# BOOK REVIEW

## A New Era of Legalism for Dispute Settlement Under the WTO

DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION: PRACTICE AND PROCEDURE. By David Palmeter and Petros C. Mavroidis. Boston: Kluwer Law International, 1999. Pp. xvi, 313. $78.00.

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David Palmeter and Petros Mavroidis have written a useful, concise overview of the World Trade Organization (WTO)[1] dispute settlement process. This book will be valuable as both a reference and a handbook to lawyers, government officials, and diplomats appearing in cases before the dispute settlement panels and the Appellate Body of the WTO. Both authors have considerable experience in this field—one is an experienced practitioner in representing clients before the WTO and its predecessor organization, the General Agreement on Tariffs and Trade (GATT),[2] and the other is a former official with the Legal Affairs Division of WTO and GATT who has advised numerous dispute settlement panels.[3]

With the exception of the first chapter setting forth the background of the WTO and GATT, the chapters in this book correspond with each of the phases of the dispute settlement process[4]—the initiation of the complaint,[5] the work of the dispute settlement panels and the Appellate Body,[6] the implementation by the WTO Dispute Settlement Body of final reports,[7] and remedies.[8] The content of each chapter tracks the relevant provisions of

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[1] Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Legal Instruments—RESULTS OF THE URUGUAY ROUND vol. 27, 33 I.L.M. 13 (1994).

[2] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

[3] DAVID PALMETER & PETROS C. MAVROIDIS, DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION: PRACTICE AND PROCEDURE 315 (1999).

[4] The WTO eschews the terms "dispute resolution" preferring the less litigious sounding "dispute settlement."

[5] PALMETER & MAVROIDIS, *supra* note 3, at chs. 2–3.

[6] *Id.* at chs. 4–6.

[7] *Id.* at ch. 7.

[8] *Id.* at ch. 8.

major treaties, agreements, or internal working procedures of the WTO, with useful footnote references to original sources. A few of the chapters go into detail about technical issues and specialized aspects of the dispute settlement process, reflecting the authors' experience in areas in which problems will likely arise. In its appendices, the book contains an exclusive list (but not the texts) of the following: (1) WTO Appellate Body reports;[9] (2) the WTO Panel Reports;[10] (3) WTO Arbitrator's Reports;[11] (4) GATT Reports;[12] and, (5) decisions from other relevant sources.[13] In addition, this book contains the texts of all the major WTO agreements and other applicable instruments, including the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU),[14] Working Procedures for Appellate Review, and relevant selections of other WTO substantive agreements, such as the Agreement on Subsidies and Countervailing Measures,[15] that create specialized treatment for dispute settlement.[16] The authors' clear exegesis of the dispute settlement process outlined in the text combined with a collection of the reports, agreements, references, and documents make this work a useful reference for those involved in WTO dispute settlement.

Although the volume does not purport to be a scholarly work (aimed instead at those working in the field), it does develop and demonstrate a major thesis: the evolution of the GATT/WTO dispute settlement process from an informal process reflecting the diplomatic roots of GATT[17] to a more formal legal structure that takes on institutional features of an adversarial process similar to that of civil litigation in the United States. This is a topic that should be followed by both practitioners and scholars alike as the WTO dispute settlement system continues to evolve further in the

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[9] *Id.* at 177–78.

[10] *Id.* at 178–79.

[11] *Id.* at 179.

[12] *Id.* at 177–78.

[13] *Id.* at 181–82.

[14] Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 2, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 112 (1994) [hereinafter DSU], *reprinted in* PALMETER & MAVROIDIS, *supra* note 3, at 187–218.

[15] Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 27.

[16] PALMETER & MAVROIDIS, *supra* note 3, at 219–306.

[17] Originally the process was called "conciliation" not dispute settlement.

direction of civil litigation. The authors show that the new WTO dispute settlement system marks a new era of legalism for the WTO and for international trade, one that will likely continue as international commerce—and the inevitable disputes that arise—becomes an increasingly important feature of the world economy. This theme, and how this book develops it, is further examined and discussed below.

