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## Procedural Issues in WTO Dispute Resolution

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# PROCEDURAL ISSUES IN WTO DISPUTE RESOLUTION

*Peter Lichtenbaum\**

INTRODUCTION AND SUMMARY .....	1195
I. BACKGROUND ON WTO DISPUTE RESOLUTION SYSTEM .....	1198
A. <i>GATT Practice</i> .....	1198
B. <i>Uruguay Round Reforms</i> .....	1200
II. PRELIMINARY ISSUES .....	1202
A. <i>Right to Counsel</i> .....	1203
B. <i>Standing to Challenge</i> .....	1207
C. <i>Ripeness</i> .....	1213
D. <i>Mootness</i> .....	1215
E. <i>Exhaustion of Domestic Remedies</i> .....	1220
III. ISSUES IN THE CONDUCT OF THE PANEL PROCEEDINGS.....	1224
A. <i>Panel Terms of Reference</i> .....	1225
1. Scope of Panel Review.....	1225
2. Judicial Economy .....	1231
B. <i>Standard of Review</i> .....	1233
C. <i>Role of Precedent</i> .....	1244
1. Effect of Panel Reports .....	1244
2. Effect of Appellate Body Decisions.....	1247
D. <i>Burden of Proof</i> .....	1248
E. <i>Panel Fact-Finding</i> .....	1252
IV. ISSUES RELATING TO REMEDIES .....	1254
A. <i>Nature of Remedies</i> .....	1254
B. <i>Compliance with WTO Rulings</i> .....	1259
V. ISSUES IN APPELLATE BODY REVIEW .....	1264
A. <i>Scope of Review</i> .....	1265
B. <i>Issues of Law vs. Issues of Fact</i> .....	1266
C. <i>Standard of Review of Panel Decisions</i> .....	1270
CONCLUSION .....	1273

## INTRODUCTION AND SUMMARY

The dispute resolution system of the World Trade Organization (“WTO”) is the centerpiece of the new organization. Unlike many other

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international organizations, the WTO has a dispute settlement system, to which its Members must submit, with the authority to issue binding legal judgments on issues of great political and economic significance. WTO Director-General Renato Ruggiero has described dispute resolution as "the WTO's most individual contribution to the stability of the global economy."<sup>1</sup> WTO dispute settlement is important, not just for international trade matters, but for what it portends for the future of international dispute settlement. The global community's ability to resolve highly-charged disputes successfully in the trade area will bode well for dispute resolution in other areas.<sup>2</sup>

Since its introduction in 1995, the WTO dispute settlement system has grappled with several significant procedural issues. Given the importance of WTO dispute settlement, these issues deserve consideration. While the WTO has detailed guidelines for dispute settlement, the guidelines do not explicitly address or resolve many of the procedural issues. The initial WTO decisions are, therefore, especially important to the development of the procedural law in the trade area.

This article identifies particularly significant procedural issues that are arising in WTO dispute resolution and comments on the possible evolutionary paths of the law. This task requires that the article strike a balance between breadth of coverage and depth of coverage. As a result, the article does not aim to provide a complete discussion of all aspects of the WTO dispute resolution system and generally does not discuss issues that have not been addressed by WTO panels.<sup>3</sup> The article does

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1. WTO Director-General Renato Ruggiero, Address to the Korean Business Association (Apr. 17, 1997), available at *The Future Path of the Multilateral Trading System* (last modified Mar. 20, 1998) <<http://www.wto.org/wto/speeches/seoul.htm>>.

2. See Ernst-Ulrich Petersmann, *International Trade Law and the GATT/WTO Dispute Settlement System 1948-1996: An Introduction*, in *INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM 1997*, at 3, 25 (Studies in Transnational Economic Law Vol. 11, 1997) (stating that "many governments view the GATT/WTO dispute settlement system as a model for enforcing international economic rules" and suggesting several reasons for this view).

3. For instance, the article does not discuss issues such as: consultations prior to the formation of a panel; transparency in WTO proceedings; the desire of non-governmental parties to participate in dispute resolution; and the role of experts in WTO proceedings. On the issue of consultations, see generally Gary Horlick, *The Consultation Phase of WTO Dispute Resolution: A Private Practitioner's View*, in 32 *INT'L LAWYER* (1998) (dealing with the issue of consultations). On the issue of transparency in WTO proceedings, see generally Whitney Debevoise, *Access to Documents in Panel and Appellate Body Sessions: Practice and Suggestions for Greater Transparency*, in 32 *INT'L LAWYER* (1998) (concerning the issue of transparency in WTO proceedings). On the role of non-governmental parties in dispute resolution, see generally Bernd-Roland Killman, *The Access of Individuals to International Trade Dispute Settlement*, *J. INT'L ARB.*, Sept. 1996, at 143. See also Martin Lukas, *The Role of Private Parties in the Enforcement of the Uruguay Round Agreements*, 29 *J. WORLD*

not seek to provide an exhaustive analysis of each issue discussed, and therefore deals briefly with the background under the WTO's predecessor, the General Agreement on Tariffs and Trade ("GATT").<sup>4</sup>

After providing background in Section I on the WTO dispute resolution system and its origins in the GATT, this article discusses the particularly significant procedural issues that are arising in WTO dispute resolution. For each issue discussed, the article summarizes the nature of the issue and analyzes WTO precedent and relevant provisions in the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU").<sup>5</sup>

Section II addresses issues that arise prior to a panel's review of the substantive complaint brought before it. The issues discussed are: (a) the right of a WTO Member to be represented by private counsel; (b) whether there is any limitation on a WTO Member's standing to challenge another Member's practice; (c) when a challenge is considered ripe for dispute settlement; (d) whether a challenge may become moot, precluding effective dispute settlement; and (e) whether exhaustion of domestic remedies is required before a Member may raise a particular issue before the WTO panel.

Section III analyzes issues arising in the course of the panel's review of the merits of the challenge. The issues discussed are: (a) the scope of a panel's review of a Member's action (*e.g.*, how the panel must determine what substantive claims are properly before it, and whether a panel must address all such claims); (b) the standard of review that a panel will apply to the substantive claim (*i.e.*, whether the panel will defer to the challenged Member's factual findings and interpretation of its WTO obligations); (c) the effect of past panel and

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TRADE 182, 183–206 (Oct. 1995) (discussing the role of non-governmental parties in dispute resolution). Two environmental non-governmental organizations recently attempted to file an *amicus curiae* brief (unsuccessfully) with a WTO panel. See WTO Secretariat, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R, paras. 7–8 (May 15, 1998) [hereinafter *United States—Shrimp*]. The panel held that only parties and third parties are allowed to submit information directly to the panel. The United States was allowed to attach part of the brief to the United States' own second submission to the panel. See *id.* para. 8.

4. There are several texts that address GATT practice regarding procedural issues generally. See generally ROBERT E. HUDEC, *ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM* (1993); JOHN JACKSON, *THE WORLD TRADING SYSTEM* (1989); JOHN JACKSON, *WORLD TRADE AND THE LAW OF GATT* 163–89 (1969). Professor Hudec's book contains a very useful bibliography. See HUDEC, *supra* at 610–19.

5. See Understanding on Rules and Procedures Governing the Settlement of Disputes [hereinafter DSU], Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 2 (last downloaded June 11, 1998) <<http://www.wto.org/wto/legal/finalact.htm>>.

Appellate Body decisions on the panel's approach; (d) the allocation of the burden of proof in the proceedings; and (e) the panel's authority to seek additional facts in order to resolve the legal issues before it.

Section IV discusses issues relating to the remedies a panel may authorize if it finds a violation has occurred. The issues discussed are: (a) the availability of retroactive remedies (*i.e.*, whether the remedy is limited to changes in practice in futuro, or whether the panel may require the Member to take some action to remedy past wrongs); and (b) the timing of the Member's compliance with the panel's ruling.

Section V addresses issues arising in the context of Appellate Body review of a panel decision. These issues include: (a) the scope of Appellate Body review; (b) the distinction between issues of fact and issues of law; and (c) the standard of review applied to the panel's decision.

## I. BACKGROUND ON WTO DISPUTE RESOLUTION SYSTEM

Some background on the WTO dispute resolution system is necessary to an understanding of the legal context for the procedural issues discussed below. Although sweeping changes were made to the dispute resolution mechanisms in the transition from the GATT to the WTO, the procedures used under the WTO have evolved out of the original GATT system. The DSU, which governs WTO dispute settlement, borrows many provisions taken directly from the previous GATT agreements on dispute settlement.<sup>6</sup> In addition, WTO panels and the Appellate Body still refer to GATT panel decisions to show past practice on procedural legal issues if the issue is germane to a dispute under the WTO.<sup>7</sup>

### A. GATT Practice

The GATT system included dispute settlement provisions from its inception.<sup>8</sup> Parties to a dispute were first encouraged to seek bilaterally a

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6. Petersmann provides a list of the successive GATT decisions and understandings relating to dispute settlement. Petersmann, *supra* note 2, at 35. For a detailed history of dispute resolution under the GATT, see, for example, ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* (1975).

7. See, e.g., WTO Secretariat, *Japan—Taxes on Alcoholic Beverages: AB-1996-2, WT/DS8/AB/R, WT/DS10/AB/R, and WT/DS11/AB/R* at 14 (Oct. 4, 1996) (last downloaded May 20, 1998) <<http://www.wto.org/dispute/bulletin1.htm>> [hereinafter *Japan—Alcohol Taxes (Appellate Body)*] (“Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels”).

8. See Judith H. Bello & Alan F. Holmer, *U.S. Trade Law and Policy Series No. 24: Dispute Resolution in the New World Trade Organization: Concerns and Net Benefits*, in *THE*

mutually satisfactory resolution without outside interference. If such negotiations were unsuccessful, a panel of experts could convene on an ad hoc basis. Panels could review submissions of interested parties, hear oral argument, and rule on the dispute. The panels would submit their rulings only to the interested parties initially in order to give friendly settlement another opportunity. These rulings acquired legal status under the GATT if adopted by the GATT Council, which was composed of all the members of the GATT (known as the Contracting Parties).

This system encountered many problems that eventually led to widespread frustration that the GATT did not provide effective dispute settlement. The party complained against had the power to delay and effectively block a resolution of the dispute for several reasons. Until 1989, when some improvements were made, the party had the ability to prevent the establishment of a panel.<sup>9</sup> After agreeing to establish a panel, the party could delay any agreement regarding the panel's terms of reference and the selection of panelists.<sup>10</sup> Even after the 1989 improvements, a single Contracting Party, including the party against which the panel report (*i.e.*, the panel's decision) came out, could block the GATT Council's adoption of a report.<sup>11</sup> In the event that the GATT Council adopted a report, the GATT had no mechanism to force the offending party to withdraw the measures inconsistent with the GATT or to pay compensation to injured parties. The injured party could not be certain that the GATT Council would authorize the injured party to retaliate with equivalent measures against the offending party. In addition, the GATT did not guarantee that the GATT Council would monitor the offending party's actions unless the injured parties prompted the Council to do so.

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GATT, THE WTO AND THE URUGUAY ROUND AGREEMENTS ACT 461-70 (H.A. Applebaum & L.M. Schlitt eds., 1995).

9. See Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance (Nov. 28, 1979), GATT B.I.S.D. (26th Supp.) 210, 212, para. 10 [hereinafter 1979 Understanding], (request for panels to be dealt with "in accordance with standard practice," *i.e.*, by consensus decision-making). In 1989, it was agreed to provide for automatic establishment of panels. See Improvements to the GATT Dispute Settlement Rules and Procedures (Apr. 12, 1989), GATT B.I.S.D. (36th Supp.) 61, 63, para. F(a) [hereinafter 1989 Improvements].

10. 1979 Understanding, *supra* note 9, para. 11 (requiring agreement of the parties concerned to the composition of a panel) & para. 12 (allowing parties to oppose panel members for "compelling reasons."). A panel's "terms of reference" circumscribe the issues it may consider. See DSU, *supra* note 5, art. 7.1; see also *infra* Part III.A. The 1989 improvements provided for standard terms of reference and for automatic appointment of panelists. See 1989 Improvements, *supra* note 9, paras. F(b) & F(c).

11. 1989 Improvements, *supra* note 9, para. G ("The practice of adopting panel reports by consensus shall be continued . . .").

This approach reflected a more political and less legalistic means of resolving disputes—what Professor Jackson has termed “power-oriented” rather than “rule-oriented” dispute settlement—and reflected traditional concerns that trade disputes were highly politicized, and that applying rigid rules would not settle disputes effectively.<sup>12</sup> However, the traditional thinking began to change in the 1970’s as the United States came to recognize the benefits of achieving clear rules that would be effectively enforced. The U.S. advocacy of a more judicialized, binding dispute settlement process derived largely from the increased focus of U.S. trade policy on achieving market access abroad and from a recognition that a strong multilateral remedy was preferable to threats of unilateral trade retaliation. U.S. pressure resulted in the 1979 Tokyo Round “Framework Agreement” on dispute resolution, which codified existing GATT dispute settlement practices.<sup>13</sup>

In the 1980’s, the GATT saw a “dramatic increase in non-compliance with dispute settlement rulings,” due partly to the ongoing Uruguay Round of trade negotiations.<sup>14</sup> In addition, the establishment of panels experienced frequent delays.<sup>15</sup> As a result of these frustrations, other GATT members (especially the European Community) joined the United States in pushing for an overhaul of the GATT dispute settlement system.<sup>16</sup>

### B. Uruguay Round Reforms

Dispute resolution was one of the fifteen original Uruguay Round topics for discussion. After years of debate, the Uruguay Round agreements established the new WTO and, with it, a new Dispute Settlement Understanding that made sweeping changes to the GATT dispute resolution mechanism.

The new system is based on the rule of law. The system’s goals are clarity and certainty in dispute resolution procedures while still encouraging bilateral settlement by the parties.<sup>17</sup> The most significant feature

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12. See JACKSON, *THE WORLD TRADING SYSTEM*, *supra* note 4, at 109–12.

13. See 1979 Understanding, *supra* note 9, at 210.

14. Petersmann, *supra* note 2, at 53.

15. *Id.*

16. See Bello & Holmer, *supra* note 8, at 262–64.

17. See WTO Secretariat, *About the WTO; Settling Disputes: The WTO's "Most Individual Contribution"* (last updated Feb. 6, 1998) <<http://www.wto.org/wto/about/dispute1.htm>>. See DSU, *supra* note 5, at art. 3.2 (dispute settlement “is a central element in providing security and predictability to the multilateral trading system”); *id.* art. 3.7 (“A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred”).

of the DSU is that it enables complainants to have a panel established, obtain a ruling from the panel, and obtain authority to retaliate, if necessary, all without the consent of the defending Member.<sup>18</sup> Under the DSU, dispute resolution proceeds automatically, subject only to a consensus decision not to go forward. Parties may now appeal a panel report to an Appellate Body. The new system also provides for surveillance of the implementation of panel reports and compensation, or authorization of retaliation if the report is not implemented within a reasonable period of time. Expedited arbitration is available regarding (1) what constitutes a reasonable period of time for implementation, and (2) what compensation or retaliation is reasonable.

The WTO approach to dispute resolution is more formalistic than that under the GATT, and, as such, the WTO approach provides strict deadlines for completion of each phase of the dispute resolution process. A normal case should not take more than one year to resolve, or fifteen months if it is appealed. At all phases, parties are encouraged to discuss the problem and settle the dispute themselves.

Bilateral consultation between the concerned parties remains the first phase of dispute resolution.<sup>19</sup> If the consultations fail to settle the dispute within sixty days, then the complaining Member may request the establishment of a panel.<sup>20</sup>

Resolving disputes where consultations have not settled the matter is the responsibility of the Dispute Settlement Body ("DSB") (*i.e.*, the General Council, consisting of all WTO Members). The DSB has sole authority to establish panels. Establishment of a panel may take up to forty-five days. A Member can block the creation of a panel at the first DSB meeting following the panel request, but at the second DSB meeting the panel will be established.<sup>21</sup>

The DSU describes in detail how panels are to operate. The panel normally has six months to conclude the case.<sup>22</sup> Panels both receive several written submissions from the parties and hear oral arguments. The panel submits its conclusions in an interim report to the Members involved. The parties have one week to ask for review. If review is sought, the panel may take another two weeks to hold additional meetings. The final report is submitted to the two sides and circulated to all WTO

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18. See DSU, *supra* note 5, arts. 4.3, 6.1, 8.7, 16.4, 17.14, 22.6.

19. See *id.* art. 4.

20. See *id.* art. 4.7.

21. See *id.* art. 6.1.

22. See *id.* art. 12.8. This period is shortened to three months in cases involving perishable goods. *Id.* Conversely, the period can be extended to as long as nine months if the panel considers it necessary. *Id.* art. 12.9.



Members. Sixty days later, the report becomes the DSB's ruling unless Members vote to reject it.

Either involved Member may appeal a panel's decision to the Appellate Body. The Member must base its appeal on a point of law, as the Appellate Body cannot reexamine evidence or admit new evidence. The Appellate Body consists of seven permanent members, and a "division" of three members hears each appeal. These individuals are not affiliated with any government. The Appellate Body can uphold, modify or reverse a panel decision. Appeals should not last more than sixty days, with an absolute maximum of ninety days in special cases.

