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Gillian Triggs

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# Dispute Settlement under the World Trade Organization: Implications for Developing Countries

## **Abstract**

This paper seeks to consider the implications for developing countries of the evolving jurisprudence of the panels and Appellate Body under the World Trade Organisation. The unique, compulsory and binding procedures, created in 1994 by the Disputes Settlement Understanding (DSU), provide a revolutionary advance upon the earlier GATT disputes procedures that were so familiar and, doubtless, so frustrating to David and Mary throughout their careers.

## **Keywords**

dispute settlement, developing countries, Disputes Settlement Understanding, World Trade Organization, WTO

# DISPUTE SETTLEMENT UNDER THE WORLD TRADE ORGANIZATION: IMPLICATIONS FOR DEVELOPING COUNTRIES.

*Gillian Triggs\**

I have known David Allan and Mary Hiscock since I joined the Faculty of Law, University of Melbourne in the early 1960's. Mary was then one of the few and leading women law lecturers in Australia. While aware of the contribution David and Mary were making to international trade law in Australia, it was only when I worked in commercial legal practice in Asia that I understood the impact of their scholarship in the region generally. Everywhere I went, it seemed David and Mary had been before! They are known and highly regarded from China to Indonesia, Vietnam to Singapore, Malaysia to the Philippines. Both David and Mary have supported my interest in public international law and I am indebted to them. This paper seeks to consider the implications for developing countries of the evolving jurisprudence of the panels and Appellate Body under the World Trade Organisation. The unique, compulsory and binding procedures, created in 1994 by the Disputes Settlement Understanding (DSU), provide a revolutionary advance upon the earlier GATT disputes procedures that were so familiar and, doubtless, so frustrating to David and Mary throughout their careers.

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On 11 September 2003, the World Trade Organisation (WTO) accepted Cambodia and Nepal as its 147<sup>th</sup> and 148<sup>th</sup> Members, being the first "least developed" countries to join the global trade body.<sup>1</sup> For most developing nations, Membership of the WTO, established by the Marrakesh Agreement<sup>2</sup> on 15 April 1994, has become a priority. Over the last two years, for example, the WTO has accepted more than a quarter of the world's population into its Membership from China, Chinese Taipei, Lithuania and Moldavia. Saudi Arabia, Laos, Vietnam and Ukraine are expected to join in the near future.<sup>3</sup> While the GATT rules have long included substantive provisions for the "special and differential treatment" of

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\* Professor, LLM (SMU) LLB PhD (Melb), Director Institute for Comparative and International Law, Barrister and Solicitor, Victoria.

1 WTO [News:2003](#) Press Release, 11 September 2003

2 Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (WTO Agreement) 33 *International Legal Materials* 1140 (1994).

3 2 January 2002, WTO News: 2002 Press Releases, [www.wto.org/english/news\\_e/pres02](http://www.wto.org/english/news_e/pres02). 25 nations are now in negotiations for accession to the WTO, WTO Press Releases, 10 December 2002.

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developing countries they have not always been applied to their advantage.<sup>4</sup> The WTO has, more recently, increased its efforts to assist least developed and developing countries through the work of the Trade and Development Committee.<sup>5</sup> Indeed, US Trade Representative Bob Zoellick argues that the Ministerial Conference held in Doha, Qatar in November 2001, has “removed the stain of Seattle” through new initiatives to respond to the social, economic, environmental and political impacts of globalization for developing country Members.<sup>6</sup>

Driving the need for developing nations to be integrated into the WTO have been the trade benefits accruing to them from Membership, particularly in agriculture and rural development.<sup>7</sup> Access to the procedures of the DSU have more recently been recognised as bringing significant benefits to developing country Members<sup>8</sup> The unique compulsory, binding and enforceable quasi-judicial procedures provided by the DSU provide an advantage to developing nations which would otherwise have no effective recourse to legal resolution of their trade disputes. Over the last 9 years, 301 disputes have been dealt with under the DSU compared with the same number over the previous 50 years under the old GATT disputes system. More surprising than the dramatic increase in resort to the new procedures has been that, since 2000, 60% of all disputes have been initiated by developing countries.<sup>9</sup> Dr Supachai Panitchpakdi, Director – General of the WTO, notes growing confidence of Members in the WTO dispute settlement system but

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- 4 Art. XV111, Governmental Assistance to Economic Development; Part IV, Trade and Development; the covered agreements also have provisions on special and differential treatment.
  - 5 See generally, [www.wto.org/english/tratop\\_e/devel/](http://www.wto.org/english/tratop_e/devel/); “Developing countries in the WTO system”, *Guide to the Uruguay Round Agreements; “Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions”* WT/COMTD/W/77, 25 October 2000. Primary concerns of developing nations are to correct imbalances in the way the agreements work, particularly in relation to subsidies for agriculture, trade related investment rules and intellectual property protection. It is argued that there has been “an enduring relative protectionism against exports from low-income developing countries in the markets of the developed countries”, WTO, *From GATT to the WTO: The Multilateral Trading System in the New Millennium (2000)* 117. For a discussion of the adjustments necessary for China to meet WTO requirements for legal transparency, see S. Biddulph, “Through a Glass Darkly: China, Transparency and the WTO” 3 *Asian Law Journal* 59-95[2001].
  - 6 WTO News, Press/266, 2 January 2002; [www.wto.org/english/news/](http://www.wto.org/english/news/).
  - 7 “Low Income Developing Countries and the GATT/WTO” WTO, *From GATT to the WTO*, *supra* n.5, 114-121; A.O.Krueger, *Trade Policies and Developing Nations* (1995); A.E.Appleton, “Environmental Labeling Schemes: WTO Law and Developing Implications” *Trade, Environment and the Millennium* (2000) 195.
  - 8 DSU, in force, 1 January 1995.
  - 9 WTO News: 2003 Press Releases, [www.wto.org/english/news\\_e/pres03/](http://www.wto.org/english/news_e/pres03/), 11 September 2003.

cautions that recourse to the disputes procedures also indicates that many trade issues remain to be resolved.<sup>10</sup>

In the past, developing countries have been frustrated by the GATT dispute resolution procedures that had depended upon a consensus of Members to adopt and enforce panel reports. The DSU has reversed the consensus rule so that the procedures apply unless there is a consensus to the contrary.<sup>11</sup> As a result, the experiences of developing countries under the WTO procedures have been significantly more fruitful in meeting their needs for a 'rule of law' approach to international law. Since 1995, there have been over 55 complaints by developing country Members against developed country Members, 41 complaints by and against other developing country Members and 6 complaints by developing country Members jointly with developed country Members.<sup>12</sup>

On examination of the outcomes of the recent panel and Appellate Body Reports, it seems that developing country Members and nations in transition to market economies may need to be cautious about their exposure to a process that enables a quasi-judicial 'court' to develop WTO jurisprudence in ways that may disadvantage their economies. The recent findings of the Appellate Body in the *Asbestos*<sup>13</sup> and *Shrimp*<sup>14</sup> cases in which environmental and human health concerns have justified trade measures otherwise inconsistent with GATT 1994 and the covered agreements, give developing countries cause for disquiet. If the panels and Appellate Body permit Members to adopt inconsistent trade measures to achieve environment, human rights and labour standards, the 'goal posts' for international trade may have moved. More positively, the recently established Advisory Centre provides legal advice to developing country Members and the *EU-Beef Hormones*<sup>15</sup>, *India-Bed Linen*<sup>16</sup> and *Thailand- Price Band*<sup>17</sup> cases indicate that developing State interests can be protected through the evolving disputes processes.

