

## POLITICAL CONSIDERATIONS AND PRAGMATIC OUTCOMES IN WTO DISPUTE RULINGS

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### I INTRODUCTION

While the number of disputes being considered in the World Trade Organization ('WTO')<sup>1</sup> is not trending upwards,<sup>2</sup> other factors suggest a growing willingness of Member governments to pursue – through litigation – outcomes they cannot achieve through negotiation. In addition to the possibility of disputes should the current Doha Round of negotiations fail to conclude successfully, these factors include disputes brought in part to influence those negotiations and the number of what Hudec described as 'hard cases', ones where litigation is unlikely to be able to satisfactorily resolve the differences between the parties.

WTO judicial bodies have shown a strong sensitivity to the broader political context in which they operate. Disputes such as *US – Section 301*,<sup>3</sup> *EC – Asbestos*<sup>4</sup> and *US – Shrimp*<sup>5</sup> highlight a willingness of Panels and the Appellate Body to accommodate political considerations and to pursue pragmatic over strict legal outcomes.

This paper examines the sensitivity of WTO judicial bodies to political considerations. We begin by looking briefly at why it matters what Panels and the Appellate Body do, in particular the implications for the WTO's dispute settlement mechanism and, more broadly, the WTO's legitimacy. We then

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1 Established pursuant to the *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) ('*WTO Agreement*').

2 For data on the number of disputes brought each year, see WTO, *Chronological list of disputes cases* <[http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_status\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm)> at 9 July 2007.

3 *United States – Sections 301–310 of the Trade Act 1974*, WTO Doc WT/DS152/R (1999) (Report of the Panel) ('*US – Section 301*').

4 *European Communities – Measures Affecting Asbestos and Products Containing Asbestos*, WTO Doc WT/DS135/R (2000) (Report of the Panel) ('*EC – Asbestos*').

5 *United States – Import Prohibition on Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R, AB-1998-4 (1998) (Report of the Appellate Body) ('*US – Shrimp*').

examine the recent and highly controversial *EC – Biotech*<sup>6</sup> dispute to see the variety of ways the Panel defused sensitive issues. This is followed by an examination more broadly of: (a) the legal and conceptual basis for the sensitivity to the broader political context of disputes; (b) the judicial and related techniques used to balance potential political, economic and legal tensions; and (c) the limits of political considerations.

We conclude that the dispute settlement process is highly political and that there is a balancing function of Panels and the Appellate Body. Nonetheless, there are limits to the role of political considerations, and some disputes, such as *US – Section 301*, ultimately require political not legal solutions.

## II WHY DOES IT MATTER WHAT PANELS AND THE APPELLATE BODY DO?

The way that Panels and the Appellate Body fulfil the responsibilities placed on them is crucial to the efficacy and legitimacy of the WTO's dispute settlement mechanism and, in turn, to the efficacy and legitimacy of WTO itself. The dispute settlement mechanism has been described as the jewel in the crown of the WTO. The reasons for this are many, including: the opportunity for appellate review by a standing body of respected international jurists, the binding nature of the regime (and the substantial compliance with this by Members), and the availability of retaliation to induce compliance.

The lustre of this jewel has been enhanced by the comparison with the well-known difficulties of securing progress by the WTO's legislative arm, especially but not only in the Doha round of negotiations. Were the dispute settlement mechanism to be tarnished, there would be significant implications for the WTO. This has, in effect, placed an additional burden on the adjudicative bodies to ensure that their actions do not diminish the respect and standing of the WTO among Members and others (including business and civil society) affected by their decisions.

This burden is likely to grow in the future if there is an increase in number and/or importance of disputes. This could occur for a number of reasons. One is if Members initiate disputes to influence the outcome of negotiations. This happened in the Uruguay Round of multilateral trade negotiations, most noticeably in the *EEC – Oilseeds*<sup>7</sup> disputes brought by the United States. Resolution of this issue was a critical element in the Blair House agreements that were essential in concluding the Uruguay Round. Already a number of disputes have been brought which relate to critical issues in the Doha negotiations.

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6 *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WTO Doc WT/DS291/R, WT/DS292/R, WT/DS293/R (2006) (Reports of the Panel) ('*EC – Biotech*').

7 *EEC – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*, GATT BISD, 37<sup>th</sup> Supp, 86, GATT Doc L/6627 (1989) (Report of the Panel Adopted on 25 January 1990); *Follow-Up on the Panel Report 'EEC – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*, GATT BISD, 39<sup>th</sup> Supp, 91, GATT Doc DS28/R (1992) (Report of the Members of the Original Oilseeds Panel).

Examples include *US – Cotton*,<sup>8</sup> *EC – Sugar*<sup>9</sup> and *EC – Geographical Indications*,<sup>10</sup> and there are other disputes where the initiation of the complaint and/or its timing suggest that there was a connection with the negotiations. The latest of these are the challenges by Canada and Brazil to US agricultural support. Canadian ministers and officials have stated publicly that their complaint<sup>11</sup> about US corn subsidies and the timing of the decision to seek a Panel are intended to influence the US approach to subsidy reduction in the Doha negotiations and in crafting US domestic legislation.<sup>12</sup>

One possibility should the Doha negotiations fail (or even if they grind on but with little prospect of immediate conclusion) is that the number of disputes will increase. The outcome of the *US – Cotton* dispute in particular suggests that a number of agricultural support programs in both the United States and the EC could be vulnerable to challenge – the Canadian complaint against US corn subsidies and the Brazilian complaint against domestic support and export credit guarantees may be the first two of a number of disputes – and there are many other issues where Members might choose litigation if no satisfactory negotiated outcome is possible. The current disputes between the European Communities and the United States over the alleged subsidies to Airbus and Boeing show how the absence of a negotiated outcome (in this instance the collapse of the bilateral agreement covering subsidies for civil aircraft) can lead to formal disputes.

Another possible reason why there could be an increase in number and/or importance of disputes is unrelated to the negotiations but instead derives from the very success of the dispute settlement mechanism: that Members may come to regard initiating a formal dispute as routine. While perhaps less so for major players such as the United States and EC, at present WTO disputes, like most other intergovernmental disputes, are a significant matter for most governments. Typically, formal dispute settlement action is the step taken when other means of resolving the problem have failed. Typically, it requires a high-level decision by government. If Members were to see WTO actions as more of a routine procedure rather than an action where governments need to calibrate political, economic, trade and sometimes strategic concerns, then there may be more disputes in absolute number terms and/or Members may choose to bring for adjudication more issues that arguably should be resolved through negotiation.

If, for any of these reasons, there were an increase in the number and/or significance of disputes, the importance of Panels and the Appellate Body being sensitive to the legal and other issues raised by the disputes will be highlighted. We turn now to the *EC – Biotech* dispute to see how a Panel coped with one of

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8 *United States – Subsidies on Upland Cotton*, WTO Doc WT/DS276/R (2004) (Report of the Panel).

9 *European Communities – Export Subsidies on Sugar*, WTO Doc WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, AB-2005-2 (2005) (Report of the Appellate Body).

10 *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WTO Docs WT/DS174/R, WT/DS290/R (2005) (Reports of the Panel).

11 *United States – Subsidies and Other Domestic Support for Corn and Other Agricultural Products*, WTO Doc WT/DS357/11 (2007) (Request for the Establishment of a Panel by Canada).

12 International Centre for Trade and Sustainable Development, 'Canada Requests Panel in US Farm Subsidy Dispute' (2007) 11(21) *Bridges Weekly Trade News Digest* <<http://www.ictsd.org/weekly/07-06-13/wtoinbrief.htm#1>> at 10 July 2007.

the most contentious complaints brought so far before the WTO's dispute settlement mechanism.

### III EC – BIOTECH: HOW THE PANEL DEFUSED A CONTENTIOUS DISPUTE

This highly contentious dispute involved the challenge by the United States, Canada and Argentina to the moratorium maintained within the European Union on the approval (for importation, cultivation and offering for sale) of a range of genetically modified organisms ('GMOs'). The decision by those Members to initiate the dispute attracted widespread criticism, including from non-governmental organisations ('NGOs') and the academic community. However, the Panel's report failed to attract the same volume of criticism, and that criticism was not as vehement or as hostile. In our view, this is only partly explained by the fact that many of the Panel's findings of violation were of the procedural rather than substantive obligations of the *Agreement on the Application of Sanitary and Phytosanitary Measures* ('SPS Agreement').<sup>13</sup> The failure of the parties to appeal the Panel's report suggests that they were also willing to accept the Panel's conclusions, even though some of those findings (especially on the scope of the definition of an SPS measure) may have significant implications for future disputes.<sup>14</sup>

In our view, a critical factor in the reaction to the Panel's report was the many actions the Panel took to defuse sensitive issues. These actions covered procedure, process, and terminology as well as legal issues.