If a violation is found, the panel or Appellate Body will recommend that the offending Member bring its measure into compliance with the panel's ruling.<sup>23</sup> The Member must follow the recommendations in the panel or Appellate Body report.<sup>24</sup> The Member must state its intention to do so before the DSB within thirty days of the report's adoption. The Member is given a reasonable period of time in which to implement the recommendations.<sup>25</sup> If the Member fails to do so, the offending party must enter into negotiations with the injured party to determine mutually acceptable compensation. If no agreement can be reached, the injured party may ask for permission to suspend trade concessions previously granted to the offending Member. Permission will be granted unless the DSB comes to a consensus against suspension of concessions, or the offending Member requests arbitration regarding the level of trade concessions to be suspended.<sup>26</sup>

Though the DSU is fairly detailed about the process of dispute resolution, many questions remain open for the lawyer involved in bringing or defending a WTO suit before a panel or the Appellate Body. These issues are just beginning to be dealt with under the new WTO system, and final resolution of them may take years.

## II. PRELIMINARY ISSUES

Certain preliminary issues can arise before a panel ever considers the merits of the substantive complaint. Can a Member be represented by whomever it wants? Can a Member challenge any measure of another

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23. *See id.* art. 19.1 (panel or Appellate Body "shall recommend that the Member concerned bring the measure into conformity").

24. *See id.* art. 21.1.

25. *See id.* art. 21.3.

26. *See id.* art. 22.6. For more detail on the process, see generally the WTO's Website at <<http://www.wto.org>>.

Member, or are Members subject to some standing limitation? Can panels only decide cases that are ripe for panel review? Alternatively, is the case already moot? Can a case be dismissed, or narrowed, because the complaining Member failed to exhaust its domestic remedies? WTO panels and the Appellate Body appear to be taking a rather flexible approach to many of these questions, perhaps to avoid dismissing bona fide trade disputes on procedural grounds and, more generally, to avoid the miring of the WTO dispute settlement system in procedural niceties, particularly at preliminary stages.<sup>27</sup>

#### A. Right to Counsel

When a WTO Member brings a challenge, is the Member entitled to hire outside attorneys to represent it in all phases of the dispute resolution process, including panel hearings and oral arguments? This question raises important issues about the nature of WTO dispute resolution. As discussed above, traditional GATT dispute resolution was viewed as something more akin to diplomatic negotiations than to courtroom litigation. Allowing outside counsel a greater role in dispute resolution is a symbolic recognition of the more adversarial nature of the new DSU system.

The DSU does not address this issue, nor has the WTO established any other rules or guidelines regarding the ways in which countries may work with outside counsel. GATT 1947 panel decisions did not address this issue either. In GATT practice, outside counsel increasingly worked with governments, most commonly in the capacity of counsel to private entities whose interests were aligned with the government's interests. On occasion, however, outside counsel had directly assisted the government itself.

The *EC—Bananas* decisions<sup>28</sup> addressed this issue, but failed to resolve it definitively. *EC—Bananas* involved a challenge by Ecuador,

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27. A preliminary issue that is *unlikely* to arise is that of jurisdiction. The issue of personal jurisdiction normally does not arise in WTO dispute settlement because all Members have submitted to panel jurisdiction by acceding to the WTO Agreement. Issues of subject matter jurisdiction also normally will not arise because the DSU expressly applies to all disputes brought under the dispute settlement provisions of the multilateral WTO agreements. See DSU, *supra* note 5, at art. 1; see also Giorgio Sacerdoti, *Appeal and Judicial Review in International Arbitration and Adjudication: The Case of the WTO Appellate Review*, in Petersmann, *supra* note 2, at 247, 274 (issues of jurisdiction "have practically never arisen within GATT, contrary to what often happens in inter-state litigation generally").

28. WTO Secretariat, *European Communities—Regime for the Importation, Sale and Distribution of Bananas: Complaint by the United States, Report of the Panel*, WT/DS27/R/USA (May 22, 1997) (last downloaded May 20, 1998) <<http://www.wto.org/dispute/bulletin1.htm>> [hereinafter *EC—Bananas (Panel Report)*]; WTO

Guatemala, Honduras, Mexico and the United States (the "Complaining Parties") to the EC's regime for the importation, sale, and distribution of bananas. Saint Lucia, appearing as a third party, sought representation by private counsel before the panel. The panel rejected this request in part because the panel's working procedures had specified that only members of governments would be present at panel meetings.<sup>29</sup> The panel also stated that the participation of private lawyers could give rise to concerns about confidentiality, could result in large financial burdens for smaller states if such participation became common practice to hire private lawyers, and could change the "intergovernmental character" of WTO dispute settlement.<sup>30</sup>

Because Saint Lucia was a third party in the proceedings, it did not have the right to appeal the panel's ruling on the "right to counsel" issue. However, after the EC and the Complaining Parties appealed certain other issues to the Appellate Body, Saint Lucia then requested that its private counsel be allowed to participate in the Appellate Body's oral hearing. Saint Lucia argued that governments have a sovereign right to decide who constitutes their official government representatives and delegation, and that nothing in the DSU or the Appellate Body's Working Procedures restricts a Member's right to nominate private lawyers as its counsel.<sup>31</sup> The Complaining Parties opposed Saint Lucia's request, arguing that allowing private lawyers to participate in oral hearings was contrary to established GATT practice, and that there was no established proposition of international law that a government can decide whom to name as its official representatives to an international body. The Complaining Parties also raised concerns that allowing private lawyers to participate was inconsistent with the DSU's purpose of promoting dispute settlement among governments and would raise difficult questions regarding lawyers' ethics, conflicts of interest, representation of multiple governments, and confidentiality.<sup>32</sup>

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Secretariat, *European Communities—Regime for the Importation, Sale and Distribution of Bananas: AB-1997-3*, WT/DS27/AB/R (Sept. 9 1997) (last downloaded May 20, 1998) <<http://www.wto.org/dispute/bulletin1.htm>> [hereinafter *EC—Bananas (Appellate Body)*].

29. See *EC—Bananas (Panel Report)*, *supra* note 28, para. 7.11.

30. See *id.*; See R.S.J. Martha, *Representation of Parties in World Trade Disputes*, 31 J. WORLD TRADE 83 (1997) (criticizing the *EC—Bananas* Panel decision to exclude private attorneys).

31. *EC—Bananas (Appellate Body)*, *supra* note 28, para. 5. Saint Lucia was joined by several other third parties (Belize, Cameroon, Cote d'Ivoire, Dominica, Dominican Republic, Ghana, Grenada, Jamaica, St. Vincent and the Grenadines, Senegal, and Suriname) in arguing that the panel had erred in not allowing Saint Lucia's private counsel to participate, based on the general principle of international law that sovereign states are free to choose the representation of their choice. *Id.* para. 108.

32. See *id.* paras. 8–9.

The Appellate Body decided to allow the private lawyers for Saint Lucia to participate in the oral hearing. The Appellate Body stated that nothing in the WTO Agreement, the DSU, or the Appellate Body's Working Procedures specified who can represent a government making representations in an oral hearing of the Appellate Body. Given this legal vacuum, the Appellate Body relied on two policy arguments. First, the Appellate Body noted that "representation by counsel of a government's own choice may well be a matter of particular significance—especially for developing-country Members—to enable them to participate fully in dispute settlement proceedings."<sup>33</sup> Second, the Appellate Body stated that "given the Appellate Body's mandate to review only issues of law or legal interpretation in panel reports, it is particularly important that governments be represented by qualified counsel in Appellate Body proceedings."<sup>34</sup>

While *EC—Bananas* makes clear that private counsel can participate in oral hearings of the Appellate Body, the situation in panel hearings is less clear. This issue, as noted, could not be considered by the Appellate Body due to Saint Lucia's third party status. Moreover, one of the reasons given by the Appellate Body for its ruling—the peculiarly legal nature of its own proceedings—would not apply as fully at the panel level as they would at the appellate level. However, at least two recent panels have reportedly allowed private counsel to participate in oral hearings.<sup>35</sup>

Most recently, the issue of the right to private counsel arose in the *Indonesia—Autos* dispute. At the first substantive meeting of the panel with the parties, Indonesia announced that two private lawyers were members of its delegation. The United States requested that these lawyers be excluded from the meeting. The panel made a preliminary ruling on this issue and rejected the U.S. request.<sup>36</sup> The panel stated that:

We conclude it is for the Government of Indonesia to nominate the members of its delegation to meetings of this Panel, and we find no provision in the WTO Agreement or the DSU, including the standard rules of procedure included therein, which prevents a WTO Member from determining the composition of its

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33. *Id.* para. 12.

34. *Id.* para. 12.

35. See WTO Official, statement at the *ABA Symposium on the First Three Years of the WTO Dispute Settlement System (1995–1997)*, in Washington, D.C. (Feb. 20, 1998) (on file with author) [hereinafter *ABA Symposium*]; see also Horlick, *supra* note 3 (citing *Panel Report of Oct. 3, 1996 re Indonesia—Certain Measures Affecting the Automobile Industry, WT/DS59* [hereinafter *Indonesia—Autos*]).

36. See *Indonesia—Autos*, *supra* note 35, para 14.1 of Panel Findings.

delegation to WTO panel meetings. Nor does past practice in GATT and WTO dispute settlement point us to a different conclusion in this case. In particular, we note that unlike in this present case, the working procedures of the *Bananas III* panel contained a specific provision requiring the presence only of government officials.<sup>37</sup>

The panel went on to emphasize that the private lawyers, like all members of a Member's delegation, were subject to the standard working procedures of the panel, including requirements of confidentiality.<sup>38</sup> Thus, despite a U.S. objection, the panel allowed private lawyers to participate as full members of a Member's delegation to the panel.

Staff lawyers at the Office of the United States Trade Representative ("USTR") have argued that private counsel should not be allowed to attend panel hearings, let alone present arguments. The U.S. lawyers argued that private counsel would not appreciate the importance of having to consider both sides of a legal position—*i.e.*, that while a government might find a particular position in its interest in one case, the government would be reluctant to take that position if the position would be adverse to its interests in another case. USTR lawyers argued that having to consider both sides of a position in this way meant that governments were constrained from taking extreme positions.<sup>39</sup> However, this argument presumes that private counsel are given *carte blanche* to litigate as they see fit, which is quite unlikely. Private counsel will normally have to seek their government clients' approval of any arguments they intend to make, a process that will ensure that all aspects of the governments' interests are considered. Moreover, private counsel are already allowed to draft WTO Members' briefs in dispute settlement.<sup>40</sup> That new arguments will be advanced in the oral hearing, such that a risk of "extreme" arguments would result from the participation of private counsel, seems improbable.

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37. *See id.* The reference to the *Bananas III* panel is to the *EC-Bananas* decision discussed above.

38. *See id.*

39. Statements of USTR Official, International Law Association Conference, New York, N.Y. (Nov. 1997) (on file with author).

40. *See EC-Bananas (Appellate Body)*, *supra* note 28, para. 11 ("[I]t is well-known that in WTO dispute settlement proceedings, many governments seek and obtain extensive assistance from private counsel, who are not employees of the governments concerned, in advising on legal issues; preparing written submissions to panels as well as to the Appellate Body; preparing written responses to questions from panels and from other parties as well as from the Appellate Body; and other preparatory work relating to panel and Appellate Body proceedings").

Seeking to persuade the U.S. government to change its opposition to participation by private counsel, the American Bar Association ("ABA") has approved a Recommendation that WTO dispute procedures should:

assure all parties the right to be represented by counsel of their selection, including non-government personnel duly accredited by the government using such assistance, in all phases of the dispute settlement process from the request for consultation to the implementation of panel and Appellate Body decisions, including the gathering of relevant facts, the preparation of written submissions to panels and the Appellate Body, attendance at hearings, the presentation of oral argument to those presiding over the proceedings and participation in settlement negotiations . . . .<sup>41</sup>

A report accompanying the Recommendation provides a detailed analysis of the issue.<sup>42</sup> The report argues that: (a) under general principles of international law, sovereign states are free to choose their representatives before international organizations, absent specific rules to the contrary; (b) of all the provisions governing international dispute settlement tribunals, only Chapter Twenty of the North American Free Trade Agreement ("NAFTA") limits a member country's choice of counsel; and that (c) policy concerns regarding private counsel participation (*e.g.*, confidentiality or conflicts of interest) can be addressed without excluding private counsel from WTO dispute settlement.

Whether or not private counsel are allowed to participate in *all* aspects of WTO proceedings, private counsel will continue to have a very significant role as behind-the-scenes advisers to governments. Therefore, the WTO Members, in cooperation with the relevant professional organizations, may wish to establish procedures governing the participation of private lawyers that would address such topics as protection of confidential information and professional responsibility.

### B. *Standing to Challenge*

Before bringing a challenge under the DSU, does a Member have to meet a threshold requirement by showing either that the Member has been harmed by the other Member's practice, or that the Member has a

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41. Recommendation 118A, *adopted at ABA 1998 Mid-Year Meeting* (Feb. 2, 1998) (on file with author).

42. "Private Counsel in WTO Dispute Settlement Proceedings," Report accompanying Recommendation 118A, *supra* note 41.

demonstrable economic interest in the disputed issue?<sup>43</sup> As discussed below, the DSU does not contain a provision expressly addressing the question of standing. Yet in the absence of any limitation, there may be a concern that Members will initiate cases even though they have no immediate trade interest at stake (*e.g.*, in order to set a legal precedent for a future proceeding).

In the *EC—Bananas* case, the EC argued that the United States did not have a right to challenge the EC's bananas regime. The EC first argued that the baseline rule of international law was that a claimant must have a "legal right or interest" in the claim that the claimant is pursuing, and that nothing in the DSU sets aside this requirement. The EC also interpreted Article 10.2 of the DSU, which allows a WTO Member that has "a substantial interest in the matter before a panel" to participate as a third party, as implying that parties bringing panel proceedings should have a "legal interest." The EC argued that the United States had no such interest given the United States' minimal banana production.<sup>44</sup>

In response, the Complaining Parties (the United States and other Members) argued that general international law did not impose a "legal interest" requirement because Article 3.2 of the DSU encompasses only customary rules of *interpretation* of public international law, not substantive rules of law.<sup>45</sup> The complaining parties further argued that the WTO Agreement contained no explicit legal interest requirement, and that in GATT practice a wide variety of interests could support a claim.

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43. Only WTO Members are entitled to bring challenges. *See* General Agreement on Tariffs and Trade (Oct. 30, 1947), 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194, *as amended*, WTO Agreement Annex 1A: Multilateral Agreements on Trade in Goods art. XXIII (Apr. 15, 1994) ("GATT 1994"), *reprinted in* H.R. Doc. No. 316, 103d Cong., 2d Sess. 1338 (1994). Moreover, distinguishing the "right to counsel" of WTO Members, discussed above, from the right of private parties to participate in dispute resolution is important. Whatever the merits of private party participation, it is analytically distinct from the question of whether a WTO Member has the right to be represented by counsel. *Cf.* William D. Hunter, *WTO Dispute Settlement in Antidumping and Countervailing Duty Cases*, in *THE COMMERCE DEPARTMENT SPEAKS ON TRADE AND INVESTMENT 1994*, at 547, 585–87 (1994) (discussing possibility that private parties would be able to appear in WTO dispute resolution proceedings). Of interest, in the legislative history of recent U.S. legislation providing funds for the Office of the United States Trade Representative, the conferees "urge[d] the USTR to permit participation of non-governmental U.S. persons in the development of U.S. positions and in the preparation for consultations and dispute settlement proceedings," under appropriate conditions. 143 Cong. Rec. H10845 (daily ed. Nov. 13, 1997); H.R. CONF. REP. NO. 405, 105th Cong., 1st Sess. (1997) (accompanying H.R. 2267, 106th Cong., Depts. of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act 1998).

44. *EC—Bananas (Panel Report)*, *supra* note 28, paras. 21–22, 35–36. The ACP third participants (Belize, Cameroon, Cote d'Ivoire, Dominica, Dominican Republic, Ghana, Grenada, Jamaica, Saint Lucia, St. Vincent and the Grenadines, Senegal and Suriname) endorsed the EC position. *See EC—Bananas (Appellate Body)*, *supra* note 28, paras. 106–107.

45. *See EC—Bananas (Panel Report)*, *supra* note 28, paras. 2.23–2.25, 2.29–2.34.

The panel rejected the EC's arguments, holding that the DSU did not contain any explicit requirement that a Member must have a "legal interest" to request a panel.<sup>46</sup> The panel noted that the United States did produce bananas in Hawaii and Puerto Rico, and that even if the United States did not have a potential export interest, the United States' internal market for bananas could be affected by the EC regime because of the potential effect on world prices.