## I. BACKGROUND OF THE WTO, GATT, AND ITO[18]

To understand the evolution and development of the WTO dispute settlement process, it is useful to trace the history of the WTO and GATT, its predecessor organization. When it became clear that the Allies would defeat Germany and Japan in World War II, the United States and other nations turned to the task of rebuilding nations and economic systems in ruins after a period of immense destruction and suffering.[19] Many believed that the economic policies of isolationism and protectionist trade policies and the resulting chaos and misery that such policies inflicted on other nations contributed to the mutual distrust and hostilities that eventually plunged almost the entire world into war.[20] World leaders were committed to establishing international economic organizations that would prevent nations from once again adopting such disastrous economic policies in the post-war era.[21] These concerns eventually led to the Bretton Woods Conference in New Hampshire in 1944, which helped to establish the International Bank for Reconstruction and Development (generally known as the World Bank) and the International Monetary Fund, two organizations that would play an important stabilizing role in the post-war global economy.[22] These two organizations focused their work on monetary issues, however, and the United States perceived a need for a third organization to deal with trade issues.[23] After Bretton Woods, the United States submitted a proposal for the International Trade Organization (ITO), which would serve as a foundation for the post-war international trade system, but the plan for the ITO was too ambitious for the times.[24] Eventually, the proposal for the ITO would meet

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[18] This section is based upon Chapter 1 of PALMETER & MAVROIDIS, *supra* note 3.

[19] PALMETER & MAVROIDIS, *supra* note 3, at 1.

[20] *Id.*

[21] *See id.*

[22] *Id.* at 1–2.

[23] *See id.* at 2.

[24] *Id.*

its demise at the hands of the United States Senate, which on December 6, 1950, refused to approve the ITO charter.[25]

The ITO was intended to be comprehensive, with plans to encompass within its scope not only trade, but issues concerning labor and employment, commodities, economic development, and restrictive business practices.[26] None of the other parts of the ITO survived, but GATT, an agreement dealing with trade issues, did survive. As other parts of the ITO were being drafted, a drafting committee was able to complete the full text of GATT in January and February 1947.[27] "From April through October 1947, the members of the [ITO] Preparatory Committee conducted a round of tariff negotiations" among 25 nations in the European Office of the ITO.[28] The conclusion of this round, the first of eight rounds, resulted in the text of GATT and an agreed upon schedule of tariffs.[29] GATT itself was originally viewed as a treaty only to be part of the ITO, but the parties did not want to wait for the ITO to be established before GATT became effective and entered into the Protocol of Provision Application, making GATT effective as of January 1, 1948.[30] Because the ITO never came into existence, GATT's provisional application lasted for 47 years until the establishment of the WTO in 1995.[31] However, the importance of GATT to international commerce led to successive negotiating rounds dealing with a variety of separate issues, including tariff cuts (Annecy, Torquay, Geneva, and Dillon Rounds) and non-tariff barriers (Kennedy and Tokyo Rounds).[32] The most recent round, the Uruguay Round, which lasted from 1986–1994, was the longest and involved the largest number of participating countries with 128 parties.[33] Dealing with dispute settlement was one of the major goals of the Uruguay Round, and the resulting agreement that was reached, the DSU, is regarded as one the major achievements of the Round.[34]

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[25] *Id.*

[26] *Id.* at 2–3.

[27] *Id.* at 3.

[28] *Id.*

[29] *Id.* at 3.

[30] Protocol of Provisional Application of the General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-2051, T.I.A.S. No. 1700, 55 U.N.T.S. 308.

[31] *Id.* at 2.

[32] *Id.* at 5.

[33] *See id.*

[34] *See id.* at 7.

