

# PRINCIPLES OF INTERNATIONAL LAW IN THE WTO DISPUTE SETTLEMENT BODY

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## INTRODUCTION

UNLIKE the original 1947 General Agreement on Tariffs and trade (GATT), the 1994 Agreement establishing the World Trade Organization (WTO Agreement)<sup>1</sup> covers a much wider range of trade. It extends beyond goods and now embraces services, intellectual property, procurement, investment and agriculture. Moreover, the new trade regime is no longer a collection of ad hoc agreements, Panel reports and understandings of the parties. All trade obligations are subsumed under the umbrella of the WTO, of which all parties are members. Member States have to accept the obligations contained in all the WTO covered agreements: they cannot pick and choose.

The WTO Agreement also ushers in a new era in decision-making by the parties and in the resolution of disputes. Under the Dispute Settlement Understanding (DSU)<sup>2</sup> a Dispute Settlement Body consisting of dispute Panels and an Appellate Body now adjudicates trade disputes between the parties. A WTO member may invoke the compulsory jurisdiction of the Dispute Settlement Body by requesting the establishment of a Panel to settle a dispute.<sup>3</sup> There is then a right to appeal the Panel's decision.<sup>4</sup> Cases which go to the Appellate Body involve legal questions arising out of the WTO agreements, and some raise important international law issues.

As international relations have become increasingly dominated by economic factors, the WTO system has moved away from its former, more power-oriented diplomatic approach to trade relations, and embraced rule-oriented approaches and impartial dispute settlement.<sup>5</sup> Addressing the need for fairness in international economic relations, dispute Panels provide a forum for the airing of disputes regardless of a party's economic power or influence. Developing countries are given an

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1. *Agreement Establishing the World Trade Organisation in Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations* (1994) 33 I.L.M. 1125.

2. Annex 2 to the *WTO Agreement* (1994) 33 I.L.M. 1226 (hereinafter DSU).

3. Article 6.

4. *Ibid.*

5. E.U. Petersmann *The GATT/WTO Dispute Settlement System* (Kluwer Law International, London: 1997) at 64.

opportunity to challenge the trade measures of economically strong States that normally dominate international negotiations and multilateral decision-making. Installing an equitable dispute resolution mechanism within the trading regime entrenches the legitimacy of the regime itself and provides a better incentive to comply with international trading obligations. The global acceptance of a compulsory dispute settlement system as part of the WTO Agreements lends credence to developments in international trade law and elevates the importance of public international law generally.

The advent of the WTO dispute resolution system suggests that the process of settling trade disputes has become judicialised. There is still a significant role for diplomacy and non-legal argument in this system. Indeed, one can detect a sense of dismay amongst non-lawyers who participate in dispute settlement that the lawyers' have "moved in", introducing concepts that are alien to them. The trade policy specialists and economists resent the litigation mindset and feel a loss of power and control to a different discipline. In fact, the move to a more "juridical" or "rule-oriented" approach preceded the emergence of the WTO,<sup>6</sup> and has simply been extended.

The DSU furthers the role of legal adjudication in international trade law by creating a permanent appellate tribunal. This reflects the need to create a neutral arbiter of trade disputes, primarily based on the legal interpretation of the WTO Agreements. Fair decisions would lead to solutions that are mutually acceptable to the parties, while remaining consistent with the WTO Agreements.<sup>7</sup> Disputes under the GATT 1947 system necessitated the Panel preferring one party's interpretation of the WTO Agreement over the other's. At the same time, a losing party could block decisions because consensus was required for adoption. This led to a disproportionate number of decisions that were never adopted. Lacking a consensus, the legality or enforceability of a decision was questionable at best. In turn, Panels may have been influenced by the objective of reaching a mutually acceptable solution when drafting their rulings.

Instead of writing reports that are designed to achieve a consensus among WTO members, Panels are now liberated from the need to satisfy all parties and can concentrate on the merits of the dispute and the unencumbered application of the facts to WTO law. This change is

6. J. H. Jackson, *The World Trading System* (MIT Press: Boston, 1989) at 85. See also R. E. Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (Salem, N.H.: Butterworths, 1993), D. P. Steger and S. M. Hainsworth, "New Directions in International Trade Law: WTO Dispute Settlement", J. Cameron and K. Campbell, *Dispute Settlement in the WTO* (Cameron May: London, 1998). G. D. Aldonas, "The World Trade Organization: Revolution in International Trade Dispute Settlements" (1995) 3 *Dispute Resolution Journal* 73 at 79.

7. DSU, Article 3:7.

attributable to the negative consensus rule under the DSU where Panel and Appellate Body reports are automatically binding, subject to a negative vote by the parties in the Dispute Settlement Body. By automatic adoption, the parties “have substituted legal legitimacy for political legitimacy in the dispute settlement process”.<sup>8</sup> This innovation in multilateral decision-making is lauded by one commentator as the “most important change in the jurisprudence of the global economy in the second half of the twentieth century”.<sup>9</sup>

Disputes at the WTO are handled expeditiously. A Panel report resolving the dispute is issued within a relatively short time after receiving the parties’ submissions. Panel procedures are scheduled to conclude a maximum of six to nine months after the commencement of the dispute.<sup>10</sup> Rulings are made within one year from the date of the establishment of the Panel.<sup>11</sup> A subsequent appeal of the Panel’s decision is determined within two to three months of the issuing of the Panel’s report.<sup>12</sup> It is anticipated that the overall time frame beginning with the date of establishing a Panel to the date of implementing DSB recommendations concerning a Panel ruling should not exceed 18 months unless the parties to the dispute agree that there are exceptional circumstances.<sup>13</sup> This is by any standards—domestic litigation or international tribunal—impressive.

From the inception of the WTO in January 1995, over 200 disputes had been initiated in the Dispute Settlement Body by mid-2000.<sup>14</sup> This poses a marked contrast with the number of disputes heard under the GATT 1947 system.<sup>15</sup> Confidence in the DSB is probably the WTO’s greatest success. The creation of an Appellate Body has contributed to a further

8. A. Chua, “The Precedential Effect of WTO Panel and Appellate Body Reports”, (1998) 11 L.J.I.L. 45 at 46.

9. P. Nichols, “GATT Doctrine” (1996), 2 Virginia J. of Int. Law, 379 at 380.

10. DSU, Article 12.

11. DSU, Article 20.

12. DSU, Article 17:5. The Law of the Sea tribunal also appears to deal with disputes expeditiously. The decision ordering the release of an oil tanker that was bunkering (refuelling) a fishing vessel within the EEZ of Guinea, took less than three weeks from the application for relief. (*MV “Saiga” Cases—Saint Vincent and the Grenadines v. Guinea*, (1998).)

13. DSU Article 21.4.

14. *Overview of the State-of-Play of WTO Disputes*, (22 June 2000) ([http://www.wto.org/english/tratop\\_e/dispu\\_e/stplay\\_e.doc](http://www.wto.org/english/tratop_e/dispu_e/stplay_e.doc)).

15. From 1991–1994, there were 36 complaints filed with 12 leading to Panel reports of which only four were adopted. In the 1980s, 115 complaints were filed with 47 of them producing Panel reports. In the 1970s, only 32 complaints were filed with 16 resulting in the circulation of a Panel report. (See Hudec, *supra* n.6 and Steger and Hainsworth, *supra* n.6 at 4.)

sophistication of international trade law.<sup>16</sup> The international dispute settlement system has never seen such a high volume of cases. As the Panels and appellate bodies develop a body of jurisprudence that clarifies WTO member's commitments, it "establishes the WTO's legitimacy and commands the respect of its members."<sup>17</sup> Indeed the stated purpose of the DSB is to provide security and predictability to the multilateral trading system.<sup>18</sup> Panels under GATT 1947 were established on an ad hoc basis, independent of any other Panels or disputes between contracting parties. There were no specific clauses under the GATT 1947 providing for the establishment of dispute resolution Panels, although they were loosely authorised under articles XXII and XXIII, which stipulated that the parties were to consult.<sup>19</sup> Dispute resolution evolved under the GATT as a practical way to administer disputes as opposed to parties engaging in consultations. Since Panel reports revolved around the particularity of the matter, they could be easily distanced from other disputes. Any connection between the decisions of the disparate GATT Panels was merely coincidental, with previous decisions taking on, at best, a persuasive role. Alternatively, the WTO Dispute system adopts a more permanent presence, lending new stature to the DSB. Its *raison d'être* is to specifically deal with trade disputes and elucidate the mutual obligations of members.

The DSB, especially the Appellate Body, has many characteristics of an administrative tribunal and other more established international tribunals, and some of a domestic court. Its caseload is more typical of many superior courts, and is matched internationally only by the European Court of Justice and the European Court of Human Rights. The resemblance to administrative tribunals is marked by the expertise which Panel members have in determining matters within a specific

16. D. M. McRae notes that the establishment of an Appellate Body in an international regime is a relatively novel development with only a few other examples of international tribunals exercising an appellate jurisdiction of international judicial bodies; "The Emerging Appellate Jurisdiction in International Trade Law" in Cameron and Campbell, *supra* n.8 at 1. For instance, Chapter 19 of the North American Free Trade Agreement provides for a challenge procedure to a NAFTA Panel decision. An Extraordinary Challenge Committee is appointed for each case. A referral to the Committee can only be made where; 1) a member of the original dispute Panel was guilty of gross misconduct, bias, or a serious conflict of interest, or materially violated the rules of conduct; or 2) the Panel seriously departed from a fundamental rule of procedure; or 3) the Panel manifestly exceeded its powers, authority or jurisdiction and where any of the actions stated above has materially affected the Panel's decision and has threatened the integrity of the binational Panel review process. (Article 1904.13) This jurisdiction is similar to the annulment procedure under the ICSID Convention (Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) 575 U.N.T.S. 160).

17. Aldonas, *supra* n.6 at 73.

18. DSU, Article 3.2.

19. Eventually, GATT 1947 contracting parties adopted certain procedural rules and understandings that governed dispute settlement.

discipline. Ultimately, decisions are no longer made by Panel members, often trade diplomats, confined by political realities, but by independent adjudicators in the Appellate Body. It is the interpretative function of the Panels and appellate bodies that has paved the way for the development of GATT jurisprudence. Panel and appellate reports are binding on the parties to the dispute and are likely to be referred to in future cases. Their decisions clarify WTO obligations for other members who are not parties to the dispute. Both the Panels and the Appellate Body rely strongly on legal reasoning, although often with different results. Despite the absence of any doctrine of *stare decisis* in the DSB, the application of a rich body of jurisprudence is well established.<sup>20</sup>

WTO case law covers not only matters of interpretation and the function of the DSB, but also includes aspects of customary international law, as well as general legal principles. Issues such as the burden of proof and judicial economy, as well as procedural fairness, have entered the discourse, enabling the DSB to develop a body of law, rather than simply act as an ad hoc arbitrator. Interpreting WTO law consistently with international law and other general legal principles enhances legal security and consistency in the WTO legal system as well as the parties' tacit acceptance of third-party adjudication.<sup>21</sup> This article will examine how DSB decisions have made use of the general jurisprudence of international law. The issues discussed are classified into three groups: interpretation; operation of the WTO dispute settlement system; and general principles of law.

### *1. Treaty Interpretation*

Probably the most fundamental issue for the DSB is how to interpret WTO agreements. Often the crux of a dispute is rooted in conflicting understandings of certain provisions. Panels have incorporated the application of the Vienna Convention on the Law of Treaties (VCLT) into GATT law as a guide for interpretation.<sup>22</sup> It was unclear whether the VCLT applied to the old GATT since for some it was uncertain whether it was, in fact, a binding treaty.<sup>23</sup> By contrast, the WTO agreements are treated as any other treaties in international law, having major implications in determining its relationship with other international agreements and international law in general.

20. P. Kuijper, "The New WTO Dispute Settlement System—The Impact on the European Community" (1996) 29 (6) *Journal of World Trade* 49 at 51.

21. Petersmann, *supra* n.5 at 17.

22. (1969), 8 I.L.M. 679 (hereinafter VCLT). GATT 1947 Panels seldom referred to the VCLT although it was recognised in *US Restrictions on Imports of Tuna*, 33 I.L.M. 839. This could be attributable to the fact that the GATT 1947 was not a treaty among nations but an agreement that countries acceded to by means of the Protocol of Provisional Application, 30 Oct. 1947, 61 Stat. A2051, 55 U.N.T.S. 308. (See Nichols, *supra* n.9 at 390.)

23. Nichols, *ibid* at 422.

Unlike previous GATT Panels, dispute settlement bodies under the WTO are explicitly required to invoke the rules of interpretation of treaties as a source to clarify WTO Agreements. Article 3:2 of the DSU states that WTO agreements are to be interpreted in accordance with the customary rules of interpretation of public international law.<sup>24</sup> On one occasion, it has been referred to as providing the only rules of interpretation of the WTO Agreements.<sup>25</sup> There may have been tacit acceptance of the application of the VCLT under the GATT 1947 regime.<sup>26</sup> In looking for sources of interpretation of the GATT 1947, Panels often attached undue importance to the drafting history of the agreement<sup>27</sup> or they would look to other material beyond the text of the GATT.<sup>28</sup>

Under the DSB system, it is imperative that the groundwork for interpretation and application of GATT rules be laid down so as to guide negotiators, decision makers and future Panels. By outlining these principles, the dispute resolution process is perceived to be more efficient and WTO agreements are more clearly understood. This can lead to the speedier resolution of disputes, and indeed dispute avoidance, since a

24. This interpretative requirement extends beyond GATT 1994 and includes other agreements such as TRIPS (*India—Patent Protection for Pharmaceutical and Agricultural Chemical Products* WT/DS50/AB/R, Dec. 1997) (hereinafter referred to as TRIPs) and the *Agreement on Textiles and Clothing* (“*United States—Restrictions on Imports of Cotton and Man-Made Fibre Underwear*” (Adopted on 25 Feb. 1997, WT/DS24.R) (hereinafter referred to as *Underwear*)).

25. *European Community Customs Classification of Certain Computer Equipment* (hereinafter *LAN Computers*). WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para. 84. For an opposite view, see D. Palmeter and P. C. Mavroidis, “The WTO Legal System: Sources of Law” (1998) 92 A.J.I.L. 398, who argue that all the subparagraphs of Article 38(1) of the Statute of the International Court of Justice are potential sources of law applicable to a WTO dispute.

26. In *EEC—Regulation on Imports of Parts and Components* (1990) 2 W.T.M. 3, Article XX(d) of the GATT 1947 was interpreted in accordance with Article 31 of the VCLT. See also J. Klabbbers, “Jurisprudence in International Trade Law; Article XX of GATT” (1992) 26 J.W.T. 63 at 86. There are a few examples where GATT 1947 Panels have used the principles stated in the VCLT to interpret the GATT 1947 without any explicit reference to the VCLT. See *United States—Restrictions on Imports of Sugar*, (1989) 36 Supp. BISD 331 for the application of the “ordinary meaning” principle mirrored in Article 31(1). Some of the principles expressed in the VCLT, such as looking at the “plain meaning” and “contextual understanding” of the GATT 1947 were applied. *European Economic Community—Restrictions on Imports of Dessert Apples—Complaint by Chile*, 36 Supp. BISD 93, (hereinafter referred to as *Dessert Apples*), *Canada—Measures Affecting Exports of Unprocessed Herring and Salmon* (1988) 35 Supp. BISD 98 (hereinafter referred to as *Herring*). The Panel in *Japan-Taxes*, ruled that Article 3(2) only codified existing GATT Panel practice, despite jurisprudence indicating a great deal of variance in the approaches to interpreting GATT 1947, Section D, p.10.

27. Drafting history, including the *travaux préparatoires*, is only useful as a supplementary means of interpretation under customary rules of international treaty interpretation. See Article 32 of the VCLT.

28. Nichols, *supra* n.9 at 430. Referring to the *travaux préparatoires* was problematic because most of the parties did not participate in the original drafting of the GATT 1947. See Petersmann, *supra* n.5 at 112–113.

correct interpretation can be determinative of future issues. Consistent, coherent and authoritative interpretation aids the development of the trade regime, connecting adjudication with the constitutional function of the WTO, and providing interested parties with grounds for trust.