This essay briefly describes the procedures established by the DSU, primarily to explain why they are proving to be attractive to all Members of the WTO. Some of

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10 Ibid.

11 Art. 6(1).

12 There have been over 180 matters brought by developed country Members against both developed and developing Members and a total of 301 complaints notified to the WTO since 1 January 1995, as at 11 September 2003; see *Overview*, [www.wto.org](http://www.wto.org).

13 *EU-Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R (18 September 2000).

14 *US- Import Prohibition on Certain Shrimp and Shrimp Products* WT/DS58/R (April 1998).

15 *Canada and the US v European Community* Appellate Body Report, WT/DS26/AB/R, 16 January 1998.

16 1 March 2001, WT/DS141/AB/R.

17 23 October 2002, WT/DS207/AB/R.

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the recent findings of the Appellate Body are then examined with a view to understanding the legal risks and benefits for developing nations posed by the dynamic interpretative role adopted by this quasi-judicial body.

### 1. Main features of the Dispute Settlement Procedures

The DSU has proved, in the nine years since it came into force, to be an outstanding initiative of the WTO Agreement by establishing compulsory and binding procedures applicable to all Members.<sup>18</sup> The DSU applies to all substantive obligations under the WTO and includes enforcement mechanisms and sanctions. The fourfold increase in case load under the WTO compared with the earlier GATT procedures has stimulated an unprecedented development of jurisprudence in international trade law and provided developing States with a forum for resolution of their disputes with economically powerful States.<sup>19</sup> The new procedures have transformed the largely diplomatic and political framework of the trade agreements under the GATT into a rule oriented, legal regime. The GATT dispute resolution process has, in short, been “juridified” under the WTO.<sup>20</sup>

A critically important feature of the new procedures is that they apply within specified time periods so that a dispute can move within 12 months from consultations and establishment of the panel to adoption of the reports of the panel or Appellate Body, with a ‘reasonable time’ for implementation and, if necessary, retaliation.<sup>21</sup> The first obligation arises where a Member requests consultations under a covered agreement. The Member to which the request has been addressed must reply within 10 days and enter into consultations in good faith. Where a ‘mutually satisfactory solution’ is not reached through these consultations within 60 days (or alternatively by arbitration, good offices, conciliation and mediation), the Member may request the establishment of a panel, indicating the legal basis at issue.<sup>22</sup>

Another fundamentally important aspect of the DSU is that each step of the procedures moves inexorably forward, unless the DSB decides by consensus not to permit it to do so.<sup>23</sup> WTO Members now recognize that a largely ‘automatic’ and

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18 See generally, Sands, McKenzie and Shany (eds) *Manual on International Courts and Tribunals* (1999) 71-85.

19 J. Waincymer, *WTO Litigation: Procedural Aspects of Formal Dispute Settlement* (2002).

20 Arie Reich, “From Diplomacy to Law: The Juridicization of International Trade Relations” 17 *Nev.J. Int’l. & Bus.* (1996-7)776.

21 There have been six invocations of the expedited procedure to resolve disputes over compliance with reports of the Panel or appellate body.

22 Article 25.

23 Article 6(1). The GATT disputes procedures required consent of the disputants to resort to the regime and to accepting and implementing the outcomes; rules that led to a often impotent process prior to 1995.

speedy regime is imperative and thus that reversal of the earlier GATT consensus was necessary. As it is highly improbable that a consensus could be reached that the dispute process should not proceed in any particular case, the negative consensus rule has provided the key to unlocking the potential of the new procedures.

Panels are *ad hoc* tribunals established for each complaint by the DSB. Panel Members are to be independent and well qualified, (preferably with experience as panel Members in earlier cases), officials of the Secretariat, representatives of Members, academics and senior trade policy officials. The Secretariat maintains an indicative list from which 3-5 panelists may be drawn and each panelist acts in their individual, rather than national, capacity. Composition of the panel is to be agreed between the Members, and terms of reference are to be provided within 20 days of establishment of the panel. A timetable is then agreed by the panel, including deadlines for written submissions.

The primary function of the panel is to assist the DSB by making an “objective assessment” of the matter in dispute, including the facts and their conformity with the relevant covered agreements. While the functions of a panel are judicial rather than arbitral, its power is simply to make findings and recommendations. Any such findings and recommendations are subject, in turn, to formal adoption by the DSB. Panels may seek information and technical advice from “any individual or body which it deems appropriate”.<sup>24</sup> Notoriously, the panel received submissions from NGOs in the *Shrimp Case* without making a prior request for such information.<sup>25</sup> While NGOs were heartened by the prospect of a closer role in the dispute settlement process, their hopes for participation were dashed in the *Asbestos Case* where no NGO briefs were formally received. A further indication of the juridicization of the process was the ruling in *Banana III* allowing Members to employ private lawyers to argue their complaints.<sup>26</sup>

A panel may also request an advisory report from an expert review group, procedures for the establishment of which are provided by the DSU.<sup>27</sup> All deliberations are confidential, individual opinions of panelists are anonymous and meetings are held in closed sessions to which Member need first to be invited<sup>28</sup>; aspects of the process fueling criticism that the procedures lack transparency.

A curious feature of the dispute resolution process is that a Member may bring a complaint without first demonstrating that it has been directly or substantially

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24 Article 13

25 WT/DS58/R (April 1998).

26 WTO document WT/DS27/AB/R, paras 10-12, AB Report was adopted on 17 November 1997.

27 Appendix 4, DSU.

28 Appendix 3, Working Procedures

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affected by the alleged non-compliance with the covered agreements. In the *Banana 111*, for example, the DSB decided that the United States could bring the complaint, among others, even though it does not export bananas and produces few of them. No legal interest is required. The panel said:

*“... with the increased interdependence of the global economy... Members have a greater stake in enforcing WTO rules than in the past since any deviation from the negotiated balance of rights and obligations is more likely than ever to affect them, directly or indirectly.”*

Logically, however, where a Member does not comply with a recommendation of an adopted report, a complainant such as the United States in *Banana 111* cannot claim compensation or retaliation as clearly it has suffered no nullification or impairment. Where a Member has a substantial interest in a matter before a panel it may notify the DSB accordingly and will have the opportunity to make written submissions and to be heard by the panel.<sup>29</sup> Any such third party participant may not, however, appeal a panel report to the Appellate Body.<sup>30</sup>

An apparently curious feature of the DSU is that the burden of rebutting a complaint lies with the Member against which the complaint has been brought.<sup>31</sup> This reversal of the usual burden of proof reflects the legal presumption that where a trade measure is inconsistent with an obligation under a covered agreement, it is *prima facie* a “nullification and impairment of benefits”. The consequence is that an inconsistent measure is presumed to have had an adverse impact on Members rights. At this stage, the burden of proof ‘shifts’ to the Member imposing the measure to justify it on one of the many grounds provided by the GATT 1994 and covered agreements.

On consideration of all rebuttal submissions and oral arguments, the panel is required to issue a draft report with findings and recommendations. The ‘interim report’ becomes, subject to comments by the parties, the final report for circulation to the Members of the DSB. The report must be made within six months or, in cases of urgency, three months of composition of the panel in order to allow the DSB to make recommendations or give rulings.<sup>32</sup> The report is then to be adopted by a DSB meeting within 60 days of circulation to all Members.

