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## The Dispute Settlement Understanding of the WTO Agreement: An Inadequate Mechanism for the Resolution of International Trade Disputes

Sean P. Feeney\*

The 1994 signing of the World Trade Organization (WTO) Agreement<sup>1</sup> marked the initiation of the most far-reaching and comprehensive international agreement on trade in the history of the modern world.<sup>2</sup> The creation of an actual trade organization was a marked improvement over the WTO's predecessor, the 1944 GATT, which never formed an organization *per se*.<sup>3</sup> Among the many improvements to the GATT, the WTO Agreement substantially changed the mechanism for dispute settlement whenever conflict arose between member states.<sup>4</sup> This change, codified as the Dispute Settlement Understanding ("DSU"), was initially hailed as a great improvement over the GATT dispute settlement provisions.<sup>5</sup>

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1. The WTO was created at the 1994 "Uruguay Round" meetings of the General Agreement on Tariffs and Trade ("GATT"), where GATT signatories reached an agreement in principle. The WTO officially organized on April 15, 1994 through the *Marrakesh Agreement Establishing the World Trade Organization*. John H. Jackson et al. *Legal Problems of International Economic Relations*, 289-90 (1995). The WTO governs and administers international trade. It currently consists of nearly 150 countries, with thirty more nations hoping to join. The organizational structure of the WTO consists of four principal groups: the Ministerial Conference, the General Council, the Secretariat, and the Director General. The principal goals of the WTO include developing a lasting, multilateral trading regime, reducing tariff rates and other roadblocks to international trade, eliminating discrimination in international trade, and expanding trade in goods and services. See Susan Tiefenbrun, *Free Trade and Protectionism: The Semiotics of Seattle*, 17 *Ariz. J. Int'l. & Comp. L.* 257, 266-68 (2000).

2. See *id.* The purpose behind the WTO Agreement was to form a concrete organization that its predecessor, the GATT, did not. *Id.* In this manner, the WTO was a formalization of the GATT, but with many important changes. *Id.*

3. The GATT was simply a contract agreement entered into by many countries, in which its signatories were referred to as "contracting parties." See Tiefenbrun, *supra* note 1, at 267-268. The WTO, proposed by a Canadian trade minister in 1990, is an organization and calls its signatories "members." *Id.* See note 12 *infra*, for a general discussion of the GATT's framework.

4. Tiefenbrun, *supra* note 1, at 267-68.

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

Unfortunately, the DSU has not been the comprehensive dispute settlement mechanism its framers had hoped to create.<sup>6</sup> Myriad problems exist with the DSU in its current state, and the remedies to these problems will not come easily. After explaining the history of the GATT, this paper will discuss the current aspects and procedures of the DSU, examine the problems with these procedures, and suggest how the dispute settlement system under the WTO can operate in a more effective and efficient manner.

### A BRIEF HISTORY OF THE GATT

In 1947, the GATT went into effect.<sup>7</sup> At that time, the International Trade Organization (“ITO”) had already been created under the “Bretton Woods” Agreements.<sup>8</sup> The GATT was intended to be nothing more than a temporary international trade agreement during the interim between the creation and ultimate ratification of the ITO.<sup>9</sup> The United States never ratified the ITO, however, because of “perceived threats to national sovereignty and the danger of too much ITO intervention in markets.”<sup>10</sup> Hence, the GATT, originally intended to be nothing more than a stepping stone to a more comprehensive international trade agreement, served as the default authority on international trade for more than fifty years.<sup>11</sup>

The framework of the GATT<sup>12</sup> incorporated many of the major theories

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Congress praised the achievements, saying that the most important improvement of the DSU over the GATT’s dispute settlement system was the increased leverage that one member state could have over an offending member state in remedying a violation. *Id.* This leverage came from the withdrawal of trade benefits from that offending member state if the offending member state did not comply with the DSU panel’s finding. *Id.*

6. See *WTO’s Defective Dispute Settlement Process*, The Hindu, July 6, 2000.

7. After the failed actualization of the ITO in Havana, Cuba, twenty-three nations ratified the GATT in Geneva Switzerland on October 30, 1947. The GATT was the primary international, multilateral trade regulation agreement and the most progressive international trade agreement up to that time. See Tiefenbrun, *supra* note 1, at 261.

8. See Michael Laidhold, *Private Party Access to the WTO: Do Recent Developments in International Trade Dispute Resolution Really Give Private Organizations a Voice in the WTO?* 12 *Transnat’l L.* 427, 429 (1999).

9. See *id.* at 430. Specifically, the GATT was designed to serve as a temporary agreement while the rest of the ITO members waited for the U.S. to ratify the ITO agreement.

10. *Id.* (quoting Michael R. Czinkita, *Executive Insights: The World Trade Organization—Perspectives and Prospects*, 3 *J. Int’l Mktg.* 85 (1995)).