## II. DISPUTE SETTLEMENT UNDER GATT[35]

Dispute settlement practice under GATT developed based upon GATT Articles XXII and XXIII and the principles established under these articles continue to serve as the basis for dispute resolution under the DSU.[36] While neither of these articles sets forth any detailed procedures on dispute settlement, these articles do set forth some substantial obligations on the part of contracting parties to provide opportunities for the airing and consideration of complaints of conduct inconsistent with GATT.[37] Under Article XXII:1, contracting parties are required to "afford other parties adequate opportunit[ies] for consultation with respect to any matter arising out of the operation" of GATT.[38] Under this provision, a contracting party dissatisfied with the policies, practices, or any other matter arising out of another contracting party's obligations under GATT had the right to bilateral consultations with the latter.[39] When such consultations fail to resolve the dispute, the complaining party is authorized by Article XXIII:2 to refer the matter to the contracting parties, which will then consult with both of the parties to the dispute. Under Article XXIII:1, "if any contracting party considers [a] benefit directly or indirectly" provided by GATT to have been "nullified or impaired by another party, [the complaining party] can make written representations or proposals to [the] other party."[40] If this does not satisfactorily resolve the matter, "the complaining party is authorized [under] Article XXIII:2 to refer the matter to the CONTRACTING PARTIES, who are required to investigate the matter and make appropriate recommendations on its settlement."[41] Under certain circumstances, the contracting parties can recommend that the complaining party suspend or withdraw tariff concessions or other benefits to the party who has engaged in conduct inconsistent with GATT obligations.[42]

Specific procedures on dispute settlement evolved over time. In practice, GATT dispute settlement was conducted through the use of panels that

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[35] This section is based upon Chapter 1, § 1.01(5) of PALMETER & MAVROIDIS, *supra* note 3.

[36] DSU, *supra* note 15, at art. 3.1, *reprinted in* PALMETER & MAVROIDIS, *supra* note 3, at 188.

[37] *See* PALMETER & MAVROIDIS, *supra* note 3, at 8.

[38] *Id.*

[39] *See id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

would hold two or three formal meetings with the parties.[43] The panel would invite the parties to submit written memoranda on issues related to the dispute.[44] In a procedure resembling a hearing, the panel invited the parties to present their views either in writing or orally and in the presence of each other.[45] The panel could then question the parties. Panels also heard the views of any contracting party having an interest in the matter, could consult with any outside source they considered relevant, and could obtain the views of experts on technical issues relevant to the dispute.[46] At the conclusion of its deliberations, the panel would issue a report containing a recommendation on how the dispute should be resolved, including recommendations on how a party can bring an offending measure into conformity with GATT.[47]

### A. *The Principle of Consensus*

Reflecting its nature as a multi-lateral treaty and its diplomatic roots, GATT required that every action affecting the treaty be consented to by all of the parties.[48] In practice, this meant that a losing party to the dispute must consent to the adoption of the panel report that is adverse to its interests and that failure to consent would block the adoption of the report. Indeed, a party could even block the very establishment of a panel if it anticipated that it would ultimately lose the dispute and be faced with the diplomatic embarrassment of having to block an adverse report.[49] Reflecting the value with which the contracting parties viewed the GATT system, parties attempted to avoid blocking, and a study of GATT dispute settlement from 1947–1992 shows that the losing party eventually accepted the results of an adverse panel report in about ninety percent of all cases.[50] Nevertheless, losing parties did sometimes block the establishment of a panel, the adoption

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[43] Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement (Article XXIII:2), GATT B.I.S.D. (26th Supp.) at 215–18 (1980).

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] Vienna Convention on the Law of Treaties, May 23, 1969, art. 40, 1155 U.N.T.S. 331, 341–42. Unless a treaty specifies otherwise, all action concerning the interpretation, modification, and amendment of the treaty must receive the unanimous consent of all contracting parties. *Id.*

[49] PALMETER & MAVROIDIS, *supra* note 3, at 9–10

[50] *Id.* at 10 (citing ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW 278 (1993)).

of adverse reports, and the threat of blocking also loomed in the background of any GATT dispute settlement process.[51] So long as the principle of consensus continued to be applied to GATT disputes, blocking was a problem—and indications in the 1980s were that blocking was occurring with increasing frequency. The requirement of consensus in dispute settlement had created issues that GATT members felt had to be addressed.