After the EC appealed, the Appellate Body affirmed the panel's decision on this issue. The Appellate Body said that it did not agree that there was any "general rule that in all international litigation, a complaining party must have a 'legal interest' in order to bring a case"<sup>47</sup> and emphasized the need to decide the question of standing by referring to the terms of the particular international treaty involved. The Appellate Body then referred to the chapeau of Article XXIII:1 of the GATT 1994, which provides:

"If any Member should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded . . . ."<sup>48</sup>

The Appellate Body interpreted the words "[i]f any Member should consider" as giving Members "broad discretion" to bring a case against another Member. In support, the Appellate Body also cited DSU Article 3.7, which states that "[b]efore bringing a case, a Member shall exercise its judgment as to whether action under these procedures would be fruitful."<sup>49</sup> The Appellate Body stated that these provisions suggest that "a Member is expected to be largely self-regulating in deciding whether any such action would be 'fruitful.'"<sup>50</sup>

The Appellate Body then pronounced itself satisfied that the United States was justified in bringing its claims because (a) the United States was a producer of bananas and therefore had a potential export interest; (b) the United States' internal market could be affected; and (c) the EC had not challenged the United States' standing with respect to its claims under the General Agreement on Trade in Services ("GATS"), which the Appellate Body said were "inextricably interwoven" with the United States' GATT 1994 claims.<sup>51</sup>

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46. *Id.* para. 7.49.

47. *EC—Bananas (Appellate Body)* para. 133.

48. *EC—Bananas (Appellate Body)* para. 134.

49. DSU, *supra* note 5, art. 3.7.

50. *EC—Bananas (Appellate Body)*, *supra* note 28, paras. 134–35.

51. *Id.* paras. 136–37.



While the Appellate Body ruled for the United States, the Appellate Body left itself some room to apply a standing limitation should one become necessary. Thus, the decision states that Members have “broad discretion” to bring challenges—implying that Members do not have unlimited discretion—and states that Members are expected to be “largely self-regulating” in bringing cases—implying that they are not *entirely* self-regulating. Indeed, the Appellate Body closed its discussion by saying that while the Appellate Body was upholding the U.S. right to bring these claims, this ruling did not mean “that one or more of the factors [the Appellate Body has] noted in this case would necessarily be dispositive in another case.”<sup>52</sup> Thus, in future cases, panels may have discretion to reject claims brought by Members with little or no stake in the proceedings, although the parameters of any such standing doctrine are unclear at this point.<sup>53</sup>

Should there be a standing doctrine at the WTO? The answer to this question depends on whether the purposes of the standing doctrine apply in the WTO context.<sup>54</sup> In the United States, the Supreme Court has identified three requirements of its standing doctrine: to determine (1) “whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise;” (2) whether the alleged harm is redressable; and (3) “whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”<sup>55</sup>

The first requirement derives from Article III of the U.S. Constitution, which limits the power of federal courts to the resolution of “cases” and “controversies” in order to avoid judicial involvement in the resolution of policy issues (*i.e.*, law-making). Requiring that a party

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52. *Id.* para. 138.

53. In this regard, one author states that the standing concept “has found little place in WTO law,” citing the *EC—Bananas* panel decision. EDMOND MCGOVERN, INTERNATIONAL TRADE REGULATION § 2.2323 (1995). This statement appears to be accurate for the present, but the scope of the standing limitation (if any) has not been definitely resolved.

54. Cf. Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standards of Review, and Deferences to National Governments*, 90 AM. J. INT’L L. 193, 208–11 (1996) (analyzing the proper interpretation of the standard of review provision in the Antidumping Agreement by considering whether the purposes of standard of review limitations in U.S. practice are equally applicable in the WTO context).

55. *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152–53 (1970). Commentators have also identified other, unstated, purposes of the standing requirement, such as: (1) to avoid deciding issues the court does not want to decide, or believes should be decided by other branches of government; (2) to make a disguised determination regarding the substantive merits of the case; or (3) to avoid judicial involvement in cases where the plaintiff’s case has little merit. See RICHARD J. PIERCE, JR. ET AL., *ADMINISTRATIVE LAW AND PROCESS* 131 (2d ed. 1992).

show it has been injured by a government action necessarily limits the role of the courts by restricting parties' ability to bring abstract disputes before the courts.

The Court has labeled this showing as "injury-in-fact," which ensures that the plaintiff has "such a personal stake in the outcome of the controversy as to assure the concrete adverseness which sharpens the presentation of issues. . . ."<sup>56</sup> In other words, the requirement should result in a higher quality of judicial decisions because the application of legal doctrines to particular facts is likely to illuminate the abstract arguments.

These concerns apply in the context of WTO dispute resolution. If there is no standing requirement at all, there is a risk that panels will be presented with abstract disputes about the interpretation of particular WTO agreements and will not have the benefit of specific facts needed to determine the correct result.<sup>57</sup> Such abstract rulings could "add to or diminish the rights and obligations in the covered agreements," violating DSU Article 3.2.<sup>58</sup> There is certainly an important concern that panels should not engage in law-making. Article 3.2 of the DSU states that "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements." However, it may be that the law-making concern is adequately dealt with by DSU Article 3.2 and by the fact that panel rulings do not have precedential effect.<sup>59</sup>

The "injury-in-fact" requirement is closely related to the second requirement for standing to exist: that is, the harm alleged must be redressable by the judicial decision.<sup>60</sup> Redressability also has a parallel in the WTO context. If the respondent Member does not comply with an adverse panel ruling, the complaining Member is entitled to compensation equivalent to the lost trade opportunities.<sup>61</sup> But if there was no lost trade opportunity, how is compensation (or equivalent withdrawal of concessions) to be established? A respondent Member might have an

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56. *Baker v. Carr*, 369 U.S. 186, 204 (1962). A related concern is to ensure that the plaintiff will "pursue the litigation vigorously." *Barlow v. Collins*, 397 U.S. 159, 172-73 (1970). This purpose addresses the situation of an insincere plaintiff, who may sue in order to lose the case and thereby set a favorable precedent. The same concern seems improbable in the WTO context, where all potential plaintiffs are sovereign governments.

57. This risk was not presented in *EC—Bananas*. A concrete dispute was arising between the EC and the Complaining Parties *other* than the United States.

58. DSU, *supra* note 5, art. 3.2.

59. See *infra* Part III.C for a discussion of the precedential effect of past panel decisions.

60. See, e.g., *Allen v. Wright*, 468 U.S. 737, 753 n. 19 (1984).

61. See DSU, *supra* note 5, art. 22.

incentive in such a case not to comply in the absence of adverse consequences.<sup>62</sup>

The third component of the standing inquiry in U.S. practice is the “zone of interests” inquiry, which derives from the fact that U.S. courts must interpret whether Congress intended to benefit particular classes of plaintiffs. This question will probably not pose a concern in WTO dispute resolution. As the panel argued in *EC—Bananas*, WTO Members necessarily have an interest in the international trading system and in other Members’ compliance with the rules of the system.<sup>63</sup> As all Members are party to the WTO Agreement, they each have a stake in ensuring that the rules are maintained in good repair. A distinct difference, therefore, lies between the WTO context and the domestic law context (at least in the context of the United States), where Congress may intend that only certain persons are entitled to the protection of a statute.

In sum, the Appellate Body reached an appropriate result in *EC—Bananas* in light of the purposes of a standing requirement, although perhaps the Appellate Body did not sufficiently justify its decision. The result is that Members are generally free to initiate WTO challenges. However, in cases where the challenging Member is unable to demonstrate that it has any particularized interest in the controversy, it is possible that a panel could refuse to hear the case out of concern that the case was insufficiently concrete to permit a resolution of the legal issues.

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62. For this reason, one author concludes that “it would probably be wise for panels to continue to require that complaining members demonstrate some personal legal interest by showing lost trade opportunities.” Jacques H.J. Bourgeois, *GATT/WTO Dispute Settlement Practice in the Field of Anti-Dumping Law*, in Petersmann, *supra* note 2, at 283, 288. In some WTO contexts, the substantive violation alleged may itself require such a showing. For instance, the WTO Agreement on Subsidies and Countervailing Measures requires a showing of “adverse effects” suffered by the complaining Member in order to establish an actionable subsidy. WTO Agreement on Subsidies and Countervailing Measures, art. 5 [hereinafter SCM Agreement].

63. The Panel stated:

[W]ith the increased interdependence of the global economy, which means that actions taken in one country are likely to have significant effects on trade and foreign direct investment flows in others, 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.

*EC—Bananas (Panel Report)*, *supra* note 28, para. 7.50.

### C. Ripeness

The issue of ripeness relates to what sort of impact a government measure must be having upon the complaining Member before a panel will rule on the measure's legality.<sup>64</sup> Professor Hudec states that it was "consistent practice in GATT not to adjudicate the legality of proposed changes in national law before they are enacted," but that after a national law's enactment, "the issue has been whether GATT should ever adjudicate before some definite action is taken affecting the complainant."<sup>65</sup>

The concept of ripeness was balanced in GATT jurisprudence by the established doctrine that the GATT disciplines protected "expectations," on which business could rely, and did not merely protect existing trade. Based on this mandate to protect trade "expectations," one GATT panel issued a ruling in a situation where the domestic law had apparently not been applied against any imports,<sup>66</sup> and another panel issued a ruling in a situation where the domestic law had not yet taken effect.<sup>67</sup>

A defense on ripeness grounds was raised in the *Argentina—Footwear* case.<sup>68</sup> In January 1997, the United States requested a WTO panel to rule on Argentina's import duties on footwear, textiles, apparel, and other items and argued that these duties were inconsistent with Argentina's tariff bindings and therefore violated Article II of GATT 1994. Argentina defended, inter alia, on the ground that the United States had not shown that any Argentine-imposed import duty actually exceeded its tariff bindings, and that the mere potential that a duty could exceed the bound rate did not constitute a violation.<sup>69</sup> In response, the United States argued that Argentina's import duty scheme "necessarily" had the potential to result in duties above its tariff binding, without any discretion

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64. The term "ripeness" is derived from U.S. practice. The U.S. Supreme Court has said the ripeness doctrine is intended "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967) (overruled on other grounds).

65. HUDEC, *supra* note 4, at 261.

66. See *Panel on Japanese Measures on Imports of Leather*, May 15–16, 1984, GATT B.I.S.D. (31st Supp.) at 94 (1985).

67. See *Panel on United States—Taxes on Petroleum and Certain Imported Substances*, June 17, 1987, GATT B.I.S.D. (34th Supp.) at 136 (1988).

68. WTO Secretariat, *Argentina—Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items: Report of the Panel*, WT/DS56/R (Nov. 25, 1997) (last downloaded May 19, 1998) <<http://www.wto.org/dispute/bulletin1.htm>> [hereinafter *Argentina—Footwear (Panel Report)*].

69. See *Argentina—Footwear (Panel Report)*, *supra* note 68, paras. 3.90–3.100.

being exercised by Argentine customs authorities, so that the Argentine measure effectively mandated a WTO violation under particular facts.<sup>70</sup>

The panel agreed that the Argentine duty scheme was a “mandatory” measure and stated that “GATT/WTO case law is clear in that a mandatory measure can be brought before a panel, even if such an adopted measure is not yet in effect, and independently of the absence of trade effect for the complaining party.”<sup>71</sup> The panel emphasized that “any measure which changes the competitive relationship of Members nullifies any such Members’ benefits under the WTO Agreement.”<sup>72</sup> The panel concluded that “the competitive relationship of the parties was changed unilaterally by Argentina because its mandatory measure clearly has the potential to violate its bindings, thus undermining the security and predictability of the WTO system.”<sup>73</sup>

The Appellate Body affirmed the result reached by the panel, finding that “there are sufficient reasons to conclude that the [Argentine measure] will result . . . in an infringement of Argentina’s obligations.”<sup>74</sup> Thus, as long as one can conclude with “sufficient” certainty that a violation will occur, the measure appears to be actionable.

If cases are considered ripe simply because a measure has the potential to create a violation, is this conclusion tantamount to abandoning any ripeness requirement? No, although the WTO test is less demanding than is the ripeness test under U.S. law. Under the WTO, a measure will not be ripe for review if the Member retains discretion to promulgate or interpret the law or regulation in a manner consistent with its obligations—*i.e.*, if the violation is not “mandatory” under any given circumstances.<sup>75</sup> But as long as a measure will necessarily result in a

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70. See *id.* paras. 3.101–3.105.

71. *Id.* para. 6.45.

72. *Id.* (citing *EC—Bananas (Appellate Body)*, *supra* note 28, para. 252).

73. *Id.* para. 6.46.

74. WTO Secretariat, *Argentina—Measures Affecting Imports of Footwear, Textiles, Apparel, and Other Items: Report of the Appellate Body*, WT/DS56/AB/R, para. 62 [hereinafter *Argentina—Footwear (Appellate Body)*].

75. See *Argentina—Footwear (Panel Report)*, *supra* note 68, para. 6.45 (citing *Panel Report adopted Oct. 4, 1994 re United States—Measures Affecting the Importation, Internal Sale and Use of Tobacco*, DS44/R). In *India—Patent Protection*, the panel confirmed that a potential violation (which was not mandatory) was not ripe for review. The United States argued, *inter alia*, that India had violated Article 70.9 of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS Agreement”) by failing to ensure that companies that had filed patent applications and received marketing approvals would be entitled to exclusive marketing rights. WTO Secretariat, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products: Report of the Panel*, WT/DS50/R, para. 4.31 (Sept. 5, 1997) [hereinafter *India—Patent Protection*]. India argued that the U.S. argument was not ripe because there was no existing measure that limited the scope of marketing rights available in this situation, and the DSU “did not permit rulings on potential future

violation under some circumstances, a Member need not wait for those circumstances to arise.

This "mandatory measure" doctrine generally makes sense in light of the purpose of the ripeness doctrine as articulated by the U.S. Supreme Court: to ensure "the fitness of the issues for judicial decision."<sup>76</sup> The legal issue the claimant Member presents to the panel is arguably fit for WTO dispute resolution because the Member has effectively made a final resolution of the legal issue.<sup>77</sup> However, creating an overly inflexible legal doctrine, so that a mandatory measure must always be considered ripe, may be inappropriate. The ripeness doctrine serves to avoid judicial entanglement in abstract issues. While the mandatory nature of the measure is a good indicator that the measure is not too abstract, situations may arise in which a panel's inability to apply a WTO provision to a particular set of facts may hamper the panel's review.<sup>78</sup> Therefore, panels should retain some discretion in order to decline to consider cases where, notwithstanding the mandatory nature of the measure, the lack of a concrete dispute hamstrings the panel's review.

#### D. Mootness

Should panels issue rulings on the merits in cases where the disputed measure has either expired or been withdrawn? As Professor Hudec wrote of this mootness issue in the GATT context, "[t]he reason for wanting a ruling in such cases is usually the concern that the same measure will be repeated in the future; ruling after the fact is one of the only ways GATT can deal with short-term GATT violations."<sup>79</sup> A similar concern has been noted in U.S. law, with the result that the mootness

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measures." *Id.* para. 4.32. Agreeing with India, the panel stated that "[w]e consider a finding on the nature of the right to be granted under Article 70.9 unnecessary to settle this particular dispute, which concerns the current non-existence of an exclusive marketing rights system in India." *Id.* para. 7.64.

76. *Abbott Labs.*, 387 U.S. at 149 (indicating that fitness of the issues and the hardship of the parties must be considered as a two-fold test).

77. *See* National Automatic Laundry & Cleaning Council v. Shultz, 443 F.2d 689, 696 (D.C. Cir. 1971). The "mandatory measure" doctrine calls attention to the overlap that exists between the ripeness doctrine and the concept of "finality" under U.S. administrative law, under which an agency action cannot be reviewed until it is final. In essence, the mandatory measure doctrine holds that a WTO member's action is ripe because it is effectively final.

78. *See id.* at 698-99 (finding matter ripe in part because the court was able to restrict its ruling to a legal issue that is susceptible to resolution in the abstract); *Diamond Shamrock Corp. v. Costal*, 580 F.2d 670, 674 (D.C. Cir. 1978) (finding case unripe because judicial review would be "facilitated by waiting until the administrative policy is implemented for then a court can be freed, at least in part, from theorizing about how a rule will be applied and what its effect will be").

79. HUDEC, *supra* note 4, at 262.

doctrine will not apply to questions that are “capable of repetition yet evading review.”<sup>80</sup>

Perhaps based on such concerns, several GATT panels were willing to rule even after the original measure was withdrawn.<sup>81</sup> *United States—Wine and Grape Products* presents a particularly interesting case, combining elements of ripeness and mootness. The United States had enacted legislation defining the term “industry” in countervailing duty (“CVD”) cases to include U.S. grape growers in any case involving wine and grape products. In January 1985, the EU requested a GATT panel to examine whether this provision was consistent with the Subsidies Code on the ground that the law impermissibly included grape growers within the “industry” even though they did not produce the like product, wine. In 1985, the U.S. grape growers filed a CVD petition against EU imports. Before the panel ruled, the U.S. International Trade Commission (“ITC”) reached a finding that ended the CVD investigation. The United States argued that the issue raised by the EU had become “moot” as a result of the ITC determination because no countervailing duties would be levied and “the practical basis of the dispute had ended.”<sup>82</sup>

The panel disagreed because its terms of reference were based on the EU’s complaint, which had argued that the U.S. law itself violated the Subsidies Code. The panel stated that it had “no option but to proceed with its work, as provided for in its terms of reference, irrespective of whether any concrete countervailing duty investigation was under way or whether any countervailing duties based on the above-noted provision were being or had been levied.”<sup>83</sup> While the panel framed the issue in terms of mootness, the decision also demonstrates that a challenge to a statute may be ripe even where the statute has not been

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80. *Renne v. Geary*, 501 U.S. 312, 320 (1991).

