Polishing the Jewel in the Crown: A Timely Review of the WTO Dispute Settlement Understanding

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I. INTRODUCTION

Integration and oversight of international trade law is the responsibility of the World Trade Organisation (WTO). International trade law, unlike classical international law, finds its foundation in economic interdependence rather than state sovereignty. In the case of New Zealand, a small export-dependent economy, the content, status and enforcement of those laws are vital to the nation’s economic well being. In 1999, this was brought home to New Zealand through the country’s ongoing dispute with the United States over the imposition of tariffs on New Zealand lamb exports. In the same year, former Prime Minister Mike Moore was appointed Director-General of the WTO.

The WTO is the product of the Uruguay Round, launched in Punta del Este in 1986 and concluded in Marrakech in 1994. At the time of writing, the WTO membership consisted of 134 countries (plus 36 observer countries), all of whom recognised that:

* The author gratefully acknowledges the assistance and encouragement of Treasa Dunworth of the University of Auckland Faculty of Law in preparing this article.

1 Agreement Establishing the World Trade Organisation, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (15 April 1994), reprinted in 33 ILM 1125 (“WTO Agreement”). The WTO Agreement incorporates: Multilateral Agreements on Trade in Goods (Annex 1A); General Agreement on Trade in Services (Annex 1B); Agreement on Trade-Related Aspects of Intellectual Property Rights (Annex 1C); Understanding on Rules and Procedures Governing the Settlement of Disputes (Annex 2); Trade Policy Review Mechanism (Annex 3) and Plurilateral Trade Agreements (Annex 4) (collectively referred to hereinafter as the “Covered Agreements”).

2 It has been estimated that the decreases in tariff and non-tariff barriers negotiated during the Uruguay Round will increase the value of the world economy by US$212-500 billion. See International Monetary Fund, World Economic Outlook (May 1994) 86-87.


4 Preamble to the WTO Agreement 33 ILM 1144.
Their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.

The WTO is the body tasked with giving effect to this ambitious objective. It has three principal functions: to help trade flow as freely as possible through the removal of trade barriers and the provision of transparent and predictable rules governing trade, to serve as a forum for trade negotiations, and to resolve trade disputes between its Members. It is the last function which is the subject of this article.

Dispute settlement is provided for by the Disputes Settlement Understanding (DSU), commonly referred to as the "jewel in the crown" of the WTO. A dispute typically arises where a Member of the WTO alleges that a trade-restrictive measure of another Member is in violation of one or other of the Covered Agreements. As the principal means of resolving the differences that inevitably arise from these various legal instruments, the DSU has a crucial role to play within the world trading system.

On a more abstract level, the DSU is critical to the integrity and credibility of the world trading system. The WTO is a body that relies upon voluntary compliance (promoted through incentives) to ensure Members abide by its rules. It is constituted as a confederation of sovereign national governments. Thus, for those who breach its terms there is no "prospect of incarceration, injunctive relief, damages for harm inflicted or police enforcement. The WTO has no jailhouse, no bailbondsman, no blue helmets, no truncheons or tear gas." Rather, compliance must be obtained through the consistent and fair application of the rule of law. This is appropriately reflected in the text of the DSU which provides that "[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system."

The impetus for this paper was a Ministerial Decision taken in April 1994 that the Ministerial Conference complete a full review of dispute settlement rules and procedures by the end of 1998 in order that Members could decide whether to continue, modify or terminate the DSU. The deadline for the

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5 See Art III of the WTO Agreement 33 ILM 1144, 1145.
8 WTO Agreement, Annex 2, Art 3.2, supra note 6, 1227.
9 The Ministerial Conference is the highest decision-making authority in the WTO and meets at least every two years. The structure of the WTO is provided for in Arts IV and VI of the WTO Agreement.
10 WTO Agreement, Annex 2, supra note 6, 1259. The reader should also be aware that the United States Congress was scheduled to conduct a review of US participation in the WTO in 2000.
conclusion of the review passed on 24 September 1999 with Members unable to agree on whether, when or how the review would resume. In light of that failure, this article will review certain concerns that have arisen during the first four years of the DSU. Part II provides the reader with an introduction to the world trading system and its process of dispute settlement, both under the DSU and its predecessor the GATT. With this background in mind, the paper then addresses two important issues for review. Part III considers the adjudicative issue of whether the Appellate Body should be vested with remand authority. Part IV, under the heading of composition, discusses the extent of private sector access to the WTO. Part V presents the conclusion.

II. DISPUTE SETTLEMENT WITHIN THE WORLD TRADING SYSTEM

The primary purpose of this section is to familiarise the reader with the provisions of the DSU. However, the DSU cannot be considered in isolation from the context in which it operates, namely the world trading system. It is necessary to first consider the historical origins of the DSU in order to better understand the legal and diplomatic motivations underlying its provisions.

1. Historical Background to the World Trading System

The WTO Agreement is the culmination of over fifty years of effort towards the development of an international institution to govern and discipline world trade. These efforts began with the Bretton-Woods Conference of 1944, where the Allied leaders agreed to create three post-war institutions: the World Bank, the International Monetary Fund and the International Trade Organization (ITO). The inspiration behind the Bretton-Woods system, and the ITO in particular, has been recounted by Mike Moore:

The post-war architects were guided by a central idea – that a durable international peace must be built on the foundations of progressive liberalisation and economic interdependence. They knew that the Great Depression was made deeper and more prolonged because of extreme protectionist policies, which bolstered the twin tyrannies of our age – fascism and communism. In their vision, removing barriers to

11 The need for change seems to be widely accepted within the WTO but Members disagree on the form that this should take. Certain Members, led by Japan, are continuing in their own de facto review in the meantime: telephone interview with WTO press officer, 7 March 2000.
12 This list of issues is neither exhaustive nor comprehensive. Many have been resolved by the Appellate Body through interpretation. See generally Lichtenbaum, “Procedural Issues in WTO Dispute Resolution” (1998) 19 Mich J Int’l L 1195.
13 These institutions were directed at the regulation of, respectively, international investment, foreign exchange policy and international trade.
14 Address given by Rt Hon Mike Moore MP to the New Zealand Institute of International Affairs, Legislative Council Chambers, Parliament House (1 July 1999) <http://www.wto.org/english/news_e/spmm_e/spmm01_e.htm> (last modified 28 June 2000).
trade would lead to prosperity and a shared commitment to international stability. The principle of non-discrimination in trade relations would restrain destructive economic nationalism, and help prevent the resurgence of the protectionist policies which had done so much to increase inter-war tensions. Their was a vision centred on the rule of law, not the rule of force, built on consensus among nations, binding commitments freely entered into and the settlement of disputes through procedures available to all and applicable to all.

