

CHALLENGES AND PROSPECTS
FOR THE WTO

Andrew D Mitchell

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WHAT IS THE MEASURE AT ISSUE?

ALAN YANOVICH* AND TANIA VOON†

This chapter examines the nature of ‘measures’ challenged in the WTO dispute settlement system. Broadly speaking, any act or omission attributable to a WTO Member may be challenged before a WTO panel and the Appellate Body. However, the success of the challenge may depend on whether the measure is challenged as such or as applied in a particular instance, whether the measure is mandatory or discretionary, and, of course, the provisions of the specific WTO agreement under which the challenge is brought. Members have challenged a wide range of measures in past disputes, sometimes involving non-government entities, and often but not always embodied in a formal legal instrument such as legislation or regulations. In many cases, the precise definition of the measure at issue is at once extremely difficult and extremely important — this definition will establish the scope of the dispute and the obligations of the responding Member in the event that the measure is found inconsistent with WTO obligations.

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The views expressed in this chapter are those of the authors and do not necessarily reflect those of the Appellate Body or the World Trade Organization.

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I INTRODUCTION

Practitioners who have appeared before WTO panels or the Appellate Body will undoubtedly find familiar the question in the title of this chapter. The measure at issue is a central element in any dispute brought to the WTO. According to Article 3.3 of the DSU, one of the purposes of the WTO dispute settlement system is '[t]he prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by *measures* taken by another Member'.¹ The measure challenged in a particular dispute will determine the scope of the panel's jurisdiction and the factual and legal issues to be resolved. If the measure is not properly described in a complainant's request for consultations or request for establishment of a panel, this may cause problems for the complainant as the dispute proceeds.² The measure at issue is also important for implementation. Specifically, the measure at issue in a given dispute is generally the measure that will need to be modified or withdrawn if it is found to be inconsistent with WTO obligations.

Issues related to the identification of the 'measure' have been raised in a number of disputes since the WTO dispute settlement system was established in 1995. This chapter provides an overview of some of these issues. We begin by looking at the measures that are 'challengeable' in WTO disputes according to the WTO agreements, as interpreted by panels and the Appellate Body. Next, we examine and classify the types of measures that have in fact been challenged to date. We then consider how the relevant measure is defined in the context of a specific dispute. Finally, we offer a few concluding remarks.

II WHAT MEASURES MAY BE CHALLENGED IN A WTO DISPUTE?

A *Defining the Term 'Measure'*

1 GATT 1994 and the DSU

Dispute settlement in the WTO can be traced to Article XXIII of GATT 1994. Article XXIII:1 recognises three circumstances in which a Member may resort to dispute settlement proceedings — namely where the Member considers that any of its benefits under the covered agreements are being 'nullified or impaired' or that the attainment of any objective of the covered agreements is being impeded as the result of:

¹ Emphasis added.

² See DSU, arts 4.4, 6.2, and 7. See also sections IV.A and B below.

(a) the failure of another Member to carry out its obligations under this Agreement, or

(b) the application by another Member of any measure, whether or not it conflicts with the provisions of this Agreement, or

(c) the existence of any other situation ...

A claim under Article XXIII:1(a) of GATT 1994 is typically known as a 'violation' complaint because, for the complaining Member to succeed, it must establish that the responding Member has violated or acted inconsistently with a WTO provision. In contrast, a claim under Article XXIII:1(b) is typically known as a 'non-violation' complaint because the complainant need not establish that the respondent has violated any WTO provisions in order to succeed.³ However, if the challenged measure is not inconsistent with a WTO provision, the complainant must demonstrate that the measure nullifies or impairs its benefits or impedes a WTO objective.⁴ Non-violation complaints are less common,⁵ and may be more difficult to prove, than violation complaints.⁶ Typically, a non-violation complaint is made in connection with subsidies — the complainant argues that the introduction of a subsidy by another Member nullifies or impairs the complainant's benefits under the WTO agreements (in particular, the benefits of negotiated tariff concessions).⁷ The so-called 'situation' complaints described in Article XXIII:1(c) of GATT 1994 are an even rarer breed.⁸

Only Article XXIII:1(b) of GATT 1994, which deals with non-violation complaints, uses the term 'measure'. In contrast, under the DSU, the concept of a measure is used in respect of both violation and non-violation

³ Appellate Body Report, *EC – Asbestos*, para 185. The Appellate Body emphasised at paragraph 187 that a claim may be brought against a measure under Article XXIII:1(b) 'whether or not' it violates a WTO provision. See also: Appellate Body Report, *India – Patents (US)*, para 39; GATS, art XXIII:3.

⁴ A measure that is inconsistent with a WTO obligation 'is considered *prima facie* to constitute a case of nullification or impairment': DSU, art 3.8. By its terms, this rebuttable presumption does not apply to measures that are WTO-consistent.

⁵ See the disputes listed in Jeffrey Waincymer, *WTO Litigation: Procedural Aspects of Formal Dispute Settlement* (2002) 92. See also the discussion of non-violation complaints in Appellate Body Report, *India – Patents (US)*, paras 38–41.

⁶ For example, Article 26.1(a) of the DSU specifically requires the Member making a non-violation complaint to 'present a detailed justification in support of any complaint relating to a measure which does not conflict with the relevant covered agreement'.

⁷ See, eg, GATT Panel Report, *EEC – Oilseeds I*; Working Party Report, *Australia – Ammonium Sulphate*; GATT Panel Report, *EEC – Canned Fruit*. See also WTO Secretariat, *A Handbook on the WTO Dispute Settlement System* (2004), 32–34.

⁸ Appellate Body Report, *India – Patents (US)*, para 39.

complaints. Article 3.7 of the DSU states that, '[i]n the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements'. The frequent reference to the term 'measure' throughout the DSU suggests that it is a central element of any violation complaint brought to the WTO dispute settlement system.⁹ As for non-violation complaints, in describing the applicable procedures, Article 26.1 of the DSU retains the language of GATT 1994 and refers to 'the application by a Member of any measure'. The concept of a measure does not appear, however, in Article 26.2 of the DSU, which applies to situation complaints.

Notwithstanding the importance of the term 'measure', the DSU does not define it. Accordingly, we now consider the meaning ascribed to that term by WTO panels and the Appellate Body.

2 Act or Omission Attributable to a WTO Member

The Appellate Body recently discussed what constitutes a measure for the purpose of WTO dispute settlement in *US – Corrosion-Resistant Steel Sunset Review*. In that appeal, the Appellate Body stated that:

In principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings.¹⁰

The requirements articulated by the Appellate Body that a measure be (a) an act or omission and (b) attributable to a WTO Member are similar to the requirements that might be seen as applying in a general international law context.¹¹ We consider these two requirements in turn.

As discussed further in sections II:C and III of this chapter, an 'act' could be a particular legislative provision, an administrative decision, a judicial ruling, or many other types of instruments alleged to be inconsistent with a WTO obligation, such as an obligation to refrain from imposing

⁹ See, eg, DSU, arts 4, 6, 10, 12, 19, 21, 22 and 24.

¹⁰ Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para 81 (footnote omitted), cited in Panel Report, *US – Oil Country Tubular Goods Sunset Reviews*, para 7.136.

¹¹ The Articles on State Responsibility adopted by the International Law Commission in 2001 (ILC Articles) define an internationally wrongful act of a State as 'conduct consisting of an action or omission' that is 'attributable to the State under international law' and constitutes a breach of an international obligation (Article 2): *Report of the International Law Commission, Fifty-third Session, A/56/10*, Chapter IV. The United Nations General Assembly took note of the ILC Articles in 2001: GA Res 83, GAOR 56th Sess, UN Doc A/RES/56/83 (2001). See also James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002).

particular trade restrictions. But how could a Member challenge an 'omission' in the WTO? Several of the WTO Agreements contain provisions mandating certain action by WTO Members, and a Member's failure to take the required action may be challenged by another Member.¹² For example, in *India – Patents (US)*, India was found to have acted inconsistently with the TRIPS Agreement in failing to establish a mechanism for granting exclusive marketing rights to products subject to a patent application.¹³ Another example of an omission challenged in the WTO arose in *Canada – Wheat Exports and Grain Imports*. The measure challenged by the United States in that case included the alleged failure by Canada to exercise its authority to supervise the Canadian Wheat Board, a state trading enterprise notified under Article XVII of GATT 1994.¹⁴ The ongoing panel proceedings in *EC – Approval and Marketing of Biotech Products* also relate to omissions. For example, in its request for establishment of a panel, Canada challenges 'measures' such as 'the failure by the EC to consider or approve, without undue delay, applications for approval of' certain products.¹⁵

The second element of the Appellate Body's definition of a measure is that it be 'attributable to a WTO Member'. This requirement is reflected in Article 3.3 of the DSU, which provides:

The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by *measures taken by another Member* is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.¹⁶

This provision suggests that a measure subject to WTO dispute settlement must be 'taken by' a Member of the WTO.¹⁷ A WTO Member may be a State (that is, a country such as Brazil), or a separate customs territory¹⁸ (for example, Hong Kong, China). The European Communities is also a

¹² *Handbook*, above n 7, 39; Appellate Body Report, *Guatemala – Cement I*, n 47.

¹³ Appellate Body Report, *India – Patents (US)*, para 84.

¹⁴ Panel Report, *Canada – Wheat Exports and Grain Imports*, para 6.16.

¹⁵ Request for establishment of a panel by Canada, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS292/17 (8 August 2003).

¹⁶ Emphasis added.

¹⁷ This might create some conceptual difficulties where the measure is an omission, which might not normally be regarded as having been 'taken by' a WTO Member.

¹⁸ Article XI:1 of the WTO Agreement describes the original Membership of the WTO. Article XII:1 of the WTO Agreement allows any 'State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for' in the covered agreements to accede to the WTO.

WTO Member.¹⁹ In most cases, attribution of a measure challenged to the relevant WTO Member is not an issue in dispute —the measure is clearly taken by an organ of the central government of the Member, such as the legislative, executive, or judicial branch of the Brazilian government. As will be seen in section III below, challenges to judicial decisions are much rarer than challenges to decisions of other branches of government. However, the Appellate Body has confirmed that judicial decisions may be challenged.²⁰ Holding WTO Members responsible for judicial decisions is consistent with general international law principles regarding the responsibility of States.²¹

Issues relating to the attribution of an act or omission to a particular WTO Member have generally arisen in respect of three types of measures: (a) measures imposed by regional or local governments within a WTO Member; (b) measures involving private parties; and (c) measures connected to a regional trade agreement between the respondent and other WTO Members. We now examine these three scenarios.

Article 22.9 of the DSU makes clear that measures taken by regional or local governments or authorities within the territory of a WTO Member may be subject to WTO dispute settlement. This is consistent with Article XXIV:12 of GATT 1994, which provides for WTO Members to take measures to ensure that regional and local governments and authorities within their territories observe the WTO agreements. It also seems consistent with public international law²² that WTO Members should ordinarily bear international responsibility for actions taken by regional

¹⁹ Article XI:1 of the WTO Agreement lists the European Communities as an original WTO Member. The WTO website explains that the 'European Union is known officially as the European Communities in WTO business' and that it is 'a WTO member in its own right as are each of its 25 member States — making 26 WTO members altogether': see link at <http://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm> (accessed 26 August 2004). Article IX:1 of the WTO Agreement specifies, in the context of decision-making by vote in the WTO (as opposed to the usual practice of decision-making by consensus), that the European Communities 'shall have a number of votes equal to the number of their member States which are Members of the WTO' but that the 'number of votes of the European Communities and their member States shall in no case exceed the number of the member States of the European Communities'.

²⁰ Appellate Body Report, *US – Shrimp*, para 173, referring to Appellate Body Report, *US – Gasoline*, 28.

²¹ Article 4.1 of the ILC Articles, above n 11, provides: 'The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, *judicial* or any other functions ...' (emphasis added). See also Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim's International Law* (9th ed, 1992) vol 1, 545.

²² Article 4.1 of the ILC Articles, above n 11, provides: 'The conduct of any State organ shall be considered an act of that State under international law, ... whatever its character as an organ of the central government or of a territorial unit of the State'.

or local governments within their territories²³ (although some specific rules apply in the WTO context compared to general international law).²⁴ As an example, in *Australia – Salmon (Article 21.5 – Canada)*, the panel's terms of reference included not only measures adopted by Australia's federal government, but also an import prohibition adopted by the government of the Australian state of Tasmania. In finding that it was entitled to examine the Tasmanian measure, the panel reasoned that this measure fell within the terms of Article 22.9 of the DSU and Article 13 of the SPS Agreement, which confirms that Members are 'fully responsible' for the observance of all obligations under that agreement and which specifically requires Members to implement 'positive measures and mechanisms' in support of such observance by 'other than central government bodies'.²⁵

We now turn to the involvement of private parties. The Panel Report in *Japan – Film* is frequently cited in discussing whether particular private conduct may be attributed to a WTO Member for purposes of dispute settlement. In that case, the panel was examining whether what was known in Japan as 'administrative guidance' was a measure for the purpose of a non-violation claim under Article XXIII:1(b) of GATT 1994. The panel explained that, in Japan, although companies may not be 'legally bound' by administrative guidance, 'compliance may be expected in light of the power of the government and a system of government incentives and disincentives arising from the wide array of government activities and involvement in the Japanese economy'.²⁶ The panel concluded, based on past GATT practice, that an action taken by a private party 'may be deemed to be governmental if there is sufficient government involvement with it', and that this must be examined 'on a case-by-case basis'.²⁷ In examining the numerous 'measures' challenged in that case, the panel found, for example, that the approval of a retailers' code of conduct by a government agency contributed to the likelihood that private parties would conform with it as if it were a legally binding measure. Accordingly, the panel regarded actions taken by a 'Retailers Council' under this code as measures attributable to the Japanese government pursuant to Article XXIII:1(b).²⁸

²³ *Handbook*, above n 7, 40.

²⁴ See section IV.C.1 below, regarding implementation obligations in the context of inconsistent measures taken by regional or local governments.

²⁵ Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para 7.13 in footnote 146, the panel cited Article 27 of the *Vienna Convention on the Law of Treaties* and Article 6 of a draft version of the ILC Articles, above n 11.

²⁶ Panel Report, *Japan – Film*, para 10.44.

²⁷ *Ibid* para 10.56.

²⁸ *Ibid* para 10.328.