11. See Laidhold, *supra* note 8, at 430.

12. The GATT is essentially a three-tiered approach toward trade liberalization. First, the GATT calls for the reduction and ultimate elimination of both quantitative and non-tariff trade restrictions that member countries imposed upon goods from other member countries at their borders. See Brett Grosko, *Just When is it That a Unilateral Trade Ban Satisfies the GATT?: The*

on international trade that existed during the Bretton Woods Agreements in 1947.<sup>13</sup> Up until that time, the traditional theory was that states trying to maximize their own powers and interests would dictate international trade.<sup>14</sup> While the GATT marked a major broadening of this theory, it lacked any enforcement mechanism to counteract states complying with GATT provisions only when it was in their individual best interests to do so.<sup>15</sup>

This lack of enforcement created a major problem in the area of dispute resolution.<sup>16</sup> From 1955 until the passage of the WTO Agreement in 1994, the GATT system on dispute resolution grew from what started as an ad hoc system to one that appeared more “‘legalistic’ and professional.”<sup>17</sup> However, for all the improvements in dispute resolution under the GATT during that thirty-nine year period, it still retained one overriding fundamental failure: GATT dispute resolution was non-binding to the parties involved.<sup>18</sup> The need for a more enforceable method for dispute resolution was instrumental in the signing of the WTO Agreement.<sup>19</sup>

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*WTO Shrimp and Shrimp Products Case*, 5 *Env'tl. L.* 817 (1999). Second, the GATT calls for “most-favored nation” treatment by all members towards other members. *Id.* “Most-favored nation” treatment, also called “normal trade relations,” means that GATT members would treat products imported from different member states equally. In other words, Member A could not impose a 5% tariff on Member B’s exports if it was only imposing a 3% tariff on the exports of Member C. Finally, the GATT called for “national treatment,” meaning countries were obligated to treat equally domestic and imported products. *Id.* Similar in scope to the “most-favored nation” treatment, “national treatment” meant that Member A could tax Member B’s manufacturers of certain products at 5% only if Member A was taxing domestic manufacturers of those same products at 5%. The original 1947 agreement was supplemented and changed by several subsequent rounds of negotiations between its member states, the most recent being the Uruguay Round, which ultimately led to the signing of the WTO agreement in Marrakesh, Morocco. *Id.*; see also Jackson, *supra* note 1, at 289-90.

13. See Laidhold, *supra* note 8, at 430. The Bretton Woods Agreements were made at an international financial conference held in 1944 at Bretton Woods, NH. See Beth A. Simmons, *Why Comply With the Public International Law of Money?*, 25 *Yale J. Int'l L.* 323, n. 60 (2000). The agreements included the creation of the International Monetary Fund (IMF). See Michael D. Sandler, *Section Recommendation and Report*, 30 *Int'l L.* 441, 444 (1996). For more information on the IMF, see [www.imf.org](http://www.imf.org).

14. Laidhold, *supra* note 8, at 430.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. See Jackson, *supra* note 1, at 340. The DSU states that dispute settlement is a central feature of the WTO system. *Id.*

## THE WTO DSU PROCEDURES AND PENALTIES FOR NON-COMPLIANCE

### 1. Deciding the Dispute

Under the DSU, the WTO Agreement's dispute settlement process begins with a "request for consultations" by the party who is alleging a violation.<sup>20</sup> If the offending party does not respond to this request, or does not otherwise resolve the conflict, the complaining party then requests the Dispute Settlement Body draw up a panel.<sup>21</sup> Unless the parties agree otherwise, this panel possesses the power to interpret any agreements between the parties to the dispute.<sup>22</sup> The parties then choose panelists from a WTO approved list of potential panelists that are well-qualified and informed on international issues.<sup>23</sup> To prevent any problems with nationalism, citizens of the parties' countries are barred from being panelists.<sup>24</sup>

After meeting twice and receiving written briefs from the disputing parties before each meeting, the panel deliberates in private and makes its report.<sup>25</sup> This report, most importantly, includes the panel's legal findings and recommended remedies.<sup>26</sup> It must be issued within six months of the second meeting.<sup>27</sup>

Within sixty days after the release of the panel's final report, the Dispute Settlement Body must accept the remedies unless they agree to reject them or one of the parties decides to appeal.<sup>28</sup> In the event of an appeal to the Appellate Body, the Appellate Body's final report binds the parties unless the Dispute Settlement Body concludes there is a consensus to reject it—an overwhelmingly rare event.<sup>29</sup>

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20. See Amelia Porges, *The New Dispute Settlement: From the GATT to the WTO*, 1075 P.L.I./Corp. 1095, 1103 (1998).

21. See *id.*

22. See *id.*

23. See *id.*

24. See *id.* This problem with nationalism is a change from the old GATT system, where the panels included nationals from the countries that were party to the dispute. See *infra*, note 40.