As an intermediate step towards the creation of the ITO, and in order to give the ITO negotiations increased momentum, 23 countries entered the General Agreement on Tariffs and Trade 1947 (the “GATT”). This was to have been incorporated into the instrument establishing the ITO. However, the refusal of the United States Congress to approve the organisation’s founding charter brought about its swift demise. The stillbirth of the ITO meant that the GATT remained in force, despite being originally conceived only as a temporary measure. The GATT took the form of a tariff schedule combined with articles drawn from the draft charter to protect the integrity of trade concessions. However, it gradually evolved from a document into an institution, and a number of subsequent multilateral trade negotiations, known as “rounds”, were conducted under its auspices. More important for our purposes is the conduct of dispute settlement under the GATT.

2. Dispute Settlement Under the GATT

Dispute settlement was originally provided for by articles XXII and XXIII of the GATT. Their operation may be described as follows. When a Contracting Party considered that a benefit accruing under the GATT was being nullified or impaired, it could hold consultations on a bilateral or multilateral basis. If consultations failed to resolve the matter, it would then be referred to the GATT membership which was required to investigate and give a recommendation or ruling as appropriate. Under certain circumstances, retaliation could be ordered against the party in breach.

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15 The Havana Charter for an International Trade Organisation (1948) was ratified by the governments of 54 countries (of a total UN membership of 61) at the United Nations Conference on Trade and Employment in Havana.
16 The GATT was applied provisionally by the Protocol of Provisional Application to the General Agreement on Tariffs and Trade (30 October 1948) 55 UNTS 187. Thus, in international law, the GATT was a contract between states rather than a treaty.
17 GATT Arts I (“most-favoured nation”) and III (“national treatment”) are the most important substantive provisions drawn from the draft charter. Significantly, the GATT did not include the organisational provisions of the draft charter that related to the proposed ITO.
18 There were eight rounds in the history of GATT: Geneva (1947); Annecy (1949); Tourquay (1950); Geneva (1956); Dillon (1961); Kennedy (1962-1967); Tokyo (1973-1979) and Uruguay (1986-1994).
19 The relevant part of Art XXIII provides: “If the contracting parties consider that the circumstances are serious enough to justify such action, they may authorise a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the
Articles XXII and XXIII lacked specificity as to how the dispute settlement process was to be conducted in practice. Therefore, the GATT membership came to supplement the text with customs and practices developed over the course of time. Initially, disputes were taken up at a meeting of the Contracting Parties in plenary session where the Chairman would make a determination. The Contracting Parties soon developed an alternative method under which a working party would investigate the dispute and make a recommendation on which the GATT membership voted.

In 1952, the use of an impartial panel, composed of three or five trade experts, became accepted. This practice was codified in 1979. However, the panel report was of no legal effect unless and until it was adopted by the GATT membership. This required a consensus amongst all the GATT membership in favour of adoption, which meant the absence of any one party’s objection. The consensus requirement existed at all stages of the process. Thus, any Contracting Party, including the defendant, could block the formation of a panel, the adoption of a panel’s report, or the imposition of retaliatory action.

The purpose of the procedures under articles XXII and XXIII was not to enforce obligations for the sake of enforcement. Rather, they were intended to correct imbalances that might arise in the benefits that countries were actually receiving from tariff reductions. The essential value underlying the legal design was reciprocity. The consensus requirement acted as a political filter to prevent politically objectionable decisions from having legal effect. In this respect, dispute settlement under the GATT was a diplomat’s concept of legal order; it reflected a compromise between the “rule-oriented” and “power-oriented” approaches to international dispute settlement.

Dispute settlement under the GATT was not unsuccessful. One study has found that on average 88 per cent of complaints were dealt with to “the satisfaction of” the parties. The author of the study concluded that “[t]here is legal substance to the enterprise .... [whose] accomplishments to this point, if not unique, are at least rare in the history of international legal institutions”.


21 Ibid.


24 Ibid 353.
Contracting Parties and the consensus in support of the GATT rules. Dramatic changes in the composition of the GATT membership, accompanied by an erosion of the consensus underlying basic GATT principles, meant that ultimately the balance was unsustainable. The inherent defects of the process, and the consensus requirement in particular, provided undue influence to those countries with diplomatic and economic muscle.

[T]he system was extremely susceptible to political gamesmanship and diplomatic power struggles among nations. The outcomes of trade disputes were subject to the vagaries ... of international relations, instead of a fair and impartial understanding of the underlying treaties.

The final years of the GATT saw a cluster of panel reports blocked by the defending party, and the increasing use of unilateral retaliatory action on the part of the major trading nations, particularly the United States and Japan. Consequently, reform of the dispute settlement process became a primary concern in Uruguay.

3. Dispute Settlement Under the WTO

As a result of the Uruguay Round, the sparse provisions of articles XXII and XXIII were replaced by the thirty-page Understanding on Rules and Procedures Governing the Settlement of Disputes (the “DSU”). The DSU provides for an elaborate set of rules and procedures that govern all disputes raised under the WTO Agreement, the Covered Agreements and the DSU itself. Administration of those rules and procedures is the province of the Dispute Settlement Body (the “DSB”), constituted by the General Council sitting under different terms of reference.