One exceptional action taken by the Panel was to make clear which of the many contentious issues that were related to the EC's moratorium it had considered. Thus, the Panel begins its conclusions with a discussion of what it did not examine in its report.<sup>15</sup> This is followed by a description of those issues that were addressed by the Panel.<sup>16</sup>

Another exceptional action taken by the Panel was to respond in its final report to some of the criticisms from civil society groups of its interim report. It did so in an additional annex (Annex K) which contains the text of the letter of the Panel to the parties of 8 May 2006 and addresses issues arising from the leaking of the interim report to an NGO and its subsequent availability on the NGO's website. Here the Panel explained its approach to four issues related to the question of the sufficiency of scientific information required under Article 5 of the *SPS Agreement*.

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13 *WTO Agreement*, above n 1, annex 1A (*Agreement on the Application of Sanitary and Phytosanitary Measures*) 1867 UNTS 493.

14 *EC – Biotech*, above n 6, [7.147]–[7.437]. For a critical analysis of the implications, see Jacqueline Peel, 'A GMO by Any Other Name ... Might Be an SPS Risk!: Implications of Expanding the Scope of the WTO *Sanitary and Phytosanitary Measures Agreement*' (2006) 17 *European Journal of International Law* 1009.

15 *EC – Biotech*, above n 6, [8.1]–[8.3].

16 *Ibid* [8.4]–[8.10].

The Panel also recognised that the terminology it used would be seen by many as critical. This was because the title of the dispute – which was chosen by the WTO Secretariat following its standard practice of identifying the respondent and the measure at issue identified in the complaint – was seen by NGOs and others as indicative of the WTO's broader approach to the issue. The complainants, presumably seeking to diminish any emotional considerations, referred to the products at issue as biotech products in their submissions. The EC, in its submissions, referred to GMOs. The Panel began its findings by indicating that it would use 'interchangeably the terms biotech products, GMOs, GM plants, GM crops or GM products, without prejudice to the views of the Parties to the dispute.'<sup>17</sup>

The Panel's handling of timing issues also demonstrated its political sensitivity. Because of the complexity of the dispute and the additional steps included in the process (such as third submissions from the parties), the Panel advised on a number of occasions that its report would be delayed. The penultimate delay meant that the report was issued after the WTO Ministerial Meeting in Hong Kong in December 2005 and thus avoided the report's being a divisive issue at a potentially crucial meeting as well as avoiding a focus of critical attention from NGOs.<sup>18</sup>

The Panel also sought to defuse criticism by consulting experts. While this practice was one that all previous Panels hearing SPS disputes had followed, it was the subject of contrary views from the parties, with the complainants arguing it was not necessary for the Panel to do so to rule on their claims. The EC, on the other hand, argued that the Panel needed to consult experts to understand, *inter alia*, the broader context of the issues it was considering. The Panel rightly recognised that failure to consult experts would exacerbate criticism that it was adjudicating on issues on which it lacked expertise, a common criticism of previous WTO Panels adjudicating SPS and trade and environment disputes. While the Panel did consult experts and asked many questions of them (and invited comments from the parties to the dispute on the answers provided by the experts), it made few references to the experts in its report, both in absolute terms and in comparison with the references to expert testimony in previous Panel reports on SPS disputes.

As well as procedural, process and terminological issues, the Panel also handled sensitive legal issues in a manner designed to avoid having to make findings that it knew would be contentious. Argentina and Canada both claimed that the EC's measures violated the *General Agreement on Tariffs and Trade* ('GATT')<sup>19</sup> Article III:4, in addition to various claims of violation of the *SPS Agreement*. This posed a potential problem for the Panel as a finding of a violation would require the Panel to rule that GMOs were like products to their conventionally bred counterparts. This would have significant implications as the

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17 Ibid [7.2].

18 International Centre for Trade and Sustainable Development, 'Sidestepping Hong Kong, GMO Ruling Delayed Until January 2006' (2005) 9(34) *Bridges Weekly Trade News Digest* <<http://www.ictsd.org/weekly/05-10-12/wtoinbrief.htm#1>> at 16 July 2007.

19 *WTO Agreement*, above n 1, annex 1A (*General Agreement on Tariffs and Trade*) 1867 UNTS 190.

heart of the dispute was the different regulatory philosophies of the EU (which treats GMOs as unlike their conventionally bred counterparts) and United States (which treats them as like).

One tool the Panel used was to exercise judicial economy: it was able to do this because Canada's claims in relation to the product-specific measures (one of the three measures at issue) had already been found to violate the procedural obligations of the *SPS Agreement*.<sup>20</sup>

The other tool the Panel used was to vary the order in which it considered the different elements of the test of consistency with Article III:4 of the *GATT*. In previous disputes examining this provision the Appellate Body had identified that a violation required that the domestic and imported products be 'like' and also that the measure at issue caused the imported product to be treated less favourably than the domestic counterpart. Here, the Panel chose to begin its examination by addressing the 'no less favourable' treatment requirement. Its finding that Argentina had failed to adduce argument or evidence that showed that the difference in treatment was based on national origin allowed it to conclude that Argentina's claim could not be sustained and that there was no need for the Panel to examine issues of likeness.<sup>21</sup>

#### IV POLITICAL SENSITIVITY

Awareness of the broader political context in which a Panel/Appellate Body report is to be received, which the Panel in *EC – Biotech* demonstrated, is not exceptional (even though some of the specific actions of that Panel were without precedent). Political considerations were always part of dispute settlement under *GATT*. Joseph Weiler famously characterised this as the ethos of diplomats.<sup>22</sup> Robert Howse also refers to the 'institutional sensitivity' of *GATT* and WTO judicial bodies.<sup>23</sup>

Even though dispute settlement has changed significantly under the WTO – the significant juridification has been characterised by Weiler as the rule of lawyers – political considerations are still a part of the workings of Panels and the Appellate Body. Before we explore these in depth, we examine some of the relevant factors that underlie the techniques employed by WTO judicial bodies.

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20 *EC – Biotech*, above n 6, [7.2505].

21 *Ibid* [7.2506]–[7.2517].

22 Joseph Weiler, 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement' (Working Paper No 9/00, Jean Monnet Center – NYU School of Law, 2000).

23 Robert Howse, 'Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence' in Joseph Weiler, *EU, WTO and NAFTA: Towards a Common Law of Economic Integration?* (2000). See also Robert Howse and Kalypso Nicolaidis, 'Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?' in Marco Verweij and Tim Josling (eds), *Deliberately Democratizing Multilateral Organization* (2003).

### A General Nature of International Law

While it is not true that only in international law is the relevant law the result of a process of negotiation, it is true that the process of negotiating treaties is different from the process of negotiating domestic laws. This is because there is no over-arching government: the negotiations take place among sovereign states, all with the option of not ratifying the outcome and making themselves subject to the agreement if they fundamentally disagree with it. Thus, more so than for other laws, treaties – including the WTO agreements – are the product of negotiation and compromise. Often, as a consequence, the wording is unclear: to conclude negotiations, negotiators frequently employ ‘constructive ambiguity’ which papers over those areas where agreement was not possible.

In addition to the process of negotiating treaties and other international agreements being different from the comparable process for domestic laws, the implementation of them is also constrained by the fact that international law applies to states. Sovereign states are often unwilling to hand over their sovereignty and expect to be accorded deference.

As well, and sometimes as a consequence, it is often difficult to be prescriptive about how treaties will be implemented. Account needs to be taken, *inter alia*, of different constitutional and legal systems, and of different regulatory philosophies and practices.

All these factors create potential difficulties for adjudicators when they are considering and ruling on disputes between states. They also encourage adjudicators to seek ways, including through process, procedure and judicial techniques, to balance competing tensions between states.

### B WTO Legal System

The WTO legal system itself also encourages Panels and the Appellate Body to exercise sensitivity. The *Understanding on Rules and Procedures Governing the Settlement of Disputes* (‘*Dispute Settlement Understanding*’ or ‘*DSU*’)<sup>24</sup> reflects the desire of Members for pragmatic outcomes. Its purpose is to settle disputes. Members have a range of alternatives available to them and are required to ‘exercise ... judgement as to whether action under these procedures would be fruitful.’<sup>25</sup>

Once a complaint is formally initiated the system permits Panels and the Appellate Body to exercise sensitivity. *DSU* Article 7 limits the mandate of Panels to the matters raised by the parties. Article 11 requires a Panel to make an objective assessment of the matter before it, including the facts of the case and the applicability and conformity with the relevant agreements, and to make ‘such other findings’ as will assist the Dispute Settlement Body (‘*DSB*’) in making recommendations or rulings. Article 17.6 limits the Appellate Body to considering issues of law and legal interpretation. In addition, under Article 3.9 the right to make authoritative interpretation of a WTO agreement remains with

24 *WTO Agreement*, above n 1, annex 2 (*Understanding on Rules and Procedures Governing the Settlement of Disputes*) 1869 UNTS 401.

