THE WORLD TRADE ORGANIZATION AND DISPUTE SETTLEMENT: TOO MUCH FOR LITIGATION

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INTRODUCTION

The World Trade Organization (WTO) was established in 1995 as a result of the Uruguay Round of multilateral trade negotiations that lasted from 1986 to 1994. It superseded the General Agreement on Tariffs and Trade (GATT), effective since 1948, which, despite its informal origins, had gradually evolved into an international organization in all but name.[1] Yet, the incremental development of the GATT led to a cluster of agreements, some with differing purposes, memberships, and dispute settlement arrangements. In this regard, if successive GATT negotiations had significantly expanded the scope of international trade provisions, the Uruguay Round formally transformed the GATT into a permanent institution, the WTO, in charge of overseeing trade relations among its members. The text of the WTO Agreement establishes a legal framework which ties together the various trade pacts negotiated under the GATT and includes institutional and procedural rules governing the activities of the organization.[2] The GATT/WTO has been the main international institution established to promote order and cooperation in world trade relations. It is the only organization which provides a worldwide set of rules – of rights and obligations voluntarily accepted by its states parties – governing international trade. More than 95 per cent of world trade today takes place within the GATT/WTO regime.

In the course of the Uruguay Round, states agreed on strengthened mechanisms and, in particular, on a new Dispute Settlement Understanding (DSU),[3] to help ensure overall compliance with international trade provisions. The agreements on the WTO and the DSU were negotiated in tandem, as dispute settlement is a critical function in the application of rules. The idea of the WTO was

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[1] *General Agreement on Tariffs and Trade*, (1947) 55 UNTS 187. GATT came to refer to both a multilateral agreement and the institution which oversaw that agreement.

[2] GATT, "Agreement Establishing the World Trade Organization", in *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, (Geneva: GATT Secretariat, 1994). On the origins and evolution of the GATT, as well as on the WTO Agreement, see John H. Jackson, "The World Trade Organisation: Watershed Innovation or Cautious Small Step Forward?" in Sven Arndt & Chris Milner, eds, *The World Economy: Global Trade Policy* (Oxford: Blackwell, 1995) at 11-31; Gilbert R. Winham, "The World Trade Organisation: Institution-Building in the Multilateral Trade System" (1998) 21:3 The World Economy 349.

[3] GATT, "Understanding on Rules and Procedures Governing the Settlement of Disputes", in *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, (Geneva: GATT Secretariat, 1994) [DSU].

all about organizational structure and dispute settlement. The WTO and the DSU were both necessary to preserve and enhance the integrity of the world trading regime that had been built incrementally from the 1940s to the 1990s.[4]

Yet, there is an imbalance between the strong, legalistic, binding DSU, on the one hand, and the comparatively weak, cumbersome, political rule-making and negotiating machinery, on the other.[5] Despite specific provisions for certain decisions to be taken either by simple, two-thirds or three-fourths majority, under the formula of one-state-one-vote, the WTO, like the GATT before it, has shied away from formal voting. Decisions are usually made by consensus, i.e., when no member present at a meeting formally objects to a proposed decision, as stipulated in Article IX of the WTO Agreement. Nevertheless, WTO members have been able to adopt some key decisions by consensus.[6] Even though the WTO Agreement contemplated that new provisions, amendments, and even new agreements could be negotiated at any time, members have also continued the GATT practice of negotiating new rules in the framework of broad, multilateral trade rounds, so that only one amendment has been negotiated and adopted since 1995.[7]

As a result, WTO members might have come to think that progress can be made through enforcement and that litigation is a faster, more convenient way to resolve difficult issues. This stands in contrast with the WTO as a forum for genuine international trade cooperation and rule-making and prevents a more broad-based participation of all stakeholders in the formulation of international trade rules.[8] But, more importantly, all of the WTO's three main functions – multilateral negotiations and rule-making; monitoring and surveillance of the implementation of its rules; and dispute settlement – are now in a state of decline, albeit at differing speeds and to varying degrees. As the Doha negotiations unfolded, there would have been a serious

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[4] Winham, *supra* note 2 at 351, 365.

[5] Debra Steger, "The future of the WTO: The Case for Institutional Reform" (2009) 12: 4 J Int'l Econ L at 806. See also: Claus-Dieter Ehlermann & Lothar Ehring, "Decision-Making in the World Trade Organization: Is the Consensus Practice of the World Trade Organization Adequate for Making, Revising and Implementing Rules on International Trade?" (2005) 8:1 J Int'l Econ L at 51; WTO, *Joint Statement on the Multilateral Trading System* (Geneva: WTO, 2001).

[6] These include: the 1996 Ministerial Declaration on Trade in Information Technology Products; the 2001 Ministerial Declaration on the TRIPS Agreement and Public Health; the 2003 Council for Trade in Goods Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds; and the 2006 General Council Decision on Transparency Mechanism for Regional Trade Agreements.

[7] Except for negotiations which were mandated as part of the 'built-in' agenda of some WTO agreements, including those on agriculture, dispute settlement, and services. Yet, aside from some decisions relating to information technology, telecommunications and financial services, those negotiations have been subsumed within the Doha Round. The first ever amendment to the WTO was adopted by the General Council in 2005 and pertains to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which formalized a 2003 Decision on Compulsory Licensing.

[8] M.C.E.J. Bronckers, "Better Rules for a New Millennium: A Warning Against Undemocratic Developments in the WTO" (1999) 2:4 J Int'l Econ L at 550.

underestimation of the importance of the monitoring, surveillance and implementation functions, while dispute settlement is at risk of seeing its standing eroded.[9]

With regard to dispute settlement, three main problems stand out. First, the dispute settlement mechanism (DSM) since the WTO's inception has encountered some issues over the standard of review and significant delays at almost all stages of the process. Second, the judicial activism of WTO adjudicating bodies has raised criticism, notably in light of their application of the interpretation rules of public international law and the ensuing results, sometimes leading to their behaving more as lawmakers than judges. Third, in view of growing overlap between trade regulations and those in such areas as labour standards and the environment, known as the trade linkage debate, the DSM has found itself trying to reconcile trade with other concerns beyond the WTO's mandate. Such problems may destroy the faith of WTO members in the DSU.[10]

This article contends that too much trust has been put on dispute settlement, with possible serious consequences for the WTO. In turn, the issues and problems with the dispute settlement process are compounded as the other main functions of the WTO have not assumed the roles expected of them. This is so particularly in view of the near stalemate in the Doha Round[11] and the fact that no authoritative interpretation of WTO provisions has ever been adopted by member states to keep WTO adjudicating bodies in check.

In a first part, the provisions and procedures for dispute settlement under the GATT and later the WTO are discussed, beginning with some preliminary considerations. This is followed, in a second part, by an analysis of the implementation of the DSU, notably through some statistics; issues and problems; key disputes that served as tests for the WTO; and, finally, the trade linkage debate. Some concluding remarks ensue.

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[9] Michel Cartland, Gérard Depayre, & Jan Woznowski, "Is Something Going Wrong in the WTO Dispute Settlement?" (2012) 46:5 J World Trade at 980-981.