## III. THE WTO AND THE PRINCIPLE OF "NEGATIVE" CONSENSUS[52]

The problems caused by the principle of consensus led the parties to adopt a series of interim rules during the Montreal round that were later adopted on a permanent basis during the Uruguay Round and became part of the WTO.[53] One of the most significant features of the Montreal rules was the new requirement that a panel must be established once a request is made by a complaining party unless all parties vote not to establish a panel.[54] In other words, the principle of consensus had been changed from one of "positive" consensus requiring the unanimous vote of all parties for the establishment of a panel to a principle of "negative" consensus requiring the unanimous vote of all parties not to establish a panel.[55] Since the complaining party is one of the parties that must vote not to establish a panel, there is no practical likelihood that a panel will not be established once the complaining party makes such a request.[56] This principle of negative consensus, first established by the Montreal rules, was extended by the Uruguay Round to other aspects of the dispute settlement process, including the adoption of panel reports and reports of the WTO Appellate Body, further discussed below.[57] This new principle of negative consensus has now effectively resolved one of GATT's most sensitive and difficult issues in the dispute settlement process: the diplomatic embarrassment of a losing party blocking any actions that adversely affects its interests. The adoption of the

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[51] *Id.* at 10.

[52] This section is based upon Chapter 1, § 1.04 of PALMETER & MAVROIDIS, *supra* note 3.

[53] Improvements to the GATT Dispute Settlement Rules and Procedures, Apr. 12, 1989, GATT B.I.S.D. (36th Supp.) at 61 (1990).

[54] *Id.*at 63.

[55] *Id.* at 17.

[56] *See id.*

[57] *See id.*

negative consensus principle also moves the WTO dispute settlement process firmly in the direction of an adversarial civil litigation system.[58]

## IV. DISPUTE SETTLEMENT UNDER THE WTO

The WTO was officially established on January 1, 1995 as the successor to GATT and formally created by the Marakesh Agreement Establishing the World Trade Organization, the culmination of the Uruguay Round of negotiations begun in the summer of 1986.[59] Unlike GATT, which was a treaty and not an organization, the WTO is a permanent institution similar in stature to the World Bank and the International Monetary Fund established by the Bretton Woods Agreement and serves as the foundation for the modern international trade system, a role that was originally intended for the ITO at the end of World War II.[60] One of the major achievements of the Uruguay round is the Dispute Settlement Understanding, attached as annex 2 to the WTO agreement. The DSU sets forth the procedures governing dispute settlement under the WTO, and the Dispute Settlement Body (DSB) is the institutional entity that was created under the DSU to deal with disputes arising under any of the WTO agreements.

### A. *The Dispute Settlement Panels*[61]

Although the DSB is empowered to resolve disputes under the WTO and DSU agreements, these responsibilities are in practice discharged by the dispute settlement panels and the Appellate Body, both of which function like courts.[62] The reports of the dispute settlement panels and the Appellate Body must be adopted by the DSB, but the principle of negative consensus means that such adoption will almost automatically occur.[63]

At the preliminary stages of the dispute settlement process, the parties have opportunities for the informal settlement of the dispute through consultations[64] and good offices or mediation.[65] Once the formal process

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[58] PALMETER & MAVROIDIS, *supra* note 3, at 61.

[59] *Id.* at 13.

[60] *See id.* 13–15.

[61] This section is based upon Chapter 4 of PALMETER & MAVROIDIS, *supra* note 3.

[62] *Id.* at 62.

[63] *Id.* at 61–62.

