1. Introduction

The World Trade Organization's (WTO) dispute settlement mechanism (DSM) has generally been highly acknowledged as one of the most effective dispute settlement mechanisms at international level. However, while some consider that the WTO’s DSM leads to a judicial outcome and successfully settles disputes between concerned parties, others think that the WTO’s DSM does not effectively provide a system to settle the dispute and that the result of the WTO’s DSM is more geared to produce a political outcome rather than a judicial outcome.

This paper focuses on exploring the phases of the WTO’s DSM, the advantages and the drawbacks of the WTO’s DSM, and the effectiveness
of the WTO’s DSM by giving examples of both successful and unsuccessful cases brought before the WTO’s DSM.

2. The World Trade Organization Dispute Settlement Mechanism

The heart of the WTO’s dispute settlement mechanism is the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) provisions (Annex 2 of the WTO), which are basically inherited from Articles XXII and XXIII of the General Agreement on Tariffs and Trade (GATT) (Brimeyer, 2001:138). The significance of the DSU is stated in Article 3.2, which reads: ‘the dispute settlement system of the WTO is a central element in providing security and predictability to a multilateral trading system’. The WTO’s DSU is described “as a giant leap forward for the international trading system” (Reynolds, 2007:1), and it has been called the “backbone of the multilateral trading system” (Moore, 2000).

There are five phases provided by the DSU regime in relation to dispute settlement mechanism as follows: (different views on the phases, see Goh, 2002, and Waincymer, 2000).

1. Consultation Phase

Article 4 of the DSU grants the right of all WTO members to enter to the consultation phase. Article 4 (2) requires that the consultation phase be based on the principle of “sympathetic consideration to and afford adequate opportunity” and consultation shall be requested by a member to whom a request is made and the member shall give a response within ten days and enter into consultations within thirty days. Article 4 (7) requires that “if the consultations fail to settle a dispute within 60 days after the date of receipt of the request for consultations, the complaining party may request the establishment of a panel”.

2. Panel Report (Final Panel Report)

Article 6 states that “a panel shall be established at the latest of the Dispute Settlement Body (DSB) meeting following that at which the
request first appears as an item on the DSB's agenda, unless at that meeting the DSB decides by consensus not to establish a panel”.

After considering all arguments from the parties, the Panel should conclude a report and it should forward to the DSB and Article 16 (1) (2) states that “the reports shall not be considered for adoption by the DSB until 20 days after the date they have been circulated to the Members” and “Members having objections to a panel report shall give written reasons to explain their objections for circulation at least 10 days prior to the DSB meeting at which the panel report will be considered”. Article 16 (4) requires that “within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report”.

3. Appellate Body

Parties to a dispute which do not accept the Panel’s final decision can appeal to the WTO Appellate Body (AB). Article 17 (1) maintains that the AB consists of seven persons with three individuals administering the case, and Article 17 (3) states that the AB should comprise “persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally”. They shall be “unaffiliated with any government” and “broadly representative of membership in the WTO”.

Article 17 (13) gives the AB authority to “uphold, modify or reverse the legal findings and conclusions” of the DSB’s final panel report. After finishing its report, Article 17 (14) implies that the AB’s report “shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the AB report within 30 days following its circulation to the Members…”.

4. Surveillance of the Implementation of Recommendations and Rulings

After the date of the adoption of the AB report, Article 21 (3) orders a DSB meeting to be held within 30 days in which “the Member concerned shall inform the DSB of its intentions in respect of
implementation of the recommendations and rulings of the DSB. If it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so…” and a reasonable period of time must not exceed 15 months (Article 21 (3) (c))

If parties to dispute having compliances regarding the implementation of the recommendations and rulings as have been decided by the AB, the compliances should report to the panel. Article 21 (5) affirms that “the panel shall circulate its report within 90 days after the date of referral of the matter to it…”, and Article 21 (6) infers that it is the DSB’s duty to continue to supervise the implementation of the adopted recommendations and rulings. However, if the parties to dispute fail to execute recommendations and rulings, written compliances might be reported to the DSB.

5. Compensation and Suspension of Concessions

Article 22 provides a mechanism when parties to dispute can not comply with the implementation of recommendations and they might have the compensations or suspension of concessions. The nature of the compensation is “voluntary and …shall be consistent with the covered agreements” (Article 22 (1)). Once the parties to dispute cannot perform pursuant to the recommendations, a demand for compensations or suspension of concessions via negotiation starts between Members in the light of DSU procedures. Moreover, Article 22 (2) affirms that when “there is no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time”, a request is delivered to the DSB, demanding the DSB authorizes suspension of “the application to the Member concerned of concessions or other obligations under the covered agreements”.