25. See Porges, *supra* note 20, at 1095, 1103. The panel releases a preliminary report at some point during this six month period. After this preliminary report, the parties are again afforded the opportunity to be heard before the panel releases their final report. See *id.*

26. See *id.* at 1103.

27. See *id.*

28. See *id.* at 1104.

29. See *id.* at 1105.

## 2. Enforcement of the Panel Provisions

Following the adoption of a panel or Appellate Body report, the offending party has thirty days to inform the Dispute Settlement Body how it plans to implement the mandated remedies.<sup>30</sup> The drafters of the WTO Agreement acknowledged that immediate implementation of such remedies would not always be practical, or even possible. Accordingly, the DSU calls for such implementation within a “reasonable period of time.”<sup>31</sup> What is reasonable, however, is not specifically spelled out in the DSU Agreement.<sup>32</sup>

## 3. Penalties for Non-Implementation within a Reasonable Time Period

If a party does not implement the panel’s recommendations within the reasonable time period (read: the offending country does not cease the offending trade practice), the complaining party is entitled to seek some sort of retribution.<sup>33</sup> This redress comes as either 1) compensation for the value of the damages caused by the offending party,<sup>34</sup> or 2) suspension of concessions previously given by the complaining party to the offending party.<sup>35</sup> This retribution is the key and decisive difference between dispute settlement under the GATT and dispute settlement under the WTO.<sup>36</sup> Under GATT Article XXIII, a complaining, prevailing party technically had the option to suspend conces-

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30. See Porges, *supra* note 20, at 1105.

31. *Id.*

32. See Jackson, *supra* note 1, at 344. The reasonable period of time may be 1) devised by the complaining party if approved by the Dispute Settlement Body, 2) agreed upon by the parties involved in the dispute, or 3) by arbitration. It is generally thought that this period should not exceed fifteen months. *See id.*

33. *See id.*

34. It is important to note that while compensation must equal the monetary value of damages caused by the offending party, such compensation is not monetary, but rather comes in the form of lower tariff rates and other concessions. *See* WTO Dispute Settlement Understanding, Art. 21. Further, such compensation is voluntary and must be agreed to by the prevailing party under Article 12.

35. *See id.*

36. While it is the key and decisive difference, such suspension of concessions, also referred to as the implementation of countermeasures, has only occurred in five cases brought before the WTO Dispute Settlement Body. *See* Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules are Rules-Toward a More Collective Approach*, 94 *Am. J. Int’l. L.* 335, 335 (2000).

sions owed to the offending party.<sup>37</sup> However, this option could only be exercised if GATT members agreed that such a suspension of concessions was the right course of action.<sup>38</sup> Under the “consensus rule,” as it was called, a single panel vote could block the adoption of the panel report that would suspend concessions to the offending party.<sup>39</sup> The inherent problem with this rule was that, due to the non-binding nature of GATT dispute settlement provisions, the *offending party’s* vote was required for consensus.<sup>40</sup> As a practical matter, such a requirement made the ‘suspension of concessions’ provision for GATT violating parties virtually useless.<sup>41</sup>

## PROBLEMS WITH THE DSU

### 1. Lack of Clarity in Explaining Complaints during the Initial Stages of Dispute Settlement

Even during the initial stage of the DSU mechanism for resolving disputes, the consultations stage, there are problems with the degree of clarity required in requesting consultations.<sup>42</sup> Articles 4, 6 and 7 of the DSU require that the parties requesting panels, should the consultations stage fail to yield a compromise, fully explain the basis of their complaints.<sup>43</sup> Once claims go to a panel, parties cannot revise them at a later time.<sup>44</sup> Such a requirement only makes sense in ensuring the fairness of the panel hearings. To draw a parallel, United States Federal Courts prohibit the altering or amending of pleadings once entered unless such an amendment would not unduly prejudice the

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37. See Jackson, *supra* note 1, at 344.

38. See *id.* at 342.

39. *Id.*

40. See *id.*

41. See *id.* at 344. In fact, during the entire GATT regime this authority was never actually employed, and was only *granted* once. In 1955, the Netherlands was authorized to suspend concessions to the United States because the U.S. had placed certain quotas on Dutch agricultural products. The Netherlands never followed through with the suspension. See *id.*

42. See Gary N. Horlick & Glenn R. Butterson, *A Problem of Process in WTO Jurisprudence: Identifying Disputed Issues in Panels and Consultations*, 31 L. & Pol’y Int’l Bus. 573, 579 (2000). Under Articles 4, 6 and 7 of the DSU, parties requesting panels must fully list the basis for their complaint; parties who do not will receive harsh treatment. See *id.*

43. See *id.*

44. See *id.*; see also WTO Appellate Body Report, *European Communities—Regime for Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R ¶¶ 142-146 (Sept. 9, 1997) (holding that once claims had been presented in a formal panel request, they could not be altered or amended in later written correspondence). It is important to note, however, that *stare decisis* does not currently play a role in international law or in WTO findings. See Raj Bhala, *The Myth About Stare Decisis and International Trade Law*, 14 Am. U. Int’l L. Rev. 845 (1999).