[64] PALMETER & MAVROIDIS, *supra* note 3, at 62–65; DSU, *supra* note 14, at art. 4, *reprinted in* PALMETER & MAVROIDIS, *supra* note 3, at 190–92.

begins, the parties undergo a process much like that of civil litigation in which the dispute is first heard by a fact finding body and then reviewed by an appellate tribunal that has a scope of review limited to issues of law.[66] Under the WTO, the panels, composed of three to five individuals,[67] will consult with the parties and will establish a time-table for the proceedings, including a schedule for written submissions and hearings.[68] Written submissions set forth the positions and arguments of the parties, similar to legal briefs in civil litigation. Meetings[69] are held in closed sessions with the complaining party presenting its case first to the panel, which may at any time interrupt with questions. The panel has flexibility in evaluating evidence and can seek information and technical advice from any source.[70] At the end of the first session, the parties are allowed to make a second written submission, which serves as a rebuttal submission directed at arguments by the opposing side raised during the first hearing.[71] At the request of a party, the panel then convenes for a second meeting at which it considers the rebuttal arguments raised by both sides. This is normally the last opportunity for the parties to make their case to the panel.[72]

Following the consideration of rebuttal submissions, the panel issues the descriptive portion (containing the facts and arguments of the parties) of its draft report to the parties.[73] After a period during which the parties are allowed to comment on the draft, the panel then issues its interim report containing the description as revised (if necessary) and the panel's findings and conclusions.[74] The parties are allowed to comment on the draft final report and request a further meeting with the panel on precise aspects of the

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[65] PALMETER & MAVROIDIS, *supra* note 3, at 66; DSU, *supra* note 14, at art. 5, *reprinted in* PALMETER & MAVROIDIS, *supra* note 3, at 192–93.

[66] PALMETER & MAVROIDIS, *supra* note 3, at arts. 11 and 17.

[67] PALMETER & MAVROIDIS, *supra* note 3, at 68; DSU, *supra* note 14, at art. 8.5, *reprinted in* PALMETER & MAVROIDIS, *supra* note 3, at 195.

[68] PALMETER & MAVROIDIS, *supra* note 3, at 72; DSU, *supra* note 14, at art. 12.3, *reprinted in* PALMETER & MAVROIDIS, *supra* note 3, at 197.

[69] The DSU eschews the term "hearings."

[70] PALMETER & MAVROIDIS, *supra* note 3, at 76; DSU, *supra* note 14, at art. 13.1, *reprinted in* PALMETER & MAVROIDIS, *supra* note 3, at 199.

[71] PALMETER & MAVROIDIS, *supra* note 3, at 88; DSU, *supra* note 14, at app. 3, ¶ 7, *reprinted in* PALMETER & MAVROIDIS, *supra* note 3, at 314.

[72] PALMETER & MAVROIDIS, *supra* note 3, at 91.

[73] PALMETER & MAVROIDIS, *supra* note 3, at 91; DSU, *supra* note 14, at art. 15.1, *reprinted in* PALMETER & MAVROIDIS, *supra* note 3, at 200.

[74] PALMETER & MAVROIDIS, *supra* note 3, at 91; DSU, *supra* note 14, at art. 15.2, *reprinted in* PALMETER & MAVROIDIS, *supra* note 3, at 200.

interim report.[75] If no comments are received during the comment period, the draft interim report becomes the panel's final report.[76] The time of the initial composition of the panel to the date that the final report is issued should not, as a general rule, exceed six months.[77] In urgent cases, the panel will strive to issue a final report in three months.[78] In no event, should the period from the establishment of the panel to the issuance of the report to Members exceed nine months.[79]

### B. *The Appellate Process*[80]

The introduction of a standing appellate body in the WTO dispute settlement process appears to be unique under international law. Even the International Court of Justice is a court of original jurisdiction that decides issues of law and fact and from which no appeal is possible. With the Appellate Body, the WTO now has a fact-finding body and an appellate review tribunal, features common in domestic civil litigation systems.