The issue of attribution to a WTO Member of conduct involving private parties also arose in *Argentina – Hides and Leather*, where the European Communities argued that the presence of private sector representatives from the Argentine tanning industry in the customs clearance of exports of raw hides operated as an export restriction contrary to Article XI:1 of GATT 1994. The Argentine government authorised the presence of the private sector representatives through a resolution. Although the panel characterised the resolution as a legally binding government measure,²⁹ the panel did not accept that Article XI:1 imposes an obligation on WTO Members ‘to exclude any possibility that governmental measures may enable private parties, directly or indirectly, to restrict trade, where those measures themselves are not trade-restrictive’.³⁰ The panel concluded that the European Communities had not provided sufficient evidence to prove that an export restriction was made effective through the regulation, leaving open the possibility that a government could effect such a restriction through interaction with a private cartel.³¹

A final example, involving issues related to both regional and local governments and to private parties, is *Canada – Dairy*. That dispute concerned the provision of milk to exporters/processors through an agreement signed by, among others, a public corporation and certain provincial marketing boards. The panel found that these boards were government agencies even though they were not ‘formally incorporated’ as such and were composed in whole or in part by individual dairy producers.³² According to the panel, ‘[w]hen — and to the extent that — these boards act under explicit delegated governmental authority, they can be presumed to act as an agency of the government’.³³ The Appellate Body agreed, stating:

Irrespective of the composition of the boards, the source of their powers is still ‘governments’ and the nature of the functions that they exercise is still ‘governmental’. Nor is our opinion altered by the fact that the provincial boards exercise their powers with a view to promoting the interests of particular traders, namely, the producers. In our view, it is part of the normal functioning of ‘governments’ to promote the perceived interests of the State, and this may involve

²⁹ Panel Report, *Argentina – Hides and Leather*, para 11.18.

³⁰ *Ibid* para 11.19 (footnote omitted).

³¹ *Ibid* para 11.51.

³² Panel Report, *Canada – Dairy*, para 7.78.

³³ *Ibid*.

securing the interests of one or more sectors of the community.³⁴

A different issue of attribution, relating to regional trade agreements, arose in *Turkey – Textiles*. That case involved quantitative restrictions imposed by Turkey on certain imports from India upon the formation of a customs union between Turkey and the European Communities. Turkey argued before the panel that these restrictions could not be attributed to Turkey because the measure was taken by another entity, namely the Turkey–EC customs union or the European Communities. The panel rejected Turkey’s argument. First, the panel noted that the restrictions were imposed through formal action by Turkey.³⁵ Although the European Communities applied similar restrictions on imports from India, these restrictions applied only to imports into the European Communities’ customs territory and not to imports into Turkey.³⁶ As to whether the measure could be attributed to the customs union, the panel found that the customs union did not have the capacity to enact legislation on behalf of its constituent parties.³⁷ The panel then emphasised that WTO dispute settlement ‘is based on Member[s]’ rights; is accessible to Members only; and is enforced and monitored by Members only’, and the Turkey–EC customs union was not a WTO Member.³⁸

3 Non-Violation or Situation Complaints

In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body did not specify whether the definition of ‘measure’ that it enunciated applies to all types of claims in the WTO settlement system. At a minimum, we might presume that the Appellate Body intended to describe measures that may be challenged in the most common types of claims — that is, violation complaints referred to in Article XXIII:1(a) of GATT 1994 — particularly as that was the type of claim brought in the appeal at hand. It is also logical that *non-violation* complaints should extend to *acts*. This is consistent with the language used in Article XXIII:1(b) of GATT 1994 and Article 26.1 of the DSU, which refer to ‘the application by [a] Member of any measure’. Turning to the possibility of *omissions* in non-violation

³⁴ Appellate Body Report, *Canada – Dairy*, para 101. See also Panel Report, *Canada – Autos*, where the measure included letters of undertaking signed by the Canadian subsidiaries of certain auto manufacturers. The panel found that, although the letters ‘[o]n their face ... are “private” acts’, they were attributable to the Canadian government because they were required by the Canadian government and their terms were negotiated by each beneficiary with Canada’s Ministry of Industry (paras 6.250–6.252).

³⁵ Panel Report, *Turkey – Textiles*, para 9.34.

³⁶ *Ibid* para 9.39.

³⁷ *Ibid* para 9.40.

³⁸ *Ibid* para 9.41, referring to Appellate Body Report, *US – Shrimp*, para 101.

complaints, on the one hand, the text of Article XXIII:1(b) could be read narrowly to exclude challenges to omissions.³⁹ On the other hand, in *EC – Asbestos*, the Appellate Body stated that the ‘use of the word “any” [in Article XXIII:1(b)] suggests that measures of all types may give rise to such a cause of action. The text does not distinguish between, or exclude, certain types of measure’.⁴⁰ This reading of the words ‘any measure’ could mean that omissions are also covered. Both paragraphs (a) and (b) of Article XXIII:1 refer expressly to ‘another Member’, which suggests that the challenged activity must be ‘attributable to a WTO Member’.

Let us assume for the moment, then, that in the passage quoted above the Appellate Body was providing an exclusive description of measures that may be subject to WTO dispute settlement pursuant to violation or non-violation complaints. In other words, ‘any act or omission attributable to a WTO Member’ may be challenged in such complaints, and nothing else may be so challenged.

As usual, this leaves the puzzle of situation complaints. Although the wording of Article XXIII:1(c) of GATT 1994 seems fairly broad, it could be argued that this provision is intended to cover ‘other’ situations and therefore cannot apply to acts or omissions.⁴¹ This view could be supported by the reference in Article 26.2 of the DSU to Article XXIII:1(c) applying to ‘the existence of any situation other than those to which’ Article XXIII:1(a) and (b) apply.⁴² It could also be argued that the absence of any reference to a WTO Member in Article XXIII:1(c) indicates that situations challenged under that provision need not be attributable to a WTO Member.⁴³ Accordingly, one might conclude that the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* was not concerned with defining the measures that could be challenged in a situation complaint. This is a difficult area to analyse and one which, at least at the time of writing, is primarily of academic interest. Therefore, we leave these questions unanswered and focus in the remainder of this chapter on measures challenged in violation and non-violation complaints.⁴⁴

B Measures ‘As Such’ or ‘As Applied’

The measure at issue in a WTO dispute may include both ‘acts setting forth rules or norms that are intended to have general and prospective

³⁹ Waincymer, above n 5, 143.

⁴⁰ Appellate Body Report, *EC – Asbestos*, para 188.

⁴¹ For a different view, see Waincymer, above n 5, 103.

⁴² DSU, art 26 is discussed further below in section IV. C. 4.

⁴³ See the reference to the discussion of this issue prior to the WTO in Waincymer, above n 5, 93.

⁴⁴ Indeed, situation complaints have even been described as not requiring a challenge to a ‘measure’ at all: Waincymer, above n 5, 102, 110, 136.

application', such as legislation, and 'particular acts applied only to a specific situation', such as an administrative decision to impose anti-dumping duties on certain imports.⁴⁵ We now consider these possibilities, keeping in mind that it may not always be possible to distinguish clearly between the two.

Acts of a general nature may be challenged in WTO dispute settlement, irrespective of whether these acts have been applied in a specific instance.⁴⁶ For example, the dispute in *US – 1916 Act* concerned Title VIII of the United States Revenue Act of 1916 (1916 Act), which allowed civil and criminal proceedings to be brought against importers who sold imported goods in the United States at dumped prices. Japan and the European Communities claimed that this legislation was inconsistent with certain WTO provisions, without challenging any particular civil or criminal proceeding conducted under this legislation.⁴⁷ This type of claim is often described as a challenge to a measure 'as such'. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body explained that challenges to measures as such are allowed because the WTO dispute settlement system is intended 'to protect not only existing trade but also the security and predictability needed to conduct future trade'.⁴⁸ In addition, allowing challenges to a measure as such helps to prevent 'future disputes by allowing the root of WTO-inconsistent behaviour to be eliminated'.⁴⁹ Thus, in *US – 1916 Act*, as the panel and Appellate Body found the challenged law itself to be WTO-inconsistent,⁵⁰ the complainants do not need to bring separate challenges to each proceeding conducted under that law.

A Member may also challenge a measure 'as applied' in a particular instance. A challenge to the imposition of anti-dumping duties, without a challenge to the underlying anti-dumping legislation or regulations, is an example of a challenge to a measure purely as applied.⁵¹ Members sometimes challenge a measure both as such and as applied. For example, in *US – Carbon Steel*, the European Communities challenged United States legislation relating to the conduct of sunset reviews of countervailing duties as such, and also as applied in a specific sunset review of

⁴⁵ Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para 82.

⁴⁶ Ibid.

⁴⁷ Appellate Body Report, *US – 1916 Act*, paras 2–3. See also Decision by the Arbitrators, *US – 1916 Act (EC) (Article 22.6 – US)*, para 6.5.

⁴⁸ Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para 82, referring to GATT Panel Report, *US – Superfund*, para 5.2.2.

⁴⁹ Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para 82.

⁵⁰ Panel Report, *US – 1916 Act (EC)*, para 7.1; Panel Report, *US – 1916 Act (Japan)*, para 7.1; Appellate Body Report, *US – 1916 Act*, para 155.

⁵¹ See, eg, Panel Report, *EC – Tube or Pipe Fittings*; Appellate Body Report, *EC – Tube or Pipe Fittings*.

countervailing duties against certain corrosion-resistant carbon steel flat products from Germany.⁵²

In *Japan – Film*, the panel noted that Article XXIII:1(b) of GATT 1994 requires the *application* by a Member of a particular measure.⁵³ Perhaps the reference in this provision to the ‘application’ of a measure could be interpreted to mean that, in a non-violation complaint, a measure may be challenged only as applied and not as such. Another, perhaps more plausible, interpretation is that the word ‘application’ was not intended as such a restriction. Rather, given the context of Article XXIII:1(b), this word might well have been used simply to establish the necessary link between the measure at issue and the Member imposing the measure.

Additional considerations arise in relation to challenges to measures as such or as applied in the context of anti-dumping, as discussed further below.⁵⁴

C Mandatory vs Discretionary Measures

Several WTO panels and, previously, GATT panels have drawn a distinction between mandatory and discretionary measures challenged in dispute settlement proceedings.⁵⁵ Specifically, these panels have held that legislation mandating particular action inconsistent with a WTO obligation may be challenged as such, whereas legislation merely granting discretion to an executive authority to act inconsistently with a WTO obligation may be challenged only as applied in a particular instance.⁵⁶ Put simply, the rationale for such a distinction is that the latter type of legislation (so-called ‘discretionary’ legislation) involves no WTO-inconsistency unless applied in an inconsistent manner.⁵⁷ The theory is that if the relevant authority always exercises the discretion in a manner consistent with WTO rules, the measure should not be open to challenge in a violation complaint.

Two WTO panels have shed some doubt on the use of a strict mandatory-discretionary distinction. In *US – Section 301 Trade Act*, the panel suggested that whether particular discretionary legislation may be challenged as

⁵² Appellate Body Report, *US – Carbon Steel*, para 3. See also Panel Report, *US – Hot-Rolled Steel*; Appellate Body Report, *US – Hot-Rolled Steel*.

⁵³ Panel Report, *Japan – Film*, para 10.41; see also paras 10.57–8.

⁵⁴ See section II.E below.

⁵⁵ See, eg, the GATT and WTO Panel Reports cited in Panel Report, *US – Oil Country Tubular Goods Sunset Reviews*, n 54.

⁵⁶ See, eg, Panel Report, *Canada – Aircraft*, para 9.124, citing GATT Panel Report, *US – Tobacco*, para 118.

⁵⁷ See generally Sharif Bhuiyan, ‘Mandatory and Discretionary Legislation: The Continuing Relevance of the Distinction under the WTO’ (2002) 5 *Journal of International Economic Law* 571.

such will depend on the particular WTO obligation in question. The panel asked: 'is it so implausible that the framers of the WTO Agreement, in their wisdom, would have crafted some obligations which would render illegal even discretionary legislation and crafted other obligations prohibiting only mandatory legislation?'⁵⁸ As an example, the panel implied that legislation granting the administration a discretion to impose on all imports 'tariffs in excess of those allowed under the schedule of tariff concessions of the Member concerned' might, as such, be inconsistent with a WTO obligation.⁵⁹

Subsequently, in *US – 1916 Act (Japan)*, the United States argued that the 1916 Act (as described above) was discretionary and therefore not challengeable as such because, among other things, 'the 1916 Act authorizes the Department of Justice to bring a criminal prosecution, [but] it does not mandate it'.⁶⁰ The panel did not agree that this discretion exempted the 1916 Act from scrutiny.⁶¹ The panel referred to Article 18.4 of the Anti-Dumping Agreement, which imposes on Members an obligation to take steps to ensure that their 'laws, regulations and administrative procedures' comply with the Anti-Dumping Agreement. The panel considered that Article 18.4 is a 'treaty provision' prevailing over any mandatory-discretionary distinction in customary international law. Therefore, the panel concluded that this distinction was 'no longer relevant in determining whether the Panel can or cannot review the conformity of the 1916 Act with the Anti-Dumping Agreement'.⁶² This reasoning appears specific to the anti-dumping context, although it is possible that some will seek to use it as support for the position that the mandatory-discretionary distinction is of diminished relevance in other areas regulated by the WTO agreements.

The Appellate Body has not yet provided a definitive view on the mandatory-discretionary distinction. In its report in *US – 1916 Act*, circulated in 2000, the Appellate Body pointed out that the mandatory-discretionary distinction is not relevant to the scope of a panel's jurisdiction. Thus, nothing prevents a Member from bringing a challenge against legislation as such. The question of whether the legislation is mandatory or discretionary is relevant, if at all, only to the panel's determination of whether the legislation is in fact inconsistent with WTO

⁵⁸ Panel Report, *US – Section 301 Trade Act*, para 7.53. The Appellate Body took note of the panel's statements in Appellate Body Report, *US – 1916 Act*, n 59.

⁵⁹ Panel Report, *US – Section 301 Trade Act*, n 658.

⁶⁰ Panel Report, *US – 1916 Act (Japan)*, para 3.56. See also Panel Report, *US – 1916 Act (EC)*, para 3.45.

⁶¹ Panel Report, *US – 1916 Act (Japan)*, para 6.191. See also Panel Report, *US – 1916 Act (EC)*, para 6.169.

⁶² Panel Report, *US – 1916 Act (Japan)*, para 6.189.

obligations.⁶³ In that appeal, the Appellate Body agreed with the panel that the discretion of the United States Department of Justice to initiate criminal proceedings under the 1916 Act did not render the 1916 Act 'discretionary', as that concept had been applied by previous panels. However, the Appellate Body specifically stated that it did not need to consider whether Article 18.4 of the Anti-Dumping Agreement had 'supplanted or modified' the mandatory-discretionary distinction because the 1916 Act was clearly not discretionary.⁶⁴ This reasoning appears to leave open the possibility that discretionary legislation could be found inconsistent with WTO provisions, at least in the anti-dumping context.

