roots in the intrinsic nature of international relations. Where there exists no central authority in international affairs, countries are exposed to different conditions in various disputes which the legal approach cannot satisfactorily manage. The "negotiation-oriented" approach offers room for maneuvers in each stage of dispute settlements.[140] Thus, the

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Marco Bronckers and Reinhard Quick (The Hague: Kluwer Law International, 2000), 292.

[135] Refer to [Table 4] at the end of the chapter.

[136] Welier, 195.

[137] Ibid.

[138] Ibid.

[139] Trebilcock and Howse, 54.

[140] Robert Hudec "A Diplomat's Jurisprudence" in *Essays on the Nature of International Trade Law*, 75.

negotiation-oriented approach is better suited for "safety valve" issues as well as dealing with difficulties developing countries face in trying to mean international standards.[141] One problem of adjudication could arise from a situation where the violator cannot, as opposed to would not, implement changes to conform to set regulations. While rule-based perspective does not provide a feasible answer to such problems, diplomatic approach can produce adjustments for special circumstances. Therefore, especially, developing countries can avoid implementing higher international standards which are detrimental to their economic standings.

Those who support the negotiation-oriented approach argue that it is more pragmatic to settle disputes through negotiations than litigation.[142] The negotiated outcome is more practical for implementation would be more likely. Although the adjudication produces rulings, there is no guarantee that the violator, when found at fault, might decide not to implement changes or could be unable to conform to the decision. Then, the adjudication process would end up obsolete by failing to achieve the goal of implementation. Accordingly, outcomes through bilateral negotiations would guarantee the enforcement at least better than the impartial adjudication process would. Additionally, mediating disputes compared to litigating cases would encourage parties to come to an agreement in a more peaceful way than confrontation.[143]

However, the negotiation-orientedness has several disadvantages for efficient dispute settlements. First, since negotiation is done on case by case basis, the system

[141] Trebilcock and Howse, 54.

[142] Jackson, Davey, and Sykes, 327.

[143] Jackson, Davey, and Sykes, 328-333.

would not be able to create adequate benchmarks.[144] The lack of general standards would cause inconsistency in international trade affairs unlike the rule-oriented system which is capable of providing some measures of predictability.[145] The inconsistent behavior on the part of the involved countries would result in ambiguity for further disputes in the future.

Another key criticism to the negotiation-oriented approach is that the negotiation processes rely on relative power positions of the participants. When two countries are involved in a dispute, the more powerful of the two could make "explicit and implicit threats"[146] to the less powerful. These threats can take various forms that could reach outside of the trade disputes themselves. They could involve measures relating to security or even retaliation in industries other than the dispute. Such usage of relative political or economic strength would allow the more powerful to muscle their way through rather than applying fairness.

Another inherent weakness pointed out of the diplomatic technique is the possibility of influence by domestic constituents. When citizens recognize their ability to make their demands heard, it will be most likely that they will demand protectionist policies which would impede the negotiation process and make it more difficult to reach a solution. Therefore, the negotiation-oriented approach becomes harder to reach a resolution in dispute settlements than applying previously set rules.

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[144] Trebilcock and Howse, 54.

[145] Ibid.

[146] Jackson, Davey, and Sykes, 333.

### 4.2 Empirical Analysis

How dispute settlements are actually settled at the WTO is important in assessing which approach is more efficient in achieving the WTO's goal. Efficiency in dispute settlements refers to the method's capacity to achieve the WTO's fundamental goal of reaching a mutually agreed resolution as well as its enforcement. It is, therefore, necessary to compare the number of cases resolved by each method identified either as negotiation-oriented or rule-oriented methods. For the comparison, as discussed earlier, the consultations and good offices, conciliation, and mediation processes are categorized as negotiation-oriented whereas the panel procedure and the appellate review are regarded as rule-oriented.

#### 4.2.1 Empirical Comparison

Since the inception of the WTO, there have been 329 complaints brought to the dispute settlement mechanism to year 2005.[147] But in this work I want to review only a part (to be correct about 73.5%) of all cases, until the year 2002. I base in my analyze on reliable work of Marion Panizzon and Young Duk Park "WTO Dispute Settlement 1995-2001: A Statistical Analysis".[148] As shown in [Table 5] until January 1, 2002, 128 cases have been settled which is 53% of all the cases and 114 cases were still in progress composing 47% of all the cases.

[147] http://www.wto.org/english/tratop_e/dispu_e/dispu_status_ e.htm

[148] Marion Panizzon and Young Duk Park, "WTO Dispute Settlement 1995-2001: A Statistical Analysis," *Journal of International Economic Law* (2001): 221-244.

**[Table 5] Number and Share of Cases from 1995-2002**

| Dispute status (as of 2001) | Complaints | Share |
|---|---|---|
| Total cases | 242 | 100% (of 242) |
| Cases in Progress | 114 | 47% (of 242) |
| Cases Settled | 128 | 53% (of 242) |

### a. Usage of Rule-Oriented vs. Negotiation-Oriented Methods

As shown in [Table 6], among 128 resolved cases, 70 cases were resolved through the adoption of panel or appellate body reports by the Dispute Settlement Body. 39 complaints were settled bilaterally, of which 35 were notified to the DSB under Article 3.6[149] and 4 were not notified.[150] Of the nineteen cases settled in other ways, nine were settled through withdrawal of the complaints[151], seven were settlements through inaction[152], and three were other forms[153]. None of the complaints

[149] DSU Article 3.6 mandates the following: "Mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements shall be notified to the DSB and the relevant Councils and Committees, where any Member may raise any point relating thereto."

[150] Panizzon and Park, 227; 35 cases are DS5, DS6, DS7+DS12+ DS14, DS19, DS20, DS21, DS28, DS35, DS36, DS37, DS40, DS42, DS43, DS72, DS73, DS74, DS83, DS85, DS86, DS91+DS92+DS93+DS94+DS96, DS102, DS119, DS124, DS125, DS151, DS190, DS198, DS199, and DS210; Four cases are DSB, DS15, DS 49, and DS57. Refer to the Appendix for the list of cases.

[151] Panizzon and Park, 229; These cases were settled through termination of further action by withdrawal, amendment, or expiration of the measures; nine cases were DS1, DS23, DS32, DS 39, DS89, DS123, DS 181, DS227, and DS240.

[152] Panizzon and Park, 229; Those settled with inaction are when (1) panelists are not selected as in DS9, (2), no further action was taken after the request for consultations in

were settled through good offices, conciliation, or mediation process.

**[Table 6] Various Means of Resolution**

| Methods of Resolution | Relevant Articles | Complaints | Share |
|---|---|---|---|
| **Panel or Appellate Body Reports Adopted by the DSB** | DSU Articles 16.4 & 17.14 | 70 | 55% (of 128) |
| **Resolved Bilaterally** | DSU Article 3.6 | 39 | 30% (of 128) |
| **Other Ways** | DSU Articles 3.7, 12.12 and others | 19 | 15% (of 128) |
| **Voluntary Arbitration DSU** | Article 25 | 0 | 0% (of 128) |
| **Good offices, Conciliation or DSU** | Article 5 | 0 | 0% (of 128) |

[Table 7] is a rearrangement of [Table 6] identifying the resolutions according either "rule-oriented" or "negotiation-oriented" approaches. 55% of the settled complaints were resolved through the adjudication process of the WTO's dispute settlement system. Disputes were also resolved through "diplomatic" ways or "negotiation-oriented" method by mutual agreements. These include 39 cases, of

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DS17 and DS25; and (3) the panel's authority lapsed pursuant to Article 12.12 of the DSU in DS38, DS77, and DS88+DS95; Article 12.12 mandates the following: "The panel may suspend its work at any time at the request of the complaining party for a period not to exceed 12 months... If the work of the panel has been suspended for more that 12 months, the authority for establishment of the panel shall lapse."