The Appellate Body is established by the DSB and consists of seven persons, three of whom can serve on any one case.[81] The Appellate Body may uphold, modify, or reverse the legal findings and conclusions of a panel but may not remand the case with directions to the panel. Under the Appellate Body's rules,[82] oral argument must be held in each case within thirty days of the Notice of Appeal,[83] and the Appellate Body normally must

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[75] PALMETER & MAVROIDIS, *supra* note 3, at 91; DSU, *supra* note 14, at app. 3, ¶ 12, *reprinted in* PALMETER & MAVROIDIS, *supra* note 3, at 215.

[76] PALMETER & MAVROIDIS, *supra* note 3, at 92; DSU, *supra* note 14, at art. 15.2, *reprinted in* PALMETER & MAVROIDIS, *supra* note 3, at 200.

[77] PALMETER & MAVROIDIS, *supra* note 3, at 93; DSU, *supra* note 14, at art. 12.8, *reprinted in* PALMETER & MAVROIDIS, *supra* note 3, at 198.

[78] DSU, *supra* note 14, at art. 12.8, *reprinted in* PALMETER & MAVROIDIS, *supra* note 3, at 198.

[79] PALMETER & MAVROIDIS, *supra* note 3, at 93; DSU, *supra* note 14, at art. 12.9, *reprinted in* PALMETER & MAVROIDIS, *supra* note 3, at 198.

[80] This section is based upon Chapter 6 of PALMETER & MAVROIDIS, *supra* note 3.

[81] PALMETER & MAVROIDIS, *supra* note 3, at 135; DSU, *supra* note 14, at art. 17.1, *reprinted in* PALMETER & MAVROIDIS, *supra* note 3, at 201.

[82] The DSU provides that the Appellate Body shall draw up its own working procedures. PALMETER & MAVROIDIS, *supra* note 3, at 136; DSU, *supra* note 14, at art. 17.9, *reprinted in* PALMETER & MAVROIDIS, *supra* note 3, at 202. These procedures are contained in *Working Procedures for Appellate Review* [hereinafter AB Rules].

[83] PALMETER & MAVROIDIS, *supra* note 143, at 91; AB Rule XXVII(1), *reprinted in* PALMETER & MAVROIDIS, *supra* note 3, at 232.

issue its decisions within sixty days of the filing of the Notice of Appeal and cannot exceed ninety days.[84]

### C. *Adoption and Implementation of Reports*[85]

Within sixty days after the submission of a final report by a dispute settlement panel, the DSB must adopt the report unless there is a consensus not to adopt the report or unless a party has formally notified the DSU of its intention to appeal the panel report.[86] "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties [] within thirty days of its circulation, unless the DSB decides by consensus not to adopt [the report]."[87] If a report finds that a measure is inconsistent with the requirements of a covered WTO agreement, the report will recommend that the Member concerned bring its measure into conformity with the relevant agreement and may contain suggestions on ways that the Member concerned can implement the report's recommendations.[88] At a meeting to be held within thirty days after the adoption of a report, "the Member concerned must inform the DSB of its intentions concerning the [report] recommendations."[89] If it is not practicable for the Member concerned to comply with the DSU's recommendations immediately, the Member concerned shall have a "reasonable time" to do so. If such a period cannot be agreed upon through a proposal by the Member concerned and approval by the DSB or by agreement by the parties within forty-five days of the adoption of a report, such a period will be determined by binding arbitration.[90]

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[84] PALMETER & MAVROIDIS, *supra* note 3, at 145; DSU, *supra* note 14, at art. 17.5, *reprinted in* PALMETER & MAVROIDIS, *supra* note 3, at 202.

[85] This section is based upon Chapter 7 of PALMETER & MAVROIDIS, *supra* note 3.

[86] PALMETER & MAVROIDIS, *supra* note 3, at 154; DSU, *supra* note 14, at art. 16.4, *reprinted in* PALMETER & MAVROIDIS, *supra* note 3, at 200.

