CONTENTS

Foreword by Minister for Trade, Warren Truss v

1. TEN YEARS – REFLECTIONS ON THE WTO DISPUTE SETTLEMENT BODY vii
   Don Kenyon 1
   Reflections on the Establishment of the Dispute Settlement Body
   and the Appellate Body

   An Interview with David Spencer; 9
   Former Australian Chair of the WTO Dispute Settlement Body’s DSU
   Review Session

   Mark Jennings 13
   The WTO Appellate Body: Have the Organization’s Members got
   what they Bargained for?

2. IN PRACTICE – SOME DFAT PERSPECTIVES 27
   Amanda Gorely 29
   Managing WTO Disputes

   Joan Hird and Margaret Durnan 35
   The Role of Domestic Stakeholders

3. IN THEORY – IDEAS, ANALYSIS, CRITICAL PERSPECTIVES 43
   Andrew Mitchell
   Fair Crack of the Whip: Examining Procedural Fairness in WTO Disputes
   Using an Australian Administrative Law Framework 45

   Christopher Arup 71
   Perspectives on WTO Dispute Settlement: Negotiated Solutions

   Michelle Sanson 89
   The Effectiveness of the WTO Disputes Settlement System

   Bryan Mercurio 105
   The WTO Dispute Settlement Understanding: How a Rules Based
   System Benefits Australia

   Thomas Faunce, Warwick Neville and Anton Wasson 123
   Non Violation Nullification of Benefit Claims: Opportunities and
   Dilemmas in a Rule-Based WTO Dispute Settlement System
4. **IN ACTION – BUSINESS AND INDUSTRY**  

Scott Gallacher  
The WTO’s Agricultural Export Subsidy Disciplines  
143

Brendan Pearson  
Dispute Settlement in the WTO After Ten Years: A Business Perspective  
155

An Interview with Peter Corish, Former President,  
National Farmers’ Federation  
165

Robert Pettit, Dairy Australia  
Australian Participation in WTO Dispute Settlement: An Industry Perspective  
167

Peter Barnard and Andrew McCallum  
Australian Lamb Exports to the United States: A Case Study  
175
MINISTER FOR TRADE’S FOREWORD

The World Trade Organization (WTO) recently reached an important milestone with its tenth anniversary. This also marked the tenth year of the WTO’s dispute settlement system. Referred to as the WTO’s ‘jewel in the crown’ and viewed as one of the most important outcomes of the Uruguay Round, the WTO dispute settlement system has developed into the key international legal regime on trade with a substantial body of jurisprudence.

A number of Governments and institutions have used the tenth anniversary of the WTO dispute settlement system to reflect on its contribution to the international trading system and on its current and future challenges. This publication marks the Australian Government’s contribution to this international effort. It brings together some Australian perspectives on the WTO dispute settlement system, its performance and what benefits it has brought Australia.

The WTO Agreements establish an agreed framework of rules for the conduct of international trade which are intended to benefit all Members. However, these rules only have substance if there is confidence they will be respected. The WTO’s dispute settlement system provides a key means to deliver such confidence.

A binding and enforceable WTO dispute settlement system was one of the major advances over the GATT panel system for addressing trade disputes. It binds all WTO Members regardless of their size. Equally, no Member can decide unilaterally that another Member has breached the rules. It must use the system to determine this. All Members have a means to seek redress against unilateral and arbitrary behaviour by other Members.

The WTO dispute settlement system provides a neutral ‘umpire’ to decide disputes. As in any dispute, one side (or sometimes both) may be unhappy with the umpire’s decisions. No country likes an adverse finding. Balanced against this, disputes initiated by Australia have delivered real benefits in various sectors including lamb, beef and sugar. It is important that all countries, including developing countries, look to use the WTO dispute settlement in the way that Australia has done where they believe the WTO rules are not being respected. It seems that developing countries are doing just that.

I take the opportunity to mention one umpire who made an outstanding contribution to the system – the Australian Justice John Lockhart. John had commenced a second term on the WTO Appellate Body shortly before he passed away in January 2006. He brought deep judicial experience and legal rigour to the Appellate Body and was held in high esteem.
The articles in this publication demonstrate that WTO dispute settlement is a living process that can deliver certainty and real trade outcomes. It may not be perfect, but it provides an invaluable forum for dialogue where there is disagreement and for resolution where there is impasse. It is in all Members’ interests to ensure that the system remains strong and credible as we strive towards a more liberalised trading regime.

WARREN TRUSS
MINISTER FOR TRADE
CANBERRA, NOVEMBER 2006.
PART ONE

TEN YEARS – REFLECTIONS ON THE WTO DISPUTE SETTLEMENT BODY
The Dispute Settlement Body in 1995

Following the focus on the negotiating process in the final stages of the Uruguay Round up to the end of 1993 and the interregnum period during 1994, there was a burst of activity with the Dispute Settlement Body (DSB) beginning its work in 1995. The first request for consultations, by Singapore against Malaysia over import prohibitions on polyethylene and polypropylene, came on 13 January. The second, that of Venezuela (later joined by Brazil) against the United States on re-formulated and conventional gasoline standards, came on 2 February.

The Dispute Settlement Understanding (DSU) had also left a number of operational issues to be settled in the first year of the DSB. These had to be dealt with in parallel with processing disputes as they came forward. The most important of these outstanding operational questions was the establishment of the Appellate Body and the selection of its initial seven members. Agreement also needed to be reached on an initial indicative list of Governmental and non-Governmental panellists. Considerable work was carried out on developing a “code of conduct” for panelists and Appellate Body Members. In addition, a certain amount of running interpretations of, and clarification to, DSU provisions was required as complaints and requests for the establishment of panels were handled in the DSB. During 1995, most of this interpretive activity was focused on DSU Articles 4 to 12, dealing with the consultations process and the establishment of panels. Given the timeframes in the DSU, the first panel report, that on re-formulated gasoline, did not come forward for consideration by the DSB until February 1996.

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1 Donald Kenyon was a senior officer at the Department of Foreign Affairs and Trade (DFAT) until 2001. From 1989, he was a senior member of DFAT’s negotiating team for the Uruguay Round of GATT Trade Negotiations. He served as Australia’s Ambassador to the GATT/WTO in Geneva from 1993 to 1997, and was First Chairman of the WTO Dispute Settlement Body from 1995. Mr Kenyon also served as Australia’s Ambassador to the European Union, Belgium and Luxembourg from 1997 to 2000, and was awarded the Order of Australia (AM) in 2002. He is currently a Distinguished Visiting Fellow at the National Europe Centre, Australian National University, Canberra. Mr Kenyon is co-author (with David Lee) of ‘The Struggle for Trade Liberalisation in Agriculture: Australia and the Cairns Group in the Uruguay Round’ (September 2006) as part of DFAT’s monograph Series Australia in the World: The Foreign Affairs and Trade Files.
It was a busy, and from my own perspective, as the first chair of the DSB, a very exciting year. A great deal of effort was expended on ensuring that all the necessary structures and working procedures were in place, to enable the new system to be fully operational within the timeframes laid down in the DSU. We all felt we were breaking important new ground and that making a success of the DSU, would go a long way towards making a longer term success of the WTO. Over the course of 1995, a total of twenty-five requests for consultations were brought into the DSB, on seventeen separate issues. As implied by these figures, a number of the individual issues coming into the DSB were multiple requests for consultations on the one issue.

There are a number of general observations I believe are worth making about the nature of the disputes that came into the DSB in its first year and how they were handled. One feature that struck me at the time was the active part played by developing countries right from the beginning. Some fifty per cent of the complaints that were brought into the DSB in 1995, were brought by developing countries. Most of them, it is true, were complaints against either the United States or the European Union, and some were multiple complaints, such as Chile and Peru joining an initial Canadian complaint against the trade description of scallops in the European Union. Some however, were cases involving only developing countries, for example, the Singapore/Malaysia case mentioned above and a case brought by the Philippines against Brazil on desiccated coconut countervailing measures later in the year. This, I believe, was a good sign of the confidence developing country WTO Members had from the outset in the new dispute settlement system with its clear and tight timeframes, automatic adoption of panel reports and objective appeals system.

Another interesting development was the cases being settled at the bilateral consultations phase. The complaint by Singapore against Malaysia, a complaint by the United States against Korea under the SPS Agreement on the shelf-life of products, and a complaint by Japan against United States import duties on automobiles under Sections 301 and 304 of the United States Trade Act of 1974, were all settled prior to the establishment of panels. At least in the first two cases, I like to think that these were instances of the new DSU fulfilling the intent of the negotiators. The automaticity of the new system and its tougher sanctions provide an inducement for defendants with weak cases to settle in the knowledge that they are likely to be forced, in any case, to bring the challenged measure(s) into conformity with the WTO. I believe this is what happened in both the Singapore/Malaysia case and the United States/Korea case.

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2 Agreement on the Application of Sanitary and Phytosanitary Measures.
The third case was rather more complex. The United States was threatening to impose Section 301 tariffs on imports of Japanese luxury cars and was refusing to allow import duties to be liquidated on imported cars from Japan held in bond in the United States, as leverage on Japan to liberalise its internal distribution system for imported automobiles and automobile parts. The United States claimed that existing Japanese distribution arrangements were anti-competitive and were discriminating against imports. Japan brought the issue into the DSB, arguing in particular that the United States was in breach of Article 23 of the DSU, which obliged WTO Members to pursue multilateral remedies rather than unilateral trade sanctions. In doing so, Japan clearly aimed to put increased negotiating pressure on the United States. When the issue came to the DSB on 31 May 1995, the United States countered by requesting its own WTO consultations with Japan on its anti-competitive practices in the automotive sector. Further bilateral consultations took place and in July Japan and the United States advised the DSB that they had settled the issue.

DSU rules were clearly important in this case. The United States was on weak ground on the Article 23 point. On the other hand, the United States knew that fighting a WTO case on competition rules may not give them the satisfaction they wanted. It was a smart move on the part of Japan to bring the issue into the DSB, and no doubt strengthened its negotiating leverage with the United States.

A final aspect of the work of the DSB in its initial year that I think worth commenting on is the pragmatism with which the WTO Members approached the task of interpreting and elaborating DSU provisions as we went along. Article 6 provides for the automatic establishment of a panel at the latest, at the second time it appears on the DSB agenda. During this period, the convention of agreeing to the establishment of a panel at its first appearance on the agenda was established with the Re-formulated Gasoline case. The only case I recall during 1995 when this practice was departed from was with the establishment of a panel requested by Canada on European Union import duties on grains. Also, Article 9 of the DSU provides that where there is a request for more than one panel on a particular issue, a single panel ‘may’ be established to examine all the complaints. The single panel route was established as the norm on the first occasion it arose (the Re-formulated Gasoline case) and continued from that time. At the time, there was a real concern of ‘overload’ and that multiple panels on the same complaint would stretch the limited resources of the WTO beyond breaking point. The single panel route was therefore readily dictated by pragmatic good sense. The same co-operative pragmatism was evident in resolving a number of technical issues that came up throughout the year relating to the interpretation of time periods for exercising rights under the DSU, arrangements for the circulation of documents, and arrangements for
the presence of observers at DSB meetings. This co-operative spirit greatly facilitated the work of the Chairman and made a heavy workload much easier to handle.

Establishment of the Appellate Body

The most important, and by far the most difficult, operational task for the DSB in 1995 was the establishment of the Appellate Body. The task was somewhat complicated by the fact that the staggered terms envisaged for Appellate Body members in the DSU meant that the initial appointment process would be the only occasion on which all seven members would be appointed at the same time. With a tight nine-month timeframe in the DSU, from the initial consultation phase to the appeals phase, there was also strong pressure to have the Appellate Body up and running well before the end of 1995. Indeed, the clock started ticking very early in the new year with the Singapore/Malaysia case coming forward in January.

The DSU (Article 17) provides that the Appellate Body “shall comprise persons of recognised authority with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally” and that its membership shall “be broadly representative of membership in the WTO”. The WTO Preparatory Committee in its subsequent guidance note on Appellate Body appointments and procedures had specified that the task of the Appellate Body would be to hear appeals “on issues of law covered in panel report(s) and legal interpretations developed by panel(s)”. The intent here was to limit the Appellate Body to questions of law and prevent obligations being increased or rights diminished in the covered agreements through the appeals process. The same guidance note had recognised that “the success of the WTO would depend greatly on the proper composition of the Appellate Body, and (that) persons of the highest calibre should serve on it”.

Helpful as all this guidance was for the selection process, it is also clear from the above that there would be many issues of principle to be resolved and many pragmatic interests to be balanced. An appeals system in the GATT/WTO disputes resolution system would be breaking important new ground. In general terms, most WTO Members knew why they wanted an appeals process in the new, more prescriptive disputes settlement system, and also in general terms what they wanted it to do. When it came, however, to the specifics of what each Member would consider to be the best seven persons for the task, there was not the same degree of consensus. What degree of legal expertise was appropriate? How much trade policy expertise should

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3 C/IPL/13 of 8 December 1994.
there be?  What balance should there be between judicial expertise and trade policy experience? And what should the geographic distribution of the seven Appellate Body Members be?

Fortunately, for the first Chairman of the DSB, the WTO Preparatory Committee had decided wisely to make the DSB chair, together with the Director-General of the WTO and the Chairs of the General, Services, Goods and TRIPS Councils jointly responsible for recommending the seven appointees to the DSB. The first stages of the selection process went smoothly. Applications were open until late April, by which time thirty-two candidates from twenty-two countries had applied. The requirement that applications be submitted on a personal basis and not as official government candidates (in order to facilitate selection of those with the very best qualifications) was respected. The quality of the applications was also very high, reflecting a high level of interest in the new WTO disputes settlement system from well qualified jurists, academics and senior trade policy specialists from a wide range of developed and developing countries.

Encouraged by this good beginning, the selection committee ‘six’ embarked on a program of consultations with individual WTO Members in Geneva during May to obtain views on which seven of the applicants would bring the best balance of qualifications to the Appellate Body. This was followed during late May/early June by the ‘six’ interviewing all the applicants with a view to making a recommendation to the DSB on a slate of appointments by the end of June.

The consultation process and interviews with the individual applicants went well, so that - reporting to the DSB on 31 May - I could say that the ‘six’ had held consultations with fifty-four delegations (or groups of delegations) in Geneva; that there was a wide level of consensus for a balance of judicial and trade policy expertise on the Appellate Body; that all appointees, whether persons having principally legal or trade policy expertise, should have demonstrated expertise in the law, international trade and WTO agreements; that appointees should be able to write their own legal opinions, and that, for appointees who were primarily legal practitioners, a combination of academic, public law and arbitration experience would be the most useful.

I was also able to report that many delegations believed that the strength of the Appellate Body would lie in its diversity of representation reflecting: (1) regional, developed and developing country balance; (2) adequate representation from regions and countries who were active participants in the trading system, including smaller as well as larger countries and (3) different legal systems, on grounds that the credibility and authority of the Appellate Body had to be acceptable to all.

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The WTO membership was therefore clearly in favour of a balance of legal and policy expertise on the Appellate Body. It was also in favour of a broad regional spread covering the interests of developed and developing countries, small as well as large participants and different legal traditions. All these elements were considered important for the credibility and objectivity of the appeals system and, through it, the DSU itself. While the ‘six’ now considered they were in a good position to begin consultations on a slate of names to bring to the DSB for approval by end June, the United States and the European Union, at around the same time, began pressing strongly to have two members each on the Appellate Body reserved for their nationals. This brought the selection process to a shuddering halt.

Of the thirty-two candidates, two were from the United States and seven were from European Union countries. A candidate from Switzerland constituted an eighth European name. They were all high quality candidates. However, it was clear from the consultations process carried out by the ‘six’ that it would never be acceptable to the WTO membership as a whole, to give four out of the seven Appellate Body positions to candidates from the United States and European Union countries. The United States and the European Union were already dominant in world trade. They were dominant either as plaintiff or defendant in dispute settlement cases.

While it had always been tacitly accepted by the broader WTO membership that both the United States and European Union would need to be represented on the Appellate Body, it was considered that United States and European Union domination of the membership would undermine the credibility of the dispute settlement system for the other developed and developing countries of the WTO. The strength of opposition to United States and European Union domination of Appellate Body membership was reflected in informal consultations on the issue during June/July and at the DSB meeting of 19 July 1995. At the DSB meeting, a long list of developed and developing countries Malaysia (for ASEAN), Argentina, Australia, Colombia (for the Latin and Caribbean countries), Hong Kong, India, Korea, Nigeria (for the African countries), Chile, Canada, Switzerland, Uruguay, Mexico, New Zealand and Egypt – all took the floor to express their opposition.

The task of the ‘six’ clearly was to convince both the United States and the European Union to scale back their ambitions. This, however, was going to take time. Efforts to resolve the problem did not resume until early September (after the summer break). In the event, the United States was more readily persuaded than the European Union. During October, the United States accepted a recommendation from the ‘six’ comprising Bacchus (United States), Beeby (New Zealand), Ehlermann (Germany), El-Naggar (Egypt), Feliciano
(Philippines), Lacarte (Uruguay) and Matsushita (Japan). The recommendation was on the basis of the high level of legal and/or policy expertise of each individual on the slate, and on the understandings that objective procedures for the rotation of Appellate Body members in the hearing of appeals would be established at an early date, and that the Appellate Body would operate in a collegiate way (so that all Appellate Body members would be consulted on the outcome of appeals).

This package was also broadly acceptable to other WTO Members. Some expressed disappointment that their ‘nationals’ were not selected on this occasion, but recognised that there would be opportunities in the future, given that there were no ‘flags’ on any of these positions. Until the very last moment, however, the European Union continued to press for changes, in particular for the substitution of one of the developing country names on the list for a second ‘European’ name. To have conceded this, however, would have set the United States back on seeking a new ‘balance’ with European membership of the Appellate Body, with a consequent unwinding of the total package. Considerable efforts were made to convince the European Union that the ‘collegiate’ operation of the Appellate Body would fully protect European Union interests. This, I believe, helped the European Union feel more comfortable with an outcome acceptable to the rest of the WTO, but unfortunately did not seem to be quite enough for the European Union to accept the outcome as readily as others. Part of the problem for the European Union, I am sure, stemmed from the fact that six of the twelve member states of the European Union at that time had nationals on the list (including all the major countries). It was probably unmanageable for the Commission to control the disappointments of those whose nationals were not selected.

The above appointments were agreed to by the DSB on 29 November 1995, and the Appellate Body formally constituted in mid-December, fortunately well before there was any requirement for the appeals process. At the DSB meeting, the European Union expressed itself “not satisfied” with the outcome and foreshadowed proposals to be brought forward for the WTO Ministerial Meeting in Singapore in December 1996 aimed at ensuring that “the composition of the Appellate Body was more balanced and took into account the role of the Communities in the multilateral trading system”. The European Union, however, did not oppose adoption of the recommended slate, nor in the event did it bring forward proposals on amended Appellate Body composition at the Singapore Ministerial.

Overall, I believe the outcome was a good one for the WTO. Getting the Appellate Body established in plenty of time for it to handle its first appeal was essential to a smooth launching of the new WTO dispute settlement system.
It was also essential to ensure that the Appellate Body had an initial membership that was not only of the highest quality, with the balance of legal and trade policy expertise that the broader WTO membership required, but that it was sufficiently representative of the geographic spread of the WTO to ensure that all WTO Members, both developed and developing, could have confidence in its objectivity. I believe that the ‘six’ succeeded in this task and that the subsequent experience with the dispute settlement and appeals system has borne this out. As indicated above, the task was not an easy one. I think that when we started, the ‘six’ thought that the task of getting the right balance between the legal and policy expertise of the initial Appellate Body membership would be the most difficult.

In the event, it was the geographic spread issue which was the most troublesome and which could have seriously de-railed the whole process. To have surrendered to United States and European Union pressure to dominate the initial membership of the Appellate Body would have set a precedent difficult to depart from in the future and would have severely compromised the credibility of the new dispute settlement system from the beginning. It was important to win this battle at the outset. In all probability, it will not need to be fought again.

**Concluding Comment**

In summary, 1995 was a year of solid achievement for the new WTO dispute settlement process. Despite a few near heart-stopping moments, the Appellate Body was established with a high quality slate of appointees, in plenty of time for it to establish its working procedures and appoint its own staff before having to deal with its first appeal. The DSB also was able to deal with all the other operational and interpretive issues that came up in this first year in a timely, pragmatic and co-operative spirit. In addition, a number of positive and promising trends began to emerge in the dispute settlement work of the DSB. The settling of some disputes prior to the panel stage and the active use of the system being made by developing countries were two very good examples of this. I believe that the achievements of the DSB in its first year put the new dispute settlement system on a sound footing to move forward into the future.
Don Kenyon’s paper focuses on the first year of the Dispute Settlement Understanding (DSU) and the challenges in getting the system up and running. Ten years on, what do you consider to be the major successes and ‘failures’ of the system?

In my view, the major success of the system is the introduction of legally binding rules and strict timeframes so that all Members, regardless of their size and strength, can enforce their rights under the WTO agreements. I don’t consider that any aspect of the system could be described as a ‘failure’ but clearly a major issue in dispute resolution at the WTO is compliance – lack of timely compliance by the two biggest users of the system, the European Communities and the United States. But even here there are indications that the ‘teeth’ in the system of authorised retaliation for non-compliance can work and have encouraged the removal of measures found to be non-compliant.

I think all Members agree that the DSU has proven to be a far better way to resolve disputes than the former GATT system.

In the DSU Review context, some Members, notably the United States, have expressed concerns about WTO adjudicative bodies ‘over-reaching’ and made proposals focussing on parties ‘regaining control’ of the system. Do you think the system has taken on a life beyond that which was envisaged when it was created? If so, why has this occurred?

There is always the possibility that if you allow adjudicative bodies too much of a margin in interpretation they will have a tendency to ‘over-reach’ and go further in their conclusions than may strictly be in their mandate. But the line between interpreting and adding something through interpretation of existing obligations is very blurred. I don’t think that the system has gone beyond what it was intended to do, which was provide a level playing field for Members through legally binding and enforceable rules, but I do think we should be careful not to encourage any tendency on behalf of Panels or the Appellate Body to go beyond their role of clarifying the provisions of the covered agreements.
What do you think has been the effect of putting the DSU Review negotiations outside of the Single Undertaking? Is this not just a legal nicety?

We are dealing with very different types of negotiations here. The DSU Review is concerned with improvements to a system that is essentially serving Members very well, rather than a negotiation about reducing trade barriers and opening up markets. It is therefore fitting that the DSU Review be outside of and not dependent on the Round. That said, I expect Members will engage more in this negotiation when there is some progress in other negotiating areas.

What is your view of the way developing country concerns have been addressed over the time of the DSU review negotiations? Have developing countries been well organised and engaged and has this changed over the course of the negotiations?

At various stages during the negotiations developing countries have been organised and indeed quite active. The key challenge with developing country concerns and this negotiation, like others, is finding a balance between recognising their special needs and adapting their obligations accordingly, while also keeping the rules as fair to all Members as possible. We often talk in the DSU review about avoiding creating a ‘two-tier system’ which would create a split between developed and developing country Members – that would undermine the fundamental premise of the DSU and indeed the wider goals of the multilateral trading system.

Over the course of the negotiations a very large number of proposals have been made, affecting almost every article of the DSU. In your view, is it better to wait until agreement is reached on a wholly-revised document, or would meaningful progress be possible if a first ‘stage’ of the review were limited to a small number of key provisions? If so, which provisions?

It seems that the scope of issues that Members are focussing on has narrowed somewhat in the last couple of years and there are between five and ten issues on which Members are working. This is much more manageable than trying to get consensus on changes to almost every article of the DSU. I don’t think a two-stage negotiation is a realistic prospect, as too much effort would need to be invested in determining which issues went into each stage. It really needs to be a package outcome. In terms of issues likely to be in that package, the sequencing issue is one where it is clear there is an ambiguity that needs to be fixed. The enhancement of third party rights, which would bring benefits to developing countries in particular in terms of their access to the system, is another that I would consider a key provision on which consensus is possible.
Over the years, and most recently in the second round of the *Hormones* disputes\(^1\) we have seen disputes focussed on questions of interpretation of the DSU that are squarely on the agenda of DSU review. If negotiations continue without a clear deadline, can you see the disputes process being used by Members in this manner where there is ambiguity or lacuna in the DSU?

Members may wish to try that avenue for clarification of some of the issues that are being dealt with in the DSU review, and it will be interesting to see how a Panel and possibly the Appellate Body address these issues. Any recommendations and rulings however in a strict legal sense only apply between the parties to the dispute (although clearly they also have value as jurisprudence for other Members due to the role the dispute settlement system fills in providing security and predictability to Members in the operation of the WTO). We should keep in mind though that the DSU exists to resolve disputes between parties and can only clarify – not add to or diminish from – rights and obligations under the WTO Agreements. So it is not possible for Panels and the Appellate Body to resolve true lacunae in the system. Only Members are entitled to make authoritative interpretations. In light of this, it is far preferable that Members use the DSU review negotiation to address these issues.

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\(^1\) *EC – Continued Suspension of Obligations in the EC – Hormones Dispute WT/DS320 (US)* and WT/DS321 (Canada).
“The WTO Agreement is a treaty – the international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own national interests, the Members of the WTO have made a bargain. In exchange for the benefits they expect to derive as Members of the WTO, they have agreed to exercise their sovereignty according to the commitments they have made in the WTO Agreement.”

Appellate Body Report, Japan – Taxes on Alcoholic Beverages

Introduction

The WTO was established by the Marrakesh Agreement (WTO Agreement) to provide “the common institutional framework for the conduct of trade relations among its Members”. This step brought to an end several decades of service by the General Agreement on Tariffs and Trade (GATT) as a “temporary measure”, following the failure to establish the International Trade Organization (ITO). It also represented “perhaps the most important development in international economic law since the Bretton Woods Agreement”.

The WTO Agreement represents a ‘single undertaking’, reflecting the intention of the negotiators “to put an end to the fragmentation that had characterised the previous system”. Article II.2 of the WTO Agreement founds the single undertaking, providing that the agreements and associated legal instruments

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3 Article II.1 of the WTO Agreement.

4 Jackson and Sykes, Implementing the Uruguay Round (1997), 3.

5 Ibid, 1.

in Annexes 1, 2 and 3 to the Agreement are “integral parts” of the Agreement and “binding on all Members”. The single undertaking can be enforced through an “integrated dispute settlement system”\(^7\) established by the Understanding on Rules and Procedures Governing the Settlement of Disputes (the Dispute Settlement Understanding, or DSU).

The DSU represents a dramatic departure from the previous GATT dispute settlement process. Of particular interest for this essay is the provision made in the DSU for a standing Appellate Body.

The role and work of the Appellate Body has been subject to close scrutiny by many politicians, academics, practitioners and non-governmental organisations. While there has been a diversity of views expressed, including a significant level of support, there has been strong criticism from some quarters with claims that the Appellate Body has exceeded its remit and engaged in “judicial activism”. As noted by Steinberg, judicial activism “is a term subject to alternative definitions and normative assessments”.\(^8\) In relation to the Appellate Body, Steinberg opines that the charges of activism often relate to “Appellate Body holdings that domestic measures contravene WTO obligations, or the Appellate Body’s fidelity to some posited, deduced, or constructed intent of those who negotiated a substantive provision of a WTO agreement”.\(^9\)

This essay does not provide a comprehensive treatment of the debate on whether the Appellate Body has engaged in judicial activism. Instead, it will seek to make a modest contribution to the debate by examining the bargain struck in the DSU as it relates to the Appellate Body and considering how the Appellate Body has exercised the functions and authority given to it in the DSU.

To begin with, the essay will briefly review the GATT dispute settlement process and the Uruguay Round negotiations leading to the DSU, providing the background to the establishment of the Appellate Body. The essay will then examine key elements of the text of the DSU relating to the Appellate Body. It will detail the functions and authority accorded to the Appellate Body and the interpretative tools at its disposal. The essay will conclude by considering how the Appellate Body has sought to discharge its functions with reference to examples of its jurisprudence on the relationship between agreements which form part of the single undertaking. This jurisprudence has been chosen because the single undertaking lies at the heart of the WTO legal regime. As such, it provides an opportunity to consider the Appellate Body’s performance on an issue of central importance.

\(^7\) Ibid.
\(^9\) Ibid, 248.
The GATT Dispute Settlement Process and the Uruguay Round Negotiations

Working to the blueprint laid out in the 1986 Punta del Este Declaration, negotiators laboured long and hard during the Uruguay Round on a complex array of issues. The Declaration outlined the general principles governing the negotiations, including that “[t]he launching, the conduct and the implementation of the outcome of the negotiations” were to “be treated as parts of a single undertaking”. On dispute settlement, the Declaration broadly stated that:

In order to ensure prompt and effective resolution of disputes to the benefit of all contracting parties, negotiations shall aim to improve and strengthen the rules and the procedures of the dispute settlement process, while recognizing (sic.) the contribution that would be made by more effective and enforceable GATT rules and disciplines. Negotiations shall include the development of adequate arrangements for overseeing and monitoring of the procedures that would facilitate compliance with adopted recommendations.

This statement recognised the need to address the existing GATT dispute settlement process.

The draft ITO Charter had provided for “a rigorous dispute settlement procedure” (see Articles 92 – 97)\textsuperscript{10}, which would have applied to the GATT. With the Charter still-born, the Contracting Parties to GATT had to make do with “very meagre treaty language as a start” for dealing with disputes (see GATT Articles XXII and XXIII).\textsuperscript{11}

Despite this inauspicious start and the early process being “wrapped in layers of diplomatic vagueness and indirection”\textsuperscript{12}, the GATT dispute settlement process worked well in its first decade\textsuperscript{13}. As the number of Contracting Parties grew and developing countries joined in increasing numbers, the process fell out of favour.\textsuperscript{14} However, the process evolved over time, being “progressively codified and supplemented” by decisions and understandings adopted by the Contracting Parties.\textsuperscript{15}

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\textsuperscript{11} Ibid, 69.


\textsuperscript{13} Ibid, 5.

\textsuperscript{14} Ibid, 6.

\textsuperscript{15} Petersmann, \textit{The GATT/WTO Dispute Settlement System} (1997), 71.
By the 1980s, the earlier diplomatic approach to dispute settlement (with its distinctive trade “diplomats’ jurisprudence”\(^\text{16}\)) gave way to an approach which came “to rely more heavily on the authority of ‘law’ itself”\(^\text{17}\), as disputes increased in “difficulty and political sensitivity”\(^\text{18}\). At the end of the decade, the dispute settlement process represented “a quite powerful legal instrument”.\(^\text{19}\) Yet, as the excerpt on dispute settlement from the Punta del Este Declaration demonstrates, the Contracting Parties believed that improvements could be made to the process “to ensure prompt and effective resolution of disputes”.\(^\text{20}\)

However, the text from the Declaration does not foreshadow a fundamental overhaul of the dispute settlement process. It suggests incremental reform was expected. There is no reference to incorporating appellate review into the process or moving from requiring consensus to adopt a panel report to requiring consensus to block adoption.

As part of the ‘early harvest’ of results in the Uruguay Round negotiations, the Contracting Parties in 1989 adopted a range of improvements to the GATT dispute settlement process.\(^\text{21}\) This decision took “important steps in the direction of a more formal, legalistic, adjudicatory-oriented regime”.\(^\text{22}\) The decision represented incremental, albeit significant, reform but not fundamental reform. It remained within the scope of reform apparently contemplated in the Punta del Este Declaration.

Fundamental reform did come. In December 1991, the then Director-General of the GATT, Arthur Dunkel, submitted a Draft Final Act to the negotiating States in an attempt to maintain momentum in the Uruguay Round. On dispute settlement, the Dunkel Draft provided for “the most detailed regulation”\(^\text{23}\) of dispute settlement since the creation of the GATT, including the “radical innovation”\(^\text{24}\) of establishing a standing Appellate Body and reversing the existing GATT consensus rule so that consensus would now be required to prevent the establishment of a panel or adoption of a panel report. The two developments are linked, with the Appellate Body seen as playing a quality


\(^{17}\) Hudec, above n12, 7.

\(^{18}\) Ibid, 8.

\(^{19}\) Ibid.

\(^{20}\) General Agreement on Tariffs and Trade (GATT) Punta del Este Declaration, Ministerial Declaration of September 1986 (see Part D – Dispute Settlement).


\(^{24}\) Ibid, 144.
control role on panel reports, given that adoption of reports would be the norm. The Dunkel text on dispute settlement survived in “slightly modified form” to become the DSU.

The dramatic overhaul of the dispute settlement process envisaged in the Dunkel text must be placed in the context of the negotiations between key protagonists in the Uruguay Round, in particular, the United States and the European Community.

Commentators have observed that the United States and the European Community took different approaches to the GATT dispute settlement process. The approach of the European Community has been characterised as not having as its main objective “the rigorous application of law, but the adjustment of divergences between states to find equitable solutions”. Whereas, the United States took “a legalistic approach” towards dispute settlement, the European Community viewed GATT as a “diplomatic” institution, while the United States viewed it as a “legal” institution.

An “aggressive” user of the GATT dispute settlement process, the United States became frustrated by the perceived difficulty it experienced in holding other GATT Parties to their obligations. This led to legislative action in the Congress to strengthen the Trade Act (section 301) to authorise unilateral retaliatory action. The beefed-up Trade Act became a “major issue” in the Uruguay Round, and clearly was in the negotiating mix on dispute settlement.

Adding further spice to the negotiations, both the European Community and the United States were on the receiving end of panel decisions during the course of the negotiations which each found “politically unpalatable” and considered legally flawed (United States: the Tuna/Dolphin panels; European Community: Oilseeds panels and the Airbus panel).

26 Young, above n22, 399.
27 The EC was not a Member de jure of GATT. On the evolution of its position as a Member de facto see, for example, Petersmann, ‘The EC as a GATT Member’, in Hilf (ed), The European Community and GATT (1986).
29 Ibid.
31 Ibid.
32 Ibid, 844.
33 Ibid, 845.
34 Kuijper, above n28, 52.
The United States was the advocate of fundamental dispute settlement reform during the negotiations. Ultimately, the European Community and other major GATT players moved to support fundamental change as advocated by the United States. In the view of Bello and Holmer, senior American trade officials at the time, the aggressive unilateralism of the United States had “converted the rest of the world to the benefits of a legalistic, rule-based dispute resolution process”.

Other GATT Contracting Parties “developed a new-found appreciation of international legal procedures as a way to discipline the United States from acting unilaterally”.

The negotiating States in the Uruguay Round constructed a dispute settlement mechanism which departed radically from its GATT predecessor. As with radical change in any field of human endeavour, the consequences are not always foreseen. The bargain struck on dispute settlement, with key roles played by the United States and the European Community, gave a central role to a new institution, the Appellate Body. The following section analyses the terms of that bargain as it relates to the Appellate Body.

The DSU and the Appellate Body

The DSU establishes the dispute settlement system as “a central element in providing security and predictability in the multilateral trading system”. The DSU lays part of the foundation for “security and predictability” by establishing the Appellate Body. It is a standing institution, being composed of seven persons of “recognised authority, with demonstrated expertise in the law, international trade and the subject matter of the covered agreements generally”. The requirement for there to be a consensus in the Dispute Settlement Body (DSB) against adoption of an Appellate Body report, rather than for adoption, highlights the need for able Appellate Body members, who can produce considered and well-reasoned reports.

Having created a major new institution and required that its members be of high calibre, what tasks did the negotiators confer on the Appellate Body? The DSU states that it is to hear appeals on “issues of law” in panel reports and “legal interpretations” arrived at by panels (functions akin to those of appeal courts in domestic legal systems). The task then of the Appellate Body

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36 Ibid.
37 DSU Article 3.2.
38 DSU Article 17.3.
39 DSU Article 17.14.
40 DSU Article 17.6.
might be described as “legal quality control”. It acts as a check on the work of panels in order “to bring additional legal certainty and predictability” to dispute settlement.41

**The Scope of the Appellate Body’s Authority**

Having given this task to the Appellate Body, the negotiators of the DSU delimited the scope of its authority. DSU Article 3.2 defines the function of the dispute settlement system (and the Appellate Body) as being “to clarify the existing provisions of [the covered] agreements in accordance with customary rules of interpretation of public international law”.

DSU Article 3.2 goes on to state that the DSB (when adopting Appellate Body and panel reports) is not to “add to or diminish the rights and obligations provided in the covered agreements”. This admonition constitutes a bright line for the Appellate Body and panels in discharging their interpretative tasks. In one of its early reports, **US – Shirts and Blouses** 42, the Appellate Body recognised the limits placed on panels and itself by Article 3.2 in the following terms:

> Given the explicit aim of dispute settlement that permeates the DSU, we do not consider that Article 3.2 of the DSU is meant to encourage either panels or the Appellate Body to “make law” by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute.43

A further check on any potential activism by the Appellate Body is provided by Article IX.2 of the WTO Agreement, which provides that the Ministerial Conference and the General Council “shall have the exclusive authority to adopt interpretations” of the Agreement and its annexed Multilateral Trade Agreements. The decision to adopt an interpretation must be taken by a three-fourths majority of Members. DSU Article 3.9 complements this provision by stating that the DSU is “without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement”.

The Appellate Body addressed the question of “authoritative” interpretations in another of its early reports, **Japan – Taxes on Alcoholic Beverages** 44, stating that:

> We do not believe that the Contracting Parties, in deciding to adopt a panel report, intended that their decision would constitute a definitive

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41 Steger and Hainsworth, above n25, 208.
43 Ibid, 19.
interpretation of the relevant provisions of GATT 1947. Nor do we believe that this is contemplated under GATT 1994. There is specific cause for this conclusion in the WTO Agreement. Article IX:2 of the WTO Agreement provides: “The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements”. Article IX:2 provides further that such decisions “shall be taken by a three-fourths majority of the Members”. The fact that such an “exclusive authority” in interpreting the treaty has been established so specifically in the WTO Agreement is reason enough to conclude that such authority does not exist by implication or by inadvertence elsewhere.45 (emphasis added)

In sum, the negotiators of the DSU can be seen to have circumscribed the authority of the Appellate Body so that WTO Members retain ultimate control of the interpretation of the WTO Agreement. Members have not exercised that control to date.

The Appellate Body’s Interpretative Tools

Having delimited the scope of the Appellate Body’s functions and authority, the negotiators of the DSU provided it with tools to do its job. In clarifying the provisions of the covered agreements, the Appellate Body is required to apply the “customary rules of interpretation of public international law”.46 The Appellate Body has clarified the meaning of this expression in the course of its reports, finding that Articles 31 and 32 of the Vienna Convention on the Law of Treaties (Vienna Convention) represent customary rules of interpretation.47 The principles contained in these two articles have been the interpretative tools used by the Appellate Body and panels.

The Appellate Body has identified Article 31.1 of the Vienna Convention as the “general rule of interpretation”.48 It provides as follows:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Analysing Article 31.1, the Appellate Body has stated that it “provides that the words of the treaty form the foundation for the interpretive process”.49

46 DSU Article 3.2.
49 Japan – Taxes on Alcoholic Beverages, above n44, 11.
Words are “to be given their ordinary meaning in their context” and the object and purpose of the treaty are “to be taken into account”.