Article 22 (7) states “the arbitrator…shall not examine the nature of the concessions or other obligations to be suspended but shall determine whether the level of such suspension is equivalent to the level of nullification or impairment. The arbitrator may also determine if the proposed suspension of concessions or other obligations is allowed under the covered agreement.
3. The Advantages and the Drawbacks of the World Trade Organization’s Dispute Settlement Mechanism

It has to be recognized that since the WTO’s DSU was founded in 1996, it has provided a process of certainty by which concerned parties can settle their disputes. Jackson acknowledges that the DSU has been successful in transforming the multilateral trading system and in bringing certainty to the dispute settlement process (Jackson, 2000:208).

The WTO's DSU expands the procedure's legal powers; it offers more specific explanations, it is permanently chartered, and it grants the “exclusive source of procedure” for resolving disputes (Palmer, 2002:464). Therefore, since the dispute settlement mechanism is based on procedural legal powers, it could produce a judicial outcome.

Furthermore, the dispute settlement system produces clear judgments about who is right and who is wrong. The dispute settlement processes under the WTO represents huge progress, since “for the first time, members have a mechanism for receiving clear judgments about right and wrong in trade disputes” (Kimble, 2006:99). In addition, “dispute settlement under the WTO is a more unified and obligatory system” (Kaplan, 1996:154).

A further benefit of the WTO's DSM is that the WTO panels and Appellate Body decisions are binding on the parties and can only be demolished by the unanimous consensus of the member states. Kimble adds that “these binding rulings are given teeth through the WTO's system for retaliation against recalcitrant members” and the WTO's decision is “extremely and uniquely powerful in the international legal context” (Kimble, 2006:100).

The WTO's DSM, on the other hand, also has some drawbacks. Kimble claims that circumscribed behaviors that could contravene the principles under which it was established, is one of the disadvantages. Kimble asserts that the most difficult thing is “the ability to obtain ‘a definitive determination’ from the WTO which encourages parties to a dispute to reach negotiated settlements and that the threat of retaliation facilitates compliance with adverse WTO decisions” (Kimble, 2006:101).
Furthermore, it is important to note that WTO's DSM is a closed model of dispute settlement in which the public is not allowed to participate directly in the dispute settlement processes. In the light of the DSU, “consultations and panel proceedings are confidential, opinions expressed by panelists remain anonymous, and parties are bound to respect the confidentiality of any document so marked” (Mercurio and Lafergia, 2005:5). In this model, non-individuals or third parties that are not the parties in the settlement dispute, are excluded from panel proceedings, and transcripts of these proceedings are not publicly available. However, limited information provided to the parties, such as the conclusion of panel reports and requested non-confidential versions of party submissions, can be open to the public (Mercurio and Lafergia, 2005:5).

Other drawbacks of the WTO arbitration style are that decisions are not enforceable, that there are issues of economic and political inequality between the members, and that there is a lack of remedy reparation. With regard to the issue that decisions are not enforceable, Pauwelyn (1995:338) asserts that “the proliferation of rules and the associated ‘legalization’ of dispute settlement have not been paired with a strong enough enforcement mechanism”. In terms of economic and political inequality between members, Pauwelyn argues that it is unproblematic for mostly developed countries, which have a strong economic and political position, while developing countries are “faced with noncompliance by a disproportionately stronger member, the reactivation of power politics…and make…compliance very hard to achieve” (Pauwelyn, 1995:339). Finally, “the WTO enforcement regime lacks the remedy of reparation, at least in the traditional sense of compensation for damages in the past” (Pauwelyn, 1995:339).

4. The Effectiveness of World Trade Organization’s Dispute Settlement Mechanism

The number, or percentage, of resolved and unresolved cases in the WTO dispute settlement mechanism can be used as an indicator of the effectiveness of the WTO's DSM. The higher the number, or percentage, of resolved cases, the higher the effectiveness of the WTO's DSM.
According to Busch and Reinhardt (in Reynolds, 2007:2), from 1995 to 2000, there were 219 disputes brought before the WTO and of that number, 154 cases were resolved. This means that only 65 cases were left unresolved. Reynolds found that between 1995 and 2004, from 324 disputes brought to the WTO, there were 107 cases (33%) still categorized as pending with no resolution. In the same period, cases settled prior to the establishment of the panel were 43 cases (13.3%), cases withdrawn were 8 cases (2.5%), panel established were 166 cases (51.2%), cases settled before panel report circulated were 37 cases (11.4%), and panel report adopted were 129 cases (39.8%) (Reynolds, 2007:10, 22).