A party to the dispute may, alternatively, appeal to a ‘standing Appellate Body’, in which case the DSB will consider the report only once the appeal is complete. The

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29 Article 10

30 Article 17(4)

31 Article 3 (8).

32 Article 12.

Appellate body is tantamount to a 'high court' and quasi-judicial body.<sup>33</sup> It comprises 7 'recognized authorities' in international trade law, appointed for four year terms. Three 'persons' serve on the Appellate Body in any one case. The appeal is limited to issues of law covered in the relevant panel report and any legal interpretations that have been developed by the panel.<sup>34</sup> As is the case for the panel, proceedings of the Appellate Body are confidential, opinions remain anonymous and written submissions are confidential though available to the parties to the dispute. The Appellate Body has the options to uphold, modify or reverse the legal findings and conclusions of the panel and must circulate its report to the DSB within 60 days of notification of the appeal. The report will be adopted by the DSB and 'unconditionally accepted by the parties' unless, within 30 days of circulation of the report, there is a consensus not to do so.<sup>35</sup> Again, the difficulty of achieving such a consensus virtually guarantees that the report will be adopted.

If a panel or Appellate Body concludes that a measure is "inconsistent with a covered agreement", it must recommend that the Member concerned bring the measure "into conformity with that agreement" and may, additionally, suggest how the recommendations could be implemented.<sup>36</sup> The Member concerned must then inform the DSB of its intentions for implementation. Implementation is critical to the success of the DSU which provides that 'prompt compliance...is essential in order to ensure effective resolution of disputes'.<sup>37</sup> The DSB is bound to keep under surveillance the implementation of the adopted recommendations and rulings.<sup>38</sup> The Member has a 'reasonable time' in which to comply; this being a period proposed by the Member and approved by the DSB. If not approved, a period must be mutually agreed by the parties. In the absence of such agreement, a period of time is to be determined by arbitration within 90 days of adoption of the recommendation and rulings. As a "guideline" for the arbitrator, this should not exceed 15 months. Moreover, the entire process from establishment of the panel to determination of the 'reasonable period' should not exceed 15 months.

It is possible that there will be further disagreement as to whether the measures of compliance are consistent with the covered agreements. If so, the matter is to be decided by the same dispute settlement procedures, reverting if possible to the original panel.<sup>39</sup> The report of the panel on compliance is then to be circulated within 90 days of the referral of the matter to it.

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33 J.H.H. Weiler, "The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement" Harvard Law School Jean Monnet Working Paper 9/00.

34 Article 18.

35 Article 17 (14).

36 Article 19.

37 Article 21(1).

38 Article 21 (6).

39 Article 21 (5).

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**2. Enforcement of Recommendations of Panels and the Appellate Body.**

As specifically noted in the DSU:

*“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 covered agreements”.*

If the recommendations and rulings are not implemented within a reasonable time, compensation and, as a last resort, suspension of concessions or other obligations may be available as temporary measures on a discriminatory basis vis-à-vis the non-conforming Member until full implementation is achieved.<sup>40</sup> Compensation is, however, to be resorted to only if the immediate withdrawal of the measure is impracticable.<sup>41</sup>

Any Member who fails to comply with a recommendation will be bound, if requested by a party, to enter into negotiations with it to develop “mutually acceptable compensation”. Any such compensation remains, nonetheless, technically “voluntary”.<sup>42</sup> If no satisfactory compensation is agreed within 20 days after the expiry of the reasonable period of time, any party may request authorization of the DSB to suspend the application to that Member of concessions or other obligation under the covered agreements. In principle, a suspension of concessions should be in the same sector in which a violation or other nullification of impairment of rights has been found by the panel or Appellate Body.<sup>43</sup> The level of suspension must be equivalent to the level of the nullification or impairment.<sup>44</sup> The DSB is bound to grant the authorization within 30 days of the expiry of the reasonable period of time or reject the request. Over the 47 year history of the GATT, authorization has been granted only 6 times.<sup>45</sup> Recent authorizations by the DSB suggest that the new procedures will stimulate further sanctions. The EU has, for example, been granted permission to apply US\$4 billion in sanctions against the US in the *Foreign Sales Corporation Case*.<sup>46</sup>

A non-complying Member may object to any authorization and the matter must then be referred to arbitration by the original panel or by an arbitrator. The

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40 Article 22(1).

41 Article 3.

42 Article 22 (1).

43 Article 22 ((2).

44 Article 22 (4); the Arbitrator’s Report on the Ecuadorian request for suspension of concessions, 24 March 2000, set the level of nullification and impairment at US \$201.6. Ecuador was thus entitled to suspend concessions and obligations in relation to the European communities.

45 See, for example, *EC-Bananas 111 EC Recourse to Article 22.6, para 6.3*. For a discussion of the procedures for suspension, see Waincymer, *supra* n.20, at 9.9.

46 7 May 2003, WT/DS108/26.

referral is to be completed within 60 days of the expiry of the reasonable time. During arbitration, no concessions or other obligations are to be suspended, thus enabling a Member to prolong the alleged non-conformity. The arbitrator's decision is final, after which the DSB may consider a request for authorization of suspension of concessions or other obligations.

Compensation is rare, as it is difficult to agree upon a pecuniary figure, and an offer to lift a trade barrier is both more effective in practice and consistent with the aim of liberalizing trade.

There is a debate regarding the legal status of a panel or Appellate Body report once it has been adopted by the DSB. Is there, as Jackson asks, a choice whether to bring the offending measure into compliance or to compensate?<sup>47</sup> Bello argues that the "only truly binding WTO obligation is to maintain the balance of concessions negotiated among Members".<sup>48</sup> Various provisions of the DSU support the view that there is an international obligation to comply with the recommendations of a report once it has been adopted by the DSB.<sup>49</sup> This conclusion is strengthened by the practice of Members who treat reports as binding; an essential factor in the creation of customary law.<sup>50</sup>

It has been the practice under the GATT and WTO dispute resolution procedures that authorization of any retaliation is prospective. The recent findings in the *Howe Co. Automobile Leather Case*,<sup>51</sup> where the offending subsidy payments are to be repaid by the company to the Australian government, suggest that future cases could include retrospective recommendations. If so, the financial consequences of the Appellate Body findings in disputes such as the *Foreign Sales Corporation Case* will be potentially momentous.

All remedies are available Member to Member, prompting the criticism that less economically powerful parties to a dispute will not, in practice, be able to enforce their rights against a more robust party. Contemporary needs may require

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47 J.H.Jackson, "Editorial Comment" (1997) 91 *American Journal of International Law* 60.

48 J.H.Bello, "The WTO Dispute Settlement Understanding - Less is More" (1996) 90 *American Journal of International Law* 416.

49 Articles 3.4,3.5,3.7,11,19.1,21.1,21.6,22.1,22.2,22.8,26.1(b).

50 For a discussion of the means by which international State practice becomes binding customary law see, I.Shearer (ed.) *Starke's International Law*, (11th Ed. 1994) Chapter 2.

51 *Australian Subsidies Provided to Producers and Exporters of Automotive Leather*, Report of the Panel, WT/DS126/R, 25 May 1999.