81. See HUDEC, *supra* note 4, at 262 (citing *Panel on United States—Prohibition of Imports of Tuna and Tuna Products from Canada*, Feb. 22, 1982, GATT B.I.S.D. (29th Supp.) at 91 (1983); *Panel on United States Definition of Industry Concerning Wine and Grape Products* [hereinafter *United States—Wine and Grape Products*], April 28, 1992, GATT B.I.S.D. (39th Supp.) at 436 (1993); *Panel on European Economic Community Restrictions on Imports of Dessert Apples Complaint by Chile*, June 22, 1989, GATT B.I.S.D. (36th Supp.) at 93 (1990).

82. *United States—Wine and Grape Products*, *supra* note 81, para. 3.1.

83. *United States—Wine and Grape Products*, *supra* note 81, para.4.1. The United States did not accept this aspect of the panel’s ruling and stated that it “reserved its position of opposition to the Panel’s view that it was ripe for the Panel to consider a matter that did not involve an actual initiation of an action, but rather an abstract question whether a proceeding, if initiated, would have been consistent with the Subsidies Code.” *India—Patent Protection*, *supra* note 75, para. 4.32 (quoting U.S. statement in *United States—Wine and Grape Products*).

applied if the statute on its face violates a WTO commitment.<sup>84</sup> The panel presumably would have refused to issue a ruling if the statute had been repealed because a repealed statute cannot possibly be applied in future cases.

Several recent panels have already considered the mootness issue. In *United States—Gasoline*,<sup>85</sup> Venezuela and Brazil argued that a U.S. Environmental Protection Agency (“EPA”) rule violated the Most-Favored-Nation (“MFN”) obligation of GATT 1994 Article I:1 by distinguishing among importers based on criteria that had no link to the imported product.<sup>86</sup> The United States argued that the claim was moot because the rule had expired, and no importer had qualified under the criteria.<sup>87</sup> The panel declined to rule on the claim and stated that “it had not been the usual practice of a panel established under the General Agreement to rule on measures that, at the time the panel’s terms of reference were fixed, were not and would not become effective.”<sup>88</sup> Because the panel’s terms of reference were established after the EPA rule had ceased to have any effect, and because the rule was neither specifically mentioned in the terms of reference nor “likely to be renewed,” the panel did not rule on the claim.

A mootness issue also arose in the WTO proceedings in *Argentina—Footwear*. As discussed above, in January 1997 the United States had requested a panel to address, inter alia, Argentina’s import duties on footwear. On February 14, 1997, Argentina revoked the relevant import duties on footwear. On February 25, 1997, the DSB established the panel to consider the “matter” requested by the United States. Argentina argued, since it had revoked the import duties on footwear, that the U.S. complaint as to footwear was moot because the measure “was no longer in effect at the time when the Panel was established.”<sup>89</sup> Argentina further argued that ruling on this issue would create a “dangerous” practice of ruling on hypothetical cases.<sup>90</sup> The United States argued that the issue was within the panel’s terms of reference based on the U.S. request that

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84. See discussion *supra* Part II.C.

85. WTO Secretariat, *United States—Standards for Reformulated and Conventional Gasoline: Appellate Body Report and Panel Report*, WT/DS2/9 (May 20, 1996) (last downloaded May 19, 1998) <<http://www.wto.org/dispute/bulletin1.htm>> [hereinafter *United States—Gasoline (Panel Report)*].

86. *Id.* para. 6.18.

87. See *id.*

88. *Id.* para. 6.19. For additional discussion of a panel’s “terms of reference,” see *infra* Part III.A.

89. *Argentina—Footwear (Panel Report)*, *supra* note 68, para. 3.6.

90. *Id.* para. 3.38.



previous panels had reviewed measures no longer in effect, and that Argentina was likely to impose these footwear duties again in the future.<sup>91</sup>

The panel held that the U.S. complaint regarding footwear was moot. While agreeing that several panels had considered measures that were no longer in force, the panel stated that “in each of those cases . . . there was no objection raised by either party to the panel’s consideration of the expired measure.”<sup>92</sup> The panel then cited the decision in *United States—Gasoline* (discussed above) that usual GATT practice was not to rule on measures that, at the time the panel’s terms of reference were fixed, were not effective and would not become effective. The panel noted that here, the Argentine measure was revoked before the panel’s “terms of reference were set, i.e. before the Panel started its adjudication process.”<sup>93</sup> The panel also cited the Appellate Body’s statement in *United States—Wool Shirts* that a panel “‘need only address those claims which must be addressed in order to resolve the matter in issue in the dispute.’”<sup>94</sup> Finally, the panel dismissed the U.S. argument that Argentina was likely to impose these duties again, saying that the panel could not “assume” that Argentina would reintroduce the duties.<sup>95</sup>

In *Guatemala—Cement*,<sup>96</sup> the Panel commented in *dictum* on the issue of mootness in the context of a challenge to the initiation of an antidumping investigation. In that case, Mexico had raised challenges to Guatemala’s initiation of an investigation, the provisional determination, and other issues in the conduct of the final investigation. The panel stated that in a case where the investigating country had not imposed provisional or final measures (or accepted a price undertaking), then the complaining country could not pursue WTO dispute settlement “since the ‘matter’ about which consultations were held will have become moot in the absence of one of these actions,” given the absence of “ongoing trade consequences.”<sup>97</sup> In other words, the panel considered that Members are only entitled to rulings on matters that can have some effect in the particular case about which consultations were held.

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91. *See id.* para. 3.7.

92. *Id.* para. 6.12.

93. *Id.* para. 6.19.

94. *Id.* (citing WTO Secretariat, *United States—Measure Affecting Imports of Woven Wool Shirts and Blouses from India: AB-1997-1*, WT/DS33/AB/R (last downloaded May 19, 1998) <<http://www.wto.org/dispute/bulletin1.htm>> [hereinafter *United States—Wool Shirts (Appellate Body)*]). This issue is discussed *infra* Part III.A.2.

95. *Id.* para. 6.14.

96. WTO Secretariat, *Guatemala—Anti-dumping Investigation Regarding Portland Cement from Mexico: Report of the Panel*, WT/DS60/R (June 16, 1998) [hereinafter *Guatemala—Cement*].

97. *Id.* para. 7.17.

In *Japan—Film*, the panel stated that the “nullification and impairment” remedy is limited to measures that were being applied at the time of the decision.<sup>98</sup> The panel noted that GATT/WTO precedent was not to rule on “measures which have expired or which have been repealed or withdrawn,” with the exception of a small number of cases in which the withdrawn measures had been applied in the very recent past.<sup>99</sup> The panel found that certain measures identified by the United States were not currently being applied by Japan.

However, in *Indonesia—Autos*, the panel rejected Indonesia’s argument that its National Car Program had expired and therefore should not be examined by the panel.<sup>100</sup> The panel reasoned that this claim was made by Indonesia after the deadline for submitting information and arguments; that the complaining parties did not agree that the program had been terminated; and that in previous GATT/WTO cases panels had made findings where a measure was terminated or amended after the panel proceedings began.<sup>101</sup>

Measures may also be considered even after they have terminated, where there are continuing trade effects from the previous measures. In *EC—Poultry*,<sup>102</sup> the panel rejected an argument by the EC that a particular measure challenged by Brazil had terminated and should not be considered. The panel reasoned that “Brazil claims that there are certain lingering effects”—*i.e.*, that the measures affected Brazil’s export performance which in turn served as the basis for allocating licenses, and therefore held that the past measures were not moot.<sup>103</sup>

The general approach taken by panels is to find that an issue is moot if the violation has been terminated by the time the panel’s terms of reference are set, even if the violation still existed at the time of the request for a panel. While seemingly logical in terms of the DSU text, this approach risks fostering circumvention of WTO obligations. A Member could maintain a measure in force until just before a panel was established, abolish the measure, and then reimpose the measure after the

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98. WTO Secretariat, *Japan—Measures Affecting Consumer Photographic Film and Paper: Report of the Panel*, WT/DS44/R, para. 10.57 (Mar. 31, 1998) [hereinafter *Japan—Film*] (discussing GATT 1994 Article XXIII:1(b)).

99. *Id.* para. 10.58. The panel cited in the latter category the panel report on *United States—Wool Shirts*, where the panel ruled on a measure that was revoked after the interim review but before issuance of the final report to the parties.

100. *Indonesia—Autos*, *supra* note 35, para. 14.9.

101. *See id.*

102. WTO Secretariat, *European Communities—Measures Affecting Importation of Certain Poultry Products: Report of the Panel*, WT/DS69/R (Mar. 12, 1998) [hereinafter *EC—Poultry (Panel Report)*].

103. *Id.* para. 252.

panel ruling. This suggests that there may be a need for panels to retain discretion to consider complaints in such cases even where the measure was not in effect at the time the terms of reference are set.

### E. Exhaustion of Domestic Remedies

The question here is whether an injured party must raise an argument in the domestic administrative or domestic judicial proceedings in order for a Member to be able to raise the argument in WTO dispute settlement—*i.e.*, whether an injured party must exhaust its domestic remedies before its representative Member may bring an action before the WTO.<sup>104</sup> An analogy is to what U.S. administrative lawyers would refer to as “exhaustion of administrative remedies.” This doctrine states that parties may not raise issues for the first time in judicial appeals if the parties did not raise the issue before the administrative agency. In the U.S. administrative law context, the exhaustion doctrine also requires parties to exhaust all available remedies within the administrative process before a federal court will review the agency’s action.<sup>105</sup> In the WTO context, the exhaustion issue normally arises in challenges to formal administrative proceedings (*e.g.* antidumping, countervailing, or safeguards proceedings), although the exhaustion issue can also arise in other situations if the challenged Member contends that domestic judicial procedures would have provided an adequate remedy.

The question of “exhaustion of national remedies as a prerequisite to an international case” raises sensitive political issues,<sup>106</sup> as states may feel it is inappropriate for a panel to find that a violation exists in situations where the domestic authorities never had an opportunity to consider the disputed issue or develop relevant facts. Thus, one U.S. government lawyer has expressed concern at the prospect that “the scope of review might not be limited to the facts presented to, and arguments made before, Commerce and the ITC,” so that “litigants could

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104. Distinguishing between these two aspects of the question is important. In particular, a Member could be required to *raise* an issue in any formal domestic proceedings but not be required to *pursue* the issue until all administrative and judicial remedies were exhausted.

105. On the narrower question of raising the issue before the agency, see *Pierce, Shapiro & Verkuil*, *supra* note 55, at 179 (referring to the rule that “a party can only raise on judicial review issues that were properly preserved in the proceedings before the agency by continuing to raise them at each point in the process where the agency had an opportunity to consider or to reconsider these issues”). On the broader question of pursuing all potential administrative remedies, see, for example, *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938); *Heckler v. Ringer*, 466 U.S. 602 (1984). Like the ripeness doctrine, the exhaustion doctrine theoretically prevents a court from interfering with the administrative process until the agency has had a chance to act.

106. *Croley & Jackson*, *supra* note 54, at 197 n.26.

be free to introduce new evidence never seen or considered by the agencies.”<sup>107</sup>

The DSU does not contain any provision addressing the question of exhaustion of domestic remedies. With respect to GATT practice, GATT panels had been hostile to any strict requirement of exhaustion of remedies. A GATT 1947 panel rejected such an argument in reviewing an antidumping decision and stated that “there was nothing in the Agreement [the 1979 GATT Antidumping Agreement]<sup>108</sup> which explicitly required the exhaustion of administrative remedies, i.e., that for an issue to be properly before a Panel, it would have had to have been raised in the domestic administrative proceedings.”<sup>109</sup> One author states that “GATT and WTO panels have never invoked the widely-used jurisdictional principle that is known as the ‘local remedies rule.’ (This is the requirement that before commencing an international claim the injured party should have exhausted all potential remedies in the country responsible for the alleged breach of international law.)”<sup>110</sup> He also states that “the approach seems unlikely to change under the WTO.”<sup>111</sup>

However, the exhaustion concept did apply to a certain extent in GATT practice. For instance, the panel in *Mexico—Cement* limited its examination to the facts in the administrative record so that the complaining Member could not submit new evidence to the panel that had not been before the administrative agency.<sup>112</sup> Moreover, GATT 1947 panels recognized that the failure to raise an argument before a national authority might affect the merits of the argument before the panel.<sup>113</sup> For

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107. Hunter, *supra* note 43, at 558; see also Timothy M. Reif, *Coming of Age in Geneva: Guiding the GATT Dispute Settlement System on Review of Antidumping and Countervailing Duty Proceedings*, 24 LAW & POL'Y INT'L BUS. 1185, 1193–96 (1993). On the other hand, the opposite concern is that the parties in an antidumping proceeding are the private foreign producers, while “at the WTO panel the government is the party and the government may not have had any realistic chance to present facts at the national level.” Croley & Jackson, *supra* note 54, at 200 n.32. Moreover, at least in the United States, administrative agencies are required to follow U.S. law, rather than WTO rules, to the extent U.S. law is inconsistent with the WTO. See 19 U.S.C. § 2504(a) (1994); *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660, 667–68 (Fed. Cir. 1992).

108. See GATT Secretariat, *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade*, Geneva (1979) [hereinafter *1979 Antidumping Agreement*].

109. *Panel Report of Sept. 7, 1992 re United States—Anti-dumping Duties on Gray Portland Cement and Cement Clinker from Mexico*, ADP/82, para. 5.9 (unadopted) [hereinafter *Mexico—Cement*].

110. McGovern, *supra* note 53, § 2.2324.

111. *Id.*; see also Petersmann, *supra* note 2, at 116–19 (arguing against a requirement of prior exhaustion of local remedies).

112. *Mexico—Cement*, *supra* note 109, para. 5.12.

113. See *Panel Report of Nov. 30, 1992 re United States—Imposition of Antidumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, ADP/87, paras. 347–

instance, an exporting country might challenge a countervailing duty determination on the ground that the importing country had failed to justify its determination on a particular issue. If the exporters failed to raise this issue in the national investigation, a panel might consider this failure as excusing the lack of an extended discussion of the issue in the importing country's determination.<sup>114</sup>

An exhaustion issue has arisen in one WTO panel decision thus far. In *Argentina—Footwear*, the panel rejected an argument that there was no violation of Argentina's WTO tariff binding because the importers had failed to exhaust their domestic remedies. Argentina argued that its duty scheme was acceptable because under its Constitution, international law was supreme to domestic law, so that an importer who was required to pay a duty above Argentina's WTO tariff binding would "ha[ve] access to a domestic mechanism to challenge such customs determination[s]."<sup>115</sup> The panel rejected this argument and stated that Members are obliged to comply with their WTO obligations unconditionally, "regardless of whether that Member provides a remedy for such violation in its domestic legal system."<sup>116</sup> The panel said that the "delay and uncertainty" resulting from Argentina's suggested approach would be inconsistent with the WTO goal of providing predictability and security for international trade.<sup>117</sup> No WTO panel has yet addressed the narrower issue of whether an issue must at least be raised in any domestic administrative proceedings to permit a WTO challenge.

Should there be a doctrine of exhaustion in WTO proceedings? One author argues that public international law (applicable in WTO proceedings pursuant to DSU Article 3.2) requires exhaustion of remedies

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419 (unadopted); *Panel Report of Dec. 4, 1992 re United States—Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, SCM/153, paras. 218; *Panel Report of October 31, 1994 re United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in France, Germany and the United Kingdom*, SCM/185, para. 640 (unadopted) [hereinafter *United States—Lead and Bismuth Steel*]; *Panel Report of Aug. 20, 1990 re United States—Imposition of Antidumping Duties on Seamless Stainless Steel Hollow Products from Sweden*, ADP/47 (unadopted).

114. For instance, in *United States—Lead and Bismuth Steel*, *supra* note 113, the EC argued that the U.S. Commerce Department had failed to give reasons for its rejection of arguments against a particular methodology for amortizing capital subsidies over time in a countervailing duty case. The panel found that the Commerce Department "was not presented with any arguments or information calling into question the reasonableness" of the methodology, and found that the Commerce Department therefore had not violated any obligation to give reasons for its decision. *United States—Lead and Bismuth Steel*, *supra* note 113, para. 640.

115. *Argentina—Footwear (Panel Report)*, *supra* note 68, para. 6.42.

116. *Id.* para. 6.68.