Reynolds also found that, of the unresolved cases, there were five cases (4.7%) brought to alternative venues, including the United States (US) Court of International Trade, the North American Free Trade Agreement (NAFTA) dispute settlement system, and the WTO’s Customs Valuation Committee. Twenty nine cases (27.1%) have been, or are, under consideration in other DSB cases. For example, “in 2004 Thailand filed a case against the US over a specific aspect of the US antidumping law commonly known as “zeroing.” However, the “same issue had already gone before a dispute settlement body due to a 2003 case initiated by the European Union, and the US has announced that it intends to comply with the DSB Appellate Body Ruling” (Reynolds, 2007: 9-10, 22). Forty-six cases (43.0%) were partially resolved or had expired, and twenty-seven cases (25.0%) had no known outcome (Reynolds, 2007:22).

From the aforementioned data, it can be stated that between 1995 and 2004, the number (percentage) of cases solved by WTO’s DSM were higher than those which failed. In other words, the WTO’s DSM can be considered effective in solving cases brought before it by concerned parties to the WTO.

5. International Trade Dispute Settlement Between Members of the WTO: Some Examples.

While many cases have been successfully resolved under the WTO’s DSM regime, there are many cases which have not been resolved. For
the purposes of this paper, only one example of both a successful and an unsuccessful case, will be elaborated upon.

1. The Australian Salmon Case – an example of a successful case

The Australian Salmon Case which involved Canada (Complainant) and Australia (Respondent), is an example of a dispute which was settled through all the legal phases, provided by the WTO’s DSM. It started from the consultation, the establishment of the Panel and a Panel report, the AB, surveillance of the implementation of recommendations and rulings, and compensation and suspension of concessions. All the processes in this case indicate that the DSM is legal power based, and therefore, by nature, it leads to a judicial outcome. The result of the dispute also shows that the concerned parties can resolve their problem through the WTO’s DSM.

The case began when Canada requested consultations with Australia in respect of Australia’s prohibition of imports of salmon from Canada based on a quarantine regulation. The Panel upheld that Australia had acted inconsistently with Articles 5.1, 5.5 and 5.6 and, by implication, Articles 2.2 and 2.3 of Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) (Report of the Appellate Body, 1998:3). Later, even when the AB reversed the Panel’s finding, the AB still found Australia’s import prohibition violated Article 5.1 (and, by implication, Article 2.2) because it was not based on a "risk assessment" requirement under Article 5.1. (WTO Dispute Settlement: One-Page Case Summaries, 2006:3).

Furthermore, the AB upheld that the import prohibition violated Article 5.5 (and, by implication Article 2.3) since "arbitrary or unjustifiable" levels of protection were applied to several different, yet comparable, situations so as to result in "discrimination or a disguised restriction" (that is, more strict restriction) on imports of salmon, compared to imports of other fish and fish products such as herring and finfish (WTO Dispute Settlement: One-Page Case Summaries, 2006:3).

The AB finally reversed the Panel’s finding that Australia had acted inconsistently with Article 5.6 of the SPS Agreement but was unable to come to a conclusion whether or not Australia’s measure was consistent
with Article 5.6 due to insufficient factual findings by the Panel (WTO Dispute Settlement: One-Page Case Summaries, 2006:3).

Canada then made a request, pursuant to DSU Article 21.5, for determination by the original Panel of whether the measures taken by Australia in implementing the recommendations of the DSB, were WTO consistent. The Panel upheld that Australia failed to bring its measure into conformity with the SPS Agreement in the sense referred to in Article 22.6 of the DSU. Australia also contravened Articles 5.1 and 2.2 of the SPS Agreement and considered the same requirement to be in violation of Article 5.6 of the SPS Agreement. The Panel found that Australia had violated Articles 5.1 and 2.2 of the SPS Agreement as well (Summary Dispute Settlement: Dispute DS 18: 2008).

At the DSB meeting on 25 November 1998, Australia informed the DSB that it was committed to implementing the recommendations of the DSB and was looking forward to discussing with the complainants the question of implementation. The Arbitrator decided that the reasonable period of time for implementation was 8 months, that is on 6 July 1999 (Summary Dispute Settlement: Dispute DS 18:2008). Australia finally fully implemented the DSB recommendations and rulings.