*A. Vienna Convention on the Law of Treaties*

What constitutes customary international law in the interpretation of treaties is generally taken to be expressed in Articles 31 and 32 of the VCLT. The Appellate Body noted that there was a need to achieve clarification of the WTO agreements by reference to the fundamental rule of treaty interpretation in Article 31(1) of the VCLT.<sup>29</sup> The universal application of the provisions of the VCLT to international trade law is problematic, as some WTO Members, including the United States, are not parties. However, the Appellate Body in *Japan-Taxes* implicitly resolved any uncertainty about its application to non-parties by declaring that the VCLT represents a codification of customary international law and is therefore binding on all States.<sup>30</sup>

In *Reformulated Gasoline*, both Venezuela and Brazil brought a complaint concerning the effects of rules prescribed under the U.S. Clean Air Act to foreign exported gasoline. Before the Panel, the U.S. attempted to justify its measure under Article XX of the GATT 1994, because it related to conserving natural resources pursuant to Article XX(g). The Panel was criticised by the Appellate Body for not giving full effect to Article 31 of the VCLT in interpreting the crucial phrase in Article XX(g) of the GATT 1994, whether the rule constituted a measure “relating to the conservation of exhaustible natural resources.” Relying on GATT 1947 jurisprudence, the Panel interpreted the term “relating to” as meaning “primarily aimed at.”<sup>31</sup> The Appellate Body disagreed with the Panel’s finding that the calculation of baseline levels of clean gasoline qualities, applicable to foreign producers, could be isolated from the overall policy objective of the legislation, so that the measure was not, on its own, “primarily aimed at” conservation. It was erroneous to conclude that baseline rules, in the context of lawmakers’ intention, were not measures “relating to” the conservation of an exhaustible natural resource.

Under Article 31(1) of the VCLT, a treaty is to be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of the treaty’s object and purpose. A

29. *Japan-Taxes* at Section D, p.10. This was a reaffirmation of what was stated in *United States—Standards For Reformulated and Conventional Gasoline* (1996) WT/DS2/AB/R (hereinafter *Reformulated Gasoline*.)

30. *Japan-Taxes*, *ibid* at p.10. For further discussion, see *Nichols*, *supra* n.9 at 429.

31. This meaning was imported from the *Herring* dispute.

tribunal begins with the words as agreed and looks for meaning there. Particular attention is paid to the context of the treaty since a provision should not be interpreted in isolation but in its context, first in that part of the agreement and then in relation to the entire agreement. Article 31(2) of the VCLT expressly defines the context of the treaty as including the text. In the *Underwear* Panel decision, the entire text of the Agreement on Textiles and Clothing (ATC)<sup>32</sup> was deemed relevant in order to interpret Articles 6.2 and 6.4 of the ATC. The cross-references and interrelationship between all of the WTO Agreements opens up the possibility of considering them when interpreting a particular agreement.

Article 32 of the VCLT codifies another fundamental rule of treaty interpretation applicable to WTO Agreements. Resort to the supplementary tools of interpretation including the *travaux préparatoires* or the circumstances of a treaty's conclusion<sup>33</sup> is only necessary when the means in Article 31 do not resolve a problem of interpretation.<sup>34</sup> Article 32 was applied in the *EC Bananas* case in order to confirm the Panel's conclusions flowing from the application of Article 31. The ordinary meaning of the word "affecting" in the General Agreement on Trade and Services<sup>35</sup> was employed by applying the test in Article 31 of the VCLT, but the Appellate Body still looked at the preparatory work of the treaty to confirm this interpretation. The *travaux préparatoires* were referred to by the Appellate Body in *Canadian Periodicals* to support a textual interpretation of Article III:8(b) of the GATT 1994.<sup>36</sup>

The link between Articles 31 and 32 of the VCLT and the interpretation requirements stated in Article 3:2 of the DSU is now entrenched in WTO law. This connection has emerged into a legal test from which Panels cannot deviate when reviewing provisions in the WTO Agreements. Failing to apply this test or using alternative methods of treaty

32. WT/DS33/2.

33. Circumstances of conclusion can include, in the context of interpreting tariff schedules, classifications by the parties. See *LAN Computers*, Section V, para. 92. See also *European Communities—Measures Affecting The Importation of Certain Poultry Products*, WT/DS69/AB/R, 13 July 1998, Section IV, para. 83 (hereinafter referred to as *Poultry*).

34. Article 32 states the secondary sources of treaty interpretation are to be referred to only for confirming the treaty's meaning after applying Article 31 or determining the meaning when, after applying Article 31, the interpretation leaves the treaty's meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. Adherence to this rule has been seen in *Japan-Taxes*, Section D, p.10, *LAN Computers*, Section V, para. 86, and previous GATT Panels under GATT 1947 (*Tuna II GATT Dispute Settlement Panel*, (DS 29/R, 3 Sept. 1994), (hereinafter *Tuna-Dolphin II*), *United States—Restriction On Imports of Tuna*, (1991) 30 I.L.M. 1594 (hereinafter *Tuna-Dolphin I*)).

35. Hereinafter referred to as GATS.

36. *Canada—Certain Measures Concerning Periodicals* (WT/DS31/AB/R) (hereinafter referred to as *Canadian Periodicals*). The Appellate Body did not refer to discussions held during the Uruguay Round but to the Reports of the Committees and Principal Sub-Committees of the Interim Commission for the International Trade Organization in 1947. ICITO I/8, Geneva, September 1948.

interpretation can result in overturned rulings.<sup>37</sup> In the *Shrimp-Turtle* dispute, the Panel was criticised by the Appellate Body for not following all of the steps in applying the customary rules of interpretation of public international law.<sup>38</sup> The correct process entails looking at the text of the provision first, followed by ascertaining the object and purpose of the treaty where the meaning of the text is equivocal or inconclusive or where confirmation of the correctness of the reading of the text is desired. In that dispute, the Panel erred in not examining the ordinary meaning of the words of the chapeau of Article XX, GATT 1994, by solely examining the design of the U.S. measure prohibiting shrimp imports and not its application. Looking at the object and purpose of the chapeau was not necessary until an examination of the immediate context of the chapeau, expressed in the specific paragraphs of Article XX. Consequently, it was incorrect to determine the object and purpose of the chapeau independently of the other paragraphs. By addressing the chapeau first, the Panel had rendered “the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation.”<sup>39</sup>

### *B. Effectiveness*

The rules of treaty interpretation under international law are not limited to what is expressed in the VCLT. The principle of effectiveness (*ut res magis valeat quam pereat*) is a fundamental tenet of treaty interpretation, flowing from the contextual analysis required under Article 31 of the VCLT. If a treaty is open to two interpretations with one of them disabling the treaty from having the appropriate effects, good faith and the objects and purpose of the treaty demand that the effective interpretation should be adopted.<sup>40</sup> GATT 1947 Panels have applied the principle of “effectiveness.”<sup>41</sup> In discussing the effectiveness doctrine, the Appellate Body in *Reformulated Gasoline* held that the interpretation of a provision cannot result in a reading that reduces whole clauses or paragraphs of a treaty to redundancy or inutility, as all terms of the treaty must be given meaning and effect.<sup>42</sup>

37. The Panel in the *LAN Computers* dispute was overruled by the Appellate Body, for its failure to examine the context of a tariff schedule or the object and purpose of the WTO Agreement and the GATT 1994, before resorting to an examination of the legitimate expectations of the parties (Section V, para. 88). For a detailed discussion of legitimate expectations, see the section below.

38. *United States—Import Prohibition of Certain Shrimp and Shrimp Products* (1998). WT/DS58/AB/R, Section VI, A., para. 115 (hereinafter referred to as *Shrimp-Turtle*).

39. Section VI, A, para. 121.

40. (1966) *Yearbook of the International Law Commission*, Vol. II, p.219, as referred to by the Appellate Body in *Japan-Taxes*.

41. *Japanese Agricultural Products* case, (1988) 27 I.L.M. 1539.

42. Section IV, p.22.

The interrelationship of the WTO Agreements constitutes a comprehensive legal system governing international trade. A contextual analysis of a specific article mandates an understanding of how the agreements function together. Applying the principle of effectiveness challenges the notion of *lex specialis*, where each agreement would operate in isolation from each other. The Panel in the *Canadian Periodicals* endorsed this approach, ruling that the ordinary meaning of the texts of GATT 1994 and GATS as well as Article II:2 of the WTO Agreement, taken together, indicate that obligations under GATT 1994 and GATS can co-exist and that one does not override the other.<sup>43</sup> This finding was consistent with the rulings by the Panel and the Appellate Body in *EC Bananas* where, in accordance with Article 31 and 32 of the VCLT, the GATS was not limited to measures that directly govern or affect the supply of a service.<sup>44</sup> Under the effectiveness principle, all of the WTO agreements are to be read harmoniously.<sup>45</sup>

Reading agreements together appears to be the preferred approach by the Appellate Body. There are potential conflicts between the provisions of the various agreements. In *Guatemala—Anti Dumping*,<sup>46</sup> the appellants argued that the dispute settlement provisions under the Anti-Dumping Agreement took precedence over the general dispute settlement rules in the DSU. The Appellate Body noted that although the former provides for special rules and procedures, they only prevail over the DSU where there is a divergence between the provisions. It is only in the situation of a conflict where adherence to the one provision will lead to a violation of the other that the Anti-Dumping Agreement provision would prevail.<sup>47</sup> Where “there is no difference, the rules of the procedures of the DSU apply together with the special provisions of the covered agreement.”<sup>48</sup>

43. Section V, C (i), para. 5.17. This was confirmed by the Appellate Body in other disputes: *Japan—Alcoholic Beverages*, p.12; *Canada: Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R, adopted 27 Oct. 1999, para. 133; and *Footwear*, at para. 88.

44. *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (hereinafter *Bananas*).

45. *Footwear*, at para. 81. The Appellate Body in *Korea—Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, 14 Dec. 1999 at Section IV, para. 81, (hereinafter referred to as *Korea—Milk*) referred to a general duty in international law, as evidenced by I.C.J. jurisprudence, to interpret a treaty as a whole.

46. *Guatemala—Anti Dumping Investigation Regarding Portland Cement from Mexico* (WT/DS60/AB/R), Section IV, para. 68, (hereinafter *Guatemala Anti-Dumping*).

47. Section IV, para. 65.

48. *Ibid.* A difference was found by the Appellate Body in *Brazil—Export Financing Programme for Aircraft*, adopted 20 Aug. 1999, WT/DS46/AB/R, para. 132 (hereinafter *Brazil—Aircraft*) with respect to the provisions governing the implementation of the recommendations and rulings of the DSB in a dispute pursuant to Article 4 of the SCM Agreement.

The effectiveness principle was applied by the Appellate Body in *Japan—Taxes*, when addressing the interpretation of Article III. The Panel’s view of Article III:1, as setting out general principles, while Article III:2 contained specific obligations regarding internal taxes and internal charges, was held to be correct. However, in order to give effect to the proper meaning of Article III:1, Article III:1 constituted part of its context. Another “reading of Article III would have the effect of rendering the words of Article III:1 meaningless, thereby violating the fundamental principle of effectiveness in treaty interpretation.”<sup>49</sup> By failing to take into account Article III:1 in interpreting Article III:2, the Panel committed a legal error.

As a by-product of giving a treaty provision contextual meaning, the need for flexibility in interpreting WTO agreements has been recognised. The Appellate Body in the *Japan—Taxes* case appreciated the need for having definitive interpretations of the GATT 1994. WTO rules were needed to be reliable, comprehensible and enforceable. However, the Appellate Body added that interpretation is not to be so rigid or inflexible as not to leave room for reasoned judgments in confronting the endless and ever-changing ebb and flow of real facts in the real cases in the real world.<sup>50</sup> The interests of the multilateral trading system were best served if the WTO Agreements are interpreted with that in mind. By accommodating the special facts in the dispute, it suggests that the DSB will adopt a judicially active role when the circumstances warrant it. This entrenches the role of the DSB as an independent body, ensuring that the WTO Agreements are applied in an appropriate fashion.

### C. *In dubio mitius*

Another tool of interpretation is the principle of *in dubio mitius*, widely recognised as a supplementary means of interpretation whereby deference is accorded to the sovereignty of States.<sup>51</sup> If a term is ambiguous, the meaning to be preferred is the one that is less onerous on the party assuming an obligation, least interferes with territorial and personal

49. *Japan—Taxes*, Sections G, H(1).

50. *Ibid.*, at Section H(2)(c).

51. The Permanent Court of Justice identified the principle as meaning that “if the wording of a treaty provision is not clear, in choosing between several admissible interpretations, the one which involves the minimum of obligations for the parties should be adopted”. See *Frontier between Turkey and Iraq* (1925), Series B, No. 12, at 25. This rule is analogous to the margin of appreciation doctrine applied by the European Court of Human Rights that defers to the government’s position in certain situations. See T. A. O’Donnell, “The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights” (1982) 4 *Hum. Rts. Q.* 474. See also McRae *supra* n.15 at 10.

supremacy, or imposes fewer general restrictions.<sup>52</sup> In *Beef Hormones*, the Panel ruled that the measures taken by the EC must be “based on” international standards under Article 3.1 of the SPS Agreement, meaning that they must “conform to” international standards as required under Article 3.2. of the SPS Agreement. This interpretation was rejected by the Appellate Body who, by referring to the Oxford Dictionary<sup>53</sup> to explain that these terms are defined differently, pointed out that the terms are used in different articles and stated that the harmonisation of a member’s SPS measures on the basis of international standards is projected in the agreement as a goal to be realised in the future and not a current requirement. The Panel’s interpretation of Article 3.1 would transform the standards, guidelines and recommendations into binding norms. The Appellate Body concluded, in applying the principle *in dubio mitius*, that it was wrong to assume that sovereign States intended to impose upon themselves the more onerous obligation, rather than less burdensome one, by mandating conformity or compliance with such standards, guidelines and recommendations.<sup>54</sup> This upheld the discretion of the EU to apply its own health and environmental standards.

Article 31(3) of the VCLT allows the Appellate Body to refer to subsequent practice when interpreting a treaty as well as subsequent decisions of the parties. The *Desiccated Coconut* Panel discussed the difference between the two.<sup>55</sup> In that case, the Panel dealt with the relationship between GATT 1947, the 1979 Subsidies and Countervailing Measures Code (SCM) and GATT 1994. The SCM Code was ruled to be a subsequent agreement but not customary practice of the GATT 1947. While the practice of SCM Code signatories might provide some interpretative value regarding the interpretation of the SCM Code, it was clearly not relevant to the interpretation of Article VI of GATT 1994. Practice in this context relates only to agreements regarding interpretation. In adopting a narrow view of what comprises subsequent practice,

52. *EC Measures Concerning Meat and Meat Products (Hormones)* WT/DS26/AB/R, WT/DS48/AB/R hereinafter referred to as *Beef Hormones*). The Appellate Body referred to excerpts from R. Jennings and A. Watts (eds.), *Oppenheim’s International Law*, 9th ed., Vol. I (Longman, 1992), p.1278 and also to I.C.J. case law including the *Nuclear Tests Case (Australia v. France, (1974), I.C.J. Rep., 267* *Access of Polish War Vessels to the Port of Danzig (1931) PCIJ Rep., Series A/B, No. 43, 142* (Perm. Ct. of International Justice); *USA–France Air Transport Services Arbitration (1963), 38 I.L.R. 243* (Arbitral Trib.), as well as writers in international law. In the GATT 1947 body of jurisprudence, judgments by the I.C.J. received only nominal adoption into the GATT regime, simply referred to in the footnotes of decisions as opposed to being directly applied in the body of a ruling.

53. L. Brown (ed.), *The New Shorter Oxford English Dictionary on Historical Principles* (Clarendon Press), Vol. I.

54. *Beef Hormones*, at Section X A, para. 165.

55. *Brazil—Measures Affecting Desiccated Coconut (1997), WT/DS22/R, Section VI.A, 1 (b) (ii)*. The Appellate Body (WT/DS22/AB/R, AB-19967–4, Section E 3) (hereinafter referred to as *Brazil—Coconut*, upheld this part of the ruling.)

the Panel held that only practice under Article VI of GATT 1947 was legally relevant for the interpretation of Article VI of GATT 1994. According to Article II:4 of the WTO Agreement, GATT 1994 was not a “subsequent agreement” of GATT 1947, pursuant to Art 31:3(a) of the VCLT, but was legally distinct. The 1979 SCM Code, was not a decision, illustrating subsequent practice, by the contracting parties to GATT 1947, but an agreement subsequent to GATT 1947. Therefore it did not qualify as subsequent practice for the purposes of interpreting GATT 1947 in light of Art 31:3(b) of the VCLT.<sup>56</sup>

#### *D. Legitimate Expectations*

The doctrine of legitimate expectations has been applied in many trade disputes.<sup>57</sup> Its foundation rests in international law, arguably representing an underlying principle of treaty interpretation.<sup>58</sup> However, it is probably derived from German law and is a general principle of interpretation applied by the European Court of Justice.<sup>59</sup> Developed in the context of something that traders can rely on, it is something “held by a reasonable person as to matters likely to occur in the normal course of his affairs.”<sup>60</sup> Other international legal principles are related to the legitimate expectations doctrine, such as *pacta sunt servanda*,<sup>61</sup> estoppel and the abuse of rights doctrine.