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collective enforcement of rulings, giving the DSB some form of objective status to enforce recommendations.<sup>52</sup>

### **3. Special and differential treatment for developing and least developed country Members.**

It is a notable feature of the DSU that it includes many provisions to assist and encourage developing countries as follows:

- Where a complaint is made by a developing country Member against a developed country Member, the developing country can invoke the decision of 5 April 1966 as a useful alternative to the procedures relating to consultation, good offices, conciliation and mediation, and the establishment and procedures of the panels.<sup>53</sup>
- In a dispute between a developing country Member and a developed country Member the developing country can request the inclusion of one panelist from another developing country Member.<sup>54</sup>
- When examining a complaint against a developing country Member, the panel is bound to ensure that such Members have sufficient time to prepare and present their arguments.<sup>55</sup> When preparing its report, the Panel is also bound to indicate how it has taken into account provisions granting differential and more favorable treatment for developing Member countries.
- When considering the implementation of recommendations and rulings in relation to a matter raised by a developing country Member, the DSB is bound to consider any further action it might take “which would be appropriate to the circumstance”.<sup>56</sup> Moreover, if the case has been brought by a developing country Member, the DSB should take into account the impact of the measure complained of “on the economy of the developing county Members concerned”.<sup>57</sup>
- The Secretariat is to provide a developing country Member with a qualified legal expert from the WTO technical cooperation services who is to assist the country, while also ensuring that the Secretariat remains impartial.<sup>58</sup>
- Particular consideration is to be given to least-developed country Members and Members are to exercise “due restraint” in raising matters under the

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52 J. Pauwelyn, “Enforcement and Counter Measures in the WTO: Rules are Rules-Towards a More Collective Approach” [2000] 94 *American Journal of International Law* 335.

53 BISD 14S/18, Articles 4,5,6 and 12.

54 Article 8

55 Article 154

56 Article 21(7)

57 Article 21 (8).

58 Article 27(2).

DSU against least developed country Members. “Due restraint [must also be exercised] in seeking compensation or authorization to suspend the application of concessions or other obligations” against developing countries.<sup>59</sup> In cases involving least-developed country Members, where a satisfactory solution has not been gained through consultations, the Director General or the Chairman of the DSB, if requested to do so by that Member, are to offer their good offices, conciliation and mediation to help to settle the dispute.

In these specific ways, the DSU purports to respond to the particular needs of developing countries, thereby encouraging confidence that the processes can be employed sympathetically in their favor.<sup>60</sup>

#### **4. Developing jurisprudence of international trade law under the Dispute Settlement Understanding.**

It will come as no surprise to common lawyers that any organization granted judicial or quasi-judicial powers will interpret its constitution and rules dynamically to respond to new circumstances. Civil lawyers may, by contrast, be less prepared for the law-interpreting role that the panels and the Appellate Body have so readily adopted. The Appellate Body, as a standing body of seven Members, is particularly able and likely to refer to its earlier findings and interpretations.<sup>61</sup> While there is no doctrine of *stare decisis* in international law nor within the WTO disputes regime, the Appellate Body has contributed to the development of jurisprudence through the usual judicial techniques of analysis, legal comparison and distinction. Developing country Members may find that the willingness of the Appellate Body to adopt an active, even creative, approach to interpretation of the GATT rules can be both to their disadvantage in some disputes and to their considerable advantage in others. Certain recent findings of the Appellate Body are discussed below with the aim of understanding how jurisprudence has a particular impact upon developing countries.

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59 Article 24.

60 The experiences of the developed States under the DSU also warrant examination. The US, for example, has lost only 2 of 25 cases it has initiated before the DSB and has lost 6 of the 17 matters brought against it. The US and European Union are, in fact, the most active States within the DSB. Note, in particular, the benefits that flowed to the US as a result of the 1998 DSB ruling on Japanese distilled liquor taxes that led to an 18% increase in US exports of whisky to Japan.

61 In the *Price Band, India Bed Linen and Thai Steel Cases* the Appellate Body referred frequently to its earlier findings, see below for a discussion of these cases and Waincymer, *supra* n.20, at 7.26.

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4.1 Korean Beef Case<sup>62</sup>

In a recent complaint by the United States and Australia against Korea, the Appellate Body made findings that have substantial implications for developing countries in enforcing their domestic trade rules. In the *Korean Beef Case*, the complainants argued that Korea's dual retail system for imported and domestic beef was inconsistent with Art. 111.4 of the GATT 1994 in that it accorded "less favourable" treatment to imported beef. The Appellate Body adopted the view that:

*"Whether or not imported products are treated "less favourably" than like domestic products should be assessed ... by examining whether a measure modifies the conditions of competition in the relevant market to the detriment of imported products."*<sup>63</sup>

On this basis, the Appellate Body concluded that the dual retail system in fact detrimentally modified the conditions of competition. Korea argued, however, that the dual retail system was designed to secure compliance with the Korean law against deceptive practices under the *Unfair Competition Act* and was thereby justified under Art. XX (d) of the GATT 1994. Moreover, Korea stressed to the Appellate Body that policing the sale of beef to ensure that domestic beef is not sold in a fraudulent manner as imported beef was not a "reasonably available" option because Korea lacks the resources to check the thousands of shops on a 'round the clock' basis. It is this aspect of the dicta of the Appellate Body that raises concerns for developing States. The Appellate Body recognised that "Members of the WTO have the right to determine for themselves the level of enforcement of their WTO-consistent laws and regulations" and that the dual retail system "facilitates control and permits combating fraudulent practices *ex ante*".<sup>64</sup> The Appellate Body considered that there were other conventional and WTO-consistent instruments that could reasonably be expected to achieve the same result as the dual retail system. It concluded that Korea's alleged lack of resources was "not sufficiently persuasive" because it was possible to target controls over retail outlets in other more effective ways.

Whatever the factual merits of the Korean position, it remains a matter of concern that the Appellate Body was so quick to dismiss its arguments based on the adequacy of Korean resources. In any future dispute in which the inconsistency of an offending measure is not clear, the capacity and resources of a Member to enforce its trade rules may be more persuasive in finding a justification under Art. XX. For the present, the *Korean Beef Case* suggests that all States, regardless of their resources, will be required to meet a high standard of compliance with the

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62 6 February 2002; complaint by the US and Australia.

63 Para. 137.

64 Para. 176-179.

GATT 1994 and that it may prove difficult to justify a measure on the ground that it was “necessary” to ensure compliance with local laws.

#### 4.2 Anti-dumping duties and the EC-India Bed Linen Case<sup>65</sup>

The findings of the Appellate Body in the *India Bed Linen Case* of 2001 demonstrated that a developing country can succeed in sustaining a complex legal complaint against a sophisticated economy such as that of the EC. Resolution of the complaint against the EC proved to be a major victory for India (with Pakistan, Egypt, Japan and United States as third party participants) against the imposition of anti-dumping measures by the EC on Indian bed linen. The duties imposed by the EC from 5 December 1997 prompted the complaint by India that they were inconsistent with the Anti-Dumping Agreement. The Appellate Body found that the duties were inconsistent both in relation to the “zeroing methodology” and in the calculation of “constructive value”. Accordingly, it recommended that the DSB request the EC to bring its measures into conformity with its obligations.<sup>66</sup>

The findings of the earlier Panel were also significant in that they marked the first time that consideration has been given to the requirement under Art. 15 of the Anti-Dumping Agreement, under which Members are bound to give “special and differential treatment” to developing country Members. Art. 15 provides that:

*“...special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. Possibilities of constructive remedies provided for by this agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members”.*

Under this provision, Members have an obligation to explore constructive remedies prior to the application of anti-dumping measures. While the EC had suspended the anti-dumping duties pending a review, India argued that the obligation to explore the possibility of remedies arose prior to imposition, not at the later date when the duties are applied. The Panel accepted the analysis of Article 15 proposed by the EC and found that there was no violation of the obligation to seek remedies until the duties are actually ‘applied’. The Indian complaint based on Art. 15 was thus deemed premature. As the Panel’s findings in relation to Art.15 were not appealed to the Appellate Body, no further analysis of the special rights of developing country Members was undertaken.