2. The Beef Hormone Case – example of an unsuccessful case

The US and Canada, on 26 January 1996 and 28 June 1996 respectively, requested consultations with the European Communities (EC) on a similar issue. Both complainants argued that, measures taken by the EC under the Council Directive Prohibiting the Use in Livestock Farming of Certain Substances Having a Hormonal Action, restrict or prohibit imports of meat and meat products from the US and Canada, and are apparently inconsistent with GATT Articles III or XI, the SPS Agreement Articles 2, 3 and 5, TBT Agreement Article 2, and the Agreement on Agriculture Article 4 (Summary of Dispute Settlement: Dispute DS28 and DS48, 2008).

The case was then appealed by the EC and the AB upheld the panel’s finding that the EC import prohibition was inconsistent with Articles 3.3 and 5.1 of the SPS Agreement, but reversed the Panel’s finding that the
EC import prohibition was inconsistent with Articles 3.1 and 5.5 of the SPS Agreement (Summary of Dispute Settlement: Dispute DS48, 2008).

By the end of the reasonable time period, 13 May 1999, when the EC had not complied with the panel’s recommendations and ruling, the EC then filed another case against the US and Canada then pursuant to Article 22.2 of the DSU, requesting authorization from the DSB for the suspension of concessions to the EC to the amount of US$202 million and CDN$75 million. However, the arbitrators determined the level of nullification suffered by the US and Canada to be equal to US$116.8 million, and CDN$11.3 million, respectively (Summary of Dispute Settlement: Dispute DS48, 2008).

Furthermore, at the DSB meeting on 7 November 2003, the EC informed that “the EU has implemented its new Directive (2003/74/EC) regarding the prohibition on the use in stock farming of certain hormones”. For that reason the UE argued that “there was no legal basis for the continued imposition of retaliatory measures by Canada and the US…and…the immediate lifting of the sanctions imposed by Canada and the US in accordance with the provisions of Article 22.8 of the DSU”. Regarding this issue, recently, the Panel, on 31 March 2008, in its final report, suspended the resolution or there was no clear resolution (see Report of the Panel, WT/DS320/R, 2008).

Surprisingly, all the concerned parties claimed themselves as the winner to the dispute. This is the longest and the most complex case settled by the WTO since its establishment (See, Bridges Weekly Trade News Digest, 2008). Korves (2008:para 4) criticized the WTO’s DSM by stating that “the easiest mark against the WTO dispute settlement process is that it should not take 12 years with no final resolution”.

It is this author’s opinion that, in this case, since the concerned parties are economically and politically independent and powerful, they can easily avoid complying with the related the GATT provisions, the panel recommendations and rulings, and the WTO itself is not able to do more to prevent this situation. It is clear that the WTO’s DSM prolongs the dispute between concerned parties. It would seem that this case represents a huge failure of the WTO’s DSM. Even though the dispute processes passed all the procedures or phases provided by the WTO’s
DSM, on one hand, the panel itself was not able to solve the dispute because of the time limit provided, the complexity of the case, and the differing interpretations to related provisions of the WTO agreements. On the other hand, the concerned parties themselves do not accept or implement the recommendations and rulings issued by the Panel.

6. Conclusion

It is evident that the WTO’s DSM is a legal power-based regime which gives the same opportunities to the members to settle their trade issues. The WTO’s DSM is still recognized as an effective tool in settling disputes between members. The WTO DSM is a highly systematic and organized elaboration of DSU provisions compared to other international enforcement mechanisms. It is evident that, since the WTO’s DSM is a legal power-based regime, then the result of the panel is a judicial outcome. The WTO’s DSM can solve the disputes and the panel recommendations and rulings must be implemented by the concerned parties. The Australian Salmon Case represents this situation.

It is also evident that the WTO’s DSM decisions are not always enforceable, there is still economic and political inequality between members, and there is still a lack of remedy reparation. It is important to note that not every case brought before the WTO’s DSM is settled effectively. Some factors that might contribute to this situation are the limitation of reasonable time to comply with the Panel’s recommendations and rulings, the complexity of the case, and different interpretations of related provisions of WTO agreements. More importantly, as can be seen from the Beef Hormone Case between the US, Canada and the EU, the WTO’s DSM is powerless since the concerned parties are economically and politically powerful.

References


WTO, 2008. Summary Dispute Settlement: Dispute DS 18, Australia — Measures Affecting Importation of Salmon http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds18_e.htm