117. *Id.*

in situations involving a national of the complaining Member.<sup>118</sup> Based on this approach, he argues that the GATT's rejection of the exhaustion concept was justified because "the object of the [GATT] obligations are not private parties but goods," but that exhaustion should be required in certain WTO contexts that involve legal obligations whose purpose is to protect private parties—obligations such as those found in the General Agreement on Trade in Services ("GATS") and the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement").<sup>119</sup>

This distinction appears to be rather unworkable and lacking in foundation. While the GATT 1947 obligations did relate to the treatment of goods, many obligations were drafted in terms of the rights of a private party. For instance, in *Mexico—Cement*, the 1979 Antidumping Agreement contained several articles along these lines.<sup>120</sup> It is unclear whether it is possible to categorize GATT or WTO obligations as relating to the treatment of goods or the treatment of private parties in a easily ascertainable manner. Equally important, it seems quite unlikely that the Uruguay Round negotiators intended to draw such a sharp distinction between agreements (*e.g.*, GATS and TRIPS) where exhaustion would be required and other agreements where it would not, without making any express reference to this distinction.

A better approach to the exhaustion issue may be to build on the existing GATT and WTO practice in this area. As in the *Argentina—Footwear* case, WTO panels should not require that the national of the complaining Member has pursued all judicial appeals in the country involved, as such a process could take many years.<sup>121</sup>

A somewhat more difficult issue is whether WTO panels should require that any argument raised by a Member in the proceeding must be raised in formal proceedings below (*e.g.*, antidumping, countervailing duty or safeguard proceedings). With respect to legal issues (*i.e.*, consistency with WTO obligations), requiring an issue to be raised below seems inappropriate, particularly because domestic administrative agencies often are obliged to follow domestic law even where this is

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118. See R. S. J. Martha, *World Trade Disputes Settlement and the Exhaustion of Local Remedies Rule*, J. WORLD TRADE, Aug. 1996, at 107, 109.

119. See *id.* at 110, 119–21.

120. See 1979 Antidumping Agreement, *supra* note 108, arts. 6.1, 6.2, 6.6 and 6.7.

121. For instance, in one U.S. countervailing duty case, Final Affirmative Countervailing Duty Determination: Certain Hot Rolled Lead and Bismuth Carbon Steel Products from the United Kingdom, [1993] 58 Fed. Reg. No. 10 at 6237, an investigation initiated in 1992 still awaits final judicial resolution from the U.S. courts as of this writing in mid-1998. If the GATT panel that considered this case (the *United States—Lead and Bismuth Steel* panel) had required the complaining party to await judicial resolution, the party would still be waiting.

inconsistent with WTO obligations.<sup>122</sup> In addition, to the extent that little or no deference is due to a Member's legal interpretation of its WTO obligations, requiring exhaustion would be inappropriate because the panel is considered as competent as the domestic authority (perhaps more so) to resolve the meaning of the WTO commitments.<sup>123</sup> This approach is consistent with *Mexico—Cement*. However, consistent with the GATT panel decisions discussed earlier, WTO panels may consider the failure to make an argument below as relevant to the merits of particular complaints, particularly complaints regarding the absence of a reasoned explanation on an issue that was not raised below.

Finally, with respect to evidentiary/factual issues, complaining Members should not be able to introduce new evidence in the dispute settlement context for substantive consideration by the panel in appeals from domestic administrative proceedings. These administrative proceedings are "on-the-record" proceedings and a WTO panel is ill-equipped to engage in fact-finding. This approach is consistent with the GATT panel decision in *Mexico—Cement*. However, a complaining Member should be able to use evidence that the complaining member tried to submit at the administrative proceedings, if only for the limited purpose of supporting a claim that the other Member refused to consider relevant evidence.

### III. ISSUES IN THE CONDUCT OF THE PANEL PROCEEDINGS

We now turn to issues that arise once the panel has resolved preliminary issues and has agreed to hear the case. What issues are properly before the panel? Must the panel decide all issues presented to it? What standard of review should the panel apply to national decisions? What is the role of precedent in panel decisions, if any? Is there a burden of proof, and if so, who has it? And can the panel engage in discovery of new facts? Each of these questions has presented WTO panels with important issues for decision, and the decisions in turn are likely to have an important impact on future WTO litigation.

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122. See generally Reif, *supra* note 107.

123. See Croley & Jackson, *supra* note 53, at 208 ("That GATT/WTO members have superior information to GATT/WTO panels about the meaning or ultimate aim of the Agreement's provisions seems implausible"). The same distinction between factual and legal arguments also applies in the U.S. context of judicial review of agency decisions. See ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* 407 (1993) ("where the issue is legal, perhaps a matter of construing statutory language, the courts are more confident of their skills and not as likely to require exhaustion") (citing *McKart v. United States*, 395 U.S. 185 (1969)).

### A. Panel Terms of Reference

#### 1. Scope of Panel Review

The issue before the panel is determined by the complaining Member's request that a panel be formed to rule on a particular matter.<sup>124</sup> From a textual standpoint, this is referred to as the panel's "terms of reference." Article 7.1 of the DSU states that unless the parties otherwise agree, a panel's terms of reference are:

to examine, in light of the relevant provisions in (name of covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document . . . and to make such findings as will assist the DSB in making the recommendations or giving the rulings provided for in that/those agreement(s).<sup>125</sup>

Because the panel's terms of reference are restricted to the "matter" referred to the DSB by the complaining Member, it is possible that a panel will be precluded from considering a particular claim because it has not been stated specifically in the complaining Member's request for a panel. Indeed, DSU Article 6.2 expressly requires that a request for a panel "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."<sup>126</sup> This provision also serves an important due process function of informing the other Member, as well as third parties who may wish to participate in the panel proceedings, regarding the nature of the precise claims at issue.<sup>127</sup>

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124. See DSU, *supra* note 5, art. 7. As one author notes, Article 7 allows the complaining Member to "unilaterally define[] the subject-matter of litigation." Pierre Pescatore, *Drafting and Analyzing Decisions on Dispute Settlement*, in HANDBOOK OF WTO/GATT DISPUTE SETTLEMENT 3, 24 (Pierre Pescatore et al., eds. 1997). This may give the complaining Member a significant advantage in the litigation, insofar as the Member is able to frame the terms of the panel's consideration of the issue.

125. DSU, *supra* note 5, art. 7.1.

126. *Id.* art. 6.2.

127. See WTO Secretariat, *Brazil—Measures Affecting Desiccated Coconut: AB-1996-4*, WT/DS22/AB/R, at 22 (last downloaded July 28, 1998) <<http://www.wto.org/dispute/bullitin1.htm>> [hereinafter *Brazil—Desiccated Coconut (Appellate Body)*], where the Appellate Body stated that:

A panel's terms of reference are important for two reasons. First, terms of reference fulfill an important due process objective—they give the parties and third parties sufficient information concerning the claims at issue in the dispute in order to allow them an opportunity to respond to the complainant's case. Second, they establish the jurisdiction of the panel by defining the precise claims at issue in the dispute.



In *EC—Bananas*, the EC contended that the request did not meet the requirements of Article 6.2 because the request simply listed the measures involved and listed the provisions of the agreements allegedly violated without providing an argument as to which aspects of the EC measures violated specific provisions of the agreements.<sup>128</sup>

The panel took a flexible approach to this issue. The panel first discussed the “ordinary meaning” of the DSU’s terms and found that if a panel request were to “identify a measure and specify the provision with which it is alleged to be inconsistent,” it would be “at the outer limits of what is acceptable under Article 6.2.”<sup>129</sup> However, the panel rejected the claims based on the “Agreement on Agriculture” and “other” WTO agreements, because “[i]n these two situations, it is not possible at the panel request stage, even in the broadest generic terms, to describe what legal ‘problem’ is asserted.”<sup>130</sup> The panel went on to support its decision by, inter alia, finding that even if there were some uncertainty as to whether the panel request conformed to DSU Article 6.2, “the first written submission of the Complainants ‘cured’ that uncertainty because their submissions were sufficiently detailed to present all the factual and legal issues clearly.”<sup>131</sup>

The Appellate Body affirmed the panel’s decision that the request met the minimum requirements of Article 6.2. However, the Appellate Body emphasized that this issue must be resolved on the face of the request. The Appellate Body rejected the panel’s suggestion that subsequent submissions by the complaining party could “cure” any deficiency in a request.<sup>132</sup> This is an interesting example compared with the U.S. civil procedure model of allowing plaintiffs to cure any deficiencies in their complaint by allowing liberal amendment of complaints.<sup>133</sup> While this result may have been required by the text of the DSU, it is unclear what purpose is served thereby because complaining Members could refile their request for a panel in response to the panel’s ruling.<sup>134</sup>

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128. *EC—Bananas (Panel Report)*, *supra* note 28, para. 2.8.

129. *Id.* para. 7.29.

130. *Id.* para. 7.30.

131. *Id.* para. 7.44.

132. See *EC—Bananas (Appellate Body)*, *supra* note 28, paras. 141–43. The Appellate Body suggested that “this kind of issue could be decided early in panel proceedings, without causing prejudice or unfairness to any party or third party, if panels had detailed, standard working procedures that allowed, inter alia, for preliminary rulings.” *Id.* para. 144. See also *United States—Denial of Most-Favored Nation Treatment as to Non-Rubber Footwear from Brazil: Report of the Panel*, June 19, 1992, GATT B.I.S.D. (39th Supp.) at 128 para. 6.2 (1993) (jurisdictional issue was resolved in a preliminary decision).

133. See Fed. R. Civ. P. 15(a).

134. See McGovern, *supra* note 53, at § 2.2323 (arguing that the DSU requirement for the prompt settlement of disputes “would be frustrated if the complainant Member was

Nonetheless, this problem is unlikely to arise very often, given the rather minimal requirements for specificity that are imposed on requests.

In *India—Patent Protection*, the panel had to decide whether a complaining Member should be allowed to raise a new claim in response to a defense raised by the defending Member. The United States had complained, inter alia, that India had violated Article 70.8 of the TRIPS Agreement by failing to put in place provisions for the filing of patent applications, known as a “‘mailbox system.’”<sup>135</sup> In its first submission, India argued that it did have in place such a mailbox system. In response, the United States argued that if India did have a mailbox system, India had violated Article 63 of the TRIPS Agreement (a transparency requirement) by failing to make that system known to other Members. India asked the panel to exclude this claim because the claim was not contained in the U.S. request or in its first written submission.<sup>136</sup>

The panel rejected India’s request to exclude the claim. First, the panel interpreted DSU Article 6.2, which requires that the panel request contain a “‘brief summary of the legal basis of the complaint sufficient to present the problem clearly.’”<sup>137</sup> The panel found that the “‘problem” should be construed broadly to refer to India’s failure to implement an adequate mailbox system, so that the United States had presented the “‘problem” in the request even though the United States had not referred to the transparency problem or to Article 63 of the TRIPS Agreement.<sup>138</sup>

In this regard, the panel’s ruling appears flawed. If Members are allowed to introduce new claims simply because they relate to the same general “‘problem” as described in the panel request, other Members

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obliged to hold back the inadequately-disclosed claims until further dispute proceedings could be launched”).

135. *India—Patent Protection (Panel Report)*, *supra* note 75, at 5 n.4. Under the TRIPS Agreement, developing countries are not required to make patent protection available for pharmaceutical and agricultural chemical products until ten years after the WTO’s entry into force. However, if a developing country elects not to do so, it is required to provide a means for filing applications for patents for such inventions in the interim period. See TRIPS Agreement, Annex 1C, art. 70.8(a), *reprinted in* H.R. Doc. No. 316, at 1621, 1652.

136. See *India—Patent Protection (Panel Report)*, *supra* note 75, para. 7.7. India also asked the panel to exclude the U.S. request for a panel suggestion as to how India should implement the panel’s ruling. The panel rejected India’s argument, finding that a request regarding implementation “is not *sensu stricto* a legal claim. It is simply a request for the Panel to exercise its discretionary authority under Article 19.1, second sentence of the DSU.” *Id.* para. 7.16. Thus, the panel appears to have held that Article 6.2 does not apply to requests regarding implementation.

137. *Id.* para. 7.11 (citation omitted).

138. *Id.* Furthermore, the panel’s decision appears inconsistent with the Appellate Body’s holding in *EC—Bananas (Appellate Body)* that panel requests must list the particular provisions of WTO agreements allegedly violated; see discussion *supra* accompanying notes 128–132. A discussion of the “‘problem” does not appear to meet this requirement.

(including third participants who are considering intervention) may not receive adequate notice of the arguments that will be raised. The panel recognized this problem,<sup>139</sup> but argued that “the panel process is a dynamic one where claims by the parties become refined and elaborated through arguments and counter-arguments.”<sup>140</sup> However, this argument was based on a citation to the *EC—Bananas* panel’s decision to allow the “cure” of omitted arguments at a later stage, which, as discussed above, was reversed by the Appellate Body.<sup>141</sup> The panel also noted that third parties can make submissions to the Appellate Body on issues of which they did not have notice. However, this argument assumes that the case is appealed to the Appellate Body. Moreover, saying that other DSU provisions may also protect such interests is not a satisfactory answer to the problem of undermining Article 6.2’s protection of third party interests.

Second, the panel pointed out that the United States had not raised its Article 63 claim in its request or in its first submission because the United States had no reason to believe that India had a mailbox system in place.<sup>142</sup> In other words, the United States was making a “direct response” to India’s rebuttal to the original U.S. argument, and the claim was therefore within the panel’s terms of reference.<sup>143</sup> While understandable in the circumstances of the case, this legal theory appears so broad as to permit end-runs around the terms of Article 6.2. If complaining Members are allowed to introduce new claims as long as the claims are a “direct response” to the other Member’s arguments, the exception to Article 6.2 could swallow the rule.

The Appellate Body reversed the panel’s decision to allow the U.S. claim under Article 63.<sup>144</sup> The Appellate Body held that the DSU does not allow a panel to consider any claims that are outside the panel’s terms of reference, and that the Article 63 claim was outside the panel’s terms of reference because the United States had not referred to Article 63 in the request for a panel. Citing its decision in *EC—Bananas*, the Appellate Body noted that the United States had failed to identify a specific provision of an agreement that is alleged to have been violated, and therefore the United States’ request did not meet the “‘minimum stan-

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139. *See id.* paras. 7.13–7.14.

140. *Id.* para. 7.13.

141. *See text supra* at notes 131–134.

142. *See id.* para. 7.12.

143. *Id.* para 7.15.

144. *See* WTO Secretariat, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products Report of the Appellate Body*, WT/DS50/AB/R, at paras. 85–96 (Dec. 19, 1997) [hereinafter *India—Patent Protection (Appellate Body)*].

dards' ” set out in *EC—Bananas*.<sup>145</sup> While acknowledging the argument that the United States had no reason to know India would assert it had a mailbox system in place, the Appellate Body found no basis in the DSU for allowing claims outside the scope of a panel's terms of reference, for any reason.<sup>146</sup>

The Appellate Body's decision appears to work some injustice in the circumstances of this case, for the sake of establishing a bright-line rule that panels are bound strictly by their terms of reference. Perhaps recognizing this and seeking to avoid future problems of this kind, the Appellate Body concluded its decision by enjoining Members to cooperate in disclosing claims and facts:

All parties engaged in dispute settlement under the DSU must be fully forthcoming from the very beginning both as to the claims involved in a dispute and as to the facts relating to those claims. Claims must be stated clearly. Facts must be disclosed freely. This must be so in consultations as well as in the more formal setting of panel proceedings. In fact, the demands of due process that are implicit in the DSU make this especially necessary during consultations. For the claims that are made and the facts that are established during consultations do much to shape the substance and the scope of subsequent panel proceedings.<sup>147</sup>

Put less diplomatically, if India had disclosed during consultation India's factual assertion regarding the mailbox system, then the United States would have been able to include the Article 63 claim in the request for a panel and the difficult issue would have been avoided.

While *EC—Bananas* and *India—Patent Protection* provide the most in-depth treatment of this issue, several other WTO panels have also addressed the scope of their terms of reference.<sup>148</sup> In *Japan—*

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145. See *id.* para. 91.