[87] PALMETER & MAVROIDIS, *supra* note 3, at 154; DSU, *supra* note 14, at art. 17.14, *reprinted in* PALMETER & MAVROIDIS, *supra* note 3, at 202.

[88] PALMETER & MAVROIDIS, *supra* note 3, at 154; DSU, *supra* note 14, at art. 19.1, *reprinted in* PALMETER & MAVROIDIS, *supra* note 3, at 203.

[89] PALMETER & MAVROIDIS, *supra* note 3, at 154; DSU, *supra* note 14, at art. 21.3, *reprinted in* PALMETER & MAVROIDIS, *supra* note 3, at 204–05.

[90] PALMETER & MAVROIDIS, *supra* note 3, at 155; DSU, *supra* note 14, at art. 21.3, *reprinted in* PALMETER & MAVROIDIS, *supra* note 3, at 204–05.

D. *Remedies*[91]

If a Member fails to comply with the recommendations of the DSB or otherwise fails to bring an inconsistent measure into conformity with a WTO covered agreement within a reasonable period (as defined above), the party that invoked the dispute settlement process can seek compensation.[92] Compensation must be mutually agreed upon by the parties and cannot be imposed upon an unwilling party.[93] If compensation cannot be agreed upon within twenty days after the expiration of the reasonable period of time, the complaining party can seek authorization for retaliation, *i.e.*, where the WTO authorizes a contracting party to suspend favorable trade concessions to another party in retaliation for the latter's failure to bring its measure into conformity with the WTO.[94]

Although compensation and retaliation have received a great deal of public attention, the overarching goal of the dispute settlement process is to bring into conformity with the WTO any measures adopted by Members that are inconsistent with the WTO's covered agreements. As a result, the DSU considers compensation and retaliation as necessary but temporary measures.[95] In the fifty year history of the WTO and GATT, retaliation has been authorized only once in a dispute when the Netherlands was authorized to limit imports of wheat by the United States, and even in this single instance the Netherlands never took any action.[96] This case indicates that the actual implementation of sanctions may be less significant than the important diplomatic victory that has already been secured by the authorization of sanctions by the WTO and GATT. Even when compensation or retaliation has been authorized, the DSB will monitor the implementation of adopted reports until the recommendations of the report have been adopted or the parties have reached a settlement.[97] This policy serves the overall goal of preserving a system that all of its members value and avoids the friction or

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[91] This section is based upon Chapter 8 of PALMETER & MAVROIDIS, *supra* note 3.

[92] PALMETER & MAVROIDIS, *supra* note 3, at 164; DSU, *supra* note 14, at art. 22.1, *reprinted in* PALMETER & MAVROIDIS, *supra* note 3, at 206.

[93] DSU, *supra* note 14, at art. 22.2, *reprinted in* PALMETER & MAVROIDIS, *supra* note 3, at 206.

[94] *Id.*

[95] PALMETER & MAVROIDIS, *supra* note 3, at 167; DSU, *supra* note 14, at art. 22.1, *reprinted in* PALMETER & MAVROIDIS, *supra* note 3, at 206.

[96] PALMETER & MAVROIDIS, *supra* note 3, at 168.

[97] DSU, *supra* note 14, at art. 22.8, *reprinted in* PALMETER & MAVROIDIS, *supra* note 3, at 208.

diplomatic embarrassment that may be caused if compensation and retaliation were implemented on a regular basis as a final settlement in the WTO dispute settlement process. The ultimate goals of the dispute settlement system remain conformity of the measure in question with the WTO system and restoring any imbalance in the WTO system caused by a non-conforming measure.[98]