[153] Panizzon and Park, 229; A new request for consultations or Panel superseded the former matter in cases DS16, DS106, DS228.

which, however, none involved the usage of good offices, conciliation, or mediation.

**[Table 7] Rule-oriented vs. Negotiation-oriented Resolutions**

| Approaches | Methods of Resolution | Complaints | Share |
|---|---|---|---|
| **"Rule-oriented"** | Panel and Appellate Body Reports | 70 | 55% (of 128) |
| **"Negotiation-oriented"** | Bilateral resolution, Good offices, Conciliation or Mediation | 39+0 | 30% (of 128) |
| **Other ways** | Withdrawal, Amendment, Expiration, Inaction | 19 | 15% (of 128) |

### b. Cases settled through Panel or Appellate Body Review

[Table 8] shows that there were 57 panel reports issued as of January 1, 2002. Of those cases, for 2 cases, time for appeal has not run out.[154] Among the 57 panel reports adopted by the DSB, 41 were appealed which amounts to 75%.[155]

[154] Panizzon and Park, 229; DS 176 and DS 202.

[155] Panizzon and Park, 229; Panel reports adopted by the DSB without appeal are as the follows: DS44, DS54+DS55+DS59+DS64, DS79, DS99, DS114, DS126, DS132, DS152, DS155, DS156, DS160, DS163, DS179, DS189, and DS194; Refer to the Appendix for the list of cases.

**[Table 8] Panel vs. Appellate Body Review**

| Disputes | Complaints | Share |
|---|---|---|
| **Total Panel Reports** | 57[156] | 100% (of 57) |
| **Time not run out for appeal** | 2 | 3% (of 57) |
| **Appellate Review** | 41 | 75% (of 55) |

[Table 9] shows the results of the Appellate Body Reviews. Of 39 cases less than half, 41% (16 cases), were upheld with some modifications in 5 cases whereas more than half, 59% were reversed either in part or whole.

**[Table 9] The Outcome of Appellate Body Review**

| Appellate Body Rulings | Matters | Share |
|---|---|---|
| All upheld | 11 | 28% (of 39) |
| Upheld with modifications | 5 | 13% (of 39) |
| **SUB TOTAL – UPHELD** | **16** | **41% (of 39)** |
| Upheld in Part, Reversed in Part | 21 | 54% (of 39) |
| All reversed | 2 | 5% (of 39) |
| **SUB TOTAL – REVERSED** | **23** | **59% (of 39)** |

[156] Cases resolved through mutually agreements and the panel reports which were brief descriptions of the cases as well as solutions reached under Article 12.7 are not counted. Compliance review panel reports and Appellate Body reports under DSU Article 21.5 are also not counted in this number.

### 4.2.2 Significance of the Empirical Evidence

The statistics above raise several considerations of the WTO dispute settlement system. The apparent feature of the statistics is that between 1995-2001 there were no cases resolved through alternative means of settling disputes *i.e.* good offices, conciliation, or mediation. While the Dispute Settlement Understanding explicitly maintains that "the aim of the dispute settlement mechanism is to secure a positive solution to a dispute" and "a solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred,"[157] the empirical evidence seems prove that "mutually acceptable" outcomes by the adjudication process are preferred to the parties than outcomes through bilateral negotiation.

However, whereas none of the were cases settled through good offices, conciliation, or mediation, 39 cases, comprising 30% of all cases were resolved bilaterally. This proves that bilateral negotiations are still a substantial part of settling disputes at the WTO and that they are not dispensable. Assuming that these bilateral resolutions lean more on the "negotiation-oriented" approach as decided above, it would be imprecise to claim that the WTO dispute settlement mechanism predominantly employs legalistic approach. Rather, the WTO dispute settlement still retains diplomatic aspects of the pre-WTO era and complements the legal mechanisms, *i.e.* panel proceedings and Appellate Review.

Additionally, when there exists a major portion of the disputes settled through bilateral negotiations, it gives some support for utilizing similar diplomatic methods

[157] Article 3.7 of the DSU.

such as good offices, conciliation or mediation. The question, nonetheless, remains as to why none of the cases were able to use such methods. One major impediment to the usage of those alternative means is the voluntary nature of these procedures. Whereas consultations stage is compulsory prior to the establishment of a panel, institutional and procedural problems rise when there are no specific requirements in engaging in good offices, conciliation or mediation processes. Member countries involved in disputes, after the consultations stage, might end up regarding such negotiation process as ineffective.

Comparison of the cases settled after the panel stage with those appealed for the Appellate Body Review furthermore raises some inquiries. Presuming that the most frequent reason for appeals to the Appellate Body is dissatisfaction with the panel rulings by either one or more parties to the dispute, the rate reaching 75%[158] indicates that 3/4 of the panel rulings are unacceptable to one or more, if not all, of the parties involved at the dispute. The outcomes of the Appellate Body Review are also noteworthy. The fact that more than half of the cases amounting to 59% of the appealed complaints were reversed reveals that the panel rulings could be unreliable to some extent. This can be an indication that "rule-oriented" aspects of the WTO dispute settlement mechanism by itself is not complete and that it could be supplemented with other means in deriving the mutually agreed resolutions.

When perceiving the ultimate object of the dispute settlement as obtaining

[158] 75% rate appears to be a relatively high rate of appeals when compared to domestic court such as the U.S. Courts of Appeals where in year 2001, 46,487 criminal and civil cases appealed compared to 313,615 criminal and civil cases filed to the U.S. District Courts which amounts to 15%; 2001 Judicial Business Administrative Office of the U.S. Courts.

mutually agreed resolutions according to the WTO laws and enforcing their outcomes, it becomes evident that weaknesses of the adjudicatory process could be complemented with other mechanisms that facilitate the process of achieving the basic goal of the organization. As the statistics show, diplomatic or "negotiation-oriented" methods are still being utilized together with "rule-oriented" system which proves to be not completely efficient by itself. The two observed aspects of the current dispute settlement system, *i.e.* continued utilization of diplomatic means and limitations of the usage the rule-oriented approach, demonstrate that a further move away from or a neglect of the diplomatic means toward the more legalistic approach should be reconsidered. As argued by one scholar, too much emphasis on the legalization could lead to "over-legalization" and result in highlighting "form over substance,"[159] which could end up having an effect of neglecting or abandoning effective means in achieving the fundamental goal of the WTO dispute settlement system.

[159] Davey, "WTO Dispute Settlement: Segregating the Useful Political Aspects and Avoiding Over-Legalization," 307.

**Table 3. Rule-Oriented Approach**

| ADVOCACY | CRITICISM |
|---|---|
| • Clear rules<br>• Predictable<br>• Stable<br>• Consistent<br>• Transparent<br>• Time limits (promptness)<br>• Better compliance [a]<br>• Beneficial for developing countries [b]<br>• Capable of identifying and sanctioning cheating<br>• Avoids real "trade warfare"<br>• Reduces domestic pressures | • Rigid thus immutable<br>• Ineffective in application and implementation<br>• Secrecy not guaranteed<br>• "Poisons the atmosphere" [c]<br>• Hostility aroused<br>• Incapable of dealing with "wrong" cases<br>• Unnecessary links to other issues |

[a] Advocates of the rule-oriented approach argue that the system induces better compliance because the previously agreed rules compel the members to follow the rules. Otherwise, the rule-breaker will be labeled as a violator, the reputation of which, is detrimental in international relations. Advocates of negotiation-oriented approach, on the other hand, argue that compliance and implementation will be easier through negotiation-oriented approach because the parties are able to settle on the implementation methods and means while the negotiation proceeds, which is more realistic than the rule-oriented approach.