The Appellate Body has made clear that these principles apply not only in the interpretation of the texts of the covered agreements but also in the interpretation of the schedules of WTO Members.

The Appellate Body has corrected panels on more than one occasion for reading concepts into the texts of agreements, explaining that:

[t]he duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the Vienna Convention. But these principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended.

The Appellate Body has identified corollaries to the general rule of interpretation expressed in Article 31.1 of the Vienna Convention. One such corollary is the principle of effectiveness, which the Appellate Body has expressed to mean that:

interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.

The Appellate Body has elaborated on this principle, stating that:

[i]n light of the interpretive principle of effectiveness, it is the duty of any treaty interpreter to “read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously”.

The Appellate Body has said also that flowing from the principle of effectiveness “a treaty should be interpreted as a whole, and, in particular, its sections and parts should be read as a whole”.

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50 Ibid, 12.
55 Ibid.
Although the application of Article 31 “will usually allow a treaty interpreter to establish the meaning of a term”\(^5\), there will be occasions where “the meaning of the term remains ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable”\(^6\). For these reasons, the Appellate Body, on occasion, has had recourse to Article 32 of the Vienna Convention which permits the use of supplementary means of interpretation.\(^7\) Article 32 does not provide an exhaustive definition of “supplementary means of interpretation”. It cites, as an example, the preparatory work of a treaty.

These then are the principal interpretative tools employed by the Appellate Body. They are the tools which negotiating States provided to the Appellate Body when they used the expression “customary rules of interpretation of public international law” in DSU Article 3.2. The following section considers the use to which the Appellate Body has put these tools in discharging its functions under the DSU.

**The Appellate Body’s Interpretative Record**

The following analysis will consider examples of how the Appellate Body has handled the relationship between the agreements which comprise the single undertaking. This has been a task of fundamental importance to the effective functioning of the single undertaking.

The Appellate Body has been asked to consider the relationship between the Agreement on Agriculture and the GATT 1994 and the Agreement on Subsidies and Countervailing Measures (SCM Agreement).

In *EC – Bananas*\(^9\), the Appellate Body considered the relationship between the Agreement on Agriculture and the GATT 1994.

The European Communities had argued the market access concessions for agricultural products made by it pursuant to the Agreement on Agriculture prevailed over Article XIII of the GATT 1994. The European Communities maintained that this result necessarily followed from the application of Articles 4.1 and 21.1 of the Agreement on Agriculture. Accordingly, the European

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56  *EC – Customs Classification of Certain Computer Equipment*, above n51, 86.
57  Ibid.
Communities contended that it was permitted with respect to such market access concessions to act inconsistently with the requirements of Article XIII of the GATT 1994.

Article 21.1 provides that:

The provisions of the GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement.

The Appellate Body interpreted it to mean that the GATT 1994 would:

apply to market access commitments concerning agricultural products, except to the extent that the Agreement on Agriculture contains specific provisions dealing specifically with the same matter.60

This reading of Article 21.1 is based on an appropriate application of the principles of treaty interpretation. It recognises that the negotiators addressed the relationship between the Agreement on Agriculture and the GATT 1994, giving priority to the former over the latter. However, the reading also applies the principle of effectiveness to read the provisions of the Agreement in Agriculture and the GATT 1994 harmoniously to avoid reducing provisions in either to redundancy or inutility. By finding that provisions in the Agreement on Agriculture must specifically deal with the same matter to enjoy priority, the Appellate Body ensured that provisions in the GATT 1994 would apply in other circumstances and not be rendered inutile.

Relying on this interpretation, the Appellate Body addressed the relationship between Article 4.1 of the Agreement on Agriculture and Article XIII of the GATT 1994. The Appellate Body did not see anything in Article 4.1 to suggest that market access concessions and commitments made as a result of the Uruguay Round negotiations on agriculture can be inconsistent with the provisions of Article XIII of the GATT 1994. There is nothing in Articles 4.1 or 4.2, or in any other article of the Agreement on Agriculture, that deals specifically with the allocation of tariff quotas on agricultural products. If the negotiators had intended to permit Members to act inconsistently with Article XIII of the GATT 1994, they would have said so explicitly. The Agreement on Agriculture contains several specific provisions dealing with the relationship between articles of the Agreement on Agriculture and the GATT 1994. For example, Article 5 of the Agreement on Agriculture allows Members to impose special safeguards measures that would otherwise be inconsistent with Article XIX of the GATT 1994 and with the Agreement on Safeguards.61

60 Ibid, 155.
In US – Cotton\(^2\), the Appellate Body was called on to consider whether Article 3.1(b) of the SCM Agreement applied to payments made to domestic processors in relation to the use of domestic cotton. Except as provided in the Agreement on Agriculture,

Article 3.1(b) prohibits subsidies contingent upon the use of domestic goods over imported goods. The United States argued that Article 3.1(b) was inapplicable to the payments because they were consistent with its domestic support reduction commitments under the Agreement on Agriculture.

The Appellate Body identified its key interpretative task as determining whether the Agreement on Agriculture contained specific provisions dealing specifically with the same matter as Article 3.1(b) that is, subsidies contingent upon the use of domestic over imported goods.\(^3\) It considered provisions dealing with domestic support in the Agreement on Agriculture (Article 6 and paragraph 7 of Annex 3). Having conducted a detailed textual analysis of these provisions, the Appellate Body concluded that they did not authorise subsidies that are contingent on the use of domestic over imported goods.

The Appellate Body found that

\[\text{The prohibition on the provision of subsidies contingent upon the use of domestic over imported goods in Article 3.1(b) of the SCM Agreement is explicit and clear. Because Article 3.1(b) treats subsidies contingent on the use of domestic over imported products as prohibited subsidies, it would be expected that the drafters would have included an equally explicit and clear provision in the Agreement on Agriculture if they had indeed intended to authorize such prohibited subsidies provided in connection with agricultural goods. We find no provision in the Agreement on Agriculture dealing specifically with subsidies contingent upon the use of domestic over imported agricultural goods.}\]

By way of another example, the Appellate Body has dealt with the relationship between the Agreement on Safeguards and Article XIX of the GATT 1994. Article 11.1(a) of the Agreement on Safeguards provides that:

\[\text{A Member shall not take or seek any emergency action on imports of particular products as set forth in Article XIX of GATT 1994 unless such action conforms with the provisions of that Article applied in accordance with this Agreement. (emphasis added)}\]

In Korea – Dairy Safeguards, the Appellate Body stated that:

\[\text{It is important to understand that the WTO Agreement is one treaty. The GATT 1994 and the Agreement on Safeguards are both Multilateral Agreements on}\]


\(^3\) Ibid, 533.

\(^4\) Ibid, 547.
Trade in Goods contained in Annex 1A, which are integral parts of that treaty and are equally binding on all Members pursuant to Article II:2 of the WTO Agreement.\(^\text{65}\) (emphasis added)

Addressing Article 11.1(a) of the Agreement on Safeguards, the Appellate Body found that:

The ordinary meaning of the language in Article 11.1(a) – “unless such action conforms with the provisions of that Article applied in accordance with this Agreement” – is that any safeguard action must conform with the provisions of Article XIX of the GATT 1994 as well as with the provisions of the Agreement on Safeguards. Thus, any safeguard measure imposed after the entry into force of the WTO Agreement must comply with the provisions of both the Agreement on Safeguards and Article XIX of the GATT 1994.\(^\text{66}\) (emphasis added)

The Appellate Body returned to this issue in subsequent reports, including United States - Lamb Safeguards\(^\text{67}\). In the Lamb Report, the Appellate Body reiterated that:

Articles 1 and 11.1(a) of the Agreement on Safeguards express the full and continuing applicability of Article XIX of the GATT 1994, which no longer stands in isolation, but has been clarified and reinforced by the Agreement on Safeguards.\(^\text{68}\)

The Appellate Body jurisprudence addressed above demonstrates both a consistent interpretative approach and the clear intention of the Appellate Body to ensure that the single undertaking is given effect. It is jurisprudence that neither adds to nor diminishes the rights and obligations provided in the covered agreements.

**Conclusion**

The WTO Members have entrusted the Appellate Body with a critical role in the dispute settlement regime, which it must perform within the parameters set by the Members. The debate about whether the Appellate Body engages in judicial activism will continue, with each new Appellate Body report providing grist to the analytical mill. It must be informed by a rigorous analysis of the Appellate Body’s jurisprudence, which takes into account the interpretative tools at its disposal and the complexity of the legal questions it must answer. Analysis not assertion is required to answer the question of whether WTO Members are being served by the Appellate Body as they had bargained for.


\(^{66}\) Ibid, 77.


\(^{68}\) Ibid, 70.
PART TWO

IN PRACTICE: SOME DFAT PERSPECTIVES
Managing Australia’s participation in a WTO dispute can be a complex process demanding consideration of a range of practical factors, including likely commercial benefits, alternative dispute resolution options, the overall bilateral relationship and available resources. A key driver for Australia will be securing or maintaining market access for Australian exporters.

Within Australia, the Minister for Trade has overall responsibility for Australia’s participation in the WTO. At officials’ level, Australia’s participation is managed by the WTO Trade Law Branch in the Office of Trade Negotiations of the Department of Foreign Affairs and Trade (the Department), in consultation with the Attorney-General’s Department. Officials based at Australia’s Permanent Mission to the WTO play an integral role in dispute activity on the ground in Geneva.

This paper provides a snapshot of some factors at play in managing Australia’s role in a WTO dispute, from the perspective of officials with day-to-day responsibility for advancing Australia’s trade policy agenda.

Deciding on Dispute Action

A WTO dispute is often a major undertaking, usually over a number of years. There is no guarantee either of success, or of success leading to actual commercial benefits for traders. The decision to launch dispute action involves significant deliberation, and includes identification of - and consultation with - stakeholders, and coordination of a whole-of-government approach.

There is no single process which triggers Australia’s consideration on whether to initiate a WTO dispute. It is open to any individual or organisation to bring a matter of concern to the attention of the Minister or the Department.2

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1 Amanda Gorely is Assistant Secretary, WTO Trade Law Branch in the Office of Trade Negotiations, Department of Foreign Affairs and Trade.
2 Direct e-mail, and telephone and facsimile contact numbers, for the Department’s WTO Trade Law Branch are published on the Department’s website: www.dfat.gov.au/trade/negotiations/wto_disputes.html
Sources may include, for example, a sole exporter or company experiencing restraints on market access overseas, or an industry group representing traders in Australia. We may also be approached by other countries to join them in a dispute if they consider we will share their concerns.

When a matter is brought to the attention of the Department, we review relevant legal and factual issues, seek further information if necessary, and assess the complexity of the matter and the seriousness of potential breaches. If research reveals a significant potential breach of WTO laws by another Member, we would usually take this up with the Member concerned with a view to reaching a bilateral solution. Most issues are resolved successfully in this manner, avoiding long and costly dispute action.

If this bilateral solution is not found, we may raise the issue in one or more of the WTO committees and seek further details from the Member on the measure in question. This can yield valuable information for a future dispute, put added pressure on the Member and also help to identify other Members with similar concerns who may be interested in joining a dispute.

The preparatory process for a potential WTO dispute is extensive and detailed research is required. We usually form an interagency task force comprised of interested Government agencies to take the analysis forward. We may ask an agency with particularly relevant expertise to make a more substantive contribution. For example, in the recent EC – Sugar dispute, the Department of Agriculture, Forests and Fisheries provided the services of a consultant economist. In some cases, private sector entities may also contribute relevant expertise. In both the US – Lamb Safeguard and Korea – Beef disputes, Meat & Livestock Australia, for example, was extensively involved in the research and analysis of factual material and its incorporation into the resulting legal cases.

Where we identify a likely breach of WTO rules affecting Australia’s national interests, decisions on how to proceed are made on a case-by-case basis. We will always be guided by prospects for a tangible commercial outcome such as improved market access opportunities for traders, or achieving systemic change to a WTO-inconsistent aspect of a Member’s trade regime. The views of domestic stakeholders will be important - Australia would not normally initiate a WTO dispute unless there was strong support from the industry concerned.  

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3 European Communities – Export Subsidies on Sugar WT/DS265.
4 United States – Safeguard Measures on Imports of Fresh, Chilled or frozen Lamb Meat from New Zealand and Australia WT/DS/178.
5 Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef WT/DS/169.
6 See paper in this publication entitled “The Role of Domestic Stakeholders”, by Joan Hird and Margaret Durnan
These are all factors taken into account by the Minister for Trade in determining whether or not formal WTO dispute action should be commenced.

**Preparing a WTO Dispute**

Once a decision is taken to launch a dispute, the process intensifies significantly, with further consultation and preparation of legal arguments. We build a dispute strategy, including consideration of the benefits of cooperation with other WTO Members as complaining parties. Where a decision is taken to seek cooperation, significant bilateral coordination is needed. Close coordination with Australia’s Permanent Mission to the WTO in Geneva is also required, with officers based at the Mission liaising with other Members’ delegations and the WTO Secretariat. All disputes initiated by Australia to date have involved significant cooperation and coordination with other complaining Members.

The WTO Trade Law Branch will normally develop an advanced draft submission to a dispute settlement panel before requesting dispute settlement consultations. This preparation is necessary to meet the tight deadlines applying to WTO panel proceedings. The dispute initiated by Australia against the European Communities’ sugar regime illustrates the preparation process. The complexity of the regime and the difficulty of accessing relevant information were such that Australia spent more than six months generating, collating and analysing relevant information and drafting text for a submission before requesting dispute settlement consultations with the European Communities. Australia spent more than 18 months preparing its case before moving to the panel proceeding phase.

Defending a dispute raises a specific set of challenges. To date, Australia has twice been a defending Member before WTO dispute settlement panels – in the **Automotive Leather** and **Salmon** disputes. Australia seeks to defend itself vigorously in any dispute and usually conducts extensive preparatory work if a dispute is anticipated. If a request for dispute settlement consultations is received, the Department’s immediate priorities will be to identify potential stakeholders, analyse the WTO rules being invoked and develop a defensive strategy. Australia seeks to use the consultations to gain a better understanding of the issues.

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7 Nevertheless, there can be occasions when it is not possible to do so, for example, as in the US – Lamb Safeguard dispute when urgent action was required to minimise the detrimental effects of the US safeguard measure on the Australian lamb industry.

8 Australia – Subsidies Provided to Producers and Exporters of Automotive Leather WT/DS126/R.

9 Australia – Measures Affecting Importation of Salmon WT/DS18.

10 In addition, both the Philippines and the European Communities have requested dispute settlement consultations concerning aspects of Australia’s quarantine arrangements. It is open to both of those Members to ask for a dispute settlement panel to be established.
of the nature of the complaining Member’s concerns and, if possible, to deflect
the complaining Member’s legal case, in part or in whole. We also seek to
identify possibilities for resolving the dispute bilaterally.

It is also worth noting that Australia participates in a number of disputes as
a third party. We take this decision based on whether there is an Australian
commercial or systemic interest in the matters under consideration. Third
party participation provides increased access to the dispute in question,
without the intense pressures of being a principal party. It gives us an
opportunity to have our views heard and often provides an excellent
opportunity for officers to develop their skills.

A WTO Dispute in Progress

The timetable covering the first and second written submissions to the
panel and the first and second meetings of the parties with the panel is tight.
During this phase, we subject the draft Australian submission to a continuous
process of review and fine-tuning through the interagency task force. Aspects
of the submission may also be subject to ‘peer review’ by external entities.
For example, in the EC – Sugar dispute, the economic analysis that underpinned
Australia’s case was scrutinised by an independent consultant. Earlier
preparations take on critical importance once dispute activity moves from
consultations to the panel stage. Australia is represented at dispute hearings
by officials from the WTO Trade Law Branch, the WTO mission in Geneva,
the Attorney-General’s Department, and other agencies if necessary.

Once a panel issues its confidential draft report to the parties, Australia
analyses the report with the possibility of an appeal by either side in mind.
The process of analysis intensifies once the panel’s final report is publicly
released, as that action triggers the timetable for any appeal. Preparations
for a possible appeal largely parallel the process of preparation for a panel
proceeding. The relevant interagency task force will continue to help the
Department shape and present Australia’s case, and consultation with
stakeholders will continue. We identify possible errors of law and legal
interpretation on the part of the panel and develop arguments to support
and to contest the panel’s findings. We also examine the impact on dispute
outcomes if the Appellate Body were to uphold, modify or reverse the
panel’s findings.

A WTO dispute does not always end with a successful outcome. Australia
places high priority on implementation of panel and Appellate Body rulings
and will use the processes available under the DSU to maintain pressure on
Members to comply. Assessing compliance can be a complex process, often involving extensive liaison with the Member concerned. Where we have concerns that compliance is lacking, we will consider further enforcement action.

**Conclusion**

The WTO dispute settlement system is a crucial mechanism for WTO Members to secure compliance with WTO rules. Its binding nature acts as a brake on all WTO Members, who must consider carefully their policy approaches in terms of WTO consistency and the risk of successful challenge. It provides essential leverage in encouraging Members to comply with the obligations they have voluntarily taken on. Australia has used the WTO dispute system to gain significant benefits for our exporters in important overseas markets. This will continue to be an essential strategic element of in our overall trade policy approach.
The Role of Domestic Stakeholders

JOAN HIRD AND MARGARET DURNAN

Introduction

A decision to initiate a formal WTO dispute is normally preceded by extensive preparatory work and, in some cases, by informal discussions at the bilateral level. A formal WTO dispute settlement panel is preceded by mandatory WTO dispute settlement consultations, usually for a minimum of sixty days before a dispute can proceed to the panel stage. In some instances, a dispute is initiated as a consequence of direct lobbying, for example by industry groups, for WTO action as a means of addressing a specific trade problem. The final decision rests with the Minister for Trade.

Initiating a formal WTO dispute requires extensive gathering of evidence – a process to which stakeholders are encouraged, and sometimes required, to provide input. Initiating a formal dispute also involves preparing detailed legal assessments of the merits of pursuing a case, including assessments of prospects for a negotiated settlement as an alternative to moving ahead with a formal dispute.

For those reasons, there is usually a long lead time in which to identify domestic stakeholders and to put in place consultative processes between stakeholders and the Australian Government. Moreover, in the case of complaints initiated by Australia, a decision to engage in WTO dispute settlement is normally only taken following extensive consultation with stakeholders. That consultation involves identifying, weighing and balancing stakeholder interests, as well as assessing the degree of support for WTO dispute settlement action.

1 Joan Hird is Director, WTO Disputes Investigation Section, in the WTO Trade Law Branch of the Department of Foreign Affairs and Trade. She has participated in GATT and WTO disputes involving Australia as a party or third party, most recently the EC – Export Subsidies on Sugar dispute (WT/DS265). Margaret Durnan is an Executive Officer in the WTO Trade Law Branch, Department of Foreign Affairs and Trade. She worked on the EC – Geographic Indications for Agricultural Products dispute, among others, as a member of the WTO Trade Law Branch.
Officials engaged in WTO disputes have adopted the practice of casting a wide net in encouraging stakeholder participation. In complaints against Australia, the starting point is the agency with portfolio responsibility for maintaining a particular program or policy. In other cases, established networks with industry organisations have either been an appropriate vehicle for engagement with stakeholders or have enabled identification of more directly concerned stakeholders. Direct action by officials to identify potentially affected stakeholders is also supplemented by advice on the DFAT website.²

Industry organisations may express a preference for dialogue to be conducted through specific industry-nominated contacts. However, anyone identifying a stakeholder interest will be included in the stakeholder consultative group established for each dispute. There is no barrier to new stakeholders joining the consultative group at any stage of a dispute.

Stakeholder Involvement in Individual Disputes

Australia – Salmon³

The dispute involved a complaint by Canada that an Australian quarantine prohibition on imports of Canadian salmon products was not justifiable under the provisions of the WTO Agreement on Sanitary and Phytosanitary Measures (the SPS Agreement). In particular, Canada challenged the validity of conclusions that Australia could not achieve a level of quarantine protection against exotic diseases by less trade restrictive measures than an import prohibition on slaughtered salmon from all Canadian salmon-producing regions. Canada also based its challenge on the different quarantine measures applying to certain other imported fish either having diseases in common with Canadian salmon (principally herring used for bait and feed, pilchards and goldfish) or, more generally, having diseases exotic to Australia. Canada also raised arguments of inconsistency connected to an alleged absence of internal quarantine restrictions on interstate trade in fish.

From the outset, the Tasmanian salmon industry and the Tasmanian State Government were active stakeholders, reflecting the position of Tasmania as the main salmon producing region of Australia. As the quarantine prohibition was also applied to protect trout in Australia’s waters, mainland commercial and recreational trout sectors were also closely engaged as stakeholders from the outset of the process.

³ Australia – Measures Affecting the Importation of Salmon, WT/DS18.
After Canada's complaint was widened to include allegations of inconsistency of quarantine treatment between salmon and other imported fish, the Western Australian rock lobster industry (which uses imported herring for bait) and the South Australian tuna industry (which uses imported herring for feed) became active stakeholders. Representatives from other State Governments also engaged as stakeholders.

Canada further widened its complaint to allegations of inconsistency of quarantine treatment in regard to the absence of prohibitions on the movement of domestically harvested fish between diseased and disease-free regions of Australia, including internal trade in redfin perch and barramundi.

What began as a dispute involving localised regional interests in Tasmania and the sub-alpine regions of Victoria and New South Wales quickly grew into a dispute involving producers of other fish across a number of Australian States and the quarantine programs of the different States.

In terms of stakeholder interests, it also revealed that, while all stakeholders had a shared interest in maintaining a high level of quarantine protection for aquatic products, not all stakeholders considered that it was necessary to maintain or introduce a total ban on the import of all fish associated with exotic diseases.

At an advanced stage of the dispute, Canada circulated a possible retaliatory list, to come into effect if Australia’s implementing measures were found to be inconsistent with Australia’s WTO obligations. The product coverage of the list was comprehensive, extending to citrus fruit from south central Queensland, macadamias grown on the northern New South Wales coast and woollen carpets exported from Geelong to Canada. While the list was not given effect, its product coverage widened the range of stakeholders well beyond aquatic interests and raised potential concerns by a number of Australian exporters from a number of very different regions.

**Australia – Automotive Leather**

This dispute involved a complaint by the United States that assistance measures provided to automotive leather manufacturers constituted export subsidies of a kind that are prohibited by the WTO Agreement on Subsidies and Countervailing Measures (the Subsidies Agreement). The assistance measures formed part of Commonwealth industry policy arrangements, which did not provide for export subsidies. The United States argued that, as constructed, the arrangements served to deliver *de facto* export subsidies to an Australian exporter competing against suppliers from the United States in countries such as Mexico.

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4  Australia – Subsidies Provided to Producers and Exporters of Automotive Leather; WT/DS126.
The direct industry stakeholder was Howe Leather, a company which produced mainly for the export market. Howe Leather and its parent company were actively involved throughout all stages of the litigation process. Other stakeholders included companies and industry organisations with a policy interest in assistance arrangements for other sectors.

**Korea – Beef**

Australia, together with the United States, challenged the WTO consistency of a diversity of Korean measures affecting access conditions throughout the distribution chain. The complaint involved claims of WTO inconsistency with the GATT 1994, the Agreement on Agriculture and the Agreement on Import Licensing Procedures.

To support Australia’s claims in the dispute, heavy reliance was placed on detailed evidence of the discrimination practised. Much of that evidence was drawn from the experience of Australian exporters to Korea.

The Australian cattle and beef industries were heavily engaged as stakeholders, in particular through the aegis of Meat and Livestock Australia (MLA). MLA maintains a representative office in Korea and contributed a great deal of information about the Korean regulatory programs, their administration and the market impact of those programs. MLA and beef exporters also provided substantive advice in regard to Korean proposals for replacement regulatory systems.

**United States – Lamb safeguard**

This dispute involved a challenge by Australia, together with New Zealand, to the WTO consistency of safeguard measures applied by the United States against imports of lamb meat. The WTO Agreement on Safeguards (‘The Safeguards Agreement’) allows for the use of temporary safeguards against increases in imports in circumstances where it can be demonstrated that an increase is causing or threatens to cause serious injury to the domestic industry or a like directly competing industry. The Safeguards Agreement places strict disciplines on recourse to such measures and to their duration.

As in the Korea – Beef dispute, MLA played a major role in coordinating input from the sheepmeat industry and contributing advice on economic data relevant to the application of safeguard measures by the United States.

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5 Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef, WT/DS161, WT/DS169.
6 US – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia, WT/DS177, WT/DS178.
Other industry sectors, while not directly engaged, had an ongoing interest in the systemic issues affecting the use of trade remedies by the United States.

**United States – “Byrd Amendment”**

This dispute involved a challenge by Australia and ten other WTO Members to the WTO consistency of a law adopted by the United States known as the “Byrd Amendment”. Under the Byrd Amendment, anti-dumping and countervailing duties collected by the United States are distributed to US domestic producers of competing like products, provided those producers supported the original petition for the imposition of anti-dumping or countervailing duties. Australia and the other complainants challenged the consistency of the Byrd Amendment with the WTO Agreement on Subsidies and Countervailing Measures and the WTO Anti-Dumping Agreement.

Reflecting that the Byrd Amendment had not to that time substantively affected Australian exports to the United States, no interested stakeholders stepped forward. Nevertheless, Australia proceeded with its challenge because of the broader systemic implications of the legislation and of its potential to affect Australian exports to the United States in the future.

**European Communities – Geographical indications (“GIs”)**

Australia challenged the European Communities’ regime for the protection of GIs for agricultural products and foodstuffs, arguing that the EC’s regime discriminated against the products and nationals of other WTO Members and did not properly protect trademark rights. Australia challenged the consistency of the European Communities’ regime under the Agreement on Trade-Related Aspects of Intellectual Property Rights (‘the TRIPS Agreement’), the GATT 1994 and the Agreement on Technical Barriers to Trade (the TBT Agreement).

In a parallel dispute, the United States also challenged the European Communities’ regime.

Again, the dispute involved a law that had not as yet directly affected Australia’s exports, in this case to the European Communities. Nevertheless, some industry groups recognised that the European Communities’ approach to GIs could significantly affect Australia’s exports in the future, in particular in third country markets.

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8 WTO Agreement on Implementation of Article VI (Anti-Dumping Agreement’).
9 EC – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, WT/DS290.
**European Communities – Sugar**

Australia, together with Brazil and Thailand, complained to a WTO dispute panel that the European Communities was circumventing its export subsidy commitments on sugar by providing export subsidies on quantities of sugar significantly in excess of the amounts permitted under WTO rules. The Agreement on Agriculture prohibits export subsidies on agricultural products except within the limits prescribed in each Member's WTO schedule of export subsidy reduction commitments. Under the Agreement's anti-circumvention provisions, WTO Members exporting in excess of scheduled commitments – for budgetary outlays on export subsidies and subsidised quantities – have the burden of proof to demonstrate that exports in excess of scheduled limits are not subsidised.

The Australian sugar industry actively lobbied for Australia to initiate a complaint in conjunction with Brazil and Thailand. The industry closely coordinated with its Brazilian and Thai counterparts in encouraging their respective governments to initiate a joint complaint.

The Australian sugar industry remained active in the domestic and plurilateral spheres throughout the course of the dispute and provided economic data to support arguments that all European Communities' sugar exports were either directly or indirectly subsidised. It coordinated its activities through national organisations of growers, millers, refiners and exporters. The industry continues to be consulted in the WTO implementation phase.

**The Experience to Date**

Domestic stakeholder interest in Australia’s involvement in WTO disputes, and the degree of stakeholder engagement, varies with each dispute.

In disputes in which Australia is a defendant, experience to date shows that domestic stakeholders wish to be closely consulted and to contribute at all stages of the dispute. These disputes generally involve defending a government program or policy that benefits – directly or indirectly – a discrete group of producers. There is normally a high degree of commonality among individual stakeholders but, as the Salmon dispute showed, such commonality cannot be assumed.

In disputes in which Australia is a complainant, it is normal for stakeholders to engage actively in regard to measures which have a tangible effect on a particular product or group of producers. Such engagement is highly

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10 EC – Export Subsidies on Sugar, WT/DS265, WT/DS266, WT/DS283.
desirable, as is a resource commitment. Again, however, a commonality among stakeholders cannot be assumed, particularly where there is a diversity of ownership of production or of export orientation within an industry. In disputes involving broader systemic measures such as the US – “Byrd Amendment” and EC – GIs disputes, there may not be any stakeholders that have substantially affected up to that time.

The product at issue in an individual dispute does not necessarily determine likely stakeholder interest. For example, the Salmon dispute raised issues that resulted in the active engagement of seafood producers spread across Australia. Following Canada’s threats of trade retaliation, several exporters to Canada of non-seafood products identified themselves as stakeholders, including regional manufacturers and horticultural producers. Mainland State Governments also identified themselves as stakeholders.

The involvement of industry organisations is important in identifying the commercial issues at stake in a dispute. In addition, the involvement of such organisations assists in identifying and understanding industry expectations of a dispute, and in responding to those expectations. The benefits or other implications of the outcomes of a dispute are often not quantifiable in monetary terms with any degree of precision. In most cases, stakeholders are looking to the preservation of existing access or to future opportunities. Exporter stakeholders generally take a longer term perspective and adopt a realistic approach that recourse to the WTO dispute settlement system is not premised on shorter term resolution of commercial trading problems, as compared to longer term opportunities arising from rights under the WTO Agreements.

**Conclusion**

Consultation with domestic stakeholders is an important part of Australia’s participation in WTO dispute settlement. Engaging with stakeholders provides valuable input to the management of a WTO dispute process, and it is important to adopt a structure which fosters their active involvement. Moreover, domestic stakeholders may make a very significant contribution to the preparation of Australia’s case in some disputes.

Because of the potential diversity in the level and nature of stakeholder interests, it is not possible to say that there is a model, or template, for engagement with domestic stakeholders that could apply in every dispute.

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11 The degree of resource commitment is determined on a case-by-case basis in consultation with the stakeholder(s). It could, for example, involve market research being provided by the stakeholder(s).
Significant contributions to the preparation and conduct of a case, whether as a complaining or a defending party, can come from unexpected directions. For these reasons, it is important to adopt a flexible approach, as well as a positive view, to stakeholder involvement in a dispute. Above all, a dispute needs to be managed in a way that encourages the commercial sector and any other interest groups identifying with a measure at issue to become involved in – and contribute to – domestic consultative processes.
PART THREE

IN THEORY: IDEAS, ANALYSIS, CRITICAL PERSPECTIVES
Introduction

The principle of ‘procedural fairness’ (also called ‘fundamental fairness’, ‘due process’ and ‘natural justice’) broadly requires administrative and judicial proceedings to be fair. Decision-makers in administrative and judicial systems attempt to achieve procedural fairness by exercising their discretion in a fair manner and by developing procedural or evidentiary rules explaining how rights, duties, powers and liabilities are administered. As will be seen in this chapter, the principle of procedural fairness is difficult to define precisely, because the demands of fairness depend on the circumstances. For example, it may be necessary to balance an individual’s interest in pursuing additional procedures with the value and cost of such procedures. Thus, in particular circumstances, procedural fairness might require a full hearing, whereas in other circumstances, basic notice and the right to speak might be sufficient. Considerations of procedural fairness might also conflict. For instance, parties’ rights to be heard and give evidence might weigh in favour of last minute introduction of evidence. On the other hand, the need for equality between the parties and their right to have sufficient time to respond and challenge evidence might weigh against such evidence. Discretion is required to resolve such conflicts.

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1 Peter Nygh and Peter Butt (eds), Australian Legal Dictionary (1997) 929, 1129.
2 See, eg, Schweiker v McClure, 456 US 188, 200 (1982) ‘due process is flexible and calls for such procedural protections as the particular situation demands.’
3 See, eg, Matthews v Eldridge, 424 US 319 (1976) (where it was held that an evidentiary hearing is not required prior to the termination of Social Security disability payments).
Procedural fairness is a necessary component of any legal system seeking legitimacy and effectiveness.\(^6\) The dispute settlement system of the WTO is no exception. Indeed, the potentially vast political and economic effects of trade liberalisation and protectionism, the opportunity for Members to challenge domestic regulations of sovereign governments using WTO rules, and the power differences between WTO Members all heighten the need for fair rule enforcement in the WTO. Howse suggests that 'the further removed the decision-maker is from responsibility to a particular electorate, the greater the extent to which legitimacy depends on procedural fairness itself.'\(^7\) This reaffirms the increased need for procedural fairness in the WTO.

WTO procedural fairness obligations are of two types. The first are obligations imposed within the WTO dispute settlement system, such as rules that protect fairness between the parties in panel proceedings. The second are obligations imposed on WTO Members to ensure procedural fairness in their domestic legal systems, such as GATT Article X:3(a), which requires that all ‘laws, regulations, decisions and rulings’ of the kind described in Article X:1 be administered ‘in a uniform, impartial and reasonable manner’. While both types of procedural fairness obligations are important and could be the subject of a WTO dispute settlement proceeding, for reasons of space, this chapter is restricted to the first type.\(^8\)

This chapter begins by examining the content of the principle of procedural fairness and its justification, focussing on procedural fairness as it is understood in Australian administrative law, but also placing the specific meaning of the principle in the WTO within its wider context in domestic law and international law generally. It then addresses how procedural fairness may be used in WTO disputes as a guide to the conduct of proceedings before WTO Panels and the Appellate Body (described for convenience as WTO Tribunals in this chapter).

**Procedural Fairness as a Principle**

A common feature of legal principles such as procedural fairness is that they are uncertain in scope and meaning. This problem is compounded by the fact that principles are often described in imprecise and conflicting ways in the relevant

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\(^6\) ‘To be effective, the system must be seen to be effective. To be seen as effective, its decisions must be arrived at discursively in accordance with what is accepted by the parties as the right process. In procedural terms: humanity wants reassurance that the emerging legal system is capable of ensuring both stability and progressive change.’ Thomas Franck, *Fairness in International Law and Institutions* (1995) 7–8.


literature and in decisions of the WTO Tribunals and other international tribunals. For the purposes of this chapter I have chosen to examine procedural fairness as a principle of WTO law and customary international law, and as a general principle of law. This categorisation is important as it affects the legal basis for using principles in WTO dispute settlement.

**A General Principle of Law**

Procedural fairness is a general principle of law recognised by civilized nations within the meaning of Article 31(1)(c) of the *Statute of the International Court of Justice* (ICJ Statute). Although there are a number of doctrinal controversies about how general principles of law are identified, broadly speaking, procedural fairness is a general principle of law since it reflects a standard that is common to all or a majority of the various systems of municipal law and it is applicable either to international legal relations or to legal relations (domestic and international) generally.

The principle of procedural fairness has its origins in domestic law. The objective of the principle of procedural fairness in the domestic context has been described in the United States as being ‘to prevent arbitrary government, avoid mistaken deprivations, allow persons to know about and respond to charges against them, and promote a sense of the legitimacy of official behaviour’. Procedural fairness was embedded in English common law and was expressed in Article 39 of the Magna Carta, whereby the King promised that ‘[n]o freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed … except by the legal judgment of his peers or by the law of the land’. The concept of ‘the law of the land’ as used in this provision incorporated the notion of procedural fairness. In the context of English criminal law, Walker defines procedural fairness as ‘[t]he conduct of legal proceedings according to established principles and rules which safeguard the position of the individual charged’.

The common law scope of procedural fairness has expanded well beyond criminal law, to other court proceedings (such as civil proceedings), as well as proceedings of other tribunals and administrative and arbitral bodies.

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10 Murray’s Lessee v Hoboken Land & Improvement Co, 59 US (18 How) 272, 276 (1856).
A broader Australian definition reflecting the potential scope of procedural fairness is ‘[p]rinciples developed at common law to ensure the fairness of the decision-making procedure of courts and administrators’.

In the United States, procedural fairness is similarly broadly defined as the ‘conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights, including notice and the right to a fair hearing before a tribunal with the power to decide the case’.

Procedural fairness is often protected in particular tribunals by written rules of procedure, which the decision-maker typically interprets in light of the objective of fairness. Where the rules are silent on a particular procedural issue, the decision-maker must decide it in light of that objective.

The Fifth and Fourteenth Amendments of the United States Constitution incorporate the principle of procedural fairness (termed ‘due process’). The jurisprudence on those amendments draws a distinction between procedural due process (which concerns the rights to notice, a hearing, counsel, appeal, and a fair and objective hearing) and substantive due process (which requires ‘legislation to be fair and reasonable in content and further a legitimate governmental objective’).

In Australia, as in many other Commonwealth legal systems, it is often considered that procedural fairness involves at least two basic rules: the ‘hearing rule’, and the ‘bias rule’. These rules concern procedural due process, according to the United States framework. That is, they are concerned with how the decision is made rather than its substance. The bias rule precludes a decision-maker from acting in circumstances in which a fair-minded observer would have a reasonable apprehension of bias, arising for example from the decision-maker’s interest in the outcome. This rule is based on the maxim *nemo debet esse judex in propria sua causa* (no one can be a judge in his own cause). In *R v Sussex Justices; ex parte McCarthy*, Lord Hewart CJ stated that it was ‘of fundamental importance that justice should not only be done, but should manifestly be seen to be done’.

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15 Bryan Garner (ed), *Black’s Law Dictionary* (7th ed, 1999) 516–517. United States due process analysis separates ‘non-fundamental rights’ which must only meet the ‘mere rationality’ test (ie the government action must be pursuing a legitimate government objective with a means rationally related to that objective) and ‘fundamental rights’ which must meet the ‘strict scrutiny’ test (ie the government action must be necessary to meet a compelling government objective).
16 *Chief Constable of North Wales Police v Evans* [1982] 3 All ER 141.
17 Nygh and Butt, above n 13, 126.
18 [1924] 1 KB 256, 259.
The hearing rule requires a decision-maker to provide to persons whose interests may be adversely affected by a decision an opportunity to present their case. This rule encompasses requirements such as: providing reasonable notice of the decision; informing affected persons of the case to be met; disclosing adverse material so that it may be challenged; and permitting representation at hearings. The hearing rule is based on the maxim *audi alteram partem* (to hear the other side). Prior notice that a decision adversely affecting interests is going to be made promotes equality between the parties. This prior notice must contain 'sufficient particulars of the allegation and the grounds upon which it is based' to permit an understanding of 'the nature and ambit of the allegation' and therefore a response. This particularisation also assists the decision-maker by defining the most contentious issues. Obviously in order to be meaningful the notice must give the recipient sufficient time to prepare a response. The requirement to disclose adverse material is also a fundamental aspect of procedural fairness. The disclosure of this material can help prevent the use of inaccurate or untested material. In some circumstances, the non-disclosure of adverse material could constitute a breach of both the hearing rule and the bias rule. Apart from promoting equality between the parties, the hearing rule also ensures that there are sufficient facts on the record for the decision-maker to arrive at a proper conclusion.