In the well known *Lotus Case* the Permanent Court of International Justice held that conduct not explicitly prohibited by international law

56. This was in contradiction to an earlier GATT Panel ruling in *United States—Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada* (adopted 11 July 1991), BISD 38S/30, where the Panel indicated, in passing, that the SCM Code represented subsequent practice under Article VI of GATT 1947. A. Chua argues that DSB decisions would be more unlikely to constitute subsequent practice since Panel reports are now automatically adopted rather than through a unanimous consensus. *Supra*, n.8 at 59.

57. See *supra* n.82.

58. Petersmann, *supra* n.5 at 95.

59. *Germany v. Council (Re Banana Regime) (Case 280/93)*, [1998] E.C.R. 1019, *O’Dwyer & Others v. E.C. Council*, [1995] 11 E.C.R. 2071. In *August Topfer & Co. GmbH v. Council (Case T-115/94)*, [1997] 1 C.M.L.R. 733, the European Court of Justice held that the principle of legitimate expectations was the corollary of the principle of good faith in public international law.

60. J. Steiner & L. Woods, *Textbook on EC Law*, (London: Blackstone Press Ltd; 1998) at 105.

61. Codified in Article 26 of the VCLT.

remained lawful.<sup>62</sup> Similarly lawful measures adopted by some States easily frustrated the intentions of GATT 1947 parties.<sup>63</sup> In response, it became a well established GATT principle that the legitimate expectations of members regarding the conditions of competition were to be protected in order to inject security and predictability into the multilateral trading system.<sup>64</sup> The need for the protection of legitimate expectations is bolstered by the dispute settlement provisions found in Article XXIII of the DSU that allow for an avenue of redress for non-violation complaints.<sup>65</sup> This offers an effective mechanism affording protection to parties who have not suffered direct injury arising from a specific treaty violation.

The application of the doctrine of legitimate expectations can preclude or limit the use of exceptions in the WTO Agreements. After reviewing the wording, the context and the overall purpose of the ATC, the Panel, in the *Underwear* dispute, concluded that exporting members can legitimately expect that transitional safeguards adopted under Article 6 of the ATC will be exercised sparingly. Members could legitimately expect that importers would not frustrate market access and investments. As a result, the Panel ruled that resort to transitional safeguards was permitted on an exceptional basis by virtue of the need to protect legitimate expectations of the parties.<sup>66</sup>

The question of legitimate expectations reappeared in the *LAN Computers* Panel report, concerning the interpretation of a tariff schedule. The Panel asserted that the protection of legitimate expectations of the tariff treatment of a bound item is one of the most important

62. *The Case of the SS Lotus*, Judgment No. 9, (P.C.I.J.), Ser. A. No. 10 (1927). The *Lotus* case has been questioned by scholars, mainly because of the court's approach to jurisdiction over the high seas, Brownlie at 305. See also Fitzmaurice (1957) 92 *Hague Recueil* II at 56 and E. Lauterpacht (1970), *International Law: Collected Papers*. The Court ruled that the Turkish authorities had wide discretion to extend its criminal law jurisdiction beyond its territory partly due to the absence of rules prohibiting this. Article 11(1) of the High Seas Convention and Article 97(1) of UNCLOS have explicitly overturned this finding, allowing only the flag State to exercise penal or disciplinary proceedings over collisions on the high seas.

63. T. Cottier and K. N. Schefer, "Non-Violation Complaints in WTO/GATT Dispute Settlement: Past, Present and Future" 143 in Petersmann, *supra* n.126 at 166.

64. *Underwear* Panel at Section VII B para. 7.20. See also the *Superfund* case, (Panel Report on *United States—Taxes on Petroleum and Certain Imported Substances*, adopted on 17 June 1987, BISD 34S/136), where it was noted that such rules and disciplines "are not only to protect current trade but also to create the predictability needed to plan future trade." The TRIPs Panel adopted the similar view taken in the *Underwear* and the *Superfund* cases, where the importance of protecting the expectations of the contracting parties as to the competitive relationship between their products and those of other contracting parties was recognised.

65. A violation of the WTO Agreements can be seen where the attainment of an objective is impeded by the application of a particular measure (GATT 1994, Art. XXIII 1(b)).

66. Section VII B para. 7.20.

functions of Article II of the GATT 1994.<sup>67</sup> Tariff concessions are granted under the presumption that the price effect of the tariff concessions will not be systematically offset.<sup>68</sup> In interpreting Schedule LXXX, the Panel evaluated what the U.S. was entitled to legitimately expect regarding the actual tariff treatment. The meaning of the term “ADP machines,” which the U.S. argued included the LAN equipment, was broad enough in light of the legitimate expectations of an exporting member. The Panel concluded that, despite the reclassification by the EC, the prevailing practice of the EC during the Uruguay Round formed a legitimate expectation that LAN equipment would continue to be given the same tariff treatment accorded to ADP machines. The security and predictability of agreements directed to the substantial reduction of tariffs and other barriers to trade could not be maintained without the respect for legitimate expectations. This was held to be consistent with the principle of good faith as codified in Article 31 of the VCLT.<sup>69</sup>

The Appellate Body disagreed with the Panel’s ruling that the meaning of a tariff concession can be determined in light of the legitimate expectations of the exporting member. It referred to the TRIPS dispute, where the Appellate Body noted that the doctrine of legitimate expectations was a concept developed in the context of non-violation complaints.<sup>70</sup> Reaffirming that decision, the application of legitimate expectations in treaty interpretation was held to be limited to non-violation complaints.<sup>71</sup> In addition, Article II provided for the possibility that treatment contemplated in a concession may differ from the treatment that is eventually accorded, as demonstrated through the existence of a compensatory mechanism in Article II:5 of the GATT 1947.<sup>72</sup> Interpreting a concession in light of the legitimate expectations of an exporter was not consistent with the principle of good faith under Article 31 of the VCLT, since it applied concepts to the treaty that were not intended by the parties.<sup>73</sup> The Appellate Body held that the purpose

67. *European Communities—Customs Classification of Certain Computer Equipment*, WT/DS62/R, WT/DS67/R, WT/DS68/R, Section VII C, para. 8.23.

68. The Panel referred to the decision in *European Economic Community—Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal Feed Proteins*, adopted on 25 Jan. 1990, BISD 37S/86, to support this point.

69. The good faith obligation extends to the performance of a treaty that is in force as well as governs negotiations. See VCLT, Article 26.

70. The Appellate Body in TRIPs ruled that it could not be invoked in the context of TRIPs, which only allowed complaints to the DSB to be made for violation complaints under Art. XXIII of GATT. Section V, para. 41. In addition, the Appellate Body held that legitimate expectations do not form a part of treaty interpretation under the rubric of good faith in Article 31(1) of the VCLT. . . . “the principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended.” (para. 45).

71. Section V, para. 80.

72. Section V, para 81.

73. Section V, paras 83, 84. See also TRIPs at para. 45.

of treaty interpretation was to ascertain the common intentions of the parties, which cannot be understood on the basis of the subjective and unilaterally determined expectation of one of the parties to the WTO Agreements.

Legitimate expectations can also be formed following a dispute. Lacking any formal precedential effect, previous decisions can still be considered by subsequent Panels as creating legitimate expectations for the parties upon which they may rely.<sup>74</sup> The concept of “reasonable expectations” is not new, but was first introduced into GATT jurisprudence as a guide for dispute Panels in *Australian Subsidy on Ammonium Sulphate* in 1952.<sup>75</sup>

#### *E. Relationship of WTO Agreements and Other International Agreements*

A pressing issue in treaty interpretation in the WTO is how a party’s obligations are affected by international commitments external to the legal regime. The Appellate Body is capable of making such a ruling under its power to interpret WTO Agreements in accordance with customary rules of interpretation of public international law. Conflicting treaty obligations can arise in numerous situations. In WTO jurisprudence this issue has arisen mainly in the context of multilateral environmental agreements and their potential to conflict with or supersede a trade obligation. Panels have been reluctant to rule definitively on this question. In the *Canada—Measures Affecting Exports of Unprocessed Herring and Salmon*, Canada argued that its export restrictions were for the purpose of conserving exhaustible natural resources, permissible under Article XX (g) of the GATT 1947.<sup>76</sup> As authority for its position, Canada referred to its bilateral relations with the U.S. including treaties entered into by the parties,<sup>77</sup> and advocated the relevance of fisheries conservation principles and the related provisions under UNCLOS.<sup>78</sup> The Panel ruled that the Canadian measures were inconsistent with Article XI of the GATT 1947 and not justified by Article XX. It expressed no opinion concerning the issue of the applicability of the other

74. *Japan—Taxes*, Section E, p.14. The concept of “reasonable expectations” was first introduced in GATT jurisprudence by the Panel in *Australian Subsidy on Ammonium Sulphate*, GATT, BISD Vol. II, 188 (1952). In the *Dessert Apples* case, although the GATT Panel ruled out the precedential value of Panel reports, it still held that the legitimate expectations by a party on an adopted Panel report can be taken into account.

75. GATT, BISD Vol. II, 188 (1952).

76. BISD L/6268—35/S-98.

77. Canada referred to the 1952 *International Convention for the High Seas Fisheries of the North Pacific* (1952) U.N.T.S. 65, and the 1985 treaty between Canada and the United States concerning Pacific salmon.

78. United Nations Convention of the Law of the Sea, (1982), 21 I.L.M. 1261.

international agreements, qualifying its mandate as limited to examining Canada's measures in light of the GATT 1947.<sup>79</sup>

Since the Dispute Settlement Body is a creature of a treaty and is designed to interpret its parent legislation, its jurisdiction is primarily limited to applying the provisions of the WTO Agreements. However, the VCLT requires treaties to be interpreted with due regard not only to rules of international law applicable between the parties, but also to other treaties<sup>80</sup>. Indeed it has been argued that interpreting the WTO Agreement in isolation from other treaties could counteract the object and purpose of the GATT 1994. The Appellate Body in *Japan—Taxes* held that Article III:2 of the DSU affirmed that the GATT 1994 cannot “be read in clinical isolation from public international law.”<sup>81</sup>

Restricting jurisdiction to the parameters of international trade law, thereby effectively sealing off the DSB from a legal relationship with multilateral environmental agreements, has generated considerable academic discussion.<sup>82</sup> The Panels' apprehension to venture into so-called non-trade areas such as the environment was heightened by the lack of any environmental expertise shared amongst Panellists and the imagined threat provided by NGO participation. Although Panels were free to request scientific or technical assistance, referring to outside experts was rarely done. In the *Tuna—Dolphin* disputes, the Panels declined the opportunity to hear scientific or ecological experts although another GATT 1947 Panel heard testimony from the World Health Organization regarding the health basis for the cigarette regulations in the *Thai Cigarette Case*.<sup>83</sup>

The *Tuna-Dolphin* disputes were the closest GATT 1947 Panels got to recognising the efficacy of multilateral environmental agreements (MEAs) in trade dispute matters. In those cases, the U.S. prohibition of the importation of tuna caught in a process detrimental to dolphins was challenged. The U.S. argued that the measure was justified under Article XX (b), (d) and (g). The *Tuna-Dolphin I* Panel suggested that an MEA may be justified as an Article XX exemption. The U.S. was unable to

79. The Panel added that the dispute had no bearing on the question of fisheries jurisdiction.

80. Article 31(3)(c).

81. *Reformulated Gas*, Appellate Body, Section III B.

82. J. Cameron & J. Robinson, “The Use of Trade Provisions in International Environmental Agreements and their Compatibility with the GATT,” (1991) 2 Y.I.E.L. 3. J. Dunoff, “Institutional Misfits: The GATT, The ICJ & Trade-Environment Disputes” (1993–1994) 15 *Michigan Journal of International Law* 1043 at 1065. See also Petros C. Mavroidis, “Das GATT als self-contained Regime,” *Recht der Internationalen Wirtschaft*, 1991, 497. D. Brack, “Reconciling the GATT and Multilateral Environmental Agreements with Trade Provisions: The Latest Debate”, (1997) 6:2 *Review of European Community and International Environmental Law* 112.

83. *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes (BISD 37S/200)*.

satisfy the requisite test under Article XX (b), (d) and (f) although the Panel remarked that in order to claim an Article XX exception, the U.S. could show it had exhausted all options reasonably available to it. Potentially, this can be evidenced through the negotiation of an international co-operation arrangement.<sup>84</sup> Multilateral agreements were appropriate by virtue of the migratory nature of dolphins that roam the waters of many States and the high seas.<sup>85</sup> Although not a definitive endorsement of MEAs as a justification for claiming an exception under Article XX, it does acknowledge that global environmental issues can be resolved through multilateral agreements and, upon consensus, can “trump” trade obligations under the WTO system.

The relationship between MEAs and GATT was explored further in the *Tuna II* Panel Report.<sup>86</sup> The Panel considered whether MEAs might be taken into account when interpreting the GATT 1947, or in other words, whether an MEA constituted a subsequent agreement for the purposes of treaty interpretation. The Panel held that MEAs that were not concluded by the parties to the GATT 1947 were irrelevant to the interpretation of the GATT 1947 or its provisions. Practice by the parties pursuant to bilateral and plurilateral treaties was held not to be equivalent to practice under the GATT 1947 and therefore did not affect its interpretation. By implication, MEAs were not relevant as a primary means of interpretation of the text of the GATT 1947, in accordance with Article 31 of the VCLT.<sup>87</sup>

A treaty entered into by WTO members is arguably subsequent practice. Article 30 of the VCLT distinguishes between successive treaties including the same parties concerning the same subject matter with identical membership and successive treaties dealing with the same-subject matter but having different membership. Subsequent agreements signed by the parties to the original treaty, providing that they relate to the same subject matter, are binding between those parties. Where a MEA is entered into which explicitly outlines its relationship with the

84. In a similar situation, the U.S. was faulted for not doing this in the *Shrimp-Turtle* dispute (see *infra*).

85. The Panel noted that the need to conserve the dolphin was recognised internationally through the work of the Inter-American Tropical Tuna Commission and UNCLOS.

86. DS29/R and (1994) I.L.M. 842.

87. Petersmann, *supra* n.5 at 127, contends that the Tuna II Panel decision raises two questions. The first one is whether subsequent agreements and subsequent practice, under Article 31, cover agreements and practices, which explicitly refer to GATT/WTO rules. The other question he poses is why the Panel did not apply the general rule of treaty interpretation requiring it to take into account any relevant rules of international law, potentially expressed in multilateral agreements that are applicable in the relations between the parties under Article 31:3 of VCLT. Principle 12 of the Rio Declaration on Environment and Development (1992) 31 I.L.M. 874, specifically refers to GATT 1947, Article XX, therefore supporting the customary international legal principle calling for harmonisation of MEAs with WTO law.

WTO regime, it may have an interpretative significance and possibly a binding effect.<sup>88</sup> By the same token, non-parties to a subsequent agreement are not bound to those obligations unless the treaty codifies customary international law. There are no MEAs containing provisions explicitly overriding WTO commitments.

The *Shrimp-Turtle* dispute presented an opportunity to integrate environmental protection and conservation principles, expressed in numerous MEAs, into WTO law.<sup>89</sup> The dispute involved trade restrictions imposed by the U.S. on shrimp not caught using harvesting methods that have turtle excluder devices (TED). In an unsolicited amicus brief submitted to the Panel by the World Wildlife Fund (WWF), an argument was raised that States are obligated under international law to supervise and control activities within their jurisdiction that undermine the conservation of endangered species.<sup>90</sup> The Panel was asked to recognise the obligations expressed in a number of MEAs including Convention on Biological Diversity,<sup>91</sup> Convention on the International Trade of Endangered Species (CITES),<sup>92</sup> UNCLOS,<sup>93</sup> and the Convention on the Conservation of Migratory Species of Wild Animals (Bonn Convention).<sup>94</sup> It was hoped that the Panel would address the relationship of CITES and the Bonn Convention to the GATT 1994, since the turtles that were subject of the trade dispute, are listed as Appendix I (endangered) species under both agreements. Therefore, trade in these species was severely circumscribed under a multilateral regime. Trade in shrimp, however, were not.