[10] *Ibid* at 985-988. See this article for a critical view of WTO tribunals' activism and adjudication. See also Juscelino F. Colares, "A Theory of WTO Adjudication: From Empirical Analysis to Biased Rule Development" (2009) 42:2 Vand J Transnat'l L 383.

[11] In December 2013, at the Ninth Ministerial Conference in Bali, Indonesia, a first ever global trade agreement approved by all WTO members, known as the Bali Package, was concluded. Covering fours areas, notably trade facilitation measures, it represents, however, a small part of the agenda of the Doha Round whose future remains uncertain.

GATT/WTO DISPUTE SETTLEMENT PROVISIONS AND PROCEDURES

1. Some Considerations on Dispute Settlement

The key implementing or enforcement mechanism in the GATT/WTO regime has revolved around dispute settlement procedures, which seek to solve conflicts that may arise between states. This means that apart from the notification to the WTO of trade measures by state governments and reviews of their trade policies, WTO interventions are essentially limited to cases of complaints brought to its attention. Obviously, a rarity of disputes may not necessarily reflect widespread rule observance,[12] but rather states' reluctance to object to others' measures, either because they use similar ones or they fear stimulating counterclaims or detrimental consequences in non-trade areas (e.g., defence cooperation or continued aid flows). In the same logic, a great number of conflicts may not be attributable to a large disregard for international trade provisions, but a desire of members to ensure strict compliance with WTO rules.

A DSM, especially a strengthened one under the WTO, can also act as a deterrent against litigation and play a crucial role in pressing states to solve their differences, sometimes in the course of the dispute settlement process, through a mutually agreed solution (MAS). Yet, disputes could still be addressed outside WTO auspices. Trade conflicts between major powers sometimes escalated irrespective of the GATT and were resolved bilaterally. In cases of bilateral solutions, disputes may be settled without due regard to international trade provisions. The WTO DSU, then, must not be confused with a 'real' enforcement mechanism as, for the most part, 'enforcement' of GATT/WTO rules has taken the form of self-discipline or retaliation.[13]

The evolution of the procedures and provisions for GATT dispute settlement are first discussed in order to better grasp the key elements of the strengthened DSM under the WTO, before turning to its implementation.

2. The Evolution of GATT Dispute Settlement

An important element of the GATT/WTO framework consists of its provisions for consultation, conciliation, and dispute settlement, as contained in Articles XXII and

[12] See e.g., Chad P. Bown & Bernard M. Hoekman, "Developing Countries and Enforcement of Trade Agreements: Why Dispute Settlement is Not Enough" (2008) 42:1 J World Trade 177.

[13] On the limits of the DSU and proposed reforms, see Bernard M. Hoekman & Petros C. Mavroidis, "WTO Dispute Settlement, Transparency and Surveillance" (2000) 23:4 The World Economy 527. On the creation of an independent prosecution department within the Secretariat, with an exclusive right to initiate dispute settlement proceedings, so as to secure the overall observance of WTO obligations, see Claus D. Zimmermann, "Rethinking the Right to Initiate WTO Dispute Settlement Proceedings" (2011) 45:5 J World Trade 1057.

XXIII of the GATT. States are required to consult with other member countries, particularly when one member feels that benefits due to it are 'nullified or impaired' by the conduct of another.[14] In case bilateral consultations fail to settle the problem, GATT/WTO may offer its good offices and act as conciliator. Should the dispute still not be solved, an *ad hoc* panel of three neutral experts examines the factual and legal aspects of the conflict, helps the parties find a solution acceptable to both sides, and if no such solution could be attained, makes findings and recommendations for adoption by the GATT/WTO Council. Panel reports, as for virtually all decisions in GATT, were adopted by consensus, i.e., when they did not raise objections from any state. When the reports were adopted, in case the recommendations were not carried out, the GATT Council could, as a last resort, authorize retaliation by allowing the impaired party to withdraw trade concessions to the offending member.

If the GATT dispute settlement process was initially a relatively informal one, it became more formal with the use of objective panels from the late 1950s onward. Before that, disputes were considered in broader working parties composed of government representatives. Increasingly, panel reports focused on more precise and concrete issues of 'violations' of treaty obligations. At the end of the Tokyo Round in 1979, an understanding on dispute settlement was adopted,[15] which comprised the concepts and procedures which had developed in the previous decades.[16]

There was some initial resistance, including within the Secretariat, to make dispute settlement evolve towards a 'rules-based' system from those who saw GATT primarily as a forum for negotiation. Such views echoed the contrast between the perception and treatment of the GATT in the United States and Europe, the former viewing it as largely a legal regime, whereas the latter dealt with GATT as a diplomatic and political system. Over time, these differences lessened in favour of a legal treatment of the GATT/WTO.

The Uruguay Round negotiations sought to remedy the problems in the DSM that plagued the GATT regime: delays in the establishment of panels and in the conclusion of dispute proceedings, the ability of disputants to block the consensus needed to approve panel recommendations and authorize retaliation, and the difficulty in securing compliance with GATT rulings. Reforms adopted at the mid-

[14] More precisely, under the DSU, members may bring two main types of complaints: *violations complaints*, alleging the failure of another member to carry out its obligations under a covered agreement; and *non-violation complaints*, alleging that a measure applied by a member, although not necessarily conflicting with a WTO provision, nullifies or impairs a benefit accruing directly or indirectly under a covered agreement or impedes the attainment of an objective of a covered agreement.

[15] GATT, *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*, GATT Doc L/4907 26th Supp BISD (1980) at 210-216.

[16] Jackson, *supra* note 2 at 19.

term review of the Uruguay Round, which became effective in 1989, included an optional arbitration procedure whereby disputing parties could agree to abide by the arbitral award, and confirmed the authority of the GATT Director-General to form a panel in case of disagreement between the disputants. Hence, there was greater automaticity in decisions on the establishment, terms of reference, and composition of panels, so that such decisions were no longer dependent on the consent of the parties to a dispute. There was also a provision whereby panel reviews were to be completed within nine months. Yet, as to the question of Council adoption of panel reports, it was still possible for a losing party to prevent consensus.[17]

3. The WTO Dispute Settlement Understanding

Mindful of the need for 'security', 'predictability', and 'the effective functioning of the WTO', member states established a DSM characterized as 'essential' for achieving a 'prompt', 'satisfactory', and 'positive' settlement of disputes, by providing recommendations and rulings in a way that 'serves to preserve the rights and obligations of Members under [all trade agreements covered by the WTO]'.[18] The WTO DSM represents a form of compulsory jurisdiction in international trade law. Moreover, there are no reservations to dispute settlement under the WTO. This is probably the most far-reaching of the various changes brought to the world trading regime by the advent of the WTO.[19]

The DSU provides for an integrated mechanism to settle disputes under all covered agreements.[20] Authority is exercised by the WTO Council acting as the Dispute Settlement Body (DSB). The DSU extended the greater automaticity agreed to at the 1988 mid-term review to the whole process, including the adoption of panel reports, and strict time limits were set. It also instituted an Appellate Body (AB), to review panel rulings, as well as procedures to ensure the proper observance of WTO decisions, including the monitoring of compliance actions and retaliation in case of non-compliance.