other party.<sup>45</sup>

Unfortunately, the current DSU fails to state how clear complaints must be during the consultations stage.<sup>46</sup> This is a substantial shortcoming of the entire DSU process. It is fundamentally unfair if one party enters into an attempt to avoid the formal dispute settlement process without being fully informed.<sup>47</sup>

## 2. General Panel Refusal of Amicus Briefs by Interested Parties.

Until a recent decision by the Appellate Body, the prevailing notion was that DSU panels were prohibited under Article 13 from even accepting amicus briefs from interested third parties.<sup>48</sup> In that decision, *United States—Import Prohibition of Certain Shrimp and Shrimp Products* (“U.S. Shrimp”), the original DSU panel held that Article 13 allowed only the parties to the dispute to submit briefs in support of their positions.<sup>49</sup> The Appellate Body reversed the panel, but only to the extent that future panels had the discretion to accept, consider, or reject amicus party briefs as opposed to being prohibited from exercising this discretion.<sup>50</sup>

The “U.S. Shrimp” decision does not require panels to accept briefs, as many commentators initially believed. The decision merely grants discretion to the panels in deciding whether or not to accept amicus briefs.<sup>51</sup> The Appel-

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45. See FRCP 15(a). Presumably, a WTO member’s withholding the basis for that member party’s claim in an attempt to force an unfair settlement would unduly prejudice the other member to the dispute.

46. See Horlick, *supra* note 42, at 579.

47. See *id.* It is even more unfair that parties not be required to reveal their entire complaints during the consultations stage, when one considers that the DSU requires parties go through this stage in an attempt to avoid the next stage of the dispute settlement provisions, the panel establishment. If the idea behind such a requirement is that parties that are forced to try to work out their differences may do just that, it is only fair to the parties involved that each has all the facts before entering into a binding compromise. See Jackson, *supra* note 1, at 341.

48. See Andrew W. Shoyer & Eric M. Solovy, *The Process and Procedure of Litigating at the World Trade Organization: A Review of the Work of the Appellate Body*, 31 L. & Pol’y Int’l. Bus. 677, 685 (2000) (discussing the recent WTO Appellate Body decision in *United States—Import Prohibition of Certain Shrimp and Shrimp Products*).

49. See *id.* at 685-86. The Panel in that case concluded that parties themselves could incorporate amicus brief positions into their own arguments, but such incorporation entailed that the same parties were responsible for anything those amicus briefs contained. See *id.*

50. See *id.*

51. See *id.*



late Body relied on the following language of DSU Article 11 in determining that the panels could consider outside information in deciding disputes:

[A] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.<sup>52</sup>

Essentially, the Appellate Body claimed that Article 11 of the DSU authorizes DSU panels to consider all “relevant” information.<sup>53</sup> Unfortunately, less clear is how far the panels may go in arriving at this “relevant” information.<sup>54</sup> Hence, there is the possibility that a panel could be unfairly swayed, fully at its discretion, based upon the non-confining nature of the Appellate Body’s interpretation of Article 11.

### 3. Lack of Transparency in Dispute Settlement Body Proceedings.

A major problem with the DSU is the lack of transparency in dispute settlement proceedings. Dispute Settlement Body panels are conducted in private, so no other parties with an indirect interest in any given dispute can observe, read, or in general know what steps led to the panel report.

Many people see trade policy, and especially the World Trade Organization, as opaque and unresponsive to the public. . . [T]hey are not entirely wrong. The trading system must . . . become more open to civil society. There is no reason the interested public should be excluded from observing dispute settlement proceedings.<sup>55</sup>

Former United States Trade Representative Charlene Barshefsky underscores a central shortcoming of the Dispute Settlement Understanding proceedings: the fact that the proceedings are conducted in private and the documents pertaining to the same are kept under seal.<sup>56</sup> The reasoning behind such secrecy in the proceedings is founded in the underlying principles of mediation and compromise that defined dispute settlement under the GATT: that a settlement not involving a “court” *per se* should be kept quiet as an incentive for resolving the dispute before trial.<sup>57</sup> However, the DSU under the WTO oper-

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52. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, art 11. See also Shoyer, *supra* note 48, at 687.

53. See *id.*

54. See *id.*

55. Former Ambassador Charlene Barshefsky, Remarks Prepared for Delivery: ISAC Plenary Session (May 6, 1998) at <http://www.ustr.gov/speeches/index.html>.

56. See John A. Ragosta, *Unmasking the WTO—Access to the DSB System: Can the WTO Live Up to the Moniker “World Trade Court?”* 31 Law & Pol’y Int’l Bus. 739, 750 (2000).