More recently, a third rule has been suggested as a basic component of procedural fairness. Under this ‘no-evidence’ rule, decision-makers must base their decisions on ‘logically probative evidence.’ Therefore, decision-makers must provide reasons that are adequate and intelligible and that deal with the substantial points raised by the parties. In addition, decision-makers must base their findings on material that shows the existence or non-existence of facts consistent with the finding, and decision-makers’ reasons must not be internally contradictory. This rule is more clearly directed towards the

19 Nygh and Butt, above n 13, 546.
21 *Arafura Seafood Products Pty Ltd v Landos* (1988) 16 ALD 519, 520.
25 Nygh and Butt, above n 13, 788; *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 31 ALR 666.
fairness of the decision itself (in other words, substantive due process) than
the hearing and bias rules. However, it is arguably a logical consequence or
extension of the other two rules: 'If the decision were determined by the toss
of a coin or some other arbitrary procedure, the 'right' to a hearing would be
illusory. If the decision could be based on unreasoned prejudice, the *audi alteram
partem* rule would be pointless'.28

The Administrative Decisions (Judicial Review) Act 1977 (Cth) (ADJR Act),
sets out the grounds for judicial review of the actions of administrators for
breach of procedural fairness in Australian Commonwealth law. The ADJR
Act was designed, among other things, to codify the common law grounds for
judicial review,29 and does not create new procedural fairness duties.30 When
procedural fairness applies, and what it requires, continues to be governed by
the common law. The ADJR Act provides for review on breach of both the bias
and hearing rule in ss 5(1)(a)31 and 6(1)(a),32 and review on the ground of 'no
evidence' is provided for in ss 5(1)(h), (3)33 and 6(1)(h), (3).34

29 'The Act applies to decisions of an administrative character made under an enactment. An aggrieved
person may apply for judicial review of the decision on several grounds, including: that the decision
breached the rules of natural justice, the procedures required to be observed in making the decision
were not observed, the decision maker did not have jurisdiction or the decision was not authorised,
the decision involved an error of law whether or not the error appears on the face of the record, the
decision was affected by fraud, there was no evidence or other material to justify the decision, there
was an improper exercise of power or the decision was otherwise contrary to law: ss 5(1), 6(1).':
Nygh and Butt., above n 13, 28.
30 Kooa v West (1985) 159 CLR 550.
31 '5(1) A person who is aggrieved by a decision to which this Act applies that is made after the
commencement of this Act may apply to the Federal Court or the Federal Magistrates Court for an
order of review in respect of the decision on any one or more of the following grounds: (a) that a
breach of the rules of natural justice occurred in connection with the making of the decision'.
32 '6(1) Where a person has engaged, is engaging, or proposes to engage, in conduct for the purpose
of making a decision to which this Act applies, a person who is aggrieved by the conduct may apply to the
Federal Court or the Federal Magistrates Court for an order of review in respect of the conduct on any
one or more of the following grounds: (a) that a breach of the rules of natural justice has occurred, is
occurring, or is likely to occur, in connection with the conduct'.
33 '5(1) A person who is aggrieved by a decision to which this Act applies that is made after the
commencement of this Act may apply to the Federal Court or the Federal Magistrates Court for an order
of review in respect of the decision on any one or more of the following grounds: ... (h) that there was no
evidence or other material to justify the making of the decision; ... (3) The ground specified in paragraph
(1)(h) shall not be taken to be made out unless: (a) the person who made the decision was required by
law to reach that decision only if a particular matter was established, and there was no evidence or other
material (including facts of which he or she was entitled to take notice) from which he or she could
reasonably be satisfied that the matter was established; or (b) the person who made the decision based
the decision on the existence of a particular fact, and that fact did not exist.'
34 '6(1) Where a person has engaged, is engaging, or proposes to engage, in conduct for the purpose
of making a decision to which this Act applies, a person who is aggrieved by the conduct may apply to the
Federal Court or the Federal Magistrates Court for an order of review in respect of the conduct on any
one or more of the following grounds: ... (h) that there is no evidence or other material to justify the
making of the proposed decision; ... (3) The ground specified in paragraph (1)(h) shall not be taken to
be made out unless: (a) the person who proposes to make the decision is required by law to reach that
decision only if a particular matter is established, and there is no evidence or other material (including
facts of which he or she is entitled to take notice) from which he or she can reasonably be satisfied that
the matter is established; or (b) the person proposes to make the decision on the basis of the existence of
a particular fact, and that fact does not exist.'
The circumstances in which procedural fairness must be accorded and the specific requirements of procedural fairness vary considerably among different municipal legal systems. Even within a given municipal legal system, the need for and content of procedural fairness depend on the context and may vary, for example, between judicial, quasi-judicial, and administrative decision-makers, and between criminal and other cases. The flexibility in procedural fairness and its ‘undefined boundaries … make it a legal chameleon. It straddles the divide between legislative and judicial power, between executive discretion and judicial values.’

Bin Cheng, in his classic study of general principles of law, states in relation to the bias rule, that the principle that no one can be a judge in his own cause is firmly established and extends beyond purely judicial proceedings. He considers that the hearing rule has similar acceptance and requires notice and full opportunity to be heard. In relation to the no-evidence rule, Cheng states that the decision-maker ‘must not neglect the examination of any relevant point of fact or law. The decision must be based on the law applicable, and should be a proper judgment.’ All of these rules are aspects of what is sometimes described as the duty of a court or tribunal to follow ‘judicial procedure’ or ‘act judicially’.

A Principle of Customary International Law

Procedural fairness is a principle of customary international law since there is evidence both of established, widespread and consistent practice on the part of states respecting procedural fairness, and that states believe that this practice is required by law. Therefore the principle satisfies the two traditional elements required for customary international law, a source of international law according to Article 31(1)(b) of the ICJ Statute.

This chapter is primarily concerned with procedural fairness requirements imposed on international tribunals in international proceedings. Therefore I will first consider the obligations that customary international law impose on international proceedings. However, customary international law also imposes analogous requirements on states in conducting domestic proceedings. Therefore, second I examine the requirements on states in conducting domestic proceedings since this may shed light on the content of procedural fairness at the international level.

36 Cheng, above n 23, 279.
37 Ibid 258, 279, 291.
International Proceedings

International courts and tribunals have long recognised that they must ensure procedural fairness in their proceedings. The principle is most obviously reflected in the numerous procedural fairness protections contained in the constituent instruments establishing various international courts and tribunals, which can be said to reflect customary international law. For example, in the case of the ICJ, procedural fairness considerations are reflected in ‘various provisions concerning the composition of the Court, the equality of the parties at different stages of the proceedings, and impartiality of the Court both in the conduct of the Court proceedings and in its judgment.’ The statute of the ICTY also contains numerous protections for procedural fairness, and the ICTY Appeals Chamber has explained that ‘each party must be afforded a reasonable opportunity to present his case — including his evidence — under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent’.

Even absent express provision in the relevant constituent instrument, international law recognises that procedural fairness must be afforded the parties in an international adjudication. As the ICJ has stated, international judicial bodies are ‘bound to remain faithful to the requirements of [their] judicial character.’ Collier and Lowe, discussing the emerging ‘body of international procedural law’ applicable to the settlement of international disputes, list ‘certain fundamental principles, all deriving from the notion of a fair trial, which must be observed’. They identify audi alteram partem as the most basic of these principles. The other fundamental principles they highlight relate to the rights of the parties to proper deliberation by a duly constituted tribunal, a reasoned judgment, and ‘an impartial tribunal free from corruption and … proceedings free from fraud’.

Domestic Proceedings

Under customary international law, the doctrine of denial of justice requires states to administer justice relating to aliens according to a minimum standard.
Denial of justice incorporates the principle of procedural fairness to some extent, including substantive and procedural aspects of due process. Procedurally, denial of justice can take a number of forms and arise at any stage of the legal process. Put simply:

If the courts or other appropriate tribunals of a state refuse to entertain proceedings for the redress of injury suffered by an alien, or if the proceedings are subject to undue delay, or if there are serious inadequacies in the administration of justice … there will be a ‘denial of justice’ for which the state is responsible.

Substantively, the state will be held responsible if an alien is injured by ‘gross defects in the substance of the judgment itself’ or by a ‘manifestly unjust judgment’. However, an error that does not rise to the level of manifest injustice is not a denial of justice. Generally, a denial of justice will require a ‘serious and intentional perversion of justice’ as a result of bad faith. Discrimination against the alien or obvious maliciousness will be particularly probative in this regard.

Several human rights treaties impose procedural fairness obligations on states, including the Geneva Convention relative to the Treatment of Prisoners of War, the International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the American Convention on Human Rights. These might reflect or codify

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45 See Mondev International Ltd v United States of America, Notice of Arbitration, 1 September 1999, 80–87; AO Adede, ‘A Fresh Look at the Meaning of Denial of Justice under International Law’ (1976) 14 Canadian Yearbook of International Law 73, 91.


49 Harvard Research in International Law, ‘The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners’ (Special Supplement 1929) 23 American Journal of International Law 131, 173 (art 9).

50 See Azizian, Davitian and Baca v United Mexican States, Award, 1 November 1999, 5 ICSID Reports 269, [103].


54 Signed 4 November 1950, 213 UNTS 221, art 6 (entered into force 3 September 1953).

principles of customary international law. These procedural fairness protections vary, even when they concern a particular type of hearing (such as a criminal trial). The ICTY has noted that variations in the understanding of concepts such as procedural fairness and fair trial mean they must be understood in the ‘context of the legal system in which the concepts are being applied’. The Statute of the ICC refers to both ‘the principles of due process recognized by international law’ and ‘the norms of due process recognized by international law’. However, even though their contours will vary, these provisions reflect a common requirement that proceedings be independent, impartial and fair.

In addition, a number of bilateral trade or investment treaties contain standards regarding the treatment of aliens, and these often include procedural fairness requirements. One of the most common standards included in such treaties is ‘fair and equitable treatment’. According to Sacerdoti, this requires a state ‘to attain a certain result by whatever appropriate means: it requires that the State acts in such a way in all circumstances and instances so that the foreigner be always treated in a fair and equitable manner’. Commentators disagree as to whether this standard provides protection beyond that imposed under customary international law. Article 5(2)(a) of the United States Model Bilateral Investment Treaty (BIT) of 2004 states:

‘fair and equitable treatment’ includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world …

Article 1105(1) of NAFTA requires each NAFTA state to accord ‘investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security’.  

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57 Article 17(2).
58 Article 20(3)(b).
60 Giorgio Sacerdoti,‘Bilateral Treaties and Multilateral Instruments on Investment Protection’ (1997) 269 *Recueil des Cours* 251, 345.
61 Christoph Schreuer,‘Fair and Equitable Treatment in Arbitral Practice’ (2005) 6 *Journal of World Investment and Trade* 357, 357.
62 Sacerdoti, above n 60, 341.
63 For the negative see ibid 341, n 143. For the affirmative see FA Mann,‘British Treaties for the Promotion and Protection of Investments’ (1982) 52 *British Yearbook of International Law* 241, 243–44; Kenneth Vandevelde, *United States Investment Treaties: Policy and Practice* (1992) 76; Schreuer, above n 61, 364.
64 <http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf>
Several claims have been made under this provision. The two most instructive claims in relation to the principle of procedural fairness are Mondev and Loewen, both of which were brought against the United States. In Mondev, the investor claimed that a denial of justice arose from ‘flagrant procedural deficiencies’ in proceedings before the Massachusetts Supreme Judicial Court and ‘gross defects in the substance of the judgment itself’, which it characterised as arbitrary and capricious. The NAFTA tribunal set out the following standard for assessing whether a particular decision regarding a NAFTA investment involves a denial of justice:

[T]he question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment.

In Loewen, the NAFTA tribunal found that the conduct of a Mississippi trial ‘was so flawed that it constituted a miscarriage of justice amounting to a manifest injustice as that expression is understood in international law’. It considered that the NAFTA and general international law standards are breached where there is a “[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety”. The tribunal pointed to the inappropriate ‘manner in which the large and excessive verdict was constructed by the judge and the jury’. The tribunal also considered that the judge had failed to protect the foreign litigant from clear discrimination and prejudice, as a result of repeated references to the investor’s foreign nationality, suggestions that the investor only did business with whites, and appeals to class-based prejudice. The tribunal held that ‘the whole trial and its resultant verdict were clearly improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment’.

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68 Mondev International Ltd v United States of America, ICSID Case No ARB(AF)/99/2 (Notice of Arbitration dated 1 September 1999) [135].
69 Mondev International Ltd v United States of America, ICSID Case No ARB(AF)/99/2 (Award dated 11 October, 2002) [127] (some footnotes omitted).
70 Loewen Group, Inc and Raymond L. Loewen v United States of America, ICSID Case No ARB(AF)/98/3 (Award dated 26 June 2003) [54].
71 Ibid [132].
72 Ibid [122].
73 Ibid [56]–[70].
74 Ibid [137].
A Principle of WTO Law

Procedural rules of WTO dispute settlement are designed to promote … the fair, prompt and effective resolution of trade disputes.75

Procedural fairness is also a principle of WTO law in the sense of being a key abstraction or generalization of certain WTO rules. This section considers how certain provisions in the Dispute Settlement Understanding (DSU) and related instruments incorporate a principle of procedural fairness, using the framework commonly employed in Australian administrative law and more generally in Commonwealth domestic legal systems: the bias, hearing and no evidence rules. These rules are intended to promote the fair resolution of trade disputes, primarily by protecting the procedural interests of the disputing parties. In most instances, these interests take precedence over the interests of other stakeholders, such as WTO Members that are not party to the dispute, states that are not WTO Members, Non-government Organisations (NGOs), and corporations. This explains certain aspects of WTO disputes that may not be strictly required in achieving procedural fairness, such as the secrecy of Panel and Appellate Body proceedings (DSU Articles 14.1 and 17.10) and the confidentiality of submissions (DSU Article 18.2).

Several provisions in the DSU incorporate procedural fairness by imposing some form of the bias rule, which precludes decision-makers from acting where there is a reasonable apprehension that they may be biased, for example because they have an interest in the outcome.76 In particular, the DSU makes clear that panelists should be free from any actual or perceived bias. Article 8.2 of the DSU states that panelists should be selected with a view to ensuring their independence, and Article 8.3 states that citizens of Members involved in the dispute (as parties or third parties) should not serve as panelists unless the parties agree otherwise. Article 9 states that panelists serve in their individual capacity and that Members shall ‘not give them instructions nor seek to influence them as individuals with regard to matters before a panel’. However, it is interesting to note that persons who are currently servants of their governments may nevertheless be panelists (Article 8.8). Prevention of bias may be achieved, in practice, through the opportunity afforded to disputing parties to object to proposed panelists for compelling reasons (Article 8.6).

At the appellate level, a similar but not identical version of the bias rule applies. Article 17.3 of the DSU states that members of the Appellate Body ‘shall be unaffiliated with any government’ and that they ‘shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest’. However, unlike at the Panel stage, a member of the Appellate

75 Appellate Body Report, United States – FSC, [166].
76 Nygh and Butt, above n 13, 126.
Body that is a citizen of a disputing party is not prevented from serving on the division hearing the appeal. Nevertheless, the apprehension of bias may be diminished through the appointment of Appellate Body members for terms of four years (Article 17.2) and through the requirement that the Appellate Body membership be broadly representative of WTO Membership (Article 17.3).

Communications between a decision-maker and a party or witness without the knowledge or consent of other parties may create a reasonable apprehension of bias (and may also breach the decision-maker's duty to afford a fair hearing). Accordingly, Article 18.1 of the DSU prohibits ex parte communications with WTO Tribunals concerning matters under consideration by them. In addition, paragraph 10 of the Panel working procedures in Appendix 3 of the DSU requires parties' and third parties' presentations, rebuttals and statements in the first and second substantive meetings to be made in the presence of the parties.

The DSB also adopted Rules of Conduct to maintain the integrity and impartiality of dispute settlement proceedings in the WTO reflecting the bias rule. They apply to panelists, Appellate Body members, arbitrators, experts, members of the Secretariat assisting panels or arbitrations, and members of the Appellate Body Secretariat. The governing principle of these rules is that these persons should be ‘independent and impartial, [and] shall avoid direct or indirect conflicts of interest’. Accordingly, they should ‘disclose the existence or development of any interest, relationship or matter that that person could reasonably be expected to know and that is likely to affect, or give rise to justifiable doubts as to, that person’s independence or impartiality’. An illustrative list of the information to be disclosed is contained in Annex 2 of the rules and includes financial, professional and other active interests. Any material violation may be challenged and may result in disqualification of the person from the proceedings, or other appropriate action. This provides a way of enforcing the bias rule.

The Working Procedures for Appellate Review, which are issued by the Appellate Body pursuant to DSU Article 17.9, reiterate some of these aspects of the bias rule. In particular, Appellate Body members are prohibited from: accepting employment or pursuing activities inconsistent with their duties.

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78 See also Cheng, above n 23, 284, 288.
81 Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, Rule II.
and responsibilities (Rule 2(2)); accepting or seeking instructions from any organisation or private source (Rule 2(3)); and participating in decision-making or exchange of views when a material violation of an obligation of independence or impartiality has occurred (Rule 11).

The hearing rule requires the decision-maker to give to those people who may be directly affected by a decision prior notice of the case they have to answer, as well as the time and place of the hearing. The DSU contains a number of provisions reflecting this requirement. For example, the complainant must give sufficient notice to the respondent of the basis of its claim, the key facts it alleges, and the legal principles on which it relies. This is achieved through the request for consultations (DSU Article 4.4),\(^83\) the request for the establishment of a Panel (often known as the ‘Panel request’) (Article 6.2), and written submissions to the Panel (Articles 12.6, 15.1). The Appellate Body has held that, pursuant to Article 6.2, a Panel request must specifically identify the relevant WTO provisions and, in some cases, the relevant sub-provisions.\(^84\) The Panel request must also clearly ‘identify the specific measures at issue’. As the Panel’s terms of reference typically incorporate the Panel request (Article 7), the terms of reference also ‘fulfil an important due process objective — they give the parties and third parties sufficient information concerning the claims at issue in the dispute in order to allow them an opportunity to respond to the complainant’s case.’\(^85\) Similarly, at the appellate level, the appellant must make clear the alleged errors of the Panel in the Notice of Appeal,\(^86\) and support its position through arguments contained in a written submission.\(^87\) Again, the Appellate Body has made clear that it will dismiss claims that are not properly set out in the Notice of Appeal, on the basis that the respondent did not receive sufficient notice of the case it had to meet.\(^88\)

The hearing rule also encompasses, unsurprisingly, a requirement that the decision-maker give interested parties an opportunity to be heard, including an opportunity to respond to adverse evidence. In the WTO dispute settlement system, parties are given an extensive opportunity to be heard. Particularly at the Panel level, the opportunities provided appear greater than in many other domestic or international tribunals. The standard working procedures set out

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in Appendix 3 of the DSU\(^8^9\) provide for Panels to conduct two substantive meetings with the parties, who are asked to provide written submissions and also to present their case orally.\(^9^0\) Panels also frequently provide questions to the parties (which may offer parties a chance to respond to adverse material), and parties typically provide written replies after due deliberation. More unusually, Panels submit to the parties in advance not only the descriptive parts of their reports but also their entire reasoning and conclusions.\(^9^1\) Parties then have an opportunity to comment on the report before it is finalised and circulated to Members (DSU Article 15).\(^9^2\) On appeal, the parties make written submissions and also represent their views at an oral hearing.\(^9^3\)

Finally, a number of DSU provisions can be seen as reflecting the requirement under the no evidence rule that a decision-maker deal with the substantial points raised by the parties. In particular, DSU Article 7.2 states: ‘Panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.’ In addition, DSU Article 12.7 requires Panels to ‘set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes’. Finally, DSU Article 17.12 provides that the ‘Appellate Body shall address each of the issues raised in accordance with [Article 17.6] during the appellate proceeding’, i.e. ‘issues of law covered in the panel report and legal interpretations developed by the panel’ raised by the parties.

**Using Procedural Fairness in WTO Disputes**

WTO Tribunals could use the principle of procedural fairness in one of two ways: either in an interpretative manner, to understand the meaning of particular WTO rule; or in a non-interpretative manner, as an independent substantive rule or a rule of procedure or evidence. In this section the interpretative use of the principle of procedural fairness is considered in relation to panel compliance with procedural fairness in DSU Articles 11 and 12.7. Following that the non-interpretative use of procedural fairness is considered in relation to inherent jurisdiction.

\(^8^9\) Panels must follow these procedures unless they decide otherwise after consultation with the parties: DSU, art 12.1.

\(^9^0\) See Cheng, above n 23, 293.

\(^9^1\) DSU, Appendix 3 (Working Procedures), [12].

\(^9^2\) The US and Chile have suggested making provision for interim reports at the Appellate Body stage in the Special Session of the DSB: Dispute Settlement Body, Special Session, ‘Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding on Improving Flexibility and Member Control in WTO Dispute Settlement’, TN/DS/W/52 (14 March 2003).

Panel Compliance with Procedural Fairness
(DSU Articles 11, 12.7)

The principle of procedural fairness can be used to interpret the WTO Agreements because DSU Article 3.2 states that the dispute settlement system serves ‘to clarify the existing provisions of the [covered agreements] in accordance with customary rules of interpretation of public international law.’ The customary rules of interpretation have been codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT). As a principle of WTO law, procedural fairness could be relevant in interpretation for determining the ordinary or special meaning under VCLT Article 31(1) or (4) if the term to be interpreted invokes that principle. Also as a principle of WTO law, procedural fairness could be relevant in interpretation for determining context or object and purpose under VCLT Article 31(1) and (2), for example because the context of a term may incorporate principles contained in the structure of the WTO Agreements or be reflected in a series of provisions. As a principle of customary international law or a general principle of law, procedural fairness would be primarily relevant in interpretation as one of the relevant rules of international law that must be taken into account under VCLT Art 31(3)(c). All WTO Members are bound by customary international law and general principles of law.

Introduction

Articles 11 and 12.7 of the DSU impose certain procedural fairness obligations on Panels. Article 11 of the DSU provides in part:

[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 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. …

This provision is the subject of a growing number of complaints at the appellate stage, and the Appellate Body has found that a Panel failed to comply with Article 11 on several occasions. In the following section, I concentrate on the primary procedural fairness aspects of Article 11, leaving to one side related issues such as whether the Panel applied the correct standard of review, which the Appellate Body also regards as falling within Article 11.95


95 See, eg, Appellate Body Report, US – Cotton Yarn, [74].
Article 12.7 of the DSU states that, unless parties reach a ‘mutually satisfactory solution’, a Panel is to ‘submit its findings in the form of a written report to the DSB’, which ‘shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes’. The Appellate Body has never found that a Panel violated the requirement to provide a basic rationale under Article 12.7, which may explain why far fewer appellants raise this provision in challenging a Panel’s decision.

In considering the procedural fairness implications of these provisions below, I first consider the requirement that the Panel address the matter before it, which is reflected in both Article 11 and Article 12.7. I then turn to the requirement in Article 11 that the Panel conduct an ‘objective assessment’.

**The Matter Before the Panel (Hearing Rule)**

Articles 11 and 12.7 of the DSU reflect different aspects of the hearing rule in relation to the Panel’s obligation to address the matter before it. On the one hand, pursuant to Article 11, a Panel must assess the ‘matter before it’, meaning that it cannot address issues that are not before it. On the other hand, pursuant to Articles 11 and 12.7, a Panel may be precluded from ignoring issues that are before it. I consider these two aspects.

In *Chile – Price Band System*, the Appellate Body agreed with Chile that the Panel acted inconsistently with Article 11 of the DSU by ruling on a claim that Argentina did not make. The Appellate Body based this finding on two main grounds. The first was that Article 11 requires a Panel to assess ‘the matter before it’, which excludes claims that are not before it. The second was ‘the requirement of due process’, according to which the Panel had to give Chile a right of response to any claims on which the Panel ruled. The Appellate Body explained the relationship between procedural fairness and Article 11 as follows:

> In making ‘an objective assessment of the matter before it’, a panel is … duty bound to ensure that due process is respected. Due process is an obligation inherent in the WTO dispute settlement system. A panel will fail in the duty to respect due process if it makes a finding on a matter that is not before it, because it will thereby fail to accord to a party a fair right of response.

The reference to due process (procedural fairness) as an ‘inherent’ obligation in WTO dispute settlement suggests, contrary to the Appellate Body’s explicit reasoning, that Panels must accord procedural fairness and that the Appellate Body may review the Panel’s conduct in this regard independently of Article 11 of the DSU.

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96 Appellate Body Report, *Chile – Price Band System*, [177].
97 Ibid [173].
98 Ibid [174].
99 Ibid [175].
In *US – Gambling*, the Appellate Body had to determine whether the Panel’s consideration of a defence submitted by the United States in its second written submission violated Article 11 by depriving Antigua and Barbuda of a full and fair opportunity to respond. The Appellate Body held that the principle of procedural fairness may oblige a Panel either to refuse to consider a defence to which ‘the complaining party had no meaningful opportunity to respond’,\(^{100}\) or to adjust its timetables to allow additional time to respond.\(^{101}\) That procedural fairness arises through the inherent obligations and jurisdiction of WTO Tribunals as judicial bodies is demonstrated by other cases regarding the right to respond. In these circumstances, it is not possible to fall back on the words ‘the matter before it’ in Article 11 to explain why Panels must ensure procedural fairness. The challenged arguments were clearly before the Panel, so the connection to Article 11 is tenuous.

The other side of the coin, in relation to the ‘matter before’ the Panel, is whether the Panel may decline to address certain aspects of the dispute such as claims or arguments in its report. This issue also relates to Article 12.7 of the DSU. In *Mexico – Corn Syrup (Article 21.5 – US)*, the Appellate Body stated that the duty to provide a ‘basic rationale’ in Article 12.7 of the DSU:

> reflects and conforms with the principles of fundamental fairness and due process that underlie and inform the provisions of the DSU. In particular, in cases where a Member has been found to have acted inconsistently with its obligations under the covered agreements, that Member is entitled to know the reasons for such finding as a matter of due process.\(^{102}\)

The Appellate Body suggested that a Panel’s obligation to address issues raised by the parties could derive from Article 7.2 of the DSU and ‘the requirements of due process’,\(^{103}\) in addition to Article 12.7. Indeed, the hearing rule, as part of the principle of procedural fairness, requires decision-makers to provide reasons for their decisions and to take into account the submissions of interested parties.

Even though a Panel must provide a basic rationale for its findings in accordance with Article 12.7 and must assess the matter before it under Article 11, the Appellate Body has recognised Panels’ discretion to leave unanswered certain claims. In other words, the Appellate Body has endorsed Panels’ use of judicial economy in appropriate circumstances. In *US – Wool Shirts and Blouses*, the Appellate Body made clear that Article 11 does not oblige a Panel to address

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\(^{100}\) Appellate Body Report, *US – Gambling*, [273].

\(^{101}\) Ibid [272].


\(^{103}\) Ibid [49].
every claim before it: \textsuperscript{104} ‘A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute’. \textsuperscript{105}

Where does this leave procedural fairness? In some cases, it seems that procedural fairness requirements will preclude the exercise of judicial economy. In the recent appeal, \textit{EC – Export Subsidies on Sugar}, the Appellate Body referred to the requirement in Article 11 of the DSU that Panels ‘make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements’. \textsuperscript{106} The Appellate Body found that the Panel failed to comply with this requirement and exercised ‘false judicial economy’ because, in not ruling on certain claims under Article 3 of the SCM Agreement, the Panel ‘precluded the possibility’ of the complainants obtaining the special remedy under Article 4.7 of the SCM Agreement available for successful claims under Article 3. \textsuperscript{107} Again, the link to Article 11 of the DSU is rather tenuous. The Panel’s procedural fairness obligations and the Appellate Body’s right to review them in the exercise of its inherent jurisdiction might have provided a more logical basis for this decision.

\textbf{Objective Assessment (Bias and No Evidence Rules)}

Certain aspects of the no evidence rule also appear to be reflected in Article 11 of the DSU, as interpreted by the Appellate Body. In the appeal in \textit{EC – Hormones}, the European Communities claimed that the Panel ‘disregarded or distorted’ evidence it had submitted, as well as that of scientific experts, and therefore did not make an objective assessment as required by Article 11. \textsuperscript{108} The Appellate Body found that an Article 11 violation involves more than ‘simply an error of judgment’. Rather, it involves ‘an egregious error that calls into question the good faith of the panel’. \textsuperscript{109} A Panel that deliberately disregards or wilfully distorts or misrepresents evidence will fail to make an objective assessment as required by Article 11, causing a denial of ‘fundamental fairness, … due process of law or natural justice’. \textsuperscript{110} In the case at hand, the Appellate Body found that the Panel had misinterpreted some evidence, but that this did not rise to the level of arbitrarily ignoring or manifesting distorting evidence in violation of Article 11. \textsuperscript{111}

\textsuperscript{105} Ibid 19.
\textsuperscript{106} Appellate Body Report, \textit{EC – Export Subsidies on Sugar}, [330], [331].
\textsuperscript{107} Ibid [335].
\textsuperscript{108} Appellate Body Report, \textit{EC – Hormones}, [131].
\textsuperscript{110} Ibid [133].
\textsuperscript{111} Ibid [253(e)].
The Appellate Body’s interpretation of Article 11 in EC – Hormones accords with the ordinary meaning of ‘objective’ and suggests a high threshold for appellate review of panels’ factual findings, similar to the standard required to demonstrate a denial of justice in international law. It appeared to read the requirement of an objective assessment as relating to both the fairness of the Panel’s decision (substantive due process as in the no evidence rule) and the fairness of the Panel proceedings, in the sense of whether the Panel deliberately disregarded or wilfully distorted evidence, suggesting it might be acting contrary to the bias rule. The Appellate Body has adopted a similar approach in several subsequent reports.\(^{113}\)

In US – Wheat Gluten, the European Communities claimed that, contrary to Article 11, the Panel ‘did not have sufficient facts before it to justify its conclusion’ that a report by the United States International Trade Commission (ITC) provided ‘an adequate, reasoned and reasonable explanation with respect to “profits and losses”’.\(^{114}\) In this regard, the European Communities challenged the Panel’s ‘appreciation of the evidence’ rather than the legal standard it applied.\(^{115}\) The Appellate Body found that the Panel’s requests for clarification of the report, and its reliance on these clarifications in making its decision, were ‘at odds’ with its conclusion that the ITC report itself adequately explained its assessment of profits and losses.\(^{116}\) Accordingly, the Appellate Body found that the Panel acted inconsistently with its obligations under Article 11. Therefore, it reversed the Panel’s finding that the ITC report provided an adequate explanation with respect to profits and losses.\(^{117}\)

Unfortunately, the Appellate Body failed to explain its conclusion in US – Wheat Gluten in terms of its earlier discussion in EC – Hormones about the nature of Article 11 violations. Did the Panel deliberately disregard, refuse to consider, wilfully distort or misrepresent the evidence before it? Did it commit an egregious error calling into question its good faith? It is far from evident that the Panel’s error reached this level. Therefore, perhaps the Appellate Body read EC – Hormones as providing an example of what kind of conduct might constitute an Article 11 violation, rather than setting a minimum threshold for

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\(^{114}\) Appellate Body Report, US – Wheat Gluten, [158], [159].

\(^{115}\) Ibid [149].

\(^{116}\) Ibid [158], [161].

\(^{117}\) Ibid [163].
Article 11 violations. Alternatively, perhaps Article 11 applies differently to panels when reviewing determinations by domestic authorities rather than engaging in primary fact-finding themselves. In any case, in *US – Wheat Gluten*, the Panel’s error seems to have been that its reasons were internally contradictory, which is closer to the no evidence rule recognised in some domestic common law jurisdictions than to the higher denial of justice standard under international law. The Appellate Body appeared to adopt a similarly low standard in finding a violation of Article 11 by the Panels in *US – Oil Country Tubular Goods Sunset Reviews* and *US – Anti-Dumping Measures on Oil Country Tubular Goods*.

As mentioned earlier, the Appellate Body has read into Article 11 of the DSU certain obligations regarding the standard of review adopted by a Panel (an issue not addressed here). In particular, Panels are not to conduct a de novo review of the evidence before domestic authorities in making determinations regarding the imposition of unilateral trade remedies. However, although *US – Wheat Gluten* and *US – Oil Country Tubular Goods Sunset Reviews* involved Panels reviewing determinations made by domestic authorities in relation to trade remedies, the Appellate Body did not fault the standard of review that these Panels applied. Accordingly, it is difficult to understand the apparent discrepancy between these disputes and the Appellate Body’s statements regarding the apparently high threshold for finding that a Panel has failed to make an ‘objective assessment’ under Article 11.

**Procedural Fairness and Inherent Jurisdiction**

The principle of procedural fairness could also be used in a non-interpretative manner as part of the exercise of WTO Tribunals’ inherent jurisdiction. Put simply, WTO Tribunals are international judicial tribunals because in determining claims, WTO Tribunals act independently, much like international courts. They fix the boundaries of the dispute before them, marshal the evidence, determine the appropriate law, apply that law to the facts, and reach a decision. If they are judicial, this means that they have inherent jurisdiction, like all other international judicial tribunals. This inherent jurisdiction (also termed incidental or implied jurisdiction) flows from the nature of the judicial function and does not depend on specific provisions in the instrument establishing the court or

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118 Claus-Dieter Ehlermann, ‘Six Years on the Bench of the “World Trade Court”: Some Personal Experiences as Member of the Appellate Body of the World Trade Organization’ (2002) 36 *Journal of World Trade* 605, 622.


121 See eg Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, [190].
tribunal.\textsuperscript{122} It gives WTO Tribunals the powers necessary for the maintenance or exercise of the tribunal’s subject-matter jurisdiction and judicial function to resolve procedural matters.

In several early appeals, the Appellate Body lamented the lack of detailed working procedures for Panels to resolve procedural issues.\textsuperscript{123} However, the relevant provisions of the DSU and related instruments, in conjunction with the inherent jurisdiction of WTO Tribunals, have proved adequate to resolve most procedural matters arising to date.

WTO Tribunals have the ability to establish additional procedural rules where none are provided. In the case of Panels, this ability is created by Article 12.1 of the DSU, which provides for the Panel to follow the working procedures in Appendix 3 of the DSU unless it ‘decides otherwise after consulting the parties to the dispute’, and by paragraph 11 of Appendix 3, which allows Panels to follow ‘[a]ny additional procedures specific to the panel’. The Appellate Body has read the DSU, and Appendix 3 in particular, as granting to ‘panels a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated’.\textsuperscript{124} The Appellate Body’s emphasis on procedural fairness highlights that, in an appropriate case, the Appellate Body might conclude that the Panel failed to accord procedural fairness in establishing an additional procedural rule.\textsuperscript{125}

In the case of the Appellate Body, Rule 16(1) of the Working Procedures for Appellate Review is even more explicit in according additional discretion linked to the requirements of procedural fairness. That rule states:

In the interests of fairness and orderly procedure in the conduct of an appeal, where a procedural question arises that is not covered by these Rules, a division may adopt an appropriate procedure for the purposes of that appeal only, provided that it is not inconsistent with the DSU, the other covered agreements and these Rules.

In addition, Rule 16(2) of the Working Procedures for Appellate Review grants the Appellate Body the specific ability to modify time periods upon request ‘where strict adherence … would result in a manifest unfairness’.

As an example of Rule 16(1) in operation, the Appellate Body in one appeal held two oral hearings instead of one because a member of the Division hearing the

\begin{thebibliography}{9}
\item \textsuperscript{123} Appellate Body Report, \textit{EC – Bananas III}, [144]; Appellate Body Report, \textit{India – Patents (US)}, [95]; Appellate Body Report, \textit{Argentina – Textiles and Apparel}, n 68.
\item \textsuperscript{124} Appellate Body Report, \textit{EC – Hormones}, n 138.
\item \textsuperscript{125} Appellate Body Report, \textit{Australia – Salmon}, [272].
\end{thebibliography}
appeal passed away after the first oral hearing. The Appellate Body decided to hold the second hearing 'in the interests of fairness and orderly procedure in the conduct of this appeal'.\textsuperscript{126} In another instance, the Appellate Body used Rule 16(1) to adopt detailed additional procedures for the receipt and consideration of \textit{amicus curiae} briefs.\textsuperscript{127} The Appellate Body has also used Rule 16(2), for example, to grant additional time for the filing of a third participant’s submission due to the time needed to translate the appellant’s submission from Spanish to English.\textsuperscript{128}

Some commentators have suggested that international tribunals may be required to exercise their inherent jurisdiction, in particular to apply general principles of law that protect fundamental procedural norms.\textsuperscript{129} Carlston states:

\begin{quote}
Express provisions are usually made in rules of procedure with a view to safeguarding fundamental procedural rights … While observing the provisions of the instrument — which is the basic law for the tribunal — the tribunal is also expected to conform its operations to the basic procedural norms. Accordingly, the fundamental procedural norms, whether or not expressly provided for, comprise (1) ‘certain fundamental rules of procedure’ (2) which are ‘inherent in the judicial process,’ and (3) generally recognized in all procedure.\textsuperscript{130}
\end{quote}

Thus, even in the absence of the specific WTO provisions allowing WTO Tribunals to determine procedural matters to ensure procedural fairness, WTO Tribunals would have this function.\textsuperscript{131} This explains WTO Tribunals’ approach to certain procedural issues that might not be regarded as falling specifically within Article 12.1 of the DSU or Rules 16(1) and 16(2) of the Working Procedures for Appellate Review.

One aspect of providing interested parties an adequate opportunity to be heard, as part of the hearing rule, is the right to representation at hearings. Neither the DSU nor the related WTO dispute settlement instruments declare Members’ right to representation by private counsel as opposed to solely government officials. In \textit{EC – Bananas III}, the Panel refused to admit private lawyers to a Panel meeting, on grounds including: their presence could give rise to confidentiality concerns; some parties objected to their presence; and the Panel had already

\begin{footnotes}
126 Appellate Body Report, \textit{US – Lead and Bismuth II}, [8].
131 Cf Panel Report, \textit{EC – Tariff Preferences}, [7.8] (relying on certain DSU provisions to explain this ‘inherent authority’).
\end{footnotes}
indicated that it expected only members of government to attend.\footnote{Panel Report, EC – Bananas III, [7.11].} This decision was not appealed. However, at the appellate stage of the same dispute, taking into account ‘customary international law [and] the prevailing practice of international tribunals’, the Appellate Body ruled that WTO Members may choose the members of their delegation appearing in oral hearings on appeal.\footnote{Appellate Body Report, EC – Bananas III, [10].} The Appellate Body also stated that the right to representation by counsel ‘may well be a matter of particular significance — especially for developing-country Members — to enable them to participate fully in dispute settlement proceedings’.\footnote{Ibid [12].} Private counsel have since become commonplace in WTO disputes.