146. See *id.*, para. 93.

147. See *id.* para. 94.

148. See WTO Secretariat, *Brazil—Measures Affecting Desiccated Coconut: Report of the Panel*, WT/DS22/R (Oct. 17, 1996) (last downloaded July 28, 1998) <<http://www.wto.org/dispute/bulletin1.htm>> [hereinafter *Brazil—Desiccated Coconut (Panel Report)*], the panel ruled that the Philippines was not entitled to a ruling on its complaint that Brazil had refused to hold consultations because the Philippines had not adequately raised this issue in the request for the establishment of a panel. See *id.* paras. 286–90. In reaching this ruling, the panel described the standard as whether it was “possible, based on a reasonable reading of the documents determining the scope of the terms of reference, to conclude that this Panel would be asked to make findings regarding Brazil's failure to consult.” *Id.* para. 289. See also WTO Secretariat, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/R/USA, paras. XXIV–XXVI (Aug. 18, 1997) [hereinafter *EC—Beef Hormones (Panel Report)*] (refusing to consider two U.S. claims because one claim was not

*Film*,<sup>149</sup> the panel addressed Japan's arguments that certain measures were outside the scope of the U.S. request for the panel. The panel stated that when particular measures are not specifically identified in the panel request, they could still be considered under certain conditions:

To fall within the terms of Article 6.2, it seems clear that a "measure" not explicitly described in a panel request must have a clear relationship to a "measure" that is specifically described therein, so that it can be said to be "included" in the specified "Measure". In our view, the requirements of Article 6.2 would be met in the case of a "measure" that is subsidiary or so closely related to a "measure" specifically identified, that the responding party can reasonable be found to have received adequate notice of the scope of the claims asserted by the complaining party. The two key elements—close relationship and notice—are inter-related: only if a "measure" is subsidiary or closely related to a specifically identified "measure" will notice be adequate. For example, we consider that where a basic framework law dealing with a narrow subject matter that provides for implementing "measures" is specified in a panel request, implementing "measures" might be considered in appropriate circumstances as effectively included in the panel request as well for purposes of Article 6.2.<sup>150</sup>

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included in the U.S. request and the United States had failed to "raise specific arguments or submit factual or scientific evidence" on the other claim); WTO Secretariat, *European Communities—Customs Classification of Certain Computer Equipment*, WT/DS67/R, WT/DS68/R, paras. 8.8–8.11 (Feb. 5, 1998) [hereinafter *EC—Computer Equipment (Panel Report)*] (rejecting an EC argument that certain products were outside the scope of the U.S. request for establishment of a panel); see also *id.* at paras. 8.13–8.14 (rejecting a U.S. request that the panel consider an EC regulation issued after the establishment of the panel, because "[i]t has been the consistent practice of previous panels not to examine measures introduced after the establishment of the panels"); see also WTO Secretariat, *European Communities—Customs Classification of Certain Computer Equipment: Report of the Appellate Body*, WT/DS62/R, WT/DS67/R, WT/DS68/R (Feb. 5, 1998) [hereinafter *EC—Computer Equipment (Appellate Body)*], paras. 58–73 (finding that the U.S. request for the establishment of a panel was consistent with DSU art. 6.2); WTO Secretariat, *Australia—Measures Affecting Importation of Salmon: Report of the Panel*, WT/DS18/R (June 12, 1998) [hereinafter *Australia—Salmon*], para. 8.28 (holding that Canada's claim of nullification and impairment under Article XXIII:1(b) of GATT 1994 was outside of the panel's terms of reference because Canada had not mentioned Article XXIII in its request for a panel); *Indonesia—Autos*, *supra* note 35, para. 14.3 (ruling that U.S. claims regarding a particular loan were not within the panel's terms of reference because the loan had not yet been made at the time of the U.S. request for a panel and the measure identified by the United States did not include the loan).

149. See generally *Japan—Film*, *supra* note 98.

150. *Id.* para 10.8. The panel cited the Appellate Body decision in *EC—Bananas* as authority as well as several GATT and WTO panel decisions. *Id.* paras. 10.10–11.

Based on this reasoning, the panel decided that certain measures were not properly before the panel as they were not subsidiary or closely related to a "measure" specified in the U.S. panel request.

## 2. Judicial Economy

Another issue is whether a WTO panel should refuse to decide issues that do not have to be decided in order to dispose of the dispute, for reasons of judicial economy. According to Professor Hudec, the normal practice of GATT panels was to decline to decide such unnecessary issues.<sup>151</sup> However, he states that panels did depart from this rule where a broader ruling would serve some purpose, such as providing guidance on the panel's view of the meaning of an important GATT provision.<sup>152</sup>

In *United States—Wool Shirts*, India argued that Article 11 of the DSU entitled India to a finding on each of the issues raised. The panel disagreed and cited "the consistent GATT panel practice of judicial economy."<sup>153</sup> The panel stated: "if 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."<sup>154</sup>

The Appellate Body upheld the panel's decision. The Appellate Body stated that neither DSU Article 11, nor previous GATT practice, requires a panel to examine all legal claims made by the complaining party. The Appellate Body declared that previous GATT 1947 and WTO panels have "frequently addressed only those issues that such panels considered necessary for the resolution of the matter between the parties, and have declined to decide other issues."<sup>155</sup> While the Appellate

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151. See Hudec, *supra* note 4, at 262 ("If a measure is found to be GATT-illegal and must be removed in its entirety, panels will normally not decide whether the measure is also discriminatory, or whether it is also illegal under some other rule"). One such instance is *Canada—Import Restrictions on Ice Cream and Yoghurt: Report of the Panel*, Dec. 5, 1989, GATT B.I.S.D. (36th Supp.) at 68 (1990) (declining to rule on whether products were "perishable" under Article XI:2(c), on the ground that decision of the issue was not necessary given the panel's rulings that the Canadian restrictions violated Article XI for other reasons). See also *United States—Wool Shirts (Appellate Body)* at 19 n.27 (collecting decisions).

152. See Hudec, *supra* note 4, at 262–63 (citing *Japan—Restrictions on Imports of Certain Agricultural Products: Report of the Panel*, March 22, 1988, GATT B.I.S.D. (35th Supp.) at 163 (1989); *United States—Customs User Fee: Report of the Panel*, Feb. 2, 1988, GATT B.I.S.D. (35th Supp.) at 245 (1989); *United States—Section 337 of the Tariff Act of 1930: Report of the Panel*, Nov. 7, 1989, GATT B.I.S.D. (36th Supp.) at 345 (1990).

153. WTO Secretariat, *United States—Measure Affecting Imports of Woven Wool Shirts and Blouses from India: Report of the Panel*, WT/DS33/R, para. 6.6 (last downloaded May 20, 1998) <<http://www.wto.org/dispute/bulletin1.htm>> [hereinafter *United States—Wool Shirts (Panel Report)*].

154. *Id.*

155. *United States—Wool Shirts (Appellate Body)*, *supra* note 94, at 19.

Body acknowledged that "a few GATT 1947 and WTO panels did make broader rulings," it said that nothing in the DSU requires panels to do so. Instead, the Appellate Body said, "[a] panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute."<sup>156</sup>

Thus, after *Wool Shirts*, panels are allowed to address issues that are not strictly necessary to resolving the dispute, but are not required to do so.<sup>157</sup> This result may be questioned on legal and policy grounds. First, DSU Article 7.2 states that panels "shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute."<sup>158</sup> The Appellate Body did not address Article 7.2 in *Wool Shirts*, even though India referred to Article 7 in its appeal of this issue.<sup>159</sup> And, as Professor McGovern argues, if the Appellate Body were to reverse the panel's decision on the issue that the panel deemed decisive, "further progress on the remaining claims might be difficult in the absence of findings by the panel."<sup>160</sup> As discussed in Section V.B., *infra*, the Appellate Body lacks authority to make factual findings on matters not addressed by the panel and lacks authority to remand to the panel for further findings. Therefore, if a panel refuses to address certain claims legitimately presented to it, this refusal creates a real risk that those claims could never be addressed (absent a new proceeding). For these reasons, the practice of judicial economy seems to have rather troubling implications.<sup>161</sup>

In fact, panels have already begun to anticipate this problem. In *India—Patent Protection*, India argued that the panel should not address the United States' argument regarding the non-transparency of India's

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156. *Id.* at 20. See also *United States—Gasoline (Panel Report)*, *supra* note 85, para. 6.43 (concluding that it was not necessary to decide whether the U.S. measures violated the Agreement on Technical Barriers to Trade, in view of the panel's findings that the U.S. measures violated Article III:4 of GATT 1994).

157. See *Guatemala—Cement*, *supra* note 96, n. 219 and para. 7.29; *Australia — Salmon*, *supra* note 151, para. 8.185 (declining to consider whether Australia's measure violated GATT 1994 art. XI, after finding that the measure was inconsistent with the SPS Agreement); *United States—Shrimp*, *supra* note 3, paras. 22–23 (declining to consider claims under Article XII and Article I of the GATT 1994, after finding that the U.S. measure was inconsistent with Article XI).

158. DSU, *supra* note 5, art. 7.2.

159. See *United States—Wool Shirts (Appellate Body)*, *supra* note 94, at 6.

160. McGovern, *supra* note 53, § 2.2321.

161. One also may wonder whether the same rule of "judicial economy" applies to the Appellate Body. See DSU, *supra* note 5, art. 17.12 (requiring Appellate Body to "address each of the issues raised during the appellate proceedings"); see also Donald M. McRae, *The Emerging Appellate Jurisdiction in International Trade Law*, in *DISPUTE RESOLUTION IN THE WTO* 98, 107 (James Cameron & Karen Campbell eds., 1988).

mailbox patent system because the United States had requested a ruling on this issue only if the panel were to find that India had a valid mailbox system in place.<sup>162</sup> India said that the “purpose of the WTO dispute settlement procedure was not to generate interpretations that were not required to resolve the dispute.”<sup>163</sup> The panel rejected this argument, stating that:

in view of the Appellate Body’s observation on the limitation of its mandate under Articles 17.6 and 17.13 of the DSU in its recent report on the *Periodicals* case, the Panel felt all the more strongly the need to avoid a legal vacuum in the event that, upon appeal, the Appellate Body were to reverse the Panel’s findings on Article 70.8 [relating to the substantive U.S. claim].<sup>164</sup>

However, another recent panel refused to issue rulings on claims on the ground that the rulings were not necessary given the panel’s finding of a separate violation.<sup>165</sup>

### B. Standard of Review

The “standard of review” issue is whether a WTO panel should make a strictly objective determination of whether a Member’s action is consistent with its WTO obligations, or whether a WTO panel should grant some deference to the factual findings and interpretations of WTO obligations made by a Member in the course of deciding to take the challenged action.<sup>166</sup> If some deference is granted, then questions arise as to how much deference is appropriate, and whether different levels of deference are appropriate for different contexts, particularly for questions of fact versus questions of law.

There are two provisions of the WTO Agreements that are particularly relevant to the standard of review issue. The DSU contains a

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162. *India—Patent Protection*, *supra* note 75, para. 6.6.

163. *Id.* para. 6.9.

164. *Id.* para. 6.11 (footnote omitted). This aspect of the *Periodicals* case cited is discussed *infra* Section V.B.

165. See *EC—Computer Equipment (Panel Report)*, *supra* note 148, para. 8.72 (holding that since the panel had found a violation of Article II:1 of GATT 1994 by the EC with respect to certain computer equipment, it was not necessary to rule on whether the United Kingdom or Ireland had violated Article II:1 as well).

166. A separate “standard of review” issue arises with respect to Appellate Body review of panel decisions. See *infra* Part V.C. Also, antidumping decisions are subject to a specific standard of review. See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, reprinted in H.R. Doc. No. 316, 103d Cong., 2d Sess. 807 (1994) art. 17.6 [hereinafter Antidumping Agreement]. See generally Croley & Jackson, *supra* note 54; see also McGovern, *supra* note 53, §§ 12.141, 12.143.



provision with general applicability to the standard of review to be applied in panel decisions.<sup>167</sup> Article 11 of the DSU states that:

The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the disputes and give them adequate opportunity to develop a mutually satisfactory solution.<sup>168</sup>

The terms of Article 11 raises a question whether panels should be influenced by the challenged Member's determinations on questions of either fact or law because a panel must make an "objective assessment" as to both "the facts of the case," *i.e.*, factual issues, and the "applicability of and conformity with the relevant covered agreements," *i.e.*, legal issues. The requirement of an "objective assessment" arguably would not permit a panel to alter the factual or legal determinations that the panel would have reached independently solely because the Member whose action is challenged has made certain factual or legal determinations.

The standard of review provision in the WTO Antidumping Agreement<sup>169</sup> could support this interpretation of Article 11 by inference. Article 17.6 of the Antidumping Agreement provides that:

In examining the matter in paragraph 5 [*i.e.*, the claim of violation]:

(i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;

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167. See DSU, *supra* note 5, art. 11; see also *United States—Wool Shirts (Panel Report)*, *supra* note 153, para. 7.16 (stating that "although the DSU does not contain any specific references to standards of review, we consider that Article 11 of the DSU which describes the parameters of the functions of panels, is relevant here . . .").

168. DSU, *supra* note 5, art. 11.

169. See Antidumping Agreement, *supra* note 166.

(ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.<sup>170</sup>

Under Article 17.6, panels are required to grant significant deference to national authorities' establishment of the facts, deferring to factual findings as long as the findings were unbiased and objective, and are required to defer to national authorities' legal interpretation of the Antidumping Agreement as long as that interpretation is within the range of "permissible" interpretations. The *Guatemala—Cement* decision was the first WTO decision to apply the standard of review set forth in the Antidumping Agreement. The panel interpreted this standard of review as requiring it to examine "whether an unbiased and objective investigating authority evaluating that evidence could properly have determined that sufficient evidence of dumping and causal link existed to justify initiating the investigation."<sup>171</sup> The panel then held that Guatemala's decision was not supported by sufficient evidence for an objective body to initiate an investigation.<sup>172</sup>

By requiring such deference in the context of review of antidumping determinations, but not in the context of other national decisions, the negotiators may have intended to instruct panels to apply a less deferential standard in the context of other national decisions. A Ministerial Decision, adopted April 15, 1994, states that the Antidumping Agreement standard of review "shall be reviewed after a period of three years with a view to considering the question of whether it is capable of general application."<sup>173</sup> This Decision makes clear that the standard does not currently have "general application."<sup>174</sup>

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170. *Id.* art. 17.6.

171. *Guatemala—Cement*, *supra* note 96, para. 7.57.

172. *See id.* para. 7.67.

173. Decision on Review of Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Uruguay Round Ministerial Decisions and Declarations.

174. Whether the Antidumping Agreement standard of review also applies in the countervailing duty context is unclear. A Ministerial Decision calls for "consistent resolution" of appeals from antidumping and countervailing duty decisions. *See* Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures. The United States interprets this Ministerial Decision as meaning that the same standard of review applies in both contexts. *See* Statement of Administrative Action to

Moreover, applying the Antidumping Agreement's standard of review in other contexts appears inconsistent with Article 11's requirement that panels make an "objective assessment" of the merits on both factual and legal issues.<sup>175</sup>

If national decisions outside the antidumping context should receive less deference than antidumping decisions, an important question would arise as to how much deference is due. It is important to distinguish among three aspects of national decisions: the "raw" evidence that is the subject of the national determination; the factual conclusions drawn from that evidence; and whether the Member's action conforms to its WTO obligations.

Regarding the first aspect—*i.e.*, the facts on which the national agency relied—it is useful to distinguish further between "on-the-record" proceedings and other proceedings. In proceedings that take place on an administrative record, the national proceedings have established the "facts of the case" under DSU Article 11. Therefore, the panel may not allow a complaining Member to introduce new facts at this stage, but is limited to assessing the existing "facts of the case." However, in proceedings that are not on-the-record, the facts of the case have not been established and the panel inevitably will have to make factual findings in the first instance as part of its "objective assessment."

The second aspect relates to the panel's review of the Member's factual conclusions based on the evidence. This is probably the most difficult issue in the standard of review context. The difficulty is that the terms of Article 11 appear at odds with the deference that appears appropriate from a policy perspective. If panels are required to perform an "objective assessment" of the facts, how can the panel grant deference to the Member's factual conclusions? Deference appears appropriate, for instance, in the context of adjudicative, on-the-record proceedings, such as countervailing duty proceedings, or safeguard proceedings, or even in the context of a national rulemaking. The agency involved has developed substantial expertise in the area, which the panel cannot match given its limitations of resources and time. A possible solution to this dilemma is to allow panels to vary their interpretation of what is required by the term "objective assessment," depending on the particular circumstances involved in order to take account of the diversity of dis-

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Uruguay Round Agreements Act, reprinted in H.R. Doc. No. 316, 103d Cong., 2d Sess. 656, 818 (1994) [hereinafter SAA].

175. See Pescatore, *supra* note 124, at 38 (the antidumping standard of review "quite evidently runs counter [to] the idea of an *objective* assessment of facts by *independent* panels, as this particular 'standard of review' serves no other purpose than to superimpose the assessment of the facts by the administration of the defendant Member to the assessment at which a panel might on its own judgment arrive").

pute contexts. However, Members ultimately may need to reconsider and clarify the appropriate standard of review of factual issues.

The third aspect of this issue is an assessment of whether the Member has conformed with its WTO obligations. As to panel review of legal issues, the requirement of an "objective assessment" may be inconsistent with a panel deferring to a Member's interpretation of its legal obligations as opposed to reaching what the panel considers as the best interpretation of the WTO obligations. This approach (*i.e.*, requiring that a panel should select the best interpretation of the relevant provisions) is supported by policy concerns. If panels deferred to national interpretations, this could result in a number of diverging permissible interpretations. Petersmann argues that this "could transform the WTO into a 'tower of Babel' and conflict with the declared objective of the WTO dispute settlement procedures to protect legal security . . ." <sup>176</sup> Moreover, some have argued that national authorities have no greater expertise in interpreting the WTO obligations than do panels, so there is little reason for a panel to defer to them. <sup>177</sup>

To date, there are three significant cases addressing the "standard of review" issue: *United States—Wool Shirts*, *United States—Underwear*, <sup>178</sup> and *EC—Beef Hormones*.