25 The two most important changes to the membership of the GATT were the introduction of the European Community in place of the six initial European Contracting Parties, and an expansion in the number of developing countries. The balance between developed and developing countries shifted from 21-16 in 1960 to 25-52 in 1970.


28 It should be noted that Arts XXII and XXIII of the GATT remain in force. The amended GATT, entitled the General Agreement on Tariffs and Trade 1994, continues to govern trade in goods and is annexed to the WTO Agreement. However, all disputes arising under the GATT 1994 are resolved in accordance with the DSU.

29 Certain Covered Agreements contain special or additional rules and procedures that prevail over those of the DSU insofar as there are inconsistencies. See WTO Agreement, Annex 2, supra note 6, 1126.

The dispute settlement process consists of (up to) five stages: consultation, panel adjudication, Appellate Body adjudication, implementation and retaliatory action. The disputants are required to first enter into “good faith consultations” with a view to reaching a mutually satisfactory solution. If no solution is reached within a 60-day period, the complainant may proceed to the second stage by requesting the establishment of a panel. The defendant may block the request at the time it is made, but a panel must be established at the following DSB meeting unless there is a consensus against it. This reverse consensus rule requires that all Members, including the complainant, be opposed to the formation of the panel.

The panel consists of three panelists nominated by the Secretariat. The disputing parties may object to the nominations for “compelling reasons”, however if the parties cannot agree on composition within a 20-day period, the panelists are selected by the Director-General. The disputants make written and oral submissions before the panel, after which the panel submits the descriptive (factual and argument) section of its report to the parties allowing two weeks to comment. The panel then submits an interim report that includes its findings and conclusions. The parties can request a review of the interim report, in which case additional hearings may be held before the final report is issued. If the final report is not appealed, it must be adopted by the DSB within 60 days of its issue unless there is a consensus not to adopt.

Either party can appeal a panel report on points of law. Appeals are heard by three members of the standing seven-member Appellate Body which is empowered to uphold, modify or reverse the panel’s legal findings and conclusions. The Appellate Body report must be adopted by the DSB and unconditionally accepted by the parties within a 30-day period unless there is a consensus not to adopt.

If a measure is found to be inconsistent with the Covered Agreements, the panel and Appellate Body must recommend that the defending party bring the measure into conformity with the relevant agreement(s). The adoption of this recommendation by the DSB instigates the fourth stage: implementation. The defending party has 30 days to inform the DSB of its intentions in respect of implementing the report. Where it is impracticable to comply immediately with the ruling, the defending party is afforded a “reasonable period of time” in which to do so.

The fifth stage, retaliatory action, arises if the defending party fails to bring the inconsistent measure into conformity within the reasonable time-period. If the complainant requests, the parties must enter into negotiations to determine mutually-acceptable compensation. If the parties cannot agree on compensation within a 20-day period, the complainant may request authorisation from the DSB to suspend the application of concessions under one or other of the Covered Agreements. The DSB must authorise the suspension of concessions within 30 days unless there is a consensus against granting such authorisation.

The foregoing summary highlights the “judicialisation” of the process for settlement of international trade disputes. The rule of law has replaced
reciprocity as the essential underlying value. Although vestiges of the diplomatic remain, the DSU exhibits a clear preference for rule-oriented rather than power-oriented dispute settlement. This is most visibly demonstrated by the “automaticity” of the process; whereas under the GATT the dispute settlement process required the unanimous consent of the Contracting Parties, under the DSU the process is automatic unless there is a consensus against it. The introduction of the Appellate Body and the imposition of strict time limits on the handling of disputes further strengthen the process. The judicialisation of the DSU has been widely applauded:

The WTO’s quasi-judicial, mandatory dispute settlement procedures are an ambitious attempt to strengthen the ‘international rule of law’. In contrast to the role of many UN agencies, the WTO has gone beyond acting as a multilateral arena for ‘power politics in disguise’.

The performance of the DSU to date would seem to bear this out. Since the inception of the WTO in 1994, there have been 182 requests for consultations on 141 distinct matters. These figures compare with the 207 cases brought over the 47 year history of the GATT. The logical conclusion is that WTO Members view the DSU as a viable and effective means of settling disputes. The fact that 32 distinct matters have been raised by developing countries, as opposed to 105 by developed countries, indicates the diminished influence of realpolitik. The volume of cases settled during the consultation period, numbering 37 at the time of writing, is evidence that the system is functioning with a higher degree of predictability and certainty.

In spite of these achievements, a number of concerns have arisen regarding the operation of the DSU. This is not surprising for, as with many agreements reached by negotiation, “some problems have been papered over deliberately in the hope that the problem may never arise or, if it does arise, it will be dealt with

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31 Examples of which are the retention of a (reverse) consensus rule, the requirement that disputing parties first enter into consultations, and the provision of good offices, conciliation and mediation under WTO Agreement, Annex 2, Art 5 supra note 6, 1227.


35 The prevalence of developed country complainants can be partially explained by their larger trade-flows and by the greater resources available for their WTO missions.
The review instigated by the Ministerial Decision of April 1994 provides us with a timely opportunity to address these problems.

### III. ADJUDICATION

This section addresses the issue of whether the Appellate Body should be vested with remand authority. The function of the Appellate Body is to hear appeals on “issues of law covered in the panel report and legal interpretations developed by the panel”. The Appellate Body is authorised to “uphold, modify or reverse the legal findings and conclusions of the panel”. The provision for an appeal body represents a new and important development in international law. To date, the vast majority of panel reports have been appealed. This is not surprising given the domestic political pressures to which the parties are subject. However, the Appellate Body lacks the power to remand cases to the lower tribunal whose decision has been appealed.