Of utmost significance are provisions whereby a panel report and, in case of appeal, an AB report, are automatically adopted unless the DSB decides by unanimous consensus against adoption.[21] Also applying to the establishment of panels,[22] this is known as the *reverse or negative consensus* rule. It represents a

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[17] GATT, *Improvements to the GATT Dispute Settlement Rules and Procedures*, 36th Supp BISD (1989) at 61-67.

[18] DSU, *supra* note 3 at Article 3.

[19] Winham, *supra* note 2 at 352.

[20] DSU, *supra* note 3 at Article 1 and Appendix 1.

[21] *Ibid* at Articles 16.4 and 17.14.

[22] *Ibid* at Article 6.1.

complete shift from previous practice when a single member state, often the losing party in a dispute, could block the adoption of a panel report and, thus, any possibility of action for GATT. Unlike dispute panels, whose three members continue to be selected on an *ad hoc* basis, the AB is a standing entity whose essential role is to review, at the request of parties to a dispute, the legal aspects of panel findings to ensure consistency in the interpretation of WTO provisions. It is composed of seven persons, three of whom serve on any one case. They are all from different member countries and may serve two consecutive terms of four years.

Panel recommendations, which may be approved or modified as a result of an appeal, are to be fully implemented. If it is impracticable to comply immediately, the member concerned shall do so within a reasonable period of time (RPT) (agreed to by the disputants or determined by an arbitrator), usually not exceeding 15 months.[23] In case of disagreement as to the existence or consistency of measures taken to comply, the original panel is reconvened (then referred to as a 'compliance panel') and submits a report, which could be appealed.[24] If the member concerned is found not to be in full compliance with WTO recommendations, and if subsequently no satisfactory compensation has been agreed, the complaining party may be authorized by the DSB to retaliate by suspending the application of WTO obligations to the offending state.[25]

Although retaliation should normally entail suspension of concessions or other obligations in the sector subject to a dispute,[26] when that is not practicable or effective, concessions may be suspended in other sectors under the same agreement. Ultimately, in serious enough circumstances, concessions under another covered agreement may be suspended, i.e., cross-retaliation. Retaliation is authorized unless the DSB decides by consensus against such action. However, at the request of the member concerned, the proposed level of retaliation may be referred to arbitration, normally conducted by the original panel or else by an arbitrator appointed by the WTO Director-General. The DSB can then authorize retaliation consistent with the arbitrator's decision.[27] As under GATT, retaliatory measures should be equivalent to the level of nullification or impairment of benefits accruing to the complaining party(ies) under the relevant WTO agreement(s).[28]

[23] *Ibid* at Article 21.3.

[24] *Ibid* at Article 21.5.

[25] *Ibid* at Article 22.2.

[26] *Ibid* at Article 22.3.

[27] *Ibid* at Article 22.6.

[28] *Ibid* at Article 22.4.

Litigation, often over complex legal matters, is not an easy and quick process. Formal and detailed procedures have to be followed. From the time of a request for consultations to the authorization of countermeasures in case of non-compliance, the whole dispute process is supposed to take about 48 months or four years; although less when panel decisions are not appealed. The time allotted for the conclusion of a panel review, as a general rule, is six months and cannot exceed nine months.[29] Particular consideration is given to developing country members and special procedures apply in the case of least-developed countries.

Presumably in view of its novelty, a Ministerial Declaration adopted at the end of the Uruguay Round provided for a full review of the DSU after four years following the entry into force of the WTO Agreement; the Ministerial Conference having to decide whether the DSM should be continued, modified, or terminated.[30] During the review that took place in 1998-1999, WTO members expressed their general satisfaction with the DSM, agreed that only fine-tuning of the system was necessary, were reluctant to make major changes, and preferred to wait for clearer evidence over a longer period of time.[31] As the legal mandate for the review expired in July 1999 without any conclusion, negotiations on dispute settlement have been included in the Doha Round, where much attention has been devoted to compliance, retaliation, and modifying the remedies available as part of the enforcement stage.[32]

THE WTO AND DSM IMPLEMENTATION

1. Some Statistics

The 'contracting parties' during GATT history came to resort more and more to the DSM. Panels were established well over 100 times and, by the end of the Uruguay Round, more frequently than ever before. Many countries, including the United States which had been the largest single applicant for dispute settlement procedures in GATT, found it useful to bring issues to panels as part of their broader approach to trade diplomacy.[33] Yet, recourse to dispute settlement under GATT remained relatively uncommon. Developing countries rarely invoked dispute settlement procedures. A 1985 study of the GATT DSM found that only eight developing states had ever filed complaints. Another study showed that, from 1948 to 1993, the United States, the European Union (EU) and its members, Canada, and Australia had made

[29] *Ibid* at Article 12.9.

[30] *Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes*, Ministerial Declaration, Uruguay Round, 15 April 1994.

[31] Gilbert Gagné, "International Trade Rules and States: Enhanced Authority for the WTO?" in Richard A. Higgott, Geoffrey R.D. Underhill & Andreas Bieler, eds, *Non-State Actors and Authority in the Global System* (London and New York: Routledge, 2000) at 233.

[32] On the DSU review, both before and during the Doha Round, see Thomas A. Zimmermann, *Negotiating the Review of the WTO Dispute Settlement Understanding* (London: Cameron May, 2006).

[33] Jackson, *supra* note 2 at 19-20.

73 per cent of the complaints, and that the vast majority of GATT members had never taken part in the dispute settlement process. Japan filed its first formal panel request only in 1990.[34]

As anticipated, the number of dispute cases increased with the advent of the WTO in January 1995. As of 1 January 2013, 454 requests for consultations had been notified. Their number has tended to decrease since 2005, from an average of 37 complaints per year during the period of 1995 to 1999 to 16 per year between 2005 and 2009. From 2010 to 2012, the average yearly number of complaints was a little over 17. These have covered a whole range of matters, including those, such as intellectual property, which were included in international trade rules following the Uruguay Round. Yet, the topics most subject to disputes have hardly changed since GATT's inception. Of all disputes, nearly 80 per cent, i.e., 359, have involved trade in goods (GATT), notably anti-dumping measures (96), subsidies and countervailing duties (CVDs) (95), and agriculture (67). The frequent invocation of the GATT is because many complaints refer to the provisions of other, more specific agreements coming under GATT, such as the Agreement on Subsidies and Countervailing Measures (SCM),[35] as well as the more general provisions of the GATT itself. With respect to 'new' areas of regulation, such as services, intellectual property, and sanitary and phytosanitary measures (SPS), the number of dispute cases has been limited but fairly steady since the WTO's inception. As for the overall number of complaints, there has been a decline within the past few years.[36]

Even though developing states have more often resorted to the WTO DSM, this usage having increased in recent years, developed countries have remained its primary users. With 190 complaints having involved either the United States or the EU as plaintiff, they have proved its heaviest users representing 41.9 per cent of all dispute cases, while either of them have been respondent in 192 cases or 42.3 per cent of the total complaints. Furthermore, 51 of these disputes have been directly between the US and the EU.[37]

Of 181 requests for consultations from the WTO's inception to 1 July 2002, 107 ended before the adoption of a panel report. Roughly one-third or 35 per cent of

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[34] John Whalley & Colleen Hamilton, *The Trading System After the Uruguay Round* (Washington, DC: Institute for International Economics, 1996) 138. For a history of GATT dispute settlement, see Robert E. Hudec, *The GATT Legal System and World Trade Diplomacy*, 2d ed (London: Butterworth, 1990).