Neither the Panel nor the Appellate Body clarified the relationship between WTO agreements and MEAs. However, both decisions rejected the American measure partially because of its unilateral nature but mostly because of its arbitrariness. It was determined that the U.S. did not go far enough in attempting to secure an international consensus on the issue and therefore the measure was not the least discriminatory course of

88. Another problem is whether the MEA is unclear about the relationship with the WTO Agreements. This is certainly evident when reading the vague provisions contained in the preamble to the Cartagena Protocol on Biosafety to the Convention on Biological Diversity (2000) hereinafter referred to as the Biosafety Protocol.

89. There were no references to MEAs in the *Reformulated Gas* dispute but there was no imperative reason to make such a reference since the measure primarily involved nationally driven American standards for gasoline quality.

90. "Amicus Brief", written by J. Cameron and F. Darroch for FIELD on behalf of the World Wildlife Fund for Nature at 2. This requirement was argued to be based on treaty law as well as regional agreements such as the ASEAN Agreement on the Conservation of Nature and Natural Resources, (1985) 15 E.P.L. 64, which contribute to international law providing for the protection of sea turtles.

91. (1982) 31 I.L.M. 822.

92. (1973) 993 U.N.T.S. 243.

93. (1982) 21 I.L.M. 1261.

94. (1983) 19 I.L.M. 15.

action.<sup>95</sup> Reinforcing this point was the existence of a regional agreement<sup>96</sup> governing the issue which, the Appellate Body implied, would not violate WTO rules. References were made to Principle 12 of the Rio Declaration and paragraph 2.22(i) of Agenda 21 to demonstrate the preference for multilateral solutions when dealing with transboundary environmental problems.<sup>97</sup> The Appellate Body refrained however from taking judicial notice of the EC third party submission,<sup>98</sup> recognising that multilateral agreements would, in general, be allowed under the chapeau of Article XX. Nevertheless, it appears that the reasoning of the Appellate Body might support such a view in subsequent rulings.

In any event, the decision by the Appellate Body bridged the pre-existing cleavage between international environmental law and international trade law. One of the principle arguments of the claimants was that the term “exhaustible natural resources” in Article XX(g) of GATT 1947, was limited so that a GATT 1994 excepting conservation measure pursuant to that section could only be taken to protect a mineral or non-living natural resource. In other words, the term exhaustible did not include any renewable resources. In dismissing this argument, the Appellate Body resorted to international environmental law to demonstrate how the term “natural resources” had evolved from what it meant when the GATT 1947 was drafted. The Appellate Body took judicial notice of the recent acknowledgement by the international community of the need for bilateral or multilateral action to protect living natural resources as evidenced in numerous agreements.<sup>99</sup> In addition, the stated objective of sustainable development in the preamble of the WTO Agreement confirmed that “natural resources” should not be read in such a restrictive fashion.<sup>100</sup> The Appellate Body attempted to adhere to the principle of effectiveness in treaty interpretation. It held that the objective of sustainable development adds “colour, texture and shading” when interpreting the WTO Agreements.<sup>101</sup>

It may be a strategic legal argument to challenge the Panel’s authority to review an agreement outside the WTO Agreements. In the *EC*

95. *Shrimp-Turtle*, Part VI C 2, para. 171.

96. (1996) Inter-American Convention for the Protection and Conservation of Sea Turtles. Available at <http://www.csf.colorado.edu>.

97. *Shrimp-Turtle* Part VI C 2, para. 168.

98. *Shrimp-Turtle*, *ibid.*, Section II 2 D 3, para. 72.

99. The Appellate Body referred to UNCLOS, Biodiversity Convention, the Bonn Convention, as well as Agenda 21. Ironically, it was paragraph 2.22(i) of Agenda 21 Report in combination with Principle 12 of the Rio Declaration, (1992) 30 I.L.M. 874, which led the Appellate Body to conclude that unilateral trade measures that address transboundary environmental problems should not be employed.

100. Article 31(2) of the VCLT refers to the preamble of a treaty as part of “the context for the purpose of the interpretation of a treaty”.

101. Section VI C 1 para. 155.

*Bananas* case, the EU and the ACP countries argued that the Panel was not authorised to interpret the Lomé IV Convention,<sup>102</sup> which formed the basis of preferential trading arrangements between them. It was submitted that only the EU and ACP country's positions on the Lomé IV Convention were to be considered. This was rejected by the Panel and the Appellate Body, who established jurisdiction to interpret the Lomé IV Convention due to the incorporation of that agreement through a prescribed waiver into the GATT 1994. The treaty was interpreted by the Panel in order to clarify the EU's legal obligations and determine how EU measures under the waiver were necessary to give effect to its Lomé IV Convention obligations. Although the treaty itself was not scrutinised to determine its relationship with WTO Agreements, the ruling demonstrated a willingness of Panels to venture beyond the WTO Agreements in order to resolve a dispute.

Certain WTO Agreements explicitly refer to the application of relevant international standards and call for the participation of relevant international organisations. The Codex Alimentarius Commission, the International Office of Epizootics, and international and regional organisations operating within the framework of the International Plant Protection Convention, are expressly mentioned.<sup>103</sup>

The applicability of international standards received consideration in the *Beef Hormones* dispute, where the Appellate Body reviewed the issue in the context of the precautionary principle.<sup>104</sup> The EU argued that the precautionary principle is a general rule of customary international law or at least a general principle of law. When applied to the SPS Agreement, it rendered it unnecessary for scientists from around the world to agree on the possibility and magnitude of the risk from eating hormone-injected beef. The operation of the principle would preclude the necessity for all or most WTO members to perceive and evaluate the risk in the same way. The Appellate Body found there was no consensus whether States have accepted it as general customary international law.<sup>105</sup> It refrained from

102. African, Caribbean and Pacific States—European Economic Community (1991) 29 I.L.M. 783.

103. SPS Agreement, Article 3:4.

104. See Principle 15 of the 1992 Rio Declaration on Environment and Development. MEAs that require parties to apply or take account of the precautionary approach or principle include the 1991 Bamako Convention on the Ban of Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, 30 I.L.M., 1991; the 1992 Helsinki Convention on the Protection and Use of Transboundary Watercourses and Lakes (1992), 31 I.L.M. 1312, Article 2(5)(a); the 1992 OSPAR Convention for the Protection of the Marine Environment of the North-East Atlantic, (1993) 32 I.L.M. 1068, Art. 2(2)(a); the 1992 UN Framework Convention on Climate Change (1992), Article 3, and the 2000 Biosafety Protocol.

105. Part VI, para. 123. The precautionary principle was given greater definition by Judge Laing, of the International Tribunal for the Law of the Sea, in a separate opinion in the *Southern Bluefin Tuna (Provisional Measures) Cases* (1999) ITLOS 3 & 4.

ruling on this question but confirmed that the precautionary principle was reflected in Articles 5.7 and 3.3 of the SPS Agreement, which allow parties to adopt higher or more cautious standards than those accepted internationally. However, the precautionary principle did not, by itself, and without a clear textual directive to that effect, relieve a Panel from the duty of applying the normal rules of treaty interpretation when reading the SPS Agreement. The principle did not override the provisions of Articles 5.1 and 5.2 of the SPS Agreement, which require risk assessments to be performed before implementing a more restrictive measure.

The polluter pays principle may also be relevant in WTO jurisprudence, although its applicability to the trade regime has not yet been the subject of any Panel reports.<sup>106</sup> A casual reference to the polluter pays principle was made in the Superfund Panel, concerning U.S. taxes on petroleum and certain imported substances levied under the Superfund Amendments and Reauthorization Act of 1986. The statute authorised the levying of taxes to fund the clean up of hazardous waste sites and to support public health programmes caused by the waste. The tax was held to be inconsistent with Article III:2 GATT 1947 and was a *prima facie* case of nullification and impairment. The violation covered the taxes imposed on petroleum but not the taxes on imported substances. The tax on certain chemicals, being a tax directly imposed on products, was eligible for border tax adjustment that met the national requirement of Article III:2 of the GATT 1994. Since GATT 1994 rules on border tax adjustments set maximum limits of tax adjustments where, up to that point, a contracting party could differentiate in the degree of tax adjustment, the Superfund Panel noted that the rules on BTAs open up the possibility to follow the polluter pays principle. However, there was no obligation to follow the polluter pays principle and parties were free to impose a lower tax or no tax at all on like imported products.<sup>107</sup>

The mention of other international institutions in the WTO Agreements may require dispute resolution Panels to broaden the scope of their analysis. Under Article III:5 of the WTO Agreement, the WTO is

106. See Principle 16 of the Rio Declaration. See also OECD Council Recommendation C (72) 128, 14 I.L.M. (1975), 236, Recommendation on the Implementation of the Polluter-Pays Principle, C(74) 223 (1974), 14 I.L.M. (1975), 234, OECD Council Recommendation on the Application of the Polluter-Pays Principle to Accidental Pollution, C.89 (Final) (1989), 28 I.L.M. 1320; EC Treaty, Art. 174; OSPAR Convention, Article 2(2)(b). Both the Oil Pollution Preparedness Convention International Convention on Oil Pollution Preparedness, Response and Co-operation (London) 30 Nov. 1990, (1991) 30 I.L.M. 733, and the Industrial Accidents Convention, preamble (UN/ECE Convention on the Transboundary Effects of Industrial Accidents (1992) 31 I.L.M. 1330, preamble, identify the polluter-pays principle as a general principle of international environmental law.

107. The consistency of a BTA and the polluter pays principle was not addressed by the Panel who limited themselves to examining the case before it. It was determined that the GATT Group on Environmental Measures provided a forum to pursue environmental issues that the Panel could not address.

required to co-operate with the IMF and the IBRD with a view to achieving greater coherence in global economic policy making. This objective means of effecting administrative co-operation was concluded in the Agreement Between the IMF and the WTO.<sup>108</sup> In the *Footwear* dispute, Argentina argued that the Panel failed to take into account Argentina's obligations towards the IMF when interpreting Article VIII of GATT 1994. The Appellate Body construed the relationship, as evinced by the agreement, as not modifying, adding to or diminishing any of the rights and obligations of WTO members. The Appellate Body held that there are certain provisions that allow a WTO member to excuse itself from its obligations in certain specified circumstances relating to exchange matters and/or balance of payments. However, Article VIII was not one of them.<sup>109</sup> When discussing the scope of the Appellate Body's powers under Article 13, the Appellate Body added that there is no duty to consult with the IMF in types of cases that do not relate to exchange measures.<sup>110</sup> The decision suggests that the Appellate Body may attempt to provide a narrow interpretation of the WTO provisions, so as to avoid finding any conflicting obligations under the matrix of interacting international institutions.

#### *F. Other Principles of Treaty Interpretation*

Another principle of treaty interpretation applied by the DSB is the non-retroactivity of treaties, codified in Article 28 of the VCLT. The WTO Agreements resulted in the replacement of the GATT 1947 with the GATT 1994 and other agreements. The relationship between the old and new agreements was inevitably to become an issue between the parties, despite the transitional provisions in the WTO agreements. The *Desiccated Coconut* Panel acknowledged that the transition from the old to a new legal regime raised delicate legal issues in relation to situations where the disputes straddle the date of entry into force of the new legal order.<sup>111</sup> In that case, the Philippines brought a complaint against Brazil under GATT 1994 for a countervailing measure on imports of desiccated

108. 9 Dec. 1996, to be found at <http://www.wto.org/wto/legal/34-dimf/wpf>.

109. Section V, para. 73.

110. Section VI B para. 85. The Appellate Body also ruled that the Panel did not abuse its discretion by not seeking information or an opinion from the IMF. The relationship with the IMF came up in *India—Quantitative Restrictions*, para. 149, where the Panel's treatment of information from the IMF, relating to India's balance of payments situation, was challenged. The appellant argued that the Panel failed to assess the views of the IMF independently, thereby delegating their duty to make an objective assessment of the matter. This was dismissed by the Appellate Body since they found the Panel critically assessed those views as well as considered other data and opinions.

111. Section VI, A, 1 (b).

coconut introduced after GATT 1994 was in force. However, the Brazilian investigation underlying the decision to impose the duty commenced before the GATT 1994 was in effect. According to the Panel, the solution to such a delicate issue concerning transition to a new regime lay in the balancing of the objective of a swift entry into force of the new agreement with the objective of safeguarding pre-existing and legitimate expectations surviving from the old regime. For countervailing duties, the transition was ruled to be gradual.<sup>112</sup>

The Appellate Body discussed the principle of non-retroactivity further, holding that Article 28 of the VCLT represents a general principle of international law. Absent a contrary intention, a treaty was not to apply to acts or facts that took place or situations that ceased to exist, before the date of its entry into force. The Appellate Body confirmed that the complaint could not be brought under GATT 1994. The investigation of the Philippine subsidy included both procedural and substantive aspects, which were continuous up to imposition of any countervailing duty and therefore subject to the older subsidies regime. In order to prevent a vacuum, there were transitional periods incorporated into the WTO Agreements, so that the Philippines had a right of action as a result of the operation of Article 32.3 of the SCM Agreement until December 1995 when the GATT 1947 was scheduled to end.<sup>113</sup>

Another reference to Article 28 was made by the Appellate Body in *EC Bananas*, although in this instance it was applied to support the application of a treaty entered into after the introduction of a trade measure.<sup>114</sup> The EC argued that, given that the GATS entered into force on 1 January 1995, only the EC banana import regime as it existed in late 1994 and afterwards, rather than the regime as it existed in 1992 and before, should be examined in light of articles II and XVII of the GATS. The Appellate Body determined that the EC banana regulations remained in force while the recurring and ongoing process of import licence allocations was maintained.<sup>115</sup> The consistency of the regulations over this time period was relevant in determining the application of GATS. The scope of the legal examination embraced only actions which the EC took or continued to take, or measures that remained in force or continued to be applied by the EC, and thus did not cease to exist after the

112. Section VI, A, 1 (b) iv para. 266.

113. Dispute settlement was available to Philippines under the SCM Code, pursuant to Articles VI and XXIII of the GATT 1947. Petersmann argues that the Appellate Body, in its reasoning, failed to account for how the legitimate interests of exporting countries, in compliance with Articles I, II and VI of GATT 1994, could be protected during the transitional phase where the SCM Code was not in force. *Supra* n.5 at 93.

114. Section IV, B, 8, C, 4, para. 236.

115. Section IV, B, 8, C, 4, para. 237. The fact that the EC common market organisation was introduced in 1993, prior to entry into force of GATS, was held not to be relevant by the Appellate Body.

entry into force of the GATS. In a footnote, the Appellate Body stated that their findings were consistent with Article 28 of the VCLT, embodying the general international law principle that unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any situation which ceased to exist before the date of entry into force of the treaty. In effect, the Appellate Body ruled that there was no grandfather clause in the WTO Agreement permitting members to indefinitely maintain national legislation inconsistent with it.

Article 28 received further comment in the *Beef Hormones* Appellate Body decision. The EC directives<sup>116</sup> enacted before the entry into force of the WTO Agreement, continued to exist after 1 January 1995. The Appellate Body ruled that the SPS Agreement did not reveal any intention to limit its application to measures enacted after the entry into force of the WTO Agreement. It was unreasonable to expect that the WTO members would explicitly exempt pre-existing measures from provisions as important as Articles 5.1 and 5.5 of the SPS Agreement. Articles 5.1 and 5.5 did not distinguish between measures adopted before 1 January 1995 and measures adopted after. As a result, the Appellate Body construed that the SPS Agreement was intended to be applicable to both. Reinforcing that point, Article XVI:4 of the WTO Agreement was mentioned. It states that members must ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the WTO Agreements. Reiterating the comments of the EC Bananas Panel, it held that there was no “existing legislation” exceptions or grandfather rights in the WTO Agreement.<sup>117</sup>

## 2. *Operation of the Dispute Settlement System*

### A. *Role of GATT Jurisprudence*

A constant source of varying opinions, which strikes at the heart of WTO dispute settlement, is the role of GATT jurisprudence. By referring to previous decisions, and thereby applying their rulings, Panels and appellate bodies are deviating from addressing the unique issues of the dispute that are relevant to the parties. Other disputes that are different in origin are imported into the dispute. However, previous decisions can assist Panels in understanding the WTO Agreements. They can serve as valuable references, informing Panels about the context and meaning of the provisions.

116. Council Directive 81/602/EEC (31 July 1981), Council Directive 88/146/EEC (7 March 1988), Council Directive 88/299/EEC (17 May 1988). These were repealed and replaced with Council Directive 96/22/EC (29 April 1996).