A final example of WTO Tribunals properly exercising their inherent jurisdiction taking into account considerations of procedural fairness relates to the Appellate Body’s approach to ‘completing the analysis’. When the Appellate Body reverses a Panel’s finding on an issue, it may need to consider whether to complete the analysis of that issue itself. Sometimes the Appellate Body has declined to complete the analysis on the basis that it lacks a sufficient factual basis, keeping in mind the restriction of appeals under Article 17.6 of the DSU to issues of law.\footnote{See eg Appellate Body Report, Australia – Salmon, [117], [213].} However, a factual basis is not the only condition for the Appellate Body to complete the analysis. Sometimes the Appellate Body has regarded the outstanding issue as insufficiently related to the issues that the Panel addressed,\footnote{See eg Appellate Body Report, Canada – Periodicals, 24.} perhaps due to a concern that the parties would not have a sufficient chance to present arguments on the issue, contrary to the requirements of procedural fairness. In \textit{EC – Export Subsidies on Sugar}, the Appellate Body declined to complete the analysis, in part based on its view that, ‘in the absence of a full exploration’ of the relevant issues in the participants’ submissions, ‘completing the analysis might affect the due process rights of the participants’.\footnote{Appellate Body Report, EC – Export Subsidies on Sugar, [339].}

\textbf{Conclusion}

It has been claimed that procedural fairness ‘is probably the greatest contribution ever made to modern civilization by lawyers or perhaps any other professional group.’\footnote{P Atiyah, \textit{Law and Modern Society} (1983) 42.} Nevertheless, significant differences exist between notions of procedural fairness under different domestic systems and under...
domestic as opposed to international law. Certainly, procedural fairness plays an important role in the WTO and makes an important contribution to the legitimacy of WTO dispute settlement. In current WTO jurisprudence, the concept is necessarily broad but it is arguable that it is unnecessarily vague. Therefore, it would add to the stability and predictability of the multilateral trading system if the Appellate Body gave more guidance on the scope of the doctrine and its constituent elements. This chapter has used an Australian administrative law framework to understand procedural fairness. While transferring a framework from a particular system of law is not ideal, there is much to be said for WTO tribunals developing or adopting some sort of framework for their approach to procedural fairness. The full potential for the principle of procedural fairness in WTO disputes is still waiting to be realised.
This paper focuses on one key aspect of World Trade Organization (WTO) dispute settlement, the practice of the parties negotiating a solution rather than submitting the dispute to a panel for a ruling. Within certain careful limits, WTO dispute settlement encourages the parties to 'settle out of court'.

The paper endeavours to do three things: (1) review the evidence regarding the rate of negotiated solutions, (2) raise for consideration the criteria by which we might assess the quality of the solutions, and (3) identify the proposals for reforming the legal process for negotiating solutions. Throughout, its interest lies with the conditions under which WTO Members might benefit from negotiating solutions, while the integrity of the WTO agreements is maintained.

On what material can we rely? The Understanding on Rules and Procedures Governing the Settlement of Disputes (the Dispute Settlement Understanding, or DSU) regulates the process of negotiating solutions. But much of what takes place is not formalised. Consequently, the paper draws on academic research, particularly the recent, 'socio-legal' studies of negotiated solutions, as well as the discussion of dispute settlement policy among officials, advisors and observers at the WTO.

Why Negotiated Solutions?

In 1995, many welcomed the capacity of the system to provide authoritative rulings. In the ten years of operation since, the very high rate of appeal from panel reports has allowed the Appellate Body a genuine opportunity to develop a legal jurisprudence on the covered agreements as well as to review the dispute proceedings of various individual disputes. The system attracts interest because it appears to support the trend to legalisation, even the international

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2 So too the covered agreements contain counterpart dispute settlement provisions and the DSU provisions are subject to interpretation and elaboration by the panels and the Appellate Body.
‘rule of law’. On this view, international institutions are developing some of the attributes of the constitutional and legal orders that are established at the national level.

Yet, in the same period, the concept of governance has become a popular tool for understanding global regulation. It has been necessary to find a looser fit than the concepts of government or law for the fluid mix of forms, principles and actors that shapes global fields such as trade relations. On this view, we should be slow to treat WTO dispute settlement as a self-contained legal system. Trade regulation is criss-crossed by the interactions between international organisations, national governments, industry associations, multinational corporations, Non-government Organisations and others. The boundaries between the WTO and other forums are permeable; the WTO has developed its own repertoire of decision-making alternatives.

This fluid mix makes it difficult to decide on the right model for negotiated solutions. Should we, for example, compare WTO dispute settlement to domestic civil litigation in a country like Australia or to cases brought before another of the international tribunals such as the European Court of Justice? Or is it best still regarded as a process for mediating diplomatic or political relations between the representatives of the nation states that are members of the WTO?

However we characterise the process, it seems common ground that a healthy system will dispose of some disputes by negotiation. A domestic civil litigation system cannot function without a majority of disputes being settled ‘out of court’. The cases at the WTO will not be as numerous or as routine. Key cases, especially in the early years, are likely to demand adjudication. Nevertheless, the system needs to find ways to control the costs of disputation. Certainly, the WTO Directors-General have sought to encourage members to place more emphasis on negotiated resolution.

So we can say that a healthy proportion of negotiated solutions is good for the process efficiency of the system overall. Disputes that are fully litigated push up the economic transaction costs for all those involved. So too, international relations may be damaged by contentious and protracted litigation. At the WTO, disputes incur political costs.

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Negotiated solutions might also increase access to justice. It takes considerable resources to push a complaint through to a ruling and then face the task possibly of obtaining compliance. To be credible in negotiations, members have to be prepared to litigate all the way. It is difficult for many countries to do so on a sustained basis and for some it might not be possible at all. For some the question finally is whether they can threaten any substantial retaliation against a respondent who fails to comply within a reasonable time with a ruling.6

Therefore the opportunity to gain an early consensual solution might be seen as a test of the system’s access to justice. More so, if we accept the proposition of researchers Busch and Reinhardt that negotiated settlement is the stage at which complainants make the greatest gains.7 They suggest that once a ruling is required, respondents become more resistant. While it is true that complainants generally succeed at the rulings stage too, the win may be qualified, and of course they run the risk of an adverse decision.

**Explaining the Rate of Settlement**

*Information Available*

For these reasons, it is worthwhile studying the dynamics of the settlement process. However, while the rulings are written for all to see, the multi-factor and partly private process of negotiation is necessarily obscured from view.

How, first, are we to interpret the evidence regarding the rate of negotiated settlements? To assist, we have the benefit of the WTO’s own data concerning the overall rates and patterns of disposition.8 Looking at the WTO figures for disputes overall, it is clear that a majority of complaints do not reach a ruling. But only some of these are regarded as being resolved; some complaints then are held in abeyance, though without formally being withdrawn or lapsing; some remain active. So, as of June 2005, the WTO shows that 241 of 330 disputes have not reached a ruling. But only 74 are classified as settled. Further on, the WTO ‘state of play’ tables contain a list of 115 disputes ‘where consultations have been requested but no panel has been established nor settlement notified’.9

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9  For an example of a dispute so classified, see *Japan - Measures Affected Distribution Services*, WTO Doc WT/DS45/1 (1996) (Request for Consultation).
Of those 74 classified as settled, the WTO distinguishes 45 mutually agreed solutions from 28 other settled and inactive disputes.\(^\text{10}\) Its category of inactive disputes is said to include ‘cases where the contested measure has been terminated, a panel request withdrawn, etc’. So we begin to encounter problems deciding which disputes have been settled by negotiated solution. We might compare William Davey’s recent categorisation of the disposition of consultation requests. He distinguishes between those settled after a panel is established, those settled with notification to the Dispute Settlement Body (DSB), those settled without notification, those dropped for legal, political, commercial reasons and those dropped (which is where the trade remedy measure has not been imposed, or it has been removed or it has expired).\(^\text{11}\)

How for example should we characterise the dropping of a complaint because the respondent has removed a trade remedy measure (such as a safeguards restriction) or because the operation of the measure has expired? Does it matter why a dispute is not submitted to ruling?

To help us understand what is happening in negotiated solutions, we now have the benefit of several systematic studies. Using quantitative methods, these studies attempt to generalise about trends. It might be argued that each WTO dispute is sufficiently individual that generalisations are not helpful. Certainly, much valuable information is to be gained by using qualitative methods such as interviews in the field. The dispute settlement literature contains many studies of individual disputes.\(^\text{12}\)

As always with such studies, the ambitions of the quantitative studies can be questioned. The researchers have to make judgements when they are classifying or coding the various outcomes and we have already seen that this is not easy. They have to control for so many other variables when they are trying to identify the influence of those they expect to be the key independent variables. Nonetheless, if we are to make judgements about the process overall and weigh proposals for reform, I feel we must take the systematic studies seriously.

**Factors Associated with the Nature of the Matter**

When researchers model domestic civil justice dispute resolution, the first but not the only factor they take into account is the state of the law.

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\(^{10}\) For an example of a mutually agreed solution, see Brazil - Measures Affecting Patent Protection, WTO Doc WT/DS199/4 (2001) (Notification of Mutually Agreed Solution).

\(^{11}\) W. Davey, ‘The WTO Dispute Settlement System: The First Ten Years’ (2005) 8 Journal of International Economic Law 17, 45-6. In his view, the overall rate of pre-hearing disposition is better than the WTO figures might suggest.

\(^{12}\) See the bibliography compiled by B. Monroe, ‘WTO Dispute Settlement Procedure Bibliography’ (2003) 6 Journal of International Economic Law 745, B. Specific WTO DS cases.
The legal nature of the WTO regime does suggest that the phenomenon we are observing is ‘bargaining in the shadow of the law’.

The WTO gives greater specificity to substantive trade regulation than the General Agreement on Tariffs and Tax (GATT). This framework of law is sourced in the covered agreements, although the fuzziness of key provisions does mean that the rulings of the panels and the Appellate Body make an important contribution too. That they remain fuzzy is supported by the fact that the GATT 1947 (now 1994) still attracts the most litigation of all. Many parts of the agreements new in 1995 have not been litigated. Thus, the members are quite often still ‘playing for rules’.

So the researchers Busch and Reinhardt may have a point when they say that the parties are bargaining in the shadow of weak law. We might anticipate, as more cases are taken to the panels and further to the Appellate Body, that the members will receive firmer guidance. Uncertainty will remain, however, because the rulings are not necessarily definitive. For a variety of reasons, some decisions are quite case-specific or factually contextualised. They might be regarded more like arbitrations than precedents. Wherever the agreements’ standards are ‘open-textured’, it will be hard to predict how they will apply in any one situation. Where the standard of review allows for some deference to be afforded the respondent’s take on the measure, the result will be variable too.

The WTO framework is also more legalised because it stiffens the legal procedures for testing compliance. It has the virtue over the GATT of ‘automaticity’ and access to a ruling. Necessarily though, the process takes time and money, transaction costs that might be exploited by some to cause delay and increase pressure. In some cases, import relief or trade remedy measures for example, the respondents might reap their benefits before a ruling is obtained and justice is done. This effect may be felt post-ruling too if the respondents drag their heels through arbitration and compliance panels.

At the WTO, protracted disputes may incur political costs too. It has been suggested that some respondents have ‘paid back’ complainants with their own complaints. Certainly, rulings might establish a precedent that can be turned against a complainant’s own measures. In civil litigation systems, we know that

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the parties sometimes settle to keep disputes from the judges and to avoid what they see as unwarranted ‘judicial activism.’\textsuperscript{17} At the WTO, after Seattle, the Members also considered the costs to the political fabric of the system overall, if compliance with the agreements was to be pushed too hard.

In civil litigation, such legal uncertainties and risks point in the direction of a negotiated solution: transaction costs, the difficulty of predicting the ruling, the desire to avoid an adverse ruling and the limited value of a favourable ruling.\textsuperscript{18} However, for settlement actually to occur, the parties must also be able to find common ground, a range of possibilities within which they can strike a compromise.

In WTO disputes, it looks as if the complainants have a singular goal, which is to obtain the respondent’s compliance with the law. As the payment of compensation is only meant to be a temporary measure and not a substitute for compliance, the parties do not have available to them the divisible sums of monetary damages, where settlements are most likely to take place in civil systems. Still, the measures in dispute may still provide room for compromise. In seeking to explain which WTO disputes are more likely to settle, Guzman and Simmons make a distinction between matters that are continuous and discontinuous (or lumpy).\textsuperscript{19} Their particular claim is that matters allowing for graduated adjustment (such as the setting of tariff rates) can be compromised, while others that turn on principle (such as compliance with intellectual property rights or health standards) gravitate towards a ruling.

**Factors Associated with the Nature of the Parties**

Yet they find that the lumpiness or ‘all-or-nothing’ nature of some outcomes is really only an impediment to settlement when the respondents are democracies. So the nature of the matter interacts with the nature of the party. For these governments, the cost considerations include the impact on domestic politics and the attitudes of local interest groups.\textsuperscript{20} Guzman and Simmons make a further distinction between parliamentary and presidential democracies, the divide between legislature and executive an extra reason why a party


\textsuperscript{20} Domestic factors were among the factors Robert Hudec, the pioneer of such work, identified; see M. Busch and E. Reinhardt, ‘Testing International Trade Law: Empirical Studies of GATT/WTO Dispute Settlement’ in D. Kennedy and J. Southwick (eds), The Political Economy of International Trade Law: Essays in Honour of Robert Hudec (2002).
may wish to externalise the dispute and say that the international tribunal is responsible for the decision.

This last observation is clearly relevant to the United States government, which must also face internal legislative/administrative processes that entitle domestic industry groups to petition the executive (the United States Trade Representative) for action. In this vein, Greg Shaffer’s study makes a comparison with the way the European Communities approaches disputes.\(^{21}\) Of course, the European Communities has its own political complexities, such as the distance between the Commission and the national members and the disparities between the national members.

Many of the big WTO disputes have been between the United States and the European Communities and a number of their disputes, where the stakes were high, have been submitted to adjudication. The failure to resolve key clashes, extending to disputes that have received a ruling, could be regarded as a problem for the system. Yet we should note that a majority of US-EC disputes have been settled out of court.\(^{22}\)

### Evaluating the Pattern of Settlement

How are we to judge the quality of the negotiated solutions? For what we have been saying, the simplest measure is the overall rate of negotiated solutions. However, the preceding analysis suggests we need to be realistic and allow for structural factors that restrict the capacity to compromise. It is not realistic to expect settlement out of court in every case. Sometimes, too, parties are entitled to their ‘day in court’. Adjudication can be desirable and settlement out of court cannot be unconditionally endorsed unless we see what the solutions contain.

As the WTO is dedicated to trade liberalisation, could the measure of success be the extent to which the negotiated solutions contribute to liberalisation? The studies suggest that complainants are generally successful in obtaining ‘concessions’ from negotiated solutions.\(^{23}\) If, however, dispute settlement is to operate within the framework of trade law, the issue more precisely is whether both complainants and respondents are realising their entitlements under

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\(^{21}\) G. Shaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation* (2003). Greg Shaffer’s study includes a useful appendix describing the outcomes in the individual disputes.

\(^{22}\) Busch and Reinhardt, above n 15, 466. They do not think that this is due to the WTO’s stronger legal framework. They attribute the improvement in the rate over the GATT to the early TRIPs and GATS disputes. In their view, where the parties were prepared to settle, the all or nothing nature of these disputes suited them to the granting of full concessions.

the agreements. If the agreements represent a delicate balance of rights and obligations, granted one that is subject to further rounds of liberalisation, the respondents should be able to call on the allowances and exceptions in the agreements.24

Access to Justice

The distributional question is the pattern of gain from settlement. We must begin here by noting the selection effect. Some countries make much more use of the system as complainants than others; some countries appear only as respondents or not at all. In the last five years, the activism of big developing countries like Brazil and India has broadened participation. Some smaller developed countries, Australia for instance, are willing to prosecute complaints too. We are beginning also to see some interesting coalitions of co-complainants.

All the same, while there might be reasons why some countries are not showing up as litigants, including structural reasons such as the lack of a sufficient trade interest, any evaluation of the negotiated solutions is necessarily left with those who have entered the system.

Do those who enter the system obtain their ‘just desserts’? In civil litigation, the modelling must allow for the operation of various ‘extra-legal factors’. Classically, outcomes are affected by asymmetries of information and inequalities in bargaining power. Translated into the WTO dispute settlement system, we might expect that good legal resources will enable a country to argue a persuasive case. Likewise, a big market for trade or the prospect of other economic advantages (such as the grant of aid or preferences) will make others anxious to please. Are some complainants more likely to obtain their legal entitlements? Conversely, do some respondents concede more liberalisation than they are obliged?

The main findings come from the Busch and Reinhardt studies. Busch and Reinhardt find that the new WTO legal regime has improved over GATT the degree to which developing countries obtain full concessions through negotiated resolution as compared with partial or no concessions.25 This is a sound achievement, but at the same time, they find that the degree is not as much as the improvement experienced by developed countries, many of their gains being concessions from developing countries. Furthermore, on the whole, the successful developing countries are the larger and more resourceful ones.

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24 Shaffer, above n 14, argues that these allowances and exceptions are there deliberately so that members may also promote other (sometimes competing) public goods. They also create space for decisions to be made in another, more appropriate forum (which could be another international forum, domestic politics or the marketplace, for instance).

25 Busch and Reinhardt, above n 7, 723. They have done their own coding of outcomes along this measure.
Busch and Reinhardt attribute this disparity to the importance of good legal resources, which are resources to push a legal point at this productive stage of consultations. Overall, this finding supports the view that the system is now governed by rules. We might still regard legal resources as a kind of power, but they are the gentler form of persuasive power rather than the coercive form of trade retaliatory power. Countries might be able to acquire these resources.

The Public Interest

One of the attractions of settlement out of court is that it permits the parties to fashion solutions that extend beyond the confines of the legal matters in dispute. It provides the freedom for more creative or subtle solutions. For example, the respondent might add other concessions to the equation, possibly even as substitutes for compliance. For complainants, other considerations, such as the value of maintaining a good relationship with the respondent, moderate their demands.

In civil litigation, the main measure of the legitimacy of such agreements is the quality of the parties’ acceptance or assent. In many situations, the compromise is convenient to both sides, not just when the legal claim is genuinely doubtful.

There is however a public interest in legality too. Article 3.2 of the DSU allows for solutions that are mutually acceptable to the parties and consistent with the covered agreements. For reinforcement, Article 3.5 states that all solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements, including arbitration awards, shall be consistent with those agreements and shall not nullify or impair benefits accruing to members under those agreements nor impede the attainment of any objective of those agreements.

The requirement that solutions be lawful represents the interest the other members share in the observance of the rules, the integrity, even, of the multilateral rule-based system. The WTO promises members that their rights and obligations will not depend on their capacity to exercise power (whether persuasive, coercive or otherwise). So negotiated solutions are not just private affairs; public law and system integrity considerations apply too. Such issues are heightened post-ruling: a real dilemma is the extent to which the parties should be encouraged to negotiate over compliance (or implementation of a ruling), rather than go to arbitration and compliance panels and the suspension of concessions.26

Curtailing Compliance

Negotiated solutions might challenge legality either by curtailing or exceeding compliance. Where solutions curtail compliance, two disputes involving Australia present the dilemma. In US - Section 110(5) of US Copyright Act, hereafter trial and arbitration, the United States fashioned a deal with the complainant the European Communities to pay compensation and delay bringing its law into compliance. This deal offered no comfort to musicians and record producers from other countries, even if those countries had been third parties to the dispute. Australia has argued that these solutions should be non-discriminatory.27 In Australia - Automotive Leather, again after trial and arbitration, the respondent Australia reached an arrangement with the United States, whereby the Australian firm would pay back a substantial part, but not all, of its subsidies.28 While legally arguable, this solution was said to suit the respondent too because its corporations were facing the prospect of repayments in another case, should the position be established that compliance must be fully retroactive.

The WTO can find other ways to release pressure on the Members. If the concern is that compliance is too onerous, the members may exercise the discretion not to bring complaints at all. Such a collective discretion was exercised after Seattle, particularly in relation to issues of implementation under the TRIPs agreement. The moratorium gave developing countries a breathing space and the WTO time to recover politically.

Eventually, other avenues were found within the WTO Agreement to deal with troublesome issues. Notably, they produced the Doha Declaration on TRIPs and Public Health and the administrative system for the export and import of generic drugs. Some hard heads might argue that such a consensual declaration is actually a way to create leeway for non-compliance. Even so, we might say it is better done in this collective and principled way rather than by ad hoc compromises within the dispute settlement system. Waiver is the more explicit means to provide some exception to strict compliance.

Exceeding Compliance

Is legality threatened if settlement obtains concessions that are ‘WTO plus’? Generally, the goal of the complainants is to bring the respondents’ measures


28 Australia - Subsidies Provided to Producers and Exporters of Automotive Leather, WT/DS126; see the WTO summary at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds126_e.htm.
into compliance, though of course according to what the complainants think compliance demands. We can expect complaints to be genuine, even if they are selective in what they target, and not merely a stratagem to achieve additional liberalisation or some other objective again. After all, the WTO has processes for extending liberalisation multilaterally. For example, further rounds of negotiations are underway in respect of the General Agreement on Trade in Services and the Agreement on Agriculture.

Provided they remain consistent with the agreements, the Members are free to settle a deal away from the WTO or enter into a bilateral or regional agreement. For example, Article 1.1 of the TRIPs agreement permits members to provide more extensive protection for intellectual property. The possible complication here is that more resourceful or powerful members might press in these forums for other Members to concede interpretations of WTO provisions.29

Perhaps these initiatives might also be regarded as positive. They help to build the kind of regulatory conversations and interpretive communities which the system needs to minimise disputation.30 However, we might prefer that these interpretations were settled multilaterally, so that competing versions of the agreements do not proliferate.31 At the least, the Members should remain free to return to the WTO system if they want a ruling there.

Yet we do not expect the consultation phase within the dispute settlement system to serve the purpose of obtaining WTO-plus concessions. Hence we can sympathise with Donald McRae’s concern that, if the current WTO negotiation round does not make progress, the dispute settlement system may become a ‘surrogate for trade liberalisation negotiations’.32 The concern might be that the complainants over-reach in their claims, arguing non-compliance in order to obtain more liberalisation than the current agreements demand. The check on this is the capacity to seek a ruling.

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29 In other words, what is TRIPs-required and TRIPs-plus, see F. Abbott, ’The TRIPs-legality of measures taken to address public health crises: responding to USTR state-industry positions that undermine the WTO’ in D. Kennedy and J. Southwick (eds), *The Political Economy of International Trade Law: Essays in Honour of Robert Hudec* (2002).


32 McRae, above n 16, 3.
Procedures and Negotiated Solutions

In civil justice systems, if blockages threaten the efficiency of the system, policy makers look to procedural reforms; so too perhaps if disparities threaten the justice of outcomes. Of course procedures can only achieve so much. There must be goodwill between the Members and towards the system as a whole, indeed a commitment to democratic values such as participation among equals. Garrett is right to say that law has no magical properties; a process does not acquire legitimacy simply through legalisation.\(^3\) A major reason why parties play by the rules, and accept unfavourable results from time to time, is their mutual interest in the survival of the system overall.

Grounds for Complaint

Currently, proposals for improvements to the WTO system form part of the Review of the Dispute Settlement Understanding.\(^4\) The first set of procedures regulates the complainants. One objective is to ensure that they do not notify complaints, lacking a belief in their merits, but simply to put pressure on respondents to yield some concession. Of course such threats of litigation can be made without any notification to the WTO, but notification itself is an easy step requiring little substantiation. So complaints might be made to establish a ‘bargaining relationship’ with the respondent.

Article 3.7 of the DSU charges each Member, before bringing a case, to exercise its judgement as to whether action under the procedures would be fruitful. Martha recommends this check be used to screen complainants who bring cases without foundation, for instance when their interests under the agreements are not affected.\(^5\) But it seems that every Member is entitled to ask for a ruling.\(^6\)

The first real requirement of pleading comes with the request for consultations.\(^7\) Article 4.4 of the DSU states that all requests for consultations

\(^4\) For analysis, see the chapters in F. Ortino and E. Petersmann (eds), The WTO Dispute Settlement System 1995-2003 (2004). Some of these proposals were included in the Chairman’s Text, see Report of the DSB Chairman, WTO Doc TN/DS/9 (2003). But the Review continues past its original deadline.
shall be notified to the DSB and the relevant Councils and Committees. The request must be submitted in writing, giving reasons for the request including identification of the measures at issue and an indication of the legal basis for the complaint. This requirement goes to procedural fairness, affording the respondent some indication of the claim against it.

Yet the respondent cannot challenge the form and content of the request in an interlocutory proceeding. To create an incentive for legality, respondents have argued that the request for consultations should be the foundation for the request for the establishment of a panel and thus the panel's terms of reference. Article 6.2 says that the panel request should indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

In practice the two requests overlap in content, but the Appellate Body has not insisted that the request for the panel should be identical to the request for consultations. A concern here is to avoid the consultation stage becoming too legalistic. Consultations should be conducted in a spirit of diplomacy and compromise. If interlocutory challenges were possible, or if the main concern became the impact on the terms of reference of a panel, the consultation stage would become more formal. It would invite legal manoeuvres. Article 3.10 says it is understood that use of the dispute settlement procedures should not be intended or considered as contentious acts and that members should engage in the procedures in good faith in an effort to resolve the dispute.

So too, there are proposals that complainants be obliged to withdraw requests for consultations and that requests for panels lapse after a reasonable period of time. The Chairman of the Review proposes that, after eighteen months, the request for consultations should no longer serve as the basis for a request for the panel.

**Negotiations in Good Faith**

A second set of procedures regulates primarily the respondents. The objective is to ensure that they respond genuinely to the complainants' requests.

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Primarily, they allow both parties access to a ruling if either of them is not interested in negotiating. Article 4.3 of the DSU states that if the respondent does not respond to the request for consultations or enter into consultations, the complainant may proceed directly to request the establishment of a panel. If consultations fail to settle the dispute within sixty days, the complainant may also request the panel establishment. Failure to consult is not a ground for refusing to establish a panel.

To encourage negotiations, Article 4.2 states that each Member undertakes to accord sympathetic consideration to and afford adequate opportunities for consultation regarding any representations made by another Member concerning measures affecting the operation of any covered agreement taken within its territory. This seems wider than consultations at the WTO. More specifically, on receipt of a request for consultations, the respondent must enter into consultations in good faith with a view to reaching a mutually satisfactory solution (Article 4.3).

These exhortations are in line with the various declarations throughout the DSU, for example in Article 3.7 that a solution mutually acceptable to the parties and consistent with the covered agreements is clearly to be preferred. Again, Article 4.5 states that Members should attempt to obtain satisfactory adjustment of the matter in the course of consultations in accordance with the provisions of the agreement, which seems to place some onus on the complainant as well as the respondent to take the consultations seriously.

It is said the respondent cannot refuse consultations or place conditions on them going ahead. Yet the panels and the Appellate Body have made it clear they will not review the adequacy of consultations. Members can easily satisfy the requirement that consultations be held by going through the motions pro forma. One proposal is to give specification to the obligation to engage in consultations in good faith. But what would give that obligation substance? Would the system be enhanced if, as a sanction for not negotiating, the complainant was refused a panel or the respondent refused a ruling?

40 Developing countries may get extended time under Article 12.10 and it is proposed that these allowances be strengthened. More substantially, Article 4.10 says that in any consultations members should give special attention to the particular needs and interests of developing country members.


43 Eg. Horlick, above n 36.
In practice, consultations are commonly used for providing information and finding facts as well as clarifying and narrowing the legal issues in dispute. If they do not produce a solution, they may at least inform the panel request and assist the panel’s work. Information provided at the consultation stage may be recalled before the panel. Nonetheless, the panels are not to draw any inferences about the strength of a party’s case from its failure to provide information that backs its case at the consultation stage. If there are facts remaining to be found, the panel should proceed to do so.

Again, it would seem, a concern is to prevent the consultation phase becoming too legalistic. If it were to turn into a mechanism for discovery, it would put a premium on legal resources. It would create an opportunity for technical moves, possibly producing delays in resolution.

Likewise, Article 4.6 currently stresses that consultations are confidential and without prejudice to the rights of Members in any further proceedings. If the offers the parties make in consultations could be made public or raised against them at the panel, this apprehension might inhibit free negotiation.

**Scrubity of Solutions**

The public/private nature of negotiated solutions figures in another issue: whether the parties should be required to notify their solutions to the DSB. A check on the content of the negotiated solutions goes both to the quality or fairness of the agreement between the parties and to the public interest in their legality. Currently Article 3.6 of the DSU states that ‘mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements shall be notified to the DSB and the relevant Councils and Committees, where any Member may raise any point relating thereto’.

To increase the scrutiny of negotiated settlements, there is a proposal to make notification mandatory. The proposal is that the notifications should contain sufficient information relevant to the covered agreements to enable other Members to understand the solutions.

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46 Waincymer, above n 37, 4.2.12.


In receiving notification, the DSB cannot be expected to assume the role of the panel and determine the legalities of the solution. Indeed, it is worth noting that, when disputes are settled during panel proceedings, the requirements of Article 12.7 are minimalist too. The panel’s report is confined to a brief description of the case and to reporting that a solution has been reached. Nonetheless, the requirement of public notification would give the other Members, and those outside the WTO, an opportunity to check the consistency of the solutions with the agreements.49

However, there is a concern that publication would have a chilling effect on settlement. In civil litigation, the parties are generally allowed to keep the terms of their settlements confidential. They may have different reasons, but one for the defendant is to avoid giving a signal to other prospective plaintiffs that it is worth suing. There may also be political sensitivities associated with making concessions public. There are counterparts to these concerns among WTO Members.

System Support and Capacity Building

Legal Aid

An entirely voluntaristic approach relies heavily on the parties being able to make use of the process themselves. Even if the consultation stage is not plagued by tactical and technical objections, Busch and Reinhardt think already the normal practice of laying out the case is placing a premium on legal resources. For some Members, positive assistance is needed to enhance access. They find it hard to match the in-house expertise of the biggest countries, together with the use they can make of law firms and trade bars in preparing their written cases.50

The WTO has responded to this challenge already by establishing the Advisory Centre on WTO Law and running courses for officials. The developed countries have provided considerable funding too for technical assistance. The Appellate Body’s preparedness to allow legal representation is said to suit countries that cannot afford to maintain expertise in-house, especially in a mission located in Geneva (another current proposal is that consultations be conducted in the least developed countries’ own capital cities51). The assistance is most desirable for written requests and submissions; it would be another matter to allow private lawyers into the consultations.

49 A further question is whether the solutions should be enforceable through the same process as rulings; proposal from the EC. Cf. Horlick, above n 36.

50 According to Shaffer, above n 21, their governments may occasionally receive legal support from industry groups as well.

51 Kessie, above n 39.
Good Offices, Conciliation or Mediation

To assist with resolution, Members may request the application of good offices, conciliation or mediation. According to Article 5.1, these procedures are voluntary and the parties must agree to them. It is proposed that developing countries enjoy a right of access to these services.52

Co-Complainants and Third Parties

More disputes are attracting multiple parties. To bring forward some complaints, Members have formed coalitions and pooled resources. The DSU also makes provision for countries to put their views to a panel as third parties (Article 10.2). This may be the only feasible avenue for some countries. Yet the larger countries make good use of this facility too. In major disputes the list of third parties grows long.

As the parties multiply, the consultations become harder to arrange and agreement is less likely to be reached. Presently, DSU Article 4.11 says that the respondent may refuse a third party a part in the consultations, if the respondent does not agree that the claim of the third party to a substantial trade interest in the consultations is well-founded. A proposal has been made to entitle third parties to their own consultations.53

Effective Remedies

Despite the application of deadlines, it takes time to obtain a ruling and then, post-ruling, it may be difficult to obtain compliance. Proposals have been made to stiffen the remedies that may be applied to recalcitrant respondents. One is for retroactive damages, the aim being to deter respondents from obtaining the benefit of unlawful measures. If countries with small markets could call on support from others, it would give weight to the threat of retaliatory sanctions.54 On the other hand, some would like to see the payment of compensation become available as a substitute for compliance. This proposal picks up on the difficulties of compliance, but it would also give greater flexibility to negotiated solutions.

52 Petersmann, above n 48, proposal from Paraguay.
53 Ibid, proposals from Costa Rica and Jamaica.
54 Kessie, above n 39.
Conclusion

Finding further ways to promote early settlement of WTO disputes would seem a good policy. It minimises transaction costs and increases access to justice. However, before choosing to allow the parties greater leeway, we should also take an interest in the distribution of settlement outcomes and the public interest in observing the legalities of the WTO agreements. Finding the right balance will take some care.
The World Trade Organization (WTO) dispute settlement system, established in 1995 by the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), has proved to be robust and successful. Indeed the DSU, which applies to all matters reached during substantive WTO negotiation rounds unless specifically stated otherwise, gives the WTO more clout over its 149 Members than the largest global institution, the United Nations (UN) has over its 191 Members.

This paper compares dispute settlement in the WTO Dispute Settlement Body (DSB) with that of the International Court of Justice (ICJ) of the UN, focusing on specific factors such as jurisdiction, standing, practice and procedure, third party accessibility, precedent, appeals and enforcement. Of course, there is no suggestion that both bodies serve the same role, or that they have overlapping jurisdiction. However it is open to argument that the degree to which states resort to a dispute mechanism is reflective of its perceived value and effectiveness.

Both the ICJ and the WTO DSB are adjudicative bodies in public international law. The ICJ is the principal judicial organ of the UN, established in 1945 to settle disputes between Member States, and give advisory opinions to the UN organs and specialised agencies. It is composed of 15 judges, elected by the

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2 The DSU is one of many agreements reached in the Uruguay Round, together comprising The Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations. The full text of the DSU is at www.wto.org/english/docs_e/legal_e/final_e.htm.

3 It is acknowledged that the precursor to the ICJ was the Permanent Court of International Justice, in operation from 1922 to 1946.

4 Article 1 of the Statute of the International Court of Justice (Statute of the ICJ).

5 Advisory opinions are few and far between (only 25 in 60 years), and the only bodies authorised to request them are the five organs of the UN and the 16 specialised agencies.
UN General Assembly in conjunction with the UN Security Council, sitting independently of each other for nine-year terms. Judges are persons of “high moral character” who are jurists or judges able to be appointed to the highest judicial offices in their respective countries.\(^6\) There is no doctrine of *stare decisis* in the ICJ, and there is no right or avenue for appeal from its decisions.\(^7\)

The DSB was established under the DSU to settle disputes between Member States arising from alleged breaches of any of the WTO agreements. The DSB, in consultation with the parties, establishes *ad hoc* panels of experts in trade, economics and law to examine each dispute and automatically adopts panel findings unless there is a consensus against doing so, and unless there has been an appeal on a point of law. The Appellate Body is composed of seven permanent experts, appointed for four-year terms. Three serve on any one case, and most have a legal background.\(^8\) A reasonable period of time is given for the non-compliant Member to comply with the decision, in negotiation with the complainant State, failing which there is a mechanism for compliance panels and for DSB authorisation of limited trade sanctions.

Both the ICJ and the DSB have issued approximately ninety judgments to date. However the DSB has been in operation for only ten years while the ICJ has been in operation for 60 years. To avoid claims that the differences are historic and circumstantial, it is perhaps fairer to compare the experience of both bodies over the past ten years. Since 1995, 35 matters have been commenced in the ICJ. In 2005, 12 of these cases were currently pending, and half of these had been pending for five years or more. In this same time period, 332 complaints have been notified to the DSB.\(^9\) Of these disputes, 89 Appellate Body and Panel Reports had been adopted, 46 had been conciliated, and 28 had been settled or withdrawn. In 2005, there were 27 active panels.\(^10\)

Why is there such a massive difference in the volume of matters referred by states to these dispute settlement mechanisms? A comparative analysis of ten key dimensions of the two mechanisms is instructive.

### Composition

Both the ICJ and WTO Appellate Body and Panel members sit as individuals, not as representatives of their respective countries.\(^11\)

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\(^{6}\) Article 2 of the Statute of the ICJ.

\(^{7}\) This is an intentionally brief introduction to the ICJ, on the basis that the large majority of readers will already be very familiar with it. For those with less existing knowledge of the ICJ, see [www.icj-cij.org](http://www.icj-cij.org).

\(^{8}\) Again, this introduction has been intentionally brief. For more general information see [www.wto.org](http://www.wto.org).

\(^{9}\) As at 20 June 2005.

\(^{10}\) As at 15 June 2005.

\(^{11}\) Article 20 of the Statute of the ICJ and Article 8(9) of the DSU.
Article 2 of the Statute of the ICJ states:

The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.

In practice, ICJ judges have primarily been judges from national courts, barristers, law professors, senior legal advisers to national ministers, and cabinet members, most of whom have served in similar or related roles within the UN system.

Article 8(1) of the DSU states:

Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.

Article 17(3) of the DSU states:

The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally.

Therefore the WTO draws from a broader pool of expertise and experience than the ICJ. This gives the benefit of a cross-disciplinary perspective, which is particularly useful where the subject matter of the dispute is more about trade and economics than law. ICJ judges, on the other hand, need to undertake research and study on complex areas that are beyond their present area of expertise, and the absence of timeframes in ICJ decision-making makes it feasible for them to do this. A potential drawback of the use of trade policy experts and economists to settle WTO disputes is the risk that individuals without proper legal training may take into account extraneous factors that are not strictly relevant to a legal interpretation of the dispute. The role of the DSB is not to engage in judicial law-making, but merely to clarify the existing obligations of WTO members without adding to or diminishing their rights and obligations.\(^\text{12}\)

\(^{12}\) DSU Article 3.2.
**Scope**

The ICJ has a broader scope than the WTO. Judgments issued by the ICJ cover disputes concerning all and any issues of public international law between states, including for example territorial boundaries, the use of force, rights to asylum, rights of passage and economic rights.

Whilst these are of course broader in scope than the WTO, a trade organisation, this is not to say that WTO adjudicative bodies only consider trade issues. In trade disputes a number of non-trade issues may arise, including the environment, public health and labour, and the Appellate Body has been increasingly called upon to balance the competing demands of these delicate issues. Indeed, the lack of a similarly effective system of dispute settlement in these other areas increases the pressure on the DSB to tackle them.

It is ironic that protests against the WTO are often focused on the lack of consideration of these broader issues, and yet if the WTO does delve into them, there is criticism that it has exceeded its mandate.

**Jurisdiction**

Article 36 of the Statute of the ICJ states:

1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

2. The States parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
   a. the interpretation of a treaty;
   b. any question of international law;
   c. the existence of any fact which, if established, would constitute a breach of an international obligation;
   d. the nature or extent of the reparation to be made for the breach of an international obligation.

3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.
4. Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court.

5. Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.

6. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

Therefore the ICJ has voluntary jurisdiction,\(^\text{13}\) and for the ICJ to have jurisdiction all parties to a dispute must consent to this.\(^\text{14}\) At present, only 65 of the 191 UN Member States have declared their acceptance of the ICJ’s jurisdiction over them pursuant to the optional clause. A State that has made a declaration under the optional clause can remove consent at any time, removing consent to the ICJ’s jurisdiction. Further, acceptance of jurisdiction is reciprocal, so if in a dispute only one Member State has ceded jurisdiction to the ICJ, it will not have jurisdiction.

Article 3(1) of the DSU provides:

> Members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein.

Therefore the WTO has compulsory jurisdiction over its 149 Members. In practice, the DSB will establish a panel to determine a dispute unless there is consensus not to. The fact that a Member has requested a panel be convened in the first place means that there will never be consensus not to.

It can therefore be seen that although the UN has some 42 more Members than the WTO, the DSB has jurisdiction over 84 more Members than the ICJ. This gives the WTO significantly more clout, and may be the single most important factor in why the WTO dispute settlement system is so effective.