The issue of remand potentially arises whenever the Appellate Body modifies or reverses a panel’s legal interpretation or reasoning. If this does not dispose of the case, then the Appellate Body is faced with two choices. It may send the case to the DSB where the parties can request the formation of a new panel to consider the remaining issue(s). Alternatively, it can decide the necessary undecided issue(s) itself, de novo. Thus far, the Appellate Body has opted for the latter.

The issue arose in the first case brought before the WTO, United States – Standards for Reformulated and Conventional Gasoline, which concerned a rule prescribing quality standards for gasoline. The rule prescribed different standards for domestically produced and imported gasoline and was, prima facie, a violation of Article III of the GATT 1994. The United States, as defendant, argued that the rule came within the exemption contained in Article XX(g) of the GATT 1994. The argument was rejected by the panel. This made it unnecessary for the panel to consider the further claims of the complainants concerning the chapeau to Article XX. When the panel’s conclusion was reversed on appeal, these further claims arose for consideration. The Appellate Body held that the panel had “erred in law in failing to decide” the remaining

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37 WTO Agreement, Annex 2, Art 17.6, supra note 6, 1236.
38 WTO Agreement, Annex 2, Art 17.3, supra note 6, 1237.
39 It should be noted that Chapter 19 of the North American Agreement on Free Trade (NAFTA) contains an “extraordinary challenge” procedure that functions as a right of appeal. However, the Extraordinary Challenge Committee is not a standing body; rather, it is composed of three individuals appointed specifically for a particular case.
The Appellate Body therefore elected to decide the outstanding issue itself, and ruled in favour of Brazil and Venezuela.

In *Canada – Certain Measures Concerning Periodicals*, the issue arose again. Canada successfully appealed against the panel’s conclusions regarding the first sentence of Article III:1 of the GATT 1994. The panel decided that, in light of its conclusion as to the first sentence, it need not consider the second sentence of Article III. On appeal, Canada therefore argued that the Appellate Body lacked jurisdiction to consider the second sentence. The Appellate Body disagreed.

As the legal obligations in the first and second sentences are two closely-linked steps in determining the consistency of an internal tax measure with the national treatment obligations of Article III:2, the Appellate Body would be remiss in not completing the analysis of Article III:2. In the case at hand, the Panel made legal findings and conclusions concerning the first sentence of Article III:2, and because we reverse one of those findings, we need to develop our analysis based on the Panel Report in order to issue legal conclusions with respect to Article III:2, second sentence, of the GATT 1994.

The Appellate Body’s statement that it “would be remiss in not completing the analysis” contrasts with its finding that the panel in *Reformulated Gasoline* had “erred in law”. This changed terminology may be attributed to its intervening decision in *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, in which it endorsed the panel’s practice of judicial economy. In this case, India argued before the panel that Article 11 of the DSU entitled it to a finding on each of the issues raised. The panel disagreed and cited prior practice under the GATT. The panel stated: “[i]f we judge that the specific matter in dispute can be resolved by addressing only some of the arguments raised by the complaining party, we can do so.” The Appellate Body upheld the panel’s decision. While acknowledging that some GATT panels did make “broader rulings”, the Appellate Body stated that nothing in the DSU requires panels to do so, and that “[a] panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute.”

There are sound arguments in support of the continued practice of judicial economy. The first is a practical one. In deciding only those issues which are necessary to determine the case at hand, the panel economises on judicial time

41 Ibid 29.
and money. The second reason is a jurisprudential one. Judicial economy avoids deciding issues that do not have to be decided. It is therefore a less expansive approach. This would seem appropriate given the relative youth of the Appellate Body, and its responsibility to adjudicate on the programmes and actions of sovereign states.

However, judicial economy brings with it the (already realised) danger that the Appellate Body will be forced to address issues that have not been subjected to a panel’s scrutiny. In these instances, the Appellate Body is not just “completing the analysis”; rather, it is engaging in de novo review. The difficulty with permitting de novo decisions is that they themselves do not benefit from appeal. The Appellate Body was created as the quid pro quo for the adoption of the reverse consensus rule. The binding nature of the new dispute settlement process brings with it the risk that Members will be held to “wrong decisions” reached by WTO panels. The appellate procedure was meant to offer the opportunity of having wrong decisions corrected. In the case of de novo review, that opportunity is foregone. One commentator has posited a second danger of de novo review, namely the possibility of a concentration of powers in the Appellate Body that “invites political pressure and may jeopardize the independence and authority of the new institution”. 47

The panel in India – Patent Protection for Pharmaceutical and Agricultural Chemical Products seems to have been alert to the danger of de novo review. India argued that the panel need not address the US argument regarding the non-transparency of India’s mailbox patent system, on the basis that “the purpose of the WTO dispute settlement procedure was not to generate interpretations that were not required to resolve the dispute”. 48 The panel rejected this argument, stating that:

[W]e believe it necessary to make our findings clear on the issue of transparency in order to avoid a legal vacuum in the event that, upon appeal, the Appellate Body were to reverse our findings on Article 70.8.

Of course, the panel’s decision to avoid “a legal vacuum” came at the expense of the advantages inherent in the practice of judicial economy.

One possible response to the problems raised by de novo review is to rely upon the “legislative” bodies of the WTO to correct errors made by the Appellate Body. The reader will recall that reports of the Appellate Body are not binding until adopted by the DSB. However, the reverse consensus rule, combined with the requirement that Appellate Body reports be adopted “unconditionally”, 50 means that there is little scope for the DSB to correct errors in legal interpretation. The role of consensus-maker is more likely to fall on the Ministerial Conference or General Council which have “exclusive authority to

49 Ibid para 7.44.
50 WTO Agreement, Annex 2, Art 17.4, supra note 6, 1237.
adopt interpretations of the [WTO Agreement] and of the Multilateral Trade Agreements ... by a three-fourths majority of the Members". 51 This might "improve the quality of work of those who draft future WTO treaty text and those who interpret it". 52 However, it would also stultify the dispute settlement process and lead to undesirable uncertainty as to the exact legal status of adopted Appellate Body reports.