57. See *id.*

ates more like litigation, at least once it gets beyond the consultations stage.<sup>58</sup> Because DSU proceedings are more like a judgment than a negotiated compromise, these proceedings should be made open to the public. Other WTO members and their citizens deserve to know what specifically has been judged to be fair and unfair, as well as the circumstances that initially gave rise to the dispute.<sup>59</sup> The United States is a major proponent of the movement demanding greater DSU transparency to ensure more fair disclosure of the practices of other member nations.<sup>60</sup>

#### 4. The Non-Binding Nature of the WTO and the Question of Precedent and Stare Decisis.

The DSU panel report *India—Patent Protection for Pharmaceutical and Agricultural Products* affirmed that the doctrine of *stare decisis* does not apply to Dispute Settlement Body panel decisions.<sup>61</sup> Regardless of the similarity between a present dispute and a prior dispute heard by a panel, the current DSU panel can hold and recommend exactly the opposite of what was held in the past.<sup>62</sup> Because panels are not bound by decisions of previous panels relating to or substantively identical to issues at hand, the deterrent effect is greatly mitigated upon the WTO member against whom a complaint has been lodged.

There has been some indication that panels do actually follow prior panel reports, at least to some degree, in making their recommendations.<sup>63</sup> Furthermore, winning parties (and interested third parties) tend to hail their victories as “precedent.”<sup>64</sup> Generally, parties will only acknowledge or at-

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58. *See id.*

59. *See id.* at 751.

60. *See* David A. Gantz, *Failed Efforts to Initiate the “Millennium Round” in Seattle: Lessons for Future Global Trade Negotiations*, 17 *Ariz. J. Int’l & Comp. L.* 349, 357 (2000).

61. *See India-Patent Protection for Pharmaceutical and Agricultural Products* (1998), at <[www.wto.org/english/tratop\\_e/dispu\\_e/t99R.pdf](http://www.wto.org/english/tratop_e/dispu_e/t99R.pdf)> 55.

62. *See id.* This panel report is the first authority on whether binding precedent exists in international trade law. However, other information hinted that this was indeed the case. Under international public law, there is a clear statute stating that precedent does not bind future cases. *Statute of the International Court of Justice*, June 26, 1945, 59 *Stat.* 1055.

63. *See* Bahala, *supra* note 44, at 871.

64. *See id.* Of course, those same parties do not pay attention to the potential law-making effect their disputes and the disputes of other parties may have on the future of dispute settlement under the DSU.

tempt to acknowledge a DSU panel or Appellate Body holding as binding when that decision is favorable to those parties' own self-interests.<sup>65</sup>

Related to this lack of precedent in Dispute Settlement Body panel and Appellate Body reports is the question of enforcement. The WTO, despite the countermeasures and compensation provisions set out in the DSU, has no means by which to actually force a non-compliant member country into complying with panel reports.<sup>66</sup> As is discussed below, this essentially means that a country does not have to comply with a WTO DSU decision if, all things considered, they would be worse off for complying than not complying and accepting the sanctions.<sup>67</sup>

#### 5. Weaker Developing Country Still Means Weaker Bargaining Power in the Institution of Countermeasures.

Recall the earlier discussion concerning the suspension of concessions (also known as countermeasures) as a possible remedy to a trade violation under the WTO and GATT provisions.<sup>68</sup> There is a wide variation of levels of sophistication across the membership of the WTO countries. Such disparity in the countries naturally leads to a disparity in bargaining power.

An unfortunate consequence of this disparity in bargaining power is that countermeasures will only truly be successful when a stronger member initiates them against a weaker member.<sup>69</sup> When a stronger member initiates the suspension of concessions against a weaker member, such suspension could likely have a dire effect on that weaker member.<sup>70</sup> In contrast, a weaker member initiating countermeasures against a stronger member is likely to be met

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65. See *id.* Perhaps the traditional theory on international trade discussed at the Bretton-Woods Agreements (*supra* notes 13-14) in 1947 is not quite as obsolete as international trade experts would like to believe.

66. See Joshua D. Sarnoff, *Issues in Modern International Environmental Law*, 10 *Colo. J. Int'l. Envtl. L. & Pol'y* 251, 254 (1999).

67. See, e.g., discussion, *infra* note 73.

68. See discussion, *supra* notes 33-35.

69. Pauwelyn, *supra* note 36, at 338. Furthermore, even where a developing member is granted concessions, the process is generally quite delayed. The entire DSU process, at its slowest, can take nearly three years to be implemented, and as such, a developing country may have taken all the right steps to gain relief, yet still suffer irreparable harm. See *WTO's Defective Dispute Settlement Process*, *supra* note 6. This slow moving system can be especially ominous for developing countries when one takes into account that the DSU countermeasure provisions are not retroactive to harm that has occurred before the panel issues its recommendations. *Id.*

70. See Pauwelyn, *supra* note 36, at 338. The economic and political pressure placed on the ruling bodies of such countries will likely result in compliance with the panel report because of the hardships that will result in the face of the non-compliance countermeasures. See *id.*

with non-compliance.<sup>71</sup> The stronger member will not be terribly affected by the countermeasures imposed upon it by the weaker member, and will likely proceed with its offending practices.<sup>72</sup> There are also “retaliation” concerns associated with any weaker member taking action against a stronger member, as there are many areas of international relations not governed by the WTO.<sup>73</sup>