\(^\text{13}\) Effectively there are three ways the ICJ has jurisdiction over a dispute. The one referred to in the body of this article is the reciprocal effect of declarations, but, in addition to this, if a treaty provides for disputes under it to be settled by the ICJ, or the parties make a special agreement for their dispute to be settled by the ICJ, it will have jurisdiction.

\(^\text{14}\) It is noted that Article 36 of the Charter of the United Nations provides that the Security Council may recommend at any stage of a dispute appropriate procedures or methods of adjustment, however the Security Council cannot in doing so confer jurisdiction on the ICJ where the parties have not otherwise done so – *United Kingdom v Albania* (Corfu Channel case), 1949 ICJ Rep 4.
Standing

Standing is the right to bring an action before a body. The current focus is on the standing of Member States before the WTO and the ICJ. Third parties such as Non-Government Organisations (NGOs) will be considered separately below.

For a Member State to have standing before the ICJ in a contentious matter, it must establish a legal right or interest in the subject matter of their claims. A Member State cannot simply bring a case in the public interest, known as actio popularis. This was specifically stated in the South West Africa cases. Ethiopia and Liberia argued a legal right or interest from the principle of the ‘sacred trust of civilization’, that is, that all civilised nations had an interest in seeing that the conduct of the Mandate for South West Africa. The ICJ rejected this, saying:

... in order that this interest might take on a specifically legal character the sacred trust itself must be or become something more than a moral or humanitarian ideal. In order to generate legal rights and obligations, it must be given juridical expression and be clothed in legal form. The moral ideal must not be confused with the legal rules intended to give it effect. The principle of the “sacred trust” had no residual juridical content which could, so far as any particular mandate is concerned, operate per se to give rise to legal rights and obligations outside the system as a whole.

Conversely, in the WTO, a Member can bring an action against another Member for a breach of WTO obligations even where it does not claim to have suffered an injury. The mere existence of a breach is sufficient for another Member to have standing to bring a dispute based upon it. A WTO Member may be concerned about possible future injury from the specific measure, or may rightly be concerned about systemic questions involved in the dispute.

In practical terms however such actio popularis actions have not been brought in the WTO, perhaps due to the fact that while Members may bring such an infringement to the relevant Member’s attention, when it comes to putting in the kind of energy, time and money that is required to bring a matter before a DSB-appointed panel, States prefer to do this on matters that materially affect them rather than those of general principle/interests.

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16 In the General Agreement on Tariffs and Trade 1947 (GATT) there was a requirement that the contravention caused a Member State’s benefit to be impaired or nullified, but it was presumed that any contravention prima facie caused this. See for example GATT Panel Report regarding Recourse to Article XXIII, BISD 11S/95, 99-100, adopted 16 November 1992.
Practice and Procedure

Approach

Both the ICJ and the WTO bodies use adjudicatory methods, but the WTO dispute settlement procedures also include elements of conciliation. These conciliatory elements were initially more prominent, but since 1995 the procedures have taken on a more judicial nature, such that while not reaching full judicial delegation, the system is closer to adjudication than to diplomatic negotiation. Panel proceedings can be suspended at the request of the complaining party to enable the parties to explore possibilities for a mutually agreed solution. Conciliation has proved a useful alternative method for settling WTO disputes, with there being 46 conciliated settlements as compared to 89 Appellate Body and panel reports.

Mootness

In the ICJ, if the issue underlying the dispute is removed during the course of the matter being brought, the ICJ will refuse to make a ruling on it. An example is the Nuclear Tests Case, in which France made a statement that it would not conduct further nuclear testing in the Pacific. The ICJ refused to make a declaratory ruling for Australia and New Zealand that such tests were in breach of international law.

In the WTO, if a trade measure that forms the basis of a WTO action is discontinued after a panel is established and its terms of reference are in place, the panel will continue to decide whether the trade measure was indeed inconsistent with Member WTO obligations. This can be useful in serving as a guide to the relevant Members, and others, as to the trade measure in question, despite the absence of a doctrine of precedent.

Timeframes

There are no established timeframes in the ICJ, apart from those set by the ICJ during each particular dispute. In consequence, half of the 12 cases currently

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18 This happened, for example, in US – Import Measures on Certain Products from the European Communities, WT/DS165/R and WT/DS15/AB/R, adopted 10 January 2001. If instead the panel has not been established and terms of reference fixed before the trade measure being complained of has been terminated, the panel will not proceed to determine the matter – see US – Standards for Reformulated and Conventional Gasoline, WT/DS2/R, adopted 20 May 1996.
19 Article 43(3) of the Statute of the ICJ provides that written communications are made through the Registrar, in the order and within the time fixed by the Court. The more general provision is Article 48, which provides “The Court shall make orders for the conduct of the case, shall decide the form and time in which each party must conclude its arguments, and make all arrangements connected with the taking of evidence”. 
pending before the ICJ have been pending for five years or more. Taking the Republic of the Congo v. France (Certain Criminal Proceedings in France) as an example, the ICJ set a time limit for the filing of a Reply by the Congo by 10 December 2004. This has been extended three times, most recently to 11 January 2006, over a year later than the original time limit.\(^{20}\)

In strong contrast, the WTO has tight timeframes\(^{21}\) with built-in flexibility such that if a dispute proceeding runs its full course to a first ruling, it will take less than a year, and if there is an appeal, 15 months.\(^{22}\) Therefore an entire dispute can be raised, heard and decided in the WTO in the time it takes the Congo to put in a Reply to France’s Defence. There is also flexibility in the WTO timeframes, and whilst some panels take longer than the established timeframes, there is also ability to shorten them, on agreement of the parties.

This may also be a decisive factor in the relative success of the WTO DSB over the UN ICJ. Although it cannot be assumed that a quicker outcome is necessarily a better one, time is a consideration for States in making a decision whether to bring a dispute or not, particularly for developing nations, as time is directly proportional to cost.

**Third Parties**

First of all, the ability for third party Member States to intervene or otherwise become involved in a dispute is examined.

Article 62(1) of the Statute of the ICJ states:

> Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene.

Article 63 states:

1. Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith.
2. Every state so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it.

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21 It is acknowledged that prior to 1995, in the GATT, these tight timeframes did not exist.

22 For further details on the stages in the WTO dispute settlement procedure, see www.wto.org/English/thewto_e/whatis_e/tif_e/disp_e.htm.
The ICJ has interpreted these provisions narrowly. See for example the Tunisia/Libya Continental Shelf case, where Malta was refused intervention, and the Libya/Malta Continental Shelf case, where Italy was refused intervention. The result has been that there have only been nine requests under Article 62 and 63, and only four of these have been allowed. However not all ICJ judges are in favour of a narrow interpretation of Article 62, and Judge Oda Shigeru has published his views both in a journal, and in his opinions on the above two cases.

Article 10(2) of the DSU provides that:

> Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a “third party”) shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report.

Although this reads similarly to Article 62(1) of the Statute of the ICJ, it has been subject to a broad interpretation in the WTO. The Appellate Body referred to ‘substantial interest’ in EC – *Bananas III* and stated that no ‘legal interest’ is required for a Member to bring a case under the DSU.

As a result, WTO panels regularly allow third parties to join matters, and indeed it can be said that now most matters have third parties involved.

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23 *Tunisia v Libya*, 1981 ICJ Rep 3 (Continental Shelf case).
24 *Libya v Malta*, 1984 ICJ Rep 3 (Continental Shelf case).
27 The AB said “We do not accept that the need for a ‘legal interest’ is implied in the DSU or in any other provision of the WTO Agreement. It is true that under Article 4.11 of the DSU, a Member wishing to join in multiple consultations must have ‘a substantial trade interest’, and that under Article 10.2 of the DSU, a third party must have ‘a substantial interest’ in the matter before a panel. But neither of these provisions in the DSU, nor anything else in the WTO Agreement, provides a basis for asserting that parties to the dispute have to meet any similar standard. Yet, we do not believe that this is dispositive of whether, in this case, the United States has ‘standing’ to bring claims under the GATT 1994” – EC — *Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997 at para 132.
28 Indeed in some cases there are many third parties. The most third parties in any one case has been 21 – see EC—*Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/ (ongoing).
It must be said, however, that despite the WTO more readily allowing third party intervention in matters than the ICJ, third parties have less scope procedurally in the WTO than in the ICJ. For example, although a third party can make written submissions it is not able to attend panel meetings with the parties (although this was allowed in *EC-Bananas*). It is expected that the amendments to the DSU being negotiated in the Doha Round will result in expanded rights for third parties.

In relation to the broader notion of ‘third parties’, that is, non-state entities, neither the ICJ nor the DSB give non-state entities standing before them. However, both can receive information from them.

Article 34(2) of the Statute of the ICJ states:

> The Court, subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative.

The WTO generally is taking steps to increase the involvement of NGOs, pursuant to Article V of the Marrakesh Agreement Establishing the WTO, which provides that:

1. The General Council shall make appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO.

2. The General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO.

Article 13 of the DSU gives WTO panels the right to seek information:

1. Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate…

2. Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter...

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29 Article 34(1) of the Statute of the ICJ stated that “Only states may be parties in cases before the Court, and Article 1 of the DSU states that it applies to Members of the WTO Agreements, which are states.
The Appellate Body in the US – Shrimp Turtle case confirmed that panels can not only seek information but can accept unsolicited information and submissions from sources other than governments involved in the dispute.\textsuperscript{30} In EC – Asbestos, the Appellate Body developed an additional procedure for the acceptance and treatment of amicus briefs. It refused 14 submissions from NGOs that were not submitted under the additional procedure. This has been the subject of much debate and discussion, and the exact scope for acceptance of information from sources other than governments involved in the dispute may change in the future.

It has also recently decided that private lawyers may be involved in WTO disputes, opening otherwise confidential deliberations to private persons, albeit those under instructions by a Member.\textsuperscript{31}

Overall the WTO DSB is under far greater public pressure for transparency and accountability than the UN ICJ. This may be due to the increased profile and prominence of the WTO, causing it to be more open to public interest and thus, scrutiny.


The AB stated at paras 107-9: “That the Panel’s reading of the word ‘seek’ is unnecessarily formal and technical in nature becomes clear should an ‘individual or body’ first ask a panel for permission to file a statement or a brief. In such an event, a panel may decline to grant the leave requested. If, in the exercise of its sound discretion in a particular case, a panel concludes inter alia that it could do so without ‘unduly delaying the panel process’, it could grant permission to file a statement or a brief, subject to such conditions as it deems appropriate. The exercise of the panel’s discretion could, of course, and perhaps should, include consultation with the parties to the dispute. In this kind of situation, for all practical and pertinent purposes, the distinction between ‘requested’ and ‘non-requested’ information vanishes. A panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, whether requested by a panel or not. The fact that a panel may motu proprio have initiated the request for information does not, by itself, bind the panel to accept and consider the information which is actually submitted. The amplitude of the authority vested in panels to shape the processes of fact-finding and legal interpretation makes clear that a panel will not be deluged, as it were, with non-requested material, unless that panel allows itself to be so deluged. Moreover, acceptance and rejection of the information and advice of the kind here submitted to the Panel need not exhaust the universe of possible appropriate dispositions thereof. The Panel suggested instead, that, if any of the parties wanted to put forward these documents, or parts of them, as part of their own submissions to the Panel, they were free to do so.’ In response, the United States then designated Section III of the document submitted by CIEL/CMC as an annex to its second submission to the Panel, and the Panel gave the appellees two weeks to respond. We believe that this practical disposition of the matter by the Panel in this dispute may be detached, as it were, from the legal interpretation adopted by the Panel of the word ‘seek’ in Article 13.1 of the DSU. When so viewed, we conclude that the actual disposition of these briefs by the Panel does not constitute either legal error or abuse of its discretionary authority in respect of this matter. The Panel was, accordingly, entitled to treat and take into consideration the section of the brief that the United States appended to its second submission to the Panel, just like any other part of the United States pleading.”

\textsuperscript{31} For a critique of this decision see McCalley, P. “The Dangers of Unregulated Counsel in the WTO”, The Georgetown Journal of Legal Ethics, Washington, Vol 18 No.3, Summer 2005, pp975-986. McCalley’s issue is with the deference by the Appellate Body to the member states to regulate the private counsel they use. McCalley (and the American Bar Association) would prefer to see the promulgation of a code of ethics for private counsel in WTO dispute settlement proceedings.
Precedent

The ICJ and the DSB have a similar approach to precedent, with there being no formal doctrine and yet with previous decisions being considered important and valuable.

Article 59 of the Statute of the ICJ states:

The decision of the Court has no binding force except between the parties and in respect of that particular case.

Similarly, there is no formal doctrine of precedent in the WTO dispute settlement system. Where a panel considered that previous panel reports constituted “subsequent practice” pursuant to Article 31 of the Vienna Convention on the Law of Treaties,\(^\text{32}\) the Appellate Body reversed this, stating that previous panel reports are binding only with respect to the dispute they settle, and there is no doctrine of *stare decisis* in the WTO.\(^\text{33}\) However there is a view that previous panel decisions create a reasonable expectation\(^\text{34}\) on other WTO Members that a similar dispute in the future would be decided in a similar manner, and perhaps over time we will see a *de facto* doctrine of *stare decisis* taking form.\(^\text{35}\) This would be consistent with the stated purpose of the dispute settlement system being “a central element in providing security and predictability to the multilateral trading system”.\(^\text{36}\)

Decisions

The ICJ decides by majority,\(^\text{37}\) and judges in dissent may write a separate opinion.\(^\text{38}\) This may be compared to the WTO, where both panel and Appellate Body decisions are issued in a single report, so that it remains

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\(^{32}\) Article 31(3) of the Vienna Convention on the Law of Treaties, which entered into force on 27 January 1980, provides “There shall be taken into account, together with the context … (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation…”


\(^{35}\) Indeed according to Ladeur “The WTO and its forms of dispute settlement can also be seen as a form of emergence of a new cooperative law, the logic of which no longer follows classical international law but in the long term requires a process of variable linkage and comptabilization of differing legal norms and principles and creation of global procedural rules and principles developed in practice case by case, but not accessible to any general fixation” - Ladeur, K-H *Public Governance in the Age of Globalization*, Ashgate, London, 2004, p112.

\(^{36}\) DSU Article 3.

\(^{37}\) Article 55(1) of the Statute of the ICJ provides “All questions shall be decided by a majority of the judges present”.

\(^{38}\) Article 57 of the Statute of the ICJ provides “If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion”.
unknown whether there were unanimous or majority/minority views. Both deliberations and the views of individuals, if expressed, are kept confidential.  

**Appeals**

There is no right of appeal within or from the ICJ. Article 60 of the Statute of the ICJ states:

> The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.

There is a right of appeal on points of law from a DSB appointed panel, to the Appellate Body. This has been broadly used: of the 95 WTO panel rulings to May 2005, 65 have been appealed, which is 68 per cent. According to Iida, this is “good for reputational concerns of the government: it can show to its constituency that it has fought a good fight”.  

**Enforcement**

Enforcement is a highly controversial and difficult issue, due to the cornerstone of international law being the doctrine of state sovereignty.  

If a Member State does not comply with a decision of the ICJ, the ICJ cannot issue orders for enforcement of judgments. However, an application for enforcement can be made through the Security Council. With Permanent Members having a veto, there is little point in seeking enforcement of a judgment against a Permanent Member, or a country closely affiliated with a Permanent Member.

In contrast, the WTO dispute settlement system has an authoritative procedure leading to enforcement measures authorised by the DSB itself. The DSB, which comprises all Members of the WTO, is automatically taken to have adopted a panel report unless there is a consensus to reject it. In practice, as this requires the losing party to get all members, including the winning party, to

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39 Article 14 of the DSU provides “1. Panel deliberations shall be confidential…3. Opinions expressed in the panel report by individual panellists shall be anonymous”. Article 17(10) and (11) provide the same thing in respect of AB deliberations and reports.


41 It is acknowledged that globalisation and the increasing acceptance of humanitarian intervention are challenging the doctrine of state sovereignty, but at this time there is no supranational entity able to enforce compliance.

block the ruling, rulings are always adopted. Where a panel report is appealed, the Appellate Body report is likewise automatically adopted in the absence of a negative consensus. The party against whom recommendations have been made is obliged to notify its intentions for implementing them. A reasonable time for compliance can be agreed by agreement of the parties and approval by the DSB within 45 days of adoption of the report, or through arbitration within 90 days of adoption.

Failure to comply with recommendations within a reasonable time brings into play provisions for compensation or the suspension of concessions. Parties can agree to suitable compensation themselves or the DSB may authorise within 30 days of expiry of the implementation period a suspension of concessions or other obligations to the offending party. Provided it is feasible, concessions are suspended in the same trade sector as the dispute. Since its establishment, there have been fifteen such authorisations made.43

It may therefore be seen that although neither the ICJ nor the DSB has direct enforcement capacity, the DSB has measures to ‘hurt’ a Member that does not comply with recommendations adopted by the DSB in respect of it. This means its tools for encouraging compliance go beyond simple diplomatic pressure, and compliance through reciprocity, and this may be another significant factor in the relative success of the WTO dispute settlement system when compared to the ICJ in the UN.

Conclusion

From the above analysis, the principal elements that could account for the greater effectiveness of the WTO dispute settlement system over that of the UN are (1) compulsory jurisdiction; (2) established timeframes with built-in flexibility; (3) accessibility of disputes to third parties; and (4) authority for enforcement.

Is there cause for worry that the WTO dispute settlement system has gone too far? This has been suggested by Iida,44 who suggests that the Appellate Body has perhaps gone beyond its mandate to make new rules through its substantive interpretation of WTO agreements and deciding between conflicting provisions.45

43 These are pursuant to Article 22.7 of the DSU and Article 4.10 of the Agreement on Subsidies and Countervailing Measures.
The author, coming from a national legal system where, although the High Court is currently less activist, a large amount of law has been made by judges, is not overly concerned by judicial activism in the Appellate Body, seeing it instead as an essential means by which to ensure coherence and consistency in the developing body of WTO law, and ensuring that gaps in present agreements do not have to wait until the Doha Round is concluded. If the dramatic expansion in the length of negotiation rounds evidenced since 1947 in the GATT are continued in the WTO, and there is every sign they will be, the Doha Round could still be several years away from completion.
The WTO Dispute Settlement Understanding: How a Rules-Based System Benefits Australia

Introduction

Since its inception in 1995, the WTO has proven itself to be a welcome improvement, in both substance and the procedure, over its predecessor, the General Agreement on Tariffs and Trade (GATT 1994). Importantly, the WTO expanded topical coverage from traditional trade topics (such as customs and tariffs) to include a variety of items not traditionally covered in multilateral trading, such as food safety, services and intellectual property. Importantly, the agriculture sector has also become more tightly regulated with the addition of an Agreement on Agriculture. In addition, the introduction of a broader, more efficient, rules-based dispute settlement system dramatically altered the landscape of world trade by adding procedural certainty and fairness into the process.

The importance of the 149-member WTO to the global community is illustrated by the level of participation within the organisation. For instance, as at April 2005, the WTO had received 329 disputes, 189 panel requests and

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adopted over 150 panel and Appellate Body reports throughout its ten year existence,\(^5\) while the International Court of Justice (ICJ), by contrast, had delivered approximately 100 judgments and provided only 24 Advisory Opinions since 1946.\(^6\)

While there are many reasons behind the heightened level of participation in the WTO, the main motivation is the Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding or DSU).\(^7\) The DSU provides for compulsory and binding jurisdiction of trade disputes, and unlike any other international agreement, the WTO, through the Dispute Settlement Body (DSB), has the ability to enforce Members’ obligations and authorise the suspension of concessions to effectuate compliance.\(^8\) Thus, even though many WTO disputes are highly contentious and politicised, Members realise the benefits of the process and, for the most part, allow the DSB to complete its task without having the complainant instigate retaliatory measures. The high level of respect for the process can be evidenced by the fact that only twelve disputes out of the 329 filed have reached an Article 21.5 implementation panel (to decide if the Member violating their WTO obligations has complied). Of these, only eight were appealed to the Appellate Body, and only sixteen disputes involving seven matters have reached an Article 22.6 panel (to authorise retaliatory measures).\(^9\) The Members’ willingness to use and comply with the system as intended shows the confidence and faith they have in the WTO to effectively resolve disputes.

Being a relatively small player in the world trade scene, with only the thirteenth largest economy, Australia has done well to situate itself in a position of relative

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\(^5\) For a listing of WTO disputes, see <http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm>.

\(^6\) For a listing of ICJ decisions and advisory cases, see <http://www.icj-cij.org/icjwww/idecisions.htm>. One reason for the marginalisation of the ICJ is the fact that, by virtue of Article 36, parties must submit to the jurisdiction of the ICJ before the Court can begin proceedings. If a party does not submit to its jurisdiction, then the Court cannot hear the dispute.

\(^7\) See Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2.


\(^9\) See worldtradelaw.net, above n 7.
power. A substantial part of Australia’s status is derived from its active participation in developing the rules of international trade through its leadership in such activities as the Cairns Group, as well as its participation in other multilateral organisations. Australia continues to build upon its reputation as an active world player through its participation in the WTO dispute settlement process.

This brief paper uses two of the completed Australian-initiated disputes resolved through recourse to the DSU to highlight two important results stemming directly from the advent of a formal, legalistic and rules-based dispute settlement mechanism. First, the paper illustrates how the implementation of the WTO and corresponding DSU has helped Australia (and other small and mid-sized nations) realise its negotiated benefits of the multilateral trading system. Such a result was not possible under the more diplomatically based model of dispute settlement under the GATT, where decisions were taken by consensus, meaning either party could choose to adopt or not adopt each panel report. Second, the paper draws out the deeper significance of each dispute and analyses its value to the growing body of WTO jurisprudence. In the interest of brevity, the paper does not analyse every issue or disagreement between the parties in each dispute. Instead the paper provides a brief summary of the facts and rulings of each dispute before exploring a key procedural or systemic aspect of the disputes which have significantly impacted on WTO jurisprudence. In doing so, the paper illustrates how the DSU has allowed small and mid-sized nations to influence the jurisprudence of the WTO in a manner which far exceeds their trading size. The paper then concludes that Australia would not have been able to effectuate such results without a strong, legally driven and rules-based dispute settlement system.


11 The Cairns Group is an Australian-lead coalition of seventeen agricultural exporting countries. The Cairns Group accounts for one-third of all agriculture trade and the strength-by-numbers approach has succeeded in putting agriculture on the multilateral trade agenda and generally reforming trade in agriculture. For more on the Cairns Group, see <http://www.cairnsgroup.org/>.

Australia and the DSU: Benefits and Contribution

Australia's participation in world trade is long-standing, with the nation of twenty million having played a large part in the development of the modern world trading system. Australia has greatly benefited from the freer market access stemming from WTO membership, with Australian exports rising annually from $93 billion to over $152.5 billion since the WTO's inception. The sharp increase in trade has also significantly contributed to well over 250,000 jobs created in Australia during that short time-frame. In addition, one in five Australian jobs now directly or indirectly relies on exports. In order to realise the benefits that should stem from Membership in the WTO, Australia has used the DSU where it has deemed it necessary and appropriate to realise its negotiated benefits.

Australia is an active participant in the WTO dispute settlement system, in total filing seven complaints, with two of those disputes resolved by mutual agreement between the parties prior to the panel phase of the DSU. Two disputes, Korea–Beef and US–Lamb, required consideration by dispute settlement panels and the Appellate Body in order to resolve the complaint.


The Australian government recognises the important role the WTO plays in protecting and advancing Australia's interests, with Minister Vaile, stating: 'Australia has benefited significantly from the WTO system, including winning better access for beef exports to Korea and regaining access for prawns and lamb exports to the United States'. Mark Vaile, Minister for Trade, 'Push to Highlight Importance of the WTO to Australia' (Media Release, 8 November 2002) MVT145/2002, <http://www.trademinister.gov.au/releases/2002/mvt145_02.html> at 8 November 2005.

14 Minister Vaile, 'Push to Highlight Importance of the WTO to Australia', above n 13.


16 The two disputes are: India – Quantitative Restrictions on Agricultural, Textiles and Industrial Products (WT/DS91) (During consultations dated March 1998, India committed to removing quantitative restrictions on a range of products according to an agreed timetable); and Hungary – Export Subsidies in respect of Agricultural Products (WT/DS35) (In March 1996, Australia and five other complainants sought consultations with Hungary; a mutually agreed solution involving a time-limited waiver was reached after some of the complainants requested the establishment of a panel).


Three other disputes, US–Offset Act,19 EC–Geographical Indications20 and EC–Sugar21, have recently been decided by dispute settlement panels / the Appellate Body and are awaiting implementation by the responding parties.

Australia has also been the respondent in nine disputes, with two disputes, Australia–Salmon22 and Australia–Automotive Leather,23 reaching the panel stage.24 In both of those disputes, Australia was found to have acted inconsistently with its obligations under the WTO Agreements. While Australia failed to comply within a ‘reasonable period of time’ in both disputes, neither dispute resulted in retaliatory measures being sanctioned or applied against Australia.

Australia has also appeared as a third party in twenty-three disputes. While appearing as a third party does not give full complainant rights or rights of retaliation, it does provide access to the system and allows for a member to voice their opinion on the matter.25 Appearing as a third party, Australia has influenced the legal reasoning and interpretation of WTO obligations in a number of important disputes.26

24 The three cases settled before reaching the panel stage are: Australia – Anti-dumping Measures on Coated Woodfree Paper Sheets, WT/DS119 (In 1998, Switzerland sought consultations over anti-dumping measures taken by Australia. The case concluded at the consultation stage after the provisional anti-dumping measures at issue were terminated in the course of routine domestic anti-dumping processes); Australia – Measures Concerning the Importation of Salmonids, WT/DS21 (In November 1995, the US sought consultations regarding Australia’s salmon import restrictions. A panel was established on 26 June 1999 but the US requested its suspension pending the outcome of the case brought by Canada (WT/DS18, below). The dispute was resolved on 27 October 2000, when the US accepted Australia’s revised measures as consistent with WTO obligations); and Australia – Textile, Clothing and Footwear Import Credit Scheme, WT/DS57 (In 1996, the US complained against subsidies Australia maintained on leather products. The parties reached a settlement soon after the panel request.).
25 See DSU, above n 7, art. 10 on third parties and the protection of their interests. For further information, see Guohua, Mercurio and Yongjie, above n 12, 99-108.
The focus of this paper, however, will be the completed dispute settlement cases filed by Australia that required consideration by dispute settlement panels — Korea–Beef and US–Lamb. It is important to note that both disputes relate to agriculture, an especially important Australian export. Agriculture has always been and remains today an industry subject to high levels of protection and market distortion. The sector has long garnered special attention and rules in the multilateral trading system and, at present, is the subject of highly contentious negotiations during the Doha Round. Under the GATT dispute settlement system, even enforcing the minimal effective disciplines proved difficult. For example, throughout the GATT years, the European Communities was continuously found to be in violation of its obligations under the GATT and, for the most part, non-compliant with the rulings and recommendations of the panels. This can be shown by the fact that in 1980 alone, ten of the thirteen agriculture cases filed were against the European Communities as well as through the European Communities’ refusal to comply with other adverse GATT panel rulings regarding its agricultural policies.

The advent of a rules-based dispute settlement mechanism based on ‘negative consensus’ decision-making has reversed that trend and brought, in the words of Article 3.2 of the DSU, ‘security and predictability to the multilateral trading system’. Simply stated, the DSU has both simplified and strengthened the process of enforcing one’s rights in every sector, including agriculture. In order to illustrate how the legalistic, rules-based system of dispute settlement has benefited Australia, this paper will review and conceptualise the two disputes before analysing the importance of the contribution to both Australia and the emerging jurisprudence of the DSU.


**Korea–Beef**

The Dispute

The Korea–Beef dispute arose as a result of Korea’s refusal to remove its stabilisation system for domestic producers of beef, an important sub-sector of agriculture. In April 1999, Australia and the United States complained against a number of measures allegedly discriminating against imported beef. The complainants alleged, *inter alia*, that the following Korean measures violated its obligations under the WTO Agreements: the Korean measures requiring imported beef be sold separately from domestic beef; limitations on private operators buying and selling imported beef; subsidies on domestic beef producers; minimum wholesale pricing schemes; discriminatory labelling requirements, and more stringent record-keeping requirements for imported beef.

The dual retail system required small shops to sell either imported or domestic beef, but not both. In addition, stores selling imported beef were required to post signs reading, ‘Specialised Imported Beef Store’, and were subjected to much more stringent record-keeping requirements. Large retailers, such as supermarkets and department stores, were allowed to sell both domestic and imported beef, but were required to display the items for sale in separate locations and display cabinets and also required to store the beef in separate storage facilities.

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30 *Korea–Beef*, Panel Report, above n 17, paras 30-47.


32 *Korea–Beef*, Panel Report, above n 17, paras 8-29. By Korea’s own admission, it is one of the world’s largest beef-importing countries, importing 153,000 tons of beef in 1999 (compared to producing 240,000 tons locally). Daniel Pruzin, ‘US, Australia Agree with South Korea on Deadline to Implement WTO Beef Ruling’, 18 International Trade Reporter (BNA) (Washington), 26 April 2001, 661. In addition, Korea is the third largest beef export market for Canada. Australia, Canada, and New Zealand Seek to Join WTO Talks on Korean Beef’, 16 International Trade Reporter (BNA) (Washington), 24 February 1999, 307. In 1997, Canada exported 4,735 tons of beef and veal to Korea. Ibid 308. Australia and New Zealand exported even more, with Australia exporting 65,000 tons and New Zealand exporting approximately 15,000 tons. Ibid. Korea is also the third largest market for American beef. See Daniel Pruzin and Rossella Brevetti, ‘WTO Appellate Body Upholds Ruling Against Korean Beef Restrictions’, 17 International Trade Reporter (BNA) (Washington), 14 December 2000, 1894-1895.


34 Ibid.

35 Ibid.
The complainants alleged the above measures violated GATT Articles III:4, Il:1, Xl:1, and XVII, and that Korea provided its beef industry with levels of domestic support inconsistent with Articles 3, 6, and 7 of the Agreement on Agriculture. In July 2000, a panel upheld the complaint in its entirety. Korea appealed two findings: the dual retail system (GATT Articles III:4) and domestic support (Agreement on Agriculture) claims.

In December 2000, the Appellate Body overturned the panel decision with respect to domestic support, due to insufficient evidence, but upheld the decision regarding the dual retail system. The Appellate Body rejected Korea’s argument that the measures did not discriminate against imported beef, holding that the measures forced retailers to choose between domestic and imported beef and effectively excluded imported beef from the retail distribution channels through which domestic beef was sold to consumers. The Appellate Body also rejected Korea’s arguments that the dual retail system was justified under Article XX(d) as a measure ‘necessary’ to secure compliance with consumer

36 The relevant portion of Article III:4 of the GATT states that imported products ‘shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution, or use’. (emphasis added)

37 Article Il:1 of the GATT states, in relevant part, that each Member must accord (a) ‘treatment no less favourable’ to other Members products for import; (b) that other members’ products shall ‘be exempt from ordinary customs duties in excess of those set forth [in the Agreement]’ and shall be exempt from all other duties or charges of any kind imposed on or in connection with importation; and (c) products shall, on their importation into such territory, subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided for in Part II of that Schedule. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with importation in excess of those imposed on the date of this Agreement or those directly or mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.

38 Article Xl:1 of the GATT states that no prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained on the importation of any product of any other Member on the exportation or sale for export of any product destined for the territory of any other contracting party.

39 GATT Article XVII provides rules and procedures for regulating state trading enterprises.

40 Agreement on Agriculture, above n 1, Annex 1A, arts 3, 6, 7 (explaining the incorporation of concessions and commitments, domestic support commitments and general disciplines on domestic support, respectively). See Korea–Beef, Panel Report, above n 17, Part II.

41 Korea–Beef, Panel Report, above n 17, paras 845-847


43 Korea–Beef, Appellate Report, above n 17, para 186(c)-(d) (finding that the panel had used an improper methodology to calculate the subsidies and therefore had sufficient information on which to base its conclusion that there was a violation of obligations).

44 See ibid paras 181 147, 149. Korea had over 45,000 shops selling domestic beef and only 5,000 selling imported beef. Ibid para 145.
fraud laws (Korean Unfair Competition Act). Therefore, the Appellate Body found the dual retail system inconsistent with Korea’s obligations under GATT Article III:4 and a variety of other agreements. By September 2001, Korea had removed the offending measures and the Korean beef market opened to Australian and other imported beef.

**Jurisprudential Significance**

*Korea–Beef* reinforces the importance of the stringent, non-discriminatory provisions of the GATT 1994. In the dispute, Australia demonstrated the effectiveness of the WTO dispute settlement system to open emerging markets and facilitate free trade at a much faster rate than possible without its use.

While the treatment of the ‘separate but equal’ argument put forward by Korea is interesting and worth further discussion, the most significant holding of this panel is its analysis of the word ‘necessary’ as it relates to Article XX.

Article XX(d) is an exception to the GATT available for ‘measures necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of [the WTO] Agreement, including those relating to…the provisions of deceptive practices’. The Appellate Body held the Korean measure was not ‘necessary’ to secure compliance with laws or regulations, as less restrictive alternative measures were available to meet Korea’s desired level of enforcement.

In so holding, the Appellate Body explained that the term ‘necessary’ is defined as being close to ‘indispensable’, although it stated that measures that are not ‘indispensable’ may nevertheless be ‘necessary’. They also referred to GATT

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45 Ibid para 182. Article XX(d) is an exception for ‘measures necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of [the WTO] Agreement, including those relating to…the provisions of deceptive practices’. Ibid. The Appellate Body held the Korean measure was not ‘necessary’, as less restrictive alternative measures were available. Ibid.

46 See ibid para 186.


48 Korea–Beef, Appellate Report, above n 17, para 131-185. According to the Appellate Body, treating imports differently does not necessarily lead to ‘less favourable treatment’ under Article III:4. Ibid. The differing treatment cannot be the sole reason for a finding of ‘less favourable treatment’, but the differing treatment must result in the detrimental conditions of imports. Ibid. However, it is hard to imagine a situation where differing treatment would not lead to ‘less favourable treatment’

49 Korea–Beef, Appellate Report, above n 17, para 182.

jurisprudence stating a measure is not ‘necessary’ if there is a reasonably available alternative measure that led to a lesser degree of inconsistency with GATT rules.\(^5\)

The Appellate Body further developed GATT precedent by creating a number of factors to consider when deciding if a measure is ‘necessary’. The Appellate Body stated:

In sum, determination of whether a measure, which is not ‘indispensable’, may be nevertheless ‘necessary’ within the contemplation of Article XX(d), involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by law or regulation, and the accompanying impact of the law or regulation on imports or exports.\(^5\)

The above factors appear to play an important role in deciding if a measure is ‘necessary’. However, it remains to be seen if future panels will refer to this approach, which expands the traditional GATT definition by adding the phrase ‘the importance of the common interests or values protected by law or regulation’, or if future panels will revert to the traditional definition. In EC–Asbestos, the Appellate Body included the additional factors into its analysis. In that case, the Appellate Body supported its position by stating the preservation of life and health is ‘both vital and important in the highest degree’.\(^5\)

Another notable feature of Korea–Beef is its treatment of and reliance on precedent. The DSB traditionally resisted its characterization as a judicial body,\(^5\) but Korea–Beef provides detailed evidence that such characterization is proving correct. One example of the DSB’s growing reliance on precedent is in the Appellate Body’s analysis of GATT Article III:4. In interpreting the GATT provision, not only does the Appellate Body refer to previous DSU decisions interpreting the section as ‘case law’, but it also reviews the panel’s analysis of the ‘case law’ in some detail before engaging its own interpretive analysis.\(^5\)

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\(^{52}\) Ibid para 164.


\(^{55}\) Korea–Beef, Appellate Report, above n 17, paras 132-37.
In fact, nearly three pages of the Appellate Body report analyses the correct legal interpretation of the ‘treatment no less favourable’ provision of Article III:4. This level of analysis, in which the Appellate Body greatly emphasised and cited ‘case law’ that supported each sentence of the legal standard, clearly proves the influence of the common law and transformation of the modern DSB.

Recognising the existence of precedent and using it to aid further jurisprudential development is not a radical departure from GATT/WTO dispute settlement procedures, but is instead an incorporation of the evolving nature of dispute settlement. The DSB must embrace the existing and emerging precedent manifesting from the dispute settlement system. Continued resistance to the trend towards the use of precedent by some Members is regrettable as precedent provides for a level playing field among Members with accurate, consistent decisions and gives Members a level of certainty before implementing national measures. In this regard, the system of de facto precedence that has emerged assists the DSB in providing the security and predictability to the multilateral trading system which Article 3.2 of the DSU requires.

**United States–Lamb**

*The Dispute*

In October 1999, Australia and New Zealand initiated a complaint against the United States for its restrictive tariff rate quota and increased tariffs on lamb meat. The United States argued its safeguard actions were permitted under GATT 1994 Article XIX and the Safeguards Agreement, which permits Members to take emergency action to temporarily restrict imports where an unexpected surge in the imported good causes or threatens to cause serious injury to the domestic market. The complainants countered the United States by stating, among other things, that increased exports of lamb were not ‘unexpected’ and that the United States relied on flawed data to reach its conclusion. Consequently, the complainants alleged that the measures breached Articles I-II and XIX of the 1994 GATT and Articles 2-5, 8, 11, and 12 of the Safeguards Agreement.

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56 Ibid.
57 Trade scholar Raj Bhala simply called the Appellate Body’s analysis of Article III:4, ‘common law judges, at the international level, in action’. Bhala, above n 29, 500.
Given that safeguard actions allow a Member to unilaterally suspend concessions against another Member not found to be violating any of its WTO obligations, panels closely scrutinise such actions in order to ascertain whether they meet the strict standard set out in the Safeguards Agreement.\footnote{See, eg, Argentina – Safeguard Measures on Imports of Footwear, WTO Doc WT/DS121/AB/R, AB-1999-7 (1999) paras 93-95 (Report of the Appellate Body).}

The panel found that the American measures violated Article XIX of the GATT 1994 and Article 12 of the Safeguards Agreement. The United States appealed the panel ruling.\footnote{US–Lamb, Appellate Report, above n 18, paras 11-19. The US claimed the panel erred in relation to (a) unforeseen developments; (b) domestic industry; (c) threat of serious injury; and (d) causation.} In May 2001, the Appellate Body upheld the decision and deemed the US measures inconsistent with WTO obligations for numerous reasons. Among these reasons were the following:

- The United States failed to demonstrate the increase in Australian and New Zealand lamb was ‘unexpected’;
- The United States definition of ‘domestic injury’ was too broad;
- The data collected by the United States for its safeguard application was inadequate to support its conclusions;
- The United States failed to demonstrate that imports were the cause of the injury to its domestic industry; and
- The United States failed to demonstrate a threat of serious injury.\footnote{Ibid para 197(a)-(e).}


**Jurisprudential Significance**

US–Lamb reaffirmed the WTO’s commitment to closely scrutinise safeguard measures and clarified several important legal issues regarding the use of safeguard measures.\footnote{See US–Lamb, Appellate Report, above n 18, para 72. The Appellate Body upheld the panel’s conclusion that the US failed to meet the standard and relied on the fact that there must be a ‘logical connection’ between the conditions of Article XIX and the ‘circumstances’ or ‘unforeseen developments’; they concluded that these circumstances must be in the report of the competent authorities. Ibid.} The most significant aspect of this dispute, however, is...
the Appellate Body’s treatment of the panel’s Article 11 analysis of its mandate relating to standard of review.67

While the issue of the standard of review to be applied by panels would seem to be a relatively straightforward and uncomplicated matter, the lack of DSU guidance has caused substantial uncertainty in the WTO dispute settlement process.