[35] GATT, "Agreement on Subsidies and Countervailing Measures", in *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, (Geneva: GATT Secretariat, 1994).

[36] Kara Leitner & Simon Lester, "WTO Dispute Settlement 1995-2012 – A Statistical Analysis" (2013) 16:1 J Int'l Econ L at 257-258, 260, 262. See also Henrik Horn, Louise Johannesson & Petros C. Mavroidis, "The WTO Dispute Settlement System 1995-2010: Some Descriptive Statistics", (2011) 45:6 J World Trade 1107.

[37] Leitner & Lester, *supra* note 36 at 258-261.

these disputes were resolved by the parties themselves at the consultation stage, and for another 21 per cent the matter was dropped after the measure complained against ceased to exist or the commercial interest changed.[38] As of 1 January 2013, the total number of panel reports being circulated is 150, with 67.3 per cent of these having been reviewed by the AB.[39] When different panel requests involved similar issues, these were often consolidated and a single panel was set up. Complainants have won, i.e., have had their views prevail in, nearly 90 per cent of the disputes.[40]

There have been 41 disputes over compliance with WTO recommendations and rulings. To date, the percentage of compliance panel reports subject to appeal is 67.9 per cent.[41] Of all AB reports adopted between 1995 and 2010: 81 per cent modified the panels' findings, four per cent reversed them, and only 15 per cent upheld them.[42] From the WTO's inception to September 2009, only nine of these disputes over compliance reached the retaliation stage and the DSB authorized suspension of concessions in six cases, with four of these involving two of the WTO's most powerful members, the EU (two cases) and the US (two cases). This makes one conclude that the WTO DSM has an admirable compliance record.[43]

2. Some Issues and Problems

While the DSM under the GATT was often paralyzed, the DSM under the WTO constitutes a significant improvement. Overall, the strengthening of the rule of law has led to a greater respect of international trade rules. States have usually abided by WTO rulings, even when their views did not prevail. As a result, the vast majority of dispute cases has been resolved with due regard to existing WTO provisions. The WTO DSM is widely perceived as an example of the primacy of law and international institutions over *realpolitik*. Yet the DSM since the WTO's inception has faced some issues, notably over the standard of review and with significant delays at almost all stages of the process.

In accordance with Article 11 of the DSU, the function of a panel is to make 'an objective assessment of the matter before it', but that does not specify the precise nature or intensity of review of factual and legal issues that a panel must perform. In every case, panels and the AB decide how intensively a measure should be reviewed

[38] William J. Davey, "The WTO Dispute Settlement System: The First Ten Years" (2005) 8:1 J Int'l Econ L at 45-49.

[39] Leitner & Lester, s*upra* note 36 at 261-263.

[40] Juscelino F. Colares, "The Limits of WTO Adjudication: Is Compliance the Problem?" (2011) 14: 2 J Int'l Econ L at 404.

[41] Leitner & Lester, *supra* note 36 at 265-266.

[42] Cartland, Depayre, & Woznowski, *supra* note 9 at 989.

[43] Colares, *supra* note 40 at 422, 426-427.

and how much deference should be granted to national authorities.[44] Hence, standards of review, which express a deliberate allocation of power between an authority taking a measure and a judicial organ reviewing it, soon gained unprecedented political and systemic significance in panel and AB proceedings.[45] As the AB held:

> The standard of review […] must reflect the balance established in [a covered agreement] between the jurisdictional competences conceded by the Members to the WTO and the jurisdictional competences retained by the Members for themselves. To adopt a standard of review not clearly rooted in the text of [a covered agreement] itself, may well amount to changing that finely drawn balance; and neither a panel nor the [AB] is authorized to do so.[46]

The AB then specified that the applicable standard in WTO adjudication is neither *de novo* review nor 'total deference',[47] and recognized that standard of review 'goes to the very core of the integrity of the WTO dispute settlement process itself'.[48] As a former member of the AB once remarked: "[T]here is a tension between granting discretion to Members and ensuring the 'security and predictability' of the trading system through the uniform application of WTO law".[49] An analysis of the WTO jurisprudence reveals that panels and the AB have in general applied intrusive standards of review, not only for the interpretation of WTO law but also with regard to factual findings.[50] As a result, most of the criticism of WTO adjudicating bodies has centered on the level of their scrutiny of states' measures, particularly trade remedy decisions.[51]

Although the possibility for panels and the AB to accept amicus curiae briefs is not expressly provided in the DSU, in light of panels' right to seek information under Article 13, the AB has accepted such a possibility despite the marked opposition of most WTO member states. WTO panels are also regularly required to specifically address economic evidence and arguments when adjudicating disputes, yet they have failed to engage rigorously with economic reasoning. The

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[44] Claus-Dieter Ehlermann & Nicolas Lockhart, "Standard of Review in WTO Law" (2004) 7:3 J Int'l Econ L at 491.

[45] Matthias Oesch, "Standards of Review in WTO Dispute Resolution" (2003) 6: 3 J Int'l Econ L at 635.

[46] *European Communities - Measures Concerning Meat and Meat Products (Hormones) (Complaint by Canada)* (1998), WTO Doc WT/DS26/AB/R at para 115.

[47] *Ibid* at para 117.

[48] *European Communities – Measures Affecting the Importation of Certain Poultry Products (Complaint by Brazil)* (1998), WTO Doc WT/DS69/AB/R at para 133.

[49] Ehlermann & Lockhart, *supra* note 44 at 521.

[50] Oesch, *supra* note 45 at 635.

[51] *Ibid*; Ehlermann & Lockhart, *supra* note 44 at 493-494.

ensuing deficiencies in panels' reports have been exacerbated by their refusal to seek information and advice from independent economic and other experts, as provided in Article 13 of the DSU.[52] Finally, one of the few achievements of the infamous 1999 Seattle Ministerial Conference was the creation of the Advisory Centre on WTO Law, which provides and finances legal assistance for developing countries to bring and defend cases.