Even if we were to accept the Appellate Body's jurisdiction to engage in de novo review, its inability to make findings of fact may leave it unable to decide the issue where the necessary facts have not been determined. This problem arose in EC – Measures Concerning Meat and Meat Products (Hormones). The Appellate Body found that the panel had erred in assigning the burden of proof to the European Union, and held that the panel should have required the United States to first make out a prima facie case. The Appellate Body dealt with this problem by considering the panel record and pronouncing itself "satisfied that the United States ... although not required to do so by the Panel, did, in fact, make this prima facie case". 53 Although it is possible to argue that the Appellate Body confined itself to a question of law, it inevitably had to consider the significance of certain pieces of evidence to decide whether a prima facie case existed. Thus, the Appellate Body came close to exceeding its mandate under article 17.6 of the DSU.

For these reasons, the author advocates an alteration to the text of the DSU to give the Appellate Body a right of remand. This would imply structural and procedural changes. A right of remand entails an expansion in the panel's jurisdiction, and a concomitant reduction in jurisdiction of the Appellate Body. To capture the full benefits of remand authority, the original panel should be available to hear the issue(s) remanded from the Appellate Body. At present, panels are composed on an ad hoc basis for each dispute. The solution would be to establish a roster of appointed panelists serving for a period of time during which they are available to the extent necessary. 54 There are two costs associated with this proposal. First, provision for a roster of appointed panelists requires greater resources. Second, the settlement of certain disputes will be subject to greater delay, in that each issue remitted to the panel would potentially be the subject of an additional appeal. However, these costs must be weighed against the possibility that de novo review will produce wrong decisions that threaten the credibility, and hence the acceptability, of the WTO dispute settlement process. There is little point in providing for a two-tiered dispute settlement system when a lack of remand authority means that some issues will have the benefit of only the second tier.

54 The author notes that the EU has proposed the creation of a body of 15-24 professional panelists from which panels could be created. See "WTO Dispute Settlement Review", Bridges Weekly Trade News Digest, vol 2, no 41, 26 Oct 1998 <http://www.ictsd.org/html/newsdigest.htm> (last modified 14 June 2000).
IV. COMPOSITION

This section considers the extent to which the private sector should be involved in the WTO dispute settlement process. There are two possible modes of involvement: passive observation and active participation. It will be seen that there is a common rationale which supports the augmentation of both, namely the legitimacy of the WTO as an organisation.

1. Transparency

The extent to which the private sector may observe the WTO depends on its degree of transparency. Transparency concerns the availability of official documents and access to dispute settlement proceedings. The WTO has continued the practice developed under the GATT of publishing panel and Appellate Body decisions. In other respects, the WTO is undoubtedly more transparent than the GATT. In particular, the General Council has adopted streamlined procedures providing for the public release of official documents. Another measure aimed at facilitating transparency is the public provision of information on the subject-matter and parties to disputes, and their passage through the dispute settlement process. Nonetheless, many documents employed in the dispute settlement system remain confidential and outside the ambit of these measures. Furthermore, access to consultations, panel meetings, or Appellate Body hearings is restricted to the particular disputants, although Members with a “substantial interest” in the matter may make submissions as third parties. Many commentators and some Members, most notably the United States and the European Union, have therefore argued that the WTO does not take transparency far enough.

55 Discussion of the transparency issue is confined to the context of dispute settlement. However, the issue is also relevant to the other functions of the WTO (see supra note 5 and accompanying text), although the power-oriented nature of trade policy negotiation means that the argument may carry less weight. See, for example, Nichols, “Realism, Liberalism, Values, and the World Trade Organization” (1996) 17 U Pa J Int’l Econ L 851.

56 Procedures for the Circulation and Derestric... (22 July 1996). Under these procedures, official documents are circulated first to Members. Most documents are classified as unrestricted and are made publicly available at this time. Restricted documents are subject to derestric... six months after their circulation, whichever is earlier.


58 WTO Agreement, Annex 2, Art 10.2, supra note 6, 1230. The issue of what constitutes a “substantial interest” was considered in European Communities – Regime for the Importation, Sale and Distribution of Bananas WT/DS27/AB/R (9 September 1997) (adopted 25 September 1997), in which the Appellate Body took a broad view of the phrase. It should be noted that, although third parties may make submissions before the Appellate Body, they may not themselves appeal the panel decision: WTO Agreement, Annex 2, Art 17.4, supra note 6, 1237.

Americans, used to government in the sunshine, to open hearings and open judicial processes, mistrust the confidentiality that prevails in WTO dispute settlement, particularly the absence of public hearings. All of this secrecy smacks of the Star Chamber to us.

The argument for increased transparency centres upon maintaining the legitimacy of the WTO and its dispute settlement process. That legitimacy is important because, as noted in the introduction, the WTO has no direct enforcement mechanism to give effect to DSB rulings. Rather, it must rely upon the voluntary compliance of its Members. Once the need for legitimacy is recognised, we must consider how legitimacy can be acquired and maintained. The judicialisation of the DSU is only part of the answer. To maintain the rule of law, justice should not only be done, but should be seen to be done. It follows that an essential ingredient in maintaining the legitimacy of the WTO is the openness with which dispute settlements are conducted.

In order to determine the extent of that openness, it is necessary to ask in whose eyes the WTO must be seen as legitimate. Is transparency important only for Members, or should the general public be included? Given that the WTO Agreement is a treaty between states, it might be argued that the need for transparency extends only to Members. But this is to ignore the fact that the primary actors in global markets are private individuals or corporate entities. These are the persons directly affected by DSB rulings. Furthermore, the majority of WTO Members are democratic. Because the decision to comply with DSB rulings is determined in the domestic forum, the persons affected stand to have a profound influence on the outcome. Thus, the need for legitimacy goes not only to Members, but also to their constituents.