Subsequently, in *US – Section 211 Appropriations Act*, the Appellate Body stated that, 'where discretionary authority is vested in the executive branch of a WTO Member, it cannot be assumed that the WTO Member will fail to implement its obligations under the *WTO Agreement* in good faith'.⁶⁵ However, the Appellate Body's ultimate conclusion did not rest on this basis,⁶⁶ and the Appellate Body has recently described that dispute as presenting 'a unique set of circumstances'.⁶⁷ In its report circulated in 2002 in *US – Countervailing Measures on Certain EC Products*, the Appellate Body stated explicitly that it was making no finding as to whether 'a Member could violate its WTO obligations by enacting legislation granting discretion to its authorities to act in violation of its WTO obligation'.⁶⁸

The most recent Panel and Appellate Body Reports on this issue relate to expiry or 'sunset' reviews of anti-dumping measures in the United States, including the United States' 'Sunset Policy Bulletin'.⁶⁹ In *US – Corrosion-Resistant Steel Sunset Review*, the panel found that the Sunset Policy Bulletin was 'not a legal instrument that operates so as to mandate a course of action' and therefore that it could not 'constitute a measure that can be challenged in WTO dispute settlement proceedings'.⁷⁰ The Appellate Body

⁶³ Appellate Body Report, *US – 1916 Act*, paras 60–61. The Appellate Body reached a similar conclusion in Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras 88–89. This approach suggests that the mandatory-discretionary distinction is relevant only to violation complaints (See also Panel Report, *Japan – Film*, para 10.49).

⁶⁴ Appellate Body Report, *US – 1916 Act*, para 99.

⁶⁵ Appellate Body Report, *US – Section 211 Appropriations Act*, para 259.

⁶⁶ *Ibid* paras 259, 264, 268.

⁶⁷ The Appellate Body explained that, in *US – Section 211 Appropriations Act*, the United States argued not that the measure itself was discretionary, but rather that the discriminatory aspects of the measure were cured by discretionary regulations, issued under a separate law: Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, n 94.

⁶⁸ Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, n 334.

⁶⁹ 'Policies Regarding the Conduct of Five-Year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders; Policy Bulletin', United States Federal Register, 16 April 1998 (Volume 63, Number 73), p 18871 (Sunset Policy Bulletin).

⁷⁰ Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para 7.126.

disagreed with the panel's approach.⁷¹ In relation to the mandatory-discretionary distinction, the Appellate Body stated:

[W]e have not, as yet, been required to pronounce generally upon the continuing relevance or significance of the mandatory/discretionary distinction. Nor do we consider that this appeal calls for us to undertake a comprehensive examination of this distinction. We do, nevertheless, wish to observe that, as with any such analytical tool, the import of the 'mandatory/discretionary distinction' may vary from case to case. For this reason, we also wish to caution against the application of this distinction in a mechanistic fashion.⁷²

The Panel Report circulated on 16 July 2004 in *US – Oil Country Tubular Goods Sunset Reviews* also relates to the Sunset Policy Bulletin. In that case, which is the subject of an appeal at the time of writing, the panel referred to the Appellate Body's reasoning in *US – Corrosion-Resistant Steel Sunset Review* and indicated that it would 'refrain from applying the mandatory/discretionary test in the abstract to determine whether the [Sunset Policy Bulletin] can give rise to a WTO violation or not [because] this would amount to applying the mentioned test in a "mechanistic fashion" and would not be acceptable'.⁷³

Several issues remain unanswered regarding the mandatory-discretionary distinction. Most importantly, does the distinction apply in WTO disputes — that is, can discretionary measures as such be found inconsistent with WTO law? The case law suggests that the answer to this question might depend on whether the measure at issue is challenged under the Anti-Dumping Agreement or some other WTO agreement, whether the measure is legislation or some other instrument, and which branch of government has discretion under the measure.⁷⁴ As the Panel Report in *US – Oil Country Tubular Goods Sunset Reviews* has been appealed, the Appellate Body may have another opportunity to address the mandatory-discretionary distinction and provide further guidance on its role in WTO dispute settlement.

⁷¹ Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras 88–89, 95.

⁷² *Ibid* para 93 (footnote omitted).

⁷³ Panel Report, *US – Oil Country Tubular Goods Sunset Reviews*, para 7.140.

⁷⁴ On this point, see Appellate Body Report, *US – 1916 Act*, paras 89 and 100; Appellate Body Report, *US – Section 211 Appropriations Act*, para 259; Panel Report, *US – Countervailing Measures on Certain EC Products*, paras 7.153–7.154.

D Summary of General Considerations

The following table summarises the discussion in this section of what measures may be challenged in WTO dispute settlement generally.

		Type of complaint		
		Violation	Non-violation	Situation
Type of Measure	Act	✓	✓	?
	Omission	✓	?	?
	Other situation	×	×	✓
	Attributable to government	✓	✓	?
	Not attributable to government	×	×	?
	As such			
	Mandatory	✓	?	
	Discretionary	?	?	
As applied	✓	✓		

E Requirements under Specific WTO Agreements

Apart from the provisions in GATT 1994 and the DSU that have already been mentioned,⁷⁵ other provisions of the WTO agreements may be relevant for determining the types of acts or omissions that may be challenged under a particular agreement.

For example, Article XXVIII(a) of GATS defines a ‘measure’ for the purpose of that agreement as ‘any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form’. Article I:1 provides that GATS ‘applies to measures by Members affecting trade in services’. These provisions could be regarded as restricting the types of measures that may be challenged under GATS, although the inclusion of the words ‘or any other form’ in Article XXVIII might suggest that these measures will be broadly defined.⁷⁶

Paragraph 1 of Annex A of the SPS Agreement contains a detailed definition of ‘sanitary or phytosanitary measure’. Broadly, these measures include all relevant laws, decrees, regulations, requirements and procedures that are applied to protect animal, human, or plant life or

⁷⁵ See section II.A.1 above.

⁷⁶ See, eg, Appellate Body Report, *EC – Bananas III*, paras 220–1; Panel Report, *Canada – Autos*, paras 10.229–234.

health from certain risks. In addition, paragraph 1 of Annex B of the SPS Agreement imposes certain publication requirements on '[s]anitary and phytosanitary measures such as laws, decrees or ordinances which are applicable generally'.⁷⁷ In *Japan – Agricultural Products II*, the Appellate Body found that this list of instruments is not exhaustive and, therefore, that the publication requirements extend to 'other instruments which are applicable generally and are similar in character'.⁷⁸

Article 17.4 of the Anti-Dumping Agreement provides:

If the Member that requested consultations considers that the consultations ... have failed to achieve a mutually agreed solution, and if final action has been taken by the administering authorities of the importing Member to levy *definitive anti-dumping duties* or to accept *price undertakings*, it may refer the matter to the Dispute Settlement Body ('DSB'). When a *provisional measure* has a significant impact and the Member that requested consultations considers that the measure was taken contrary to the provisions of paragraph 1 of Article 7, that Member may also refer such matter to the DSB.⁷⁹

The Appellate Body has interpreted Article 17.4 as limiting the circumstances in which a Member may refer to the DSB a dispute concerning the initiation and conduct of an anti-dumping investigation⁸⁰ (that is, a dispute concerning an anti-dumping measure as applied in a particular instance). In *US – Guatemala Cement I*, the Appellate Body held that Article 17.4 allows a Member to refer such a dispute to the DSB only if one of the anti-dumping measures mentioned in that provision — namely, definitive anti-dumping duties, price undertakings, and provisional measures — is in place and identified in the request for establishment of a panel.⁸¹ In that case, Mexico had challenged the initiation and conduct of an anti-dumping investigation by Guatemala, without identifying one of the measures identified in Article 17.4.⁸²

⁷⁷ Footnote 5. See also SPS Agreement, art 7.

⁷⁸ Appellate Body Report, *Japan – Agricultural Products II*, para 105. At para 108, the Appellate Body agreed with the panel that the varietal testing requirement set out in Japan's Experimental Guide for Cultivar Comparison Test on Insect Mortality – Fumigation amounted to a phytosanitary regulation within the meaning of paragraph 1 of Annex B.

⁷⁹ Emphasis added.

⁸⁰ Appellate Body Report, *Guatemala – Cement I*, para 80.

⁸¹ *Ibid* para 79.

⁸² *Ibid* para 86.

In *US – 1916 Act*, the United States argued that Article 17.4 of the Anti-Dumping Agreement precludes challenges to anti-dumping legislation as such. The Appellate Body rejected this assertion and found that when a Member challenges anti-dumping legislation as such, it need not point to any specific anti-dumping duty, price undertaking, or provisional measure. The Appellate Body supported its finding with reference to Articles 18.1 and 18.4 of the Anti-Dumping Agreement.⁸³

Article 18.4 of the Anti-Dumping Agreement requires Members to take steps to ensure that their ‘laws, regulations and administrative procedures’ comply with the Anti-Dumping Agreement. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body did not interpret Article 18.4 of the Anti-Dumping Agreement as restricting the types of measures that are open to challenge to ‘laws, regulations and administrative procedures’. Rather, the Appellate Body read this phrase, as a whole, as ‘encompass[ing] the entire body of generally applicable rules, norms and standards adopted by Members in connection with the conduct of anti-dumping proceedings’.⁸⁴

Incidentally, Article XVI:4 of the WTO Agreement also requires each Member to ‘ensure the conformity of its laws, regulations and administrative procedures with its obligations’ under the covered agreements. The reasoning in *US – Corrosion-Resistant Steel Sunset Review* could suggest that the Appellate Body would interpret Article XVI:4 of the WTO Agreement in a similar manner so as not to restrict the types of measures that a WTO may challenge.

III TYPES OF MEASURES CHALLENGED IN PAST DISPUTES

A Introduction

In this section, we attempt to classify the measures challenged in previous WTO disputes according to the type of legal instruments underlying them. Classifying measures in this way is a useful exercise in order to understand the types of challenges that have been made. However, this is a difficult and somewhat arbitrary process because complainants frequently frame the challenged measure quite broadly in terms of the ‘act’ taken by the WTO Member and not the instrument where this ‘act’ is embodied or through which it is authorised. For instance, a complaining party may frame the challenged measure as an ‘import prohibition’ or an ‘import restriction’; this is the act attributable to the WTO Member, but the ‘import restriction’ itself may be embodied in or authorised by a particular legal

⁸³ Appellate Body Report, *US – 1916 Act*, paras 55, 74–75, 82–83.

⁸⁴ Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para 87.

instrument, such as a law or a regulation.⁸⁵ In this section, we try to focus not on the act itself but on the legal instrument underlying it.

The difficulty of classifying measures according to the legal instruments underlying them is compounded by the fact that such instruments vary from one domestic legal system to another, in both name and substance.⁸⁶ In addition, many WTO rules allow Members to choose the appropriate method for implementing their obligations within their own legal system and practice,⁸⁷ with the result that different Members may use different instruments to achieve the same objective. Accordingly, in this section we use broad categories and focus on the main elements of each instrument. For each category of measure, we indicate issues that may arise depending on whether the measure is challenged as such or as applied in a particular instance. Due to the large number of disputes initiated in the WTO since 1995, we focus on those disputes that reached the stage of appellate review. The different categories of measures and the examples provided are not meant to be exhaustive or mutually exclusive.

B Legislation

Enactments of the highest legislative bodies of WTO Members have frequently been challenged in the WTO. In some cases, the challenged measure is a particular law alone.⁸⁸ In other cases, a challenge to legislation is combined with a challenge to other types of instruments such as implementing regulations issued by the executive branch.⁸⁹ Where the

⁸⁵ For example, in *Turkey – Textiles*, India challenged certain ‘import restrictions’ without identifying any written instrument imposing those restrictions. The panel sought from Turkey the Official Gazette in which these restrictions were published, but apparently Turkey did not provide this: Panel Report, *Turkey – Textiles*, para 9.32.

⁸⁶ Referring to the phrase ‘laws, regulations and administrative practice’ in Article 18.4 of the Anti-Dumping Agreement, the Appellate Body has stated that the scope of each element cannot be determined simply by reference to the label given to various instruments under domestic law. Rather, this determination must be based on the content and substance of the instrument. Otherwise, the obligations in Article 18.4 would vary from one Member to another depending on the particular label used under each Member’s domestic law: Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, n 87.

⁸⁷ See, eg, TRIPS Agreement, art 1.1 and Appellate Body Report, *India – Patents (US)*, para 59.

⁸⁸ See, eg, Panel Report, *US – Offset Act (Byrd Amendment)*; Appellate Body Report, *US – Offset Act (Byrd Amendment)*; Panel Report, *US – Section 211 Appropriations Act*; Appellate Body Report, *US – Section 211 Appropriations Act*; Panel Report, *US – 1916 Act (EC)*; Panel Report, *US – 1916 Act (Japan)*; Appellate Body Report, *US – 1916 Act*; Panel Report, *Canada – Patent Term*; Panel Report, *Chile – Alcoholic Beverages*; Appellate Body Report, *Chile – Alcoholic Beverages*; Panel Report, *Korea – Alcoholic Beverages*; Appellate Body Report, *Korea – Alcoholic Beverages*; Panel Report, *Japan – Alcoholic Beverages II*; Appellate Body Report, *Japan – Alcoholic Beverages II*.

⁸⁹ See, eg, Panel Report, *Japan – Apples*; Appellate Body Report, *Japan – Apples*; Panel Report, *India – Quantitative Restrictions*; Appellate Body Report, *India – Quantitative Restrictions*; Panel Report, *US – Shrimp*; Appellate Body Report, *US – Shrimp*; Panel Report, *US – FSC*; Appellate

measure at issue is a complex combination of legislation and other instruments, it is sometimes labelled a 'system' or 'regime'.⁹⁰

Legislation challenged in the WTO is typically issued by a national parliament. In a few disputes, however, Members have challenged legislation issued by sub-national legislatures. For example, in *US – Gambling*, Antigua and Barbuda challenged, among other things, legislation passed by the legislative bodies of several US states.⁹¹ In disputes brought against the European Communities, the legislation is usually supra-national — that is, it is legislation of the European Communities.⁹² However, the legislation of individual member States of the European Communities may also be challenged, in which case the European Communities may be the defendant.⁹³

As already mentioned, legislation may be challenged either as such or as applied. In some disputes, legislation is challenged only as such.⁹⁴ In other cases, legislation is challenged both as such and as applied. For instance, in *US – Hot-Rolled Steel*, Japan challenged certain provisions of the United States' anti-dumping statute both as such, and as applied through the imposition of anti-dumping duties on certain hot-rolled steel products from Japan. The panel found that section 735(c)5(A) of the United States Tariff Act of 1930, as amended, which set out a method

Body Report, *US – FSC*; Panel Report, *US – Carbon Steel*; Appellate Body Report, *US – Carbon Steel*; Panel Report, *US – Textiles Rules of Origin*, para 6.1.