#### 6. Decreasing Efficacy of the Consultations Stage.

Evidence suggests that the consultations stage of the DSU is waning in its efficacy to settle disputes before they reach the panel stage.<sup>74</sup> Very few cases since 1998 have been settled during the consultations stage.<sup>75</sup> These results directly contrast with what the framers of the DSU desired when they drafted the procedures for dispute resolution between WTO members. By requiring that parties enter into consultations before a panel is formed to mediate a dispute, the WTO drafters had hoped that many disputes would be resolved in the spirit of cooperation between the parties.<sup>76</sup> Unfortunately, it appears that parties would rather wait for the panel processes—exactly the opposite of what the WTO framers had in mind.<sup>77</sup>

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71. *See id.*

72. *See id.*

73. *Id.* Pauwelyn’s article uses the following scenario to illustrate these concerns: Estonia wants to invoke countermeasures against the United States in response to unfair trade practices, but is also highly dependent upon the United States for development aid. Estonia is thus put in the dilemma of whether to simply accept and deal with the unfair trade practices the U.S. employs against it, or to institute countermeasures and risk retaliation in the form of less or even no development aid. Such aid is not under the jurisdiction of the WTO, and the U.S. could freely suspend such aid without fear of countermeasures. *Id.*

74. *See* Olin L. Wethington, *Commentary on the Consultation Mechanism Under the WTO Dispute Settlement Understanding During its First Five Years*, 31 *L. & Pol’y. Int’l Bus.* 583, 588 (2000).

75. *See id.* For example, in 1998, only five disputes under the DSU were resolved during the consultations stage. In 1999, only one case was settled before a panel issued any report. Even in that case, *European Communities—Measure Affecting Butter Products*, WT/DS72/1 (Nov. 18, 1999), the parties, New Zealand and the European Community, resolved the matter by agreement after a panel had been formed. *Id.*

76. *See* Jackson, *supra* note 1, at 289-90.

77. *See* Wethington, *supra* note 74, at 588.

## SUGGESTIONS FOR IMPROVED DISPUTE SETTLEMENT UNDER THE WTO FRAMEWORK

1. Emphasize Full Disclosure of the Basis of Dispute during the Consultations Stage.

Recall that one problem with the DSU is its failure to clarify how much parties must disclose during the consultations stage.<sup>78</sup> The only fair remedy to this problem requires that complaining parties fully disclose the basis of their disputes at the initial consultations stage.<sup>79</sup>

Requiring parties to disclose the entire basis of their dispute will improve the overall DSU dispute settlement process.<sup>80</sup> Such a requirement will bring about two substantial changes in the current dispute settlement process. First, the emphasis on full disclosure during the initial stages of DSU dispute settlement will help to ensure due process to all parties involved, which will only heighten the fairness of the proceedings.<sup>81</sup> Second, such disclosure will improve the efficiency of the system as a whole. With full disclosure of the complaining party's dispute, more disputes will be resolved and disposed of in a timely manner before ever reaching the panel stage.<sup>82</sup> Thorough information logically produces a quicker result.

2. Amend the DSU to Mandate the Acceptance of Amicus Briefs during Panel Considerations.

The WTO should provide more of an opportunity for interested parties to be heard in disputes through amicus briefs. Fairness dictates that parties with an indirect interest in a dispute be given the chance to offer a position in support of their respective decisions. In many cases, the panel's decision will, at the very least, affect those parties, who could potentially bear the burden of the panel's decision.<sup>83</sup> Allowing the submission of amicus briefs in addition to

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78. See Horlick, *supra* note 42, at 579; See also discussion, *supra* note 44.

79. See Jackson, *supra* note 1, at 341. It appears necessary to require full disclosure when one looks at the number of cases to date that have been settled during the consultations stage. As of Spring, 2000, forty-one of the seventy-eight complaints that have been disposed under the DSU have been resolved at the consultations stage. See Christopher Parlin, *Operation of Consultations, Deterrence and Mediation*, 31 *Law & Pol'y Int'l Bus.* 565, 569 (2000).