[b] Rule-orientedness is beneficial for developing countries in the way that the most powerful are not able to make threats because every member has to obey certain set rules. However, negotiation-orientedness could also benefit developing countries because the system can provide the developing countries with safety valves thereby able to adjust negotiation outcomes on the basis of their developmental situation.

[c] "Poisoning the atmosphere" refers to creating hostility through the notion of "win" vs. "lose" in litigation processes. The rule-orientedness might, some worry, create such environment when unnecessary and unintended.

**Table 4. Negotiation-Oriented Approach**

| ADVOCACY | CRITICISM |
|---|---|
| • Inherent nature of trade disputes – closed and internal<br>• Flexible<br>• "Safety-valve" function<br>• Better implementation [d]<br>• Beneficial for developing countries [e]<br>• More pragmatic | • No adequate benchmarks<br>• Inconsistency → ambiguity<br>• Reliance on relative power positions<br>• Usage of explicit or implicit threats<br>• Susceptible to domestic influence |

[d] Advocates of the rule-oriented approach argue that the system induces better compliance because the previously agreed rules compel the members to follow the rules. Otherwise, the rule-breaker will be labeled as a violator, the reputation of which, is detrimental in international relations. Advocates of negotiation-oriented approach, on the other hand, argue that compliance and implementation will be easier through negotiation-oriented approach because the parties are able to settle on the implementation methods and means while the negotiation proceeds, which is more realistic than the rule-oriented approach.

[e] Rule-orientedness is beneficial for developing countries in the way that the most powerful are not able to make threats because every member has to obey certain set rules. However, negotiation-orientedness could also benefit developing countries because the system can provide the developing countries with safety valves thereby able to adjust negotiation outcomes on the basis of their developmental situation.

# CHAPTER V
# PROSPECTS AND THE "PRINCIPLE-ORIENTED" APPROACH

Though the argument that neither of the two extremes is never reached in reality gains an extensive amount of validity,[160] whether the WTO should approach the dispute settlement mechanism either with rule-orientedness or negotiation-orientedness is still of considerable debate. Some keen observers of the WTO dispute settlement system argue that the organization has now passed along three stages of its development; namely, power-oriented to rule-oriented, and finally to a principle-oriented system.[161] Fundamental principles such as trade liberalization, non-discrimination, respect of sovereignty, sustainable development, cooperation, multilateralism, transparency, rule of law, and proportionality are recognized as underlying the current WTO system.[162]

These are apparently embodied in the WTO laws as well as reports produced by the Appellate Body.[163] Such argument seems convincing when one searches for what lie underneath the current system of complicated and intricate trade economic rules. However, although it might be true that the organization is making another move from the current system to the one with embedded principles as its foundations,

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[160] Jackson, Davey, and Sykes, 334-335.

[161] Meinhard Hilf, "Power, Rules and Principles-Which Orientation for WTO/GATT Law?" *Journal of International Economic Law* (2001): 111-130.

[162] Hilf, 117-121.

[163] Frieder Roessler, "Diverging Domestic Policies and Multilateral Trade Integration" in *Fair Trade and Harmonization: Prerequisites for Free Trade?* ed. Jagdish Bhagwati and Robert E. Hudec, vol. 2 (Cambridge, London: the MIT Press, 1996), 24-31.

the methodological features of approaching the settlements of disputes should still be considered on the "negotiation-rule oriented" spectrum. Procedural aspects remain as yet in the field of "diplomacy versus rules" and it will probably remain although the institution does make a leap to a "principle-oriented" system.

# CHAPTER VI

# CONCLUSION

Since its inception in 1995, the World Trade Organization, as the successor to GATT, has demonstrated its efficiency in settling trade disputes through legalistic means supported by binding force on its member countries. As international economic interdependence has increased with the pursuit of free trade, the issue of settling trade disputes has become a crucial matter of concern for nation-states as well as firms and individuals across the world. The WTO has received both approval and contempt for its success as an effective institution to resolve trade disputes and as a contributor to the controversial trend called "globalization". Amidst these unceasing controversies concerning this international "court" for trade, one evident fact is that the WTO is now an imperative international organization in terms of its functions as a dispute settlement mechanism. Therefore, part of the essence of the WTO lies in how the dispute settlement system works and through what means it tries to gain efficiency in resolving disputes.

With binding force and the automatic adoption of reports, the WTO has transformed itself into a more legalistic organization. However, while the overall structure is considered as an adjudicative system, the dispute settlement mechanism incorporates both diplomatic and legalistic means in obtaining resolutions for disputes by requiring bilateral negotiation processes as a prerequisite for panel procedures. This paper, thus, argues that the WTO dispute settlement system should function by applying both rule-oriented and negotiation-oriented approaches. Through such

means, the WTO should be better able to achieve its fundamental goal of reaching mutually agreed resolutions and enforcing the rulings.

The DSS resolves disputes between Members through the exercise of compulsory jurisdiction over all Members (no Member can refuse to answer a complaint brought against it). It is empowered to make rulings and recommendations, and to authorize sanctions that are widely viewed as binding upon the defaulting Member.

The DSS is open to claims by any Member against any other Member. The formal rules of standing to bring a complaint, or to participate as a third party to a complaint are liberal. Any Member that considers its WTO benefits are being impaired by another Member may protect its interests by calling for the establishment of an *ad hoc* panel, or by appealing the decision of such a panel to the WTO's standing Appellate Body. Panel and Appellate Body reports become binding on the disputants when they are adopted, by a rule of "negative consensus" (which requires all Members present to agree to block the report) by the WTO Membership sitting as the Dispute Settlement Body.

This thesis first argues that the current dispute settlement system contains both negotiation-oriented aspects and rule-oriented aspects within its procedures. The negotiation-oriented approach can be observed in stages of consultations, good offices, conciliation, and mediation whereas the rule-oriented approach is found at the panel procedures and the Appellate Body reviews. The significance of the dispute settlement mechanism is that it recognizes the importance of the negotiation-oriented approach by requiring a consultation stage before the panel process and leaving the

option of good offices, conciliation, and mediation as alternative means for resolution available at any stage.

This paper then analyzes the "rule-oriented" and "negotiation-oriented" approaches by comparing the arguments for and against both approaches. Advocates for the "rule-oriented" approach argue that it provides predictability and consistency which in turn produces stability in today's integrated economic world. Abiding by previously agreed and set rules also provides transparency and better compliance by the parties involved and the rules makes it easier to identify and sanction cheating. Rules also reduce the possibility of domestic pressures and benefits developing countries who are not as easily influenced by relative power positions of developing countries in trade disputes. However, this approach is criticized for features such as rigidity and ineffective implementation and unnecessary openness and consequent linkage to unrelated issues.

The "negotiation-oriented" approach, on the other hand, is supported for its flexibility and pragmatism. It induces better compliance because, through negotiations, the parties are able to reach more "practical" resolutions to the disputes. With the "negotiation-oriented" approach, the dispute resolution system can provide "safety-valves" for countries that cannot meet the international standards. However, the "negotiation-oriented" approach has shortcomings for it is regarded as unable to provide adequate benchmarks thus causing ambiguity and inconsistency. Countries are also susceptible to relative power positions with each other and also vulnerable to domestic influence.