The major delays at the outset of the dispute settlement process pertain to the composition of panels. While the DSU provides that this should not take longer than 30 days, in most cases it has taken longer as parties have preferred to compose panels by agreement. From 1995 to 2010 the average length for consultations was 164.4 days, as disputants often prefer to invest additional time at this stage so as to reach a mutually satisfactory solution.[53] The lengthiest stage in many cases remains the panel process, which is beyond the exclusive control of the parties to a dispute, and since 2005 these delays have increased. The average length of panel reviews, from the establishment of a panel until the circulation of its report, has been 14.7 months, instead of six months as provided in the DSU. The panel process has been completed within the statutory time limits in only 10 instances. For 42 disputes it took more than 16 months and in five cases more than two years, as in *EC-Hormones* (DS320) (DS321) where the panel was composed in 2005 and issued its report two years and seven months later in 2007.[54]

At the end of the process, there have been the RPT (usually 15 months) left to respondents to make their practices conform to WTO obligations, the delays for determining whether the changes brought to states' measures conform to WTO recommendations and, if applicable, for authorizing the suspension of concessions or other obligations to a non-compliant party.[55] The RPT in most cases has been mutually agreed to by the parties to a dispute, as provided in Article 21.3(b).[56] Despite a statutory 90-day deadline, compliance panels can take a longer time as

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[52] See C.A. Thomas, "Of Facts and Phantoms: Economics, Epistemic Legitimacy, and WTO Dispute Settlement" (2011) 14:2 J Int'l Econ L 295.

[53] Horn, Johannesson & Mavroidis, *supra* note 36 at 1132-1133.

[54] *Ibid*, 1133, 1136; Matthew Kennedy, "Why Are WTO Panels Taking Longer? And What Can Be Done About It?" (2011) 45:1 J World Trade at 231, 234.

[55] For more on compliance, see Colares, *supra* note 40, who argues that, in view of rather low levels of non-compliance with WTO rulings, 'compliance is the "least" of the [WTO DSM's] problems'; while less-than-perfect compliance plays a cushioning role in a system driven by increasing judicialization and adjudicator activism. On 'uncompliance' understood as tactical compliance so as to avoid retaliatory actions but followed by re-enactment of similar measures to those found in violation of WTO rules, see David J. Townsend & Steve Charnovitz, "Preventing Opportunistic Uncompliance by WTO Members" (2011) 14:2 J Int'l Econ L 437.

[56] M.A. Qian, "Reasonable Period of Time' in the WTO Dispute Settlement System" (2012) 15:1 J Int'l Econ L 284. See this article for considerations on the RPT for bringing measures into compliance with WTO provisions.

Article 21.5 does not provide for a maximum delay for the process. In practice, they have taken on average around eight months.[57]

3. Some Tests for the WTO

This section briefly discusses some disputes that are particularly illustrative of the strengths and shortcomings in the implementation of the WTO DSM. In particular, it will be shown that the outcomes from the pursuit of the WTO DSM are not always conclusive. This owes to respondents' stances, equivocal provisions, application of the principle of judicial economy, incomplete analysis, or overreliance on the interpretive rules of public international law.

Among the disputes that served as early tests of the new WTO, a major conflict pertained to a request for consultations from Japan in May 1995 on announcement by the United States of 100 per cent import duties on Japanese luxury cars. This amounted to almost $6 billion in retaliatory measures for what the US considered regulatory barriers and restrictive practices in Japan's auto and auto parts market. This was the US-Japan auto dispute, which the parties settled through a MAS. In this case, the knowledge that both sides were to refer their respective grievances to the WTO DSM apparently pressed them towards a deal.[58] Yet, the deal was struck on the day the US threat of unilateral tariffs was to take effect, which would have violated GATT obligations.

The first case where a panel report was reviewed by the AB involved a complaint by Venezuela and Brazil over a US environmental regulation regarding gasoline composition (*US-Gasoline* (DS2) (DS4)). In May 1996, the United States was asked to bring its regulation into conformity with the GATT within an agreed time frame of 15 months.[59] In that case, the AB first evinced a concern with ensuring that governments have adequate discretion to adopt what they consider as necessary environmental measures, on the proviso that they meet GATT's non-discrimination requirements.[60] As stipulated in Article 3.2 of the DSU, the WTO DSM serves 'to clarify the existing provisions of [the covered] agreements in accordance with customary rules of interpretation of public international law'. Although the panel had

[57] Horn, Johannesson & Mavroidis, *supra* note 36 at 1136.

[58] *United States – Imposition of Import Duties on Automobiles from Japan under Sections 301 and 304 of the Trade Act of 1974 (Complaint by Japan)* (1995), WTO Doc WT/DS6/1.

[59] *United States – Standards for Reformulated and Conventional Gasoline (Complaint by Venezuela)* (1996), WT/DS2/R, WT/DS2/AB/R.

[60] On the regulatory latitude of WTO members, see Michael M. Du, "Autonomy in Settling Appropriate Level of Protection under the WTO Law: Rhetoric or Reality?" (2010) 13: 4 J Int'l Econ L 1077; Michael M. Du, "The Rise of National Regulatory Autonomy in the GATT/WTO Regime" (2011) 14: 3 J Int'l Econ L 639. In the latter article, Du argues that recent WTO case law marks the beginning of a better balance between trade liberalization and states' regulatory autonomy.

referred to the provisions of the Vienna Convention on the Law of Treaties (VCLT)[61] in order to interpret WTO provisions, and the practice of GATT panels had been to follow this general approach even when not citing it, this first appeal was also noteworthy for the AB's focus on the exact words of the relevant treaty text. Among the criteria for the interpretation of treaties under the VCLT, the first of these is 'the ordinary meaning [of] the terms of the treaty in their context and in the light of its object and purpose' (Article 31). If ordinary meaning can be established in a number of ways, WTO tribunals have been particularly keen to establish it by reference to dictionary definitions.[62] Such very extensive use of dictionary meanings has led some to ironize that the *New Oxford Shorter English Dictionary* – the AB's favourite dictionary – has become a 'covered agreement'![63]

A major and long-standing dispute, referred to as *EC-Bananas* (DS27), already addressed in the last years of GATT, figured periodically on the WTO's dispute settlement agenda for 16 years, from 1996 to 2012. It related to a complaint from Ecuador, Guatemala, Honduras, Mexico, and the United States over the EU's regime for the importation, sale and distribution of bananas. The panel's findings, mostly upheld by the AB, were that the EU regime was inconsistent with WTO rules.[64] The EU reaffirmed its attachment to the WTO DSM and stated that it would fully respect its international obligations. This contrasted with the EU's attitude under the GATT when it prevented the adoption of two panel reports on its bananas regime in the first half of the 1990s. Yet, after a 15-month period, the US requested the right to retaliate against the 'revised' EU bananas regime. The request was authorized by the DSB in April 1999. Ecuador made a similar request; it was granted in May 2000.[65] In April 2001, the parties reached an understanding whereby the US and Ecuador lifted their sanctions against the EU.[66] The Bananas case presented one of the most difficult implementation problems owing to divergent US and EU interpretations of the DSU. While the US insisted that it be authorized to suspend concessions following the EU's failure to put in place a WTO-consistent measure within the RPT, the latter argued for the WTO-consistency of its new measure to be reviewed before any retaliatory action could be taken.

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[61] *Vienna Convention on the Law of Treaties*, UNTSOR, UN Doc A/Conf 39/27, (1969).

[62] Andrew D. Mitchell, "The Legal Basis for Using Principles in WTO Disputes" (2007) 10:4 J Int'l Econ L at 812. See also David Pavot, "The Use of Dictionary by the WTO Appellate Body: Beyond the Search of Ordinary Meaning" (2013) 4:1 Journal of International Dispute Settlement 29.