25 *Ibid* [3.7].

Members (following the procedures set out in Article IX:2 of the *WTO Agreement*). As well the *DSU* provides Members with the discretion to determine how to remedy violations. (There are some exceptions: the *Agreement on Subsidies and Countervailing Measures* ('*SCM Agreement*') specifies in Article 4.7 that prohibited subsidies shall be withdrawn immediately and in Article 7.8 that actionable subsidies shall be withdrawn or the adverse effects removed. In addition, Panels may offer suggestions: several Panels in anti-dumping disputes have made specific recommendations where the violations have been adjudged to be of a 'fundamental nature and pervasive'.)<sup>26</sup>

### C Legitimacy

Dispute settlement that takes account of the political and economic context is important for the legitimacy of the WTO's dispute settlement regime and of the WTO in general. Failure to do so exposes the mechanism, and the institution itself, to potential criticism.<sup>27</sup> Panels and the Appellate Body have shown themselves to be aware of the significance of their reports for the legitimacy of the system, especially in high-profile disputes such as *EC – Hormones*<sup>28</sup> and *US – Shrimp* – we explore in Section V the ways they have done this.

In addition to the role of adjudicators in adding to the legitimacy of the system, legitimacy is also built into the agreements themselves. In addition to the procedural and other flexibility provided to Panels and the Appellate Body in the *DSU*, other WTO agreements reflect a balance of legal and political rights and obligations. Examples include the general exceptions provisions in both *GATT* (Article XX) and the *General Agreement on Trade and Services* ('*GATS*')<sup>29</sup> (Article XIV), and the provisions in both *GATT* (Article XXIV) and *GATS* (Article V) that allow free trade agreements and customs unions that would otherwise violate the fundamental 'most favoured nation' ('MFN') non-discrimination obligations.

## V TECHNIQUES EMPLOYED BY WTO JUDICIAL BODIES

That the *WTO Agreement* reflects a balance of rights and obligations is a recurrent theme in WTO dispute rulings. This captures not just the need to

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26 *WTO Agreement*, above n 1, annex 1A (*Agreement on Subsidies and Countervailing Measures*) 1869 UNTS 14; *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WTO Doc WT/DS156/R (2000) [9.6] (Report of the Panel); *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WTO Doc WT/DS241/R (2003), [8.3]–[8.7] (Report of the Panel); *Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala*, WTO Doc WT/DS331/R (2007) [8.7]–[8.13] (Final Report of the Panel).

27 There is a substantial body of literature dealing with issues of legitimacy in general and of the WTO in particular. See, eg, Daniel Esty, 'The World Trade Organization's Legitimacy Crisis' (2002) 1 *World Trade Review* 7; Jeffrey Dunoff, 'The WTO's Legitimacy Crisis: Reflections on the Law and Politics of WTO Dispute Settlement Resolution' (2002) 13 *American Review of International Arbitration* 197.

28 *EC – Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc WT/DS26/AB/R, WT/DS48/AB/R, AB-1997-4 (1998) (Report of the Appellate Body) ('*EC – Hormones*').

29 *WTO Agreement*, above n 1, annex 1B (*General Agreement on Trade in Services*) 1869 UNTS 183.



balance the different interests of WTO Members in a given dispute, but also competing political, economic and legal considerations.

The balance of rights and obligations is perhaps best crystallised in Article XX (General Exceptions) of *GATT*. In balancing the rights of WTO Members to benefits under the agreements with that of governments to pursue legitimate public policy objectives, the Appellate Body has applied a pragmatic test. Determining whether measures are ‘necessary’ to fulfil a policy goal under Article XX(b) or (d) involves a ‘weighing and balancing process’ in which ‘[t]he more vital or important [the] common interests or values’ pursued, ‘the easier it would be to accept as “necessary” a measure designed as an enforcement instrument.’<sup>30</sup> It is also given specific application in the chapeau of Article XX which requires that a measure which pursues a legitimate policy objective must not constitute a means of arbitrary or unjustifiable discrimination, or a disguised restriction on international trade.

WTO judicial bodies have also employed a range of other techniques to balance competing tensions. These include, for example:

- the constructive use of Panel procedures and processes;
- limiting the scope of WTO rulings through the exercise of judicial economy;
- a reluctance to exceed their treaty mandate and engage in judicial activism; and
- according sensitivity to Member governments, particularly on matters of life or health and in the interpretation of domestic legislation.

We will focus our discussion on these techniques and will limit our analysis to the ‘first principles’ as articulated in Panel and Appellate Body reports. We note however that the above list is far from exhaustive and there are other techniques by which the WTO judicial bodies – and indeed the DSB itself<sup>31</sup> – have sought to accommodate political considerations in disputes.

### A Constructive Use Of Procedures And Processes

The *DSU* provides detailed procedures for the conduct of WTO disputes. These include for example: the establishment of a Panel, a Panel’s terms of reference, the function of Panels, dispute timeframes and Panel working

30 *Korea – Measures Affecting Imports of Chilled, Fresh and Frozen Beef*, WTO Doc WT/DS161/AB/R, WT/DS169/AB/R, AB-2000-8 (2000) [162] (Report of the Appellate Body).

31 In two disputes, the DSB accepted advice from the relevant Members on mutually agreed solutions: *European Communities – Trade Description of Scallops* disputes WTO Doc WT/DS7/R, WT/DS12/R, WT/DS14/R (1996) (Reports of the Panel); *European Communities – Measures Affecting Butter Products*, WTO Doc WT/DS72/R (1999) (Report of the Panel). In both disputes the Panels’ substantive reports were not presented to the DSB for adoption as the parties reached a mutually agreed solution after the Panels’ confidential draft reports had been circulated.

procedures.<sup>32</sup> Additional working procedures for the Appellate Body have been developed in consultation with the Director-General of the WTO and the Dispute Settlement Body.<sup>33</sup>

These procedures are not however exhaustive. Panels and the Appellate Body have from the outset exercised their inherent jurisdiction to develop additional procedures to facilitate dispute management. In a number of instances, they have done this in a manner that accorded sensitivity to broader political considerations. Examples include the development of procedures to accord due process and the acceptance of amicus curiae briefs.

## 1 *Due Process*

Due process or procedural fairness is a necessary element in any international or domestic judicial system. It is especially important in the WTO context given the unique nature of the WTO dispute settlement system – binding and compulsory jurisdiction, the highly intrusive nature of WTO obligations and the potential consequences of rulings on sovereign governments. Due process therefore supports the political and legal legitimacy of dispute outcomes, and the security and predictability of the WTO system.<sup>34</sup>

In prescribing Panel procedures and timeframes, the *DSU* does not expressly articulate any principle of due process.<sup>35</sup> Panels and the Appellate Body have, however, applied *DSU* procedures in a manner that affirms due process principles. An example is the opportunity for a defending party to defend itself. The WTO judicial bodies have adopted a stringent approach to the requirements in Article 6 (request for the establishment of a Panel) and Article 7 (terms of reference) of the *DSU*.

In *US – Carbon Steel*,<sup>36</sup> the Appellate Body noted that one rationale for the request for the establishment of a Panel was to ‘serve the due process objective of notifying the parties and third parties of the nature of a complainant’s case’.<sup>37</sup> Any defects in the request could not be ‘cured’ in subsequent submissions in the Panel proceedings.<sup>38</sup> In *Brazil – Desiccated Coconut*,<sup>39</sup> the Appellate Body

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32 See *DSU*, above n 24, Article 6 (establishment of Panels), Article 7 (terms of reference), Article 10 (third parties), Article 11 (function of Panels), Article 12 (Panel procedures), Article 13 (right to seek information), Article 14 (confidentiality), Article 15 (interim review) and Appendix 3 (panel working procedures).

33 For the current revision, which applies to all appeals initiated after 1 January 2005, see *Working Procedures for Appellate Review*, WTO Doc WT/AB/WP/5 (2005).

34 For a detailed discussion on due process and the WTO, see Andrew Mitchell, ‘Due process in WTO disputes’ in Rufus Yerxa and Bruce Wilson (eds), *Key Issues in WTO Dispute Settlement: The First Ten Years* (2005) 144.

35 See n 24 above, where Rule 27(3)(c) of the Appellate Body Working Procedures does however refer to ‘due process’ in relation to the participation of third parties to a dispute at oral hearings of the Appellate Body.

36 *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WTO Doc WT/DS213/AB/R, AB-2002-4 (2002) (Report of the Appellate Body).

37 *Ibid* [126].

38 *Ibid* [127].