The analysis of cases from 1995 to 2002 demonstrates that although with

weakness exists, both approaches are used in settling disputes at the WTO. Of 128 cases that were settled through the WTO dispute settlement mechanism since 1995 till 2002, 39 cases which comprise 30% of all settled cases were resolved bilaterally. The use of negotiations proves that the dispute settlement system endorses and incorporates the diplomatic approach rather than solely relying on the adjudicative processes. Although other means of "negotiation-oriented" approach such as good offices, conciliation, or mediation were not utilized at all, a dismissal or abandonment of such measures would not be beneficial for the system as a whole. Furthermore, the rate at which the panel reports are appealed also raises some concerns about the adjudicative system as a whole. The relatively high rate of reversal of the panel reports at the Appellate Body reaching 59% might signify that the legalistic procedures are not completely reliable, a fact that strengthens the argument for utilizing the "negotiation-oriented" methods.

Although the system as a whole appears to be making another paradigm shift toward principle-oriented approach, the procedural components of the dispute settlement should continue to employ diplomatic and legalistic approaches in reaching resolutions.

Moreover, based on the analysis of the different stages of the WTO DSS, we can try to draw some conclusions for possible improvements of it.

First, the preventive power of the WTO Dispute Settlement System is too limited to discourage new trade restrictions. Even if the probability of winning a case is slim, countries have an incentive to introduce trade restrictions, as rents continue to accrue during the litigation process, and sanctions or compensations for past damages

do not exist. On the other hand, the likelihood of a nuisance suit against a well behaved country is rather small. A complaint is only filed if the probability of winning is sufficiently high.

Second, there is a strong tendency for the losing government to appeal against the panel decision, even if the chances of a revision are slim. An appeal delays the implementation of negative findings and suits the interests of domestic groups. This obviously has consequences for the way the parties perceive the dispute settlement process, as they plan for an appeal right from the start. The appellate review's legal expertise might be used even by winning complainants with a view to accumulate arguments for future disputes on similar issues.

Third, the implementation stage, together with the absence of sanctions for damages during litigation, is the weakest element of the Dispute Settlement System. In case of a panel/appellate review decision in favor of the complainant, the defendant has strong incentives to delay implementation. Unless reputation losses of non-conforming are sufficiently high, the limited threats of compensation payments or retaliation measures fail to provide the loser country's with an incentive to implement the panel's recommendations quickly.

Fourth, bilateral settlements are more likely to be observed at an early stage of the litigation process. In clear-cut cases, the results of bilateral settlements should be similar to the expected ruling of the DSB. The losing party can avoid reputation losses (often at the price of giving up its position immediately) by agreeing upon a mutually accepted solution. Changes in the expected outcome of the process and in payoff elements, in particular by joining third parties, have an impact on the scope for

bilateral settlement.

However, while changes are taking place – albeit slowly – it is unclear whether the reforms will change public perception of the Dispute Settlement System. Some of the criticisms leveled at the Dispute Settlement System are aimed at the very foundation of a rules based trading system and may never be adequately addressed through procedural reforms. If the goal is to improve the operation of the system, then certain changes should certainly be considered by WTO member countries. If, however, the goal is to gain the support – or, at least, lessen the criticisms – of the system's most bitter critics, then it is unclear if any amount of change will be sufficient. In the end, it is vital for policy makers to determine what their objectives really are in suggesting changes to the system. Without such a clear sense of direction, there is a risk that the process of reform could put at risk a system.

# APPENDICES

# APPENDIX A

## <List of Cases 1995-2005>

(Sources: www.wto.org - http://www.wto.org/english/tratop_e/dispu_e/dispu_status_ e.htm and www.worldtradelaw.net - http://www.worldtradelaw.net/dsc/database/wtodisputes 1.asp)

Notes

1) Only resolved cases are described in the status column.

2) Other ways include withdrawal, amendment or expiration of the measures (including withdrawal of complaint)

| Case Number | Case Name | Brought by | Status (Results) |
|---|---|---|---|
| DS1 | Malaysia – Prohibition of imports of polyethylene and polypropylene. | Singapore | Other ways |
| DS2 | United States – Standards for reformulated and conventional gasoline. | Venezuela | Appellate Body |
| DS3 | Korea –Measures concerning the testing and inspection of agricultural US products. | | |
| DS4 | United States – Standards for reformulated and conventional gasoline. | Brazil | |
| DS5 | Korea – Measures concerning the shelf-life of products. | US | Mutually Agreed and Notified DSB |
| DS6 | United States – Imposition of import duties on autos from Japan under Sections 301 & 304 | Japan | Mutually Agreed and Notified DSB |
| DS7 | European Communities – Trade description of scallops. | Canada | Mutually Agreed and Notified DSB |
| DS8 | Japan – Taxes on alcoholic | EC | Appellate Body |

| | | | |
|---|---|---|---|
| | beverages. | | |
| DS9 | European Communities – Duties on imports of cereals. | Canada | Panelists not selected |
| DS10 | Japan – Taxes on alcoholic beverages. | Canada | Appellate Body |
| DS11 | Japan – Taxes on alcoholic beverages. | US | Appellate Body |
| DS12 | European Communities – Trade description of scallops. | Peru | Mutually Agreed and Notified DSB |
| DS13 | European Communities – Duties on imports of grains. | US | Mutually Agreed but Not Notified DSB |
| DS14 | European Communities – Trade description of scallops. | Chile | Mutually Agreed but Not Notified DSB |
| DS15 | Japan – Measures affecting the purchase of telecommunications equipment. | EC | Mutually Agreed but Not Notified DSB |
| DS16 | European Communities – Importation, sale and distribution of bananas. | Guatemala, Honduras, Mexico, US | New request or panel superseded former matter |
| DS17 | European Communities – Import duties on rice. | Thailand | No further action after consultation |
| DS18 | Australia – Import prohibition of salmon from Canada. | Canada | Appellate Body Reasonable Period of Time Arbitration |
| DS19 | Poland – Import regime for automobiles. | India | Mutually Agreed and Notified DSB |
| DS20 | Korea – Measures concerning bottled water. | Canada | Mutually Agreed and Notified DSB |
| DS21 | Australia – Measures concerning the importation of salmonids | US | Mutually Agreed and Notified DSB |
| DS22 | Brazil – Measures affecting desiccated coconut | Philippines | Appellate Body |
| DS23 | Venezuela – Anti-dumping investigation concerning certain oil country tubular goods. | Mexico | Other ways |
| DS24 | United States – Quantitative restrictions on Costa Rican | Costa Rica | Appellate Body |