[63] Davey, *supra* note 38 at 22.

[64] *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (1997), WTO Doc WT/DS27/R, WT/DS27/AB/R.

[65] *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 by Ecuador* (2000), WTO Doc WT/DS27/RW/ECU.

[66] *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Notification of Mutually Agreed Solution* (2001), WTO Doc WT/DS27/58.

Following the end of the 'Doha Waiver', during which the EU was to adopt a new bananas regime, a second compliance panel report was issued in April 2008 at Ecuador's request concluding that the EU had failed to implement WTO rulings. In May 2008, at US request, a second compliance panel report was issued. Both reports were appealed. The two AB reports, and the second compliance panel reports as modified, were adopted by the DSB on 11 December 2008 for Ecuador and on 22 December 2008 for the US.[67] In January 2009, the EU committed to bring itself into compliance with WTO recommendations. An agreement was initialled between the disputants in December 2009 and, in November 2012, the parties notified the DSB of a MAS. The resolution of this conflict took so long because the EU was torn between its respect of WTO obligations and its preferential treatment of African, Caribbean and Pacific (ACP) countries for development purposes.

If this case clearly shows the limits of the WTO DSM, these are not always primarily attributable, as in the Bananas dispute, to the conduct of the party(ies) subject to complaint. In what is arguably the most important and intricate trade dispute ever, involving the Canadian exports of softwood lumber to the United States, the WTO DSM, in *US-Softwood Lumber IV* (DS257) and *US-Softwood Lumber VI* (DS277), revealed some shortcomings due to its operation.

The central issue at the basis of the ever-lasting softwood lumber dispute is whether the fees charged by Canadian provincial governments to firms to harvest trees on public lands (stumpage rights) constitute subsidies to lumber producers because these rights would be below market value. In *US-Softwood Lumber IV*, the panel and the AB found that stumpage fees constituted a *financial contribution* through the provision of a good (standing timber), but diverged on the use of US benchmarks to establish the existence and amount of *benefit* conferred on lumber producers; both elements being essential for a finding of subsidy. The SCM Agreement stipulates that the provision of a good by a government does not confer a benefit unless the provision is made for *less than adequate remuneration*, the adequacy of remuneration to be determined 'in relation to prevailing market conditions for the good in question in the country of provision' (Article 14(d)). Although recognizing that the price of timber in Canada might be distorted by the dominant 'public' market, two different panels[68] concluded that the United States could not use prices in neighbouring US states as benchmarks for this would make redundant the specification 'in the country of provision'.

[67] *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador* (2008), WTO Doc WT/DS27/RW2/ECU, WT/DS27/AB/RW2/ECU; *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States* (2008), WTO Doc WT/DS27/RW/USA, WT/DS27/AB/RW/USA.

[68] Canada referred both the preliminary and final US CVD determinations to the WTO. *United States – Preliminary Determinations with Respect to Certain Softwood Lumber from Canada* (US-Softwood Lumber III) (2002), WTO Doc WT/DS236/R; *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada* (US-Softwood Lumber IV) (2004), WTO Doc WT/DS257/R.

The AB, on the other hand, reversed this finding and estimated that the phrase 'in relation to' did not mean 'by comparison of' and that the United States could use cross-border benchmarks as long as these were related to prevailing market conditions in Canada.[69] Obviously the AB's 'semantic' analysis led to odd results, as such interpretation arguably goes against states' intentions when the relevant provisions were agreed upon, especially when one recalls that the specification 'in the country of provision' was added late in the negotiations with a view to prevent cross-border comparisons. For Gary Horlick, first Chair of the WTO Permanent Group of Experts on Subsidies, the AB's conclusions were undoubtedly wrong.[70]

Once the panels determined that the United States could not use US timber prices as benchmarks, they found the US imposition of CVDs on Canadian lumber inconsistent with WTO rules. As this matter was dispositive of the case, following the principle of judicial economy,[71] the panel[72] did not investigate further as to whether the United States made proper adjustments to US timber prices to reflect Canadian market conditions. Hence, there was no sufficient factual basis for the AB to examine the appropriateness of US methodology and, thus, did not rule on whether the US determination of the existence and amount of benefit, and consequent CVDs on Canadian lumber, were consistent with WTO provisions.

In a separate yet related case pertaining to the US finding of threat of material injury to US lumber producers by reason of Canadian exports of subject products (*US-Softwood Lumber VI*), a WTO panel reached essentially the same conclusions as another panel established under the North American Free Trade Agreement and found that the US had acted inconsistently with its international obligations.[73] However, after a reopening of the record of the original investigation through a Section 129 determination by the United States, the WTO panel ruled that the US had properly followed its recommendations. The AB reversed this finding on the basis that the compliance panel had been too deferential to the US and applied an incorrect standard of review, but declined to complete its analysis as to the

[69] *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada* (2004), WTO Doc WT/DS257/AB/R.

[70] Interview with the author, Washington DC, 12 March 2008.

[71] The concept of judicial economy is well accepted in WTO adjudication. It stands for the proposition that panels do not need to rule on every single claim made by disputing parties, only those required to resolve a matter. On judicial economy in WTO dispute settlement practice, see Alberto Alvarez-Jiménez, "The WTO Appellate Body's Exercise of Judicial Economy" (2009) 12:2 J Int'l Econ L 393.

[72] Only the panel report on the final US CVD determination was appealed by the United States.

[73] *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada* (2004), WTO Doc WT/DS277/R.

conformity of the US determination with its WTO obligations.[74] Thus, after years of litigation for Canada and the United States, the adjudication in both *US-Softwood Lumber IV* and *US-Softwood Lumber VI* remained inconclusive as a result of incomplete analysis on the part of WTO authorities.[75]

4. The Trade Linkage Debate

Within the past few years, attempts to have the WTO deal with issues such as investment and competition law or the growing overlap between trade regulations and those in such areas as labour standards and the environment have been strongly resisted by many members, mainly from the developing world. This refers to the trade linkage or 'trade and' debate, relating to the boundaries of the WTO, and towards which there are two main contending perspectives. For one, issues such as labour or the environment should remain under the sole responsibility of the international regimes and organizations specifically mandated to deal with them. For the other, the centrality of the WTO should bring it to help resolve the conflicts that may arise between regulations coming under different institutions. Indeed, because of the key features of its DSM, the WTO has seen many voices calling for broadening of its purview.[76] In early 2001, three former GATT/WTO Directors-General issued a public statement to the effect that '[t]he WTO cannot be used as a Christmas tree on which to hang any and every good cause that might be secured by exercising trade power'.[77]

It might be worth mentioning that this issue arose in the 1980s when tougher international standards were sought for intellectual property rights. After the US and the EU failed to secure such strengthening within the World Intellectual Property Organization, they moved the issue to the GATT, which was at first reluctant to assume such responsibility arguably outside of its jurisdiction. On the other hand, during the Uruguay Round the US and the EU pushed for TRIPS to be handled by the WTO, especially in view of the strengthened DSM which was simultaneously under negotiation.

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[74] *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada* (2006), WTO Doc WT/DS277/RW, WT/DS277/AB/RW.