The idea of increased transparency nonetheless has been opposed by some Members and commentators. Philip Nichols relies upon the positive theory of political economy to reject an alteration to the existing process. This theory maintains that protectionist constituencies are best at mobilising themselves as a lobbying force because of their small numbers and the concentrated benefits they incur from protectionism. Expanding transparency, it is argued, would bring trade disputes further into the national consciousness thereby presenting protectionist groups with an opportunity to exercise their greater political power. In Nichols’ view, “The international trade regime provides a buffer between the makers of trade policy and special interest groups.” Increased transparency would obviate that buffer.

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60 In particular, Pakistan, Brazil and Malaysia have been vocal in their opposition to increased transparency, let alone its extension beyond Members: telephone interview with WTO Press Officer, 19 August 1999.


62 Ibid 320.
This argument may be easily rebutted. Given the interests and power of protectionist constituencies, it is naive to think that “low-profile” dispute settlement will escape their attention. Indeed, the existing WTO procedures ensure that reports on the progress of disputes are posted right from the first request for consultations. This means that the need for increased transparency is in fact greater; without a legitimate dispute settlement system, protectionist sentiments will carry that much more weight.63

Eliminating the most resilient and restrictive barriers to trade will require popular approval. Thus, it is vital for the public to understand the aims of the WTO and to develop trust in that organization.

Having established the reason for increased transparency, the focus shifts to how this might be achieved. Thus far, transparency advocates have concerned themselves primarily with access to proceedings and the release of the disputants’ written submissions. Both the United States and the European Union maintain that panel and Appellate Body hearings should be opened up to non-participant Members and the general public.64 Under a judicialised dispute settlement system, the conduct of proceedings in obscurity serves no good purpose. Open proceedings would not only instill public confidence in the system, but would also allow outsiders to better understand how a particular decision was reached, thereby increasing certainty in the law. Some Members have reacted to this proposal by expressing concerns about the release of commercially sensitive information.65 These concerns could easily be addressed by granting panels authority to restrict access in particular instances. Furthermore, the concern is unlikely to arise in Appellate Body proceedings which are confined to questions of legal interpretation.

The United States and the European Union have also proposed that written submissions to the panels and Appellate Body be made public. Article 18.2 of the DSU provides that:

[Nothing in the DSU] shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member ... which that Member has designated as confidential.

Thus, Members are free to release their entire submissions to the public, but this freedom does not extend to the submissions of other parties. Article 18.2 goes some way towards addressing this concern by requiring parties to provide non-confidential summaries of their submissions if so requested by any Member.66

64 Supra note 60.
65 Ibid.
66 The Uruguay Round Agreements Act §127(c)(1) requires the United States Trade Representative to publicly release its submissions in all cases in which the United States is a party. The Representative is also required to request parties to release their full written submissions, or alternatively, a non-confidential summary.
However, Article 18.2 provides no guidelines which must be adhered to. In practice, parties often ignore the request, provide a summary with insufficient content, or comply only after considerable delay.

At the minimum, therefore, Article 18.2 should provide for a uniform procedure with respect to non-confidential summaries and some indication of the level of detail required. A more satisfactory result would be to require parties to make their entire submissions available to Members and public alike. The rationale justifying open hearings applies equally to the written submissions used in those hearings. Indeed, panel reports invariably contain a summary of the facts and arguments contained in those submissions. It seems illogical therefore to make these submissions confidential. Furthermore, such a requirement would assist developing-country Members whose legal offices are typically understaffed.  

2. Participation

The signatories to the WTO Agreement are sovereign states. This is reflected in a dispute settlement system that provides for the settlement of disputes between Members, but makes no concession to the rights of the private sector to actively participate in that process.

Although the private sector do not have participatory rights, Articles 13.1 and 13.2 of the DSU authorise panels to “seek information” from “any individual or body which it deems appropriate” and “any relevant source”. The ambit of these provisions was considered in United States – Import Prohibition of Certain Shrimps and Shrimp Products. The panel considered whether it could entertain unsolicited submissions containing technical, legal and political advice submitted by non-governmental organisations. The panel concluded that it would be incompatible with Article 13 to accept non-requested information, although it was open to the parties to designate the submission as their own. This finding was overturned on appeal. The Appellate Body held that the panel had “the discretionary authority either to accept and consider or to reject information and advice submitted to it, whether requested by a panel or not”. The Appellate Body reached this conclusion by juxtaposing Article 13 against Article 11 which

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67 The DSU recognises the inequalities which may arise between developed and developing-country Members. Article 27.2 provides: “[T]here may also be a need to provide additional legal advice and assistance in respect of dispute settlement to developing country Members. To this end, the Secretariat shall make available a qualified legal expert from the WTO technical cooperation services to any developing country Member which so requests.” Also relevant is Art 24 which provides for “Special Procedures Involving Least-Developing Country Members”: WTO Agreement, Annex 2, Art 27.2 supra note 6, 1243-1244.


70 Ibid para 108.
requires panels to “make an objective assessment of the matter before it, including an objective assessment of the facts of the case”.

The Appellate Body’s conclusion rests on a seemingly strained interpretation of Article 13; “seek” is taken to include “receive”. Implicitly at least, the decision was influenced by a desire to facilitate private sector participation in the dispute settlement process. This raises two questions. First: what are the merits of affording the private sector participatory rights? Second: is Article 13 the most appropriate means of doing so?

The argument in favour of broader participation takes up where the argument for increased transparency leaves off. It has already been argued that the legitimacy of the WTO is essential to compliance with its rulings, and that the need for legitimacy extends beyond Members to include private individuals. In making that argument, reliance was placed on the principle that justice must be seen to be done. However, legitimacy requires more than just transparency. It requires that those affected by a decision be given a right to be heard by the decision-maker. The extension of participatory rights to the private sector can provide the connective tissue that links the WTO to its political constituency.