In *United States—Wool Shirts*, India argued that a U.S. safeguard action against imports of woven wool shirts and blouses violated Articles 6, 8, and 2 of the Agreement on Textiles and Clothing ("ATC"). India's main claim was that the United States had failed to demonstrate the existence of serious damage to the U.S. industry, as required by ATC Article 6. With respect to the appropriate standard of review, India argued that the panel should determine whether the United States had observed the requirements of Article 6 in "good faith," but that the panel should not determine whether the United States had acted "reasonably." <sup>179</sup>

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176. Petersmann, *supra* note 2, at 103.

177. See Croley & Jackson, *supra* note 54, at 208; see also *supra* note 123 and accompanying text.

178. WTO Secretariat, *United States—Restrictions on Imports of Cotton and Man-Made Fibre Underwear: Report of the Panel*, WT/DS24/R (Nov. 8, 1996) (last downloaded May 20, 1998) <<http://www.wto.org/dispute/bulletin1.htm>> [hereinafter *United States—Underwear (Panel Report)*].

179. *United States—Wool Shirts (Panel Report)*, *supra* note 153, para. 7.13. See also *id.* paras. 5.7–5.8. India stated that it was

not requesting the Panel to conduct a *de novo* review of the matter and to replace the United States' determination by its own, but was asking the Panel to objectively assess, in accordance with Article 11 of the DSU, whether the United States had made its determination in accordance with its obligations under Article 6 of the ATC.

In contrast, the United States argued that the panel should determine “whether the US authorities could reasonably and in good faith have determined that serious damage or actual threat thereof existed, not whether serious damage or actual threat thereof existed, as such.”<sup>180</sup> The EC, appearing as a third party, stressed that the standard of review issue was “of great importance,” and argued that while on factual issues “a margin of discretion should be left to [the national] authorities,” the U.S. approach of seeking “extreme deference” to national determinations was inappropriate because panels should not simply transpose the deferential standard of review used in U.S. administrative law.<sup>181</sup>

The panel in *United States—Wool Shirts* essentially avoided ruling on the standard of review issue, repeating the language of Article 11 without providing an explanation of what this language requires.<sup>182</sup> The panel did state that “[w]hen assessing the WTO compatibility of the decision to impose national trade remedies, DSU panels do not reinvestigate the market situation but rather limit themselves to the evidence used by the importing Member in making its determination to impose the measure.”<sup>183</sup> But this elaboration is of little help because it only addresses what evidence the panel will consider, and not the standard of review the panel will apply in evaluating that evidence. Nor can one glean an approach to the standard of review issue from the panel’s ultimate decision. Because the panel found that the United States had failed to consider several factors that the United States was obliged to consider under the ATC,<sup>184</sup> the panel did not address the issue of whether

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*Id.* para. 5.7.

180. *Id.* para. 7.13; *see also id.* paras. 5.9–5.21. The United States did not reject India’s argument that it was bound to act in “good faith,” but interpreted that requirement to mean simply that it had to act “in accordance with standards of honesty, trust, sincerity, etc.” *Id.* para. 5.20.

181. *Id.* paras. 4.11–4.12. The EC placed great weight on the unadopted GATT 1947 panel report in *United States—Lead and Bismuth Steel*, noting that in the context of reviewing factual assessments by domestic authorities, the panel had rejected the idea of applying the standard of review used in the GATT signatories’ domestic law systems. *Id.* para. 4.12 (citing *United States—Lead and Bismuth Steel*).

182. *Id.* para. 7.16.

183. *Id.* para. 7.21. The statement appears to be limited to the context of national trade remedies (*i.e.*, safeguard, antidumping, or countervailing duty actions), which are made on an administrative record. Outside those contexts, it has been established that panels may consider evidence not relied on by a Member in deciding whether the Member has acted consistently with its WTO obligations. *See infra* Part III.E.

184. *See id.* para. 7.51. The panel stated in paragraph 7.52 that in the safeguard context, “[t]he relative importance of particular factors including those listed in Article 6.3 of the ATC is for each Member to assess in the light of the circumstances of each case,” which suggests that a panel should not reweigh the evidence in this context. *Id.* para. 7.52. However, whether this conclusion has any impact on the standard of review issue in other contexts is unclear given that Article 6.3 of the ATC simply required the United States to

the U.S. finding of "serious damage" was justified on the merits. The standard of review issue was not appealed by either side to the Appellate Body.

*United States—Underwear* involved a safeguard action taken by the United States against Costa Rican imports, which Costa Rica challenged as violating the ATC. The United States argued that the appropriate standard to apply to the U.S. decision was "a standard of reasonableness"<sup>185</sup> and that Costa Rica had to provide "convincing evidence that [the U.S. action] was unreasonable."<sup>186</sup> Costa Rica argued that the panel must, *inter alia*, analyze whether the United States establishment of the facts was "proper," whether the United States had objectively evaluated those facts, and whether the United States had properly exercised its discretion in interpreting its legal obligations.<sup>187</sup> Costa Rica emphasized that absent an express rule to the contrary (as existed in the Antidumping Agreement), there was no limitation on the panel's power of review.<sup>188</sup> Costa Rica argued that the "reasonableness" standard advocated by the United States was not even sanctioned by the Antidumping Agreement, let alone the ATC.<sup>189</sup>

The panel noted that the DSU "does not contain a provision mandating a specific standard of review," but described Article 11 as the "main relevant provision of the DSU."<sup>190</sup> The panel rejected an approach of "total deference" to the national authorities, which the panel said could not ensure the "objective assessment" required by Article 11.<sup>191</sup> However, the panel also rejected a *de novo* review in which panel review would be a "substitute" for the national authorities' proceedings.<sup>192</sup> The panel analogized to GATT panel decisions in the antidumping and

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consider these various factors. One possible impact could be in the context of reviewing injury decisions in countervailing duty determinations. *See also* SCM Agreement, *supra* note 62, art. 15.4 (listing "relevant economic factors" that must be considered). However, most WTO obligations are more narrowly drawn, requiring that a particular factual determination be made, rather than requiring that a range of factors be considered. *See, e.g.*, SCM Agreement, *supra* note 62, art. 1.1 (requiring determination of whether a "financial contribution" is provided).

185. *United States—Underwear (Panel Report)*, *supra* note 178, para. 5.32 (citing *Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement on Tariffs and Trade Concerning Women's Fur Felt Hats and Hat Bodies*, CP/106 (Mar. 27, 1951) (the "*Fur Felt Hat*" case)).

186. *Id.* para. 5.41. The United States further said that the panel needed only to decide whether the national authorities had examined the requisite factors and adequately explained the basis for their decision. *Id.* para. 5.45.

187. *See id.* para. 5.47.

188. *See id.* paras. 5.50, 5.54.

189. *See id.* para. 5.58.

190. *Id.* paras. 7.8, 7.9.

191. *Id.* para. 7.10.

192. *See id.* para. 7.12.

countervailing area, which had rejected de novo review.<sup>193</sup> However, this reliance on GATT practice in the antidumping area does not take into account the new Article 17.6 of the Antidumping Agreement, which contemplates a different standard of review for antidumping decisions.

The panel then stated its view of what an “objective assessment” would require:

In our view, an objective assessment would entail an examination of whether the [U.S. authority] had examined all relevant facts before it (including facts which might detract from an affirmative determination in accordance with the second sentence of Article 6.2 of the ATC), whether adequate explanation had been provided of how the facts as a whole supported the determination made, and, consequently, whether the determination made was consistent with the international obligations of the United States.<sup>194</sup>

The panel cited no authority for this interpretation of Article 11, and the interpretation seems at odds with the DSU text. It is not sufficient for national authorities to reach their decisions in an “objective” manner for the panels to affirm the decision. The national authorities may have acted objectively, but incorrectly. Under DSU Article 11, panels have the duty to make their own “objective assessment of the facts of the case.” Panels will not fulfill this function if they simply determine whether the national authorities established the facts in an objective manner. Article 11 does not require the panel to ensure that the *Member* has made an objective assessment. Article 11 requires the *panel* to make an objective assessment. Decisions such as *Underwear* that simply require the Member to act in an objective fashion appear inconsistent with the terms of Article 11. Thus, whether or not the panel in *Underwear* reached an appropriate result in terms of deference due, the result is difficult to justify from the text of the DSU.<sup>195</sup>

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193. *See id.* The panel further stated that its task was to “examine the consistency of the US action with the international obligations of the United States, and not the consistency of the US action with the US domestic statute implementing the international obligations of the United States.” *Id.* While this statement is correct, how this statement determines the appropriate standard of review in evaluating whether the United States satisfied its WTO obligations is hard to see.

194. *Id.* para. 7.13.

195. Professor McGovern states that the *United States—Underwear* decision “explicitly adopted” the deferential principles of standard of review developed in the antidumping and countervailing duty context. McGovern, *supra* note 53, § 2.2324. He views such deference as justifiable where there are “detailed procedural and substantive rules” in place, so as to ensure that “due process” is applied by the national government. *Id.* For this reason, he does not view deference as “controversial” in the context of safeguard decisions that are subject to detailed procedural and substantive rules. He questions whether a deferential standard of

The most recent, and perhaps the most significant, of the WTO decisions addressing the appropriate standard of review is *EC—Beef Hormones*. In its appeal to the Appellate Body, the EC argued that the panel had failed to apply an appropriate standard of review in assessing various EC acts and certain scientific evidence.<sup>196</sup> The EC argued that WTO panels should adopt a “deferential ‘reasonableness’ standard when reviewing a Member’s decisions to adopt a particular science policy” because past GATT panels had rejected *de novo* review, and the “reasonable deference” standard embodied in the WTO Antidumping Agreement should be applied to “all highly complex factual situations.”<sup>197</sup> In response, the United States agreed that a panel was not to conduct a *de novo* review, but said that “nothing in the SPS Agreement or the WTO Agreement requires a Panel to defer to the Member maintaining the SPS measure,” pointing out that the standard used in the Antidumping Agreement did not apply in this context.<sup>198</sup>

The Appellate Body disagreed with the EC argument. The Appellate Body first determined the relevant legal provisions and noted that neither the SPS Agreement, nor the DSU, nor any other WTO agreements (other than the Antidumping Agreement) prescribe a particular standard of review.<sup>199</sup> The Appellate Body expressly rejected the idea that the Antidumping Agreement standard of review can be applied in other contexts, stating that “[t]extually, Article 17.6(i) is specific to the *Anti-Dumping Agreement*.”<sup>200</sup> The Appellate Body then held that Article 11 of the DSU “bears directly on this matter and, in effect, articulates with great succinctness but with sufficient clarity the appropriate standard of

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review of determinations under the ATC was justified because there are few procedural rules for such decisions. Without taking issue with Professor McGovern on the substantive issue of when deference is appropriate, he does not explain how his preferred approach is based on the DSU text agreed by the Members. The DSU text does not suggest that deference is appropriate in situations where there is a greater level of procedural protections at the national level. Nonetheless, as discussed above, allowing panels some flexibility in varying the standard of review in different contexts may be necessary.

196. WTO Secretariat, *EC Measures Concerning Meat and Meat Products (Hormones)*: AB-1997-4, WT/DS26/AB/R and WT/DS48/AB/R, paras. 13–15 (Jan. 16, 1998) (last downloaded May 20, 1998) <<http://www.wto.org/dispute/bulletin1.htm>> [hereinafter *EC—Beef Hormones (Appellate Body)*]. For instance, the EC argued that the panel had not accorded deference to the EC’s decision to set and apply a level of sanitary protection higher than the relevant international standard. *Id.* para. 13.

197. *Id.* paras. 14–15. The EC argued that under the correct “deference” standard, a panel “should not seek to redo the investigation conducted by the national authority but instead examine whether the ‘procedure’ required by the relevant WTO rules had been followed.” *Id.* para. 111.

198. *Id.* paras. 41–42.

199. *See id.* para. 114.

200. *Id.*



review for panels in respect of both the ascertainment of facts and the legal characterization of such facts under the relevant agreements.”<sup>201</sup>

In the context of “fact-finding by panels,” the Appellate Body interpreted Article 11 as requiring neither “total deference” to the national determination nor a de novo review, but rather an “‘objective assessment of the facts.’”<sup>202</sup> But what is required by this “objective assessment”?

The Appellate Body provides some guidance later in its opinion. It states that:

In the present appeal, the European Communities repeatedly claims that the Panel disregarded or distorted or misrepresented the evidence submitted by the European Communities and even the opinions expressed by the Panel’s own expert advisors. The duty to make an objective assessment of the facts is, among other things, an obligation to consider the evidence presented to a panel and to make factual findings on the basis of that evidence. The deliberate disregard of, or refusal to consider, the evidence submitted to a panel is incompatible with a panel’s duty to make an objective assessment of the facts. The willful distortion or misrepresentation of the evidence put before a panel is similarly inconsistent with an objective assessment of the facts. “Disregard” and “distortion” and “misrepresentation” of the evidence, in the ordinary signification in judicial and quasi-judicial processes, imply not simply an error of judgment in the appreciation of evidence but rather an egregious error that calls into question the good faith of a panel. A claim that a panel disregarded or distorted the evidence submitted to it is, in effect, a claim that the panel, to a greater or lesser degree, denied the party submitting the evidence fundamental fairness, or what in many jurisdictions is known as due process of law or natural justice.<sup>203</sup>

The Appellate Body then considered and rejected the EC’s claim on this issue. The Appellate Body found that the panel had engaged in an “objective assessment” of the facts—*i.e.*, had acted in good faith.

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201. *Id.* para. 116.

202. *Id.* para. 117. The Appellate Body stated that de novo review would be inappropriate because “under current practice and systems, [panels] are in any case poorly suited to engage in such a review.” *Id.* The Appellate Body rejected “total deference” because it would not ensure an “objective assessment” as required by Article 11 of the DSU. *Id.* (citing *United States—Underwear*, WT/DS24/R para. 7.10 (Feb. 25, 1997)).

203. *Id.* para. 133.

The Appellate Body's interpretation of "objective assessment" appears incomplete. The Appellate Body identified one way in which a panel can fail to perform an objective assessment—*i.e.*, if the panel fails to act in "good faith" by disregarding evidence submitted to it. However, the Appellate Body described this obligation as "among other things" that are part of the duty to undertake an "objective assessment." The Appellate Body did not find that a panel *only* violates Article 11 where it does not act in good faith, but merely found that failure to act in good faith is one way in which a panel violates Article 11; the reference to "other things" suggests that there are other elements of the Article 11 requirement.<sup>204</sup> The *EC—Beef Hormones* decision does not resolve either the critical question, discussed above, of whether a panel must find a Member's decision inconsistent with its obligations if it finds that the evidence does not support the Member's action, or the question of whether a panel should grant some deference to the Member's interpretation of the evidence.<sup>205</sup> Thus, despite the "sufficient clarity" of Article 11, the core question regarding standard of review—*i.e.*, the parameters of an "objective assessment"—remains to be litigated.

The Appellate Body's rejection of the EC's argument regarding a "reasonable deference" standard, discussed above, could be read as suggesting that the Appellate Body does not believe that extensive deference to Member fact-finding is required (outside the Antidumping Agreement). However, it may be that the Appellate Body disagreed with the particular formulation advanced by the EC, which was closely

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204. However, in a recent decision, the Appellate Body appeared to interpret the "objective assessment" requirement in Article 11 quite narrowly. See WTO Secretariat, *European Communities—Measures Affecting the Importation of Certain Poultry Products: Report of the Appellate Body*, WT/DS69/SB/R (July 13, 1998) [hereinafter *EC—Poultry (Appellate Body)*]. The appellant, Brazil, argued that the panel had failed to make an objective assessment because it allegedly had failed to consider a series of arguments put forward by Brazil. The Appellate Body rejected Brazil's appeal on this issue, stating that:

An allegation that a panel has failed to conduct the "objective assessment of the matter before it" required by Article 11 of the DSU is a very serious allegation. Such an allegation goes to the very core of the integrity of the WTO dispute settlement process itself . . . . The alleged failures imputed to the Panel by Brazil do not approach the level of gravity required for a claim under Article 11 of the DSU to prevail.

*Id.*, paras. 133–34.

By suggesting that Article 11 *only* requires that panels act in good faith, *EC—Poultry* may indicate that the Appellate Body is adopting a narrow approach to the question of whether panels have violated Article 11. See *infra* Section V.C.

205. For instance, if a panel defers to a Member's factual finding, the complaining Member may be able to appeal the panel decision to the Appellate Body on the ground that the panel had failed to engage in an objective assessment of the facts.

linked to the Antidumping Agreement. There is a wide spectrum of possible standards of review, varying from de novo review at one end to "total deference" at the other. The Appellate Body's decision in *EC—Beef Hormones* narrows the spectrum somewhat by holding that panels are not required to defer to any "reasonable" factual finding, but significant uncertainty still remains regarding the appropriate standard of review.