117. Section VII, para. 128.

The role of GATT Panel decisions in interpreting the WTO Agreements received some attention by the Appellate Body in *Japan Taxes*.<sup>118</sup> It interpreted Article XVI:1 of the WTO Agreement<sup>119</sup> and paragraph 1(b)(iv) of Annex 1A incorporating GATT 1994 into the WTO Agreement, as bringing the legal history and experience under the GATT 1947 into the new realm of the WTO, to ensure continuity and consistency in a smooth transition. The experience acquired by the parties to the GATT 1947 was deemed relevant to the experience of the new trading system under the WTO. Flowing from that experience are Panel reports that become an important part of the GATT *acquis*, often considered by future Panels.

The Appellate Body refused to accord any binding effect of previous Panel reports of GATT 1947. Panel reports required an adoption by the contracting parties in order to have any effect. Lack of adoption under the GATT 1947 regime can lessen the weight given to a Panel's decision.<sup>120</sup> Where the decision to adopt a Panel report is made, it still does not constitute an agreement by the contracting parties on the legal reasoning contained in the Panel report.<sup>121</sup> The decision to adopt a report by the parties did not constitute a definitive interpretation of the relevant provisions of GATT 1947 for the future. Under the WTO system, exclusive authority in interpreting GATT 1994 is conferred on the Ministerial Conference and the General Council that have the sole power to adopt interpretations, with decisions taken by a three-quarters majority of the members.<sup>122</sup> The DSB can issue recommendations and adopt rulings but they are prohibited from adding or diminishing the

118. Section E, p.12.

119. Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947.

120. In *Japan—Taxes*, para. 6.18, the Panel ruled that since the Panel report in the *U.S. Auto Taxes* case (*United States—Taxes on Automobiles*, Report of the Panel, 29 Sept. 1994), (1994) 33 I.L.M. 1397 was not adopted, it did not bind the Panel or create any obligation to lend any weight to the decision. Some have argued that unadopted Panel reports are precedents for GATT Panels (see W. J. Snape III & N. B. Lefkovitz, "Searching for GATT's Environmental Miranda: Are "Process Standards" getting "Due Process?"", (1994) 27 *Cornell Int'l L.J.* 777), while others have flatly refused such a position. See S. Charnovitz, "Environmental Trade Sanctions and the GATT: An Analysis of the Pelly Amendment on Foreign Environmental Practices", (1994), 9 *Am. U.J. Int'l L. & Policy* 751. See also Nichols, *supra* n.9 at 431.

121. Section E, p.13. J. Jackson limits the significance of the adoption of a Panel report under the GATT to simply a recognition by the parties that the dispute resolution has concluded as opposed to the contracting parties' acknowledgment of the proper interpretation of the GATT 1947. See "World Trade Rules and Environmental Policies: Congruence or Conflict?" (1992) 49 *Wash & Lee L. Rev.* 1227 at 1253.

122. Article IX:2 of the WTO Agreement. See Articles 3(2) of the DSU and 19:2 of the WTO Agreement.

parties' rights and obligations. This effectively pre-empts the incorporation of other interpretations into the WTO Agreements. By deferring to the legislative branch of the WTO, the Appellate Body in *Japan—Taxes* limited the role of the DSB to clarifying, and not making WTO law.

The Appellate Body in *Japan—Taxes* concluded that Panel decisions were not binding, except with respect to resolving the particular dispute between the parties to that dispute.<sup>123</sup> Panels are not bound by the details and legal reasoning of prior Panel reports, since there are other factors to consider including other GATT practices and the particular circumstances of the complaint. Decisions are deemed to be isolated acts that are generally not sufficient to establish subsequent practice, since they do not form a sequence of acts establishing an agreement of the parties.<sup>124</sup> E.U. Petersmann challenges the Appellate Body's reasoning that a Panel report is an isolated act that is not sufficient to establish subsequent practice, because it "neglects the contextual difference between, for instance, a judgment by the International Court of Justice (ICJ) and a GATT Panel report, whose subsequent deliberation and adoption by both the GATT Council and the annual conference of the GATT contracting parties could make such reports more than an "isolated act."<sup>125</sup> Professor John Jackson also criticises the Appellate Body's ruling on this point.<sup>126</sup> He notes that the Appellate Body in *Japan—Taxes* compared the DSB with the International Court of Justice, where the ICJ is governed explicitly by Article 59 of the Statute of the International Court of Justice<sup>127</sup>, which dismisses any *stare decisis* in ICJ jurisprudence.<sup>128</sup> Historically, this has not inhibited the development by the ICJ of a body of case law in which considerable reliance on the value of previous decisions is readily discernible.

One of the hallmarks of any legal system is its body of jurisprudence. Common law systems afford more judicial authority to previous decisions consistent with the doctrine of *stare decisis* than in civil law. In bridging these two legal traditions in an international tribunal such as the DSB, established jurisprudence should have persuasive value. It is true that the discretion of dispute settlement bodies in the WTO is not to be fettered by

123. See also *Canada—Import Restrictions on Ice Cream and Yogurt*, (1985) 36 Supp. BISD 68 at 85, where the Panel held that prior Panel reports can be relevant but are not dispositive.

124. *Japan—Taxes* at Section E, p.13.

125. E.U. Petersmann "International Trade Law and the GATT/WTO Dispute Settlement System 1948–1996: An Introduction" at 3 in E.U. Petersmann *supra* n.37.

126. J. Jackson, *The World Trading System: Law and Policy of International Economic Relations (2d)* (MIT Press, Cambridge: 1997 at 32).

127. 59 Stat. 1055, T.S. No. 993.

128. It is generally considered that previous decisions by international tribunals lack formal precedential effect. See I. Brownlie, *Principles of Public International Law* at 21 (5th ed.), (New York: Clarendon Press; 1998).

precedent. Disputes are to be decided on a case-by-case basis. However, Panel decisions have been deemed relevant when interpreting provisions of the GATT 1947.<sup>129</sup> What is relevant may be a question of fact in light of the particularities of the dispute. Since the WTO operates under a series of agreements on new products and services that were not governed under the previous GATT 1947 regime, WTO Panels have adopted a clean slate approach when interpreting these new agreements. The Appellate Body in *India—Woven Wool Shirts and Blouses*<sup>130</sup> dismissed the relevance of GATT 1947 jurisprudence because the ATC introduced a new legal dimension to international trade in those goods. In the *Coconut* dispute, the Panel did not lend much credence to GATT jurisprudence under the GATT 1947 and the 1979 SCM Code, which formed part of the pre-WTO regime, because that regime of which those agreements were part, was rebuked as being fragmented. This was something WTO members intended not to repeat.<sup>131</sup>

In the new era in dispute settlement it appears that the development of case-law under the WTO Dispute Settlement Body may provide guidance for subsequent decisions. Panel and Appellate Body decisions have applied legal tests established in earlier decisions. In *Canadian—Periodicals*, the Appellate Body upheld the test for determining like products under Article III:2 of the GATT 1994 that was devised by the Appellate Body in *Japan—Taxes*.<sup>132</sup> As the number of Panel decisions increase, there will be a growing reliance on them to substantiate a party's position. Although Panel decisions have been ruled as not forming a proper source of interpreting the WTO Agreements and the Appellate Body has reinforced the case-by-case approach to resolving disputes,<sup>133</sup> there is an inevitable trend that future Panels may be influenced by previous decisions. The reasoning of the Panels can provide useful guidance for future decisions, even to the point of being persuasive in a more formal sense. This is a concept familiar to common law lawyers.<sup>134</sup> However, the legal conclusions found in an unadopted Panel report cannot be relied upon. In *Argentina—Measures Affecting Imports of*

129. J. Klabbbers, *supra* n.26, states that Panel reports under the GATT 1947 had no formal precedential value but in practice, they did serve as precedent, often being referred to in a number of Panel proceedings and relied on by the Panels themselves, "Jurisprudence in International Trade Law: Article XX of GATT" (1992), 26 *Journal of World Trade* 63 at 65.

130. (1997), WT/DS33/AB/R hereafter *Shirts and Blouses*.

131. Section IV, E 3.

132. Section G, p.17. The Appellate Body also applied the test in *Japan Taxes* for determining whether a product is "directly competitive or substitutable" under the second sentence of Article III:2. Section H, p.18.

133. *Japan Taxes*, Section E.

134. *Desiccated Coconut*, Panel report (WT/DS22/R) at Section VI, A, I (b) (iii) para. 258.

*Footwear, Textiles, Apparel and Other Items*,<sup>135</sup> the Panel considered the reasoning of the Panel in the *Bananas II* Panel report,<sup>136</sup> which was unadopted, to be relevant and useful to the dispute. The Appellate Body clarified the distinction between deriving useful guidance from an unadopted report and relying upon it.<sup>137</sup>

Parties to a dispute will be likely to assert that a decision binds the Panel or they will attempt to distinguish previous rulings. There is no guarantee of success, leaving a Panel or Appellate Body with the freedom to selectively relegate prior rulings to a status of *obiter dicta*.<sup>138</sup> The process of deliberation for the DSB will be continually challenged by defining the relationship of their previous ruling with the current dispute.

### B. Burden of Proof

The burden of proof is an evidentiary rule, fundamental to legal systems. In WTO law, the burden is normally allocated to the complainant to establish that a violation of GATT 1994, as well as other WTO agreements, has occurred. In *Shirts and Blouses*, the Panel found that the burden of proof rested with India to prove that there was a violation of the ATC due to the U.S. safeguard measure. It was for India to advance factual and legal arguments in order to establish that the import restriction was inconsistent with Article 2 of the ATC and that the U.S. determination of serious damage or actual threat, pursuant to Article 6 of the ATC, was not evident. In the *Beef Hormones* case, the initial burden under the SPS Agreement was ruled to lie with the complaining party, who is required to establish a prima facie case of inconsistency with a particular provision of the agreement. Once this is done, the burden of proof would move to the defending party who must refute the inconsistency.<sup>139</sup> In sum, the burden of proof rests with the party, whether complainant or defendant, that asserts the affirmative of a particular claim or defence.

The Appellate Body in *Shirts and Blouses* discussed the burden of proof in the context of international law. In rejecting India's contentions

135. WT/DS56/R.

136. DS38/R, 11 Feb. 1994. (This was a pre-WTO Panel report dealing with the bananas import dispute over the EU regime).

137. DS56/AB/R at Section IV A, para. 44 (hereinafter referred to as *Footwear*).

138. In *Canada Periodicals*, the Appellate Body ruled that the position expressed in the *EEC Oilseeds*, adopted 25 Jan. 1990, BISD, 37S/86, that subsidies not paid directly to producers are not made exclusively to them under Article III:(8)(b), was merely *obiter dicta*. By contrast, the Appellate Body concurred with the Panel in *United States—Malt Beverages*, adopted 19 June 1992, BISD 39S/206, that permissible subsidies under Article III:8(b) of the GATT 1994 were limited to payments, which involve the expenditure of revenue by a government.

139. Section IV, para. 109.

that the burden of proof was initially on the U.S., the Appellate Body questioned how any system of judicial settlement could function where a mere assertion of the claim amounts to proof. It is a generally accepted principle of law applicable in most jurisdictions that the burden of proof rests upon the party who raised a particular claim or defence. This was a generally accepted canon of evidence in civil law, common law and in most jurisdictions. How much and what kind of evidence is required to establish the presumption will, however, vary from measure to measure, provision to provision and case to case.<sup>140</sup>

The burden of proof serves as a benchmark for any effective dispute resolution system. It maintains fairness and order by presuming that WTO members are in compliance with their obligations until proven otherwise. A dispute mechanism operating under such a principle assures members that the benefits accruing directly or indirectly to them under the GATT 1994 will be protected. If a member feels that its benefits are nullified or impaired, dispute settlement is available.<sup>141</sup> The complainant is initially required to demonstrate a prima facie case of nullification or impairment. The complainant party establishes this in the absence of effective refutation by the defendant.<sup>142</sup> Where there is an infringement of the obligations under one of the WTO Agreements, the action constitutes a prima facie case of nullification or impairment of benefits.<sup>143</sup> Where differential treatment is accorded to domestic and imported products, this is evident.<sup>144</sup> In *EC Bananas*, the Appellate Body upheld the principle, as advanced in the *Superfund* case,<sup>145</sup> that any measure that changes the competitive relationship of members nullifies any such members' benefits under the WTO Agreement<sup>146</sup>.

There is a presumption that a breach of WTO rules produces an adverse impact on other members, thereby compelling a member, against whom the complaint is brought, to rebut the charge. In the *Footwear* case, the Panel attempted to define what a presumption is. It held that in conformity with the ordinary meaning of the words, as spelled out in the Black's Law Dictionary,<sup>147</sup> *Lexique de termes juridiques*<sup>148</sup> and other

140. Section IV, p.14. See also TRIPs, section IV, para. 74.

141. Article XXIII(a) allows a party to bring forward a complaint when any provision of the WTO Agreements is violated.

142. *Shirts and Blouses*, Section IV, p.13.

143. Article 3:8 of the DSU.

144. The Appellate Body in *Canadian Periodicals* ruled, for instance, that there was a "well-established" principle that the trade effects flowing from differential tax treatment between imported and domestic products do not necessarily have to be shown in order for the measure to be found inconsistent with Article III of GATT 1994.

145. Panel Report on *United States—Taxes on Petroleum and Certain Imported Substances*, adopted on 17 June 1987, BISD 34S/136.

146. Section IV, C, 6 (d), para. 253.

147. 6th Edition, West Publishing (1991).

148. Raymond Guillien and Jean Vincent, Dalloz (1981).

similar dictionaries, a presumption constitutes an inference in favour of a particular fact.<sup>149</sup> It would also refer to a conclusion reached in the absence of direct evidence. Setting out the violation of a WTO Agreement activates the presumption that a member's benefits have been, or will potentially be, nullified or impaired.

The burden of proving a violation is not insurmountably onerous. In international disputes, tribunals are normally given considerable flexibility in evaluating claims before it. A common problem is that a party cannot obtain access to specific evidence to prove a prima facie violation.<sup>150</sup> The U.S. experienced this problem in the *Footwear* dispute, as its request for production of documents from Argentina was not honoured. In light of this, the Panel held that the U.S. presumption, contravening Article II of GATT 1994, was established, in certain cases, by virtue of the very nature of the minimum specific duty system maintained by Argentina.<sup>151</sup>

Where a non-violation complaint is asserted, the rule on the burden of proof is modified.<sup>152</sup> Non-violation complaints place the onus on the claimant to provide a detailed justification of its claim.<sup>153</sup> This is a practice in the WTO recognised in the 1979 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance.<sup>154</sup> Article 26(1)(a) of the DSU deals with non-violation claims, providing that the claiming party must present a detailed justification to support their claim.

A prima facie case is established if *in the absence* of effective refutation by the defending party a Panel is required as a matter of law to rule in favour of the complaining party presenting the prima facie case.<sup>155</sup> There is, in our view, no burden shift in the midst of this prima facie test. That is to say there should not be scope for a Panel to say a complainant makes a claim and then the burden shifts to the defendant to refute the evidence and arguments of the complainant, and after that the Panel weighs up the evidence submitted by both. The proper interpretation is that the burden remains with the complainant to establish the prima facie case which

149. Part IV, B.2. para. 6.38.

150. Due to the differing institutional capacities of WTO members, this problem is more acute in developing and transitional countries.

151. Para. 6.65, affirmed by the Appellate Body at part IV, B. 62.

152. These are permitted under Article XXIII(1)(b), GATT 1947, which allows a party to assert a nullification or impairment of a benefit regardless of there being any violation of the agreement. The burden of proof would be allocated in a similar way to the complainant in cases of a situational complaint pursuant to Article XXIII(1)(c).

153. *United States—Restrictions on the Importation of Sugar and Sugar-Containing Products Applied Under the 1955 Waiver and Under the Headnote to the Schedule of Tariff Concessions*, (1990), 37 Supp. BISD 228, *Japan—Trade in Semi-Conductors*, (1988), 35 Supp. BISD 116.

154. (1979) 26 Supp. BISD 210. Nichols, *supra* n.8 at 413, notes that there is an absence of jurisprudence demonstrating customary practice in non-violation disputes.

155. *EC—Hormones* para. 104.

means that if they do so through evidence and argument and the defendant fails to refute the evidence and argument, the Panel is bound as a matter of law to rule in favour of the complainant.