| | | | |
|---|---|---|---|
| | underwear. | | |
| DS25 | European Communities – Implementation of Uruguay Round commitments concerning rice | Uruguay | No further action consultation |
| DS26 | European Communities – Measures concerning meat and meat products (hormones). | US | Appellate Body Suspension of Concessions Arbitration |
| DS27 | European Communities – Regime for the importation, sale and distribution of bananas. | Ecuador, Guatemala, Honduras, Mexico, US | Appellate Body Suspension of Concessions Arbitrations |
| DS28 | Japan – Measures concerning the protection of sound recordings | US | |
| DS29 | Turkey – Restrictions on imports of textile and clothing products. | Hong Kong | |
| DS30 | Brazil – Measures affected desiccated coconut and coconut milk powder. | Sri Lanka | |
| DS31 | Canada – Measures prohibiting or restricting importation of certain periodicals. | US | Appellate Body |
| DS32 | United States – Measures affecting imports of women's and girls' wool coats. | India | Other ways |
| DS33 | United States – Measures affecting imports of woven wool shirts and blouses. | India | Appellate Body |
| DS34 | Turkey – Restrictions on imports of textile and clothing products | India | Appellate Body |
| DS35 | Hungary – Export subsidies in respect of agricultural products. | Argentina, Canada, Australia, New Zealand, Thailand, US | |
| DS36 | Pakistan – Patent protection for pharmaceutical and agricultural chemical products. | US | |
| DS37 | Portugal – Patent protection under the Industrial Property Act. | US | |
| DS38 | United States – The Cuban Liberty and Democratic Solidarity Act. | EC | Panel's lapsed |
| DS39 | United States – Tariff increases on products from the EC | EC | Other ways |
| DS40 | Korea – Laws, regulations and practices in the telecommunications | EC | |

| | | | |
|---|---|---|---|
| | procurement sector. | | |
| DS41 | Korea – Measures concerning inspection of agricultural products. | US | |
| DS42 | Japan – Measures concerning sound recordings. | EC | |
| DS43 | Turkey – Taxation of foreign film revenues. | US | |
| DS44 | Japan – Measures affecting consumer photographic film & paper. | US | Panel report adopted without appeal |
| DS45 | Japan – Measures affecting distribution services. | US | |
| DS46 | Brazil – Export financing program for aircraft. | Canada | Appellate Body Suspension of Concessions Arbitration |
| DS47 | Turkey – Restrictions on imports of textile and clothing products. | Thailand | |
| DS48 | European Communities – Measures affecting meat and meat products (hormones). | Canada | Appellate Body Suspension of Concessions Arbitration |
| DS49 | United States – Anti-dumping investigation on fresh and chilled tomatoes from Mexico. | Mexico | Mutually Agreed but Not Notified DSB |
| DS50 | India – Patent protection for pharmaceutical and agricultural chemical products. | US | Appellate Body |
| DS51 | Brazil – Certain automotive investment measures. | Japan | |
| DS52 | Brazil – Certain measures affecting trade and investment in the automotive sector. | US | |
| DS53 | Mexico – Customs valuation of imports. | EC | |
| DS54 | Indonesia – Certain measures affecting the automobile industry. | EC | Panel report adopted without appeal Reasonable Period of Time Arbitration |
| DS55 | Indonesia – Certain measures affecting the automobile industry. | Japan | |
| DS56 | Argentina – Measures affecting imports of footwear, textiles, apparel and other items. | US | Appellate Body |

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| DS57 | Australia – Textile, Clothing and Footwear Import Credit Scheme (TCP Scheme). | US | Mutually Agreed but Notified DSB |
| DS58 | United States – Import prohibition of shrimp and shrimp products. | India, Malaysia, Pakistan, Thailand | |
| DS59 | Indonesia – Certain measures affecting the automobile industry. | US | Panel report adopted without appeal Reasonable Period of Time Arbitration |
| DS60 | Guatemala – Anti-dumping investigation on imports of Portland cement from Mexico. | Mexico | Appellate Body |
| DS61 | United States – Import prohibition of certain shrimp and shrimp products | Philippines | Appellate Body |
| DS62 | European Communities – Customs classification of certain computer equipment | US | |
| DS63 | United States – Anti-dumping measures on imports of solid urea | EC | |
| DS64 | Indonesia – Certain automotive industry measures | Japan | Panel report adopted without appeal Reasonable Period of Time Arbitration |
| DS65 | Brazil – Certain measures affecting trade and investment in the automotive sector | US | |
| DS66 | Japan – Measures affecting imports of pork | EC | |
| DS67 | United Kingdom – Customs classification of certain computer equipment | US | Appellate Body |
| DS68 | Ireland – Customs classification of certain computer equipment | US | Appellate Body |
| DS69 | European Communities – Measures affecting importation of certain poultry products | Brazil | Appellate Body |
| DS70 & DS71 | Canada – Measures affecting the export of civilian aircraft | Brazil | Appellate Body |
| DS72 | European Communities – Measures | New Zealand | Panel Ruling |

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| | affecting butter products | | |
| DS73 | Japan – Procurement of a navigational satellite | EC | |
| DS74 | Philippines – Measures affecting pork and poultry | US | |
| DS75 | Korea – Taxes on alcoholic beverages | EC | Appellate Body Reasonable Period of Time Arbitration |
| DS76 | Japan – Measures affecting agricultural products | US | Appellate Body |
| DS77 | Argentina – Measures affecting textiles, clothing and footwear | EC | Panel's authority lapsed |
| DS78 | United States – Safeguard measure against imports of broom and corn brooms | Colombia | |
| DS79 | India – Patent protection for pharmaceutical & agricultural chemical products | EC | Panel report adopted without appeal |
| DS80 | Belgium – Measures affecting commercial telephone directory services | US | |
| DS81 | Brazil – Measures affecting trade and investment in the automotive sector | EC | |
| DS82 | Ireland – Measures affecting the grant of copyright and neighboring rights | US | |
| DS83 | Denmark – Measures affecting the enforcement of intellectual property rights | US | |
| DS84 | Korea – Taxes on alcoholic beverages | US | Appellate Body Reasonable Period of Time Arbitration |
| DS85 | United States – Measures affecting textiles and apparel products | EC | Mutually Agreed and Notified DSB |
| DS86 | Sweden – Measures affecting the enforcement of intellectual property rights | US | Mutually Agreed and Notified DSB |
| DS87 | Chile – Taxes on alcoholic beverages | EC | Appellate Body Reasonable Period of Time Arbitration |

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| DS88 | United States – Measures affecting government procurement | EC | Panel's authority lapsed |
| DS89 | United States – Imposition of anti-dumping duties on imports of color television receivers from Korea | Korea | Other ways |
| DS90 | India – Quantitative restrictions on imports of agricultural, textile and industrial products | US | Appellate Body |
| DS91 | India – Quantitative restrictions on imports of agricultural, textile and industrial products | Australia | Mutually Agreed and Notified DSB |
| DS92 | India – Quantitative restrictions on imports of agricultural, textile and industrial products | Canada | Mutually Agreed and Notified DSB |
| DS93 | India – Quantitative restrictions on imports of agricultural, textile and industrial products | New Zealand | Mutually Agreed and Notified DSB |
| DS94 | India – Quantitative restrictions on imports of agricultural, textile and industrial products. | Switzerland | Mutually Agreed and Notified DSB |
| DS95 | United States – Measures affecting government procurement. | Japan | Panel's authority lapsed |
| DS96 | India – Quantitative restrictions on imports of agricultural, textile and industrial products. | EC | Mutually Agreed and Notified DSB |
| DS97 | United States – Countervailing duty investigation of imports of salmon from Chile. | Chile | |
| DS98 | Korea – Definitive safeguard measure on imports of certain dairy products. | EC | Appellate Body |
| DS99 | United States – Anti-dumping duty on dynamic random access memory semiconductors (DRAMS) of one megabyte or above originating from Korea. | Korea | Panel report adopted without appeal |
| DS100 | United States – Measures affecting imports of poultry products. | EC | |
| DS101 | Mexico – Anti-dumping investigation of high-fructose corn syrup from the United States | US | |
| DS102 | Philippines – Measures affecting pork and poultry | US | Mutually Agreed and |