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65 1 March 2001, WT/DS141/AB/R.

66 Para. 87.

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With the rise in the number of complaints brought to the DSB, it was to be expected that many of them concern only or predominantly developing country Members. The Appellate Body may shortly need to consider, not only how the special and differential provisions apply as between developed and developing States but also how they apply amongst developing States themselves.

### 4.3 Developing country Members of Latin America and the Price Band Case.

The recent recommendations of the Appellate Body in the *Price Band Case*<sup>67</sup> provide a further example of the willingness of developing country Members to resort to the dispute resolution procedures of the DSB and of their capacity to develop sophisticated legal arguments in support of their cases. In this dispute, Argentina complained that Chile's price band system for certain agricultural products and the safeguard measures imposed on these products were inconsistent with Art.11:1 of GATT 1994 and Art. 4.2 of the Agreement on Agriculture. Argentina also argued that the safeguard measures violated Art.XIX:1(a) of GATT 1994 and the Agreement on Agriculture. In addition to Chile and Argentina, eight WTO Members joined the complaint as Third Participants of which five, Brazil, Columbia, Ecuador, Paraguay and Venezuela, are also from Latin America.<sup>68</sup> The submissions of the Participants were well argued and supported at the Panel stage. Further legal arguments were made by them to the Appellate Body on appeal.

The Panel found that the complaints were valid and concluded that Chile had nullified or impaired the benefits accruing to Argentina. On appeal, the Appellate Body upheld the findings of the Panel on all substantive issues except that relating to the meaning of "ordinary customs duty".

The findings of the panel and Appellate Body develop the jurisprudence of the WTO and integrate two important aspects of international trade law; the GATT obligation on tariff bindings and the limitation on import barriers that must be converted to ordinary customs duties under the Agreement on Agriculture. The Appellate Body developed the notion of "due process" of a right of "fair response" within the DSU, applied international laws of treaty interpretation and asserted its right to determine as a question of law whether a set of facts is consistent with a treaty provision. Chile's price band system was found to be a "border measure" that is similar to variable import levies and minimum import prices, and was prohibited by Art. 4.2 of the Agreement on Agriculture. In reaching this conclusion, the Appellate Body embarked upon an analysis of highly complex terms, applying Art. 32 of the Vienna Convention on the Law of Treaties and testing the impact of the price band system.

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67 Georges Michel Abi-Saab, Presiding Member; James Baccus and John Lockhart, Members.

68 Australia, European Communities, United States,

The robust and articulate support for Argentina's complaints by its Latin American neighbours suggests that these WTO Members consider the DSB can provide substantial support for a 'rule of law' approach to fair global trade.

#### 4.4 Anti-dumping duties and the Thailand Steel Case

Recently, developing State Members of the WTO have taken a leaf from the book of developed country Members by imposing anti-dumping duties, a measure that had earlier been seen as a protective tool against developing State imports. The panel and Appellate Body Reports in the *Thailand Steel Case*<sup>69</sup> provide an object lesson in the need to avoid the excessive use of anti-dumping duties. In this dispute, Poland complained, (with the US, EC and Japan filing third participant submissions) that the anti-dumping measures adopted by Thailand against the steel products of Polish companies violated Articles 2, 3, 5 and 6 of the Anti-dumping Agreement and Art. VI of the GATT 1994. The Panel concluded that the duties were inconsistent with Articles 3.1, 3.2, 3.4 and 3.5 and recommended that the DSB request Thailand to bring the offending measures into conformity with its obligations. The Appellate Body left undisturbed the panel's findings in relation to Article 3 of the ADA.

Of particular interest to developing States, (indeed to all WTO Members), was the discussion by the Appellate Body of the obligation to meet the requirements under Article 3.4 when assessing the impact of dumped imports on the domestic economy. Applying customary rules of interpretation established at public international law, the Appellate Body looked at how the panel had carried out its obligation to review the establishment and evaluation of the facts by the Thai investigating authority. The panel concluded, and the Appellate Body agreed, that "each of the 15 individual factors listed in the mandatory list of factors in Article 3.4 must be evaluated by the investigating authorities".<sup>70</sup> The mandatory nature of the evaluation requires that there is, contrary to Thailand's argument, no room for a "permissible" interpretation and all factors need to be considered.<sup>71</sup>

The findings in the *Thai Steel Case* thus make it clear that Members may not impose anti-dumping duties in a self-serving or precipitate manner. Rather, Members must make a determination of any injury to the domestic market based on positive evidence and an objective examination of the volume of dumped imports, their effect on prices of "like products" within the domestic market and the consequent impact of these imports on domestic producers of these products. In short, anti-dumping duties may be adopted by developed or developing country Members only where objectively assessed evidence of dumping has been established. Tempting though it may be for developing States to seek to benefit

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69 12 March 2001, WT/DS122/AB/R.

70 Para. 125 of the Appellate Body Report.

71 Ibid, Para 127.

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from the Anti-Dumping Agreement, they are subject to the same rules of assessment as all other Members.

#### 4.5 The Shrimp Case<sup>72</sup>

Article XX has proved to be a fruitful basis for creative problem solving that has caused developing nations to question the predictability of the 'rule of law' as it evolves within the DSB. Article XX enables Members of the WTO to adopt trade measures that would otherwise be inconsistent with the WTO obligations by providing that:

*Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:*

- (a) necessary to protect public morals*
- (b) necessary to protect human, animal or plant life or health*  
\*\*\*\*
- (f) imposed for the protection of national treasures of artistic, historic or archaeological value*
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.*

While there had been earlier attempts to justify a GATT inconsistent trade measure on the grounds that it falls within the exceptions listed in Article XX,<sup>73</sup> the *Shrimp Case* of 1998 was the first to demonstrate the potential scope of the provision in ways that raise serious concerns for developing countries. The trade dispute was prompted by the US ban on shrimp and shrimp products under the *Endangered Species Act* of 1973. This legislation was passed on the ground that fishing methods led to the drowning of turtle species that are protected by the Convention on International Trade in Endangered Species (CITES). The ban purported to apply to shrimp and shrimp products from all over the world, including those fished from the high seas. It was applied specifically against products from India, Thailand, Pakistan and Malaysia. These nations complained, (and were later joined by other WTO Members including the E.U. and Australia),

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72 For a discussion of this decision see A.E. Appleton, "Shrimp/Turtle: Untangling the Nets" *2J.Int'l Econ. L.* 477 (1999).

73 *US-Restrictions on Imports of Tuna*, June 16, 1994, DS29/R; *US – Standards for Reformulated and Conventional Gasoline*, Appellate Body report, April 29, 1996, WT/DS2/AB/R

to the DSB that the ban was inconsistent with Articles I, XI and XIII and not justified under Art. XX.