Once the prima facie case is sufficiently demonstrated, the burden shifts to the other party to adduce evidence to rebut the presumption.<sup>156</sup> Where a party attempts to invoke an exception under the GATT 1994 or other WTO Agreements, the burden is shifted to that party. If the respondent party justifies its actions under an exemption, there is a burden on it to demonstrate that its measures are consistent with that exception.<sup>157</sup> For the general exemptions in Article XX, as well as specific ones under Article XI:(2),<sup>158</sup> these are definitively narrowed in scope and do not amount to positive rules establishing obligations for the parties. They are however affirmative defences with requisite conditions to be satisfied, making it reasonable to place the burden of raising such a defence on the party asserting it.<sup>159</sup> The Appellate Body in *Reformulated Gasoline* held that a party claiming an Article XX exception carries a heavier burden than simply showing that the measure is categorically within the boundaries of the permitted exception.<sup>160</sup> The party invoking the general exception under Article XX should demonstrate that its measure does not constitute abuse of the exception under the chapeau of that provision. Parties are initially required to demonstrate that their measure falls under one of the enumerated exceptions and must then satisfy a Panel that the measure is consistent with the chapeau of Article

156. *Ibid.* The Appellate Body, in *Shirts and Blouses*, determined that Article 6 of the ATC was a fundamental part of the rights and obligations of WTO Members and consequently a party claiming a violation of a provision of the WTO Agreement by another member had to assert and prove its claim. India was required to put forward evidence and legal arguments sufficient to demonstrate that the safeguard by U.S. was inconsistent with obligations assumed by the U.S. under Articles 2 and 6 of ATC. The onus then shifted to U.S. to bring forward evidence and disprove the claim. See also *LAN Computers*, part VI, para. 103.

157. *Canada—Administration of the Foreign Investment Review Act*, BISD 30S/140 (adopted 7 Feb. 1984). The Panel report in that case represented the first dispute where the burden of proof was allocated to the party claiming the exception. In that case, Canada was required to demonstrate that the purchase undertakings that foreign investors were required to enter into to ensure preferential buying of Canadian products, were necessary to secure compliance with the Foreign Investment Review Act, and therefore in accordance with Article XX(d) of the GATT 1947.

158. Article XI deals with quantitative restrictions. The Panel in *Canada—Import Restrictions on Ice Cream and Yogurt*, (1989) 36 Supp. BISD 68 at 85, refused to reverse the burden of proof under the requirements of Article XI:2(c)(i) to the claiming State because it would seriously affect the balance of tariff concessions that were negotiated among the contracting parties.

159. *Shirts and Blouses*, Section IV, p.16.

160. Part IV. Klabbers *supra* n.26 at 89 notes that although there was a consensus that the burden of proof rests on the party invoking Article XX, it was still unclear in GATT jurisprudence where the onus of proof rests with respect to the various elements of Article XX.

XX, which requires that the measure does not constitute arbitrary or unjustifiable discrimination between the countries or act as a disguised restriction on trade.<sup>161</sup>

The burden of proof issue was given a procedural context by the Appellate Body in the *Korea Milk* dispute. In that dispute, the appellant argued that the respondent did not meet its burden of showing a prima facie violation of Article 4 of the Agreement on Safeguards. The Appellate Body referred to *India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, providing that where the Panel considers the respondent's defence to a prima facie violation, it does not shift the burden of proof to the respondent.<sup>162</sup> In addition, this does not result in the Panel "making the case"<sup>163</sup> for the complainant. The Appellate Body concluded that the burden of proof was satisfied by the claimant who supplemented their submissions with answers to some of the Panel's questions at the first meeting of the parties.<sup>164</sup>

In anti-dumping and countervailing duty cases, the burden of proof rests on the party enforcing the measure. GATT 1947 Panels have refrained from ruling definitively on whether Article VI, authorising the use of countervailing duties, is an exception placing the burden of proof on the complaining party.<sup>165</sup> This would impose a hardship on the complainant since access to the facts and evidence underlying the retaliatory measure is usually held by the country imposing the measure and is potentially limited.

There are no WTO Panel reports addressing the legitimacy of a particular countervailing duty and therefore GATT jurisprudence offers the only guidance on this issue. In addition, there are no instructive cases on where the burden of proof would lie in cases of a measure alleged to be in violation of the Agreement on Technical Barriers to Trade (TBT Agreement). However, the TBT Agreement states that if a regulation is

161. *Reformulated Gasoline*, Section IV, p.21. The Appellate Body in *Shrimp-Turtle* disagreed with the Panel's analysis of Article XX, where the respondent would be required to justify its measure under the chapeau before asserting that its measure fell under the particular exception. Part VI, para. 122.

162. WT/DS90/AB/R, adopted 22 Sept. 1999, para. 143, (hereinafter *India—Quantitative Restrictions*).

163. This was found to occur in the *Japan—Measures Affecting Agricultural Products* (WT/DS76/AB/R), where the Appellate Body overruled the Panel's ruling concerning an issue that was not claimed by the United States. As a result, the claimant did not initially make out a prima facie case (Section VI, A para. 129).

164. According to the Appellate Body in TRIPs, with respect to fact-finding, the dictates of due process could better be served if Panels had standard working procedures that provided for appropriate factual discovery at an early stage in the Panel proceeding, Section VIII, para. 95.

165. *United States—Imposition of Anti-dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, GATT Doc. ADP 87 (adopted 27 April 1994), *EC Anti-dumping Duties on Audio Tapes in Cassettes Originating in Japan*, (unadopted).

in accord with “relevant international standards” and is adopted for a certain purpose, such as environmental protection, health and safety or consumer protection, it is rebuttably assumed not to create an unnecessary obstacle to trade.<sup>166</sup> The Appellate Body in *Beef Hormones* noted that a similar, although rebuttable, presumption exists under Article III:1 of the SPS Agreement.<sup>167</sup>

### C. Judicial Economy

Judicial economy is succinctly defined as an “attempt to settle as many issues as possible in a single proceeding.”<sup>168</sup> GATT 1947 Panel members, in the context of hearing two separate proceedings that involve similar parties and/or similar trade measures, discussed it. GATT 1947 Panels usually conducted disputes in a restrictive manner, addressing the issues framed only in the terms of reference.<sup>169</sup> Panels would not offer conclusions on issues not raised by the disputants,<sup>170</sup> and would not examine exceptions under the GATT 1947 unless the parties raised them.<sup>171</sup> After determining that a GATT 1947 violation existed, Panel members would refrain from discussing whether other GATT 1947 provisions were violated.<sup>172</sup> Applying judicial economy resulted in forgoing an Article XX analysis when no violation of the GATT 1947 was found.<sup>173</sup>

Where a party would refuse to have their complaint combined, GATT 1947 Panels would accede to this and two separate proceedings would

166. Article 2.5.

167. Part X, B. para. 170. However, the Appellate Body affirmed that, where a WTO member chooses a measure that is not based on an international standard, there must be evidence of a risk assessment pursuant to Article V:1 of the SPS Agreement. For application of the similar allocation of the burden of proof to subsidies cases under the SCM Agreement, see *Brazil—Aircraft*, section VI, paras. 139–141.

168. Nichols, *supra* n.9 at 403.

169. *European Communities—Refunds on Exports of Sugar*, (1979), 26 Supp. BISD 290. *Canada—Administration of the Foreign Investment Review Act*, (1984) 30 Supp. BISD 140. *European Economic Community—Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*, (1990), 37 Supp. BISD 86. *Herring supra*. One notable exception may be seen in *Dessert Apples*, at 124, where the Panel construed its terms of reference to instill authority to examine the matter in light of all relevant provisions, including those related to its interpretation and implementation such as the legitimate expectations created by the adoption of the report as well as other GATT 1947 practices, adopted Panel reports and the particular circumstances of the complaint.

170. *United States—Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil*, 39 Supp. BISD 128.

171. *Tuna-Dolphin I. Section 337 of the Tariff Act of 1930* (1989), 36 Supp. BISD 345.

172. *Tuna-Dolphin I, Tuna-Dolphin II, Norway—Procurement of Toll Collection Equipment for the City of Trondheim* 40 Supp. BISD 319 (1992).

173. *United States—Taxes on Automobiles*, 33 I.L.M. 1397 (1994), *United States—Section 337 of the Tariff Act of 1930*, 36 Supp. BISD 345 (1989). *Tuna-Dolphin I, European Economic Community—Regulation on Imports of Parts and Components*, 37 Supp. BISD 132 (1990).

result.<sup>174</sup> Article 9(1) of the DSU has codified the practice of joining disputes, giving a Panel full discretion to do this when it is requested by more than one WTO member. The concept of judicial economy evolved in WTO jurisprudence to outline the Panel's freedom to determine what issues it will respond to. The need for judicial economy is greater under the WTO. Each particular argument advanced by the parties is much broader in scope. Responding to all of them undermines the effectiveness of the DSB to respond expeditiously to complaints made by the parties. The WTO Agreements have ushered in a new era of international trade law that is more complicated than pre-existing GATT law. Panels are asked to rule on the provisions of the various agreements and the intricate relationship existing between them. There are numerous references to other international agreements as well as customary rules of interpretation of public international law. The historical GATT 1947 practice, including Panel decisions, further complicates contemporary international trade law.

Early DSB practice demonstrated in the *Reformulated Gasoline* and *Japan—Taxes* cases revealed that a response would follow on every issue that was pleaded. The Appellate Body in *Shirts and Blouses* ruled however that nothing in Article 11 of the DSU, or previous GATT practice, mandated an examination of all legal claims made by the complaining party. It was conceded that some Panels do take the liberty of deciding issues that are not absolutely necessary to the disposition of the particular dispute.<sup>175</sup> Although Panels may undertake to respond to all of the parties' claims, even where it is not essential to the resolution of the dispute, this was not evidence of a Panel's requirement under the DSU to address each one.

Panels are not required to address all of the parties' arguments but only those necessary to resolve a particular claim.<sup>176</sup> It must be clear from the report however that a Panel has reasonably considered a claim.<sup>177</sup> The Appellate Body added that in reviewing recent practice of WTO Panels, Panels will make findings only on claims that were necessary to resolve the particular matter, as long as they were stated in the terms of

174. In a footnote, the Appellate Body referred to the *Dessert Apples*, where the Panel determined that the impugned measures were in violation of Article XI:1 of the GATT 1947 and not justified by Article XI:2(c)(i) or (ii). No further examination of the administration of the measures was required in that dispute but the Panel deemed it appropriate to review the administration of the measures in respect of Article XIII in light of the questions of great practical interest that were raised by both parties.

See also *European Economic Community—Restrictions on Imports of Apples, Complaint by the United States*, (1989) 36 Supp. BISD 135; *Decision on Improvements to the GATT Dispute Settlement Rules and Procedures of 12 April 1989*, 36 Supp. BISD 61 (1989).

175. Section VI, p.21.

176. *Poultry*, at section VIII, para. 135.

177. *Ibid.*

reference.<sup>178</sup> This was in accordance with the basic aim of dispute settlement in the WTO, set out in Article 3.7 of the DSU, to secure a positive solution to a dispute.

Another feature of judicial economy is of a procedural nature. In *Reformulated Gasoline*, the Appellate Body denied attempts by Venezuela and Brazil to raise arguments on a matter that was not appealed. Venezuela and Brazil had failed to file appellants' submissions, pursuant to Rules 23(1) nor separate appeals under 23(4) of the Working Procedures,<sup>179</sup> but made new arguments on their submissions filing them under Rule 22. To permit Venezuela and Brazil to advance positions not mentioned in their initial submissions would force the Appellate Body to disregard its own procedures, which it would not do in the absence of a compelling reason based on grounds such as fundamental fairness or *force majeure*.<sup>180</sup>

The inverse of judicial economy occurs where a Panel or Appellate Body rules on issues that are not within the parameters of the case before it. Although this is common practice for tribunals and courts empowered to rule on the law within their jurisdiction, it might be expected from the ethos of the WTO system that the Dispute Settlement Body is limited to addressing the questions raised before. The GATT 1947 dispute resolution system did not feature an ongoing court or tribunal, but a mechanism activated by a party's request for it. This differs fundamentally from the WTO DSB that has a permanent status. It is not surprising that the Appellate Body would be willing to rule on matters outside the scope of the dispute as presented to it, so that ambiguities in the WTO Agreements can be clarified. In one sense, such "judicial activism"<sup>181</sup> can prevent future disputes over dubious terms.

178. *Ibid.* It must be kept in mind that a partial resolution of a dispute, by not responding to all the necessary claims, can create false judicial economy and therefore be in violation of Article 3:7. In *Australia—Measures Affecting Importation of Salmon*, WT/DS18/AB/R Section IV, E 1, para. 223–224, the Panel's failure to make any determinations on Article 5.5 and 5.6 of the SPS Agreement, potentially resulted in the disability of the DSB to make sufficiently precise recommendations to allow for compliance.

179. By contrast, the Panel proceedings are not subject to any procedural rules other than general guidelines stated in Appendix 3 to the DSU. This was something that was to be a subject of discussion at the Seattle Ministerial Conference as agreed in the *Singapore Ministerial Declaration*, adopted on 13 Dec. 1996, WT/MIN(96)/DEC, 18 Dec. 1996, para. 9. The Appellate Body in *Bananas* recommended that Panels develop standard working procedures (para. 144).

180. *Reformulated Gasoline* at para II.C.

181. Charnovitz, *supra* n.83 at 200. J. P. Gaffney asserts that the judicial activism is engaged by the Appellate Body because of its concern for the integrity of the dispute settlement system. "Due Process in the World Trade Organization: The Need for Procedural Justice in the Dispute Settlement System" 14 (1999) *Am. Univ. Int'l L. Rev.* 1173 at 1192.

*D. Terms of Reference*

The terms of reference form the jurisdictional boundaries for a Panel. They are important for two reasons: fulfilling an important due process objective by providing the other parties sufficient information concerning the claims at issue and allowing an opportunity to respond; and defining a Panel's jurisdiction.<sup>182</sup> As a result, all claims must be included in a request for a Panel and be sufficiently specified.<sup>183</sup> A Panel lacks the authority to consider claims not referred to in the terms of reference.<sup>184</sup> The provisions relied upon by the parties and the ones that are allegedly violated must be listed.<sup>185</sup> Omissions cannot be cured by a party's subsequent submissions or their statements to the Panel.<sup>186</sup> A Panel is precluded from modifying the explicit provisions of Article 7, in addition to other provisions of the DSU.<sup>187</sup>

A request for a Panel must be sufficiently precise since it forms the basis for the terms of reference pursuant to Article 7 of the DSU and it informs the defending party and third parties of the legal basis of the complaint.<sup>188</sup> The request must: be in writing; indicate whether consultations were held; identify the specific measures at issue; and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.<sup>189</sup> A claim must include the benefits that the respondent allegedly violated, nullified or impaired.<sup>190</sup> In the *TRIPs* case, the U.S. attempted to rely on unspecified provisions by using the words "including, but not limited to" in their terms of reference. This was deemed to be inadequate by the Appellate Body, who ruled that this was inadequate to "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly" as is required in Article 6(2) of the DSU. It ruled that there must be a brief summary,

182. *Desiccated Coconut*, Section VI, p.21. The European Community submitted that a request for an establishment of a Panel is to include: (a) the infringing measure; (b) the obligation under the WTO Agreement which is alleged to be violated; and (c) a brief explanation of the way in which the measure infringed the legal obligations. The Appellate Body did not specifically address this point but these arguments appear to have been recognised by the Appellate Body in the *Korea—Milk, infra* at para. 235.

183. Article 6:2 of the DSU.

184. *Desiccated Coconut*, Section VI, p.21, *Guatemala—Anti Dumping*, section V, paras. 86, 87.

185. *Bananas* at para. 143, TRIPS at section VIII, para. 91.

186. *Bananas, ibid, Korea—Milk, infra* n.245 at para. 143.

187. TRIPS, at section VIII, para. 92.

188. *Ibid* at para. 142.

189. *Korea—Milk*, WT/DS98/AB/R at Section IV, para. 120.