⁹⁰ See, eg, Panel Report, *EC – Bananas III (Ecuador)*; Panel Report, *EC – Bananas III (Guatemala and Honduras)*; Panel Report, *EC – Bananas III (Mexico)*; Panel Report, *EC – Bananas III (US)*; Appellate Body Report, *EC – Bananas*; Panel Report, *Chile – Price Band System*; Appellate Body Report, *Chile – Price Band System*; Panel Report, *Canada – Wheat Exports and Grain Imports*; Appellate Body Report, *Canada – Wheat Exports and Grain Imports*.

⁹¹ Request for establishment of a panel by Antigua and Barbuda, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US – Gambling)*, WT/DS285/2 (13 June 2003). At the time of writing, the Panel Report has not yet been circulated to the Members of the WTO. See also the requests for establishment of a panel submitted by the European Communities and Japan in relation to the Act Regulating State Contracts with Companies Doing Business with or in Burma (Myanmar) enacted by the Commonwealth of Massachusetts on 25 June 1996: WT/DS88/3 (9 September 1998) and WT/DS95/3 (9 September 1998).

⁹² See, eg, Panel Report, *EC – Hormones (Canada)*; Panel Report, *EC – Hormones (US)*; Appellate Body Report, *EC – Hormones*; Panel Report, *EC – Bananas III (Ecuador)*; Panel Report, *EC – Bananas III (Guatemala and Honduras)*; Panel Report, *EC – Bananas III (Mexico)*; Panel Report, *EC – Bananas III (US)*; Appellate Body Report, *EC – Bananas III*; Panel Report, *EC – Sardines*; Appellate Body Report, *EC – Sardines*; Panel Report, *EC – Tariff Preferences*; Appellate Body Report, *EC – Tariff Preferences*.

⁹³ The *EC – Asbestos* dispute is an example of the European Communities acting as a respondent on behalf of one of its member States, where the measure challenged was a French decree: Panel Report, *EC – Asbestos*; Appellate Body Report, *EC – Asbestos*.

⁹⁴ See, eg, Panel Report, *US – 1916 Act (EC)*; Panel Report, *US – 1916 Act (Japan)*; Appellate Body Report, *US – 1916 Act*.

for calculating the 'all others rate', was inconsistent as such with the Anti-Dumping Agreement. As a result, the panel also found inconsistent the application of this provision in the challenged anti-dumping investigation.⁹⁵ Both findings were upheld by the Appellate Body.⁹⁶ It is also possible for an anti-dumping provision to be found inconsistent as applied in a specific investigation but consistent as such. This is in fact what happened in the same dispute in relation to section 771(7)(C)(iv) of the United States Tariff Act of 1930, as amended. The Appellate Body found that this provision was not inconsistent, as such, with the Anti-Dumping Agreement, but that it was inconsistent as applied in the specific anti-dumping investigation challenged by Japan.⁹⁷

In disputes concerning United States trade remedy measures, the parties frequently refer to the Statement of Administrative Action (SAA),⁹⁸ which was submitted to the United States Congress together with the Uruguay Round Agreements Act.⁹⁹ By its own terms, the SAA:

represents an authoritative expression by the [United States] Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements, both for purposes of U.S. international obligations and domestic law. Furthermore, the Administration understands that it is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement.¹⁰⁰

Panels have relied on the SAA as an aid in interpreting related United States statutes.¹⁰¹ However, at least one panel has stated that the SAA does not have 'an operational life or status independent of the statute such that it could, on its own, give rise to a violation of WTO rules'.¹⁰²

⁹⁵ Panel Report, *US – Hot-Rolled Steel*, para 7.90.

⁹⁶ Appellate Body Report, *US – Hot-Rolled Steel*, para 129.

⁹⁷ *Ibid* para 240(g).

⁹⁸ Uruguay Round Agreements Act, Statement of Administrative Action, HR Doc No 103–316 (1994) (SAA).

⁹⁹ Uruguay Round Agreements Act, Public Law 103–465, 108 Stat. 4809.

¹⁰⁰ SAA, 656.

¹⁰¹ In *US – Section 301 Trade Act*, the panel found that the promises made by the United States Administration in the SAA overrode the prima facie inconsistency it had preliminarily found in respect of Section 304 of the United States Trade Act of 1930, as amended: Panel Report, *US – Section 301 Trade Act*, paras 7.109–7.113. See also Panel Report, *US – Export Restraints*, para 8.100; Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para 7.129.

¹⁰² Panel Report, *US – Export Restraints*, para 8.99.

C Executive Rules

By ‘executive rules’, we mean all formal rules and regulations of general application issued by the executive branch of government, including independent agencies of that branch. Different WTO Members may describe these as regulations, decrees, resolutions, or ordinances. Executive rules have been challenged in the WTO either on their own¹⁰³ or together with other legal instruments.¹⁰⁴ Like legislation, executive rules may be challenged either as such¹⁰⁵ and/or as applied in a particular instance.¹⁰⁶

Some measures are difficult to classify as executive rules, administrative decisions (as discussed further below), or something else. In particular, it may be difficult to determine whether a particular rule applies generally or to a specific set of facts. For example, in some instances, a sanitary or phytosanitary measure under the SPS Agreement could be regarded as an executive rule. In *Japan – Apples*, the measure challenged comprised several different phytosanitary requirements imposed on certain types of imported apples.¹⁰⁷ This was a measure of general application, in the sense that it related to the phytosanitary requirements themselves rather than to any application of those requirements to a particular shipment of apples or to apples imported from a particular supplier. Nevertheless, the requirements applied only to a defined product (certain types of apples).¹⁰⁸

Another example of a measure that is more difficult to classify is found in *US – Certain EC Products*, where the European Communities challenged certain countermeasures imposed by the United States in response to the European Communities’ failure to implement the recommendations and rulings of the DSB in *EC – Bananas III*. The panel defined the measure at issue ‘as the “increased bonding requirements” imposed by the United States on a list of products imported from the European Communities’, and the Appellate Body agreed with this description.¹⁰⁹ The ‘increased bonding requirements’ were effected through a Memorandum from the Director of the Trade Compliance Division of the United States Customs

¹⁰³ See, eg, Panel Report, *US – Gasoline*; Appellate Body Report, *US – Gasoline*; Panel Report, *Argentina – Textiles and Apparel*; Appellate Body Report, *Argentina – Textiles and Apparel*.

¹⁰⁴ See, eg, Panel Report, *Canada – Autos*; Appellate Body Report, *Canada – Autos*; Panel Report, *Australia – Salmon*; Appellate Body Report, *Australia – Salmon*.

¹⁰⁵ See, eg, Panel Report, *US – Gasoline*; Appellate Body Report, *US – Gasoline*.

¹⁰⁶ See, eg, Panel Report, *US – Corrosion-Resistant Steel Sunset Review*.

¹⁰⁷ Panel Report, *Japan – Apples*, para 8.25.

¹⁰⁸ See also Panel Report, *EC – Sardines*; Appellate Body Report, *EC – Sardines*.

¹⁰⁹ Appellate Body Report, *US – Certain EC Products*, paras 5, 128(a).

Service to the Directors of Ports and Customs Areas.¹¹⁰ Although the measure applied to the importation of a defined list of products, it applied generally to the importation of those products rather than to particular shipments or to products from particular exporters. To the extent that the measure applied to all prospective imports, rather than to a particular shipment, it resembles executive rules in the way we have described them.

D Administrative Practice

By 'administrative practice', we mean a consistent approach adopted by an agency of the executive branch of government with respect to a particular issue, usually used repeatedly during a certain period of time.¹¹¹ A complaining party will usually argue that this practice is binding on the agency. In contrast to the executive rules described in the previous subsection, practice is not formally embodied in a legal instrument; complainants have alleged that evidence of a particular practice may be provided in the form of a series of administrative determinations or decisions (which themselves may be contained in different legal instruments).

Administrative practice has most frequently been challenged in specific trade remedy investigations. In some cases, the challenge is limited to the application of the practice in a specific anti-dumping or countervailing duty investigation. For example, in *EC – Bed Linen*, India successfully challenged the European Communities' practice of 'zeroing' as applied in calculating dumping margins in an anti-dumping investigation against imports of cotton-type bed linen from India.¹¹² Similarly, in *US – Hot-Rolled Steel*, Japan challenged the method used by the United States, in an anti-dumping investigation into imports of certain hot-rolled steel products from Japan, to determine whether sales to an affiliated party are 'in the ordinary course of trade'.¹¹³ This method (99.5 percent test) was not mandated by any United States legislation or regulations. Rather, it was a 'consistent practice' of the United States Department of Commerce (USDOC) reflected in certain federal notices of the United States government.¹¹⁴ The Appellate Body

¹¹⁰ Ibid para 3. The Appellate Body upheld the panel's finding that the subsequent imposition by the United States of 100% duties on certain products imported from the European Communities was a distinct measure that was not within the panel's terms of reference: Appellate Body Report, *US – Certain EC Products*, para 82.

¹¹¹ Administrative practice usually involves the use of a particular methodology.

¹¹² Appellate Body Report, *EC – Bed Linen*, para 66.

¹¹³ Although the panel noted that Japan purportedly challenged as such the 'general practice' of the United States regarding this method, the panel found that Japan's request for establishment of a panel did not include such a claim: Panel Report, *US – Hot-Rolled Steel*, n 83; see also Appellate Body Report, *US – Hot-Rolled Steel*, n 93.

¹¹⁴ Appellate Body Report, *US – Hot-Rolled Steel*, para 133.

upheld the panel's finding that the application of the 99.5 percent test was inconsistent with Article 2.1 of the Anti-Dumping Agreement.¹¹⁵

Administrative practice has also been challenged as such, although some previous panels have refused to find that the particular practice challenged amounted to a measure that could entail a WTO-inconsistency. Thus, for example, in *US – Export Restraints*,¹¹⁶ Canada challenged an alleged administrative practice of USDOC of treating export restraints as meeting the 'financial contribution' requirement of Article 1.1(a)(1)(iv) of the SCM Agreement. Canada defined 'practice' as 'an institutional commitment to follow declared interpretations or methodologies that is reflected in cumulative determinations'.¹¹⁷ According to Canada, this practice had 'an operational existence in and of itself' because United States agencies, including USDOC, normally follow the precedents set in previous determinations and are required to do so in the absence of a reasoned explanation.¹¹⁸ The panel recognised that a United States agency normally has to follow past practice. Nevertheless, the panel observed that USDOC could depart from past practice as long as it provided a reasoned explanation. In the panel's view, this 'prevents such practice from achieving independent operational status in the sense of *doing* something or *requiring* some particular action'.¹¹⁹ The panel found before it 'no measure in the form of US "practice"'.¹²⁰ The Panel Report was not appealed.

In contrast, in *US – Countervailing Measures on Certain EC Products*, the panel and Appellate Body found an administrative practice of the United States inconsistent as such with the Anti-Dumping Agreement.¹²¹ In that dispute, the European Communities challenged the United States' method for determining whether a benefit continues to exist following a change in ownership of an enterprise.¹²² The European Communities challenged this 'same person' method both as such and as applied in 12 countervailing duty investigations. This method was not prescribed by United States legislation or regulations. Rather, it was a method that USDOC

¹¹⁵ Ibid paras 158 and 240(d).

¹¹⁶ Panel Report, *US – Export Restraints*, para 8.120.

¹¹⁷ Ibid para 8.120.

¹¹⁸ Ibid para 8.122.

¹¹⁹ Ibid para 8.126 (original emphasis).

¹²⁰ Ibid, para 8.129. In *US – Steel Plate*, India challenged a USDOC practice relating to the application of 'total facts available'. The panel followed the reasoning of the *US – Export Restraints* panel, concluding that the practice challenged by India was 'not a separate measure which can independently give rise to a WTO violation': Panel Report, *US – Steel Plate*, paras 7.23 - 7.24.

¹²¹ Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para 151; Panel Report, *US – Countervailing Measures on Certain EC Products*, para 7.90.

¹²² Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, paras 86, 128-129.

‘[g]enerally’ applied in making countervailing duty determinations following a change in ownership.¹²³

When administrative practice is challenged as such, as in *US – Countervailing Measures on Certain EC Products*, it may be difficult to define the measure at issue and to determine its consistency with the WTO agreements. In such cases, significant evidence could be required to establish the existence, content, and binding nature of a particular administrative practice.

E Guidelines

In this chapter, we use the term ‘guidelines’ to refer to a document setting out certain suggested criteria or instructions, but with which compliance is not necessarily mandatory.¹²⁴

In *Japan – Agricultural Products II*, the United States argued that Japan had acted inconsistently with the SPS Agreement by failing to publish certain guidelines developed by the Japanese Ministry of Agriculture and Forestry and Fisheries to test the efficacy of quarantine treatment imposed by an exporting country on agricultural exports in order to combat certain pests.¹²⁵ Japan maintained that the publication requirements set out in Article 7 and paragraph 1 of Annex B of the SPS Agreement did not apply to these guidelines because the guidelines were not contained in a legally enforceable instrument.¹²⁶ The panel found that the measure was not mandatory, in that an exporting country could demonstrate the efficacy of its quarantine treatment using other methods — it did not have to use the test described in the guidelines in question. Nevertheless, the panel found that the publication requirements applied to the guidelines. The panel pointed out that nothing in paragraph 1 of Annex B of the SPS Agreement indicates that only mandatory or legally enforceable measures have to be published, and it determined that sufficient incentives existed to attain compliance with the guidelines.¹²⁷

¹²³ Ibid para 129.

¹²⁴ Sometimes, instruments called ‘guidelines’ have been challenged or related to measures challenged, even though these instruments may have been more closely analogous to ‘executive rules’ according to the categorisation used in this chapter. See, eg, Panel Report, *US – Shrimp*, paras 2.8–14.

¹²⁵ Experimental Guide for Cultivar Comparison Test on Insect Mortality – Fumigation: Panel Report, *Japan – Agricultural Products II*, para 2.24.

¹²⁶ Panel Report, *Japan – Agricultural Products II*, para 8.106. The panel found that the guidelines amounted to phytosanitary regulations within the meaning of paragraph 1 of Annex B of the SPS Agreement: Panel Report, *Japan – Agricultural Products II*, para 8.111; Appellate Body Report, *Japan – Agricultural Products II*, paras 105–8. See the discussion of *Japan – Agricultural Products II* in section II.E above.

¹²⁷ Panel Report, *Japan Agricultural Products II*, para 8.111–2. See also Appellate Body Report, *Japan – Agricultural Products II*, para 108.