39 *Brazil – Measures Affecting Desiccated Coconut*, WTO Doc WT/DS22/AB/R, AB-1996-4 (1997) (Report of the Appellate Body).

affirmed that the ‘terms of reference 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’.<sup>40</sup>

The Appellate Body has also affirmed due process principles in relation to a Panel’s function under Article 11 of the *DSU*. In *US – Gambling*,<sup>41</sup> the Appellate Body considered that ‘as part of their duties, under Article 11 of the *DSU* ... Panels must ensure that the due process rights of parties to a dispute are respected.’<sup>42</sup> Accordingly, a Panel would act inconsistently with this duty if it addressed a defence raised by a responding party at such a late stage of the proceedings that the complainant had no meaningful opportunity to respond.

The WTO judicial bodies have nevertheless adopted a pragmatic approach to due process. In *US – Foreign Sales Corporations*,<sup>43</sup> the Appellate Body stated that the ‘procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes’.<sup>44</sup> The same principle of good faith requires that responding Members ‘seasonably and promptly bring claimed procedural deficiencies to the attention of the complaining Member, and to the DSB or the Panel’ so that necessary corrections might be made.<sup>45</sup>

## 2 *Amicus Briefs*

A contentious example of the constructive use of procedures is the Appellate Body’s approach to amicus curiae briefs. In *US – Shrimp*, the Appellate Body adopted an expansive interpretation of the right of Panels under Article 13 of the *DSU* ‘to seek information and technical advice from any individual or body which it deems appropriate’. In the Appellate Body’s view, this authority to ‘seek’ information also included ‘the discretionary authority either to accept and consider or to reject information and advice submitted to it, *whether requested by a [P]anel or not*’.<sup>46</sup>

The decision was sharply criticised by Member governments in a reaction described by former Appellate Body member Claus-Dieter Ehlermann as a ‘major diplomatic row’. The decision resulted in the WTO General Council taking the extraordinary step of holding a special meeting to discuss the Appellate Body’s action. During that meeting, all governments that spoke (with the exception of one Member) attacked the Appellate Body’s decision.<sup>47</sup>

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40 Ibid [22].

41 *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/AB/R, AB-2005-1 (2005) (Report of the Appellate Body).

42 Ibid [273].

43 *United States – Tax Treatment for Foreign Sales Corporations*, WTO Doc WT/DS108/AB/R, AB-1999-9 (2000) (Report of the Appellate Body).

44 Ibid [166].

45 Ibid.

46 *US – Shrimp*, above n 5, [108]–[109] (emphasis in original document).

47 Claus-Dieter Ehlermann, ‘Tensions between the dispute settlement process and the diplomatic and treaty-making activities of the WTO’ (2002) 1 *World Trade Review* 301, 303.

Concerns expressed by Member governments included the loss of confidentiality in dispute proceedings, the potential flood of uninvited (and uninformed) interventions by civil society activists, the additional burdens imposed on governments in an already resource-intensive process, and the potential for undermining the integrity of the WTO dispute process. Given the Appellate Body is highly attuned to the views of Member governments, why did it pursue a course that would clearly put it in conflict with most WTO Members?

Characterising the Appellate Body's approach as a logical exercise of its inherent jurisdiction provides only part of the answer. What is apparent is that the decision came at a time of rising civil society unrest about the WTO – which would later crystallise in the Seattle demonstrations and the collapse of the Seattle negotiations. Against this background, the Appellate Body would have been aware of broader efforts by the WTO to promote greater legitimacy and transparency. Its approach therefore reflects a sensitivity to the political challenges facing the WTO and the need for the institution to respond, notwithstanding the concerns of Member governments.

The decision to accept amicus briefs has not, to date, led to a flood of civil society or business interventions. Despite its highly contentious subject matter – which should have made it a lightning rod for civil society interest – the *EC – Biotech* dispute attracted only three NGO submissions.<sup>48</sup> Many governments might nonetheless feel vindicated in their original concerns given the leaking/publication of the Panel's confidential interim findings and conclusions on NGO websites.<sup>49</sup>

It must be noted that no Panel or Appellate Body has to date indicated a reliance on an amicus brief in reaching its legal and factual findings. This is reflected for example in the *EC – Biotech* dispute where the Panel accepted the amicus brief 'into the record' but stressed that 'in rendering our decision, we did not find it necessary to take the amicus curiae briefs into account.'<sup>50</sup> The Appellate Body has also *rejected* an amicus brief from a private industry organisation over concerns it received leaked confidential submissions of a party to the dispute.<sup>51</sup> The approach of Panels and the Appellate Body can therefore be said to reflect a desire to balance the sensitivities of governments involved in disputes, and the need for civil society to be heard.

### B Reluctance To Engage In Judicial Activism

In exercising their judicial functions, Panels and the Appellate Body have shown a strong sensitivity to their mandate under the WTO agreements. Article 3.2 of the *DSU* provides that: 'Recommendations and rulings of the DSB cannot

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48 Two submissions however represented multiple NGOs.

49 The Panel found it 'surprising and disturbing that the same NGOs which claimed to act as *amici*, or friends, of the Panel when seeking to convince the Panel to accept their unsolicited briefs subsequently found it appropriate to disclose, on their own websites, interim findings and conclusions of the Panel which were clearly designated as confidential': *EC – Biotech*, above n 8, [6.196].

50 *EC – Biotech*, above n 6, [7.11]. See also *EC – Asbestos*, above n 4, [6.1]–[6.4], [8.12]–[8.14].

51 *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H Beams from Poland*, WTO Doc WT/DS122/AB/R, AB-2000-12 (2001) [74] (Report of the Appellate Body).

add to or diminish the rights and obligations provided in the covered agreements'. In addition, only the WTO Members have the right to 'interpret' WTO agreements with Panels and the Appellate Body only having the mandate to 'apply' or 'clarify' them. WTO Members remain highly vocal in criticising any rulings they perceive as exceeding this.

Notwithstanding this, there is an appreciation by the different players in the system that the evolution from *GATT* to the WTO has seen a fundamental shift in power. Ehlermann describes this shift from the political to the legal elements of the system:

Under the WTO, the situation has fundamentally changed. Dispute settlement has become strong. It is no longer based on the rule of consensus. However, the political decision-making process remains *de facto* governed by the principle of consensus. Compared with the new dispute settlement process, the political decision-making process now appears weak and inefficient.<sup>52</sup>

The situation appears contradictory at first glance. On the one hand, Article 3.2 of the *DSU* prescribes very clear limits to the mandate of WTO judicial bodies. On the other hand, the judicial bodies now possess unprecedented legal power to deliver outcomes in a way that they could not under *GATT* – and for practical purposes, which the Member governments are finding increasingly difficult to do so under the WTO.

To date however, the WTO judicial bodies have been cautious at making rulings that could be perceived as 'pushing the envelope' or judicial adventurism. This reveals an appreciation of the broader political sensitivities and the 'appropriate place' of the judicial bodies within the system. This caution is reflected for example in a reluctance to import (potentially controversial) extra-WTO legal concepts in WTO rulings, or to 'fill in' any actual or perceived gaps in the WTO agreements.

### 1 *Reluctance to Import Extra-WTO Legal Concepts*

Panels and the Appellate Body have responded cautiously to calls to import extra-WTO legal concepts from domestic or even international law into WTO dispute rulings. Often this stems from a lack of international consensus pertaining to a particular principle, which is reflected in the different views of the parties to a dispute.

An example is the Appellate Body's approach to the precautionary principle in *EC – Hormones*. At the time of the dispute, the 'precautionary principle' was the subject of intense WTO debate including in the Committee on Trade and Environment and the SPS Committee.<sup>53</sup> Much of this focused on the status of the

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52 Ehlermann, above n 47, 302.

53 Proponents of the precautionary principle cite Principle 15 of the 1992 *Rio Declaration on Environment and Development*, which states that '[i]n order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation': *Rio Declaration on Environment and Development: Report of the UN Conference on Environment and Development*, UN Doc A/CONF.151/26 (Vol. I) (1992).

principle in general international law, its precise formulation, and its applicability or otherwise in the WTO context. There was a significant divergence of views among WTO Members with some governments concerned about its potential misuse to undermine science-based decision-making and justify disguised protectionism.<sup>54</sup>

The precautionary principle was invoked by the European Communities in *EC – Hormones* as part of its defence of its import ban on meat treated with certain growth hormones. Recognising the highly politicised nature of the issue, the Appellate Body declined to rule on the legal status of the precautionary principle. It considered instead that the precautionary principle – at least outside the field of international environmental law – still awaited authoritative definition.<sup>55</sup>

The Appellate Body however went on to elaborate that to the extent there *was* a precautionary principle, this was already ‘reflected’ in the *SPS Agreement*. In particular: in the right of WTO Members to determine their own appropriate level of protection; the right of Members to take provisional measures under Article 5.7 of the *SPS Agreement*; and that a Panel examining whether a measure was scientifically warranted should ‘bear in mind that responsible, representative governments commonly act from perspectives of prudence and precaution where risks are irreversible.’<sup>56</sup> In both a legal and political sense, the Appellate Body’s response helped defuse the debate in the WTO, while reaffirming the careful balance of rights and obligations articulated in the *SPS Agreement*.