190. *Ibid*, para. 139. The Appellate Body added that a claim is distinguishable from an argument, which is adduced by a party to demonstrate the infringement. The distinction was applied to uphold the Panel's consideration of a Korean report on the challenged safeguard measure, which was not included in the request for a Panel. Para. 140.

providing the basis of the terms of reference and informing the party of the basis of the complaint.<sup>191</sup>

In compliance with Article 6(2), a simple listing of the provisions of the WTO Agreements that the parties allege were violated is arguably not sufficient. A contrary result occurred in *EC Bananas*, on the basis that the EC was not misled as to what claims were being asserted against them. However, in *Korea—Milk*, the Appellate Body ruled that where the listed articles do not present a single and distinct obligation for the parties, but rather multiple obligations, more is required to satisfy Article 6.2.<sup>192</sup> Essentially, the question comes down to the circumstances of the case,<sup>193</sup> with the major consideration being whether a party has been prejudiced in the dispute by an allegedly insufficiently pleaded claim. Panels are required to examine the request of a Panel “very carefully” to determine compliance with Article 6.2.<sup>194</sup> Under the current reasoning the prejudiced party is required to demonstrate how it has been affected by the omissions of the claiming party.<sup>195</sup> This may not be consistent with a clear procedural obligation on the claimant. Anything more than a *de minimis* test might alleviate some of the burden on a claimant to state its case as clearly as possible.

In *LAN Computers*, the Appellate Body regarded the alleged lack of precision of certain terms in the claim as not prejudicing the U.S.’s knowledge of the measures which were at issue. There was no requirement for the European Community to identify the individual products to which the claimed provisions applied, although it may have been necessary to identify them with respect to certain WTO obligations.<sup>196</sup> However, the terms used to identify the products did not impact the European Community’s ability to defend itself, and as a result, the fundamental rule of due process was not violated.<sup>197</sup> By measuring the effect of a procedural violation on the parties, the Appellate Body is affording some practical assessment, in order to exempt itself from a rigid interpretation of its rules.

Where the request for a Panel is insufficiently stated, a Panel or Appellate Body may refuse to address the complaint. The Appellate Body in the *Guatemala—Anti Dumping* dispute abstained from considering the substantive issues raised in the appeal since the merits of Mexico’s claims were not properly before them.<sup>198</sup> Mexico did not specifically

191. TRIPs at section VIII, para. 90

192. Section VI, para. 125.

193. *Ibid.*, at para. 128.

194. *EC Bananas*, section IV (a) 2, para. 142.

195. *Korea—Milk*, section IV, para. 131.

196. Section IV, para. 67.

197. Section IV, para. 70.

198. Section V, para. 89.

identify, in the terms of reference, the final anti-dumping duty as the measure at issue. Although the Panel chose to hear the dispute despite the procedural error, the Appellate Body overturned the Panel's decision to do so, leaving the dispute completely unresolved.

The notices of appeal are under similar requirements as the request for a Panel. Rule 20(2) of the Working Procedures for Appellate Review,<sup>199</sup> requires certain content including a brief statement of the nature of the appeal, including the allegations of errors in the issues of law covered in the Panel report and the legal interpretations developed by the Panel. According to the Appellate Body in *Shrimp-Turtle*, these requirements are met where the findings or legal interpretation of the Panel, which are being appealed, are identified as being erroneous with reasons given that support the submission provided.<sup>200</sup> Where there is no specific mention of the Panel finding, the defending party is seen as being prejudiced, resulting in the exclusion of the issue from the appeal.<sup>201</sup>

An example of "judicial activism" in this regard was evident in *Canadian Periodicals*. The Appellate Body overturned the Panel's application of the "like" products test, thereby reversing the finding that Canada was in violation of Article III:2. The Appellate Body continued with their analysis of the case by attempting to decipher whether the periodicals were "directly competitive or substitutable" under the second sentence of Art III:2. This was not requested by the parties, but by invoking the test, it allowed for justice to be applied so that a violation could still be found. This suggests that the Appellate Body retains a residual discretion to apply any part of the WTO Agreements in order to ensure fairness, especially in light of their lack of power to remand a case back to a Panel. The Appellate Body is wholly familiar with WTO law and does not have to rely on the parties' submissions in order to make a determination. Much like a specialist domestic court, they become legal experts of their own jurisdiction.

The importance of making a ruling in the absence of legal reasoning was equated with a "duty" or "responsibility" by the Appellate Body in *Shrimp-Turtle*.<sup>202</sup> The Appellate Body reversed the Panel's decision that the impugned measure was inconsistent with the chapeau of Article XX, but felt compelled to undergo the proper and complete analysis of a claimed exception by looking at the specific exceptions listed in Article XX. In the *Poultry* case, the Appellate Body acknowledged the possibility that a reversal of a Panel's ruling may necessitate making a determination on a legal issue not addressed by the Panel.<sup>203</sup> Completing the legal

199. (1997) WT/DS57/AB/R found at <http://www.wto.org/wto/dispute/ab3.htm>.

200. Section III B, para. 95.

201. See, *EC Bananas*, section IV(a) 4 at 152.

202. Section VI, para. 123.

203. Section IX (b) para. 156.

analysis allows the Appellate Body to properly dispose of the matter between the parties without the dispute beginning again before a Panel. The Appellate Body, being an organ of the WTO and servant of the objectives set out in the constituent instrument, holds a strong interest in establishing some finality to a matter and avoiding the endless delay involved in decision-making under formal procedures. In the cases where the Appellate Body was required to make legal conclusions that did not correct or endorse a Panel determination, there were facts on the record to permit the completion of the analysis. It is unlikely that the Appellate Body would adduce facts in the absence of any foundation provided by the parties, unless certain inferences could be made.<sup>204</sup>

The application of adverse inferences was given considerable attention by the Appellate Body in *Canada—Aircraft*. The Panel's failure to draw adverse inferences from Canada's refusal to provide requested information to the Panel was challenged. Although the power to make such inferences is limited in cases involving actionable subsidies under Annex V of the SCM Agreement, the appellant argued that this power should extend to prohibited subsidies. The Appellate Body agreed, asserting that this is general practice or usage by all international tribunals.<sup>205</sup>

#### *E. Standing and Representation*

The WTO dispute settlement bodies are designed to preside over disputes between WTO members, most of whom are States, but not all (for example Hong Kong). The DSU outlines the procedures for bringing a dispute in front of a WTO Panel or Appellate Body and accords certain rights to the parties to the dispute. Similar to any other judicial system however, the rules cannot anticipate every procedural or practical situation. Panels themselves are required to fill in the interpretive gaps in the rules so that parties to the dispute, as well as future complainants, can fully understand the proper procedure. The *EC Bananas* case is illustrative of attempts by the Panel to define its own rules.<sup>206</sup> It was a complex case, involving an intricate series of EC regulations concerning

204. One prescribed adverse inference is in the SCM Agreement, which allows a Panel to conclude that the complaining party suffered serious prejudice from an actionable subsidy, if the presumption of prejudice is not rebutted by the subsidising party (Art. 6).

205. *Canada—Measures Affecting the Export of Civilian Aircraft* WT/DS70/AB/R (hereinafter referred to as *Canada—Aircraft*, Section VIII, 1(c), para. 202. The general practice referred to was supported by international law jurisprudence such as the *Corfu Channel* case (1949, I.C.J. 4, at 18); *Case Concerning Military and Paramilitary Activities In and Against Nicaragua*, 1986 I.C.J. 14, pp.82–86, paras. 152, 154–156; and *Case Concerning the Barcelona Traction, Light and Power Company, Limited*, 1970 I.C.J. 3, p.215, para. 97.

206. For comparison, see the exercise of the Panel's authority under Article 9.3 of the DSU in *Beef Hormones*, which allows a party to harmonise disputes where more than one Panel examines the same complaints. The Panel granted third party status to the U.S. and Canada in each other's claims.

the importation of bananas that differentiated between traditional importing ACP<sup>207</sup> countries, non-traditional importing ACP countries, and non-ACP countries. There were six parties, including the EC representing 15 Member States, as well as 20 third parties. Since the number of third parties to the dispute was large, and their arguments varied from each other, the Panel granted broader participatory rights than those provided under the DSU.<sup>208</sup> The Panel based the decision largely on the fact that the widespread economic effect of the disputed EC banana regime on the third parties appeared to be large.

Similar to *locus standi* rules developed by national and international courts and tribunals, it was necessary for the Panel to determine third party rights since they are afforded the opportunity to be involved in a dispute because of their general presumed interest of freer international trade is affected. In response to the EC's claim that the U.S. lacked a right to raise claims on trade in goods since its production of bananas was minimal and its exports nil, thereby precluding any nullification or impairment of WTO benefits,<sup>209</sup> the Panel, as well as the Appellate Body, agreed that having a legal interest was not a prerequisite for the establishment of a Panel under Articles 3:3 and 3:7.<sup>210</sup> Actual trade impacts were not required to be shown since WTO disputes are partly concerned with the threat to competitive opportunities and potential trade effects. Moreover, each party has an interest in a determination of rights and obligations under the WTO Agreements. A member's interest in the potential interference with trade in goods and services and its stake

207. African, Caribbean and Pacific countries.

208. DSU, Article 10 and Appendix 3. Article 10 affords third parties an opportunity to be heard and make written submissions (Art. 10(2)) and have access to the disputants' submissions (Art. 10(3)). Third parties were permitted to participate in Panel proceedings under GATT Panel practice, including the right to submit written comments to Panels and to make oral arguments. (*United States—Customs Users Fees*, 35 Supp. BISD 245 (1988), *Panel on Japanese Measures on Imports of Leather*, 31 Supp. BISD 94 (1984), *Japan—Trade in Semi-Conductors*, 35 Supp. BISD 116 (1988). Steger and Hainsworth, *supra* n.6 at 21, add that at the time of negotiation of the DSU, it was not anticipated that several cases would involve multiple complainants and that the members would use the provisions of Article 10 to participate as third parties. Steger, *supra* n.6 at 7 notes that the easier access for third parties to a dispute will create a greater problem for finding Panellists who are acceptable to all of the parties to a dispute.

209. The EC argued that the U.S. did not have an effective WTO remedy. With no effective remedy and absent any authority of the Panel to issue a declaratory judgment or advisory opinion in the WTO dispute settlement system, the EC claimed that the U.S. was unable to raise a "goods" issue because it had no legal right or interest therein.

210. See Appellate Body, *Bananas* at paras. 132,133. The I.C.J. established a general rule in international law that a complaining party must have a legal interest in order to bring a case. See *South West Africa Cases*, (Second Phase), (1966) I.C.J.R. 4, *Case Concerning the Barcelona Traction, Light and Power Company Limited* (Second Phase), (1970) I.C.J.R. 4, *Mavrommatis Palestine Concessions Case*, (1925) Series A, No. 2, 1, S.S. "Wimbledon" (1923) Series A, No. 1, 1 (P.C.I.J.), (*Case Concerning the Northern Cameroon* (1963), I.C.J.R. 4.

in a determination of rights and obligations under the WTO Agreement each provide sufficient grounds to establish a right to pursue WTO dispute settlement. The United States was found to have standing in that it was a producer of bananas and therefore had a potential export interest. Moreover, the EC banana regime could render effects on the global supplies and world prices of bananas that may impact the internal banana market of the United States. The increased interdependence of the global economy elevates the significance for members in having the WTO rules enforced.<sup>211</sup>

Another determination by the Panel in the *EC Bananas* dispute concerned a party's ability (St. Lucia) to retain its own legal counsel, who were not government officials or nationals, to participate in the actual proceedings. The Panel limited participation to only government officials of the parties, as private lawyers were not subject to governmental disciplinary protocol such as the duty of confidentiality. Proceedings of both the Panel and the Appellate Body are considered closed proceedings and are treated as confidential under Article 17:10 of the DSU. It was held that by admitting private lawyers, it would also create a disproportionately higher financial burden on smaller countries that lack the financial resources to retain private counsel and alter the character of WTO dispute settlement proceedings away from being primarily an intergovernmental affair. These were unpersuasive arguments. The Appellate Body reversed this finding, holding that there was nothing in the DSU, other WTO Agreements or even customary international law or practice preventing a WTO member from determining the composition of its own delegation.<sup>212</sup> The freedom of a party to choose its representatives was upheld. The Appellate Body noted that maintaining this discretion accommodates developing countries that lack the legal expertise within their own governmental organs. Appellate matters involve complex technical legal issues. Therefore, the need for outside legal expertise is graver.<sup>213</sup> There is a paramount need for parity between the parties where developing countries have equal access to the WTO remedies not impeded by the disparities of dispute resolution

211. The Appellate Body cautioned that the factors supporting the U.S. standing was not necessarily dispositive in another case. Section IV, A 2, para. 138.

212. Section I, A. para. 12.

213. For a more detailed discussion of the role of outside counsel in the WTO dispute settlement system, see Marco C.E.J. Bronkers and John H. Jackson, Editorial Comment: Outside Counsel in WTO Dispute Processes, (1999) 2 *J. Int'l Econ. L.* 155.

resources.<sup>214</sup> The use of outside counsel facilitates developing country access to the DSB.

This ruling was reinforced by the Panel decision in *Indonesia Automobiles*.<sup>215</sup> In that dispute, the U.S. claimed that certain non-government officials be excluded from the Panel proceedings. The Panel held that it was up to the Indonesian government to determine the composition of its delegation to the meetings. In response to the fears about the potential breach of confidentiality from the engagement of non-government personnel, the Panel obtained express affirmation from the parties that the individuals attending the hearings were representatives of the respective governments and would comply with the DSU obligations regarding confidentiality. Members would be held responsible for the actions of their representatives. This is all perfectly consistent with practice in other international tribunals. Members just put their legal counsel on their delegations. There is no reason why this should be controversial. Selecting the best possible representation of the interest of the State in dispute first makes sense.

The significance of these decisions underscores the function of the DSB as a judicial dispute resolution body and not an official political forum for trade discussions. As dispute resolution becomes more judicialised, the scope of the matters brought before a Panel has become much greater. Disputes are tackling issues that encroach on matters connected to international trade, beyond that covered by trade policy before 1994. The involvement of the private sector in WTO disputes is becoming the norm.<sup>216</sup> Although dispute resolution is essentially an inter-State regime, there will be an increasing interest of trade associations<sup>217</sup>, business

214. Article 27(2) recognises the need to provide additional legal advice and assistance in respect of dispute settlement to developing country members and requires the Secretariat to make available a qualified legal expert from the WTO technical co-operation services to any requesting developing country members. Some developed WTO member countries have recently provided financial support for a WTO Legal Advisory Centre for developing countries, which will be based in Geneva.

215. *Indonesia—Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, (2 July 1998), para. 14.1.

216. Section 301 of the US Trade Act allows a U.S. commercial interest, that is harmed by illegal or unfair actions, to petition a U.S. trade representative to commence an investigation. Similarly, under the EC New Commercial Policy, a firm can force the EC to react to obstacles to trade that is adopted by a third country that causes injury or adverse trade effects. The dispute between Japan and the U.S. (*Japan—Measures Affecting Consumer Photographic Film and Paper* WT/DS44/R), was effectively a dispute between two large camera companies, although both countries were seeking a longer term interest.

217. In *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R (10 May 2000), (hereinafter *US—Countervailing Duties on Steel Products*), the American Iron and Steel Institute and the Speciality Steel Industry of North America submitted amicus briefs to the Appellate Body, which were accepted but were not found to be necessary for the Appellate Body's deliberations.

groups and NGOs in the outcome of decisions. The *Shrimp-Turtle* dispute was the first occasion where an unsolicited amicus brief was submitted to the Panel. No provision in the DSU, nor previous practice, determined whether this was permissible in a system open exclusively to members. The Panel ruled that accepting non-requested information from non-governmental sources was incompatible with the DSU. The Appellate Body overruled the Panel, holding that Panels have full discretion to entertain unsolicited information although they are not under any obligation to do so. They resorted to interpreting Article 13, authorising a Panel to receive information from a relevant source.<sup>218</sup> What was relevant did not depend so much on where it came from but only if the Panel requested it. The only way non-solicited information could come before the Panel was if the submission was annexed to the party's submissions.<sup>219</sup>

The scope of Article 13 had been discussed in previous Appellate Body rulings. In *Beef Hormones*, the Appellate Body upheld the discretion available to a Panel to seek information and advice as they deemed appropriate.<sup>220</sup> This is to include obtaining information from a party to the dispute.<sup>221</sup> The scope of Article 13 was expanded upon in the *Footwear* case, where the Appellate Body ruled that it is not required to seek information or consult experts in every case, having the discretion not to do so.<sup>222</sup> It is important for the Panel to shape the process of its fact finding and legal interpretation and avert the bombardment of non-requested material. Much like a court, effective Panels need to be the masters of

218. Article 13 empowers a Panel to seek information and technical advice from any individual or body which it deems appropriate. As part of this authority, they can request an advisory report from an expert review group with respect to a factual issue. A similar power was found to exist for the appellate body in *US—Countervailing Duties on Steel Products*, Section III, para. 42.