80. See Horlick, *supra* note 42, at 579-81.

81. See *id.*

82. See *id.*

83. See Terence P. Stewart & Amy Ann Karpel, *Review of the Dispute Settlement Understanding: Operation of Panels*, 31 *L. & Pol'y Int'l Bus.* 593, 607 (2000). The United States has offered a similar proposal to allow interested parties to attend the oral arguments made before the

the briefs submitted by the parties will ensure that interested parties have the opportunity to protect themselves.<sup>84</sup>

### 3. Provide Greater Transparency in DSU Proceedings.

Currently, the DSU excludes individuals or organizations who are not parties or third parties to a dispute before the Dispute Settlement Body from both making or even attending the oral arguments.<sup>85</sup> The EU, Japan, and other WTO members support this exclusion for various reasons, a position opposite that of the United States.<sup>86</sup> The problem with this provision is that it excludes non-governmental organizations, interested parties, and other individuals from being a part of a decision that will bear directly upon their day-to-day operations.<sup>87</sup> It is inherently unfair to deny an organization or individual the opportunity to be heard when a decision rendered could have such dire consequences.<sup>88</sup>

Allowing interested parties to attend the oral arguments and participate in the argument process is key to creating a more comprehensive and fundamentally fair dispute settlement process under the WTO. The counter-argument that such third parties should be excluded from the decision as irrelevant to the parties to the dispute pales in comparison to the number of parties possibly affected by a decision, even when they have no part in the disposition. The DSU should be amended to grant these interested parties a voice.

In addition, very strong arguments exist for allowing simple, overall transparency in DSU panel hearings. The position promulgated by the EU and Japan, that DSU hearings should continue to remain open only to the parties involved in the disputes at hand, is incompatible with establishing trust in the DSU and WTO as a whole.<sup>89</sup> Greater transparency is essential. Simply al-

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DSU panels and WTO Appellate Body. *See id.*

84. *See* Kevin R. Gray, *Internet Symposium: Issues in Modern International Environmental Law*, 10 *Colo. J. Int'l. Envtl. L. & Pol'y.* 405, 406 (1999). Such assurance is necessary because there is currently no cause of action for an interested or adversely affected party to demand being heard if a panel decides not to accept their brief. *See id.*

85. *See* Stewart, *supra* note 83, at 604.

86. *See id.* at 607; *see also* Gantz, *supra* note 60, at 357.

87. *See* Stewart, *supra* note 83, at 607.

88. *See, e.g.,* FRCP 24(a).

89. *See, e.g.,* Faryar Shirzad, *The WTO Dispute Settlement System: Prospects for Reform*, 31 *L. & Pol'y Int'l. Bus.* 769, 770-71 (2000).

lowing these decisions to be open to anyone who is interested will help the process gain the trust of the people who are subjected to its jurisdiction. For example, one of the major reasons why environmental protestors thwarted the WTO "Millennium Round" in Seattle stemmed from their adverse reaction to a DSU panel report that struck down a U.S. restriction on trading with countries that did not adequately protect Sea Turtles.<sup>90</sup>

4. Greater Encouragement of Regional Treaties as a Method for Resolving the Problems Created by a Lack of Precedent and Disproportionate Bargaining Power between Stronger and Weaker Members.

There is no simple solution to the major problem caused by lack of precedent and *stare decisis* in international trade law. Perhaps the following suggestion could remedy the resulting issue of non-compliance.

The WTO Agreement allows two major exceptions to the principles of equal treatment for all member nations<sup>91</sup> outlined in Article I.<sup>92</sup> The first ex-

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90. The decision by the WTO Appellate Body underscored the philosophical conflict between international trade and environmental concerns. See Jennifer A. Bernazani, *The Eagle, the Turtle, the Shrimp and the WTO: Implications for the Future of Environmental Trade Measures*, 15 Conn. J. Int'l L. 207 (2000). In that case, the Appellate Body overturned a United States law prohibiting trade for certain products with countries that did not have an acceptable standard for Turtle Excluder Devices ("TED's"). See WTO Dispute Settlement Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998). The Report based its conclusion on the rationale that the law constituted discrimination because a convention between several American countries relaxed the time period for certification of the TED's, whereas other countries not parties to the convention had no flexibility on the time period (giving special treatment to certain WTO members without according it to all members in violation of Article 3). See *id.* The environmental groups' outrage was predictable and great, and the resulting protests over the decision were one reason why the Millennium Round talks, scheduled for Seattle in 1999, were never able to get off the ground. See Sean D. Murphy, *Collapse of Efforts to Launch Millennium Round of Multilateral Trade Negotiations*, 94 Am. J. Int'l L. 375, 378 (2000). It is perhaps naive to propose that these problems would not have occurred had there been a more informed populace about the reasoning behind the decision. However, it is not implausible to surmise that many who would have protested the decision would have understood the reasoning behind it had they been informed of the arguments throughout the panel hearing.

91. These equal treatment principles are normal trade relations and national treatment. See discussion, *supra* note 12.

92. See Article I, WTO Agreement. There are other important exceptions to the rules of normal trade relations and national treatment that are of questionable importance to this discussion but nonetheless deserve mention. Article 20 (specifically subsections (g) and (h)) allows for disparate treatment of another member nation if done to protect human, animal and plant health and the conserve natural resources. Article 21 allows for disparate treatment of another member nation if such treatment protects national security. Further, while the WTO agreement does not expressly provide for an exception for preferential treatment of developing countries, a permanent waiver for such treatment was signed by WTO members. See Jackson, *supra* note 1, at 1115.

ception, under Article 24, §5, is a Free Trade Agreement. The second exception, under Article 24, §8, is a customs union.<sup>93</sup>