A similar approach has been taken in relation to estoppel. In *EC – Sugar*, the EC argued that the principle of estoppel applied to prevent the complainant (who was ‘estopped’) from bringing a WTO dispute. Both the Panel and the Appellate Body considered it was ‘far from clear that the estoppel principle applies in the context of WTO dispute settlement.’<sup>57</sup> Even assuming such a principle did apply, it would fall within the existing provisions of the *DSU* – and there was ‘little in the *DSU* that explicitly limits the rights of WTO Members to bring an action’.<sup>58</sup>

## 2 Reluctance to Fill in the Gaps in the WTO Agreements

This paper earlier examined the nature of international law and international treaty negotiations. This is reflected in WTO treaty language that is sometimes vague and which lacks the clear prescription of domestic instruments. A number of agreements also contain lacunae – which the negotiators included either by design or by accident. Such lacunae pose significant challenges to WTO judicial bodies where they directly affect the rights and obligations of parties engaged in a WTO dispute. Examples include: the meaning of ‘substantially all trade’ in Article XXIV (preferential trade agreements) of *GATT*; the sequencing of Article

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54 For a discussion of the precautionary principle and the WTO agreements, see, eg, Gavin Goh, ‘Precaution, Science and Sovereignty: Protecting Life and Health under the WTO agreements’ (2003) 6 *Journal of World Intellectual Property* 441.

55 *EC – Hormones*, above n 28, [121].

56 *Ibid* [186].

57 *EC – Sugar*, above n 9, [310].

58 *Ibid* [312].

21.5 and 22.6 of the *DSU*; and the lack of an appropriate remedy for ‘one-off’ prohibited subsidies.

(f) *‘Substantially all trade’ and Article XXIV of GATT*

Article XXIV provides a limited exception from general *GATT* obligations for customs unions and free trade areas. This reflected a belief by the *GATT* founders that regional trade agreements could have an overall benefit to international trade and that some trade liberalisation between some countries was better than none at all. It also reflected a need to support European integration efforts then underway and its importance for European (and international) peace and security.

Article XXIV imposes a number of conditions on such arrangements including that duties and other restrictive regulations of commerce must be eliminated on ‘substantially all the trade’ between the parties.<sup>59</sup> This is consistent with the objective that regional trade agreements be trade-creating as opposed to trade-diverting.

The term ‘substantially all trade’ has however never been defined and it is unclear whether this equates to, for example, 90 per cent, 80 per cent or even 60 per cent of trade; whether it is calculated on a trade weighted basis or simply the number of tariff lines; or whether it covers potential trade (i.e. where existing barriers effectively prevent trade in a product) as opposed to current trade. This lacuna partly explains the ongoing failure of the WTO Committee on Regional Trade Agreements to complete an examination of an arrangement notified to it.<sup>60</sup>

The lack of a clear legal standard for ‘substantially all trade’ has important consequences for the WTO given the potential tensions between such arrangements and the multilateral trading system. The Appellate Body has however declined to provide a meaningful interpretation of the term. In *Turkey – Textiles*,<sup>61</sup> the Appellate Body only considered – somewhat unhelpfully – that the term was ‘not the same as all the trade’ but was ‘something considerably more than merely some of the trade’.<sup>62</sup> This indicates a strong reluctance to fill a significant lacuna in the WTO agreements, notwithstanding the clear need for guidance.<sup>63</sup>

(g) *Sequencing of Articles 21.5 and 22 of the DSU*

A lacuna that gave rise to significant disagreements – at least in the early years of the WTO – is the sequencing of Article 21.5 and Article 22.6 of the *DSU*. To summarise: this situation arises when the reasonable period of time for

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59 Article XXIV:8 of *GATT* 1994.

60 Similarly, pre-WTO, only one such examination was ever completed: the Czech Republic and Slovak Republic customs union following the break-up of Czechoslovakia: Peter Sutherland et al, *The Future of the WTO: Addressing institutional challenges in the new millennium*, Report by the Consultative Board to the Director-General of the WTO (2004) [77].

61 *Turkey – Restrictions on Imports of Textile and Clothing Products*, WTO Doc WT/DS34/AB/R, AB-1999-5 (1999) (Appellate Body Report) (*‘Turkey – Textiles’*).

62 Ibid [48].

63 See also Nicholas Lockhart and Andrew Mitchell, ‘Regional Trade Agreements Under GATT 1994: An Exception and its Limits’ in Andrew Mitchell (ed), *Challenges and Prospects for the WTO* (2005) 236.

implementing WTO rulings have expired, and there is disagreement between the parties on measures taken to comply. The *DSU* is silent on whether parties must first proceed with a compliance Panel under Article 21.5, or whether the complainant can suspend concessions under Article 22. For governments already engaged in contentious disputes, this uncertainty did nothing to ameliorate tensions between parties.

To address this lacuna, parties have agreed to bilateral arrangements applicable to individual disputes. These range from an agreement not to apply retaliation pending the outcome of an Article 21.5 process in exchange for not appealing the Article 21.5 report (*Australia – Automotive Leather*<sup>64</sup>) to the full suspension of retaliation until the completion of both an Article 21.5 process and an appeal process (*US – Foreign Sales Corporations*).<sup>65</sup>

The WTO judicial bodies have shown strong reluctance to make legal rulings on the correct sequencing of Article 21.5 and 22.6. In *Brazil – Aircraft Subsidies*,<sup>66</sup> the Article 22.6 Arbitrators indicated they were ‘aware of the question of “sequencing” recourse to Article 21.5 and Article 22.6 of the *DSU*’ and that ‘one of the effects of the Bilateral Agreement [between Brazil and Canada] was to establish such a “sequencing”’.<sup>67</sup> The Arbitrators considered that by issuing its report after the Appellate Body report, the intention of the parties had been respected. Importantly, the Arbitrators declined to rule on the correct sequencing of Articles 21.5 and 22.6: ‘The question of whether such a sequencing is actually required under the *DSU* is not part of the mandate of the Arbitrators’.<sup>68</sup>

WTO judicial bodies have also declined to rule on bilateral procedural agreements concluded between the parties. In *Brazil – Aircraft Subsidies*, the Arbitrators refused to examine Brazil’s claim that Canada had breached its bilateral agreement by seeking recourse to Article 22.2 of the *DSU* before completion of Article 21.5 proceedings. The Arbitrators instead noted that given neither party had objected to its proposed date for issuing its report, ‘we consider that we acted in conformity with our obligations under the norms applicable to our task’. The Arbitrators therefore saw no need ‘to discuss the question of whether we could interpret the Bilateral Agreement or whether it ceased to apply to the Arbitrators’ tasks ...’.<sup>69</sup>

#### (h) Retrospective Remedies for One-off Prohibited Subsidies

The WTO’s *SCM Agreement* prohibits the use of export subsidies and local content subsidies. Where a measure is found to constitute a prohibited subsidy,

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64 *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather – Recourse to Article 21.5 of the DSU by the United States*, WTO Doc WT/DS126/RW (2000) Annex 1–1[7] (Report of the Panel) (*‘Australia – Automotive Leather’*).

65 *Dispute Settlement Body 12 October 2000 – Minutes of Meeting*, WTO Doc WT/DSB/M/90 (2000) [13].

66 *Brazil – Export Financing Programme for Aircraft: Recourse to Arbitration by Brazil Under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WTO Doc WT/DS46/ARB (2000) (Decision by the Arbitrators) (*‘Brazil – Aircraft Subsidies’*).

67 *Ibid* fn 7.

68 *Ibid*.

69 *Ibid* [3.8].



Article 4.7 of the *SCM Agreement* obliges the subsidising Member to ‘withdraw the subsidy without delay’. The Agreement is however silent on whether this includes retrospective, as opposed to prospective withdrawal. It is also silent on the appropriateness of the remedy where a subsidy is a one-off grant already expended, as opposed to an ongoing program of payments.