219. *Shrimp-Turtle*, section III, paras. 88–91. The amicus brief submitted by the Center for Marine Conservation and the Center for International Environmental Law was attached to the U.S. claim, while the WWF brief was not at the Panel stage. However, there is evidence that the WWF brief was read by the Panel since the presentation of the evidence in the Panel report was based on the conservation facts adduced by the WWF experts. The Appellate Body of course determined that it could look at the submissions and the U.S. enabled the two briefs to be presented at that stage.

220. Section IX, A, para. 147.

221. *Canada-Aircraft* at Section VII, 1, para. 202.

222. Para. 84. This would include the freedom to decide not to consult with the IMF. The ruling was reaffirmed by the Appellate Body in *Shrimp-Turtle*, which added that a Panel can determine the need for the information, ascertain its acceptability and relevancy and then decide what weight to ascribe to it. See also *Beef-Hormones*, where the Panel's discretion to determine whether an expert review group is necessary or appropriate under the SPS Agreement was recognised by the Appellate Body. (Section IX, A, para. 147.)

their own proceedings. Where there are factual gaps, a Panel should be able to compile the necessary information to support its ruling.<sup>223</sup>

#### APPLICATION OF GENERAL PRINCIPLES

##### *A. State Responsibility*

AN analysis of WTO jurisprudence cannot exhaust the possible international or general legal principles that may guide Panel decision making. However, GATT 1947 Panel reports are likely to be an expansive source of (re)new(ed) arguments. For instance, an indirect reference was made to the principle of State responsibility by the Appellate Body in *Shrimp-Turtle*, where the United States was held to be responsible for acts of its departments and branches including its judiciary. The U.S. Court of International Trade had ordered that the requirement that all shrimp importing countries use TEDs be universally applied, thereby giving most countries only four months to implement such an obligation.<sup>224</sup> The ruling had a discriminatory effect, rendering the U.S. government responsible for incompatibility with WTO commitments.

The relevance of State responsibility is apparent when determining whether certain measures can be impugned as attributable to a Member State. It was implicitly applied in a few GATT 1947 disputes.<sup>225</sup> The GATT 1947 Panel ruled in the *Japanese Agricultural Products* case<sup>226</sup> that non-binding and voluntary government measures, aimed to encourage Japanese farmers to restrict internal production, were held effectively to be government measures under Article XI:2(c)(i) of GATT 1947. In the EEC *Apples* case, private consumer organisations in the EEC were authorised to withdraw the marketing of fruit and vegetables under certain circumstances such as overproduction. When there was market withdrawal, the EC would pay compensation to farmers. Chile asserted that this system of market withdrawal was not a government measure under ART XI:2(c), because it was carried out by private organisations on a voluntary basis. The Panel disagreed, concluding that the regime was

223. This can also compensate for the real possibility that the complaining party is unable to obtain all relevant facts needed to support its case and the defending party is often reluctant to disclose all relevant facts, especially those that may weaken its defence. J. Cameron and S. J. Orava, *GATT/WTO Panels Between Recording and Finding Facts: Issues of Due Process, Evidence, Burden of Proof, and Standard of Review in GATT/WTO Dispute Settlement* (unpublished paper) (1999) at 9 [soon to be published in F. Weiss, *Improving WTO Dispute Settlement Procedures*, Cameron May 2000.

224. Para. 177.

225. See C. Tiete, "Voluntary Eco-Labeling Programmes and Questions of State Responsibility in the WTO/GATT Legal System" (1995) 29 (5) *Journal of World Trade Law* 123 at 148.

226. (L/6253—35S/163) (2 Feb. 1988).

established by Community regulations, with its operation depending on Community decisions fixing prices and on public financing. It was therefore a measure pursuant to Article XI:2(c)(i). As a result, the government measures designated in EC Regulation No. 1035/72 were considered to be acts of State.<sup>227</sup>

Another dimension of State responsibility is the relationship between domestic and international law. The *Footwear* Panel discussed the use of national law to excuse an international trade obligation. Argentina argued that they were not in violation of Article II since their legal system afforded an adequate judicial remedy to correct any apparent breach. The Argentine Constitution provided that international law would take precedence over national legislation and all Argentine judges were obligated to recognise the supremacy of WTO rules over inconsistent Argentine measures. The Panel rejected this argument. Although Argentine judges were required to recognise the supremacy of WTO rules over an inconsistent Argentine measure, a party can still be in violation regardless of any available judicial remedy.<sup>228</sup> Being forced to pursue this remedy could be time-consuming, causing inevitable delay and uncertainty in such procedure, which is fundamentally at variance with the WTO principles and the aim of tariff bindings that are to provide predictability and security for international trade. In a footnote, the Panel noted that there is a general rule of international law that a State cannot plead provisions of its own law (or deficiencies in that law) as a defence to a claim against it for an alleged breach of its obligations under international law.<sup>229</sup> A WTO Member cannot assert that its internal system provides for a remedy to certain individuals, either national or foreign, so that it could never be in violation of a WTO agreement.

### *B. Estoppel*

Another principle of international law considered by Panels is estoppel. Originating in both civil and common law, estoppel prevents a State from denying a clear and unequivocal representation made with the intention that it should be relied on. Estoppel is shown where the other party, relying on the representation, changes its position to its detriment or

227. If a government effectively influences and controls private activity, it loses the element of autonomy and is therefore an act of State. See Tietje, *ibid* at 151. See also the GATT 1947 Panel report, *Japan Trade in Semiconductors*, adopted 4 May 1988, 5th Supp., BISD 1986, where the Panel held that third party monitoring under the Agreement Concerning Trade in Semiconductor Products (2 Sept. 1986, 25 I.L.M. 1409), constituted an act of state imposing a quantitative restriction contrary to Article XI:1.

228. This part of the Panel's ruling is good law as Argentina refrained from appealing this part of the ruling. Section VI 3, para. 6.68.

229. The Panel referred to *Free Zones of Upper Savoy and the District of Gex*, 1932, P.C.I.J., Series A/B, case No. 46, p.167, in n.198.

suffers some prejudice.<sup>230</sup> It has been explicitly recognised in trade dispute. In the *German Starch* case,<sup>231</sup> the Benelux governments complained that Germany had not acted on its promise to reduce its tariffs immediately on varieties of starch. Germany's promises were manifest in the form of a general assurance made during the negotiations that their duties would be reduced as soon as possible and that Germany would commence negotiation of the tariffs in 1952. Detrimental reliance was evidenced by the Benelux governments' unreciprocated tariff concessions, given during the negotiations, which were based on the promise of future German tariff reductions. The ruling was not determinative in the dispute as the Panel recommended that the parties find an acceptable resolution of the problem. Therefore, in what can be considered *obiter dicta*, the Panel noted that the subsequent agreement by Germany to grant tariff concessions implied that Germany would have been estopped from refusing to provide the expected tariff concessions.<sup>232</sup>

### C. Abuse of Rights

The abuse of rights (*abus de droit*) doctrine is rooted in the principles of good faith and equity.<sup>233</sup> It prohibits action that, while not contrary to the letter of the law or agreement, deviates from their purpose and frustrates legitimate expectations relating to the exercise of the corresponding obligations.<sup>234</sup> If the assertion of the right "impinges on the field covered by a treaty obligation, it must be exercised bona fide, that is to say reasonably".<sup>235</sup> The doctrine was applied in a trade context in the

230. See *North Sea Cases*, (1969) I.C.J. Rep. 26, *Temple of Preah Vihear*, (1962) I.C.J. Rep. 143, *Gulf of Maine Case*, (1984) 309. Claims based on acquiescence and estoppel were accepted in a 1990 GATT 1947 arbitration award on *Canada/EC Article XXVIII Rights*, where Canada was ruled to have relinquished its rights under the GATT 1947, remaining silent during the negotiation of a bilateral wheat agreement. (GATT BISD 37S/80.)

231. (1950) BISD 3S/77-*German Import Duties on Starch*. See also *EEC—Members Import Regimes for Bananas*, 1993.

232. The principle of estoppel was submitted to the Panel in the *Shrimp-Turtle* dispute. It was advanced in the WWF amicus brief to preclude the complainant States from challenging the U.S. law prohibiting the imports of shrimp captured without Turtle Excluder Devices. It was submitted that, under the principle of *nullus commodum capere de sua injuria propria*, (no man can be allowed to take advantage of his own wrong), the complainant States, who are in violation of their international commitments to protect turtles and therefore in breach of international law, are denied redress under another remedial regime such as the WTO. Neither the Panel nor the Appellate Body addressed this argument.

233. Petersmann, *supra* n.5 at 178; *Certain German Interests in Polish Upper Silesia*, (1926) P.C.I.J., Ser A, no. 7, 30. See also A. Kiss, "L'Abus de Droit en Droit International", (1953) *Recueil des Cours*.

234. *Ibid.*

235. This is a quote from B. Cheng, *General Principles of Law as applied by International Courts and Tribunals* (Stevens and Sons, Ltd. 1953) referred to in the *Shrimp-Turtle* Appellate Body report. The doctrine was not applied directly by the Appellate Body but it did underline its premise that a misuse of an exception of Article XX occurs where it is exercised in an arbitrary or unjustifiable manner.

*Ammonium Sulphate* case.<sup>236</sup> In that case, Chile and Australia negotiated for mutual tariff concessions on ammonium sulphate fertilisers. Australia discontinued its system of subsidies for Chilean fertilisers that was in place at time of negotiations. Chile complained that its expected benefits under the GATT 1947 were impaired by the withdrawal. During negotiations, Chile's concession was reasonably based on the assumption that the subsidies would continue as they had existed for years. Australia replied that it had no obligation under the GATT 1947 to continue subsidising foreign production. The Panel conceded that the removal of a subsidy did not result in nullification or impairment of benefits. However, the situation at the time of negotiations was such that Chile relied on the subsidy of which the removal created an imbalance in trading relations. Chile was ruled to have a legitimate expectation of the subsidy not being revoked, basing their own concessions on the availability of the subsidy.

#### *D. Exhaustion of Local Remedies*

The requirement of prior exhaustion of local remedies<sup>237</sup> is not readily applicable to trade disputes.<sup>238</sup> No party under the GATT 1947, nor any WTO member, has ever raised the argument in a trade dispute.<sup>239</sup> Exhaustion of local remedies would be more relevant to cases involving the violation of individual rights protected under international law governing human rights, foreign investment, or the protection of property. However, the rule of exhaustion of local remedies may arise in disputes involving anti-dumping, subsidies, countervailing duties, safeguards measures and intellectual property rights granted under the TRIPS Agreement. Individuals may be involved in and may derive certain rights from the procedures established under WTO Agreements.<sup>240</sup> GATS protects the rights of services, suppliers and commercial interests of particular enterprises<sup>241</sup> and obligates the parties to create independent review procedures at the domestic level.<sup>242</sup> The WTO Anti-Dumping and Subsidies Agreement requires members to maintain judicial, arbitral or administrative tribunals or procedures for the purpose

236. *The Australian Subsidy on Ammonium Sulphate*, 3 April 1950, BISD II/188.

237. *Case Concerning Elettronica Sicula S.p.A. (ELSI)* I.C.J. Rep. 1989, 15.

238. E.U. Petersmann, *The GATT/WTO Dispute Settlement System*. International Law, International Organizations and Dispute Settlement (London: Kluwer Law International, 1997) at 242.

239. One dispute where the principle appeared was the *Grey Portland Cement* case, (GATT Doc. ADP/82), where the Panel noted that there is nothing in the GATT 1947 explicitly requiring the exhaustion of administrative remedies.

240. Kuijper, *supra* n.20 at 65.

241. Article III.

242. Article IV.

of prompt review of administrative actions relating to final determinations and reviews of such determinations.<sup>243</sup> Both the TRIPS Agreement<sup>244</sup> and the Agreement on Government Procurement,<sup>245</sup> have similar provisions. The availability of a local remedy would reinforce WTO members' obligation to at least explore domestic avenues of redress, through a private person's or company's initiative in a violating party's jurisdiction, before going to the DSB. As the private sector engages more frequently in trade disputes, especially in the early stages, the likelihood of arguments evincing exhaustion of local remedies becomes greater.<sup>246</sup>

#### CONCLUSIONS

THE advent of the DSB marks an exciting epoch in the development of international trade law. Decisions by Panels, and especially the Appellate Body, carry a great deal of importance for governments, businesses and the citizens who are ultimate beneficiaries of the law. The thoroughness of the rulings, the precision of the reasoning and the clarity of the opinions will assist the parties in navigating the complexities of the WTO regime and yet all these attributes remain controversial. More scrutiny is inevitable with more disputes. The failure in Seattle to negotiate an agenda for a new round has left many conflicts unsettled. Where negotiations for new agreements fail to provide an agreed solution, dispute settlement through law becomes even more necessary. Many unresolved issues will go to the DSB, increasing an already burdensome workload.

The DSB is still at an early stage in its development. A review of the DSB has failed to make progress since the Ministerial meeting held in Seattle in 2000. This would have afforded an opportunity to improve upon existing procedures and rectify certain difficulties. Numerous disputes have been resolved and subsequently adopted by WTO members through the negative consensus system. However, disagreements persist over how the dispute is to be resolved following an Appellate Body decision.<sup>247</sup> Prompt compliance with the result is essential to ensuring the termination of disputes and restoring faith in the system.<sup>248</sup> Although the DSB is the final adjudicator of international trade disputes, it cannot supplant the inherently political character of international trade regulation. It can only

243. Article XIII.

244. Articles 41–50, 59.

245. Article XX.

246. The *ELSI* case, *supra* n.293, noted that the exhaustion principle cannot be implicitly dispensed with by States but must be specifically excluded by a treaty, which none of the WTO Agreements appear to do.

247. Both the *Beef Hormones*, *Brazil-Aircraft* and *Bananas* disputes resulted in sanctions imposed against the European Union in light of their failure to comply with their respective decisions.

248. Article 21:1 of the DSU.

act when a dispute is brought before it. Lacking an enforcement arm, its judicial function limits its capacity to achieve real world solutions to trade problems. A whole panoply of other actors is required for that. The law can, nonetheless, set a rational course for trade relations and assist in creating the conditions for more and more certain exchanges of goods and services across borders. Whilst providing a dependable structure for those that trade it can through the use of general principles incorporate societal values and maintain trust in the institution.

Perhaps the success of the DSB is more evident when looking at the evolutionary process of dispute resolution. Panels are no longer created on an ad hoc basis while parties are aware of the possibility of sanctions, in addition to the rebuke of other WTO members, when DSB decisions are not adhered to. Rulings are not isolated judgments that resolve particular disputes exclusively relevant to the parties. The DSB is now the last word in interpretation. Although there is no precedent or principle of *stare decisis* and the DSB does not have any law-making powers, their decisions add to a rich body of jurisprudence that expand and qualify the meaning of the WTO Agreements. It pre-empted future misunderstandings between members and lends authority to positions argued for while engaging in future trade negotiations.

The development of WTO case law can be viewed as contributing to the larger evolution of international law. Its rulings develop international legal jurisprudence. At the institutional level, the global community becomes more secure with the knowledge that an international dispute resolution regime can function in a mutually satisfactory, principled and efficient, way. The judicial character of the Appellate Body enables it to exercise authority over the WTO parties, reinforces it as a neutral body that favours no party while supporting the integrity of the regime itself. Its position as an independent adjudicator enhances its potency to build a lasting and legitimate international institution.

We know there is still much to be done to improve the functioning of the DSB so that it is able to integrate important societal values connected to trade in a global economy. Nonetheless, in the future, we hope to be able to assess positively the role of the DSB as an institution maintaining peace and security in the international order. The path is set for its emergence as the authority on the regulation of trade relations and global commerce. The need for an objective, fair and professional body will be great, at a time when international trade reaches visible prominence in the global community. Correspondingly, the issues, swirling around the non-trade phenomenon of globalisation, become more complex, picking up and mixing other potent interests. The credibility of such an institution will, in part, be measured by its jurisprudence. We are only at a nascent stage of development for the DSB but its authority continues to grow. The careful linkages which have been made between the specialised system of

rules in the WTO and general principles of international law have aided the growth in credibility. These general principles are founded in the moral purpose of the law, they are essential to a just legal order no matter how technical the rules which are to be applied to a set of facts at the heart of a dispute. Whilst there is much that the new WTO system and those who serve it can learn from general international law there is a great deal that can and should flow back into the old vessel. International lawyers can study international law in action, cases emerging from matters of concern to the major players in our contemporary global economy. Here in the WTO DSB we need endure no angst as to our relevance.