[75] On incomplete analysis and ensuing unsettled disputes in WTO adjudication, see Alan Yanovich & Tania Voon, "Completing the Analysis in WTO Appeals: The Practice and its Limitations" (2006) 9:4 J Int'l Econ L 933.

[76] See the symposium: "The Boundaries of the WTO" in (2002) 96:1 Am J Int'l L, in particular Steve Charnovitz, "Triangulating the World Trade Organization" 28; and John H. Jackson, "Afterword: The Linkage Problem – Comments on Five Texts" 118. See also Andrew T.F. Lang, "Reflecting on 'Linkage': Cognitive and Institutional Change in the International Trading System" (2007) 70:4 Mod L Rev 523.

[77] *Joint Statement on the Multilateral Trading System*, *supra* note 5.

The applicable law for WTO adjudication is the one reflected in WTO agreements, and it is only to that extent that WTO tribunals may apply principles of customary international law or general principles of law in resolving disputes.[78] To date, the only non-WTO treaty to which WTO adjudicating bodies refer systematically is the VCLT and most prominently its rules on treaty interpretation found in Articles 31 and 32. These are considered 'the customary rules of interpretation of public international law' that panels and the AB are bound to follow pursuant to Article 3.2 of the DSU. This does not, however, call upon them to position WTO law into the broader field of general international law nor to apply non-WTO law in a specific manner.[79]

The administration of WTO law has been ensured through recourse to general international law on questions such as the allocation of the burden of proof, legal standing, temporal/retroactive application of treaties, representation before panels; and to its key principles, such as good faith, *abus de droit*, effectiveness, contemporaneity.[80] Yet, the question remains as to what other international agreements and non-WTO rules the WTO adjudicating bodies can apply. Those referred to in some WTO agreements, such as the major international intellectual property conventions mentioned in the TRIPS Agreement or the international standards under the Agreement on Technical Barriers to Trade or the SPS Agreement,[81] constitute direct and autonomous sources of law in WTO dispute settlement proceedings. But for those agreements not mentioned in WTO texts, academic opinion is divided as to whether non-WTO rules could be relevant for WTO adjudication purposes and, if so, under what conditions.[82]

Some scholars argue that non-WTO law may be applied in WTO adjudication in the absence of an express prohibition in the DSU and as long as WTO tribunals do not apply international law incompatible with WTO law.[83] Under Article 31.3(c) of the VCLT, 'any relevant rules of international law applicable in the relations between the parties' must be considered in interpreting a treaty. In *EC-*

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[78] Mitchell, *supra* note 62 at 827.

[79] Panagiotis Delimatsis, "The Fragmentation of International Trade Law" (2011) 45:1 J World Trade at 99.

[80] *Ibid* at 99-100.

[81] GATT, "Agreement on Trade-Related Aspects of Intellectual Property Rights", "Agreement on Technical Barriers to Trade", "Agreement on the Application of Sanitary and Phytosanitary Measures", in *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, (Geneva: GATT Secretariat, 1994).

[82] Delimatsis, *supra* note 79 at 100-103.

[83] See notably Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge: Cambridge University Press, 2003). Among scholars for whom only WTO law can be applied by panels and the AB under the DSU, see Joel Trachtman, "Jurisdiction in WTO Dispute Settlement" in Rufus Yerxa & Bruce Wilson, eds, *Key Issues in WTO Dispute Settlement – The First Ten Years* (Cambridge: Cambridge University Press, 2005) 132.

Biotech (DS291) (DS292) (DS293), the panel underlined that Article 31.3(c) requires a treaty interpreter to take into account other rules of international law and 'where consideration of all other interpretative elements set out in Article 31 results in more than one permissible interpretation, a treaty interpreter […] would […] need to settle for that interpretation which is more in accord with other applicable rules of international law'.[84]

The more international regimes emerge and inevitably intertwine, the more pressing the demands for taking non-WTO sources of law into consideration will become. WTO members increasingly refer to such sources before WTO adjudicating bodies. In *China – Publications and Audiovisual Products* (DS363),[85] the specificity of cultural goods and services was invoked, as affirmed by the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (CDCE), under the auspices of the United Nations Educational, Scientific and Cultural Organization (UNESCO).[86] Another dispute which echoed the trade and culture debate was the famous Periodicals conflict (DS31) in the second half of the 1990s over the US complaint against some of Canada's measures for the protection of its periodicals industry. The WTO rulings[87] in that case led Canada and France to have a key role in the negotiations and adoption within UNESCO of the CDCE, which enshrined in international law the specific character of cultural products, as well as states' rights to pursue cultural policies.[88]

Following the principles of international law, states must respect and act consistently with the obligations they have undertaken in various forums and avoid commitments that would lead to breaching their obligations under other agreements. This implies that real conflicts of law should not arise and a state's international obligations can be interpreted in a way that accommodates them all in a harmonious manner.[89] It appears from WTO jurisprudence that the general exceptions under Article XX of the GATT have proved a key instrument for balancing trade concerns with others such as environmental protection (*US-Gasoline* (DS2), *US-Shrimp* (DS58)) or public health (*EC-Hormones* (DS26) (DS48), *EC-Asbestos* (DS135)). The measures must be 'necessary' to achieve the desired policy goal, and their application should not amount to arbitrary or unjustifiable discrimination or a

[84] *European Communities – Measures Affecting the Approval and Marketing of Biotech Products* (2006), WTO Doc WT/DS291/R, WT/DS292/R, WT/DS293/R at para 7.69.

[85] *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (2010), WTO Doc WT/DS363/R.

[86] *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, UNESCO, 2005.

[87] *Canada – Certain Measures Concerning Periodicals* (1997), WTO Doc WT/DS31/R, WT/DS31/AB/R.

[88] For more on this, see Gilbert Gagné, « La diversité culturelle: vers un traité?' » in Marie-Françoise Labouz & Mark Wise, eds, *Cultural Diversity in Question(s)* (Brussels: Bruylant, 2005) at 277-302.

[89] Delimatsis, *supra* note 79 at 103, 112. See also Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body* (Oxford: Oxford University Press, 2009) at 358.

disguised restriction on trade. The 'weighing-and-balancing' and 'less restrictive alternative' tests have played a central role in WTO adjudication, and in many cases have decided the outcome of litigation.[90]

A well-known dispute has been the one between Mexico and the United States over the latter's measures for the importation, marketing and sale of tuna and tuna products, the *Tuna-Dolphin* case (DS381). Once addressed within GATT, it resurfaced on the WTO dispute settlement agenda in 2008.[91] While GATT was criticized in the early 1990s for refusing to engage with the problem of the intersection between trade disciplines and environmental considerations, in the first trade and environment dispute addressed under the WTO, the *US-Shrimp* case, it has been argued that WTO authorities took account of environmental concerns in their recommendations and rulings. These cases of US 'environmental unilateralism' involve fishing methods for tuna which may affect dolphins and those for shrimps impacting on turtles.