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| DS103 | Canada – Measures affecting the importation of milk & the exportation of dairy products | US | Appellate Body |
| DS104 | European Communities – Measures affecting the exportation of processed cheese | US | |
| DS105 | European Communities – Regime for the importation, sale and distribution of bananas | Panama | |
| DS106 | Australia – Subsidies provided to producers and exporters of automotive leather | US | New request or panel superseded former matter |
| DS107 | Pakistan – Export measures affecting hides and skins | EC | |
| DS108 | United States – Tax treatment for Foreign Sales Corporations | EC | Appellate Body |
| DS109 | Chile – Taxes on alcoholic beverages | US | |
| DS110 | Chile – Taxes on alcoholic beverages | EC | Appellate Body |
| DS111 | United States – Tariff rate quota for imports of groundnuts | Argentina | |
| DS112 | Peru – Countervailing duty investigation against imports of buses from Brazil | Brazil | |
| DS113 | Canada – Measures affecting dairy exports | New Zealand | Appellate Body |
| DS114 | Canada- Patent protection for pharmaceutical products | EC | Panel report adopted without appeal Reasonable Period of Time Arbitration |
| DS115 | European Communities – Measures affecting the grant of copyright and neighboring rights | US | |
| DS116 | Brazil – Measures affecting payment terms for imports | EC | |
| DS117 | Canada – Measures affecting film distribution services | EC | |
| DS118 | United States – Harbor maintenance tax | EC | |
| DS119 | Australia – Anti-dumping measures on imports of coated wood free | Switzerland | Mutually Agreed and |

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| | paper sheets | | Notified DSB |
| DS120 | India – Measures affecting export of certain commodities | EC | |
| DS121 | Argentina – Safeguard measures on imports of footwear | EC | Appellate Body |
| DS122 | Thailand – Anti-dumping duties on angles, shapes & sections of iron or non-alloy steel & H-beams | Poland | Appellate Body |
| DS123 | Argentina – Safeguard measures on imports of footwear | Indonesia | Other ways |
| DS124 & DS125 | European Communities – Enforcement of intellectual property rights for motion pictures and TV programs. Greece – Enforcement of intellectual property rights for motion pictures and TV programs. | US | Mutually Agreed and Notified DSB |
| DS126 | Australia – Subsidies provided to producers and exporters of automotive leather | US | Panel report adopted without appeal |
| DS127 | Belgium – Measure affecting tax treatment for exports | US | |
| DS128 | Netherlands – Measure affecting tax treatment for exports | US | |
| DS129 | Greece – Measure affecting tax treatment for exports | US | |
| DS130 | Ireland – Measure affecting tax treatment for exports | US | |
| DS131 | France – Measures affecting tax treatment for imports and exports | US | |
| DS132 | Mexico – Anti-dumping investigation of high-fructose corn syrup from the United States | US | Appellate Body |
| DS133 | Slovak Republic – Measures concerning the importation of dairy products & the transit of cattle | Switzerland | |
| DS134 | European Communities – Measures affecting import duties on rice | India | |
| DS135 | European Communities – Measures affecting asbestos and products containing asbestos | Canada | Appellate Body |
| DS136 | United States – Anti-Dumping Act of 1916 | EC | Appellate Body Reasonable Period of Time Arbitration |
| DS137 | European Communities – Measures | Canada | |

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| | affecting imports of wood of conifers from Canada | | |
| DS138 | United States – Imposition of countervailing duties on certain hot-rolled lead & bismuth carbon steel products originating from the United Kingdom | EC | Appellate Body |
| DS139 | Canada – Certain measures affecting the automotive industry | Japan | Appellate Body Reasonable Period of Time Arbitration |
| DS140 | European Communities – Anti-dumping measures on imports of unbleached cotton fabrics from India | India | |
| DS141 | European Communities – Anti-dumping measures on imports of cotton-type bed-linen from India | India | Appellate Body |
| DS142 | Canada – Certain measures affecting the automotive industry | EC | Appellate Body Reasonable Period of Time Arbitration |
| DS143 | Slovak Republic – Measure affecting import duty on wheat from Hungary | Hungary | |
| DS144 | United States – Certain measures affecting the import of cattle, swine and grain from Canada | Canada | |
| DS145 | Argentina – Countervailing duties on imports of wheat gluten from the European Communities | EC | |
| DS146 | India – Measures affecting the automotive sector | EC | Appellate Body |
| DS147 | Japan – Tariff quotas and subsidies affecting leather | EC | |
| DS148 | Czech Republic – Measure affecting import duty on wheat from Hungary | Hungary | |
| DS149 | India – Import Restrictions | EC | |
| DS150 | India – Measures affecting customs duties | EC | |
| DS151 | United States – Measures affecting textiles and apparel products (II) | EC | Mutually Agreed and Notified DSB |
| DS152 | United States – Sections 301-310 of the Trade Act of 1974 | EC | Panel report adopted |

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| | | | without appeal |
| DS153 | European Communities – Patent protection for pharmaceutical and agricultural products | Canada | |
| DS154 | European Communities – Measures affecting differential and favorable treatment of coffee | Brazil | |
| DS155 | Argentina – Measures on the export of bovine hides and the import of finished leather | EC | Panel report adopted without appeal Reasonable Period of Time Arbitration |
| DS156 | Guatemala – Definitive anti-dumping measure regarding grey Portland cement from Mexico | Mexico | Panel report adopted without appeal |
| DS157 | Argentina – Anti-dumping measures on imports of drill bits from Italy | EC | |
| DS158 | European Communities – Regime for the importation, sale and distribution of bananas (II) | Guatemala Honduras, Mexico, Panama. US | |
| DS159 | Hungary – Safeguard measure on imports of steel products | Czech Republic | |
| DS160 | United States – Section 110(5) of the US Copyright Act | EC | Voluntary arbitration, but invoked after the reasonable period of time for implementation expired Panel report adopted without appeal |
| DS161 | Korea – Measures affecting imports of fresh, chilled and frozen beef | US | Appellate Body |
| DS162 | United States – Anti-Dumping Act of 1916 (II) | Japan | Appellate Body Reasonable Period of Time Arbitration |
| DS163 | Korea – Measures affecting government procurement | US | Panel report adopted without appeal |
| DS164 | Argentina – Measures affecting imports of footwear | US | |

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| DS165 | United States – Import measures on certain products from the European Communities | EC | Appellate Body |
| DS166 | United States – Definitive safeguard measures on imports of wheat gluten | EC | Appellate Body |
| DS167 | United States – Countervailing duty investigation with respect to live cattle from Canada | Canada | |
| DS168 | South Africa – Anti-dumping duties on import of certain pharmaceutical products from India | India | |
| DS169 | Korea – Measures affecting imports of fresh, chilled and frozen beef | Australia | Appellate Body |
| DS170 | Canada – Term of protection for patents | US | Appellate Body Reasonable Period of Time Arbitration |
| DS171 | Argentina – Patent protection for pharmaceutical products | US | |
| DS172 | European Communities – Measures relating to the development of a flight management system | US | |
| DS173 | France – Measures relating to the development of a flight management system | US | |
| DS174 | European Communities – Measures relating to the protection of trademarks & geographical indications | US | |
| DS175 | India – Measures relating to trade & investment in the motor vehicle sector | US | Appellate Body |
| DS176 | United States – Section 211 Omnibus Appropriations Act | EC | Appellate Body |
| DS177 | United States – Safeguard measure on imports of fresh, chilled or frozen lamb from New Zealand | New Zealand | Appellate Body |
| DS178 | United States – Safeguard measure on imports of fresh, chilled or frozen lamb from Australia | Australia | Appellate Body |
| DS179 | United States – Anti-dumping measures on stainless steel plate in coils and stainless steel sheet and strip from Korea | Korea | Panel report adopted without appeal |
| DS180 | United States – Reclassification of | Canada | |