The notion that dispute settlement should exclude all but sovereign signatories belies the realities of a global market place dominated by the private sector. Furthermore, the private sector is on solid legal ground in seeking greater participatory rights. Drawing on the expertise of non-governmental organisations is a hallmark of other international institutions. For example, Agenda 21, a programme of action implemented by the United Nations Conference on Environment and Development, states that:71

> [A]ll intergovernmental organizations and forums should, in consultation with non-governmental organizations, take measures to: ... enhance existing or, where they do not exist, establish, mechanisms and procedures within each agency to draw on the expertise and views of non-governmental organizations in policy and programme design, implementation and evaluation; ... [and] provide access for non-governmental organizations to accurate and timely data and information to promote the effectiveness of their programmes and activities.

However, the merits of private sector participation go beyond simply increasing the legitimacy of the WTO. The private sector draws upon expertise, interests and values that may not be found either in the Secretariat or amongst Member governments. The incorporation of that expertise into the dispute settlement process, it is argued, will lead to more informed decision-making. This argument has been persuasively put by environmental groups in particular, whose concern is that the WTO promotes trade values at the expense of

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71 Agenda 21, Art 27(9), UN DOC A/CONF.151/26 (1993). Other institutions that provide for private sector participation, in varying degrees, are the International Labour Organization (ILO) and the Organization for Economic Cooperation and Development (OECD). It should also be noted that Art 87(2) of the original ITO Charter provided that “the Organization may make suitable arrangements for consultation and cooperation with nongovernmental organizations concerned with matters within the scope of this Charter”: supra note 17.
environmental wellbeing. Richard Shell has used the argument to develop what he calls the “trade stakeholders model” of international relations. Shell rejects the international relations theory of realism as an accurate representation of global trade markets. In his view, realism, which he incorporates into a “regime management model”, exalts domestic values over transnational ones, thereby resulting in undue political pressure that may threaten the stability of the WTO. His trade stakeholders model “embodies a form of ‘participatory legalism’ that would render the WTO an effective forum for discussing the trade-offs between trade and non-trade issues”.

Some commentators believe that private sector expertise, interests and values can be adequately represented through the channel of Member governments. Thus, indirect access by the private sector can be facilitated through persuasion of national governments, thereby obviating the need for an extension of participatory rights. This assumes, of course, that it is a foreign trade measure that is under scrutiny, and that Member governments are responsive to the concerns of their constituents. In the case of undemocratic Members such as Burma, the most that can be said is that “[i]t is unlikely ... that a group of human rights activists would be allowed to leave Burma to participate in a proceeding in Geneva, or, having somehow done so, would find a comfortable reception waiting at home.”

Initiatives taken by the United States and the European Union have given this method more potency. Under section 301 of the United States Trade Act of 1974, “interested persons” may file petitions with the United States Trade Representative. The Act authorises “mandatory” and “discretionary” action if it is found that a foreign act or practice infringes rights accorded to the United States under a trade agreement. European Community Council Regulation 3286/94 accords the same rights to natural and legal persons of the European Community although, unlike section 301, it precludes retaliatory action that is inconsistent with the provisions of the DSU. However, both the US Trade Representative and the EC Commission are left with complete discretion as to whether to accept the case.

Undoubtedly, persuasion of Member governments can provide an effective avenue for private sector participation. A section 301 petition brought by

76 Nichols, supra note 61, 313-314.
Chiquita Brands International and the Hawaiian Banana Industry Association was the impetus for the United States’ complaint in the *Bananas* case. However, the problem with this practice is that it is subject to political limitations. It is possible to conceive of numerous instances in which governments may succumb to political expediency and refrain from presenting the views of private sector elements. A Member may not wish to present a point urged by one of its constituents because it believes it to be incorrect, or because it is fearful of undermining its position in another case. Reluctance may also stem from a desire to avoid the political controversy sometimes associated with lodging a formal complaint. Despite the judicialisation of the DSU, political influences are sometimes unavoidable. Indeed, the likelihood of these scenarios eventuating is the very reason for the width of the US Trade Representative’s discretion under section 301. Even without that discretion, the aforementioned problems can be only partially ameliorated. As long as Member governments are responsible for a complaint’s prosecution, it stands to reason that they may have a determinative influence on the outcome. That is the nature of an adversarial system.

But more fundamental still is the reality that a Member cannot possibly represent every interest that its constituents may have at stake in any one dispute. That international trade produces winners and losers is a truism. The interests of affected persons will therefore frequently conflict. Regardless of the (in)ability of democracies to balance these conflicting interests, the balancing exercise should be conducted at the level at which trade disputes are determined. This raises the question of what mechanism will best facilitate that balancing exercise. In the adversarial system utilised by the WTO, we are faced with two choices: *amicus curiae* status, or extension of standing. These possibilities will be considered separately.

The effect of the decision in the *Shrimp* case is that the private sector may participate in the dispute settlement system as *amicus curiae*. Legitimate criticism has been levelled against this decision. Article 13.1 provides that “before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member”. From a legal standpoint, the decision has the effect of depriving Members of a right accorded to them under the DSU. At a practical level, there is the danger that both panel and parties will be deluged with submissions. The decision to accept submissions is within the discretion of the panel. This raises the question of whether the panel is obliged to at least consider submissions, or whether its discretion is wholly unfettered.