The Appellate body found that a ban by the United States on Thai shrimp caught without turtle exclusion devices (TEDS) was inconsistent with the Article XI, as it constituted a denial of market access. It also found that the ban could not be justified under Article XX because it has been applied in a manner that was arbitrary and discriminatory. The legally significant aspect of the reasoning of the Appellate Body was that it adopted the two tiered analysis used in the *Gasoline Case*<sup>74</sup> to interpret Article XX. First, it was necessary to determine if one of the listed exceptions applied and then, secondly, the panel should consider whether the conditions of the chapeau had been met. The merit of this approach is that future panels and the Appellate Body can explore the application of each of the exceptions and thereby develop an understanding of their meaning. It was possible in the *Shrimp Case*, for example, to decide that a measure to conserve turtles listed by the CITES is necessary to protect animal life under Articles XX (b) and relating to the conservation of an exhaustible natural resource under Article XX (g). On these grounds, an inconsistent trade measure can be justified so long as it meets the conditions of the chapeau and is within what the Appellate Body described as a “line of equilibrium”. As the trade ban imposed by the United States was both unilateral and discriminatory, it could not be justified in the circumstances.<sup>75</sup>

The Appellate Body found that the language of the WTO Preamble:

“demonstrates a recognition by WTO negotiators that optimal use of the world’s resources should be made in accordance with the objective of sustainable development. As this preambular language reflects the intention of negotiators of the WTO Agreement, we believe that it must add color, texture and shading to our interpretation of the agreements annexed to the WTO Agreement, in this case the GATT 1994...”<sup>76</sup>

The Appellate Body also argued that exhaustible natural resources are not confined to non-living resources and that it “must be read...in light of contemporary concerns of the community of nations about the protection and conservation of the environment”. It was not therefore surprising, though ironic,

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74 *Ibid*, Appellate Body Report adopted on 20 May 1996, WT/DS2/AB/R.

75 The DSB findings lead to changes in US laws. On 22 Oct. 2001, the Appellate Body accepted the earlier Panel finding that section 609 of Public Law 101-162, 8 July 1999, is now justified under Art XX “as long as the conditions stated in the findings of this report, in particular the ongoing serious good faith efforts to reach a multilateral agreement, remain satisfied”.

76 Paras. 129 and 152.

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that the findings in the *Shrimp Case* were seen as a 'victory' for environmental groups, who saw a way forward to use trade measures to achieve their objectives.

For the developing nations, by contrast, the outcomes of the *Shrimp Case* may prove to be the harbinger of new interpretations of WTO rules that could be to their economic disadvantage. The significance of the *Shrimp Case* for developing countries is that, providing a trade measure is non-discriminatory and not arbitrary, it may validly be employed to achieve an environmental objective. The fear is that developed countries will impose environmental standards on developing, low-income nations, "depriving them of their natural comparative advantage"<sup>77</sup> and subjecting them to trade barriers if they fail to meet standards set by the environmental treaties. The reality that trade barriers will be used to their disadvantage prompts concerns that the "goal posts" are being moved to achieve the environmental agendas of developing countries. While common lawyers may accept judicial creativity, the views of the DSB that the concept of natural resources is "not static" but rather by "definition, evolutionary" might be seen as dangerous by many developing civil law States.

Despite the views of the panels in the *Tuna/Dolphin*<sup>78</sup> cases on the limits to extraterritorial legislative reach, the Appellate Body in the *Shrimp case* found, with little analysis, that there was a sufficient jurisdictional link between the migratory sea turtles and the US trade measure. This aspect of the findings prompts further concerns for recent Members of the WTO who are now unsure of the jurisdictional limits of national trade measures.

After the findings of the Appellate Body, Malaysia brought a further complaint to the DSB that the US had failed to comply with the rulings. In a disappointing finding, the Panel concluded that the US measure continued to be inconsistent with Article XI but that it no longer conflicted with Article XX. As the US had made good faith efforts to reach a solution and as negotiations on an international agreement were continuing, the Panel considered that the US was not in breach of the terms of the chapeau. The Malaysian position raises an important issue. Should it have a right of veto over the outcomes of negotiations if it does not agree with the US on a consensual approach? Should the US be at liberty to avoid conformity with Article XI on the ground that negotiations are continuing but inconclusive? There are no simple answers to these questions, though the better position arguably is that consistency with WTO rules should be the higher priority.

The challenge for the future is to ensure that developing nations are integrated into the international trading system and are assisted, through training,

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77 D.C.Esty, "Bridging the Trade and Environment Divide", 15(3) *Journal of Economic Perspectives* (2001) at 3.

78 *Supra* n.74.

technology transfer and aid, to work with the international community to achieve agreed environmental objectives. If a genuine consensus-based approach is taken, the adversarial ‘carrot and stick’ wielded through the WTO dispute settlement process should be less important. Adversarial dispute resolution is, in any event, too little too late.

#### 4.6 Article XX and the Asbestos Case

In 2001, further recognition of the links between trade and environment was given in the *Asbestos Case*.<sup>79</sup> Developing States might be justifiably concerned that the Appellate Body in this dispute reinterpreted a trade term in a way that amends its relatively settled meaning to embrace wider contemporary concerns. France had imposed a general trade ban on asbestos products in circumstances in which a substitutable product was produced domestically. Canada complained that the prohibition by France<sup>80</sup> on asbestos products was inconsistent with Articles III and XI of the GATT 1994 and Article 2 of the *Agreement on Technical Barriers to Trade* (TBT Agreement). The Panel agreed with Canada that the ban was inconsistent with Art. 111(4) but found the French trade measure was, nonetheless, justified under Article XX (b) as a measure that was necessary to protect human health.

The ‘like product’ test is central to many GATT obligations. Article III provides that:

*(2) “The products of the territory of any contracting country imported into the territory of any other contracting party shall not be subject ... to internal taxes ... in excess of those applied ... to like domestic products.*

*(4) The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws... affecting their internal sale, etc...”*

The Appellate Body could have resorted to the *Shrimp Case* option to determine that a trade measure is invalid for inconsistency with the GATT/WTO. If it adopted this option the Appellate Body could have proceeded to assess whether an exception applies under Article XX. Another option, and a more significant one for the future of WTO trade law, is to determine that the trade measure is valid in the first instance. In other words, it would be possible to apply a new approach by finding that the products are not ‘like products’ and that, therefore, the measure is

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79 WT/DS135/R (18 September 2000).

80 Moreover, the Panel found that Canada had not established that it suffered any non-violation nullification or impairment of a benefit within the meaning of Art. XXIII: 1(b).

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consistent with the WTO rules. If so, there would be no need to rely on any justification under Article XX. Reinterpretation of the 'like product' test could be achieved by moving away from established tests – substitutability, end use, tariff classifications, consumer tastes and objective quality – to include other values such as economic rationality, the precautionary principle, human rights, labour laws, the environment or contemporary concerns of a liberal culture.

The findings of the Appellate Body in the *Asbestos Case* provide the first indicator that the second approach may be adopted in the future. Article I of the French decree provided that:

“For the purpose of protection of workers ... the manufacture, processing, sale, import, placing on the domestic market and transfer...of all varieties of asbestos fibres shall be prohibited, regardless of whether these substances have been incorporated into materials, products or devices.”

The Panel found that the Decree was inconsistent with Article III (4) of the GATT, but that it was justified under Article XX(b) as a measure that was necessary to protect human health. The Canadian asbestos product was considered to be a product 'like' the substitute fibres permitted by France and thus the French ban was inconsistent with Article III (4). The Panel, nonetheless, accepted French evidence that the chrysotile asbestos fibres were dangerous and that the trade measure could be justified under Article XX(b).<sup>81</sup>

The Appellate Body, in a far more adventurous decision, found that there was no reason to explore the application of Article XX because there had been no violation of Article III(4) in the first instance. Rather, the Appellate Body revisited earlier interpretations of the words “like products”<sup>82</sup> and concluded that they should not be construed narrowly. It observed that:

*“ The concept of ‘likeness’ is a relative one that evokes the image of an accordian. The accordian of ‘likeness’ stretches and squeezes in different places as different provisions of the WTO Agreement are applied.”*<sup>83</sup>

Departing from earlier interpretations, the Appellate Body found that a health risk can be a legitimate factor in determining whether there has been a violation

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81 Para.88, *Asbestos Case*, supra n.14.. See Working Procedures for Appellate Review, adopted under Article 17 of the DSU exclusively for the purposes of the appeal to the Appellate Body in the *Asbestos Case*.