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| | certain sugar syrups | | |
| DS181 | Colombia – Safeguard measure on imports of plain polyester filaments from Thailand | Thailand | Other ways |
| DS182 | Ecuador – Provisional anti-dumping measure on cement from Mexico | Mexico | |
| DS183 | Brazil – Measures on import licensing and minimum import prices | EC | |
| DS184 | United States – Anti-dumping measures on certain hot-rolled steel products from Japan | Japan | Appellate Body Reasonable Period of Time Arbitration |
| DS185 | Trinidad & Tobago – Anti-dumping measures on pasta from Costa Rica | Costa Rica | |
| DS186 | United States – Section 337 of the Tariff Act of 1930 & amendments thereto | EC | |
| DS187 | Trinidad & Tobago – Provisional anti-dumping measure on imports of macaroni & spaghetti from Costa Rica | Costa Rica | |
| DS188 | Nicaragua – Measures affecting imports from Honduras & Colombia | Colombia | |
| DS189 | Argentina – Definitive anti-dumping measures on carton-board imports from Germany & definitive anti-dumping measures on imports of ceramic floor tiles from Italy | EC | Panel report adopted without appeal |
| DS190 | Argentina – Transitional safeguard measures on certain imports of woven fabrics of cotton and cotton mixtures originating in Brazil | Brazil | Mutually Agreed and Notified DSB |
| DS191 | Ecuador – Definitive anti-dumping measure on cement from Mexico | Mexico | Mutually Agreed and Notified DSB |
| DS192 | United States – Transitional safeguard measure on combed cotton yarn from Pakistan | Pakistan | Appellate Body |
| DS193 | Chile – Measures affecting transit and importation of swordfish | EC | |
| DS194 | United States – Section 771(5) of the Tariff Act of 1930, as amended | Canada | Panel report adopted |

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| | and applied | | without appeal |
| DS195 | Philippines – Measures affecting trade and investment in the motor vehicle sector | US | |
| DS196 | Argentina – Certain measures on the protection of patents and test data | US | |
| DS197 | Brazil – Measures on minimum import prices | US | |
| DS198 | Romania – Measures on minimum import prices | US | Mutually Agreed and Notified DSB |
| DS199 | Brazil – Measures affecting patent protection | US | |
| DS200 | United States – Section 306 of the Trade Act of 1974 and amendments thereto | EC | |
| DS201 | Nicaragua – Measures affecting imports from Honduras & Colombia | Honduras | |
| DS202 | United States – Definitive safeguard measures on imports of circular welded carbon quality pipe from Korea | Korea | Appellate Body |
| DS203 | Mexico – Measures affecting trade in live swine | US | |
| DS204 | Mexico – Measures affecting telecommunications services | US | |
| DS205 | Egypt – Import Prohibition on canned tuna with soybean oil | Thailand | |
| DS206 | United States – Anti-dumping and countervailing measures on steel plate from India | India | Appellate Body |
| DS207 | Chile – Price band system and safeguard measures relating to certain agricultural products | Argentina | Panel ruling |
| DS208 | Turkey – Anti-dumping duty on steel and iron pipe fittings | Brazil | |
| DS209 | European Communities – Measures affecting soluble coffee | Brazil | |
| DS210 | Belgium – Administration of measures establishing customs duties for rice | US | Mutually Agreed and Notified DSB |
| DS211 | Egypt – Definitive anti-dumping measures on rebar from Turkey | Turkey | |
| DS212 | United States – Countervailing | EC | |

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| | measures concerning certain products from the EC | | |
| DS213 | United States – Countervailing duties on certain corrosion-resistant carbon steel flat products from Germany | EC | Appellate Body |
| DS214 | United States – Definitive safeguard measures on imports of steel wire rod and circular welded carbon quality line pipe | EC | |
| DS215 | Philippines – Anti-dumping measures regarding polypropylene resins from Korea | Korea | |
| DS216 | Mexico – Provisional anti-dumping measure on electric transformers | Brazil | |
| DS217 | United States – Continued Dumping & Subsidy Offset Act of 2000 | Australia, Brazil, Chile, the EC, India, Indonesia, Japan, Korea, Thailand | Panel ruling |
| DS218 | United States – Countervailing duties on certain carbon steel products from Brazil | Brazil | |
| DS219 | European Communities – Anti-dumping duties on malleable cast iron tube or pipe fittings from Brazil | Brazil | |
| DS220 | Chile – Price band system and safeguard measures relating to certain agricultural products | Guatemala | |
| DS221 | United States – Section 129(c)(l) of the Uruguay Round Agreements Act | Canada | |
| DS222 | Canada – Export credits & loan guarantees for regional aircraft | Brazil | Panel ruling |
| DS223 | European Communities – Tariff-rate quota on corn gluten feed from the US | US | |
| DS224 | United States – US Patents Code | Brazil | |
| DS225 | United States – Anti-dumping duties on seamless pipe from Italy | EC | |
| DS226 | Chile – Provisional safeguard measure on mixed edible oils | Argentina | |
| DS227 | Pent – Taxes on cigarettes | Chile | Other ways |
| DS228 | Chile – Safeguard Measures on | Colombia | New request or |

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| | Sugar | | panel superseded former matter |
| DS229 | Brazil – Anti-Dumping Duties on Jute Bags from India | India | |
| DS230 | Chile – Safeguard Measures and Modification of Schedules Regarding Sugar | Colombia | |
| DS231 | European Communities – Trade Description of Sardines | Peru | Panel ruling |
| DS232 | Mexico – Measures Affecting the Import of Matches | Chile | |
| DS233 | Argentina – Measures Affecting the Import of Pharmaceutical Products | India | |
| DS234 | United States – Continued Dumping and Subsidy Offset Act of 2000 | Mexico | Panel ruling |
| DS235 | Slovakia – Safeguard Measure on Imports of Sugar | Poland | |
| DS236 | United States – Preliminary Determinations with Respect to Certain Softwood Lumber from Canada | Canada | |
| DS237 | Turkey – Certain Import Procedures for Fresh Fruit | Ecuador | |
| DS238 | Argentina – Definitive Safeguard Measures on Imports of Preserved Peaches | Chile | |
| DS239 | United States – Certain Measures Regarding Anti-Dumping Methodology | Brazil | |
| DS240 | Romania – Import Prohibition on Wheat and Wheat Flour | Hungary | |
| DS241 | Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil | Brazil | |
| DS242 | European Communities – Generalized System of Preferences | Thailand | |
| DS243 | United States — Rules of origin for textiles and apparel products | India | |
| DS244 | United States — Sunset review of anti-dumping duties on corrosion-resistant carbon steel flat products from Japan | Japan | Appellate Body |
| DS245 | Japan — Measures affecting the importation of apples | US | Information on implementation |