The Appellate Body in EC–Hormones first established the criterion for a proper standard of review.68 The Appellate Body first recognised that the Anti-Dumping Agreement is the only agreement to contain special standards for the appropriate standard of review. Article 17.6(i) of the Anti-Dumping Agreement states in relevant part: ‘in its assessment of the facts of the matter, the panel shall determine whether the authorities’ establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned’.

The Appellate Body held that the standard enunciated in Article 17.6(i) of the Anti-Dumping Agreement was specific to that particular agreement and did not necessarily transfer to other WTO Agreements. The Appellate Body stated:

The … SPS Agreement itself is silent on the matter of an appropriate standard of review for panels deciding upon SPS measures of a Member. Nor are there provisions in the DSU or any of the covered agreements (other than the Anti-Dumping Agreement) prescribing a particular standard of review. Only Article 17.6(i) of the Anti-Dumping Agreement has language on the standard of review to be employed by panels engaged in the ‘assessment of the facts of the matter’. We find no indication in the SPS Agreement of an intent on the part of the Members to adopt or incorporate into that Agreement the standard set out in Article 17.6(i) of the Anti-Dumping Agreement. Textually, Article 17.6(i) is specific to the Anti-Dumping Agreement.69

The Appellate Body then opined that the panel must make an ‘objective assessment of the matter’ and an ‘objective assessment of the facts’.70

67 The relevancy of Article 11 is that it says the function of the panel is to assist the DSB in discharging its responsibilities under the WTO agreement and the covered agreements; a panel assessment should be objective in the case facts, applicability, and conformity of relevant agreement, while making other findings to assist the DSB in their recommendations and ruling. For detailed interpretation, see Guohua, Mercurio and Yongjie, above n 12, 124-128.


69 Ibid 114.

70 Ibid para 116.
Therefore, the Appellate Body held the appropriate standard ‘is neither de novo review as such, nor ‘total deference’.’\textsuperscript{71} The Appellate Body in \textit{Argentina–Textiles} further developed the standard by adding that the panel must not ‘abuse its discretion’ when resolving a dispute.\textsuperscript{72}

Thus, case law dictates that panels must make a separate ‘objective assessment’ when they identify pertinent facts of the dispute, interpret the relevant legal provisions, and apply the law to the facts.\textsuperscript{73} While it is easy to describe how panels must operate, it is more difficult to understand and explain how the standard is to be applied. This is because panels are not simply evaluating the consistency of national law, but essentially acting as an appellate court reviewing a lower court or investigating authorities ruling (i.e. a ruling from the USITC). In such a case, the level of deference paid to the national court, tribunal or investigating authority (the lower court, if you will) is important to the outcome. As the DSU does not offer any guidance on the matter (except for matters under the Anti-Dumping Agreement), the DSB is forced to wade through the uncertainty on a case-by-case basis.

The panel and Appellate Body in \textit{US–Lamb} were forced to rule on the issue because the complainants challenged the decision of the United States investigating authority (USITC) with respect to the issue of the treatment of serious injury under Safeguards Agreement Article 4.1(b).\textsuperscript{74} The panel and Appellate Body drew upon prior precedent from \textit{Argentina–Footwear Safeguards} when developing a two-prong test to an ‘objective assessment’.\textsuperscript{75} The Appellate Body stated a panel must first review whether the investigating authority has ‘evaluated all relevant factors’.\textsuperscript{76} Secondly, a panel must review whether the investigating authority has ‘provided a reasoned and adequate explanation of how the facts support their determination’.\textsuperscript{77}

The Appellate Body elaborated on the principles by stating that the requirement to examine all relevant factors was not just simply a matter of form, but required the competent authorities to ‘conduct a substantive evaluation of the ‘bearing,’ or the ‘influence’ or ‘effect’ or ‘impact’ that the relevant factors have

\textsuperscript{71} Ibid 117.
\textsuperscript{73} \textit{EC–Hormones}, Appellate Report, above n 68, para 116 (finding that a panel should make an objective assessment of the matter before it, including an objective assessment of the case and the applicability of and conformity with the relevant covered agreements).
\textsuperscript{74} \textit{US–Lamb}, Panel Report, above n 18, para 5.51.
\textsuperscript{75} Ibid para 7.1.
\textsuperscript{76} \textit{US–Lamb}, Appellate Report, above n 18, 103, 141.
\textsuperscript{77} Ibid.
on the situation of [the] domestic industry'. The Appellate Body continued by reiterating that by examining whether the explanation given by the competent authorities in their published report was reasoned and adequate, panels can determine whether those authorities acted consistently with the obligations imposed by Article 4.2 of the Agreement on Safeguards. The Appellate Body also stressed that panels could only assess the adequacy of a competent authority’s explanation if the panel had critically examined the explanation and in the light of the facts before the panel.

The Appellate Body affirmed the panel’s analysis, declaring ‘if some alternative explanation of the facts is plausible, and if the competent authorities’ explanation does not seem adequate in the light of that alternative explanation’, then a panel must find the explanation unreasoned.

The Appellate Body then opined that a critical examination required consideration of whether the explanation of the competent authorities fully addressed the nature and especially, the complexities, of the data, and responded to other plausible interpretations of that data. Therefore, in reviewing the determination of the competent authorities, the panel should not simply accept the conclusions of the authorities, but instead should review whether the competent authorities’ explanation fully addresses the nature and complexities of the data and responds to other plausible interpretations of that data. Correspondingly, ‘if some alternative explanation of the facts is plausible, and if the competent authorities’ explanation does not seem adequate in the light of that alternative explanation’, then the panel should find that the explanation given by the competent authorities is not reasoned or adequate.

In the US – Lamb case, the Appellate Body observed that the Panel formulated its standard of review by reference to the Appellate Body report in Argentina – Footwear Safeguards, and also correctly declined to carry out a de novo review of the evidence: ‘the Panel correctly interpreted the standard of review appropriate to the examination of the claims by Australia and New Zealand’. However, the Appellate Body did find fault with the Panel’s application of the standard and reversed its decision not to examine the complainants’ alternative explanations. The Appellate Body recalled its report in Thailand – Steel (in the context of an anti-dumping investigation) where it explained that, because the parties in WTO dispute settlement differed from the parties to an anti-dumping investigation,

78 Ibid 104.
79 Ibid paras. 100-106.
80 Ibid para 106, 108.
81 Ibid para 106.
82 Ibid paras 108-109 (emphasis added by the Appellate Body).
it could not be assumed that the range of issues raised in an anti-dumping investigation will be the same as the claims that a Member chooses to bring before the WTO in a dispute. The Appellate Body considered that reasoning persuasive and applicable in this instance. Therefore, in arguing claims under the DSU, ‘a WTO Member [is] not confined merely to rehearsing arguments that were made to the competent authorities by the interested parties during the domestic investigation, even if the WTO Member was itself an interested party in that investigation’. The Appellate Body reversed the Panel’s decision that it could not examine arguments made by Australia and New Zealand that had not been made before the ITC during the lamb meat investigation.

Following this announcement, it appears that a panel must now critically examine the domestic investigating authorities’ investigation of the facts (i.e. determine whether the domestic authority was objective in gathering and assessing the facts). It seems that the announcement also requires a panel to determine whether the explanation of how the facts support the legal conclusion is ‘reasoned and adequate’ (i.e. determine whether a reasonable authority could have reached the legal conclusion that was in fact reached by the domestic authority). Only by conducting these determinations can the DSU Article 11 review be satisfied.

Therefore, while a panel will not initiate a de novo review of the factual application of the domestic investigating authorities’ decisions, a panel will not give deference to the domestic authorities’ conclusion. Thus, panels will accord greater deference to the domestic authorities’ factual application of the issues and only find a violation where the authorities do not critically examine the facts or where they do not provide a reasoned and adequate explanation of how the facts supported their conclusions. While these standards are derived from the context of Safeguards Agreement Article 4.2, it is logical to assume the standards will apply to other provisions of the Safeguards Agreement and other WTO agreements.

**Conclusion**

The introduction of legalistic rules and a system of binding dispute settlement transformed the world trading system. The changes now allow smaller nations to not only use the system to achieve positive results and favourable outcomes, but also to influence the developing jurisprudence of the DSU. Such results

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83 Ibid paras 112-113.
84 However, in view of the Appellate Body’s substantive findings, it found it unnecessary to examine the New Zealand argument that the Panel refused to consider. Ibid para 116.
would not have likely occurred under the GATT, where the dispute settlement system was more of a voluntary process with every organisational decision requiring complete consensus, meaning the respondent essentially had a veto right at every step of the process from the adoption of the panel’s legal ruling to the authorization of trade sanctions for non-compliance. As a result, smaller developed and every developing nation found it virtually impossible to obtain a successful resolution to a dispute. The strict, binding nature of the dispute settlement process under the WTO prevents larger Members from halting or frustrating the process through unilateral action.

Australia is a perfect example of a smaller sized nation using the system to achieve fairness and equality in its trading relationships. It has always been a player in the international trading environment, but until the WTO was formed, it had trouble winning concessions from larger Members or influencing systemic change under the GATT.

Since the inception of the WTO, Australia has been able to benefit from the advent of the DSU in a number of demonstrable ways. For instance, there can be no doubt that the advent of the WTO, and importantly of a rules-based DSU, has increased market opportunities for Australian exporters. For instance, the ‘win’ in Korea–Beef led to an increase of Australian beef exports to Korea (already the third largest market for Australian beef). While other beef producing nations competed for market share in the newly liberalised Korean beef market, Australian exporters significantly increased their thirty-four percent market share in Korea. In fact, Australian exports to Korea were expected to increase from 50,000 tons, valued at approximately A$150 million, to 90,000 tons, valued at approximately A$270 million, following the decision due to stronger Korean demand and WTO-driven market liberalisation.

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88 Mark Vaile, Minister for Trade, Australia Pleased with WTO Beef Report’, (Media Release, 1 August 2000), MVT72e/2000 <http://www.dfat.gov.au/media/releases/trade/2000/mvt072e_00.html> (explaining how Korea is also Australia’s third largest beef market); Korea is also Australia’s third largest export market and fourth largest trading partner.


In actual fact, by 2004, Australian beef exports to Korea were worth over $484 million. Without a binding, enforceable decision backed by the threat of retaliatory measures, Korean compliance in the dispute would not likely have occurred. In fact, as pointed out above, Australia had tried and failed during the GATT years to resolve a dispute involving Korean measures pertaining to imported beef.

The US–Lamb case is another example of two ‘smaller’ economic players using the rules-based dispute settlement system provided for in the WTO to force another, larger trading nation to abide by the agreed upon multilateral rules. Again, US–Lamb not only represented a significant expansion of the lamb export market to the United States, but it also represented a systemic ‘win’ for all ‘smaller’ Members of the WTO, who can now point to this decision as an example of smaller Members (i.e. Australia and, more poignantly, New Zealand) effectively navigating the system to produce a successful result against a larger Member. The importance of cases such as this to the overall effectiveness of the organisation as a whole cannot be understated.

In addition to directly benefiting from the system in the form of increased market opportunities (Korea–Beef and Hungary–Agricultural Subsidies), the WTO’s system of most favoured nation has seen Australia benefit where other parties ‘litigated’ the dispute and it only participated as a third party (US–Shrimp, Canada–Dairy) or where it had no direct participation in the dispute (EC–Poultry).

Moreover, this paper further demonstrates how Australia’s use of the DSU has influenced DSB jurisprudence in a way that far exceeds its market size or wealth. In every dispute in which Australia has appeared, important principles and key systemic findings have emerged to significantly shape DSU jurisprudence and, correspondingly, the direction of dispute settlement in the WTO. These disputes illustrate the importance of active participation in the organisation and prove that one Member, even a relatively small sized trading nation, can influence the future of dispute settlement in the WTO simply by using the system as it is designed. Such a positive outcome could not have been possible under the GATT and would not be possible in any other international forum.


93 See, eg, Australian Bureau of Agricultural and Resource Economics (ABARE), Meat and Livestock Australia, Prime Lamb Industry: Performance and Outlook to 2003-04, which, at page 1, states: ‘Growth in export markets has been particularly important to Australian sheep producers. The opening of the US market over the past decade has enabled the expansion of the prime lamb industry, increasing farm profitability and bringing about substantial change in lamb production in Australia.’ For specific statistics, see ABARE, ‘Australian Commodities: March quarter 2005’ <http://www.abare.gov.au/australiancommodities/commods/sheepmeat.html>. 
Non-Violation Nullification of Benefit Claims: Opportunities and Dilemmas for Australia in the WTO Dispute Settlement System

THOMAS FAUNCE, WARWICK NEVILLE, ANTON WASSON

Introduction

This paper considers the possibilities and dilemmas created for domestic-oriented industry, exporters, government and relevant trade law practitioners, by 'non-violation nullification of benefits' (NVNB) claims under the World Trade Organization (WTO) dispute resolution process. It examines whether such claims have a legitimate role in metamorphosing textual constructive ambiguities of multilateral and bilateral trade agreements into binding rules enforceable by trade sanctions.

The WTO dispute resolution process has been controversial since its inception. The Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) was promoted as facilitating greater efficiency, security, predictability and compliance in the resolution of trade disputes. Much has been made of the 'rule-based' features that supposedly provide such predictability. The automatic judicial-type panels, rights of appeal and

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4 M Kantor (US Trade Representative), ‘General Agreement on Tariffs and Trade’ Hearing Before House Committee on Ways and Means 103rd Congress 26 April 1994.
requirement for adoption of reports, have made the system popular. Yet NVNB claims have the potential to add a curious element of unpredictability into this process.

NVNB claims are directly referred to in Article 26 of the DSU, Article XXIII of the General Agreement on Tariffs and Trade 1994 (GATT 1994) Article XXIII of the General Agreement on Trade in Services (GATS) and Article 64 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Under such NVNB provisions, the full range of dispute resolution mechanisms may be invoked whether or not a breach of any specific provision is alleged or substantiated. The precondition is that a ‘reasonably expected’ ‘benefit’ accruing under the relevant trade agreement, has been ‘nullified or impaired’ by a ‘measure’ applied by a WTO Member.

Both the United States and European Economic Community have argued before a GATT 1994 panel that recourse to NVNB claims should remain ‘exceptional’ otherwise ‘the trading world would be plunged into a state of precariousness and uncertainty.’

In a well-known comment Judge Pescatore similarly stated that

A merely grammatical turn of the words in the General Agreement; ‘whether or not’ in Art XXIII:1(b) […] ‘it conflicts with the provisions of this Agreement’ […] creates an easy escape from the obligations imposed by the General Agreement. In my opinion, this part of the draft Understanding should be deleted and the matter should be left to the speculations of professors fond of legal paradoxes.

Nevertheless, a theme of this chapter is that contemporary controversy over NVNB claims and proceedings arises in large part from their potential to allow a WTO Member to tactically exploit a trade agreement’s textual constructive ambiguities and threaten a dispute if a wide and largely undefined range of domestic regulatory components are not altered, or compensation organised.

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6 The so-called ‘TRIPS Agreement’ is Annex 1C of the 1994 Marrakesh Agreement Establishing the World Trade Organization. The DSU is more formally styled, in Annex 2 to the same Agreement, as the Understanding on Rules and Procedures Governing the Settlement of Disputes. All relevant texts are published by the WTO (on line and in hard-copy with Cambridge University Press 1994) as The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations.
7 EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins, BISD 37S/86, 118 [114-113].
9 F M Abbott, Non-Violation Nullification or Impairment Causes of Action under the TRIPS Agreement and the Fifth Ministerial Conference: A Warning and Reminder (2003).
This development, it will be argued, while not necessarily endorsed by WTO jurisprudence, offers strategic advantages in certain trade sectors that may not have been entirely unforeseen. It may facilitate a WTO dispute settlement process involving deliberate diplomatic ‘gaming’ of trade ‘rules,’ from what had otherwise been viewed as finely balanced textual truces, where uncertainty is deliberate and inherent and dispute panel interpretation more an act of ongoing negotiation, than judicial analysis. Other commentators, similarly, have described NVNB claims as potentially inserting corporate competition policy into the DSU.10

This chapter begins by examining the origins and place of NVNB provisions in the DSU, GATT 1994, GATS and TRIPS.11 It then discusses the relevant WTO jurisprudence and some opportunities and dilemmas posed by such claims and provisions under a rule-based DSU. It concludes by offering some policy options.

Background to NVNB Claims in the WTO

In the 50-year history of the GATT and WTO, there have been less than ten cases where panels have substantially discussed NVNB claims.12 In GATT jurisprudence, NVNB complaints appear to have originally been designed to counter the capacity of countries to avoid relatively simple obligations and specific tariff concessions in multilateral trade agreements, by making ambiguous domestic regulatory arrangements.13

NVNB provisions comparable to Article XXIII:1(b) of GATT 1994 featured in pre-World War II treaties of commerce.14 The NVNB concept, however, appears to have suffered, in terms of normative sophistication, from its development outside the general corpus of international law. Some commentators have seen NVNB claims as a vestigial concept from the days when binding dispute settlement proceedings were not possible.

With the considerable growth of international trade regulation in terms of scope and subject matter, the potential role of the non-violation complaint


11 NVNB complaints would rarely be necessary to protect the exchange of rights and obligations in the other agreements in Annex I of the Marrakesh Agreement, as these already include substantial flexibility within their rules to address borderline cases.

12 Abbott, above n 9.


has been considerably reduced. It will be further reduced as general principles of law are applied in the process of interpreting WTO law.  

Article XXIII (‘Nullification or Impairment’) of GATT 1994 states:

1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of:
   a. the failure of another contracting party to carry out its obligations under this Agreement, or
   b. the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
   c. the existence of any other situation, the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it [emphasis added].”

Article XXIII.1(b) contains the NVNB provision or so-called ‘non-violation complaint.’ Article XXIII.1(c) is the even broader ‘situation complaint.’ Yet to be invoked or ruled upon before a DSU panel, this could cover any situation whatsoever, even if it did not result from any action of a WTO Member, as long as it resulted in ‘nullification or impairment’ of a ‘benefit.’

Article XXIII.3 of GATS states:

If any Member considers that any benefit it could reasonably have expected to accrue to it under a specific commitment of another Member under Part III of this Agreement is being nullified or impaired as a result of the application of any measure which does not conflict with the provisions of this Agreement, it may have recourse to the DSU. If the measure is determined by the DSB to have nullified or impaired such a benefit, the Member affected shall be entitled to a mutually satisfactory adjustment on the basis of paragraph 2 of Article XXI, which may include the modification or withdrawal of the measure. In the event an agreement cannot be reached between the Members concerned, Article 22 of the DSU shall apply [emphasis added].

The NVNB remedy has clearly been narrowed in scope under GATS Article XXIII:3. This article limits NVNB complaints to benefits accruing from ‘specific commitments’ undertaken by Members. Unlike NVNB claims under GATT 1994, however, the NVNB remedy under GATS may include the ‘modification or withdrawal’ of a ‘measure.’ The specific application of Article 22 of the DSU to NVNB claims means that compensation and the suspension of concessions are available in the event that a dispute panel’s recommendations and rulings are not implemented within a reasonable period of time.

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Article 26 of the WTO DSU reads as follows:

1. Non-Violation Complaints of the Type Described in Paragraph 1(b) of Article XXIII of GATT 1994

Where and to the extent that such party considers and a panel or the Appellate Body determines that a case concerns a measure that does not conflict with the provisions of a covered agreement to which the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable, the procedures in this Understanding shall apply, subject to the following:

(a) the complaining party shall present a detailed justification in support of any complaint relating to a measure which does not conflict with the relevant covered agreement;

(b) where a measure has been found to nullify or impair benefits under, or impede the attainment of objectives, of the relevant covered agreement without violation thereof, there is no obligation to withdraw the measure. However, in such cases, the panel or the Appellate Body shall recommend that the Member concerned make a mutually satisfactory adjustment;

(c) notwithstanding the provisions of Article 21, the arbitration provided for in paragraph 3 of Article ther party, may include a determination of the level of benefits which have been nullified or impaired, and may also suggest ways and means of reaching a mutually satisfactory adjustment; such suggestions shall not be binding upon the parties to the dispute;

(d) notwithstanding the provisions of paragraph 1 of Article 22, compensation may be part of a mutually satisfactory adjustment as final settlement of the dispute [emphasis added].

One important element to note in Article 26, is the requirement for a ‘detailed justification’ of the NVNB claim. One WTO Member may thus be able to predict when another is strategically preparing for a NVNB claim by the manner in which it sets up (during negotiations) mechanisms allowing it to subsequently claim a ‘measure’ was not ‘reasonably expected’ and to acquire the data necessary to calculate damages. It also encourages the view that for a State to prevent its legitimate expectations of benefit under a trade agreement containing a NVNB provision being undermined, it must develop expertise in accumulating the necessary detailed information to justify them. The second important aspect of Article 26 of the DSU in this context, concerns the capacity of the complaining party to request that a panel use the data prepared to put a money value on the ‘benefits’ nullified or impaired and to claim that as compensation.

Article 64 (Dispute Settlement) of the TRIPS agreement provides:

1. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement except as otherwise specifically provided herein.
2. Subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 shall not apply to the settlement of disputes under this Agreement for a period of five years from the date of entry into force of the WTO Agreement.

3. During the time period referred to in paragraph 2, the Council for TRIPS shall examine the scope and modalities for complaints of the type provided for under subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 made pursuant to this Agreement, and submit its recommendations to the Ministerial Conference for approval. Any decision of the Ministerial Conference to approve such recommendations or to extend the period in paragraph 2 shall be made only by consensus, and approved recommendations shall be effective for all members without further formal acceptance process.

The delayed entry into force of the NVNB provision in Article 64 reflected the intense disagreement expressed on the concept during the TRIPS negotiations. It may also reveal how determined certain developed nations (the dominant rent-gatherers from intellectual property rights) were to ensure its inclusion, despite the fact that there was little in TRIPS that would have justified a NVNB claim as the concept was originally developed. The United States, for example, subsequently has argued that the initial and subsequent moratoria is over and the NVNB remedy must now be accepted, by all WTO Members, as applying to the TRIPS Agreement.\footnote{Communication from the United States, Scope and Modalities of Non-Violation Complaints Under the TRIPS Agreement, (IP/C/W/194).}

At the WTO meeting in Hong Kong in December 2005, United States negotiators attempted to obtain concessions in return for their support for the continuance of the NVNB moratorium.\footnote{Professor P Drahos, personal communication 20 December 2005.} This emphasis, as will be shown, is but one indication suggesting the likelihood of a new strategic agenda on NVNB claims being pushed by some developed nations in more politically convenient circumstances.

**Some Key Principles of NVNB Claims**

The original rationale for NVNB claims, under GATT 1994, was articulated in *EEC – Oilseeds 1*:

> The idea underlying them is that the improved competitive opportunities that can legitimately be expected from a tariff concession can be frustrated not only by measures proscribed by the General Agreement but also by measures consistent with that Agreement. In order to encourage contracting parties to make tariff concessions they must therefore be given a right of redress when a reciprocal concession is impaired by another contracting party as a result of the application of any measure, whether or not it conflicts with the General Agreement.\footnote{EEC – Oilseeds 1, above n 7, [144].}
This explanation was quoted with approval by the Appellate Body in
EC – Asbestos.\textsuperscript{19} The concept was further explored in Japan - Film,
where the purpose of Article XXIII(1)(b) was described as being:

\begin{quote}
[T]o protect the balance of concessions under GATT by providing a means
to redress government actions not otherwise regulated by GATT rules that
nonetheless nullify or impair a Member’s legitimate expectations of benefits
from tariff negotiations\textsuperscript{20} [emphasis added].
\end{quote}

In summary, four requisite elements of a NVNB claim under Article XXIII(1)(b)
have been identified:

1. That a ‘measure’ has been applied by a party subsequent to the entry into
   force of the relevant trade agreement;
2. That a ‘benefit’ was reasonably expected by the other party as being
   negotiated in return for some textual agreement; and
3. That as a result of the application of the measure that benefit has been
   ‘nullified or impaired’.\textsuperscript{21}
4. That the nullification or impairment was contrary to the legitimate or
   reasonable expectations of the complainant at the time of the negotiations
   4. That such claims will only be used in extremely rare circumstances (for
   example proven bad faith during negotiations), due to their capacity to
   upset the certainty of the international trading order

In relation to the first element, the ‘measures’ initiating a NVNB claim may
include laws, regulations, general policy statements by government agencies and
officials. Nonetheless

At the same time, it is also true that not every utterance by a government
official or study prepared by a non-governmental body at the request of the
government or with some degree of government support can be viewed as a
measure of a Member government.\textsuperscript{22}

The panel in Japan - Film was even prepared to entertain the idea that
government incentives or disincentives to private actors could become a
measure, although it stressed that this broad interpretation was only possible
because of the explicit balance of concessions that had previously been made
under GATT1994.\textsuperscript{23}

\begin{footnotes}
\item[21] Ibid, [10.41].
\item[22] Ibid, [10.43].
\item[23] Ibid, [10.50].
\end{footnotes}
In EC – Asbestos the Appellate Body agreed with the panel in Japan - Film that Article XXIII:1(b) “should be approached with caution and should remain an exceptional remedy.” It also rejected the interpretation that “any measure” in Article XXIII(1)(b) applied only to “commercial measures.” Instead, the Appellate Body held it applied to “measures which affect trade in goods” and which “have a commercial impact.” This meant that health-related measures could fall within such provisions, in rare circumstances such as where such a measure was not impliedly or expressly addressed by either party during negotiations. It explicitly left open the question of whether a party could have “reasonable expectations” for NVNB purposes in relation to “continued market access for products which are shown to pose a serious risk to human life or health.” This also meant it also left open the question as to whether protection of a public health policy from nullification or impairment by a commercial measure, could be regarded as an actionable “benefit” for the purposes of a NVNB claim. The Panel indicated that parties cannot bring NVNB claims against “old” measures that are no longer applied.

Article 26.1(a) of the DSU, as mentioned, requires parties invoking Article XXIII(1)(b) to present ‘a detailed justification in support of any complaint relating to a measure which does not conflict with the relevant covered agreement’ [emphasis added]. The burden of proof on the complainant in this regard is likely to be higher where the measure is justified under an exception like Article XX (general exceptions to the GATT), whereby the parties recognise that accrued benefits may be overridden by measures considered by the parties to be of greater importance. Specifically it will be much harder then to prove such measures could not have been reasonably anticipated at the time of negotiations, and that they thus run contrary to the complaining party’s legitimate expectations. In addition the burden of proof increases with the amount of time between the negotiations and the claim, recognising that it is much harder to reasonably anticipate measures in the distant as opposed to the near future.

As regards the second component, ‘benefit,’ in almost all prior NVNB cases under GATT1994, the claimed ‘benefit’ ‘nullified or impaired,’ involved legitimate or reasonable expectations of market access arising from tariff concessions...
negotiated in return for textual obligations.\textsuperscript{30} It follows that a NVNB claim is unlikely to be successful if made in relation to sections of a trade agreement where no specific and unequivocal concessions about market access were made during negotiations.

Concerning the third component of a NVNB claim, that a benefit has been ‘nullified or impaired as the result of’ the application of a measure, the complainant is required to show that the measure upset the relative competitive relationship established by a specific negotiated concession between domestic and imported products, language used consistently throughout the jurisprudence on Article XXIII(1)(b) [emphasis added].\textsuperscript{31}

Thus, if it can be established that the alleged ‘measure,’ in fact was pro-competitive, or that the complainant’s nullified ‘benefit’ itself has anti-competitive elements, then an NVNB claim should not succeed. This will also be the case if it can be proven that the agreement itself contemplated only a relative alteration in competition, or that the terms directly express the differing expectations of the parties over particular benefit. Conversely, a country wishing to protect its ‘reasonably expected ‘benefits’ (for example from continuance unchanged of a public health or environment program), would need to show that the potentially nullifying or impairing ‘measure’ arose explicitly or implicitly from a government decision or action (for example by relevant documented links between the relevant industry and a government agency) of the other country.

The burden of proving that a ‘measure’ ‘nullifies or impairs’ ‘benefits’ rests with the complainant.\textsuperscript{32} Four main causation issues have been identified in this context:

1. The degree of causation, established by the complainant’s Article 26 DSU ‘detailed justification.’
2. Whether the measure is ‘origin-neutral’ (in both \textit{de jure} and \textit{de facto} terms), so that the complainant has not discharged the burden of establishing it has a disproportionate impact on its products.
3. Whether the measure was intended to ‘nullify or impair’ a benefit.
4. Whether the ‘nullification or impairment’ impact of measures can be measured collectively.\textsuperscript{33}

\textsuperscript{30} Japan – Film, above n 20, [10.61].
\textsuperscript{31} Australia – Ammonium Sulphate, GATT BISD II/188) (1950) [12], Treatment by Germany of Imports of Sardines, GATT Doc 1S/53 (1952) [16](Report Adopted by the Contracting Parties), EEC – Oilseeds, above n 7, [77].
\textsuperscript{32} Japan – Film, above n 20, [10.36].
\textsuperscript{33} Japan – Film, above n 20, [10.83].
A fourth requisite element for a NVNB claim was identified in the
*Korea – Procurement* dispute: ‘that the nullification or impairment of the
benefit as a result of the measure must be contrary to the reasonable
*expectations* of the complaining party at the time of the agreement’\(^{34}\) [emphasis added]. In *Japan – Film* it likewise was held that the ‘legitimate
expectation’ of improved market access could be nullified if the complainant
anticipated the nullifying or impairing measure during negotiations.\(^{35}\)

To succeed in an NVNB claim, in other words, a WTO Member has to prove to
the relevant dispute resolution panel that it couldn’t have reasonably anticipated,
for example, the domestic legislation that nullified its ‘legitimate expectations’.\(^{36}\)

The passage of amendments creating or dealing with a ‘measure’ by way of
the implementing legislation for a particular trade agreement, would almost
certainly thwart a claim that such a ‘measure’ was not ‘reasonably expected.’

Also having this chilling effect on a NVNB claim would be an exchange of letters
or some other interpretive document attached as part of the agreement, or
capable of being consulted in relation thereto, which clearly establishes the
differing expectations of the parties over a particular ‘benefit.’

It is important to reiterate, however, that the Appellate Body in *EC - Asbestos*
agreed with the Panel *Japan – Film*, stating that the non-violation nullification
or impairment remedy in GAT Article XXIII:1(b): ‘should be approached with
cautious and treated as an exceptional concept. The reason for this caution
is straightforward. Members negotiate the rules that they agree to follow
and only exceptionally would expect to be challenged for actions not in
contravention of those rules.’\(^{37}\)

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(Report of the Panel).

\(^{35}\) *Japan – Film*, above n 20, [10.76-7].

\(^{36}\) Ibid. See also the following decisions: Report of the Panel on Uruguayan recourse to Article XXIII, L/1923-
11s/95 (1962); *EEC – Payments and Subsidies Paid to Processors and producers of oilseeds and Related Animal-
(1950); *United States-restrictions on the Importation of Sugar and Sugar-Containing Products Applied Under the
1955 Waiver and under the Headnote to the Schedule of Tariff Concessions*, L/6631-37S/228 (1990); *European
Japan-Trade in Semi-Conductors*, L/6309-35S/116 (1988); *EEC - Production Aids Granted on Canned Peaches,
Canned Pears, Canned Fruit, Cocktail and Dried Grapes*, L/5778 (1985); *EC - Measures Affecting Asbestos and
Asbestos-Containing Products*, WT/DS135/R (2000); *Canada-Generic Pharmaceuticals Case*, WT/DS114/R;

\(^{37}\) *Japan – Film*, above n 20, [10.37]; *EC – Asbestos*, above n 19 [186].
Emerging Problems for NVNB Jurisprudence

A convenient place to begin discussing emerging problems in the jurisprudence of NVNB claims is the WTO case involving Incheon Airport, formally known as the Korea - Procurement dispute. Here, a WTO DSU panel dealt with a United States NVNB complaint that Korean measures concerning bidding and contracts ('government procurement') for the Incheon International Airport (inadequate bid deadlines, imposition of certain qualifications and some domestic partnering requirements, as well as no domestic procedures for challenges) violated the 'reasonable expectations' of the US arising out of particular trade negotiations.

The Panel (Cartland, Ineichen-Fleisch and Armin Trepte), stated that Article XXIII.1 (b) of GATT1994 could be used to claim impairment or nullification of a 'reasonable expectation' of benefit, not only for lack of good faith in implementation, but lack of good faith in negotiations. The panel held:

A key difference between a traditional non-violation case and the present one would seem to be that, normally, the question of 'reasonable expectation' is whether or not it was reasonably to be expected that the benefit under an existing concession would be impaired by the measures. However here, if there is to be a non-violation case, the question is whether or not there was a reasonable expectation of an entitlement to a benefit that had accrued pursuant to the negotiation rather than pursuant to a concession [emphasis added].

Article 3.2 of the DSU requires panels to clarify existing provisions of agreements in accordance with customary rules of interpretation of public international law. This lead the Panel to consideration of how the NVNB principle interacts with Article 26 of the Vienna Convention on the Law of Treaties, incorporating the principle of pacta sunt servanda: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.” NVNB claims appear to undermine this fundamental principle of international law by subsequent reinterpretations based on the 'spirit' of the agreement.

The Panel considered that non-excusable error in treaty interpretation during negotiation could not be subsequently addressed by a NVNB claim.

Parties have an obligation to negotiate in good faith. It is clear to us that it is necessary that negotiations in the Agreement before us (the Government

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38 Korea - Procurement, above n 34.
39 Ibid.
40 Ibid [7.87].
Procurement Agreement) be conducted on a particularly open and forthcoming basis.\textsuperscript{41}

The Panel continued:

Customary international law applies generally to the economic relations between WTO members. Such international law applies to the extent that the WTO treaty agreements do not ‘contract out’ from it. To put it another way, to the extent there is no conflict or inconsistency, or an expression in a covered WTO agreement that implies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO.\textsuperscript{42}

These comments highlight that problems with a Party using NVNB claims to undermine good faith treaty interpretation and continue negotiations about constructive textual ambiguities. If a panel, for example, determines that the absence of explicit definition for a WTO treaty term was deliberate (for example because evidence establishes that the parties manifested opposing points of view during the negotiations that were not resolved) then a corollary is that the parties were unable to agree on what ‘benefits’ or concessions were being granted. This removes one of the essential preconditions for use of a NVNB claim.

They also indicate, however, that NVNB claims can be used to correct concessions agreed to after deliberate misrepresentations by the other Party. If, for example, one party was mislead concerning the extent of their obligations by the differing position of an annex or appendix in the draft and final agreement, that documentary history could be adduced before a panel to counter a NVNB claim in relation thereto. Yet, the Panel in the Korea - Procurement case indicated that error as a basis for a NVNB claim will not be easy to establish. It concluded that certain circumstances in the 2-1/2 year interval between Korea’s answer and the final offer, put the United States on notice of a possible error under Article 48 of the Vienna Convention on the Law of Treaties. This circumstance removed the basis for a claim of non-violation nullification or impairment of a benefit it had legitimately expected.\textsuperscript{43}

Article 26(1)(b) prevents the panel or Appellate Body from recommending the withdrawal of measures found to nullify or impair benefits, merely allowing it to propose that a ‘mutually satisfactory adjustment’ be made. Commentators have considered that this means the DSU explicitly excludes a right to force

\textsuperscript{41} Ibid [7.110 and 7.121], see also Gabcikovo-Nagymaros Project (Hungary/Slovakia) Judgment, ICJ Reports (1997) \[142\]: “…it is the purpose of [Article 26] of the Treaty, and the intentions of the parties in concluding it, which should prevail over its literal application. The principle of good faith obliges parties to apply it in a reasonable way in such a manner that its purpose can be realised.”

\textsuperscript{42} Korea - Procurement, above n 34, [7.96].

\textsuperscript{43} Ibid [7.125-7.126].
a Member to grant restitution for an established NVNB claim. Rather, while changed behavior may be recommended, there is no binding demand that the dispute settlement body can make of the injuring Member. 44

The governments of Canada, the Czech Republic, the European Communities, Hungary and Turkey have recently stated at the WTO that “the uncertainty regarding the application of such non-violation complaints needs to be resolved so as to minimize the possibility of unintended interpretation.” 45 Developing countries have also expressed concern about expansive interpretations of WTO obligations, and the ‘activist’ nature of the Appellate Body. Related appeals have been made for greater transparency in the DSU process. 46 Some of these advocate third part State and even Non-government Organisation (NGO) involvement. 47 Decisions of the DSU Appellate Body cannot easily be reversed by WTO Members. Developing nations are concerned that expanding the non-violation remedy - and with it the right to challenge measures that are otherwise consistent with WTO obligations - may further imbalance the proper distribution of responsibilities between WTO Members, and panels and the Appellate Body.

A number of WTO Members have noted that non-violation complaints under the TRIPS Agreement may give rise to incoherence among other WTO Agreements. All WTO obligations apply cumulatively, and consequently something that is consistent with one WTO agreement (ie: GATT 1994) may potentially be found to nullify and impair benefits under another (ie: TRIPS).

It is highly questionable whether WTO Members would be in favour of leaving the option open for countries to file a non-violation complaint under the TRIPS Agreement, if the measure is found to be in full compliance with ... the GATT and its annexed agreements or the GATS. 48

Having given a summary of the key elements of NVNB claims and some of their more contentious issues in relation to them, we will now address the question why NVNB complaints may become an important factor in the evolution of the DSU, given the relatively small number of past cases dealing with them.

44 Cottier and Schefer, above n 15 at 66.
45 Communication from Canada, the Czech Republic, the European Communities and their Member States, Hungary and Turkey, Non-Violation Complaints under the TRIPS Agreement - Suggested Issues for Examination of Scope and Modalities under Article 64.3 of the TRIPS Agreement, [13], (IP/C/W/191).
48 Jackson, above n 4.
Evolving Roles for NVNB Provisions

An increased interest in NVNB claims may have a significant influence on the ongoing debate about the nature of the WTO DSU. One possibility sees the latter evolving to resemble a judicial model set firmly within the general corpus of international law. An alternative sees it become more clearly recognised to be part of a ‘gaming’ process, often at the service of powerful corporate multinationals. The latter possibility may be detected in suggestions for a more ‘flexible,’ ‘conciliatory’ or ‘diplomatic’ version of the DSU, in which dispute settlement panels issue preliminary reports that the parties can modify by mutual consent and where such panels give greater deference to domestic tribunals. It may also be implicit in claims that the WTO DSB has been making rules, or legislating. This is despite DSU Art. 3.2, which states: “Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.” Such differences of opinion have led to a stalling in the process of revising the DSU.

What we wish to consider here is whether economically powerful trading nations with the legal resources to ‘game’ the complex mechanisms behind rule creation and implementation in the DSU, may gain increasing advantage through NVNB claims. Particularly vulnerable may be WTO Members, who have failed to develop the expertise and data necessary to carve out from trade obligations their key public goods, whose continuance then becomes a legitimate ‘benefit’ reasonably expected.