82 The GATT Working Group on Border Tax Adjustments adopted 3 criteria for determining likeness, nature and quality of the product, the end uses of the product and consumer's tastes and habits, 2 December 1970, cited in the WTO Appellate Body Report *Japan- Alcoholic Beverages*, WTO Doc WT/DS8 (also 10 and 11) /AB/R. 4 October 1996

83 Para. 88.

of 'likeness' under Article 111. It considered that "evidence relating to the health risks associated with a product may be pertinent in a examination of 'likeness' under Article 111(4). Carcinogenicity or toxicity constituted the 'defining aspect of the physical properties of chrysotile asbestos fibre". In short, a product that causes cancer is fundamentally different from a substitute product that is safe to human health.

On reflection, the conclusion of the Appellate Body seems obvious; so obvious that the decision does not provide clear guidance as to how other less obvious cases raising the 'likeness' test should be determined in the future. As Footer and Zia-Zarifi point out,<sup>84</sup> if likeness is to be determined on a case-by-case basis, it is less easy to predict how the DSB will respond to trade measures against GMOs, chemicals and pesticides or fossil fuel based products. It is at least clear that Members of the Appellate Body are prepared to develop the jurisprudence of the WTO rules creatively and in light of concerns of States and civil society about the environment and human health.<sup>85</sup> The *Asbestos Case* thus indicates that trade liberalisation rules can be balanced sensibly with environmental and human health concerns.

An unexpected aspect of the *Asbestos Case* of interest to developing countries is that the Appellate Body decided to deny eleven NGOs leave to file a written brief because they failed "to comply sufficiently with all the requirements of the new procedures". Also, 13 other NGO submissions were 'returned to sender' for failing to comply with the additional procedural requirements.<sup>86</sup> No precise explanation was offered, dashing the hopes of NGOs to be more closely involved in the dispute settlement processes of the new WTO.<sup>87</sup> Regulating the use by the panels and Appellate Body to *amicus briefs* provided by NGOs is likely to be seen by developing countries as a means of controlling the 'unfair' support given to developing countries where a WTO dispute raises issues concerning human rights, labor conditions or the environment.

Superficially, the *Shrimp* and *Asbestos* findings by the Appellate Body indicate that trade measures that are inconsistent with the WTO rules are not easily

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84 M. Footer and S. Zia-Zarifi, "European Communities – Measures Affecting Asbestos and Asbestos-Containing Products" Case Note [2002] 3(1) *Melbourne Journal of International Law* 120, 142.

85 Note also the *Declaration on the TRIPS Agreement and Public Health* at the DOHA WTO Ministerial Conference, affirming the right of Members to ensure access to essential medicines in the interests of public health protection, 14 November 2000, WTO Doc. WT/MIN/(01)(20 November 2001).

86 The findings of the Panel and Appellate Body were curious in that there was little analysis of Article XI or the TBT.

87 Appellate Body Report, 16 January 1998, WT/DS26/AB/R. See further G Marceau and M Stilwell: "Practical Suggestions for *Amicus Curiae* Briefs Before WTO Adjudicating Bodies" (2001) 4 *Journal of International Economic Law* 155.

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justified by environmental obligations under multilateral environmental agreements, partly where the scientific standards are difficult to meet. On looking more closely, however, the panels and Appellate Body have developed the jurisprudence of the WTO so as to provide building blocks for litigating environmental issues in the future. The DSB has:

- Clarified the role of Article XX, particularly the means of application and interpretation of the listed justification and the role and meaning of the chapeau.
- Included the loss of species within the concept of exhaustible natural resources.
- Taken a 'generous' if controversial view of the extra-territorial scope of national environmental legislation.
- Placed a strong emphasis on the objective, scientific nature of risk assessment and adopted high standards of proof.
- Insisted on a multilateral approach to adopting trade measures, requiring consultation, non-discrimination and national treatment.
- Indicated that it is prepared to reassess earlier findings interpreting the basic provisions of the GATT/WTO so as to integrate environmental values into trade terms such as 'likeness'.

### 4.7 Scientific Risk Assessment

An important safeguard upon application of the WTO Agreement is the strong emphasis on objective, scientific risk assessment; a safeguard of particular importance to developing countries in their attempts to withstand unsubstantiated environmental concerns, predominantly expressed by developed countries. In the *Beef Hormones Case* of 1998,<sup>88</sup> the European Union issued three directives of the European Parliament to ban the use of hormones in meat produced from within the EC and imported meat. Canada and the US complained that the ban was inconsistent with Sanitary and Phytosanitary Agreement and differed from the standards set by the voluntary *Codex Alimentarius*. The European Communities responded that as the *Codex* was out of date and did not provide the necessary level of protection to human health, its trade measure was justified under Article XX.

Adopting the standards of the SPS, the Appellate Body found that the ban was inconsistent with this Agreement and had not been justified by scientific evidence, particularly as it related to the synthetic hormone MGA. It was found that there was no evidence to support the argument that standards higher than those set out in the *Codex* were necessary. Risk assessment under the SPS Agreement must be based on accurate and full scientific data.

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88 *Canada and the US v European Community* Appellate Body Report, WT/DS26/AB/R, 16 January 1998.

The emphasis in the *Beef Hormones Case* on scientific evidence was repeated in the *Salmon Case* where Canada again complained successfully that Australian import bans on salmon had not been justified on the basis of the risk assessment under the SPS Agreement. These cases support the objective nature of risk assessment and the high standards that must be met before an otherwise inconsistent trade measure can be adopted. The benefit for developing countries is that the concerns of developed states for the environment, labour standards and human rights will provide a basis for trade measures only where the evidence supports them.

### 5. Relationship between WTO obligations and international law.

An aspect of WTO jurisprudence that is of particular significance to developing countries is the relationship between their specific trade obligations and the more general rules of public international law. The WTO rules are, like human rights or environmental law, an integral part of international law.<sup>89</sup> The relationship between international law and the WTO rules is not, however, clear. It remains to be determined, for example, how a conflict between a customary norm or treaty obligation and a WTO rule is to be resolved.<sup>90</sup> The relative effectiveness of the dispute processes under the WTO have also raised the question whether the DSB can assert jurisdiction over a matter which predominantly concerns violations of non-WTO laws, such as disputes over maritime jurisdiction or human rights. Consider, for example, the following hypothetical:

*State A negotiates a duty free trade concession with State B for its computers on the basis, among others, that State B will respect international labor standards and not permit the employment of children under the age of 10 years. In fact, State B permits children to assemble computers, enabling production at a price lower than can be achieved by State A.*

*There has been no violation of WTO rules, but State A complains that State B has nullified the value of the trade concession and demands compensation for nullification under the non-violation heading.<sup>91</sup>*

Such questions have assumed a critical importance in light of the semi-automatic and compulsory nature of dispute resolution under the DSU and of attempts to link human rights, labor standards and environmental law with trade measures. For developing States, the risk is that the GATT 1994 will be interpreted by reference to international law so that the trade rules are vulnerable to being “trumped” by a wider or conflicting customary rule or treaty-based obligation.

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89 Paulwelyn, “The Role of Public International Law in the WTO: How Far Can We go?” 95 *American Journal of International Law* 535,538.