A free trade agreement consists of a group of states agreeing to reduce and ultimately eliminate tariff rates among them on specific goods.<sup>94</sup> Under such an agreement, WTO members can reduce and eliminate such tariffs so long as they maintain current tariff rates for other WTO members.<sup>95</sup> While such an arrangement would otherwise violate normal trade relation status, as WTO members not party to the free trade agreement would pay a higher tariff rate than WTO members and non-members in the free trade agreement, such pacts are allowed because of the efficiency they promote in regional trade.<sup>96</sup>

Similar to free trade agreements are customs unions.<sup>97</sup> Like free trade agreements, customs unions eliminate tariffs among the member countries.<sup>98</sup> They take the provisions of free trade agreements a step further by unifying their external tariff rate as to all other nations.<sup>99</sup> Such a union is attractive to WTO members—it creates a stronger negotiating standpoint in that outside members must now negotiate with a group of countries regarding trade rates and barriers.<sup>100</sup>

Since WTO member nations are allowed to establish treaties that relate only to certain members so long as those treaties do not result in indirect

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93. See WTO Agreement, Article 24.

94. See Article 24, §5. See also Andrea Kupfer Schneider, *Getting Along: The Evolution of Dispute Resolution Regimes in International Trade Organizations*, 20 Mich. J. Int'l L. 697, 739 (1999). While many other free trade organizations exist, the most well-known is the North American Free Trade Agreement (NAFTA), entered into by the United States, Mexico and Canada in 1994. For a more detailed discussion and information about NAFTA, see [www.mac.doc.gov/nafta/nafta2.htm](http://www.mac.doc.gov/nafta/nafta2.htm).

95. See Schneider, *supra* note 94, at 739. Essentially, a member state in a free trade agreement cannot “cover” its losses in lost tariffs by raising tariff rates with respect to other WTO members. See Article 24, §5.

96. See Sheila M. Raftery, *Safety Net and Measuring Rod: The North American Free Trade Agreement Transitional Adjustment Assistance Program*, 12 Temp. Int'l & Comp. L.J. 159 (1998). Countries benefit from these types of agreements because the resources and specialties of each nation are more efficiently allocated among the nations party to the agreement. See *id.*

97. See WTO Agreement Article 24, §8.

98. See *id.*; see also Schneider, *supra* note 94, at 739.

99. See *id.* There are many customs unions in existence, the most well known being the European Union. For a more detailed description of the EU, see [www.europa.eu.int](http://www.europa.eu.int).

100. See Schneider, *supra* note 94, at 739-40.



harm to other member nations,<sup>101</sup> one can assume that greater incentives to establish more favorable treatment with neighboring or near members will greatly increase the efficiency of world trade. If parties have more reasons to cooperate, it logically follows that they will have less reason to engage in DSU proceedings.

### CONCLUSION

Despite the many improvements the WTO's Dispute Settlement Understanding features in comparison to the former dispute settlement provisions under the GATT, myriad problems still exist with the DSU. As this paper has discussed, the major problems are: 1) the overall clarity of the DSU; 2) the discretionary refusal of amicus briefs by parties interested to disputes; 3) a lack of overall transparency in Dispute Settlement Body Proceedings; 4) a lack of precedent to follow in DSU proceedings; 5) disproportionate bargaining power between stronger and weaker member countries; and 6) an overall decreasing efficacy of methods designed to avoid formal dispute settlement. These issues must be addressed before the DSU truly becomes a fair mechanism for resolving disputes between WTO members.

A reform approach calling for greater clarity, accessibility and transparency of DSU proceedings would go a long way towards gaining the trust of would-be disputants under the WTO provisions. Such disputants, especially those members raising trade issues before the WTO DSU for the first time, will undoubtedly feel more comfortable if they know exactly how the system operates and what they can expect.

Further, the plaguing lack of *stare decisis* and precedent in international trade law will be most difficult to combat. How can any one organization, such as the WTO, pass legislation that makes international trade law dispute decisions binding when that legislation itself is not binding? In that context, the best solution to such a problem would call for parties to minimize their disputes and thus never even have to deal with the uncertainty of whether a panel decision binds them.

Obviously, such a solution will be very difficult to bring about. However, if the members of the WTO were to amend their agreement to allow more regional trade agreements with special incentives for instituting them, the number of disputes would likely fall. Regional trade agreements promote international trade efficiency. Such efficiency would reduce costs to all parties involved. Further incentives to those parties for initiating such agreements

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101. Article 24 of the WTO allows trade unions and free trade agreements.

would also mean reduced costs. In sum, the minimizing of costs could logically lead to the minimizing of disputes.

The WTO's DSU, while to date the most progressive agreement for settling international trade disputes, is a system in need of major reform. A more transparent system would gain the trust of the members who are subject to the agreement. Such trust would lead to the minimization of disputes and an overall increase in the efficacy of the DSU process.