Of several hundred WTO disputes since 1995, although few initially required additional steps to ensure compliance, this picture may be changing particularly in relations to claims with strategic economic importance. Also the average length of a dispute resolution process is increasing. As it does so do the

52 G G Yerkley, ‘Sen. Baucus Calls WTO “Kangaroo Court” with Strong “Bias” Against the US’ (2002) 19 Int’l Trade Rep. 1679. The comments of the United States are also rather unusual given that studies show that that country has been one of the highest users (either as a complainant or respondent) of the WTO/DSU. J Jackson and W Davey, Legal Problems of International Economic Relations: Cases, Materials and Text (1986).
55 The average time from Panel establishment to report adoption was 15 months in 2003. In the Australia - Salmon case, it took three years from initial Panel request to acceptable implementation, a second Panel proceeding being required.
opportunities for WTO Members to bargain behind the scenes using NVNB claims.  

One major area where (because of the high levels of investment and return involved) increased use of NVNB claims could occur is in relation to intellectual property rights. The application of NVNB claims to protect inherently anti-competitive private property rights under the TRIPS agreement, represents a decidedly novel and innovative employment of the remedy that could hardly have been foreseen in the early days of GATT. In the negotiations between technological creators and receivers on the TRIPS agreement, there was no clear balance of concessions produced and many of the provisions (such as the patent exceptions under Article 30) were deliberately vague in initial drafts.  

In this context, NVNB claims could create great vulnerability for nations, such as Australia, that are likely for some time to remain net importers of intellectual property.

At the WTO meeting in Hong Kong in December 2005, as mentioned, the United States delegation pushed hard behind the scenes for trade concessions in return for its acquiescence to the moratorium on the use of NVNB provisions under TRIPS. The resultant Ministerial Declaration left the position of NVNB claims under TRIPS extremely uncertain.  

45. We take note of the work done by the Council for Trade-Related Aspects of Intellectual Property Rights pursuant to paragraph 11.1 of the Doha Decision on Implementation-Related Issues and Concerns and paragraph 1.h of the Decision adopted by the General Council on 1 August 2004, and direct it to continue its examination of the scope and modalities for complaints of the types provided for under subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 and make recommendations to our next Session. It is agreed that, in the meantime, Members will not initiate such complaints under the TRIPS Agreement.

A formal NVNB claim in the WTO dispute settlement system could also arise under Article 21.2(c) of the Australia-United States Free Trade Agreement (AUSFTA). One circumstance could be where a Panel is called upon to settle a dispute over deliberately (or constructively) ambiguous terms such as ‘innovation’ in Annex 2C on Pharmaceuticals, as well as various provisions in Chapter 17 on intellectual property. If Australia is able to withstand the

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58 Professor P Drahos, above n 17.

associated lobbying pressure, than it may be advantageous in such a case to be the first Party to initiate dispute settlement proceedings. This would allow Australia to choose WTO dispute settlement procedures under the choice of forum provision in Article 21.4 of the AUSFTA. This WTO dispute resolution option (where Australia is more likely to be successful), could be closed off if the United States was the first Party to initiate such an AUSFTA dispute.\(^{60}\) In such a situation it would be important for the Parties and the Panel to ensure that any NVNB claim does not merely represent a continuing mechanism of unfinished negotiations over a deliberately ambiguous treaty term associated with uncertain expected benefits (such as ‘recognition of pharmaceutical innovation’). Australia, however, could undoubtedly make an NVNB claim concerning clearly defined benefits manifested to the other Party during negotiations. One in this context would be continuation of the basic architecture of Pharmaceutical Benefits Scheme (PBS) cost-effectiveness processes as a legitimate expected benefit or concession obtained in return for the ‘transparency’ provisions in Annex 2C.

The question of what either Party can reasonably claim as a negotiated ‘benefit’ subsequently nullified or impaired is extremely controversial in the area of intellectual property.\(^{61}\) It may come down to proof of what was explicitly declared during the negotiation period.\(^{62}\) The passage prior to the conclusion of a trade agreement of legislative amendments to counter any anticipated ‘measure’, would almost certainly thwart a claim that the ‘benefit’ obtained by such amendments was not ‘reasonably expected’.\(^{63}\) The harmonisation of our laws with the world’s largest intellectual property market may provide Australian exporters with a more familiar environment and to attract US

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\(^{60}\) Australia-United States Free Trade Agreement Article 21.2 Scope of Application

Except as otherwise provided in this Agreement or as the Parties otherwise agree, the dispute settlement provisions of this Section shall apply with respect to the avoidance or settlement of all disputes between the Parties regarding the interpretation or application of this Agreement or wherever a Party considers that:

(a) a measure of the other party is inconsistent with its obligations under this Agreement

(b) the other Party has otherwise failed to carry out its obligations under this Agreement; or

(c) a benefit the Party could reasonably have expected to accrue to it under Chapters Two (National Treatment and Market Access for Goods [including Annex 2C on pharmaceuticals]), Three (Agriculture), Five (Rules of Origin), Ten (Cross-Border Trade in Services), Fifteen (Government Procurement) or Seventeen (Intellectual Property Rights) is being nullified or impaired as a result of a measure that is not inconsistent with this Agreement.

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\(^{61}\) Communication from Canada to WTO, Non-Violation Nullification or Impairment Under the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) IP/C/V/127 10 Feb 1999.


investors. Others, however, are greatly concerned about Australia’s potentially vulnerable position if (despite Article 3.2 of the DSU) subsequent NVNB trade disputes in such an area encouraged speculative ambit claims for increased levels of intellectual property protection or compensation backed by threat of trade sanctions.

**Conclusion - Australian Policy Options on WTO NVNB Claims**

It is important for the successful growth of international trade under the auspices of the WTO, that its rules should be seen to harmonise with the certainty, transparency and normative legitimacy that characterises the corpus of international law. NVNB claims should be no exception in this regard.

If their use increases without strict bounds being established, they may replace the commercial certainty implicit in a regime predicated on basic principles of international law concerning good faith in treaty interpretation, with process of tactical ‘gaming’ of deliberate textual ambiguities in which negotiations are designed to continue into the WTO dispute resolution mechanism.

Our hypothesis is that pressure from NVNB claims is most likely to arise from ‘behind doors’ lobbying using threats of cross retaliation linked to claimed breaches of the ‘spirit’ of the agreement. Formal dispute resolution proceedings may never be initiated if such lobbying is persuasive.

One way of circumscribing NVNB claims so they don’t conflict with the obligation to act in good faith, or with other rules of treaty interpretation under Articles 31 and 32 of the Vienna Convention on the Law of Treaties, is to restrict their operation to ensuring ‘transparency and openness’ in the negotiating process. In consequence, in NVNB disputes, the inquiry to be made by a dispute resolution Panel is whether the complaining party was induced into error during negotiations by the other treaty Party about a fact or situation, that the former could not reasonably have foreseen.

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68 Davey, above n 56.
69 See, for example: S Lewis, ‘FTA Drug Safeguard at Risk’ _The Australian_ 3 January 2006.
70 _Korea - Procurement_, above n 34, [7.100-7.102].
71 Ibid, [7.122].
PART FOUR

IN ACTION: BUSINESS AND INDUSTRY
Introduction

One of the key outcomes of the Uruguay Round trade negotiations - which led to the establishment of the WTO in 1995 - was the development of the Agreement on Agriculture. Up until that time, trade in agricultural products had been mostly excluded from the disciplines of the international trading system.

The Agreement on Agriculture was the first multilateral trade agreement dedicated to the agricultural sector. It was a step towards reforming trade in agriculture and establishing a “fair and market-oriented agricultural trading system”. This reform process is obviously still continuing, as evidenced by the negotiations currently under way as part of the Doha Development Agenda, which was launched in November 2001 at the fourth WTO Ministerial Conference in Doha, Qatar. Notwithstanding this ongoing reform process, the Uruguay Round negotiations managed to establish some very important disciplines in the areas of market access, domestic support and export subsidisation (generally known as the ‘three pillars’). These disciplines have met one of the general aims of the Uruguay Round negotiations in agriculture to “achieve greater liberalisation of trade in agriculture and bring all measures affecting import access and export competition under strengthened and more operationally effective GATT rules and disciplines”.

For an agricultural export-oriented country like Australia, the Agreement on Agriculture was a vitally important outcome of the Uruguay Round. In particular, the export subsidy disciplines were regarded as constituting a key outcome because they were focussed on improving the competitive environment for agricultural products in the global agricultural market.

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2 See, for example, the first and second preambular paras of the Agreement on Agriculture.

3 See, for example, Doha Ministerial Declaration, WT/MIN(01)/DEC/1, 20 November 2001.

4 See, for example, Punta Del Este Ministerial Declaration, MIN.DEC, 20 September 1986, 6.
This article provides a review of the various disputes related to the agricultural export subsidy disciplines that have been pursued through the WTO’s dispute settlement system over the first decade of the WTO, highlighting some of the key themes that have been explored in these disputes.

**The Export Subsidy Disciplines**

The export subsidy disciplines in the Agreement on Agriculture essentially take the form of:

- the specific binding reduction commitments, which have been inscribed into Members’ Schedules pursuant to Article 3.1 of the Agreement on Agriculture constituting “commitments limiting subsidization”; and
- the rules set out in the Agreement on Agriculture itself, which are designed to protect the scheduled commitments and provide a framework to govern the use of agricultural export subsidies.

Articles 3.3, 8, 9.1 and 10 of the Agreement on Agriculture set out the general parameters for the core rules relating to export subsidies.

Article 3.3 establishes that no Member shall provide export subsidies listed in Article 9.1 “in respect of the agricultural products or groups of products specified in … its Schedule in excess of the budgetary outlay and quantity commitment levels specified therein and shall not provide such subsidies in respect of any agricultural product not specified in … its Schedule”.

Article 8 establishes:

> Each Member undertakes not to provide export subsidies otherwise than in conformity with this Agreement and with the commitments as specified in that Members’ Schedule.

Article 9.1 goes on to establish that the following practices are deemed to be export subsidies for the purposes of the Agreement on Agriculture and therefore subject to the export subsidy commitments laid down:

- provision by governments or their agencies of direct subsidies, including payments-in-kind, to a firm, to an industry, to producers of an agricultural product, to a cooperative or other association of such producers, or to a marketing board, contingent on export performance;\(^5\)
- the sale or disposal for export by governments or their agencies of non-commercial stocks of agricultural products at a price lower than the comparable price charged for the like product to buyers in the domestic market;\(^6\)

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\(^5\) See Article 9.1(a) of the Agreement on Agriculture.

\(^6\) See Article 9.1(b) of the Agreement on Agriculture.
• payments on the export of an agricultural product that are financed by virtue of governmental action, whether or not a charge on the public account is involved, including payments that are financed from the proceeds of a levy imposed on the agricultural product concerned or on an agricultural product from which the exported product is derived;\(^7\)

• the provision of subsidies to reduce the cost of marketing exports of agricultural products (other than widely available export promotion and advisory services) including handling, upgrading and other processing costs, and the costs of international transport and freight;\(^8\)

• internal transport and freight charges on export shipments, provided or mandated by governments, on terms more favourable than for domestic shipments;\(^9\)

• subsidies on agricultural products contingent on their incorporation in exported products.\(^10\)

Any other export subsidies that might exist are subject to the provisions of Article 10 of the Agreement on Agriculture which relates to the prevention of circumvention of export subsidy commitments. Article 10.1 provides:

> Export subsidies not listed in paragraph 1 of Article 9 shall not be applied in a manner which results in, or threatens to lead to, circumvention of export subsidy commitments; nor shall non-commercial transactions be used to circumvent such commitments.

As the panel in *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products (Canada - Dairy)* indicated:

> … a Member may [therefore] use export subsidies not listed within Article 9.1 within the limits of its scheduled reduction commitments. However, as stipulated by Article 10.1, such subsidies may not be applied so as to circumvent these and other export subsidy commitments under the Agreement on Agriculture.\(^11\)

Whilst Articles 3.3, 8, 9.1 and 10 are the substantive provisions relating to export subsidies in the Agreement on Agriculture, they are linked to other provisions, most notably the definition of ‘export subsidies’ in Article 1(e) which provides context and meaning to Article 9.1, as well as Article 10.1. Article 1(e) defines ‘export subsidies’ as ‘subsidies contingent upon export performance, including the export subsidies listed in Article 9’. At the same time, the Agreement on Subsidies and Countervailing Measures (SCM Agreement)

\(^7\) See Article 9.1(c) of the *Agreement on Agriculture*.

\(^8\) See Article 9.1(d) of the *Agreement on Agriculture*.

\(^9\) See Article 9.1(e) of the *Agreement on Agriculture*.

\(^10\) See Article 9.1(f) of the *Agreement on Agriculture*.

provides guidance as to the interpretation of certain aspects of the Agreement on Agriculture, including terms such as ‘subsidies’ and ‘contingent’.

The WTO Disputes

The export disciplines that were established in the Agreement on Agriculture by the negotiators during the Uruguay Round have been considered a number of times by WTO dispute settlement panels, as well as the Appellate Body, and their strength has been consistently emphasised, in line with the object and purpose of the Agreement. Australia has been an active participant - either as a principal or a third party - in each of these disputes and has actively encouraged the WTO dispute settlement system to uphold the strength of the export subsidy disciplines.

There are a number of themes that have emerged from the various disputes that have focused upon the agriculture export subsidy disciplines. Some of the key themes are:

- burden of proof;
- relationship between the Agreement on Agriculture and the SCM Agreement;
- relationship between the Agreement on Agriculture and Members’ Schedules
- export contingency/related to export;
- subsidies not necessarily related to money;
- not necessary for the government to provide the economic resources; and
- scope of Article 10.1.

Burden of Proof

The burden of proof generally rests upon the complainant in a WTO dispute. The complainant must make out a *prima facie* case by presenting sufficient evidence to raise a presumption in favour of its claim. If the complainant succeeds, the respondent may then seek to rebut the presumption.\(^\text{12}\) As such, under this “usual allocation of the burden of proof a responding Member’s measure will be treated as WTO-consistent, until sufficient evidence is presented to prove the contrary” (emphasis in original).\(^\text{13}\)

But this general rule of burden of proof does not strictly apply in the case of export subsidies under the Agreement on Agriculture. Article 10.3 establishes:

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Any Member which claims that any quantity exported in excess of a reduction commitment level is not subsidized must establish that no export subsidy, whether listed in Article 9 or not, has been granted in respect of the quantity of exports in question.

In *Canada - Dairy*, the Appellate Body agreed with the principal complainants (New Zealand and the United States) that Article 10.3 “provides a special rule for proof of export subsidies that applies in certain disputes under Articles 3, 8, 9 and 10 of the Agreement on Agriculture”\(^\text{14}\). The respondent, Canada, had tried to argue that Article 10.3 simply reverses the burden of proof, whereby the respondent needed to establish a rebuttable presumption that its measures are not inconsistent with its WTO obligations, which would then be up to the complaint to rebut.

Referring to the fact that claims under Articles 3, 8, 9 and 10 of the Agreement on Agriculture are invariably in two parts - namely a quantitative part and an export subsidisation part - the Appellate Body observed that Article 10.3 alters the usual rules that would apply to burden of proof:

> Consistent with the usual rules on burden of proof, it is for the complaining Member to prove the first part of the claim, namely that the responding Member has exported an agricultural product in quantities that exceed the responding Member’s quantity commitment level.

> If the complaining Member succeeds in proving the quantitative part of the claim, and the responding member contests the export subsidization aspect of the claim, then, under Article 10.3, the responding Member *must establish* that no export subsidy … has been granted’ in respect of the excess quantity exported. The language of Article 10.3 is clearly intended to alter the generally-accepted rules on burden of proof\(^\text{15}\). (Emphasis in original).

**Relationship between the Agreement on Agriculture and the SCM Agreement**

In most of the disputes under the Agreement on Agriculture thus far, the relationship between that Agreement and the SCM Agreement has - to varying degrees - been considered by the Appellate Body.

In *US - Subsidies on Upland Cotton (US - Cotton)*, the Appellate Body highlighted that the *Agreement on Agriculture* and the SCM Agreement are both “integral parts of the same treaty” - namely, the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement) - that are binding on all WTO Members. As such, the Appellate Body indicated that all applicable parts of

\(^{14}\) See *Canada Dairy (Second Recourse to Article 21.5)*, [69] (Report of the Appellate Body).

\(^{15}\) See *Canada Dairy (Second Recourse to Article 21.5)*, [72-73] (Report of the Appellate Body).
these Agreements should be read in a way that “gives meaning to all of them, harmoniously” (emphasis in original).\textsuperscript{16}

But such harmony only goes so far. In \textit{Canada - Dairy}, Canada frequently tried to rely upon unrelated provisions and language in the SCM Agreement to override the ordinary meaning of the provisions of the Agreement on Agriculture. That approach was rejected by the panel and the Appellate Body.\textsuperscript{17}

There is, of course, no doubt that the Agreement on Agriculture and the SCM Agreement share a common heritage, and that the subsidy provisions in the SCM Agreement can provide important context for the interpretation of the subsidy provisions of the Agreement on Agriculture. But in order for any guidance to be obtained from the SCM Agreement for the interpretation of the Agreement on Agriculture, there has to be some similarity between the terms, words or provisions that are being interpreted.

In this regard, the Appellate Body has noted that it is appropriate to rely upon the SCM Agreement for guidance in interpreting the terms ‘subsidies’ and ‘contingent’ as they appear in Article 1(e) of the Agreement on Agriculture.\textsuperscript{18}

But when the language in the Agreement on Agriculture is different from that which appears in the SCM Agreement, no contextual guidance can be obtained. This was made clear in \textit{Canada - Dairy} when the Appellate Body rejected Canada’s attempts to obtain guidance from the term ‘financial contribution’ in Article 1.1(a)(1) of the SCM Agreement when interpreting ‘financed by governmental action’ in Article 9.1(c) of the Agreement on Agriculture. The Appellate Body refused to countenance Canada’s approach by noting that the language was completely different.\textsuperscript{19}

In a similar vein, the Appellate Body in \textit{EC - Export Subsidies on Sugar} (EC - Sugar) observed that it was ‘not persuaded’ that the key export subsidy provisions in the Agreement on Agriculture, on the one hand, and the SCM Agreement, on the other hand, were necessarily “closely related” because the issues presented in the two Agreements were “different in several respects”.\textsuperscript{20}

\begin{itemize}
  \item \textsuperscript{17} See, for example, \textit{Canada - Dairy}, [7.31] (Report of the Panel).
  \item \textsuperscript{19} See, for example, \textit{Canada - Dairy (Second Recourse to Article 21.5)}, [128] and footnote 113 (Report of the Appellate Body).
\end{itemize}
In particular, the Appellate Body believed that the question of the applicability of the SCM Agreement to the export subsidies (under the Agreement on Agriculture) in that dispute raised a number of complex issues, including:

- whether the SCM Agreement applied to the subsidy as a whole, or only to the extent that the subsidy exceeds the Members’ commitment levels, as specified in its Schedule; and

- whether, in the event the SCM Agreement applied, a dispute settlement panel could make a recommendation to withdraw the subsidy as a whole, or whether that recommendation would only apply to that part of the subsidy that exceeds the Members’ commitment levels.\(^{21}\)

The Appellate Body ultimately decided that it did not have the requisite factual findings to complete the legal analysis,\(^ {22}\) but its analysis in *EC - Sugar* usefully reinforced that:

- there are differences between the Agreement on Agriculture and the SCM Agreement; and

- there is a need for caution when trying to link some of the key provisions.

**Relationship between the Agreement on Agriculture and Members’ Schedules**

In *EC - Sugar*, the Appellate Body was, amongst other things, being asked by the European Communities to consider whether the claimed commitment in footnote 1 of the European Communities' Schedule 'limiting' subsidisation of sugar exports by the European Communities could prevail over the provisions of the Agreement on Agriculture itself, despite such a footnote being inconsistent with Articles 3.3 and 9.1 of the Agreement on Agriculture.

In brief, the Appellate Body rejected the European Communities’ arguments and observed that it could find no provision under the Agreement on Agriculture which authorised countries to “depart, in the Schedules, from their obligations under that Agreement”.\(^ {23}\) Indeed, Article 8 of the Agreement on Agriculture requires that, in providing export subsidies, countries need to comply with the Agreement on Agriculture, as well as the export subsidy commitments specified in their Schedules. And as the Appellate Body has observed:

> This is possible only if the commitments in the Schedules are in conformity with the provisions of the Agreement on Agriculture. Thus, we see no basis for the European Communities’ assertion that it could depart from the obligations under the Agreement on Agriculture through the claimed commitment in Footnote 1.\(^ {24}\)

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\(^{21}\) See *EC - Sugar*, [339], footnote 537 (Report of the Appellate Body).

\(^{22}\) See, for example, *EC - Sugar*, [340] (Report of the Appellate Body).


**Export Contingency/Related to Export**

Article 9.1 deems that a range of practices are ‘export subsidies’ for the purposes of the Agreement on Agriculture. In each instance, there is a notion of the practice in question being contingent or, at a minimum, related to the export of an agricultural product, eg:

- provision by governments or their agencies of direct subsidies … *contingent on export performance* (emphasis added);
- the sale or disposal for export by governments or their agencies of non-commercial stock … (emphasis added);
- payments on the export of an agricultural product … (emphasis added);
- the provision of subsidies to reduce the cost of marketing exports of agricultural products … (emphasis added);
- internal transport and freight charges on export shipments … (emphasis added); and
- subsidies on agricultural products *contingent on their incorporation in exported products* (emphasis added).

There are obviously other elements that will need to be met before a disputed measure (or payment) can be brought within the scope of the specific practice outlined in one of the sub-paragraphs of Article 9.1, but the general notion of export contingency or, at a minimum, the need for the subsidy in question to be related to the export of an agricultural product is common to them all.

Article 10.1 also contains this notion of export contingency by way of Article 1(e) of the Agreement on Agriculture, which defines ‘export subsidies’ as “subsidies *contingent* upon export performance” (emphasis added).

The phrase ‘contingent on’ has been read by the Appellate Body to require an element of “dependency”, “conditionality” or even a “tie” to export performance.\(^25\) Indeed, in US - Cotton the Appellate Body emphasised that a “relationship of conditionality or dependence”, namely the granting of a subsidy that is “tied” to export performance, lies at the “very heart” of the legal standard relating to export-contingency.\(^26\)

And in EC - Sugar, the Appellate Body observed that the phrase ‘on export’ means that the product in question “must be exported” or “in connection” with exports.\(^27\)

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25 See, for example, the US - FSC, [136]; and US - Cotton, [572] (Report of the Appellate Body).


Subsidies not Necessarily Related to Money

Export subsidies also do not necessarily need to involve monetary transfers.

In the Canada - Dairy case, the Appellate Body noted that the word ‘payment’ in Article 9.1(c) denoted a “transfer of economic resources” and that such a transfer could equally involve the transfer of goods or services for less than full value, as opposed to a monetary payment. It then concluded that the ordinary meaning of the word ‘payment’ “encompasses ‘payments’ made in forms other than money”.

In the EC - Sugar case, the Appellate Body went on to observe that the transfer of resources that is envisaged by Article 9.1(c) could include “transfers of resources within one economic entity.” This was in response to an argument that the European Communities had tried to run which argued that a ‘payment’ required, by definition, the presence of two distinct legal entities. In the Appellate Body’s view, this argument would lead to illogical outcomes:

The European Communities’ approach is, in our view, too formalistic. To illustrate, one could envisage a scenario under which the producers of C sugar are legally distinct from the producers of A and B sugar. In this situation, the European Communities’ approach could recognize that a ‘payment’ under Article 9.1(c) could exist because there would be a transfer of economic resources between different parties. If, however, these same producers of A, B and C sugar were integrated producers and organized as single legal entities, a payment under Article 9.1(c) would not exist, because the transfer would be merely ‘internal’. We do not believe that the applicability of Article 9.1(c) should depend on how an economic entity is legally organized.

Not Necessary for the Government to Provide the Economic Resources

The Appellate Body in Canada - Dairy observed that Article 9.1(c) of the Agreement on Agriculture describes:

… an unusual form of subsidy in that ‘payments’ can be made by private parties and need not be made by a government. Moreover, ‘payments’ need not be funded from government resources, provided they are ‘financed by virtue of governmental action’. Article 9.1(c), therefore, contemplates that ‘payments’ may be made and funded by private parties, without the type of governmental involvement ordinarily associated with a subsidy.


See, for example, EC - Sugar, [263] (Report of the Appellate Body).


Obviously, not any type of ‘governmental action’ will have the requisite connection to the financing of payments. Thus, the Appellate Body has also stated that where government regulation merely enables payments to occur:

… the link between the governmental action and the financing of the payments is too tenuous for the ‘payments’ to be regarded as financed by virtue of governmental action’ … within the meaning of Article 9.1(c). Rather, there must be a tighter nexus between the mechanism or process by which the payments are financed … (emphasis in original).

Ultimately, however, the relationship between the governmental action and payments at issue will need to be ascertained on a case-by-case basis. In the compliance proceedings of Canada - Dairy, the Appellate Body found that the payments at issue - namely those relating to the sale of commercial export milk (CEM) by Canadian producers to Canadian processors for processing into various dairy products for export - were financed by virtue of governmental action. In the Appellate Body’s view:

Canadian ‘governmental action’ controls virtually every aspect of domestic milk supply and management. In particular, government agencies fix the price of domestic milk that renders it highly remunerative to producers. Government action controls the supply of domestic milk through quota, thereby protecting the administered price. The imposition by government of financial penalties on processors that divert CEM into the domestic market is another element of governmental control over the supply of milk. Further, the degree of government control over the domestic market is emphasized by the fact that the government pools, allocates, and distributes revenues to producers from all domestic sales. Finally, governmental action also protects the domestic market from import competition through tariffs.

In our view, the effect of these different governmental actions is to secure a highly remunerative price for sales of domestic milk by producers. In turn, it is due to this price that a significant proportion of producers covers their fixed costs in the domestic market and, as a result, has the resources profitably to sell export milk at prices that are below the costs of production.

The Appellate Body reiterated its thoughts on this aspect of the Agreement on Agriculture in EC - Sugar where the European Communities (EC) attempted to argue that the sales of C beet below its total cost of production was not ‘financed by virtue of governmental action’ The Appellate Body rejected the EC’s arguments and agreed with the Panel that the EC’s sugar regime went far beyond merely ‘enabling’ or ‘permitting’ beet growers to make payments to sugar producers. Indeed, the Appellate Body indicated that it had no doubt that, “without the highly remunerative prices guaranteed by the EC sugar regime for

34 See Canada - Dairy (First Recourse to Article 21.5), [116] (Report of the Appellate Body).
A and B beet, sales of C beet could not take place profitably at a price below the total cost of production”.  

Some of the factors that the Appellate Body thought indicative of ‘governmental action’ in EC - Sugar included:

- the EC sugar regime:
  - regulated prices of A and B beet;
  - established a framework for the contractual relationships between beet growers and sugar producers with a view to ensuring a stable and adequate income for beet growers;
  - was tightly controlled by the EC, including through financial penalties that were imposed on sugar producers that diverted C sugar into the domestic market;
  - significant number of beet growers were likely to finance sales of C beet below the total cost of production as a result of participation in the domestic market by making ‘highly remunerative’ sales of A and B beet; and
  - C sugar producers had ‘incentives’ to produce C sugar so as to maintain their share of the A and B quotas.

**Scope of Article 10.1**

As indicated above, Article 10.1 of the Agreement on Agriculture covers any export subsidies not covered by Article 9.1. Article 9.1 is quite detailed and would, at first glance, appear to cover all possible export subsidy practices. But the Appellate Body has highlighted the fact that Article 9.1 is not exhaustive in the context of defining the realm of export subsidies in the Agreement on Agriculture. After all, Article 1(e) of the Agreement on Agriculture defines ‘export subsidies’ as “subsidies contingent upon export performance, including the export subsidies listed in [Article 9.1]”. In US - Cotton, the Appellate Body noted that the use of the word ‘including’ suggests that the term ‘export subsidies’ “should be interpreted broadly and that the list of export subsidies in Article 9 is not exhaustive”.  

The Appellate Body has not, however, gone on to extrapolate what sort of practices might not be captured by Article 9 and thereby captured by Article 10.1, except insofar as noting that an export credit guarantee that met the definition of an “export subsidy” would be covered by Article 10.1 of the Agreement on Agriculture because it is not covered by Article 9.

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37 See, for example, EC - Sugar, [238] (Report of the Appellate Body).
38 See, for example, US - Cotton, [615] (Report of the Appellate Body).
Conclusion

The export subsidy disciplines in the Agreement on Agriculture are essentially centred around Articles 3.3, 8, 9.1 and 10.1 and were established by negotiators during the Uruguay Round. The disciplines have been considered by the Appellate Body in a number of disputes. In each of the disputes, the Appellate Body has, in line with the object and purpose of the Agreement on Agriculture, consistently emphasised the strength of the disciplines and ensured that the competitive environment for agricultural products in the global market is - as far as it can in line with the language of the Agreement - sufficiently protected.

Obviously, the ongoing reform process taking place under the rubric of the Doha Development Agenda will see a further tightening of the disciplines, but the experience thus far demonstrates that agricultural exporters like Australia have made some important gains from the pre-Uruguay Round days and those countries that continue to subsidise their exports need to strictly adhere to their commitments.
The World Trade Organisation’s Dispute Settlement Understanding (DSU) is a wolf in sheep’s clothing, according to some of its most trenchant critics. It is, these critics contend, the cat’s paw of global corporate titans who use it to run roughshod over environmental and health concerns, and threaten millions with starvation. Its rulings, have been ‘goofy, sloppy and bizarre’ and forced a Central American country [Guatemala] to choose between “a life-saving UNICEF baby formula policy and an expensive defence in a Swiss trade tribunal.” In bending supinely to the whim of global business, the DSU is variously said to have undermined clean air regulations, endangered school lunch programs, and put the interests of global commerce ahead of that of sea turtles, tuna and other sea life. The DSU is a menace to liberal values, these critics argue, as it ‘violates most democratic notions of due process and openness.’ Nothing less than national sovereignty, perhaps even democracy itself, is at risk.

Given this characterisation of the control and influence that business has over the DSU, some might feel that the corporate world was universally grateful for, and perhaps even embarrassed at, the solicitude of the DSU to its whims. But the trade sceptic view of the DSU is cartoonish and inaccurate. It is certainly true that the DSU is a highly regarded pillar of the WTO’s architecture. But from the perspective of some elements of the business community, the DSU more often resembles a sheep in wolf’s clothing rather than the opposite. It is cumbersome, moves too slowly, fails to provide interim

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relief even from the most glaring of trade breaches and has a limited toolbox of remedies. Respected US trade lawyer, Gary Horlick summed up the private sector’s frustration with the lengthy time-frames at a 2005 conference in Washington:

With private sector clients, when I tell them the DSU takes 15 to 18 months, [they say] That’s ok, it’s faster than a court. [But] when you tell them it’s 3 to 4 years, [they say] we’re outta here. Life’s too short, and we’ll just go about our business.5

Then there are the concerns that many obstacles to trade fall outside the coverage of WTO agreements, an issue confronted, at some considerable cost, by photographic giant Kodak in the early years after the DSU’s establishment.

Against this backdrop of sharply divergent perceptions of the DSU’s role and performance, this paper will canvass business perspectives on the DSU’s evolution to date, identify areas of perceived weakness and offer some suggestions for reform, both modest and more far-reaching.

The Progress so far

Notwithstanding some of the concerns discussed below, the prevailing view in the commercial world is that the WTO’s DSU is a significant advance on its predecessor under the General Agreement on Tariffs and Trade (GATT.) The improvements are critical, and numerous. Under the previous GATT system, panel proceedings were drawn out, the defending party could block any unfavourable judgment, and the GATT panel process did not cover some of the agreements. Under the new WTO arrangement, there are specified timetables for panel proceedings, the defendant cannot block unfavourable findings, and there is one dispute settlement process covering all the Uruguay Round Agreements.6

Reflecting these expanded powers, and newfound confidence in the arbitration of trade disputes, the DSU has been much busier than its predecessor. In the 10 years since its creation, 352 disputes had been submitted to the DSU, roughly the same number considered by its predecessor in the previous five decades.7

There are differing views on how to measure the effectiveness of the DSU, but the academic reviews have been sufficiently positive to prompt some analysts to claim that the literature on the DSU’s operations is characterised by “near irrational exuberance”.  

Certainly, over the last 10 years, the DSU has emerged as a significant contributor to the removal of illegal and unfair trade restrictions and practices. Analysis by the World Bank has shown that complainants have won 86 per cent of cases – a trend line that has been remarkably stable since 1995. In other words, for completed cases at least, the DSU has had a distinctly liberalising impact on global trade. In its own modest way, the DSU has been the flagship of the WTO’s mission of continuing or rolling liberalisation. This contribution should not be under-estimated given the delays which bedevilled the efforts firstly to launch the new round of global trade negotiations, and then, more recently have seen the Doha Round stall, and miss a series of self-imposed deadlines.

But the general assessment of the business community that the DSU is an improvement on previous arrangements should not be interpreted as an excuse for ignoring further reforms to improve the system, and address some of its obvious shortcomings.

**Business Concerns with the WTO Dispute Settlement System**

**The Singular Reliance on Trade Sanctions to Force Compliance**

After ten years of the DSU, the last resort of the enforcement mechanism remains on retaliation not reward. To induce compliance, the offending party in a dispute is punished (with punitive tariffs) rather than the disadvantaged party/ies being rewarded or compensated (with improved market access). This concept is plainly contrary to the implicit guiding principle of the World Trade Organization – that the object of the membership in the global trading ‘club’ is to lower barriers, not to raise them. As Steve Charnovitz has noted:

> In approving trade sanctions for commercial purposes, the WTO subverts the goal of open trade by allowing governments to ban trade in response to violations by others.  

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Charnovitz contrasts this approach with other international agencies that do not sponsor actions that contradict their primary raison d’être:

For example, the World Health Organisation does not authorise spreading viruses to countries who do not co-operate in international health efforts. The World Intellectual Property Organisation does not fight piracy with piracy. Hence, the WTO’s endorsement of a trade restriction to promote free trade seems bizarre.  

While the latter example might reasonably be dismissed as glib, the emphasis on trade sanctions as the primary method of inducing compliance with DSU rulings does have significant disadvantages.

The emphasis on retaliation, not reward, serves to reinforce the notion that trade restrictions on imports are cost-free for the importing country. This is an unusual principle to define the dispute settlement mechanism of a body otherwise committed to expanded trade flows.

In fact, by raising the costs of imported goods, the reliance on sanctions (usually 100 per cent tariffs) has a negative impact on the economy that originally raised the complaint. This paradoxical ‘double-whammy’ was neatly described by the Report of the International Financial Institution Advisory Commission in March 2000. The bipartisan Commission, chaired by economist Allan Meltzer, was primarily asked to assess the performance of the International Monetary Fund and the World Bank, but also briefly examined aspects of the operation of the WTO’s DSU, and notably its reliance on trade sanctions to force compliance. The study concluded:

The injured party then suffers twice - once from restrictions on its exports, imposed by the foreign governments, and again when tariffs or duties raise the domestic cost of the foreign goods selected for retaliation. To compensate for the injury done by others, we impose costs on ourselves as well as them.

Just one example of how individual companies in the complainant nation can be disadvantaged is the fate of US-based importers and retailers of European food products who expressed alarm at the impact on them of the 100 per cent tariffs imposed on European Union products as a result of Brussels’ reluctance to comply with DSU rulings in the Beef Hormones and Bananas cases.

Second, the economic leverage to comply with an adverse ruling varies according to the size (and relative importance) of the complainant member nation. For instance, larger nations may be able to shrug off the imposition of punitive tariffs on its exports to a nation with a small domestic market.

11 Ibid.

This inevitably means that companies in small to medium sized nations – especially those with a strong export orientation – appear to have less clout in the DSU system. Prevailing practice seems to bear this out. Recent research points to data showing that “there is not one single occasion where a developing country (non-OECD member) imposed countermeasures to induce compliance, even when faced with non-implementation.”

The paper concludes, with an element of understatement:

The data suggest that countermeasures are a more or less ineffective instrument in the hands of smaller players.

Third, individual companies in respondent Member nations can become ‘effective hostages’ with no link to the breach of WTO rules can be caught in the crossfire of the WTO-approved retaliation. For example, Australian wine exporters to the United States faced the prospect of being slapped with 100 per cent tariffs on their surging imports as part of the United States pressure on the Australian Government in the case involving subsidies paid to Howe Leather for automotive leather.

Justice Delayed is Justice Denied

One of the strengths of the DSU is its adoption of prescribed timetables. But many of these deadlines pass unmet. Moreover, other steps have become redundant (e.g. the power to block the first request for the establishment of a panel) while overly generous implementation periods have been permitted in many cases. As noted earlier, the length of time for the complete prosecution of a case has slipped to as much as three or four years. In complex cases this may be understandable. But in more straightforward cases, it is unacceptable, and the lengthy and cumbersome nature of cases is slowly weakening the DSU’s credibility in the eyes of its strongest backers – the business community.

Trade Restrictions with Impunity

The increasing concern with the timeliness of justice has a nasty by-product, especially when combined with the fact that DSU rulings are regarded as prospective only. It provides encouragement, or at least no sanction, for those WTO member nations tempted to introduce a temporary trade restriction in full knowledge that they will receive up to four years of impunity from sanction or retaliation. This is a source of considerable disaffection for the corporate sector. As Washington trade lawyer, Gary Horlick has explained:

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14 Ibid.
It’s just a simple calculation. For example, Argentina puts on a statistical tax knowing perfectly well it is illegal. It collects it, and never gives it back even though they lose the case. At that point, a few more companies say this system isn’t for me.  

The absence of any restitution in such cases further infuriates affected companies:

Somehow some businesses, shockingly enough, don’t understand that if it is ruled that the duty was being collected illegally, they don’t get their money back. It’s really hard to explain that illegally collected duties aren’t refunded.

Some Suggestions for Change

The concerns outlined above do not represent a complete catalogue of the complaints and irritations that business groups have with the existing DSU. Nor does the above represent a call for either its abolition, or substantial reform. The suggestions below simply represent an elucidation of some of the areas where refinements and improvements might be considered.

Short-Term Measures

Transparency

There is a strong case for opening up panel hearings to the public, albeit with provision for in-camera hearings in cases where sensitive national security or commercial-in-confidence material is being aired. If it is to nurture and retain the confidence of the communities in its member nations, the WTO’s reflex must invariably be towards greater openness and transparency. Panel submissions should also be made public, with appropriate caveats for confidential material.

Modernising Procedures

Under current rules, the respondent in a WTO dispute case can block the first request for the establishment of an adjudication panel. But as the blocking cannot be repeated at the second request, this delay – of at least 30 days and often much more– is an obsolete, unnecessary and unjustifiable relic in DSU procedures.

Another factor that has added unnecessarily to delays in the operation of the DSU is the selection of panellists to adjudicate on disputes. This process is

15 Ibid.
16 Ibid.
routinely taking three times longer than envisioned under DSU timelines,\textsuperscript{17} and on occasions up to several months. Such delays are an additional source of frustration with a system where delays can frustrate and weaken support for the system.