The United States' Sunset Policy Bulletin¹²⁸ could be described as an instrument containing guidelines in the sense that we have defined them for this chapter. In the Sunset Policy Bulletin, which was published in the United States Federal Register in 1998, USDOC sets forth 'policies regarding the conduct of five-year ("sunset") reviews' of anti-dumping and countervailing duty orders.¹²⁹ As discussed above in relation to the mandatory-discretionary distinction,¹³⁰ the question whether the Sunset Policy Bulletin was a measure that could be subject to WTO dispute settlement arose in *US – Corrosion-Resistant Steel Sunset Review*. The United States described the Sunset Policy Bulletin as 'a non-binding statement, providing evidence of [the Department of] Commerce's understanding of sunset-related issues not explicitly addressed by the statute and regulations'.¹³¹ The panel found that the Sunset Policy Bulletin 'is not a mandatory legal instrument obligating a certain course of conduct'¹³² and, therefore, that the Sunset Policy Bulletin 'is not a measure that is challengeable, as such, under the *WTO Agreement*'.¹³³ The Appellate Body reversed these findings,¹³⁴ stating that 'there is no basis ... for finding that only certain types of measures can, as such, be challenged in dispute settlement proceedings under the *Anti-Dumping Agreement*'.¹³⁵ The Appellate Body proceeded to examine the challenged aspects of the Sunset Policy Bulletin but ultimately did not find any inconsistency in respect of the Sunset Policy Bulletin.¹³⁶

The panel in *US – Oil Country Tubular Goods Sunset Reviews* stated that 'there can be no doubt that the Appellate Body considers the [Sunset Policy Bulletin] to be a measure that can be subject to WTO dispute settlement, and we will proceed accordingly'.¹³⁷ Moreover, the panel found certain provisions of the Sunset Policy Bulletin inconsistent as such with the covered agreements.¹³⁸ In the United States' view, finding instruments such as the Sunset Policy Bulletin inconsistent with WTO

¹²⁸ See above n 69.

¹²⁹ Sunset Policy Bulletin, p 18871.

¹³⁰ See section II.C above.

¹³¹ Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para 7.121.

¹³² *Ibid* para 7.145.

¹³³ *Ibid* para 7.195

¹³⁴ Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para 212(a).

¹³⁵ *Ibid* para 88. The Appellate Body's interpretation of Article 18.4 of the Anti-Dumping Agreement, in relation to this issue, is discussed above in section II.E.

¹³⁶ Specifically, the Appellate Body concluded that Section II.A.2 of the Sunset Policy Bulletin, as such, was not inconsistent with Article 6.10 or 11.3 of the Anti-Dumping Agreement. However, the Appellate Body did not complete the legal analysis of Japan's claims against Sections II.A.3 and 4 of the Bulletin: Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para 212 (c) (i) and (d) (i).

¹³⁷ Panel Report, *US – Oil Country Tubular Goods Sunset Reviews*, para 7.136.

¹³⁸ *Ibid* para 8.1(b).

law may discourage Members from formalising and publicising their administrative guidelines or practices, which could be detrimental from the perspectives of predictability and transparency.¹³⁹ Again, the Appellate Body may address this issue in the near future, given that the Panel Report in *US – Oil Country Tubular Goods Sunset Reviews* has been appealed.¹⁴⁰

F Administrative Decisions

By ‘administrative decisions’, we mean determinations made by an administrative agency in relation to a specific factual situation. In contrast to executive rules, administrative decisions are not norms with general and prospective application.

The administrative decisions that are most frequently challenged at the WTO relate to trade remedies, that is, anti-dumping measures,¹⁴¹ countervailing measures,¹⁴² and safeguard measures.¹⁴³ Additionally, challenges have been brought against transitional safeguards applied pursuant to the Agreement on Textiles and Clothing.¹⁴⁴ In some disputes, the complainant has challenged a specific trade remedy determination or action together with an act of a general nature as such — that is, the law

¹³⁹ WTO Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 9 January 2004*, WT/DSB/M/162 (16 February 2004) paras 18–19.

¹⁴⁰ Notification of an Appeal by the United States, *US – Oil Country Tubular Goods Sunset Reviews*, WT/DS268/5 (31 August 2004).

¹⁴¹ See, eg, Panel Report, *Guatemala – Cement I*; Appellate Body Report, *Guatemala – Cement I*; Panel Report, *EC – Bed Linen*; Appellate Body Report, *EC – Bed Linen*; Panel Report, *Thailand – H-Beams*; Appellate Body Report, *Thailand – H-Beams*; Panel Report, *Mexico – Corn Syrup (Article 21.5 – US)*; Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*; Panel Report, *US – Hot-Rolled Steel*; Appellate Body Report, *US – Hot-Rolled Steel*; Panel Report, *EC – Tube or Pipe Fittings*; Appellate Body Report, *EC – Tube or Pipe Fittings*; Panel Report, *EC – Bed Linen (Article 21.5 – India)*; Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*; Panel Report, *US – Corrosion-Resistant Steel Sunset Review*; Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*; Panel Report, *US – Softwood Lumber V*; Appellate Body Report, *US – Softwood Lumber V*.

¹⁴² See, eg, Panel Report, *Brazil – Desiccated Coconut*; Appellate Body Report, *Brazil – Desiccated Coconut*; Panel Report, *US – Lead and Bismuth II*; Appellate Body Report, *US – Lead and Bismuth II*; Panel Report, *US – Countervailing Measures on Certain EC Products*; Appellate Body Report, *US – Countervailing Measures on Certain EC Products*; Panel Report, *US – Carbon Steel*; Appellate Body Report, *US – Carbon Steel*; Panel Report, *US – Softwood Lumber IV*; Appellate Body Report, *US – Softwood Lumber IV*.

¹⁴³ See, eg, Panel Report, *Korea – Dairy*; Appellate Body Report, *Korea – Dairy*; Panel Report, *Argentina – Footwear (EC)*; Appellate Body Report, *Argentina – Footwear (EC)*; Panel Report, *US – Wheat Gluten*; Appellate Body Report, *US – Wheat Gluten*; Panel Report, *US – Lamb*; Appellate Body Report, *US – Lamb*; Panel Report, *US – Line Pipe*; Appellate Body Report, *US – Line Pipe*; Panel Reports, *US – Steel Safeguards*; Appellate Body Report, *US – Steel Safeguards*.

¹⁴⁴ See, eg, Panel Report, *US – Underwear*; Appellate Body Report, *US – Underwear*; Panel Report, *US – Wool Shirts and Blouses*; Appellate Body Report, *US – Wool Shirts and Blouses*; Panel Report, *US – Cotton Yarn*; Appellate Body Report, *US – Cotton Yarn*.

or regulation pursuant to which the determination was made.¹⁴⁵ For example, in *US – Hot-Rolled Steel*, Japan’s challenge to the anti-dumping measures included a claim that certain provisions of the United States’ anti-dumping statute were inconsistent with the Anti-Dumping Agreement.¹⁴⁶ In other cases, such as *EC – Tube or Pipe Fittings*, the challenge is limited to the administrative decision to impose anti-dumping or countervailing duties.¹⁴⁷

The aspects of anti-dumping or countervailing duty actions that have been challenged in the WTO include the determination of dumping¹⁴⁸ or subsidisation,¹⁴⁹ the determination of injury,¹⁵⁰ and reviews of anti-dumping or countervailing duties including administrative reviews¹⁵¹ and sunset reviews.¹⁵²

In most cases, the calculation of dumping or subsidisation, the determination of injury, and the imposition of duties are submitted to WTO dispute settlement as part of a single matter.¹⁵³ Nonetheless, in at least one case, the complainant initiated separate disputes against the imposition of preliminary duties, the calculation of subsidisation, the calculation of dumping, and the determination of injury,

¹⁴⁵ Members have brought complaints against legislation or regulations as such in the context of anti-dumping and countervailing duties. In contrast, safeguards legislation or regulations have not been challenged, as such, as at the date of writing.

¹⁴⁶ Panel Report, *US – Hot-Rolled Steel*; Appellate Body Report, *US – Hot-Rolled Steel*. See also Panel Report, *US – Countervailing Measures on Certain EC Products*; Appellate Body Report, *US – Countervailing Measures on Certain EC Products*.

¹⁴⁷ Panel Report, *EC – Tube or Pipe Fittings*; Appellate Body Report, *EC – Tube or Pipe Fittings*.

¹⁴⁸ See, eg, Panel Report, *US – Softwood Lumber V*; Appellate body Report, *US – Softwood Lumber V*; Panel Report, *US – Hot-Rolled Steel*; Appellate Body Report, *US – Hot-Rolled Steel*; Panel Report, *EC – Tube or Pipe Fittings*; Appellate Body Report, *EC – Tube or Pipe Fittings*; Panel Report, *EC – Bed Linen*; Appellate Body Report, *EC – Bed Linen*.

¹⁴⁹ See, eg, Panel Report, *US – Softwood Lumber IV*; Appellate Body Report, *US – Softwood Lumber IV*.

¹⁵⁰ See, eg, Panel Report, *EC – Tube or Pipe Fittings*; Appellate Body Report, *EC – Tube or Pipe Fittings*; Panel Report, *EC – Bed Linen (Article 21.5 – India)*; Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*; Panel Report, *Mexico – Corn Syrup (Article 21.5 – US)*; Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*; Panel Report, *Thailand – H-Beams*; Appellate Body Report, *Thailand – H-Beams*; Panel Report, *US – Softwood Lumber VI*.

¹⁵¹ See, eg, Panel Report, *US – Lead and Bismuth II*; Appellate Body Report, *US – Lead and Bismuth II*; Panel Report, *US – Countervailing Measures on Certain EC Products*; Appellate Body Report, *US – Countervailing Measures on Certain EC Products*; Request for consultations by Canada, *United States – Reviews of Countervailing Duty on Softwood Lumber from Canada*, WT/DS311/1 (14 April 2004).

¹⁵² See, eg, Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*; Panel Report, *US – Carbon Steel*; Appellate Body Report, *US – Carbon Steel*; Panel Report, *US – Countervailing Measures on Certain EC Products*; Appellate Body Report, *US – Countervailing Measures on Certain EC Products*.

¹⁵³ See, eg, Panel Report, *EC – Tube or Pipe Fittings*; Appellate Body Report, *EC – Tube or Pipe Fittings*.

respectively.¹⁵⁴ In addition, 're-determinations' (that is, modified determinations made after the initial determination is declared WTO-inconsistent) have been challenged pursuant to Article 21.5 of the DSU.¹⁵⁵

G Judicial Decisions

Typically, parties to WTO disputes have raised judicial decisions as evidence of how particular legislative or regulatory measures are interpreted or applied domestically, without challenging the decisions themselves. For instance, in *US – Section 211 Appropriations Act*, the European Communities submitted that two United States federal court decisions were relevant evidence of how Section 211 of the United States' Omnibus Appropriations Act of 1998 operated in practice. However, the European Communities did not challenge the WTO-consistency of these decisions.¹⁵⁶ Judicial decisions are just one form of evidence that may be used to establish the consistency or inconsistency of a particular municipal law of a WTO Member.¹⁵⁷

Of course, it would also be possible for a Member to challenge a judicial decision itself. For example, in its request for establishment of a panel in *US – Gambling*, Antigua and Barbuda claimed that certain 'actions or measures taken by United States Federal and State administrative agencies, officials and judiciary' are inconsistent with the United States' obligations under the WTO agreements.¹⁵⁸ At the time of writing, the Panel Report in this dispute has not yet been circulated to WTO Members.

Certain interesting questions arise in connection with potential challenges to judicial decisions as such or as applied. For example, a challenge could be brought against a series of judicial decisions regarding particular legislation. Such a challenge could be characterised as a challenge to the

¹⁵⁴ Panel Report, *US – Softwood Lumber III*; Panel Report, *US – Softwood Lumber IV*; Appellate Body Report, *US – Softwood Lumber IV*; Panel Report, *US – Softwood Lumber V*; Appellate Body Report, *US – Softwood Lumber V*; Panel Report, *US – Softwood Lumber VI*.

¹⁵⁵ See, eg, Panel Report, *Mexico – Corn Syrup (Article 21.5 – US)*; Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*; Panel Report, *EC – Bed Linen (Article 21.5 – India)*; Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*. Article 21.5 of the DSU is discussed further in section IV.C.1 below.

¹⁵⁶ Appellate Body Report, *US – Section 211 Appropriations Act*, para 98. See also Appellate Body Report, *US – 1916 Act*, para 100; Panel Report, *US – Steel Plate*, para 7.90; Panel Report, *US – Countervailing Measures on Certain EC Products*, para 7.139.

¹⁵⁷ Appellate Body Report, *US – Carbon Steel*, para 157. According to the Appellate Body, other forms of evidence that might be relevant in this context include evidence of the 'consistent application' of the law and 'the opinions of legal experts and the writings of recognized scholars'.

¹⁵⁸ Request for establishment of a panel by Antigua and Barbuda, *US – Gambling*, WT/DS285/2 (13 June 2003) Annex, section III.

legislation as such (using the judicial decisions to interpret the meaning of the legislation), or as a challenge to the legislation as applied by the courts in specified instances. Judicial decisions could also be challenged independently of legislation, regulations, or other measures. For example, it might be argued that issuing judicial decisions that discriminate between WTO Members is inconsistent with the obligation to provide most-favoured-nation treatment under Article I of GATT 1994. To the extent that a judicial decision relates to specific parties and particular factual circumstances, the challenge might be cast 'as applied' in that instance. However, judicial decisions often have wide implications, affecting non-parties to the dispute or the actions of other government bodies. Therefore, attempts may be made to challenge the decision as such, with a view to preventing its application in similar disputes in future and to prevent other government bodies from acting on it. Such a challenge to a judicial decision might be particularly significant in domestic judicial systems incorporating the principle of *stare decisis*.

Assessing the WTO-consistency of judicial decisions could raise some difficulties, some of which have already arisen in assessing judicial decisions as evidence for the purpose of interpreting a statute. For example, it might be difficult to assess the WTO-consistency of judicial decisions where several non-uniform decisions are made on the same issue, perhaps by different courts at different levels.¹⁵⁹ The permanence or certainty of a particular decision might also be affected by the availability of an appeals process, in relation to which it would be inappropriate to speculate, according to the Appellate Body.¹⁶⁰ Nevertheless, these problems are not insurmountable, and the delicate process of weighing and balancing evidence and assessing the consistency of domestic measures is part of the usual judicial function, to which panels and the Appellate Body are accustomed.