When looking at the general exceptions under GATT Article XX, the AB in *US-Shrimp* thought that the concept of 'exhaustible natural resources' contained in paragraph (g) was evolutionary in nature. It concluded that:

> [g]iven the recent acknowledgment by the international community of the importance […] to protect living natural resources, and recalling the explicit recognition […] of the objective of sustainable development in the preamble of the WTO Agreement, [Article XX(g) could not] be read as referring only to the conservation of exhaustible mineral or other non-living natural resources.[92]

This decision was of fundamental importance as it confirmed the wide scope of Article XX(g), now likely to encompass many environmental measures, despite the absence of any express reference to the environment in Article XX.[93]

Over public health, there was the long conflict between Canada and the US, on one side, and the EU, on the other, concerning the exports of Canadian and US meat and meat products treated with certain growth hormones (*EC-Hormones*). As for the Bananas dispute, the GATT had been seized of the matter before being

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[90] Piet Eeckhout, "The Scales of Trade – Reflections on the Growth and Functions of the WTO Adjudicative Branch" (2010) 13:1 J Int'l Econ L at 12-14.

[91] *United States - Restrictions on Imports of Tuna*, DS21/R, circulated 3 September 1991; *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (2012), WTO Doc WT/DS381/R, WT/DS381/AB/R.

[92] *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (1998), WTO Doc WT/DS58/AB/R at paras 129-131. See Delimatsis, *supra* note 79 at 103-105.

[93] Eeckhout, *supra* note 90 at 23.

addressed under the strengthened DSU. In accordance with the SPS Agreement, any trade limitation must be scientifically based, whereas the EU insisted on the precautionary principle in order to prevent potential risks to humans.[94] In July 1999 the DSB authorized the United States and Canada to suspend concessions to the EU.[95] Interestingly, the absence of a review mechanism for retaliatory action in the DSU gave rise to a dispute when, in 2003, the EU estimated that it had implemented the WTO rulings (DS320) (DS321).[96] The EU later reached an agreement with the US in May 2009 and with Canada in March 2011. There was also, in the late 1990s, a dispute over the EU ban on asbestos, with Canada as a complainant (*EC-Asbestos*), in which the AB looked at conventions under the World Health Organization to find evidence as to the toxicity of asbestos and the deleterious effects of its use to public health.[97]

THE WTO AND ITS DSM: SOME CONCLUDING REMARKS

The DSM, the 'jewel in the crown' of the WTO regime, has been praised as a success story.[98] The WTO rules and case law, even though corresponding to a 'self-contained' regime, have been frequently referred to by other international DSMs not only on matters of procedure but also on various substantive aspects of trade law and general international law. While in the case of trade law this might be expected from preferential trade agreements (PTAs), references to the WTO on issues of international law reveals its broader influence on international dispute settlement.[99]

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[94] *European Communities – Measures Concerning Meat and Meat Products (Hormones)* (1998), WT/DS26/R/USA, WT/DS48/R/CAN, WT/DS26/AB/R, WT/DS48/AB/R.

[95] *European Communities – Measures Concerning Meat and Meat Products (Hormones)* (1999), WT/DS26/ARB, WT/DS48/ARB.

[96] *United States – Continued Suspension of Obligations in the EC-Hormones Dispute* (2008), WTO Doc WT/DS320/R, WT/DS320/AB/R; *Canada - Continued Suspension of Obligations in the EC-Hormones Dispute* (2008), WTO Doc WT/DS321/R, WT/DS321/AB/R.

[97] *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* (2001), WTO Doc WT/DS135/R, WT/DS135/AB/R.

[98] Donald McRae, "The WTO in International Law: Tradition Continued or New Frontier?" (2000) 3:1 J Int'l Econ L at 38.

[99] Gabrielle Marceau, Arnau Izaguerri & Vladyslav Lanovoy, "The WTO's Influence on Other Dispute Settlement Mechanisms: A Lighthouse in the Storm of Fragmentation" (2013) 47:3 J World Trade at 481. On similarities, differences, and interrelationships between the WTO DSM and those of PTAs, see: Fernando Piérola & Gary Horlick, "WTO Dispute Settlement and Dispute Settlement in the "North-South" Agreements of the Americas: Considerations for Choice of Forum" (2007) 41:5 J World Trade 885; Henry Gao & C.L. Lim, "Saving the WTO from the Risk of Irrelevance: The WTO Dispute Settlement Mechanism as a "Common Good" for RTA Disputes" (2008) 11:4 J Int'l Econ L 899; Jeanine Gama Sá Cabral & Gabriella Giovanna Lucarelli de Salvio, "Considerations on the Mercosur Dispute Settlement Mechanism and the Impact of its Decisions in the WTO Dispute Resolution System" (2008) 42:6 J World Trade 1013; Nellie Munin, "The Evolution of Dispute Settlement Provisions in Israel's PTAs: Is There a Global Lesson?" (2010) 44:2 J World Trade 385.

After the first decade of the WTO, the general conclusion was that the DSM had worked reasonably well overall,[100] but it has since known some problems. The expanding delays in the WTO dispute settlement process mainly come to mind. Yet, the prompt settlement of disputes is essential to the effective functioning of the WTO, especially in view of the fact that the DSU lacks interlocutory and retrospective relief.[101]

The way WTO dispute settlement institutions have carried out their functions has sometimes raised criticisms. In interpreting WTO law, panels and the AB have, in some instances, been accused of exceeding their authority by adding to member states' obligations or limiting their rights instead of merely clarifying the scope of existing rules of the world trading regime. Anyhow, even when strictly following Articles 31 and 32 of the VCLT, 'interpretation' is a matter of definition.[102] It remains that the reliance on dictionary definitions of the words of the relevant treaty texts has led in many cases to a 'semantic' analysis on the part of WTO adjudicating bodies which has given flanks to warranted criticism. Finally, handling the trade linkage debate on its own puts the adjudicative branch in a difficult position. This may lead to resentment on the part of member states for which the WTO should only deal with issues falling within its specific mandate.

These issues and problems with the DSM are exacerbated as the other main functions of the WTO have not played their anticipated roles, leaving too much to be assumed by the adjudicative branch of the organization. A better balance between the negotiating, rule-making, monitoring, and dispute settlement functions is indispensable to ensure the continuing relevance of the WTO.

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[100] Davey, *supra* note 38 at 50; Kennedy, *supra* note 54 at 222; Yanovich & Voon, *supra* note 75 at 934.

[101] Kennedy, *supra* note 54 at 252.

[102] See Alexander Keck & Simon Schropp, "Indisputably Essential: The Economics of Dispute Settlement Institutions in Trade Agreements" (2008) 42:5 J World Trade at 806-807. On the WTO adjudicative branch, see John H. Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (Cambridge: Cambridge University Press, 2006); Eeckhout, *supra* note 90. On the functioning of the AB, see Alberto Alvarez-Jiménez, "The WTO Appellate Body's Decision-Making Process: A Perfect Model for International Adjudication?" (2009) 12:2 J Int'l Econ L 289. For a thorough discussion of the WTO DSM, see T.N. Srinivasan, "The Dispute Settlement Mechanism of the WTO: A Brief History and an Evaluation from Economic, Contractarian and Legal Perspectives" (2007) 30:7 The World Economy 1033.