Past practice under *GATT* did not provide for retrospective remedies. It was also widely understood by WTO Members that the WTO dispute settlement system did not provide for retrospective remedies given its object was to preserve future trading opportunities and not to punish governments for past actions. From a governance perspective, there are significant legal and constitutional constraints on the ability of governments to recover monies already paid legally and in good faith to private individuals.<sup>70</sup>

The *Australia – Automotive Leather Article 21.5 Panel*, however, ruled that to ‘withdraw the subsidy’ required repayment of past subsidies. While the Panel’s approach was influenced by the need to provide an effective remedy for one-off subsidies, the report attracted considerable criticism by WTO Members.<sup>71</sup> WTO government views were reflected in the fact that neither the United States nor Australia requested a retrospective remedy in the proceeding – and in fact went to ‘some lengths’ to argue the opposite.<sup>72</sup>

In subsequent WTO disputes, no WTO Member has requested such a remedy and WTO Panels have been at pains not to apply one against the wishes of the parties to a dispute.<sup>73</sup> By treating the Panel report as ‘a one-time aberration of no precedential value’,<sup>74</sup> the WTO legal system has shown that it can be self-correcting in relation to judicial outcomes that ignore the broader political sensitivities.

### 3 Corollary: An Evolutionary Approach to Interpretation

At the same time, however, the Appellate Body in particular has recognised the need to ensure that it and Panels have tools available that allow them to take account of the broader political and other concerns that attend disputes. One of

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70 Gavin Goh and Andreas Ziegler, ‘Retrospective Remedies in the WTO After *Automotive Leather*’ (2003) 6 *Journal of International Economic Law* 545.

71 *Australia – Automotive Leather*, above n 64. That Australia did not appeal the report was due to a bilateral agreement with the United States on the sequencing of Article 21.5 and Article 22.6 of the *DSU*. Under the agreement, Australia agreed not to appeal any Panel report in return for the United States not applying retaliation during the Article 21.5 panel process. Accordingly, an evangelical panel report and the absence of Appellate Body oversight could be attributed to the uncertainty at that time on the sequencing issue.

72 *Ibid* [6.20].

73 For example, the Article 21.5 panel in *Canada – Aircraft Subsidies* stated that ‘we consider that Brazil does not in fact want us to make any finding along the lines of *Australia – Leather Article 21.5*. The same is more obviously true of Canada. As noted above, we consider that a panel’s findings under Article 21.5 of the *DSU* should be restricted to the scope of the “disagreement” between the parties. In the present case, therefore, we do not consider it necessary to make any finding as to whether Article 4.7 of the *SCM Agreement* may encompass repayment of subsidies found to be prohibited’: *Canada – Measures Affecting the Export of Civilian Aircraft*, WTO Doc WT/DS70/RW (2000) [5.48] (Report of the Panel).

74 *Dispute Settlement Body 11 February 2000 – Minutes of Meeting*, WTO Doc WT/DSB/M/75 (2000) 8 (see statement by Canada).

these is the adoption of an evolutionary approach to interpretation: instead of reading phrases such as ‘exhaustible natural resources’ in Article XX(g) of *GATT* in the limited manner that may have been intended by the drafters in 1947, the Appellate Body held that such phrases ‘must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment’.<sup>75</sup> The Appellate Body referred to the preamble to the *WTO Agreement*, as well as other international agreements, to support its evolutionary approach to interpretation. Here, again, the Appellate Body showed its sensitivity to the broader context in which the dispute was being considered.

### C Limiting The Scope Of WTO Rulings

Panels and the Appellate Body have sought to limit the scope of WTO rulings through the exercise of judicial economy. The Appellate Body in *US – Shirts and Blouses*<sup>76</sup> affirmed there was no obligation on Panels to rule on all the legal claims and arguments before it. Accordingly, Panels have the discretion to limit rulings to only those claims and arguments necessary to resolve a dispute as provided for in Articles 3.4, 3.7 and 11 of the *DSU*.<sup>77</sup> These provisions articulate the pragmatic objective of the WTO dispute settlement system – which is to achieve a ‘satisfactory settlement of the matter’ or ‘to secure a positive solution to a dispute’.

While its legal basis under the *DSU* is clear, judicial economy has also been employed by Panels and the Appellate Body as a means of balancing political and legal tensions, and to encourage pragmatic outcomes. In *Japan – Apples*,<sup>78</sup> for instance, the Panel was confronted with two apparently contradictory propositions. On the one hand, the available scientific evidence was that apples as internationally traded posed only a negligible risk of fire blight.<sup>79</sup> On the other, there were reservations expressed by the scientific experts to the Panel about permitting imports of apples from ‘severely blighted’ orchards, or to ‘eliminating “in one step” all phytosanitary controls given Japan’s island environment and climate’.<sup>80</sup>

The Panel’s approach sought to balance the competing political, legal and scientific considerations and it did so by narrowing the scope of its findings. As a starting point, the Panel noted that Japan’s measure comprised a number of different conditions or elements. While the measure as a whole was considered ‘disproportionate to the risk’,<sup>81</sup> the Panel identified two of Japan’s requirements as ‘most obviously’ maintained without sufficient scientific evidence, ‘either as

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75 *US – Shrimp*, above n 5, [129].

76 *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WTO Doc WT/DS33/AB/R, AB-1991-1 (1997) (Report of the Appellate Body) (*‘US – Shirts and Blouses’*).

77 *Ibid* [18]–[19].

78 *Japan – Measures Affecting the Importation of Apples*, WTO Doc WT/DS245/R (2003) (Report of the Panel) (*‘Japan – Apples’*).

79 *Ibid* [8.173], [8.226].

80 *Ibid*.

81 *Ibid* [8.181].

such or when applied in cumulation with others'.<sup>82</sup> These were: the prohibition of imported apples from any orchard (whether or not it is free of fire blight) should fire blight be detected within a 500-metre buffer zone surrounding such orchard; and the requirement that export orchards be inspected at least three times yearly for the presence of fire blight. In doing so, the Panel explicitly avoided making a finding against other elements of Japan's measure, including the requirement that apples be sourced only from disease-free orchards.

The Panel took pains to emphasise that its legal findings related to the application of the measure 'as a whole' and did not 'prejudge the question whether certain elements of the measure at issue could, individually or in combination with others, be compatible with Article 2.2'.<sup>83</sup> The Panel recalled the scientific experts' reservations about permitting imports of apples from diseased orchards and about the complete and immediate removal of Japan's requirements given its island-status.<sup>84</sup> The Panel therefore sought to leave open the door for the parties to negotiate a set of measures that *would* have prohibited apples from blighted orchards. Such an outcome would have permitted trade to flow, whilst protecting Japan's political sensitivities about the fire blight.<sup>85</sup>

Judicial economy can also function as an 'issue-avoidance technique' allowing judicial bodies to side-step difficult or controversial issues not necessary to settle a dispute.<sup>86</sup> In *EC – Hormones*, the Appellate Body declined to rule on the status of the precautionary principle in customary international law, considering it 'unnecessary, and probably imprudent, for the Appellate Body in this appeal to take a position on this important, but abstract, question'.<sup>87</sup> It instead confined its analysis to the provisions of the *SPS Agreement* and in so doing, avoided an issue that had become highly politicised among WTO governments.

#### D Sensitivity And The Standard Of Review

The standard of review defines the role of an adjudicative body in relation to the other actors of the system of legal rules and institutions, and the limits of its authority to apply and enforce the legal rules for which it has been entrusted with jurisdiction.<sup>88</sup> While fundamentally a legal question, the standard of review assumes broader political consequences in the WTO and relates to the competence and sovereignty of national authorities in decision-making processes. It is one of the levers that balance rights and obligations under the WTO agreements – namely the sovereignty of governments in implementing and

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82 Ibid [8.182].

83 Ibid [8.225].

84 Ibid [8.226].

85 The Panel Report was upheld by the Appellate Body: WTO Doc WT/DS245/AB/R, AB-2003-4 (2003) (Report of the Appellate Body) ('*Japan – Apples AB*').

86 Philip De Keyser, 'Exploring WTO Dispute Settlement in *US Anti-Dumping Act 1916*: An Easy Case?' (Working Paper No 11/01, Jean Monnet Center – NYU School of Law, 2001) 31.

87 *EC – Hormones*, above n 28, [123].

88 Holger Spamann, 'Standard of Review for World Trade Organization Panels in Trade Remedy Cases: a Critical Analysis' (2004) 38 *Journal of World Trade* 509. See also: Steven Croley and John Jackson, 'WTO Dispute Procedures, Standard of Review, and Deference to National Governments' (1996) 90 *American Journal of International Law* 193.

justifying national measures, versus the rights of other WTO Members to benefits under the WTO agreements.

Article 11 of the *DSU* articulates the general standard of review for Panels – which is to undertake ‘an objective assessment of the facts’.<sup>89</sup> The standard of review has proven difficult to define in precise legal terms. In *EC – Hormones*, the Appellate Body considered that the standard equates to neither *de novo* review nor ‘total deference’.<sup>90</sup> Moreover, the Appellate Body has recognised that Panels have a discretion as the ‘trier of facts’ in determining ‘the credibility and weight properly to be ascribed to’ a given piece of evidence.<sup>91</sup>

As a starting point, there is no general principle of due deference in the WTO. A government defending a measure in a WTO dispute does not enjoy additional privileges that go beyond the right to an ‘objective assessment of the facts’ by the Panel and the normal operation of the burden of proof rules. Panels and the Appellate Body have, however, shown sensitivity to national governments particularly in relation to life or health, as well as on the interpretation of domestic laws.