H Other Measures

In the discussion above regarding the attribution of acts and omissions to WTO Members,¹⁶¹ we mentioned certain measures that do not fit easily within the other categories. In *Canada – Autos*, the measure included letters of undertaking signed by the Canadian subsidiaries of certain auto manufacturers and negotiated with Canada's Ministry of Industry.¹⁶² In

¹⁵⁹ Panel Report, *US – 1916 Act (Japan)*, paras 6.51–6.52; Panel Report, *US – 1916 Act (EC)*, paras 6.52–6.53; Panel Report, *US – Section 110(5) Copyright Act*, para 6.144.

¹⁶⁰ See, eg, Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, paras 94–95; Panel Report, *US – 1916 Act (Japan)*, para 6.157; Panel Report, *US – 1916 Act (EC)*, para 6.139.

¹⁶¹ See section II.A.2 above.

¹⁶² Panel Report, *Canada – Autos*, paras 2.4–5, 6.250–52.

Canada – Dairy, the measure at issue was embodied in an agreement signed by a public corporation and provincial marketing boards, among others.¹⁶³ The measures challenged in *Japan – Film* included actions taken by a ‘Retailers Council’ under a retailers’ code of conduct that had been approved by a government agency.¹⁶⁴

IV IDENTIFYING THE MEASURE AT ISSUE IN A DISPUTE

A *How the Measure is Initially Identified*

1 Requirements in Initiating a Dispute

The complaining party initially defines the measure that is the object of a specific dispute. However, certain conditions apply to the complainant’s definition of the measure. As we shall see, if the complainant fails to comply with these conditions, it may find the panel ruling on something other than the measure it intended or declaring the measure to be outside the panel’s terms of reference.

At the WTO, a dispute is formally initiated when a WTO Member requests consultations with another WTO Member pursuant to Article 4 of the DSU. The request for consultations must include ‘the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint’.¹⁶⁵ If the consultations do not lead to a mutually satisfactory solution, the complaining party may then decide to request the establishment of a panel pursuant to Article 6 of the DSU. In accordance with Article 6.2, the request for the establishment of a panel shall ‘identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly’.

In *Guatemala – Cement I*, the Appellate Body considered that the panel had blurred the distinction between, on the one hand, a ‘measure’ and, on the other hand, a ‘legal basis for the complaint’ or a ‘claim’ of nullification or impairment of benefits. The Appellate Body emphasised that, in accordance with Article 6.2 of the DSU, the request for establishment of a panel (also known as the ‘panel request’) must contain both these elements.¹⁶⁶ Article 4.4 also refers to these two elements in describing the request for consultations. However, as one panel has noted, Article 4.4 refers to ‘the measures at issue’, whereas Article 6.2 refers to the ‘specific measures at issue’, which might suggest that the requirements

¹⁶³ Panel Report, *Canada – Dairy*, para 7.80.

¹⁶⁴ Panel Report, *Japan – Film*, para 10.321.

¹⁶⁵ DSU, art 4.4.

¹⁶⁶ Appellate Body Report, *Guatemala – Cement I*, paras 69, 72.

for a request for consultations are less stringent than those for a panel request.¹⁶⁷

The complainant in a WTO dispute needs to decide not only what measure to challenge, but also whether to challenge the measure as such, as applied, or both. This decision is important because it will have implications when it comes to implementation of the relevant recommendations and rulings, in the event that the challenge is successful, as discussed further below.¹⁶⁸ In addition, a challenge to a measure as such would elicit reasoning from the panel or the Appellate Body addressing the measure in general rather than only in one specific set of circumstances.¹⁶⁹ This could be useful for a complainant seeking broader guidance about measures of that type as well as greater security and predictability for exporters. Often, a Member challenges a measure both as such and as applied, leaving the panel to rule on the two challenges separately.¹⁷⁰ This gives the Member a 'fallback' position in the event that the as such challenge fails for reasons such as insufficient evidence.

Following the request for establishment of a panel by the complainant, the panel may need to define the parameters of the matter before it. The standard terms of reference of a panel established under the DSU are:

To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the *matter* referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s).¹⁷¹

In general, the document described above as referring a matter to the DSB will be the panel request. Thus, the 'matter' before the panel will be the measures at issue and the claims of the complaining party.¹⁷² However, a measure that is not clearly specified in the panel request (or, occasionally, the request for consultations)¹⁷³ falls outside the panel's terms of reference and, therefore, cannot be examined by the panel.¹⁷⁴

¹⁶⁷ Panel Report, *Wheat Exports and Grain Imports*, para 6.10 (sub para 15).

¹⁶⁸ See section IV.C below.

¹⁶⁹ *Handbook*, above n 7, 41.

¹⁷⁰ See, eg, Panel Report, *Canada – Aircraft*, para 9.129.

¹⁷¹ DSU, art 7.1 (emphasis added). These terms of reference apply unless the parties agree otherwise within 20 days of the establishment of the panel.

¹⁷² Appellate Body Report, *Guatemala – Cement I*, para 72.

¹⁷³ Appellate Body Report, *US – Certain EC Products*, para 70.

¹⁷⁴ See, eg, Appellate Body Report, *Australia – Salmon*, para 105; Appellate Body Report, *US – Carbon Steel*, para 171.

2 Potential Difficulties

Two disputes serve as examples of the difficulties that may arise in identifying the measure at issue, while demonstrating the importance of properly defining the measure in the panel request. In the recent dispute *Canada – Wheat Exports and Grain Imports*, the United States claimed that Canada was acting inconsistently with its WTO obligations in connection with ‘matters concerning the export of wheat by the Canadian Wheat Board and the treatment accorded by Canada to grain imported into Canada’.¹⁷⁵ Canada argued that the United States’ panel request did not comply with Article 6.2 of the DSU, and the panel issued a preliminary ruling on this question before the Panel Report was circulated.¹⁷⁶ Among other things, Canada maintained that the panel request failed to identify the specific measures at issue. The panel referred to the Appellate Body’s ruling in *US – Carbon Steel* in noting that the purpose of this requirement is both (a) to define the scope of the dispute and the panel’s jurisdiction; and (b) to accord due process to the respondent and third parties by informing them of the nature of the complaint.¹⁷⁷ The panel indicated that these purposes are relevant in assessing whether a panel request properly identifies the specific measures at issue.¹⁷⁸

In the case at hand, the panel found that the following statement, contained in the United States’ panel request, did not adequately specify the measures at issue in relation to the United States’ claims under Article XVII of GATT 1994:

[T]he laws, regulations and actions of the Government of Canada and the CWB related to exports of wheat.

In reaching this conclusion, the panel noted that the relevant instruments were not identified by name or date and indicated that the ‘absence of clarity as to the number of laws and regulations at issue is the source of significant uncertainty’.¹⁷⁹ The panel also considered that the United States had not clearly described the content of the instruments challenged, making it difficult for Canada to prepare its defence.¹⁸⁰ The panel therefore declined to address the merits of the United States’ claims under Article XVII.¹⁸¹ As a result of this ruling, the panel proceedings were suspended

¹⁷⁵ Panel Report, *Canada – Wheat Exports and Grain Imports*, para 1.1.

¹⁷⁶ The preliminary ruling is duplicated in *ibid* para 6.10.

¹⁷⁷ Panel Report, *Canada – Wheat Exports and Grain Imports*, para 6.10 (sub para 16), referring to Appellate Body Report, *US – Carbon Steel*, para 126.

¹⁷⁸ Panel Report, *Canada – Wheat Exports and Grain Imports*, para 6.10 (sub para 17).

¹⁷⁹ *Ibid* para 6.10 (sub paras 21–22).

¹⁸⁰ *Ibid* para 6.10 (sub para 24).

¹⁸¹ *Ibid* para 6.10 (sub para 32).

at the request of the United States and the United States filed a new panel request, some months after filing the first.¹⁸²

Canada – Wheat Exports and Grain Imports demonstrates that a failure to specify a measure properly in the panel request may result in certain measures being left out of the panel's consideration. What is worse for the complainant is that, conceivably, an entire dispute might end on the basis of a panel's preliminary ruling that the panel request failed to identify the measure at issue as required by Article 6.2 of the DSU. Therefore, complainants should generally identify the instruments they wish to challenge as precisely as possible in the panel request.

A second example of the problems that may arise in identifying the measure at issue is found in the earlier case of *Australia – Salmon*. In that case, Canada was the complainant. Canada described the challenged measures as follows in its panel request:

The Australian Government's measures prohibiting the importation of fresh, chilled or frozen salmon ... includ[ing] Quarantine Proclamation 86A, dated 19 February 1975, and any amendments or modifications to it.¹⁸³

Quarantine Proclamation 86A (QP86A) prohibited the import of 'dead fish of the sub-order Salmonidae' unless authorised by the Director of Quarantine and heat-treated in a manner prescribed in certain other instruments.¹⁸⁴ On 1 June 1988, the Australian Department of Primary Industries and Energy imposed certain heat-treatment requirements (1988 Conditions) on the importation of 'uncanned salmon and trout meat and salmon roe'.¹⁸⁵ The panel treated the 1988 Conditions as a prohibition on imports of fresh, chilled or frozen salmon (and therefore within its terms of reference) because it concluded that the 1988 Conditions 'in effect deny the importation of commercial quantities of salmon product not heat-treated as prescribed'.¹⁸⁶ The panel explained:

As Canada puts it, to contend that the heat treatment requirements have nothing to do with importation of fresh, chilled or frozen salmon is like saying that a 'no smoking' regulation has nothing to do with smoking

¹⁸² Ibid para 6.11. The proceedings of the two panels were harmonised in accordance with DSU, art 9.3: Panel Report, *Canada – Wheat Exports and Grain Imports*, para 1.11.

¹⁸³ Panel Report, *Australia – Salmon*, para 8.7, quoting Request for establishment of a panel by Canada, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/2 (10 March 1997).

¹⁸⁴ Panel Report, *Australia – Salmon*, para 8.10.

¹⁸⁵ Ibid para 8.7, 8.11.

¹⁸⁶ Ibid paras 8.18–8.19.

or that a requirement to offer proof of legal drinking age when entering a bar has nothing to do with prohibiting consumption of alcohol by minors.¹⁸⁷

The Appellate Body disagreed. In the view of the Appellate Body, the 'product at issue' was fresh, chilled or frozen salmon and the measure applied to that product was QP86A. The 1988 Conditions applied to a different product, namely smoked salmon and salmon roe. Moreover, the import prohibition on fresh, chilled or frozen salmon resulted from the express prohibition in QP86A and not the heat treatment requirements in the 1988 Conditions. Therefore, the Appellate Body held that the 1988 Conditions were not part of the measure at issue and were not within the panel's terms of reference.¹⁸⁸

The Panel and Appellate Body Reports in *Australia – Salmon* illustrate that, even when the panel request identifies a specific legal instrument by name, the precise scope of the measure at issue may be disputed. This case also shows that, in some circumstances, the measure at issue in a dispute will relate to a particular 'product'. This may be particularly likely in relation to trade remedies (such as anti-dumping and countervailing duties) or sanitary and phytosanitary measures. The identification of the product in such cases may be important in determining the required scope of the panel's reasoning. This is because the panel is expected to examine the measure at issue in its entirety.¹⁸⁹ Therefore, if the measure in dispute includes a range of products, the panel should address the measure in connection with all the products. For instance, in *Japan – Alcoholic Beverages II*, the European Communities, Canada, and the United States each referred a matter to the DSB regarding Japan's taxation of particular products. The United States' complaint referred to shochu and 'all other distilled spirits and liqueurs falling within HS heading 2008'. The Appellate Body found that the panel committed an error of law in reaching conclusions on only 'shochu, whisky, brandy, rum, gin, genever, and liqueurs', rather than the broader range of products included in the United States' complaint.¹⁹⁰

A final point worth noting in relation to the initial definition of the measure at issue is that several measures may be challenged together in a particular

¹⁸⁷ Ibid para 8.95.

¹⁸⁸ Appellate Body Report, *Australia - Salmon*, paras 103–05.

¹⁸⁹ In *Canada – Wheat Exports and Grain Imports*, the Appellate Body suggested that a claim that a panel did not examine the measure in its entirety should be properly raised, under Article 11 of the DSU, as a failure by the panel to make an objective assessment of the matter: Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para 176.

¹⁹⁰ Appellate Body Report, *Japan – Alcoholic Beverages II*, 28.

dispute¹⁹¹, or a single measure alone.¹⁹² In some cases, a number of different requirements or legal instruments are grouped together and regarded as a single measure. For example, in *Japan – Apples*, the panel decided to treat as a single challenged measure nine different requirements or prohibitions regarding the importation of apples from the United States.¹⁹³ In making this decision, the panel took into account the fact that the challenged requirements were interrelated and that the parties ‘argued the case as an “all or nothing” exercise’.¹⁹⁴ The panel also pointed out that neither party objected to this approach and that Japan specifically requested it.¹⁹⁵ Nevertheless, the panel emphasised that its decision to treat the challenged requirements as a single measure did not mean that it would have to conclude that the entire measure was either consistent or inconsistent with the WTO agreements — rather, it could conclude that part of the measure was consistent and part of it inconsistent.¹⁹⁶

B *Developments During the Proceedings*

Once a Member has formally initiated dispute settlement proceedings in the WTO, it may happen that subsequent developments affect the measure at issue in the dispute. For example, such developments could involve an amendment to or termination of an instrument described in the request for consultations or the panel request, or the adoption of new legal instruments related to those described in the request for consultations or the panel request.

In some disputes, developments like these have arisen after the parties have held consultations, but before the complaining party has requested the establishment of a panel. In such a situation, the question may arise whether the complaining party may redefine the measure to include the recent developments. In *Brazil – Aircraft*, Canada challenged particular export subsidies granted by Brazil to foreign purchasers of certain Brazilian aircraft.¹⁹⁷ Brazil objected to the inclusion in the panel request of certain regulatory instruments that came into effect after the consultations.¹⁹⁸ The Appellate Body indicated that Articles 4 and 6 of the DSU do not ‘require a *precise and exact identity*’ between the measures that

¹⁹¹ For example, in *Canada – Wheat Exports and Grain Imports*, the United States challenged two categories of measures. One category related to the export of wheat by the Canadian Wheat Board and the other included measures that applied to grain imported into Canada.

¹⁹² See, eg, Panel Report, *EC – Sardines*; Appellate Body Report, *EC – Sardines*.

¹⁹³ Panel Report, *Japan – Apples*, paras 8.5, 8.20.

¹⁹⁴ *Ibid* paras 8.16–8.17.

¹⁹⁵ *Ibid* para 8.15.

¹⁹⁶ *Ibid* para 8.19.

¹⁹⁷ Appellate Body Report, *Brazil – Aircraft*, para 129.