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| DS246 | European Communities — Conditions for the granting of tariff preferences to developing countries | India | Appellate Body |
| DS247 | United States — Provisional anti-dumping measure on imports of certain softwood lumber from Canada | Canada | |
| DS248 | United States — Definitive safeguard measures on imports of certain steel products | EC | |
| DS249 | United States — Definitive safeguard measures on imports of certain steel products | Japan | |
| DS250 | United States — Equalizing excise tax imposed by Florida on processed orange and grapefruit Products | Brazil | |
| DS251 | United States — Definitive safeguard measures on imports of certain steel products | Korea | |
| DS252 | United States — Definitive safeguard measures on imports of certain steel products | China | |
| DS253 | United States — Definitive safeguard measures on imports of certain steel products | Switzerland | |
| DS254 | United States — Definitive safeguard measures on imports of certain steel products | Norway | |
| DS255 | Peru — Tax treatment on certain imported products | Chile | |
| DS256 | Turkey — Import ban on pet food from Hungary | Hungary | |
| DS257 | United States — Final countervailing duty determination with respect to certain softwood lumber from Canada | Canada | Appellate Body |
| DS258 | United States — Definitive safeguard measures on imports of certain steel products | New Zealand | |
| DS259 | United States — Definitive safeguard measures on imports of certain steel products | Brazil | |
| DS260 | European Communities — Provisional safeguard measures on imports of certain steel products | United States | |

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| DS261 | Uruguay — Tax treatment on certain products | Chile | Mutually Agreed and Notified DSB |
| DS262 | United States — Sunset reviews of anti-dumping and countervailing duties on certain steel Products from France and Germany | EC | |
| DS263 | European Communities — Measures affecting imports of wine | Argentina | |
| DS264 | United States — Final dumping determination on softwood lumber from Canada | Canada | |
| DS265 | European Communities — Export subsidies on sugar | Australia | Constitution of the Panel |
| DS266 | European Communities — Export subsidies on sugar | Brazil | Constitution of the Panel |
| DS267 | United States — Subsidies on upland Cotton | Brazil | |
| DS268 | United States — Sunset review of anti-dumping measures on oil country tubular goods from Argentina | Argentina | |
| DS269 | European Communities — Customs classification of frozen boneless chicken | Brazil | |
| DS270 | Australia — Certain measures affecting the importation of fresh fruit and vegetables | Philippines | |
| DS271 | Australia — Certain measures affecting the importation of fresh pineapple | Philippines | |
| DS272 | Peru — Provisional anti-dumping duties on vegetable oils from Argentina | Argentina | |
| DS273 | Korea — Measures affecting trade in commercial vessels | EC | |
| DS274 | United States — Definitive safeguard measures on imports of certain steel products | Chinese Taipei | |
| DS275 | Venezuela — Import licensing measures on certain agricultural products | United States | |
| DS276 | Canada — Measures relating to exports of wheat and treatment of imported grain | United States | |
| DS277 | United States — Investigation of | Canada | |

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| | the International Trade Commission in softwood lumber from Canada | | |
| DS278 | Chile — Definitive safeguard measure on imports of fructose | Argentina | |
| DS279 | India — Import restrictions maintained under the export and import policy, 2002-2007 | EC | |
| DS280 | United States — Countervailing duties on steel plate from Mexico | Mexico | |
| DS281 | United States — Anti-dumping measures on cement from Mexico | Mexico | |
| DS282 | United States — Anti-dumping measures on oil country tubular goods (OCTG) from Mexico | Mexico | |
| DS283 | European Communities — Export subsidies on sugar | Thailand | Constitution of the Panel |
| DS284 | Mexico — Certain measures preventing the importation of black beans from Nicaragua | Nicaragua | |
| DS285 | United States — Measures affecting the cross-border supply of gambling and betting services | Antigua and Barbuda | |
| DS286 | European Communities — Customs classification of frozen boneless chicken cuts | Thailand | |
| DS287 | Australia — Quarantine regime for imports | EC | |
| DS288 | South Africa — Definitive anti-dumping measures on blanketing from Turkey | Turkey | |
| DS289 | Czech Republic — Additional duty on imports of pig-meat from Poland | Poland | |
| DS290 | European Communities — Protection of trademarks & geographical indications for agricultural products and foodstuffs | Australia | |
| DS291 | European Communities — Measures affecting the approval and marketing of biotech products | United States | |
| DS292 | European Communities — Measures affecting the approval and marketing of biotech products | Canada | |
| DS293 | European Communities — Measures affecting the approval and marketing of biotech products | Argentina | |
| DS294 | United States — Laws, Regulations | EC | |

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| | and Methodology for Calculating Dumping Margins (“Zeroing”) | | |
| DS295 | Mexico — Definitive anti dumping measures on beef and rice | United States | |
| DS296 | United States — Countervailing duty investigation on dynamic random access memory semiconductors (DRAMS) from Korea | Korea | Establishment of a panel |
| DS297 | Croatia — Measure affecting imports of live animals and meat products | Hungary | |
| DS298 | Mexico — Certain pricing measures for customs valuation and other purposes | Guatemala | |
| DS299 | European Communities — Countervailing measures on dynamic random access memory chips from Korea | Korea | Establishment of a panel |
| DS300 | Dominican Republic — Measures affecting the importation of cigarettes | Honduras | |
| DS301 | European Communities — Measures affecting trade in commercial vessels | Korea | |
| DS302 | Dominican Republic — Measures affecting the importation and internal sale of cigarettes | Honduras | Establishment of a panel |
| DS303 | Ecuador — Definitive safeguard measure on imports of medium density fibreboard | Chile | |
| DS304 | India — Anti-dumping measures on imports of certain products from the European Communities and/or Member States | EC | Request to join consultations<br>Acceptance of requests to join consultations |
| DS305 | Egypt — Measures affecting imports of textile and apparel products | United States | Request to join consultations<br>Acceptance of requests to join consultations |
| DS306 | India — Anti-dumping measure on batteries from Bangladesh | Bangladesh | Request for consultations |
| DS307 | European Communities — Aid for commercial vessels | Korea | |
| DS308 | Mexico — Tax measures on soft | United States | |

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| | drinks and other beverages | | |
| DS309 | China — Value-added tax on integrated circuits | United States | |
| DS310 | United States — Determination of the International Trade Commission in hard red spring wheat from Canada | Canada | |
| DS311 | United States — Reviews of countervailing duty on softwood lumber from Canada | Canada | |
| DS312 | Korea — Anti-dumping duties on imports of certain paper from Indonesia | Indonesia | |
| DS313 | European Communities — Anti-dumping duties on certain flat rolled iron or non-alloy steel products from India | India | |
| DS314 | Mexico — Provisional Countervailing Measures on Olive oil from the European Communities | EC | |
| DS315 | European Communities — Selected customs matters | United States | |
| DS316 | European Communities and certain Member States — Measures affecting trade in large civil aircraft | United States | |
| DS317 | United States — Measures affecting trade in large civil aircraft | EC | |
| DS318 | India — Anti-dumping measures on certain products from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu | The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu | |
| DS319 | United States — Section 776 of the Tariff Act of 1930 | EC | |
| DS320 | United States — Continued suspension of obligations in the EC — Hormones dispute | EC | |
| DS321 | Canada — Continued suspension of obligations in the EC — Hormones dispute | EC | |
| DS323 | Japan — Import quotas on dried laver and seasoned laver | Korea | |
| DS322 | United States — Measures relating to zeroing and sunset reviews | Japan | |

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| DS324 | United States — Provisional anti-dumping measures on shrimp from Thailand | Thailand | |
| DS325 | United States — Anti-dumping determinations regarding stainless steel from Mexico | Mexico | |
| DS326 | European Communities — Definitive safeguard measure on salmon | Chile | |
| DS327 | Egypt — Anti-dumping duties on matches from Pakistan | Pakistan | |
| DS328 | European Communities — Definitive Safeguard Measure on Salmon | Norway | |
| DS329 | Panama — Tariff classification of certain milk products | Mexico | |

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