### 1 *Disputes Concerning Life or Health*

Disputes under Article XX(b) of *GATT* and the *SPS Agreement* invariably involve situations of scientific uncertainty or conflicting science where applying the standard of review envisages a choice between competing scientific approaches. In *Japan – Apples*, the Appellate Body expressly rejected the contention that, for the purposes of the *SPS Agreement*, a Panel ‘is obliged to give precedence to the importing Member’s approach to scientific evidence and risk when analysing and assessing scientific evidence’.<sup>92</sup>

The approach by WTO judicial bodies nevertheless reflects a strong sensitivity to governments in matters concerning life or health. One reflection of this sensitivity is the pragmatic approach of Panels and the Appellate Body to the concepts of ‘sound science’ and ‘scientific justification’. To that end, the Appellate Body has recognised that: scientific justification under the *SPS Agreement* does not mean strict positivist or empirical science;<sup>93</sup> governments are not confined to ‘mainstream’ scientific opinion;<sup>94</sup> and that the risk to be evaluated is a ‘real world risk’ and not one simply ascertainable in a science

89 Article 17.6(i) of the WTO’s Anti-dumping Agreement additionally sets out a standard specific to that Agreement: ‘[I]n 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.’ See WTO Agreement, above n 1, annex 1A (*Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*) 1868 UNTS 201 (‘Anti-dumping Agreement’).

90 *EC – Hormones*, above n 28, [115]–[117].

91 *Ibid* [132].

92 *Japan – Apples AB*, above n 85, [167].

93 But see, eg, Joanne Scott, ‘On Kith and Kine (and Crustaceans): Trade and Environment in the EU and WTO’ (Working Paper No 3/99, Jean Monnet Center – NYU School of Law 1999) 28–9.

94 *EC – Hormones*, above n 28, [195].

laboratory.<sup>95</sup> Accordingly, Panels *should* ‘bear in mind that responsible, representative governments commonly act from perspectives of prudence and precaution where risks are irreversible.’<sup>96</sup>

This sensitivity is also reflected in the degree of discretion accorded to governments in identifying and selecting measures. The Appellate Body has applied the obligation in Article 5.1 of the *SPS Agreement* – that measures be ‘based on’ a risk assessment – as only requiring a ‘rational relationship’ and not ‘strict conformity’.<sup>97</sup> This provides for a less stringent standard than a strict scientific necessity test.

Panels and the Appellate Body have adopted a similar approach with respect to the ‘necessity test’ under Article XX(b) of *GATT*. In the *EC – Asbestos* case, the Panel undertook a detailed scientific examination to determine whether France’s ban on chrysotile asbestos products was necessary to protect human life or health under Article XX(b) of *GATT*. The Panel ‘assessed the nature and the character of the risk posed by chrysotile-cement products’ and found on the basis of the scientific evidence that ‘no minimum threshold of level of exposure or duration of exposure has been identified with regard to the risk of pathologies associated with chrysotile, except for asbestosis’.<sup>98</sup> The Panel concluded on the available scientific evidence that there was no alternative measure, other than a ban on chrysotile asbestos products, that would meet France’s chosen level of health protection.

Governments are therefore accorded considerable deference in the scientific assessment of risks, and in the selection of measures to manage risks.<sup>99</sup> The more vital or important the policy interests or values being pursued, the easier it would be to accept as ‘necessary’ measures designed to achieve those ends.<sup>100</sup> This sensitivity reflects recognition of the multilateral character of the WTO system and the need to carefully manage national sensitivities in balancing WTO rights and obligations.

It also recognises in part that Panels are ultimately comprised of individuals with human perceptions and sensitivities. Putting aside references to the precautionary principle, human beings tend to err on the side of caution in cases involving potentially serious consequences, particularly in decisions involving life or health.<sup>101</sup>

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95 Ibid [187]. See also *Brazil – Measures Affecting Imports of Retreaded Tyres*, WTO Doc WT/DS332/R (2007) [7.64]–[7.71] (Report of the Panel).

96 Ibid [186].

97 Ibid [193].

98 *EC – Asbestos*, above n 4, [167].

99 The Appellate Body in *EC – Hormones* also characterised deference to importing governments on the selection of SPS measures as one reflection of the precautionary principle, to the extent that this might be a principle of international law: *EC – Hormones*, above n 28 [193].

100 *EC – Asbestos*, above n 4 [172].

101 See also Maxwell Gregg Bloche, ‘WTO Deference to National Health Policy: Toward an Interpretive Principle’ (2002) 5 *Journal of International Economic Law* 825; and Robert Howse, ‘Democracy, Science and Free Trade: Risk Regulation on Trial at the World Trade Organization’ (2000) 98 *Michigan Law Review* 2329.

## 2 *Sensitivity to Domestic Laws*

Governments are also accorded sensitivity with respect to the interpretation of their own domestic laws, regulations or requirements being challenged. The Panel in *US – Section 301* considered that, while Panels are not *bound* to accept the interpretations presented by a defending government, ‘any Member can reasonably expect that considerable deference be given to its views on the meaning of its own law’.<sup>102</sup>

This sensitivity reflects a fundamental difference in the role of a judicial body interpreting domestic statutes from one interpreting international treaties. As Steger notes, in domestic courts, judges are sceptical about assertions and demand proof.<sup>103</sup> An international court on the other hand is dealing with sovereign states and must defer to their assertions of fact on evidentiary issues.

The *US – Section 301* case is perhaps the most pertinent example of the influence of political considerations in WTO dispute rulings. The dispute involved a highly contentious challenge by the EC of the US Trade Act of 1974, including section 304. The EC claimed that by imposing strict time limits within which unilateral determinations must be made by the US Administration and trade sanctions taken, the Act did not allow the United States to comply with *DSU* rules where a prior WTO ruling has not yet been adopted by the Dispute Settlement Body. Furthermore, the prescribed timeframes were shorter than the *DSU* timeframes for an examination of compliance measures under Article 21.5 of the *DSU*, or for compensation or suspension of concessions under Article 22. Accordingly, section 304 infringed Article 23 of the *DSU*, which obliged WTO Members to abide by *DSU* rules and procedures, and not to resort to unilateral measures.

By challenging the US statute *per se*, as opposed to its application in a particular instance, the dispute raised considerable domestic sensitivities in the United States. US trade (and trade remedies) legislation remains a sensitive issue for a US Congress highly suspicious of any perceived interference in US sovereignty. A WTO ruling against the US Trade Act would raise real difficulties on the ability of the United States to comply, with systemic implications for the WTO as a whole.

The Panel’s approach sought to balance the legal and political tensions confronting it. First, it found that the ‘statutory language’ of Section 304 *prima facie* precluded compliance with the prohibition in Article 23 of the *DSU* against unilateral measures.<sup>104</sup> However, the Panel went on to consider that the ‘overall conformity’ of the measure could only be assessed by examining all of the elements that comprised the measure. These included not just the statutory language, but also other institutional and administrative elements.

In particular, the Panel relied on undertakings in a Statement of Administrative Action (‘SAA’) issued by the US President and approved by Congress at the time

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102 *US – Section 301*, above n 3, [7.19].

103 See the report on a February 2005 Roundtable at the University of Ottawa: Debra Steger, *WTO Dispute Settlement: Systemic Issues* (2005) Department of Foreign Affairs and International Trade (Canada) <<http://www.international.gc.ca/eet/research/TPR-2005/menu-en.asp>> at 24 August 2007.

104 *US – Section 301*, above n 3, [7.97].

the United States implemented the Uruguay Round Agreements. The SAA committed the Administration to base any determination that there has been a violation of US WTO rights on rulings adopted by the Dispute Settlement Body, to allow the defending party a reasonable period of time to implement the WTO rulings, and to seek WTO authority for any retaliation. Accordingly, the Panel concluded that the SAA effectively curtailed any discretion created by the statutory language that would have permitted unilateral action prior to the exhaustion of *DSU* proceedings.<sup>105</sup>

The Panel also relied on written and oral undertakings given by US representatives in the Panel proceedings. These statements reflected ‘official US policy, intended to express US understanding of its international obligations as incorporated in US law’.<sup>106</sup> These statements ‘were solemnly made, in a deliberative manner, for the record, repeated in writing and confirmed in the Panel’s second hearing’.<sup>107</sup> The Panel went on to caution that should the undertakings articulated in the SAA and confirmed by the statements before the Panel be repudiated or in any other way removed, its finding of conformity of the US measure ‘would no longer be warranted’.<sup>108</sup> The EC did not appeal the Panel report which was adopted by the WTO Dispute Settlement Body.