¹⁹⁸ Panel Report, *Brazil – Aircraft*, para 7.4.

were the subject of consultations and the measures identified in the panel request.¹⁹⁹ The Appellate Body agreed with the panel that '[o]ne purpose of consultations ... is to "clarify the facts of the situation", and it can be expected that information obtained during the course of consultations may enable the complainant to focus the scope of the matter with respect to which it seeks establishment of a panel'.²⁰⁰ The Appellate Body found that the regulatory instruments in question were properly before the panel.²⁰¹ In reaching this conclusion, however, the Appellate Body emphasised that these instruments 'did not change the essence of the export subsidies'.²⁰²

US – Certain EC Products concerned a development that took place after the request for consultations but before the panel request. In that case, the European Communities challenged certain actions taken by the United States in response to the European Communities' failure to implement the recommendations and rulings of the DSB in *EC – Bananas III*. Specifically, the European Communities requested consultations with the United States on 4 March 1999 regarding an increase in the bonding requirements that applied to certain products imported from the European Communities, effective from 3 March 1999.²⁰³ Subsequently, on 19 April 1999, the United States imposed duties at the rate of 100 per cent *ad valorem* on certain European Communities imports.²⁰⁴ Consultations were held on 21 April 1999, and on 11 May 1999 the European Communities requested the DSB to establish a panel 'with respect to' the United States' decision that took effect on 3 March 1999. The panel request noted the action of 19 April 1999 without expressly stating that this action was also challenged.

The panel and Appellate Body both found that the measure at issue in *US – Certain EC Products* was the '3 March Measure' alone.²⁰⁵ The Appellate Body stated that it was unable to conclude, merely from the reference in the panel request to the '19 April action', that this action was within the panel's terms of reference.²⁰⁶ In addition, the Appellate Body took into account the fact that the request for consultations did not refer to the 19 April action (since that action had not yet been taken).²⁰⁷ Finally, the Appellate Body determined that the 19 April action was 'separate and

¹⁹⁹ Appellate Body Report, *Brazil – Aircraft*, para 132 (original emphasis).

²⁰⁰ *Ibid* para 132, quoting Panel Report, *Brazil – Aircraft*, para 7.9.

²⁰¹ Appellate Body Report, *Brazil – Aircraft*, para 133.

²⁰² *Ibid* para 132.

²⁰³ Panel Report, *US – Certain EC Products*, para 1.2.

²⁰⁴ *Ibid* para 2.36.

²⁰⁵ *Ibid* para 6.11; Appellate Body Report, *US – Certain EC Products*, para 82.

²⁰⁶ Appellate Body Report, *US – Certain EC Products*, para 69.

²⁰⁷ *Ibid* para 70.

legally distinct' from the 3 March Measure.²⁰⁸ The Appellate Body's reasons on this last point included that the 3 March Measure and the 19 April action did not apply to exactly the same list of products and were effected by separate agencies pursuant to separate legal authorities.²⁰⁹

In other disputes, developments affecting the measure at issue have arisen after the panel has been established. For example, in *Chile – Price Band System*, Argentina requested the establishment of a panel to examine Chile's 'price band system' 'under Law 18.525, as amended by Law 18.591 and subsequently by Law 19.546, as well as the regulations and complementary provisions and/or amendments'.²¹⁰ Subsequently, at the panel's second meeting with the parties, Chile informed the panel that Law 19.722 had entered into force, inserting a new paragraph into Law 18.525.²¹¹ Chile argued that, even if Argentina were correct in alleging that Chile had violated a WTO tariff binding, the amendments ensured that such violation would now cease and provided a 'positive solution' to the dispute.²¹²

The Appellate Body held, in *Chile – Price Band System*, that Law 19.722 was within the panel's terms of reference because it fell within the word 'amendments' in the panel request.²¹³ The Appellate Body also held that Law 19.722 was part of the measure under appeal because it did not change the essence of Chile's price band system.²¹⁴ In reaching these conclusions, the Appellate Body emphasised:

[W]e do not mean to condone a practice of amending measures during dispute settlement proceedings if such changes are made with a view to shielding a measure from scrutiny by a panel or by us. We do not suggest that this occurred in this case. However, generally speaking, the demands of due process are such that a complaining party should not have to adjust its pleadings throughout dispute settlement proceedings in order to deal with a disputed measure as a 'moving target'. If the terms of reference in a dispute are broad enough to include amendments to a measure—as they are in this case—and if it is

²⁰⁸ Ibid para 75.

²⁰⁹ Ibid paras 74–75.

²¹⁰ Appellate Body Report, *Chile – Price Band System*, para 149.

²¹¹ Panel Report, *Chile – Price Band System*, para 7.3.

²¹² Ibid para 7.4.

²¹³ Appellate Body Report, *Chile – Price Band System*, para 135.

²¹⁴ Ibid paras 138–139, citing with approval Panel Report, *Argentina – Footwear (EC)*, para 8.45.

necessary to consider an amendment in order to secure a positive solution to the dispute—as it is here—then it is appropriate to consider the measure *as amended* in coming to a decision in a dispute.²¹⁵

Together, the decisions of the Appellate Body in *Brazil – Aircraft*, *US – Certain EC Products*, and *Chile – Price Band System* suggest that two overlapping criteria must be fulfilled if a panel’s terms of reference are to encompass a development that occurs subsequent to the panel request (or the request for consultations) and that affects the measure at issue (be it an amendment or termination of an instrument or the introduction of a new instrument). These criteria could be framed as follows: first, the wording of the panel request (and the request for consultations, if the development occurs before the panel request) must be sufficiently broad to incorporate the subsequent development; second, the ‘essence’ of the challenged measure must be the same before and after the subsequent development. If the subsequent development is a ‘separate and legally distinct’ measure from the one originally described, then the essence of the measure has changed and the subsequent development falls outside the panel’s terms of reference.

The mere fact that a particular development falls outside the panel’s terms of reference does not necessarily mean that the panel cannot consider it in assessing the specific measure that is challenged. Thus, in *US – Certain EC Products*, the panel stated:

Accordingly, we shall continue to limit ourselves to our terms of reference and to the measure therein identified, keeping in mind that events surrounding the 3 March Measure may have to be addressed in order for the Panel to provide an answer to the claims at issue.²¹⁶

Nevertheless, in some circumstances it may be difficult to distinguish between developments that need to be addressed in order to assess the complainant’s claim and developments that are not relevant to the precise measure at issue. In *US – Certain EC Products*, the Appellate Body held that the panel had erroneously made statements that were relevant only to the 19 April action, which, as the panel itself recognised, fell outside the panel’s terms of reference.²¹⁷

In addition, it is worth noting that the fact that a challenged measure is no longer in effect, of itself, does not necessarily prevent the panel from assessing

²¹⁵ Appellate Body Report, *Chile – Price Band System*, para 144 (original emphasis).

²¹⁶ Panel Report, *US – Certain EC Products*, para 6.11, referring to Panel Report, *Argentina – Footwear (EC)*, para 6.63. See also Panel Report, *India – Autos*, paras 7.30, 8.20.

²¹⁷ Appellate Body Report, *US – Certain EC Products*, para 89.

that measure, even though it may affect the panel's rulings in connection with implementation, as discussed further below.²¹⁸ While some panels have refused to address expired measures,²¹⁹ several panels have indicated their willingness to examine and make findings regarding measures that have already expired or allegedly expired.²²⁰ This approach may be necessary in order to provide a 'positive solution' to the dispute,²²¹ and to prevent the purpose of the dispute settlement system from being defeated.²²²

C Implementation

1 Bringing an Inconsistent Measure into Conformity

This section relates to the normal rules governing implementation of successful violation complaints under the WTO Agreements. Different considerations apply to prohibited and actionable subsidies under the SCM Agreement.²²³ Article 19.1 of the DSU provides, in respect of violation complaints in the WTO:

Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.²²⁴

A recommendation by a panel or the Appellate Body that a Member bring an inconsistent measure into conformity becomes a recommendation or ruling of the DSB when the DSB adopts the relevant Panel or Appellate Body Report. The dispute will be resolved, preferably, by the Member

²¹⁸ See section IV.C.1 below and Panel Report, *India – Autos*, para 7.30.

²¹⁹ See, eg, Panel Report, *Argentina – Textiles and Apparel*, paras 6.14–5; Panel Report, *Japan – Film*, para 10.58; Panel Report, *US – Gasoline*, para 6.19.

²²⁰ See, eg, Panel Report, *US – Wool Shirts and Blouses*, para 6.2; Panel Report, *Chile – Price Band System*, paras 7.112, 7.115, 7.124–6; Panel Report, *Indonesia – Autos*, para 14.9; Panel Report, *India – Autos*, para 7.26.

²²¹ 'The aim of the dispute settlement mechanism is to secure a positive solution to a dispute': DSU, art 3.7. See also Appellate Body Report, *Australia – Salmon*, para 223; Panel Report, *Chile – Price Band System*, paras 7.112, 7.115.

²²² Thus, one Panel has noted, 'as a general matter, that if a respondent could make changes of any degree to a measure subject to challenge and then always be able to successfully argue that the Panel's report can have no ultimate normative effect because the changes are distinct measures from those originally envisaged, this could entirely frustrate the dispute settlement system': Panel Report, *India – Autos*, n 455.

²²³ See below nn 224, 226, 230.

²²⁴ Footnote omitted. Where the measure is a prohibited subsidy, the panel recommends that the Members withdraw the measure: SCM Agreement, art 4.7.

concerned implementing the recommendation to bring the measure into conformity. Compensation or, as a last resort, suspension of concessions are available as temporary measures, subject to certain conditions, if the Member does not fulfil this implementation requirement.²²⁵

In bringing an inconsistent measure ‘into conformity’ in order to implement the recommendations and rulings of the DSB, a Member would need to withdraw the measure entirely or modify it to remove the inconsistency.²²⁶ If a measure such as a legislative act is found inconsistent as such, then the implementing Member will need to withdraw or modify the legislation itself. However, if the legislation is found inconsistent as applied in a particular instance (for example, where anti-dumping legislation is used to impose anti-dumping duties on a specific product imported from a specific country), then the implementing Member will need to withdraw or modify the legislation only as applied in that instance. In the example just mentioned, this might entail the Member conducting a new anti-dumping investigation or revising the rate at which anti-dumping duties are imposed on the relevant imports. This distinction illustrates the significance of the complainant’s initial decision to challenge the measure as such or as applied.

In general, it is up to the Member to determine precisely how to implement the recommendations and rulings of the DSB, provided that the means chosen is consistent with those recommendations and rulings and also with the covered agreements.²²⁷ Nevertheless, in some cases, pursuant to the second sentence of Article 19.1 of the DSU as cited above, panels have suggested how the Member could fulfil its implementation obligation. For example, in *US – Offset Act (Byrd Amendment)*, pursuant to the second sentence of Article 19.1, the panel suggested that the US repeal the measure that the panel had found inconsistent as such, namely the United States’ Continued Dumping and Subsidy Offset Act of 2000.²²⁸ In several anti-dumping disputes, the panel has suggested that the respondent repeal or revoke the anti-dumping measure applied in a particular case, namely the instrument imposing anti-dumping duties on a specific product from a specific country.²²⁹

²²⁵ DSU, arts 3.7, 22.1.

²²⁶ See DSU, art 3.7, as mentioned in section II.A.1 above. Where the measure is a prohibited subsidy, the Member must withdraw the measure (see above n 224). Where the measure is an actionable subsidy (that is, a subsidy that has resulted in adverse effects to the interests of another Member within the meaning of Article 5 of the SCM Agreement), the Member must either take appropriate steps to remove the adverse effects or withdraw the subsidy: SCM Agreement, art 7.8.

²²⁷ See, for example, Panel Report, *India – Patents (US)*, para 7.65; Award of the Arbitrator, *Chile – Price Band System*, para 32.

²²⁸ Panel Report, *US – Offset Act (Byrd Amendment)*, para 8.6.

²²⁹ See, for example, Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para 8.7; Panel Report, *Guatemala – Cement I*, para 8.6; Panel Report, *Guatemala – Cement II*, para 9.6.

Pursuant to Article 21.3 of the DSU, if it is 'impracticable to comply immediately with the recommendations and rulings' of the DSB, the implementing Member has 'a reasonable period of time in which to do so'.²³⁰ This period may be proposed by the implementing Member and approved by the DSB, mutually agreed by the parties to the dispute, or determined through binding arbitration.²³¹ The nature of the measure found inconsistent is likely to affect the period of time required for implementation. Thus, for example, a Member might be expected to take longer to withdraw or amend a law or regulation found inconsistent as such than to adjust its application in a particular instance. Moreover, several arbitrators under Article 21.3(c) of the DSU have pointed out that legislative changes will generally take longer than regulatory changes.²³² Accordingly, implementation effected through legislative means (for example, where the inconsistent measure is legislation and the Member decides to amend the legislation itself) may take longer than implementation effected through regulatory means (for example, where the inconsistent measure is a regulation and the Member decides to amend the regulation itself).²³³ This distinction is broadly consistent with the pattern of periods of time awarded in Article 21.3(c) arbitrations to date.²³⁴

Where an inconsistent measure is imposed by a regional or local government or authority and attributed to the WTO Member (rather than being imposed directly by the central government of that Member), the Member might be precluded from bringing the measure into conformity itself, for example due to restrictions in the domestic constitution of that

²³⁰ Where the measure is a prohibited subsidy, the Member must comply without delay, within the time period specified by the panel: SCM Agreement, art 4.7. Where the measure is an actionable subsidy, the Member must usually either comply within six months of adoption, or provide compensation or face countermeasures: SCM Agreement, art 7.9. See also Appellate Body Report, *Brazil – Aircraft*, para 192.

²³¹ DSU, art 21.3(a)–(c).

²³² See, for example, Award of the Arbitrator, *Canada – Pharmaceutical Patents*, para 49; Award of the Arbitrator, *Canada – Patent Term*, para 41; Award of the Arbitrator, *US – Section 110(5) Copyright Act*, para 34.

²³³ In *US – Offset Act (Byrd Amendment)*, the Arbitrator held that the determination of the reasonable period of time was not affected by the panel's suggestion, pursuant to the second sentence of Article 19.1 of the DSU, that the inconsistent legislation be repealed. In other words, it was still for the implementing Member to determine the means of implementation: Award of the Arbitrator, *US – Offset Act (Byrd Amendment)*, paras 51–52.

²³⁴ The period of time awarded for implementation through legislative means has typically been 10 months or more (see, for example, Award of the Arbitrator, *EC – Bananas III*, para 20; Award of the Arbitrator, *Chile – Alcoholic Beverages*, para 46; Award of the Arbitrator, *Chile – Price Band System*, para 58). The period of time awarded for implementation through regulatory means has typically been 8 months or less (see, for example, Award of the Arbitrator, *Australia – Salmon*, para 39; Award of the Arbitrator, *Canada – Pharmaceutical Patents*, para 64; Award of the Arbitrator, *Canada – Autos*, para 56).