## IV. CONCLUSION

DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION is a useful, clear text that illustrates the basic mechanics and some of the complexities of the WTO dispute settlement process. The volume not only provides an overview of the entire system but also goes into some depth on the more technical aspects of dispute settlement and reflects the authors' combined experience in both appearing before and advising GATT/WTO dispute settlement bodies. This volume also demonstrates how the DSU and its principle of negative consensus—that WTO reports should be adopted unless there is a consensus not to do so—have introduced a new era of legalism in international dispute settlement. The authors argue persuasively that the WTO dispute settlement process is now arguably the most effective dispute settlement process in the entire arena of public international law.[99]

While the authors do not stress the continuing differences between international dispute settlement and domestic legal systems, readers should be cautioned that there are some fundamental differences between international dispute settlement and domestic civil litigation that do not appear to be likely to disappear any time soon. Unlike domestic legal systems, the WTO dispute settlement system does not contain a coercive mechanism to compel unwilling parties to comply with an adverse report. In a domestic legal system, such as the United States, winning parties can invoke the coercive power of the State through the execution and enforcement of judgments by the judicial system and through other means to impose a judicial solution upon a recalcitrant party. In some domestic legal systems, failure of a losing party to comply with a legal judgment may result in a party being subject to other civil or even criminal sanctions, including imprisonment.

No similar mechanism exists in international law, and the adoption of the DSU and the principle of negative consensus does not alter this fundamental difference between international dispute settlement and its counterpart in

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[98] DSU, *supra* note 14, at art. 22.1, *reprinted in* PALMETER & MAVROIDIS, *supra* note 3, at 206.

[99] PALMETER & MAVROIDIS, *supra* note 3, at 153.

some domestic systems. The DSU and the principle of negative consensus, however, does create greater institutional and political pressures to comply with DSU reports and can result in greater diplomatic embarrassment for those members who refuse to comply. No longer can a Member block the establishment of a panel or the adoption of an adverse report and stall the entire dispute settlement process. Instead, under the DSU, a Member is faced with the diplomatic and political pressures of compliance with reports that have received the institutional approval of the DSU and the WTO. Failure to comply under these circumstances may call into question the Member's respect for the entire WTO system and may risk undermining that Member's reputation in the world trading system. Institutional pressure, the desire to maintain the WTO system because it is of value to all of its members, and the avoidance of diplomatic embarrassment—not fear of coercion—underlies the motivation to comply with DSU reports. While the WTO dispute settlement system has increased the pressures from all of these sources to comply with DSU reports, the system remains fundamentally a system of voluntary compliance consistent with the tradition of public international law. As a result, there appears to be some limits on the evolution of the international dispute settlement system in the direction of domestic civil litigation.

From the point of view of those who are likely to appear before DSU bodies—government officials, diplomats, and lawyers—it would have been useful if the volume had included a discussion of a greater number of the WTO Panel and Appellate Reports that have already been adopted. Such a discussion would be helpful to those who do not have substantial experience with the DSU and would give a more complete picture of the dispute settlement process. Given that there are relatively few WTO decisions since 1995, inclusion of some of the texts of these decisions in the appendix, in addition to the agreements and treaties already collected, would also add to the usefulness of the volume as a reference work.

A discussion of future trends might also be useful, as it appears likely that the dispute settlement process will continue to evolve and move in new directions. For instance, one of these trends is an increasing role for lawyers. Dispute settlement under GATT was often done without the assistance of attorneys but done through the work of government officials and diplomats. An increase in a role for private lawyers appears to be one result of the changes brought about by the DSU—some of the documents submitted during the dispute settlement process resemble legal briefs that may be suitable for private attorneys to draft. Moreover, lawyers may have additional roles in representing their clients during the meetings of the dispute settlement panels and the Appellate Body—meetings which resemble hearings and oral argument under domestic law. The involvement of lawyers

may mean that WTO dispute settlement may develop an even greater affinity with domestic civil litigation and the adversary process. Some observations by the authors of these and other future trends in a rapidly evolving area might have been useful to both their readers. But these are minor quibbles with a useful volume that should find a receptive audience in this new age of legalism for the WTO dispute settlement process.