The WTO’s Dispute Settlement Procedures
Are They up to the Task after 10 Years?

Steven KOURIS*  

1. INTRODUCTION

It is now 10 years since the World Trade Organization was established. The general consensus is that its “integrated” dispute settlement system has worked reasonably well during that time. As at November 2005, 335 disputes had arisen, with the WTO’s Dispute Settlement Body (DSB) having adopted 95 panel and 69 Appellate Body (AB) reports. While this suggests greater legalization and sophistication in the resolution of international trade disputes (which is welcome), the presumed success of pre-adjudication resolution (the system’s “clear preference”) must also not be forgotten. Developing countries such as India and Brazil have also been active participants, while others have had little or no involvement. No doubt statistics of this nature (with some hesitation towards its treatment of developing and least developed countries) give some prima facie support to the argument that the system is working reasonably well and consequently is “a central element in providing security and predictability” to the WTO’s trading regime.

1 Guatemala — Anti-Dumping Investigation Regarding Portland Cement from Mexico (Guatemala—Cement), Report of the Appellate Body, WT/DS60/AB/R, adopted 25 November 1998, para. 64. The system’s rules and procedures in the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) apply to disputes arising under its “covered agreements”, including the WTO Agreement. The covered agreements have their own “special or additional rules and procedures on dispute settlement” which prevail to the extent they are different from those in the DSU. Unless otherwise agreed, disputes in relation to the applicability of these rules and procedures will be determined by the Chairman of the WTO’s Dispute Settlement Body in consultation with the parties. Procedural uncertainty and conflict may weaken and undermine the system (see for instance, WTO Article 21.5 Panel Report, Australia—Subsidies Provided to Producers and Exporters of Automotive Leather (Australia—Automotive Leather), WT/DS126/RW, adopted 11 February 2000, as to the conflict between recommendations in Article 4.7 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), to withdraw a “prohibited subsidy” without delay, and Article 19.1 of the DSU, to bring an inconsistent measure into conformity). The WTO’s dispute settlement regime will be better served with uniform rules and procedures.

2 This was recently acknowledged by the Consultative Board to the WTO, established in June 2003 by the WTO’s Director-General to prepare a report “on how to institutionally strengthen and equip the WTO to respond effectively to future economic challenges brought about by an increasingly integrated global economy”. See its Report (hereafter Consultative Board Report), pages 49-50; available on the WTO Website, at: www.wto.org/english/tratop_e/disp_e/dispu_status_e.htm; and adoption rates at: www.wto.org/english/tratop_e/dispu_e/dispu_e_stats_e.htm.

3 Complaints can be found on the WTO Website, at: www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm; and adoption rates at: www.wto.org/english/tratop_e/dispu_e/dispu_e_stats_e.htm.


5 DSU, Article 3.2.
While the system may present well statistically, it is not a legal system in the traditional sense, in particular with its *laissez faire* and decentralized approaches to remedies and enforcement and its bias towards market power, casting doubt on its credibility and deterrence value. The system also stands accused of sanctioning noncompliance and being socially and economically regressive. This article critiques the system's current weaknesses and examines whether comprehensive reform is the answer, having regard to the very fabric that defines the WTO, its treatment of developing and least-developed Members and the institutional and international challenges it faces. It is the writer's view that comprehensive reform (even though legally an ideal outcome) is not the answer, as this would be difficult to achieve within a "Member-driven" organization like the WTO and contrary to its objectives. Rather, the system would benefit from sensible and cautious reform to the remedies it provides, by developing credible transparency and access procedures, and addressing system ambiguities and the imbalance and inequalities faced by less powerful Members.

II. THE PREVAILING CIRCUMSTANCES

A. MARKET POWER BIAS

While the WTO advocates trade liberalization via "the substantial reduction of tariffs and other barriers to trade" and the "elimination of discriminatory treatment in international trade relations,"6 this is not readily achievable in that type of an environment, especially given the need to reconcile and advance national interests. Further, not every WTO Member enjoys similar or comparable market status—approximately two thirds of the WTO Membership have developing or least developed status.7 However, the paradox is that market status and dominance is perhaps the most significant variable in its dispute settlement regime. It has been suggested (quite correctly) that the effectiveness of the system's retaliatory remedies depends on the "relative economic importance of the party adopting them"8 In those circumstances, the strong inference is that the system (described as one between unequal players)9 has a bias towards market power, which is unavoidable given the present make-up of the WTO membership.

B. INCOMPLETE CONTRACTS AND EFFICIENT BREACH

The WTO Agreement has been described as a substantially incomplete contract

---

6 WTO Agreement, Preamble.
7 The WTO presently has 149 Members; see the WTO Website, at: [www.wto.org/english/tratop_e/whatis_e/tif_e/org6_e.htm](http://www.wto.org/english/tratop_e/whatis_e/tif_e/org6_e.htm). Statistics for developing and least developed countries are available at: [www.wto.org/english/tratop_e/whatis_e/tif_e/dev1_e.htm](http://www.wto.org/english/tratop_e/whatis_e/tif_e/dev1_e.htm); and at: [www.wto.org/english/tratop_e/whatis_e/tif_e/org7_e.htm](http://www.wto.org/english/tratop_e/whatis_e/tif_e/org7_e.htm).
9 Ibid., at 811.