Member.²³⁵ Thus, it could be difficult for the Member to comply with the usual implementation obligation of bringing the measure into conformity with the WTO agreements. The relevant WTO provisions therefore require a Member in such cases simply to 'take such reasonable measures as may be available to it to ensure its observance'.²³⁶ In other words, the fact that a Member is unable to secure the withdrawal or modification of the measure in order to bring it into conformity will not, of itself, necessarily constitute a breach of WTO rules. Nevertheless, a failure to bring the measure into conformity may lead to compensation or suspension of concessions like any other implementation failure.²³⁷

If a panel finds that a measure is inconsistent with a WTO provision but that the measure is no longer in effect,²³⁸ it does not make sense for the panel to recommend pursuant to Article 19.1 of the DSU that the Member concerned bring the measure into conformity. In *US – Certain EC Products*, the Appellate Body upheld the panel's finding that the United States acted inconsistently with its WTO obligations by adopting the 3 March Measure mentioned above.²³⁹ However, the Appellate Body also upheld the panel's finding that this measure was no longer in effect.²⁴⁰ The Appellate Body therefore concluded that the panel 'erred in recommending that the DSB request the United States to bring into conformity with its WTO obligations' the 3 March Measure.²⁴¹ Instead, the Appellate Body ruled as follows: 'As we have upheld the panel's finding that the 3 March Measure, the measure at issue in this dispute, is no longer in existence, we do not make any recommendation to the DSB pursuant to Article 19.1 of the DSU'.²⁴² Subsequently, the panels in *India – Autos* and *Chile – Price Band System* reiterated the approach of the Appellate Body regarding the recommendations to be made pursuant to Article 19.1 in respect of a measure that no longer exists.²⁴³

2 Compliance Measures

In several cases, disputes have arisen regarding measures taken by Members to comply with the DSB's recommendations and rulings. If the

²³⁵ *Handbook*, above n 7, 90.

²³⁶ DSU, art 22.9. See also GATT 1994, art XXIV:12.

²³⁷ DSU, art 22.9. Footnote 17 to Article 22.9 notes that different provisions in other covered agreements regarding measures taken by regional or local governments or authorities would prevail over these general rules.

²³⁸ As mentioned in section IV.B above, several panels have made findings of this kind.

²³⁹ Appellate Body Report, *US – Certain EC Products*, paras 127, 128(e). See section IV.B above.

²⁴⁰ *Ibid* paras 82, 128(a).

²⁴¹ *Ibid* para 81.

²⁴² *Ibid* para 129.

²⁴³ Panel Report, *India – Autos*, paras 8.25–6, 8.30; Panel Report, *Chile – Price Band System*, paras 7.112–3, 7.124, 8.3. See also Panel Report, *India – Autos*, para 8.19.

complainant considers that such a measure fails to comply with those recommendations and rulings or is otherwise inconsistent with the covered agreements, it may bring the matter back to dispute settlement, where the original panel will normally assess the implementing measure in accordance with Article 21.5 of the DSU (in turn, this 'compliance panel' decision may be appealed to the Appellate Body).

In Article 21.5 disputes, the original complainant may challenge only measures taken to comply with the DSB's recommendations and rulings in the original dispute.²⁴⁴ According to the Appellate Body, a measure that is 'taken to comply' will be distinct from the measure originally found to be WTO-inconsistent.²⁴⁵ Thus, for example, in *Mexico – Corn Syrup*, the panel found inconsistent Mexico's imposition of anti-dumping duties on certain imports of high-fructose corn syrup from the United States (including the underlying determination of threat of material injury), and it recommended that Mexico bring this measure into conformity.²⁴⁶ Mexico subsequently published a new resolution, revising the regulation that originally imposed these duties. The United States challenged, pursuant to Article 21.5, Mexico's confirmation in the new resolution that the subject imports posed a threat of material injury to the domestic sugar industry.²⁴⁷ The panel and Appellate Body upheld the United States' challenge.²⁴⁸

Whether a measure is taken to comply is a question for the panel rather than for the implementing Member or the complaining Member.²⁴⁹ In other words, a declaration by the implementing Member that it did not take a particular measure to comply with the original rulings is not dispositive; the complainant's claim that the measure was taken to comply is also insufficient to determine the panel's mandate.²⁵⁰ In *EC – Bed Linen (Article 21.5 – India)*, the compliance panel refused to examine two measures on the ground that they were not taken to comply with the rulings in the original *EC – Bed Linen* dispute.²⁵¹ As mentioned earlier, the original measure found inconsistent was the European Communities' practice of 'zeroing' as applied in an anti-dumping investigation into imports of certain bed linen from India.²⁵² The measures that the panel found were

²⁴⁴ Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para 78.

²⁴⁵ Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para 36.

²⁴⁶ Panel Report, *Mexico – Corn Syrup*, paras 1.1, 8.2, 8.4.

²⁴⁷ Panel Report, *Mexico – Corn Syrup (Article 21.5 – US)*, paras 1.2–1.3; Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para 79.

²⁴⁸ Panel Report, *Mexico – Corn Syrup (Article 21.5 – US)*, paras 6.23, 6.36; Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para 135(b) and (c).

²⁴⁹ Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para 78.

²⁵⁰ Panel Report, *EC – Bed Linen (Article 21.5 – India)*, paras 6.15, 6.17.

²⁵¹ *Ibid* para 6.22.

²⁵² Appellate Body Report, *EC – Bed Linen*, para 66 (see section III.D above).

not taken to comply with the original ruling related to anti-dumping duties imposed on certain imports from Egypt and Pakistan.²⁵³

The panel's reasoning in *EC – Bed Linen (Article 21.5 – India)* suggests that a new measure taken by an implementing Member will be considered as a measure taken to comply with an original ruling only if the original ruling directly concerned the subject matter of the new measure. However, if the original measure was found inconsistent as such (for example, if the European Communities' zeroing practice had been found inconsistent as such in *EC – Bed Linen*), one might expect that a broader range of actions could be regarded as measures taken to comply with the original ruling.

3 Suspension of Concessions

If a Member fails to implement the DSB's recommendations and rulings by bringing an inconsistent measure into conformity within a reasonable period of time, the complaining Member may request negotiations 'with a view to developing mutually acceptable compensation'. If no such compensation is agreed within a specified period of time, the complaining Member may request authorisation from the DSB to 'suspend the application to the Member concerned of concessions or other obligations under the covered agreements'.²⁵⁴ If the implementing Member objects to the level of suspension proposed by the complaining Member, the appropriate level of suspension (corresponding to the level of nullification or impairment suffered)²⁵⁵ may be determined by arbitration under Article 22.6 of the DSU.

The level of nullification or impairment is likely to differ according to whether the panel and Appellate Body found the challenged measure inconsistent as such or as applied. When the measure is inconsistent as applied, the level of nullification or impairment is restricted to the nullification or impairment resulting from that specific application of the measure, even though a new application in similar circumstances might also be expected to be inconsistent and cause nullification or impairment.²⁵⁶ In contrast, the level of nullification or impairment arising from a measure that is inconsistent as such may include nullification or impairment arising from applications of that measure in the future. Thus, for example, in the Article 22.6 arbitration in *US – 1916 Act (EC)*,²⁵⁷ the arbitrators stated:

²⁵³ Panel Report, *EC – Bed Linen (Article 21.5 – India)*, paras 6.9, 6.18.

²⁵⁴ DSU, art 22.2.

²⁵⁵ DSU, art 22.4.

²⁵⁶ Decision by the Arbitrator, *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, para 3.111.

²⁵⁷ The measure at issue in the underlying dispute is described in section II.B above.

The existence and maintenance of the 1916 Act as such violates the rights of the European Communities, and each application of the Act — i.e. if a court in the United States were to issue an award of damages against an EC entity, or if EC entities enter into agreements to settle claims under the 1916 Act — increases the level of nullification or impairment sustained by the European Communities as a result of the Act.²⁵⁸

It could be difficult to determine the level of nullification or impairment arising from a measure that is inconsistent as such, especially if it has not been applied in any individual case or if the extent of its application in future cases is uncertain. In *US – 1916 Act (EC)*, the arbitrators concluded that the level of nullification or impairment included ‘the cumulative monetary value of any amounts payable by EC entities pursuant to final court judgments for claims under the 1916 Act’ and ‘the cumulative monetary value of any amounts payable by EC entities pursuant to the settlement of claims under the 1916 Act’.²⁵⁹ The arbitrators also suggested that the parties to the dispute should act in good faith by providing access to relevant information such as settlement awards to enable other parties to determine the extent of nullification or impairment over time.²⁶⁰ Similarly, in the recent Article 22.6 arbitration in *US – Offset Act (Byrd Amendment)*, the arbitrator determined that the level of nullification or impairment arising from the United States’ Continued Dumping and Subsidy Offset Act of 2000, which was found inconsistent as such, would need to be calculated each year based on disbursements made under that Act in the preceding year.²⁶¹

4 Non-Violation Complaints²⁶²

The preceding paragraphs focus on the rules applicable to implementation in the usual type of dispute — that is, a complaint that a measure is inconsistent with a WTO provision, which gives rise to a recommendation or ruling to bring the inconsistent measure into conformity with the covered agreements. However, as already outlined,²⁶³ a non-violation complaint may also be made pursuant to Article XXIII:1(b) of GATT 1994. If such a complaint succeeds, the panel or Appellate Body will not

²⁵⁸ Decision by the Arbitrators, *US – 1916 Act (EC) (Article 22.6 – US)*, para 6.14 (see also para 6.17).

²⁵⁹ *Ibid* para 8.2.

²⁶⁰ *Ibid* para 9.1.

²⁶¹ See, eg, Decision by the Arbitrator, *US – Offset Act (Byrd Amendment) (Brazil) (Article 22.6 – US)*, paras 5.1–5.2.

²⁶² As mentioned above (section II.A.3), we have focused on violation and non-violation complaints. Different provisions apply to situation complaints in accordance with DSU, art 26.2.

²⁶³ See section II.A.1 above.

normally make a finding that a measure is inconsistent, nor a recommendation that the Member bring the measure into conformity. This is because the complainant need not establish that a challenged measure is inconsistent with a WTO provision in order to succeed in a non-violation complaint.²⁶⁴ Therefore, different considerations apply to the implementation of recommendations or rulings arising from this type of complaint.

If a panel or the Appellate Body determines that a measure challenged in a non-violation complaint nullifies or impairs benefits under, or impedes the attainment of objectives of, a covered agreement without violating that agreement, Article 26.1(b) of the DSU provides that 'there is no obligation to withdraw the measure', but 'the panel or the Appellate Body shall recommend that the Member concerned make a mutually satisfactory adjustment'.²⁶⁵ This adjustment may include compensation, even though compensation would normally be available following a violation complaint only if the DSB's recommendations and rulings are not implemented within a reasonable period of time.²⁶⁶ Moreover, it has been pointed out that it is theoretically possible for a non-violation complaint to give rise to an arbitration under Article 21.3(c) of the DSU regarding the reasonable period of time for implementation.²⁶⁷ In such an arbitration, the arbitrator may determine the level of nullification or impairment suffered and also make non-binding suggestions of 'ways and means of reaching a mutually satisfactory adjustment'.²⁶⁸

As with violation complaints, it appears that panels and the Appellate Body have some flexibility in the recommendations they make regarding a measure that is successfully challenged. To determine the type of 'mutually satisfactory adjustment' that a panel or the Appellate Body might recommend, apart from compensation, we need to look to the reports of certain panels pursuant to GATT 1947, because no successful challenge has been brought under Article XXIII:1(b) of GATT 1994.²⁶⁹ Thus, for example, in *EEC – Oilseeds I*, the GATT panel found that benefits accruing to the United States under GATT 1947 were impaired because the European Communities granted subsidies to oilseed producers, effectively nullifying the European Communities' zero tariff bindings for

²⁶⁴ See section II.A.1, including above n 3.

²⁶⁵ See Panel Report, *EC – Asbestos*, para 8.270.

²⁶⁶ DSU, art 26.1(d).

²⁶⁷ Pierre Monnier, 'The Time to Comply with an Adverse WTO Ruling' (2001) 35 *Journal of World Trade* 825, 827.

²⁶⁸ DSU, art 26.1(c).

²⁶⁹ Although Article 26.1(b) of the DSU came into effect with the WTO in 1995 and therefore did not apply to Panel Reports under GATT 1947, Article XXIII:1 of GATT 1947 also referred to the goal of effecting a 'satisfactory adjustment' of the matter.

oilseeds. In that case, the panel recommended that the GATT contracting parties suggest that the European Communities 'consider ways and means to eliminate the impairment of its tariff concessions for oilseeds'.²⁷⁰ Earlier, in an analogous dispute involving subsidies granted by Australia, a GATT working party issued a draft recommendation to the GATT contracting parties that Australia consider adjusting the subsidies 'to remove any competitive inequality between the two products arising from subsidization'. That working party was keen to point out that such an adjustment was not required by Article XXIII of GATT 1947; rather, the adjustment of the subsidies was recommended simply because this action appeared 'to afford the best prospect of an adjustment of the matter satisfactory to both parties'.²⁷¹

V CONCLUSION

Understanding and accurately identifying the measure at issue in any WTO dispute is important for several reasons. At the start of a dispute, the jurisdiction of the panel will depend largely on how the measure is initially described by the complaining Member in its request for consultations and request for establishment of a panel. At the end of the dispute, if the measure is found inconsistent with WTO obligations, the responding Member's obligations in implementing the relevant recommendations and rulings will also depend on the initial definition of the measure, as interpreted by the panel and Appellate Body.

The nature of the challenged measure could also determine whether it is properly the subject of dispute settlement in the WTO and whether it can be held inconsistent with any WTO provision, whether as such or as applied in a particular instance. In this chapter we provided some examples of the different legal instruments that have been challenged in WTO disputes to date. This survey indicates that WTO Members have challenged under the DSU a diverse range of measures that may be adopted by other Members. These measures have included traditional legal documents, such as laws or regulations, as well as measures taking the form of practice or guidelines, and other actions. It is to be expected that new types of measures will be raised in future cases. Some of the issues regarding the types of measures that may be challenged have not been resolved at the time of writing, such as the meaning and relevance of the mandatory-discretionary distinction. It is likely that new issues related to the identification of the measure will arise as the legalisation of WTO dispute settlement continues.

²⁷⁰ GATT Panel Report, *EEC – Oilseeds I*, para 156.

²⁷¹ Working Party Report, *Australia – Ammonium Sulphate*, paras 16–17.