## VI THE LIMITS OF POLITICAL CONSIDERATIONS

Notwithstanding the discretion accorded to WTO judicial bodies, there are practical limits to the role of political considerations in dispute rulings. The function of Panels and the Appellate Body is ultimately a judicial one and Panels are obliged under Article 11 of the *DSU* to undertake ‘an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements’. There are also consequences for the certainty and predictability of the WTO dispute settlement system, and the prompt settlement of disputes.

### A Objective Assessment of the Facts

The *Japan – Apples* dispute is an example of the limits to which Panels can take into account political considerations in dispute rulings. The paper has earlier discussed how the Panel in the original dispute left the door open for a revised measure that might have included a ban on apples sourced from diseased orchards. Such an outcome would have permitted trade to flow whilst recognising Japan’s domestic sensitivities in being compelled to import fruit from diseased orchards. The United States’ subsequent challenge to Japan’s revised measures, however, forced the Panel to revisit this issue.

In its Article 21.5 report two years later, the Panel re-examined the concerns expressed by scientific experts about fruit from ‘severely blighted’ orchards.

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105 Ibid [7.112]

106 Ibid [7.121].

107 Ibid [7.122].

108 Ibid [7.136].

However, the Panel concluded that these concerns related more to ‘good agricultural and commercial practice’.<sup>109</sup> This did not override the scientific conclusion that apples as internationally traded posed only a negligible risk of transmitting fire blight, even if harvested from severely blighted orchards.<sup>110</sup>

Given the evidence, the Panel had little choice but to rule that Japan’s ban on apples sourced from even ‘severely blighted’ orchards was WTO-inconsistent. Any other finding would have left the Panel open to claims it had failed to conduct an ‘objective assessment of the facts’ as required by Article 11 of the *DSU*.

The Appellate Body has however applied a very difficult test for an appellant claiming that a Panel has failed to conduct an ‘objective assessment’ under Article 11 of the *DSU*. For such a claim, the party must demonstrate ‘an egregious error that calls into question the good faith of a Panel’.<sup>111</sup> This would be where a Panel ‘disregarded or distorted the evidence submitted to it’ or where the Panel engaged in ‘wilful distortion or misrepresentation of the evidence’ before it. It is not sufficient to simply show an error of judgment by the Panel in the appreciation of the evidence.

### B Security and Predictability

The *US – Section 301* report comes close to skirting – and some would argue exceeding – the limits to political considerations. Despite the explicit language of the US statute, which the Panel acknowledged as constituting a prima facie infringement, the Panel considered this remedied by a SAA and undertakings by US representatives before the Panel. From a purely legal perspective, the Panel’s report could be criticised as a political fix cloaked in a legal fiction. A number of criticisms of the Panel’s legal reasoning might be offered:

- the explicit ‘statutory language’ of section 304 of the US Trade Act ‘precluded compliance’ with Article 23 of the *DSU*;<sup>112</sup>
- the mere existence of legislation could have an appreciable ‘chilling effect’ on the economic activities of individuals;<sup>113</sup>
- the SAA, while submitted by the President and approved by Congress, did not have the same statutory status as section 304 of the US Trade Act;
- other provisions in the SAA appeared to contradict the provision whereby the Administration undertook not to take extra-*DSU* unilateral action;<sup>114</sup>
- the Panel applied a presumption that in the event of ambiguity, the US instrument should be interpreted where possible in a manner consistent with

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109 *Japan – Measures Affecting the Importation of Apples – Recourse to Article 21.5 of the DSU by the United States*, WTO Doc WT/DS245/RW (2005) [8.87] (Report of the Panel).

110 *Ibid* [8.89].

111 *EC – Hormones*, above n 28, [133].

112 *US – Section 301*, above n 3, [7.97].

113 *Ibid* [7.81].

114 *Ibid* [7.113].



US international obligations – in so doing, the Panel placed itself in the shoes of a US constitutional court;<sup>115</sup>

- the reliance on ex post facto statements made by US representatives before the Panel.<sup>116</sup>

A casual observer is left with the impression of a Panel bending backwards to accommodate the United States, including by applying unduly favourable presumptions in the event of any contention between the parties. It remains in the realm of academic speculation as to how the Appellate Body would have approached the Panel's reasoning, including any claim by the EC that the Panel had failed to conduct 'an objective assessment of the case' under Article 11 of the *DSU*.

But the fact that the EC did not appeal the report underlines how closely aligned the Panel was to the broader political sensitivities. However one might question the legal basis of the report, the courage and professional integrity of the panellists is beyond question. They merit the highest praise for their efforts to resolve one of the most difficult and politically contentious disputes ever brought before a Panel – and one we contend should never have been brought.<sup>117</sup>

The *US – Section 301* ruling nevertheless raised concerns about the certainty and predictability of the WTO dispute settlement system. These came to a head in *India – Autos*,<sup>118</sup> in which India sought to defend its measure by claiming it was discretionary legislation. While the Panel carefully sought to distinguish the particular facts of the case in rejecting India's arguments, it could not dispel the perception of some WTO Members that different rules applied to India compared to the United States.

### C Failure To Secure Prompt Dispute Resolution

The *DSU* declares the 'prompt settlement' of disputes as 'essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members' (Article 3.3). Accordingly, recommendations or rulings of the Dispute Settlement Body 'shall be aimed at achieving a satisfactory settlement of the matter' (Article 3.4).

Sensitivity to political considerations can, however, have an adverse effect on dispute timeframes. The use of issue avoidance techniques may, for example, result in failure to resolve a dispute, which might then need to be re-litigated in an Article 21.5 *DSU* compliance Panel process.

In *Japan – Apples*, the Panel in the original dispute avoided ruling on what was in fact the fundamental issue in the dispute – whether apples sourced from diseased orchards could transmit fire blight disease. By leaving open the question, the Panel sought to encourage the parties to arrive at a mutual outcome that would allow trade to flow while recognising Japan's domestic sensitivities.

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115 Ibid [7.113], fn 688.

116 Ibid [7.120]–[7.125].

117 The panellists were David Hawes (Chair), Terje Johannessen and Joseph Weiler.

118 *India – Measures Affecting the Automotive Sector*, WTO Doc WT/DS146/R, WT/DS175/R (2001) (Report of the Panel) ('*India – Autos*').

The United States' subsequent challenge however forced the Panel to address this issue.

With the wisdom of hindsight, a ruling by the Panel in the first instance might have secured settlement of the dispute and avoided the need for a subsequent Article 21.5 process. There are therefore risks in a Panel trying to 'second guess' the ability and willingness of parties to reach a mutually-satisfactory outcome. In many instances, parties are seeking binding legal rulings because they have already exhausted this possibility.

## VII CONCLUSION

While the WTO dispute settlement system can be characterised as a system of law, it remains a highly political one. WTO judicial bodies have shown strong sensitivity to the political context in which they operate. This is reflected in a willingness to accommodate political considerations in dispute rulings, and to pursue pragmatic over strict legal outcomes. Some observations might be offered in conclusion.

First, the judicial function of Panels and the Appellate Body can be described as a balancing one. In any dispute, Panels are required to balance the evidentiary and legal issues, as well as broader considerations such as the pragmatic objectives of the dispute settlement system, the balance of rights and obligations, the security and predictability of the WTO, and the functioning and survivability of the system. The image is one of dynamic tension with the WTO as both a political and legal creature.

Second, any analysis of Panel and Appellate Body reports cannot be made in 'clinical isolation' from the broader political matrix. Doing so runs the risk of ignoring the very real considerations that colour Panels, the Appellate Body and the Secretariat – as well as the parties themselves – in their approach to WTO disputes.

Third, there is no single formulation to explain why, for example, the Appellate Body appears reluctant to 'fill in the gaps' in WTO agreements on some occasions (eg, retrospective remedies) and not others (eg, amicus briefs); or to import international law on some occasions (eg, multilateral environment agreements in *US – Shrimp*) but not others (eg, precautionary principle and estoppel). What appears consistent, however, is that Panels and the Appellate Body accord strong sensitivity to political considerations in exercising their judicial function.

Finally, there are limits to the role of political considerations given that the function of Panels and the Appellate Body is ultimately a judicial one. The *US – Section 301* report comes closest to skirting – and many would argue exceeding – the boundary. Disputes such as *US – Section 301* ultimately require political as opposed to legal solutions. It is inappropriate and unfair to expect Panels and the Appellate Body exercising a limited judicial mandate to resolve highly politicised disputes, particularly those with systemic political consequences for the broader institution. That Panels and the Appellate Body are increasingly being called upon to do so is a reminder of the relative success of the WTO

dispute settlement system. This is in contrast to the greater difficulties with the WTO's legislative bodies, manifest in the ongoing frustrations in concluding the current round of multilateral trade negotiations.