It is submitted that these criticisms may be partially addressed by reforming the DSU. One option would be to require panels to consider *amicus* briefs where

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77 Supra note 58.
78 An example of the influence of political considerations is *United States – The Cuban Liberty and Democratic Solidarity Act* WT/DS38. The complaint, lodged by the European Union, was over the Helms-Burton Act, which allows American courts to impose sanctions on domestic and foreign companies that do business in Cuba. After pressure from the United States, the European Union requested the suspension of the panel on 21 April 1997.
GATT Article XX is in issue.\textsuperscript{79} It could be argued that the practical difficulty this would impose on panels is no greater than that handled by domestic courts when dealing with \textit{amicus curiae} briefings. However, the difference between domestic courts and the WTO is that, in the case of the former, the conflicting interests at stake have already been taken into account at the legislative stage. This means that \textit{amicus} briefs are infrequent. In the context of international trade, the vast array of interests at stake means that extending \textit{amicus curiae} status to the private sector may, in many instances, amount to no more than hollow process. This might suggest reform be directed at allowing the private sector greater input at the negotiation stage rather than at the adjudicative stage. But given the complex and unwieldy nature of international trade negotiations, the practicality of this suggestion is questionable. Another suggestion proffered by Philip Nichols is to alter the composition of panels to include panelists who are representative of non-trade interests.\textsuperscript{80}

Because trade is a central activity in human endeavours, the World Trade Organization must not turn a blind eye toward trade’s connection with other social issues. Myopia, however, is cured not by changing what the eye is shown, but instead by changing how the eye sees.

The short answer to this is that decisions in an adversarial system are necessarily determined by the content of the parties’ submissions to the decision-maker.

The impracticalities of extending \textit{amicus curiae} status to the private sector, and the inadequacy of alternative suggestions, have led to proposals that the private sector be provided with standing under the DSU.\textsuperscript{81} There is good reason to permit the private sector to bring complaints before the WTO. From a legal and economic perspective, such a mechanism would lead to the most efficient use of the dispute settlement system. The operation of the free market can be relied on to ensure that complaints will be brought only when the interests at stake warrant the expense of the claim. It would also create greater certainty for trade market participants. Risk-averse businesses are necessarily reluctant to invest capital in an uncertain regulatory environment. Giving these businesses a right of standing renders that environment more certain, thereby encouraging international trade. The response of Philip Nichols is that such a scheme would permit narrow special-interest groups to assert an undue influence, because not all elements of the private sector may be able to afford the expense of direct participation.\textsuperscript{82} However, this argument may have the reverse effect by giving

\textsuperscript{79} GATT Article XX of the GATT agreement provides that trade measures otherwise in violation of the GATT may be justified if they are needed to carry out legitimate social policies.

\textsuperscript{80} Nichols, supra note 61, 329.

\textsuperscript{81} See, for example, Lukas, “The Role of Private Parties in the Enforcement of Uruguay Round Agreements” (1995) 29 J World Trade 181; Charnovitz, supra note 72; Schleyer, supra note 26; Shell, supra notes 73 and 74.

\textsuperscript{82} Nichols, supra note 61.
under-represented elements their due. In any case, this is a problem faced by any adversarial system, hence the place for legal aid schemes.

In the author’s view, the extension of standing to the private sector is the best means to give the WTO the legitimacy it requires, and to ensure that its dispute settlement process is sufficiently well-informed. As a practical reality, this is a long way off. Although there are legal precedents for private sector standing,\(^{83}\) no Member advocates its place in the WTO.\(^{84}\) This is understandable. Many Members would baulk at the prospect of defending complaints brought by, for example, powerful American corporations or environmental groups. Says Philip Nichols: \(^{85}\)

> When the concept of sovereignty has lost all utility, when cultural differences have been minimalized, and when all societies have roughly the same set of values, then perhaps it will be possible and desirable for the World Trade Organization to shoulder Shell’s proposed role as arbiter of social policy. At the present time, however, the World Trade Organization would collapse under the weight of social differences, and the benefits of trade liberalization would be lost.

A compromise would be to allow the Secretariat to filter out frivolous complaints\(^ {86}\). Recognising that there is a finite limit to judicial resources, this proposal would also ensure that the dispute settlement system was not stretched beyond its capacity.

**V. CONCLUSION**

The theory of comparative advantage was formalised by David Ricardo.\(^ {87}\) The theory maintains that international trade must increase the wealth of all participating nations, regardless of their natural and human resources. Thus, international trade is a positive-sum game. The theory has come to be (almost) universally accepted by economists. The difficulty is that, if one nation imposes protectionist measures, it may sometimes appropriate for itself the benefits which should accrue to its trading partners. If other trading nations follow suit, these benefits are lost. International trade becomes a zero-sum game. The Members of

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83 For example: Arts 24 and 25 of the Constitution of the International Labour Organization give employer and worker non-government organizations standing to lodge complaints about a government’s conformity with its responsibilities under a ratified ILO convention; under Art 177 of the Treaty Establishing the European Economic Community, individuals may seek to refer challenges to national laws to the European Court of Justice; Art 1116 of the North American Agreement on Free Trade contains a provision allowing private investors to invoke arbitration when they believe a NAFTA government has violated a rule on investment.

84 Supra note 60.

85 Nichols, supra note 61, 327.

86 The concern of frivolous complaints is noted in the General Provisions of the DSU. Art 3.7 provides: “Before bringing a case, a Member shall exercise its judgment as to whether action under these procedures would be fruitful”: WTO Agreement, Annex 2, Art 3.7 supra note 6, 1227.

the WTO have sought to prevent this phenomenon by voluntarily agreeing to restrict the protectionist measures which they, in their sovereign capacities, may impose.

The Members have also recognised that the long-term sustainability of such an agreement requires some mechanism to settle the trade disputes that inevitably arise between them. The solution they have opted for is the DSU – a landmark development in international law. By seeking to remove power politics from the domain of dispute settlement, they have created a mechanism which is fairer and more effective. To date the DSU has functioned remarkably well. Nonetheless, as this article has demonstrated, the “jewel in the crown” of the WTO is in need of a polish. By giving the Appellate Body a right of remand, we can obtain the benefits of the appeal process while retaining the advantages of judicial economy. By increasing the transparency of dispute settlement, we can ensure that the WTO has the legitimacy that is essential to its ongoing well-being.
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