A number of proposals have been tabled to address this issue, including the establishment of a permanent roster of panellists, from which a three-person line up could be established within five days of WTO’s decision to establish a panel. Given that some panellists have served on numerous disputes, this seems, \textit{prima facie}, a reasonable way of ensuring that unnecessary delays do not clog up the system.

\textbf{More Substantial Reforms}

\textit{The Case for Interim Relief}

Lengthy delays in dealing with a blatant, trade restriction is a significant concern to the corporate sector. At present, the DSU provides no disincentives for the introduction of such trade restrictions aimed at providing short-term protection for a particular industry/ies. As Jacques Bourgeois put it at the recent Stresa conference, “a WTO proceeding may be tantamount to closing the stable door when the horse has bolted”.\textsuperscript{18} This means, he added, that the complaining member bears the cost of the adverse effects of the WTO-inconsistent measure until the final resolution of the dispute and the compliance with the DSB’s recommendations.

There are two related potential options to deal with this problem. The first is a fast track preliminary assessment mechanism to screen alleged breaches of WTO rules. Such a process could be used to screen ‘frivolous and vexatious’ complaints.\textsuperscript{19} A second, and more important option, is to provide an avenue for the granting of interim relief or an expedited adjudication process.

To address the second option, Mexico has proposed the introduction of procedures allowing the grant of interim relief in cases where the trade restriction is causing, or threatening to cause, ‘damage difficult to repair’. In such ‘exceptional circumstances’, the panel could request the respondent ‘to stop or counteract the damage or threat thereof’ within 30 days, or face

\begin{itemize}
\item\textsuperscript{17} Valerie Hughes, Director, Appellate Body Secretariat, WTO, ‘From Initiating Proceedings to Ensuring Implementation: What Needs Improvement?’ Paper delivered to conference \textit{The WTO at 10: the Role of the Dispute Settlement System}, Stresa, Italy 11-13 March 2005.
\item\textsuperscript{18} Professor Jacques H J Bourgeois, Presentation at conference \textit{The WTO at 10: The Role of the Dispute Settlement System}, Stresa, Italy, 11-13 March 2005.
\item\textsuperscript{19} For a hypothetical example see Bourgeois, Ibid.
\end{itemize}
the authorisation of counter-measures.20 There are significant potential complications with this proposal, not the least being the challenge of differentiating between trade restrictions based on the level of damage they will cause and the degree of their ‘reparability’. But the proposal is worth genuine further exploration and consideration.

New Ways to Promote Compliance

The DSU’s effectively singular reliance on the threat (and implementation) of retaliation to induce compliance with WTO rules is a considerable shortcoming in its arsenal. But plausible and practical alternatives are difficult to find. As Charnovitz has noted:

Although the WTO is lauded for its strong compliance system, the reality is that the WTO’s toolbox is nearly empty.\(^2\)\(^1\)

During his term as European Trade Commissioner Pascal Lamy admitted the imperfections of the existing compliance model, but said it was likely to be around for some time given the absence of any obvious alternatives:

It would be good to think that we could find a way of ensuring WTO conformity without getting into the business of distorting trade flows which stems from sanctions. That said, the current system is all we have to enforce compliance, and I certainly cannot and will not tell you today that we renounce the instrument in the absence of better ideas.\(^2\)\(^2\)

A number of suggestions have been put forward to replenish the toolbox, with some more workable than others. Some argue for a greater reliance on moral pressure by promoting a ‘culture of compliance’. Given the hard-nosed world of commercial and trade politics, this is unlikely to garner much support either from negotiators or the corporate community. The prospect of suspending WTO membership or various rights pursuant to membership is another idea that has been floated. Given the number of potentially outstanding disputes and the practical difficulties involved, this too is an idea likely to find more favour in a university symposium than in WTO capitals or their business communities.

The use of fines is another issue that has been raised, including by the Meltzer Commission. Retaliation, it concluded, was contrary to the spirit of the WTO.

Instead of retaliation, countries guilty of illegal trade practices should pay an annual fine equal to the value of the damages assessed by the panel or provide equivalent trade liberalization.\(^2\)\(^3\)

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20 Ibid.
21 Charnovitz, above n 10, 823.
22 Ibid (cited in).
23 Above n 12.
It was not clear to whom the retaliation would be paid – the WTO, the complainant party, or an approved charity of the latter. Whatever its merits, the political obstacles are substantial. The prospect of the United States Government paying the European Communities billions of dollars in fines over the *Foreign Sales Corporations* dispute is a concept difficult to conjure. On the other hand, the prospect of such enormous fines would represent a considerable obstacle.

A more realistic, if still distant, reform is designed to overcome the problem where it is unrealistic or counterproductive for a WTO Member nation to impose retaliatory measures on a much larger economy. We have noted already that such retaliation can disadvantage companies and consumers in the country applying them. As Mexico put it in making the case for a new and innovative approach to the imposition of countermeasures:

> The suspension of concessions phase poses a practical problem for the member seeking to apply such suspension. The Member may not be able to provide a trade sector or agreement in respect of which the suspension of concessions would bring about compliance *without affecting its own interests* *(italics added)*. There may be others, however, with the capacity to effectively suspend concessions to the infringing Member.24

Accordingly Mexico has proposed that this problem be overcome by making the right to impose countermeasures a tradable right, saleable to other Member with a direct commercial interest in imposing such countermeasures. This idea has some appeal, especially for smaller nations, and those with a heavy export orientation. Businesses too in the complainant nation would be spared the ‘double whammy’ referred to above. But the suggestion could simply shift that problem to another nation, and it is conceivable that in a globalised world that the fallout could still adversely impact, albeit more indirectly, business operations from the original complainant nation.

The real challenge is to find an alternative to a singular reliance on retaliation to force compliance with DSU rulings. That has been elusive to date but the effort to find such alternatives must continue.

**Conclusion**

The DSU has been a much needed and overdue addition to the arbitration of disputes between governments that have a direct effect on the flows of trade and investment around the world. But its effectiveness has brought higher expectations from many, including in the business world that it can and should be improved further. And those who interpret the recent failure of

24 Bagwell, Mavroidis and Staiger, above n 13, 10.
WTO Members to agree on proposals to improve the DSU as a sign that that everything is satisfactory are mistaken.

Moreover the euphoria which surrounded the DSU’s performance after 5 years has begun to dissipate. This, combined with the diminishing confidence in the WTO’s ability to deliver trade liberalisation, threatened to eat away at the foundations of the WTO’s essential support base. Hugo Paemen, a long-time head of the European Communities delegation to Washington summed up this problem recently:

There’s also a crisis in constituency terms. Governments are not 100 per cent enthusiastic or behind the process, and the business community is not 100 per cent behind. They don’t believe it anymore. They think that the WTO has become too complicated, too unpredictable. When they have a problem, they are strong enough, at least the big ones, they think they are strong enough to go and settle their problem. They don’t count on the multilateral system any more. And that’s not a good thing.  

To prevent this disaffection from worsening, those with a stake in the WTO project must work to continuously improve and refine the DSU. But business must approach this debate with realism. The DSU is an inter-governmental crucible of commercial considerations, quasi-legalism, the concession of national sovereignty and tricky domestic and sometime geo-politics. On occasions it bares its teeth. On others it runs round in circles, leaderless and looking lost. Those expecting perfection will be disappointed. They should also remember that the binding nature of the organisation’s rulings means that the DSU is a rarity amongst international organisations. The DSU’s weaknesses must be seen in this light. And proposals for reform must, by necessity, temper ambition with realism, and vice versa.

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How do you see the WTO dispute settlement system? What does it mean to Australian farmers?

The Uruguay Round of negotiations under the General Agreement on Tariffs and Trade (GATT) was a watershed for Australian farmers. The Round delivered two key outcomes for us. First, the Agreement on Agriculture, which for the first time saw agriculture captured by world trade rules. Second, the negotiations saw the establishment of the WTO in 1995, which provide a body of trade rules and a binding dispute settlement system to decide perceived breaches of those rules.

I think the dispute settlement system has subsequently provided Members with a strong, effective system for resolving trade disputes, including disputes over trade in agricultural products. To me, the system is a central plank of the multilateral rules-based trading system, and it has greatly benefited Australian farmers. Australia has successfully prosecuted or been involved as a third party in a number of disputes that have either improved market access for Australian agricultural commodities or obliged countries to remove illegal policy measures that distort trade flows and/or world commodity prices.

Which WTO disputes do you see as particularly significant for farmers?

A number come to mind. The Korea – Beef ruling requiring South Korea to liberalise its beef import arrangements (in 2000), and the US – Lamb ruling requiring the United States to remove its safeguard arrangements on lamb imports (in 2001) both had benefits for Australian farmers. US – Cotton (in 2005), of course, was a landmark case ruling against multi-billion dollar United States subsidy programs that were found to have consistently distorted world
cotton prices. And the 2005 EC – Sugar ruling requiring the European Union to dramatically reduce its sugar subsidies, and its level of subsidised sugar exports, was significant for Australian farmers.

As a middle-sized trading nation, WTO rules protect Australian farmers from unfair and illegal trade practices. The disputes I mentioned (above) have in their own right benefited Australian farmers to the tune of tens of millions of dollars a year. In fact, in my view, the landmark ruling in the US – Cotton dispute has proven WTO rules included in the Agreement on Agriculture are much stronger than was first thought at the end of the Uruguay Round. This is particularly so with regard to disciplines on “Green Box” support (agricultural support that is considered to be minimally trade distorting).

Looking back ten years, how has the system changed from your perspective?

The reality is that prior to the establishment of the WTO, Australia and the majority of other trading nations were at the mercy of the ‘big boys’ – the United States and the European Union. The WTO has established the ‘Rule of Law’ for trade. As we’ve seen in the US – Lamb Safeguard and EC – Sugar disputes, the WTO means that a middle-sized trading nation such as Australia can take on the world’s largest trading nations.

Would the NFF like to see further changes?

The NFF is fully committed to advancing the interests of its members. In that regard we will continue to work closely with the Australian Government in the current Doha Round of negotiations to further strengthen the multilateral rules for trade in agricultural products. We will also encourage the Government to fully utilise WTO rules wherever possible to prosecute WTO disputes that will improve the trading circumstances of Australian farmers.
Introduction

The establishment of the WTO introduced major improvements in the dispute settlement procedures that had applied under its predecessor organisation, the General Agreement on Tariffs and Trade (GATT).

[compared to GATT, dispute settlement under the WTO was strengthened by eliminating the possibility of blocking the establishment of a panel or the adoption of panel reports, introducing time limits for the various stages of panel proceedings, standard terms of reference for panels, creating an appeal process, improved surveillance of the implementation of panel reports, and automaticity of approval for retaliation in cases of non-compliance with a panel recommendation.]

In addition, the establishment of a new standing Appellate Body was an important development because of its ability to consider challenges regarding the legal interpretations developed by a panel. Perhaps no case better illustrates the potential significance of the Appellate Body’s role in the WTO dispute settlement system than the Canada – Dairy dispute.

This paper provides some thoughts on the WTO dispute settlement system from the perspective of an industry competing in the international marketplace.
Approximately half of Australia’s milk production or around five billion litres was exported in a wide variety of dairy product and dairy ingredient forms to more than 130 nations in 2004/05. Dairy is the largest processed food industry in Australia and has major forwards and backwards economic linkages ranging from grain and services inputs on-farm to the food service and retail sectors and exporting. The total value of exports was A$2.6 billion in 2004/05.

After identifying some directly relevant dispute findings, the paper points to some operational aspects of the WTO dispute settlement system that affect directly the interests of private sector industries. It then looks at the potential impact on dairy processor and farmer returns and industry profitability from farm support schemes that do not comply with WTO Members’ commitments and obligations under the Uruguay Round Agreement on Agriculture (URAA). If unchallenged in WTO dispute settlement proceedings, these schemes could cause medium-term to long-term deterioration in Australian dairy industry returns from exporting. This deterioration would in turn have adverse consequences for the dairy industry’s rate of return relative to that of competing land uses, potentially discouraging productive investment in the dairy industry, undermining the perception of dairying as a rewarding and lucrative career, and limiting the ability of dairy to contribute significantly to the socio-economic welfare of rural regions.

**Specific Dispute Outcomes Affecting Trade in Agricultural Products**

WTO dispute settlement outcomes to date have on the whole been ‘trade friendly’, facilitating liberalisation of trade in agricultural products. Particularly important have been the outcomes of the Canada – Dairy, US – Cotton and EC – Sugar disputes. The findings in those disputes have curtailed schemes which provided exports subsidies, either directly or indirectly, to three major commodities and, as a consequence, distorted world markets for those commodities. The findings have put pressure on farm support programs, particularly those in developed nations with high export volumes of supported commodities, and have added momentum for agricultural trade reform in the Doha Round negotiations.

The broad interpretation of Article 9.1(c) of the URAA in the Canada – Dairy dispute, may have has been instrumental in discouraging schemes that allow the

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6 US – Subsidies on Upland Cotton, WT/DS267.
7 EC – Export Subsidies on Sugar, WT/DS265, WT/DS266, WT/DS283.
8 Article 9.1(c) of the URAA refers to “payments on the export of an agricultural product that are financed by virtue of government action ….”
disposal of surplus dairy products in excess of a WTO Members’ commitments. For example the European Union has a major structural surplus of the two intervention (price supported) dairy products; skim milk powder (SMP) and butter. The European Union utilises a range of subsidised internal and external programs to manage this pervasive structural surplus. Depending on market conditions, however, extensive subsidised programs may not result in market balance been achieved i.e. public stockpiles have persisted since introduction of the European Union’s milk quota system in the 1983/84 season with the occasional exception. The United States also has a price support system with Government purchases of non-fat dry milk powder (or SMP), butter and cheese utilised to establish a floor price for producers’ milk. Between the last third of 1999 and 2004 the US Government, through the Commodity Credit Corporation purchased a huge volume of SMP, well in excess of what could be subsidised for export under their URRA commitments.

The cross-subsidisation link established between domestic support and export subsidies in Canada – Dairy set an important precedent, given dairy’s position as the most heavily subsidised agricultural sector in dollar terms in OECD member countries. A major policy goal for the price deregulated Australian dairy industry is that disciplines on domestic support programs are substantively tightened; as a result of WTO Doha Round Negotiations particularly but not entirely related to amber box payments. If not, then recipient dairy industries may be able to use these non-market related payments to maintain an export presence; even if direct subsidies are phased out during the implementing period.

**Some Aspects of the Operation of the WTO Dispute Settlement System**

The ‘enforceability’ of the WTO dispute settlement system is a major step forward when compared to dispute settlement under the GATT, but there are still challenges in the implementation of dispute findings.

The time taken to resolve cases is a problem. The Canada – Dairy dispute required three sets of panel and Appellate Body findings before resolution. The case dragged on for almost five years, and during this time subsidised dairy exports by Canada potentially denied export opportunities and incomes for non-subsidising Australian processors. The lack of backdated enforcement provisions is a potentially major issue as it could involve extended, and possibly permanent, loss of established market share(s).

The Appellate Body’s inability, where there are insufficient findings of fact, to remand matters back to a panel for further consideration emerged as a
significant issue in the *Canada – Dairy* dispute. The Second Recourse to Article 21.5 process was a direct result of the development by the Appellate Body during the First Recourse to Article 21.5 process of the average cost of milk production standard for determining whether a subsidy existed in the context of an export subsidy claim. The Appellate Body should have the authority to remand an issue back to original panel for further analysis, avoiding the need to establish a new panel process and thereby saving considerable time.

Retaliation may work effectively, even if belatedly, for very large economies with huge trade volumes, for example, by the United States against the European Communities in the *EC – Hormones*\textsuperscript{9} dispute, and by the European Communities against the United States in the *US – FSC*\textsuperscript{10} dispute. In most cases\textsuperscript{11}, retaliation involves raising tariffs which ultimately can be detrimental to the interests of the industry end user (which adds value) and the consumer, as well as to the retaliating economy as a whole. However, it remains unclear whether other WTO Members will be able to make effective use of the retaliatory provisions of the dispute settlement system. There are other, seemingly unrelated, factors that may need to be considered. For example, would a medium or small developing WTO Member’s retaliation against the two ‘majors’ risk non-trade repercussions, perhaps concerning development assistance or security arrangements.

The cost of WTO dispute settlement cases, whether by a government on its own or by a government and industry acting together, may discourage action despite a demonstrably strong case. A potential development is that industry associations and/or companies combine resources to fund cases. In the dairy sector, a market access issue with the potential to lead to collaborative dispute settlement action may arise from the provisions of the 2002 United States farm support legislation (the Farm Security and Rural Investment, or FSRI, Act) that impose a tax on the milk equivalent of dairy product imports to fund generic promotion in the United States. A second and possible collaborative example would be the imposition by the United States of tariff rate quotas on imports of casein, caseinates and milk protein concentrates.

The partnership approach, with an increasing responsibility on industry to fund cases, may need to be matched by non-governmental access to panel and Appellate Body hearings. Currently, there is no scope for direct participation in a dispute by non-government entities.

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\textsuperscript{9} *EC – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26, WT/DS48.  
\textsuperscript{10} *US – Tax Treatment for “Foreign Sales Corporations”*, WT/DS108.  
\textsuperscript{11} Noting that in *EC – Bananas*, part of Ecuador’s authorisation concerned proposed retaliatory measures under the TRIPS Agreement, although Ecuador never implemented the retaliation.
However, making submissions and/or hearings more open to non-government representatives may be strongly resisted by developing WTO Members fearful of Non-Government Organisations (NGOs) appearing, for example, in relation to environmental issues.

The timing of emerging disputes may also either encourage or discourage cases to one party’s economic benefit. Respective governments may not wish to ‘rock the boat’ for fear of harming their overall economic interests during periods of potentially decisive negotiations, for example in the lead-up to the Hong Kong ministerial in December 2005 or in 2006 when Doha Round negotiations across agriculture, Non-agricultural Market Access (NAMA) and the services sectors are finely balanced.

WTO dispute settlement reports are long and complex, and they are not easy for non-experts to comprehend. For example, the panel and Appellate Body reports in the US – Cotton dispute exceeded 2,300 pages. As a consequence, the transparency and accessibility of the WTO dispute settlement system is reduced, which in turn reduces the level of trust and the perceived credibility of the system.

Finally, the emergence of a dissenting opinion in the Appellate Body’s report in the US – Cotton dispute is another sign of the increasing judicialisation of the WTO dispute settlement system. Dissenting opinions are common occurrences in many national appeal courts and can later form the basis for a court to overrule one of its earlier decisions. If the Appellate Body were to follow the path of national appeal courts on this issue, it could result in more time and cost to settle a case and potentially create even greater long-term disruption of trading patterns, with possible severe economic loss.

**The Economic Impact of Trade-Distorting Farm Support Schemes**

The distortion of dairy commodity markets by the combined impact of both illegal and legal URRAA mandated export subsidies reduces the returns of Australian processors and ultimately and adversely the price farmers receive for their milk. For example, Canada’s special milk price class 5(e) and subsequent Commercial Export Milk (CEM) schemes initially priced skim milk powder (SMP) to eliminate a relatively small SMP stockpile on the world market. Because the schemes grew supply, they increased competition in targeted markets and the SMP price was consequently put under greater pressure. SMP is the barometer (or proxy) price for milk proteins embodied in a range of dairy products and dairy ingredients such as whole milk powder (WMP), cheeses, casein, caseinates, milk protein concentrates and specially
formulated ingredients. As a result movements in the commodity based SMP free on board (f.o.b.) price will have ripple effects on returns achieved for the above mentioned value added products. Between the years 2000 and 2004, when the Canada – Dairy dispute was running, the f.o.b. price for SMP ranged from US$1,100/tonne to US$2,200/tonne. This huge fluctuation resulted from a combination of (a) buyer resistance when prices were high, involving running down of stocks and substitution where technically feasible of cheaper proteins such as whey and soy; (b) arbitrary changes in export subsidies; (c) rapid growth in the structural surplus of SMP, particularly in the United States bringing wholesale prices down to the support level and leading to undermining of market sentiment and the traded f.o.b. This was exacerbated by illegal subsidised exports.

In effect illegal subsidised exports can both exacerbate a downturn in the SMP f.o.b. (and by proxy for dairy productions containing milk protein) and hinder a price recovery in all markets. This ripple effect has a direct impact on Australian processor returns given their reliance on export business\textsuperscript{12}, and in turn has affected their profitability and ability to reward cooperative shareholders and suppliers generally in terms of the farm gate price for milk. The very wide range in the SMP f.o.b. between 2000 to 2004, in view of the reliance of Australian processors on exporting, may have influenced the farm gate milk price by up to one-third\textsuperscript{13}.

Lower commodity prices also create a price subsidy spiral, bringing forth pressure for increases in export subsidies that in turn potentially exacerbate any fall in the commodity price. A stimulation to demand from lower prices might mitigate the price decrease but the world market for SMP has been characterised for many years by a pervasive structural surplus. In addition there are limits to how much SMP each market can absorb, irrespective of price, resulting in the potential for subsidised product to displace unsubsidised product. Downward pressure on the price for milk proteins can also have an unfavourable effect on the price for the two growth products of world trade – cheese and whole milk powder (WMP). Both product groups incorporate significant proportions of protein, for example, cheddar contains approximately 25 per cent and standard WMP 26 per cent.

\textsuperscript{12} In the 2004-05 season (ending on 30 June) approximately 50 per cent of Australia’s total milk production was exported in a wide variety of value added dairy product and dairy ingredient forms.

\textsuperscript{13} The farm gate price impact can also be decisively influenced by f.o.b. movement in the other commercially valuable component of milk i.e. the fat content. Protein, however, comprises two-thirds of the value obtained from milk in the market place.
If unchallenged, schemes such as those implemented by Canada could encourage dairy industries in other WTO Members to seek to have comparable programs set in place. In such an event, the major losers would likely be the dairy industries in non-subsidising WTO Members, particularly those in Australia and New Zealand who account for a significant proportion of world trade. The root cause of the problem is price support programs in developed Member countries such as the European Union, United States and Canada generating structural surpluses. The earlier two are the largest cows’ milk producing region and country respectively in the world. The policy situation is further exacerbated in Canada and the EU by milk quotas which are set above the level of domestic consumption.

Conclusion

Outcomes to date have illustrated the importance of the WTO dispute settlement system in ensuring that WTO Members comply with the multilaterally agreed trade rules. Industry has concerns about the operation of that system, for example the time taken to reach a final decision but these should be kept in perspective: The system has been shown to work, even against the most enduring of farm support programs, as demonstrated in Canada – Dairy, USA – Cotton and EC – Sugar disputes.

Illegitimate measures that have been agreed by WTO Members to be unfair, unduly suppress prices in targeted export markets and indirectly in third markets. The milk price received by Australian dairy farmers is determined by movements in f.o.b. prices. Therefore, any fall in the f.o.b. price will directly influence farmer and processor incomes and profitability. Such downturns also affect the confidence needed to undertake the requisite risk taking behaviour as reflected the investment needed to sustain long-term dairy industry growth and prosperity.
Introduction

On 7 July 1999, the United States President introduced tariff rate quotas on lamb imports because of a perceived threat of serious injury to the US domestic lamb industry. As a result, the Australian lamb industry’s response to burgeoning US consumer demand for high-value lamb was restrained. Safeguard measures were applied until November 2001 and were only lifted after Australian industry and the Australian Government sought recourse via the WTO dispute settlement system. This outcome was a strong endorsement for effective dispute resolution and the rules-based international trading system underpinned by the WTO. Not only did it represent a win for the Australian lamb industry, but also for small to medium sized WTO Members who would otherwise have no recourse against unjust trade restrictions applied by larger Members.

This paper reviews the lamb dispute between Australia and the United States, covering the events that led to the US import restraints, the safeguard measures applied by the United States, the response by the Australian lamb industry and the Australian Government and the dispute settlement process.

Background

Since 1960, the US sheep meat industry had been in a state of decline. Sheep numbers had fallen from close to 35 million head to around 10 million head by 1990, and there was a corresponding decline in the number of lamb properties and processing establishments.

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1 Dr Peter Barnard is General Manager – Economic, Planning and Market Services, Meat & Livestock Australia (MLA). Dr Barnard has been involved in every major access issue that has confronted the Australian red meat industry over the past decade. These have included WTO challenges against the United States on lamb and Korean beef, and securing an advantageous outcome for the meat industry from the Uruguay Round.

Andrew McCallum is Manager – Trade Policy, Meat & Livestock Australia. Mr McCallum leads MLA’s market access/trade policy portfolio including high-level input into multilateral WTO talks, Free Trade Agreement negotiations and bilateral access issues (economic and technical). He provides pivotal trade advocacy on behalf of the Australian red meat industry.
Lamb consumption was down to just 0.5kg/capita compared to 3.3 kg in 1945 - a situation not aided by rising lamb prices. In the mid 1990s, the US Government also withdrew subsidies under the Wool Act which further exacerbated the sheepmeat industry’s decline.

In response, lamb imports from both Australia, and to a lesser extent New Zealand, rose in volume to fill some of the void left by the faltering US lamb industry.

**US Sheepmeat Industry Reaction**

In October 1988, the American Sheepmeat Industry Association (ASI) formally petitioned the US International Trade Commission (ITC) about the perceived alarming rise in lamb imports.

The ASI sought to invoke WTO safeguard provisions to prevent the apparent ‘flood of imports’, citing WTO Article XIX:1(a) of the GATT which states:

>If … any product is being imported into the territory of [a] contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession (emphasis added).

At the time, lamb imports into the United States were subject to a tariff of 0.7 US cents/kg; less than 1% of the value of the product. However, the United States, as with many countries, had provided a general legislative framework for the implementation of safeguard measures in its domestic law.

**Determination by the US International Trade Commission (ITC)**

The ITC has primary responsibility in the United States for determining safeguard cases.

As Article XIX:1(a) of the GATT implies, a number of facts must be proven before safeguard actions can be properly introduced, namely:

i. that imports are increasing;

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2 The ITC is an independent, non-partisan, quasi-judicial federal agency which makes recommendations to the President regarding relief for industries seriously injured by increasing imports.

ii. that domestic producers of like or directly competitive product are suffering, or are threatened with, serious injury; and

iii. that a causal link exists between (i) and (ii).

Causation is interpreted under US law as ‘a cause, which is important, and not less than any other cause’.

Once these three factors are proven, safeguard remedies can be considered. These remedies may involve the imposition of quotas, an increase in tariffs, direct assistance to the domestic industry or a combination of these measures.

In making a determination, the ITC convenes safeguard hearings (known in the United States as Section 201 hearings) which proceed in two phases. First, the ITC is required to determine whether imports are causing injury, or threat thereof, to a domestic industry. If this determination is made in the affirmative, the ITC examines and recommends appropriate remedies.

**ITC Injury Determination on Lamb - Phase One**

The ASI (which was joined by eight companies as joint petitioners) filed a petition with the ITC in early 1999.

This petition was not the first attempt by US lamb producers to raise import barriers. During the early 1980s, three petitions were filed against lamb imports. Another petition was lodged in 1988, resulting in countervailing duties against New Zealand lamb imports. In 1995, at the behest of US lamb producers, the ITC conducted yet another investigation into the impact of lamb imports on the domestic industry. On that occasion, the ITC found virtually no relationship between the level of lamb imports and market conditions for domestic lamb producers in the United States.

In its 1999 submission, and in subsequent documentation, the ASI alleged that lamb imports had risen substantially, that the domestic industry was suffering serious injury and that this serious injury was caused by lamb imports from Australia and New Zealand. Meat & Livestock Australia (MLA), on behalf of Australian sheep meat producers, processors and exporters made two submissions to the ITC refuting these claims.

In its findings, the ITC accepted MLA’s argument that imports were not a major cause of serious injury to the domestic industry, but concluded they threatened serious injury. The ITC reached this conclusion even though the issue of threat of injury had not been particularly highlighted in the ASI’s petition submission.
In MLA’s opinion, it seemed only flimsy evidence existed to support the ITC finding of threat. Certainly an increase in lamb shipments to the United States was forecast in 1999 (Australian and New Zealand exporters projected a 21% increase in shipments, and the Australian Bureau of Agricultural and Resource Economics, or ABARE, had forecast a 6% increase). But this forecast increase was against a backdrop of a 47% increase in lamb imports between 1993 and 1997, with a further substantial rise in 1998. An obvious question was: if imports had increased by 47% between 1993 and 1997, without representing a major cause of serious injury, why should a further increase of between 6-21% cause such serious injury? The ITC did not address this question, instead relying on a presumption.

In general, marshalling arguments against threat of injury is much more difficult than against current injury. Threat is not tangible, it does not physically exist. Statistical evidence can be presented to refute allegations of current injury, but no statistics exist into the future.

**ITC Remedy Determination on Lamb - Phase Two**

Once the ITC determined that a threat of injury to the domestic industry existed, the ASI argued that a tariff rate quota over a four-year period should apply and that tariffs should be reduced gradually over this period.

MLA proposed that the ITC had another option besides imposing border protection measures. This could involve direct and targeted government adjustment assistance to the US lamb industry.

Above all, MLA argued that any remedy proposed by the ITC had to be consistent with its findings of ‘no current injury’, only threat of injury. The ASI remedy proposals were not consistent with these findings.

On 29 March 1999, a majority of ITC Commissioners recommended the following remedy:

- An unspecified level of adjustment assistance to the US lamb industry.
- A tariff rate quota over four years (effective 22 July 1999), with an in-quota tariff rate of zero but with a 20% above-quota tariff rate which would reduce to 10% over the 4 year period.

**Political Lobbying Phase**

In the three months following the ITC remedy determination, consideration of this issue entered a political lobbying phase. The Australian industry, together
with the Australian Government and US importer groups, worked hard to increase the understanding of the issues and to lobby against the imposition of the proposed trade restraints at all levels of the US Administration.

A key point stressed with US administrators, and contacts in the US Administration and Congress, was the potential cost to the United States of introducing border protection. An independent study by the Centre for International Economics estimated that the cost to US consumers of the introduction of trade restrictions on lamb (due to the resulting price increase) would be around $123 million over three years. (The study also estimated the value of Australian lamb production would fall by $83 million and, as the industry contracted, Australian export returns from all markets would fall by $115 million).

Industry delegations travelled to Washington to meet with all US Departments involved in the decision. Consistent with the Australian industry’s views on the more appropriate remedies and to demonstrate a genuine desire to cooperate with the US industry, it was proposed that lamb be jointly promoted by the US, Australian and New Zealand industries. This promotional proposal was conditional on current market access conditions being maintained. Unfortunately, this offer was not accepted.

Lobbying assistance was also provided by the peak farm organizations in Australia and New Zealand, and through a number of letters from Cairns Group Farm Leaders to the United States Trade Representative. Direct representations were made by Australia’s Prime Minister, Deputy Prime Minister and Ambassador.

### The Introduction of Restraints

In spite of the extensive lobbying effort, on 7 July 1999, the President of the United States announced the introduction of a tariff rate quota (TRQ) regime – moreover, a more restrictive regime than that recommended by the ITC.

However, due to the efforts coordinated by MLA, involving legal and economic experts as well as importers and retail customers of Australian lamb coupled with invaluable assistance from the Australian Government, the restrictions announced by the President were well short of the extreme measures originally requested by the US domestic industry.

Details of the TRQ announced by the US President, to apply over three years, are shown in Table 1.
### Table 1

<table>
<thead>
<tr>
<th>Period</th>
<th>Quota for All Countries (tonnes)</th>
<th>Country Specific Allocations (tonnes)</th>
<th>In Quota Tariff Rate</th>
<th>Out of Quota Tariff Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>22 July 1999-21 July 2000</td>
<td>31,851</td>
<td>Australia 17,140</td>
<td>9%</td>
<td>40%</td>
</tr>
<tr>
<td></td>
<td></td>
<td>New Zealand 14,482</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Other 230</td>
<td></td>
<td></td>
</tr>
<tr>
<td>22 July 2000-21 July 2001</td>
<td>32,708</td>
<td>Australia 17,601</td>
<td>6%</td>
<td>32%</td>
</tr>
<tr>
<td></td>
<td></td>
<td>New Zealand 14,871</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Other 236</td>
<td></td>
<td></td>
</tr>
<tr>
<td>22 July 2001-21 July 2002</td>
<td>33,566</td>
<td>Australia 18,062</td>
<td>3%</td>
<td>24%</td>
</tr>
<tr>
<td></td>
<td></td>
<td>New Zealand 15,261</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Other 242</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

As the 1998/99 level of Australian lamb shipments to the US was 20,777 tonnes (i.e. above the 17,140 tonne quota to apply from 22 July 1999), it was clear the TRQ would have a negative effect on trade.

In addition to these trade restrictions, the US President announced a $US100 million assistance package for the US lamb industry over 3 years.

### Recourse to the WTO

The decision by the US President to impose safeguard remedies could not be appealed under US domestic law. However, it was open to Australia to initiate a challenge to the decision through the WTO dispute settlement system.

If Australia could show that the US decision had not been made in accordance with the relevant WTO rules, the United States would be required to remove the restrictions, or else it would face the prospect of retaliatory trade sanctions by Australia.

The Australian Government, with full industry encouragement and support, announced that it would immediately seek WTO dispute settlement consultations with the United States. These consultations were requested in late July 1999. Given their trade interests in the US safeguard remedies, New Zealand, the European Communities and Canada asked to join the consultations. The consultations were held on 26 August 1999, but unfortunately did not lead to a satisfactory resolution of the matter. As a result, Australia requested that a dispute settlement panel be established.

On 19 November 1999, the WTO Membership formally approved the setting up of a dispute settlement panel to consider Australia’s complaint against the US safeguard remedies, together with a parallel complaint by New Zealand.
Canada, the European Communities, Iceland and Japan, as well as New Zealand (in respect of Australia’s complaint) and Australia (in respect of New Zealand’s complaint), reserved third party rights before the Panel. The membership of the Panel was agreed in March 2000.

Two submissions were prepared by the Australian Government, with the assistance of the Australian meat industry, for the Panel hearings. These submissions relied heavily on material already prepared for the US ITC hearings. However, given the different legal setting of a WTO Panel, new material was also prepared.

Before the Panel, Australia and New Zealand claimed among other things that increased exports of lamb were not unexpected and that the US had relied on flawed data to reach its findings. Australia and New Zealand alleged that the US safeguard remedies, and the supporting actions and decisions, were inconsistent with US obligations under a number of provisions of GATT 1994 and the Agreement on Safeguards.

The United States countered that its safeguard remedies were permitted under GATT 1994 and the Agreement on Safeguards. The United States argued that it had taken emergency action to temporarily restrict imports due to an unexpected surge in such imports which caused, or threatened to cause, serious injury to the domestic market.

The Panel released its report on 21 December 2000. The Panel found in favour of Australia and New Zealand by concluding that:

• the United States had acted inconsistently with Article XIX:1(a) of GATT 1994 by failing to demonstrate the increase in lamb imports was `unexpected’;

• the US had acted inconsistently with Article 4.1(c) of the Agreement on Safeguards because the US ITC had defined the domestic industry too broadly (it included live lamb growers and feeders, who are not strictly lamb meat producers);

• the US had acted inconsistently with Article 4.1(c) of the Agreement on Safeguards because the US ITC failed to obtain adequate data in respect of the number of producers and total domestic production to support its conclusions;

• the US had acted inconsistently with Article 4.2(b) of the Agreement on Safeguards because the US ITC’s determination in respect of causation did not demonstrate the required causal link between increased imports and threat of serious injury; and
by virtue of the violations of Article 4 of the Agreement on Safeguards, the
United States also acted inconsistently with Article 2.1 of the Agreement
on Safeguards.

The Panel chose not to rule on a number of other claims made by Australia
and New Zealand against the US safeguard remedies, since the findings outlined
above clearly placed the United States in breach of its WTO obligations.

On 31 January 2001, the United States initiated an appeal of the Panel's findings.
After the United States filed its appellant's submission, both Australia and New
Zealand lodged cross-appeal submissions. All three parties subsequently lodged
appellee submissions. The European Communities filed a third participant's
submission, and Canada and Japan participated as observers at the oral hearings.

In its report released on 12 April 2001, the Appellate Body upheld all of the
Panel's findings as outlined above. In addition, the Appellate Body found that
the United States had acted inconsistently with Article 4.2(a) of the Agreement
on Safeguards because the ITC failed to provide an adequate explanation of its
determination that a threat of serious injury to the domestic industry existed.

On 31 August 2001, the United States announced that it had decided to end
the safeguard measure on imports of lamb and was beginning the necessary
legal steps to implement this decision.

After three years of legal and political battles, not to mention the significant
cost incurred by both the Australian industry and Australian Government in
mounting the challenge, the United States implemented the recommendations
and rulings of the Dispute Settlement Body. Effective from 15 November 2001,
the quota restraints were removed, and the import regime reverted to the
previously existing tariff of 0.7 US cents/kg.

**The Effectiveness of the WTO Dispute Settlement System**

The diverse nature of Australia's red meat and livestock exports means that
particular importance is placed on multilateral trade negotiations and the
disciplines these impose.

In common with many agricultural products, Australia's meat and livestock
industries are beset with trade access problems. There would be very few of
the 100 plus countries to which we export product in which a market access
issue has not arisen at some stage - this points to the importance of developing
strong international trade rules and challenging countries that do not abide by
these rules.
The US – Lamb Safeguard dispute provides a useful example of the merits of maintaining a multilateral dispute settlement system which does not allow Members to ‘opt out’, and which provides incentives for their compliance with obligations. Previously the US would have been able to introduce these restraints with impunity. But the WTO provides a binding dispute settlement system which prevents Members from halting or constraining trade in a manner inconsistent with WTO rules.

The dispute also reaffirmed the WTO’s role in relation to the use of safeguard measures by WTO Members. Importantly, it illustrated a panel’s responsibility to make an objective assessment of the facts of a case when considering a dispute. As part of its examination of the conclusions drawn by the US ITC, the Panel in the dispute reviewed whether the ITC had evaluated all the relevant factors. It also reviewed whether the ITC had provided an “adequate explanation of how the facts as a whole support the US ITC’s threat determination”.

The Appellate Body upheld the Panel’s approach. As part of its reasoning, the Appellate Body indicated that a panel must find that an explanation is not reasoned “if some alternative explanation of the facts is plausible, and if the competent authorities’ explanation does not seem adequate in the light of that alternative explanation”.

This rigorous scrutiny of a domestic investigating authority’s determination of an issue not only sends an important signal to WTO Members that the facts surrounding the introduction of a trade impost must be reasoned and adequate but also strengthens the overall WTO dispute settlement process.

The Australian lamb industry’s experience is that the WTO is transparent and accountable. The WTO is also very effective in dispute settlement. And our experience is that industry is consulted widely by our Government and we value the partnership, including on matters related to the WTO

The dispute settlement system is one of the cornerstones of the WTO, and gives Members confidence that the commitments and obligations contained in the WTO Agreement will be respected. If trade justice is to be obtainable by small- to medium-sized WTO Members, there is no substitute for the disciplines imposed by a rules-based international trading regime:

4 i.e. to act in accordance with DSU Article 11.