90 Ibid; Waincymer, *supra.* n.20,7.25- 7.30.

91 Based on the example given by Paulwelyn , *supra.* n. 53 at 559.

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The DSU specifically, though probably unnecessarily, provides that the dispute settlement system serves:

*“to clarify the existing provisions of [the covered agreements] in accordance with customary rules of interpretation of public international law”.*<sup>92</sup>

Thus, a State could call on customary rules, as set out in the Vienna Convention on the Law of Treaties of 1969, to determine the legal obligations of the parties. In particular, the WTO agreement is a treaty that must be performed by the parties in good faith. Thus a recommendation that a State should bring its practices into conformity with a WTO rule is a binding obligation at international law.<sup>93</sup> The Vienna Convention also provides some guidance in determining the relationship between the WTO and international law. Article 31(3) (c) provides that, when interpreting a treaty, account must be taken of “any relevant rules of international law applicable in the relations between the parties”. Consistently with this provision, the DSB panel in the *Korea-Government Procurement Case*<sup>94</sup> rejected the notion that customary international law should be excluded when interpreting a claim.

Resort to international law on treaty interpretation facilitates the application of the trade rules in a predictable and globally acceptable way. Of greater concern to developing country Members of the WTO is whether the panels and Appellate Body will, when applying established trade rules, take into account other substantive international laws.<sup>95</sup> The failure of the Appellate Body in the *EC-Hormones Case*<sup>96</sup> to take a position on the legal status of the precautionary principle suggests that it will be reluctant to apply customary law except in crystal clear cases. If so, developing country Members may be comfortable with the relatively easily ascertainable content of those international laws that might have an impact on how the trade rules are enforced.

### 6. Secretariat and Advisory Centre

Since 1995, the Secretariat has assumed a growing role directly and indirectly in the operation of the dispute settlement procedures, developing the characteristics of an international bureaucracy. Its responsibilities are to assist the panels with

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92 Article 3.2 of the DSU. As the WTO Agreement is a treaty, international customary laws on treaty interpretation apply in any event.

93 A further question arises as to whether the WTO, as an international legal person, is bound to comply with customary international law.

94 WT/DS163/R, 1 May 2000, adopted 19 June 2000.

95 Paulwelyn argues that non-WTO rules are applicable if they are binding on both parties to a dispute and the conflict rule is that the non-WTO law prevails, *supra*, n.53

96 *EU-Measures Concerning Meat and Meat Products (Hormones)*, Report of the Appellate Body, WT/DSS26/AB/R, WT/DS48/AB/R (January 16, 1998); adopted 13 February 1998.

legal, historical and procedural aspects of cases and to provide secretarial and technical support. In fact, the Secretariat plays a key role in selecting the Members of the panel and it is the repository of the institutional memory of the GATT.<sup>97</sup> Through its familiarity with the GATT/WTO principles as they have evolved, the Secretariat has a strong influence on outcomes, particularly where it assists the *ad hoc* panels by providing them with first drafts of their findings.

The influential role of the Secretariat may both assist developing countries and raise concerns for them. The provision of training programs through the Secretariat will assist developing countries to acquire the expertise necessary to benefit from improved access to world markets. But a strong Secretariat could be perceived by them as diminishing their sovereignty and unsympathetic to their needs.

An impediment to resort to the DSB processes of import to developing countries is their lack of legal skills and resources to represent their views at Geneva. Article 27.2 of the DSU provides that the Secretariat is bound to make available a qualified legal expert to provide additional legal advice and assistance to developing countries in a way that does not prejudice its impartiality. As Waincymer points out, this means that the legal advice does not constitute formal representation of the developing country Member in any particular dispute.<sup>98</sup>

The recently established Advisory Centre for WTO Law, a not-for-profit agency headed by the former head of the GATT Legal Division, now provides legal aid services to developing countries, externally to the WTO itself. The value of the Advisory Centre in leveling the playing field for developing countries has been demonstrated in the complaint by Peru against the European Communities in the *Trade Description of Sardines Case*.<sup>99</sup> The recommendations by the Appellate Body in this dispute are the first in which a claimant has been represented by lawyers from the Advisory Centre. The legal dispute concerned an EU Regulation under which preserved sardines were required to meet various standards and be exclusively from the species “*Sardina Pilchardus Walbaum*” found mainly in European waters. The *Codex Alimentarius* Commission had set a standard for many other species of sardine including the species found mainly in Peru and Chile. Peru argued that the EU Regulation was inconsistent with Art. 111:4 of the GATT 1994 and Articles 2.1 and 2.2 of the TBT Agreement and was joined in these contentions by the United States, Canada, Ecuador and Venezuela. The Panel agreed with the central Peruvian position and its findings were substantially upheld by the Appellate Body. This long and highly technical dispute raised issues demanding expert legal advice and experience within the WTO disputes process. It may be surmised that the Advisory Center played a crucial

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97 Weiler, *supra*. n. 34, at 14.

98 Waincymer, *supra*.20, at 751.

99 WT/DS231/AB/R (23 October 2002).

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role in ensuring that all aspects of Peru's complaints were fully developed before the panel and Appellate Body, ensuring that no advantage lay with the EU in its superior legal resources.

The success of representation of Peru's claims in the *Sardines Case* suggests that many other developing States will be encouraged to seek legal aid to ensure their positions are argued forcefully and accurately within the disputes process. It is thus questionable whether the Advisory Centre will have the resources to continue to advise those Members States that come to it for assistance with disputes, especially in light of the rise in numbers of complaints by developing countries.

### Conclusions

At first glance, the new dispute resolution procedures appear, especially to a lawyer, to be a significant improvement on the earlier GATT system. The DSU is rule based, virtually autonomous, compulsory and binding on all Members. It is speedy, provides some access for NGOs, relies upon science as the yardstick for the adoption of trade measures and facilitates the development of a jurisprudence of WTO trade law despite the absence of any principle of *stare decisis*. Judging by the numbers and kinds of complaints, the procedures meet the needs of both developed and developing Members. Less fruitfully, the legalization of the processes has significantly diminished the earlier emphasis on negotiation, concession and compromise, often influenced by experienced trade officials. The importance of scientific standards detracts from other, less easily measured values such as human rights, the environment and labor standards, providing a simplistic solution to complex issues. Retaliation and counter measures are still dependent on economic muscle in the market place and, unlike the International Court of Justice, the DSB cannot order reparations for past damage.<sup>100</sup> Finally, a rule-based process cannot alter the fundamental nature of the negotiated trade bargain between sovereign States nor the private rather than public law roots of trade law. For the future, Members might come to see the wisdom in opening disputes procedures to closer public scrutiny, making them more amenable to NGO participation.

For developing country Members of WTO, and those about to become Members, the capacity to bring a complaint to the DSB is a significant improvement on the GATT regime and, further more, on the procedures currently available in all other aspects of international law. A note of caution should, nonetheless, be sounded if the Appellate Body continues to develop trade rules challenging the comparative advantages of developing countries in the contemporary international market. It may be hoped that closer integration of developing countries in international trade through Membership of the WTO will not only bring them economic benefits but

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<sup>100</sup> Though, as discussed, the *Howe Leather Case* may change this understanding of the powers of the DSB.

also enable them to work more closely with the developed world. It should be possible, for example, for increased technical assistance and training, to enable developing States both to meet their developmental needs while also meeting evolving labor, environmental and human rights standards. If so, the current tension between trade measures and environmental and human rights objectives may be lessened. For the present, the DSB has proved to be successful in doing what it was set up to do, provide a compulsory process for resolution of international trade disputes among WTO Members. The bonus has been that the process has engaged developing nations in dispute resolution for the first time in history and in a way that has proved, in the main, to be to their advantage.