### C. Role of Precedent

A fundamental issue for any judicial system is the extent to which past decisions are binding on future judicial decision-makers. In the two-tiered DSU system, there are two broad issues. First, there is the issue of whether a panel is bound by an earlier panel decision. This issue can arise either when a subsequent panel considers a situation with the same parties and facts (a law-of-the-case issue), or when a subsequent panel considers the same legal issue that was decided by the first panel. Second, there is the issue of whether panels are bound by Appellate Body decisions. As discussed below, the broad outlines of the WTO's practice in this area have been established. However, some interesting questions remain, including whether a series of panel decisions can create an established "practice."

#### 1. Effect of Panel Reports

Under GATT practice, panel rulings on a particular legal issue did not bar subsequent panels from reconsidering the issue.<sup>206</sup> This was true even if the panel ruling was adopted by the GATT Contracting Parties because, under the GATT, parties did not treat adoption as tantamount to endorsement by all the member countries. Indeed, panel rulings were not treated as binding even in situations involving virtually identical facts, as shown by the several rounds of litigation regarding European apple import restrictions. In that case, two 1989 GATT panels ruled that they were not bound by a 1980 panel decision addressing an earlier version of the same restrictions. The panel report stated that "[w]hile taking careful note of the earlier panel reports, the Panel did not consider they

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206. As Professor Hudec describes the justification for this rule,

[t]he unstated assumption of most GATT governments had been that, while adopted panel reports could undoubtedly be cited as supporting precedent for subsequent decisions, neither the manner [in] which they were made nor the manner [in which] they were adopted were rigorous enough to entitle the precise legal rulings in such decisions to binding effect on future controversies.

HUDEC, *supra* note 4, at 263.

relieved it of the responsibility, under its terms of reference, to carry out its own thorough examination on this important point.”<sup>207</sup>

GATT practices, though they are not binding, are often looked to for guidance by WTO panels or the Appellate Body in resolution of specific issues. Article XVI:1 of the WTO Agreement and Paragraph 1(b)(iv) of Annex 1A affirm “the importance to the Members of the WTO of the experience acquired by the Contracting Parties to the GATT 1947—and acknowledge[] the continuing relevance of that experience to the new trading system served by the WTO.”<sup>208</sup>

The Appellate Body in *Japan—Alcohol Taxes* explicitly concluded that adopted panel reports are not binding in subsequent cases, even in cases involving the same parties and essentially the same facts. In that case, a GATT 1947 panel had addressed very similar arguments regarding Japan’s alcohol tax regime. The WTO panel followed the decision of the GATT 1947 panel, holding that that adopted panel reports “constitute subsequent practice in a specific case by virtue of the decision to adopt them.”<sup>209</sup> The existence of “subsequent practice” is an important element of treaty interpretation under Article 31 of the Vienna Convention on the Law of Treaties. The Vienna Convention is relevant, in turn, because DSU Article 3.2 requires panels to interpret the WTO agreements in accordance with “customary rules of interpretation of public international law.”<sup>210</sup>

The Appellate Body disagreed with the panel, holding instead that adopted panel reports constitute neither definitive interpretations of GATT 1947 or GATT 1994, nor agreement by the Contracting Parties on the legal reasoning contained in the panel report.<sup>211</sup> The Appellate Body concluded that the GATT practice should be continued under WTO dispute settlement because the Contracting Parties had not contemplated a change from the earlier GATT practice,<sup>212</sup> that the Ministerial Conference and the General Council have the exclusive authority to adopt

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207. *European Community—Restrictions on Imports of Dessert Apples*, L/6491, June 22, 1989 GATT B.I.S.D. (36th Supp.), at 93, 127 (1990).

208. *Japan—Alcohol Taxes (Appellate Body)*, *supra* note 7, at 13.

209. WTO Secretariat, *Japan—Taxes on Alcoholic Beverages: Report of the Panel*, WT/DS8/R, WT/DS10/R and WT/DS11/R, para. 6.10 (July 11, 1996) (last downloaded May 20, 1998) <<http://www.wto.org/disputes/bulletin1.htm>> [hereinafter *Japan—Alcohol Taxes (Panel Report)*], para. 6.10.

210. DSU, *supra* note 5, art. 3.2.

211. See *Japan—Alcohol Taxes (Appellate Body)*, *supra* note 7, at 12–14.

212. See *id.* at 13 (“We do not believe that the CONTRACTING PARTIES, in deciding to adopt a panel report, intended that their decision would constitute a definitive interpretation of the relevant provisions of GATT 1947. Nor do we believe that this is contemplated under GATT 1994.”).

interpretations of the WTO Agreement and the Multilateral Trade Agreements,<sup>213</sup> and that continuity was a goal throughout the formation of the WTO.<sup>214</sup>

The Appellate Body's decision in *Japan—Alcohol Taxes*, regarding the lack of precedential effect even in the specific case, is somewhat troubling from the standpoint of effective dispute resolution. The decision raises the specter of a challenged Member bringing the particular measure challenged into conformity with its WTO obligations, but then enacting a slightly different measure that operates in essentially the same way, and forcing the complaining Member into relitigation of the same legal question.<sup>215</sup> The Appellate Body may have reasoned that Members are unlikely to act in such bad faith, and that this risk was outweighed by the need for a strong political signal that under no circumstances can WTO panels make law. Only time will tell whether the decision will encourage such behavior by Members.

One possible interpretation of the Appellate Body's decision in *Japan—Alcohol Taxes* is that the Appellate Body was not saying that panel decisions can never constitute "subsequent practice" under Article 31 of the Vienna Convention, but was simply saying that a single panel decision is insufficient to constitute such "practice."<sup>216</sup> This suggests that if several panel reports followed the same interpretation on a particular

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213. See *id.* Article IX:2 of the WTO Agreement states "The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements." Specificity in granting this exclusive authority indicates that authority in interpreting the treaty does not exist elsewhere. See *id.*

214. See *Japan—Alcohol Taxes (Appellate Body)*, *supra* note 7, at 13. Article XVI:1 and Paragraph 1(b)(iv) of Annex 1A, incorporating GATT 1947 into the WTO, bring legal history into the WTO in a way that ensures continuity and consistency between the two systems. The Appellate Body stated that panel reports are an important part of this continuity, and their status has not changed under the new WTO Agreement. See *id.*

215. See Petersmann, *supra* note 2, at 84 ("The need for repeated GATT/WTO dispute settlement proceedings against essentially the same measures because of non-compliance with GATT/WTO law and with previous dispute settlement findings can raise problems of due process of law and good faith").

216. The Appellate Body stated that "[a]n isolated act is generally not sufficient to establish subsequent practice; it is a sequence of acts establishing the agreement of the parties that is relevant." *Japan—Alcohol Taxes (Appellate Body)*, *supra* note 7, at 13 (footnotes omitted). Petersmann criticizes this reasoning for failing to recognize that the consideration and adoption of panel reports by the GATT Council "could make such reports more than an 'isolated act.'" Petersmann, *supra* note 2, at 39 n.51. However, as the Appellate Body stated, it is doubtful whether WTO Members understand themselves to be ratifying panel reports in this sense, particularly now that adoption is virtually automatic. Another commentator has criticized the Appellate Body for not distinguishing between subsequent agreements (a contractual concept) and subsequent practice (a factual concept). See Sacerdoti, *supra* note 27, at 279. While the adoption of a panel report may not represent an "agreement of the parties," a repeated series of panel decisions could nonetheless establish a "subsequent practice."

legal point, a WTO panel could be under some obligation to act consistently with this "practice," even if not legally bound by the past decisions.<sup>217</sup> Indeed, the United States has argued that the mere fact of publication of a panel decision, combined with a long period of time in which the panel's interpretation is not contested, is sufficient to make the panel's approach "subsequent practice" under the Vienna Convention.<sup>218</sup>

*Japan—Alcohol Taxes* also reaffirmed that unadopted panel reports have no legal status in the GATT or WTO system because they have not been endorsed by the Contracting Parties to GATT or by the WTO Members. Nevertheless, said the Appellate Body, a panel could find guidance in the reasoning of such reports if the panel deemed the unadopted report to be relevant to the case at hand.<sup>219</sup>

## 2. Effect of Appellate Body Decisions

Thus far, WTO cases have not confronted the question of whether Appellate Body decisions are binding on subsequent panels. The only rather shadowy guidance on this issue comes from the Appellate Body's decision in *United States—Wool Shirts*. There, the Appellate Body addressed a different issue: whether a panel is required to address issues presented to it if those issues need not be resolved in order to dispose of the dispute.<sup>220</sup> The Appellate Body stated that "[g]iven the explicit aim of dispute settlement that permeates the DSU, we do not consider that Article 3.2 of the DSU is meant to encourage either panels or the Appellate Body to 'make law' by clarifying existing provisions of the *WTO Agreement* outside the context of resolving a particular dispute."<sup>221</sup> This statement suggests a discomfort on the part of the Appellate Body with the concept of "making law." Since Appellate Body decisions would indeed "make law" if they were binding on future panels, the statement suggests that the Appellate Body would not hold that its decisions are binding, if the issue were presented.

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217. In this context, Professor Jackson has called attention to a useful distinction between the U.S. concept of *stare decisis*, which has not been applied at the WTO, and the European practice of according significant weight to past rulings without treating them as legally binding. Statement of Professor Jackson, ABA Conference on WTO Dispute Resolution, Feb. 20, 1998.

218. See *United States—Underwear (Panel Report)*, *supra* note 178, para. 5.43 (United States arguing that the *Fur Felt Hat* decision had become "customary law, or at the least 'subsequent practice' . . .").

219. See *Japan—Alcohol Taxes (Appellate Body)*, *supra* note 7, at 14.

220. See *supra* Part III.A.2.

221. *United States—Wool Shirts (Appellate Body)*, *supra* note 94, at 20.

The Appellate Body in *United States—Wool Shirts* also referred to the fact that authority to adopt interpretations of the WTO Agreement and the Multilateral Trade Agreements is located elsewhere in WTO machinery. Following the decision in *Japan—Alcohol Taxes*, the Appellate Body pointed out that Article IX of the WTO Agreement gives the Ministerial Conference and the General Council the “exclusive authority” to adopt such interpretations,<sup>222</sup> and that this concept is also recognized in Article 3.9 of the DSU.<sup>223</sup> The Appellate Body seems to be suggesting that even if it were inclined to hold that its decisions were binding, it may not have the power to do so under these instruments.

However, the issue is quite unlikely to be presented, absent a clear error of law by the Appellate Body. Panels are strongly motivated to act consistently with prior Appellate Body decisions. Indeed, one participant at a recent conference suggested that the WTO Secretariat—which assists panelists—seeks to ensure that panel decisions are “Appellate Body-proof.”<sup>224</sup> Thus, the question of whether Appellate Body decisions are legally binding may be of more interest to commentators than to WTO Members in practice or to practitioners. Still, one recent panel has interpreted the Appellate Body’s decision in *Japan—Alcohol Taxes* as meaning that “panel reports and Appellate Body reports . . . are not binding, except with respect to resolving the particular dispute between the parties to that dispute.”<sup>225</sup>

#### D. Burden of Proof

The burden of proof issue is whether the complaining party always has the burden of proof in WTO dispute settlement, or whether the burden may shift to the challenged Member in certain conditions, and if so,

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222. *Id.* (citing *Japan—Alcohol Taxes (Appellate Body)* at 13).

223. *See id.* Article 3.9 of the DSU states: “The provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement.” *See also India—Patent Protection (Appellate Body)*, *supra* note 144, paras. 46–47 (stating that “[b]oth panels and the Appellate Body must be guided by the rules of treaty interpretation set out in the Vienna Convention, and must not add to or diminish rights and obligations provided in the WTO Agreement” and that “both panels and the Appellate Body are bound by” DSU Articles 3.2 and 19.2.).

224. Statement of panelist, ABA Symposium, *supra* note 35.

225. *Indonesia—Autos*, *supra* note 35, n. 639 (citing *Japan—Alcohol Taxes (Appellate Body)*). *See also* WTO Secretariat, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products: Report of the Panel*, WT/DS79/R (Aug. 24, 1998), para. 7.30 (“panels are not bound by previous decisions of panels or the Appellate Body even if the subject-matter is the same.”).

when.<sup>226</sup> Several WTO decisions have addressed this issue, reaching consistent results, and therefore only the most significant decisions in *United States—Wool Shirts* and *EC—Beef Hormones* will be discussed in detail here.

In *Wool Shirts*, India argued that it should not have to prove that the United States had violated the ATC, but that instead the United States should have to prove that the United States was justified in relying on the “exception” to WTO disciplines created by the safeguard procedure of Article 6 of the ATC.<sup>227</sup> The United States argued that, based on accepted GATT 1947 dispute settlement practice, India had the burden to make a prima facie case that the U.S. safeguard measure was inconsistent with its obligations.<sup>228</sup> Thus, an important issue in the *Wool Shirts* case was whether the ATC was an “exception” to WTO obligations such that the United States had the burden of proving that the conditions for the exception were met.

The panel agreed with the United States and stated that because India had initiated the proceedings, India had to establish that the U.S. restriction was inconsistent with the United States’ obligations.<sup>229</sup> The panel explained that India had to make a prima facie case of violation, which would shift the burden to the United States to prove the contrary.<sup>230</sup> However, the panel did not provide much explanation of the reasoning underlying this decision.

The Appellate Body affirmed the panel’s conclusion but provided a different rationale. The Appellate Body held that India had to provide evidence and argument “sufficient to establish a presumption” of violation and that “it was then up to the United States to bring evidence and argument to rebut the presumption.”<sup>231</sup> The Appellate Body cited the international law rule that a party asserting a fact must prove that fact.<sup>232</sup> The Appellate Body said that the ATC was a free-standing transitional arrangement rather than an exception to WTO disciplines (as the panel had held), and emphasized that the ATC balance of rights and obligations could be upset by requiring the United States to demonstrate that it

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226. In principle, the concept of burden of proof “only applies to facts, not to issues of law,” Joost Pauwelyn, “Evidence, Proof and Persuasion in WTO Dispute Settlement: Who Bears the Burden?,” 1 J. INT’L ECON. L. 227, 242 (1998). However, most contested issues are mixed questions of fact and law, making this distinction problematic to apply in practice.

227. See *United States—Wool Shirts (Panel Report)*, supra note 153, paras. 5.2, 5.3.

228. See *id.* paras. 5.4–5.6.

229. See *id.* para. 7.12.

230. See *id.* para. 6.7.

231. *United States—Wool Shirts (Appellate Body)*, supra note 94, at 13.

232. *Id.* at 14.



had not violated its commitments.<sup>233</sup> Thus, the Appellate Body essentially reasoned that the substantive deal struck in the ATC required the allocation of the burden of proof to complaining countries.

However, the Appellate Body's case-specific approach appeared to leave open the door for complaining countries to argue that particular WTO agreements constitute "exceptions" from WTO obligations such that the burden of proof must shift. Such possibility would be particularly relevant to WTO review of antidumping and countervailing determinations because past GATT 1947 panels have held that the anti-dumping and countervailing duty provisions of the GATT were exceptions from the broader GATT disciplines.<sup>234</sup> More generally, the Appellate Body's decision left murky the manner in which Members and future panels should determine whether a particular provision or agreement is an "exception" that shifts the burden of proof, or whether there are other situations where the complaining country does not have the burden of proof.

Subsequent panels, such as *EC—Computer Equipment*, applied the *Wool Shirts* approach in allocating the burden of proof between the complaining and defending Members.<sup>235</sup> In *Japan—Film*, the panel referred to the *Wool Shirts* rule regarding the allocation of burden of proof, but went on to emphasize that the burden on the complaining Member is higher in the context of a "nullification or impairment" case under GATT 1994 Article XXIII:1(b). Citing Article 26.1 of the DSU, the panel stated that the complaining Member in such a case must pro-

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233. See *id.* at 16. The Appellate Body recognized that Members asserting an affirmative defense, such as a GATT 1994 Article XX defense that a measure is justified on environmental grounds, should have the burden of proof. *Id.*

234. See, e.g., *United States—Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada: Report by the Panel*, July 11, 1991, GATT B.I.S.D. (38th Supp.) at 30 (1992). Cf. Petersmann, *supra* note 2, at 101 ("GATT panels have placed the burden of proof for the GATT-consistent conduct of anti-dumping procedures on the country basing its discriminatory duties on [GATT] Article VI").

235. *EC—Computer Equipment (Panel Report)*, *supra* note 148, paras. 8.34–8.35, 8.39–8.40. The Appellate Body affirmed the panel's approach as being consistent with the standard set out in *Wool Shirts*. See *EC—Computer Equipment (Appellate Body)*, *supra* note 151, para. 103. See also *India—Patent Protection*, where the Appellate Body upheld the panel's application of the burden of proof rule established in *Wool Shirts*, finding that the United States had established a prima facie case that India's administrative guidance regarding mailbox applications was legally insufficient to prevail over mandatory provisions in its Patents Act. *India—Patent Protection (Appellate Body)*, *supra* note 144, para. 74. In upholding the panel, the Appellate Body emphasized that "it is not sufficient for a panel to enunciate the correct approach to burden of proof; a panel must also apply the burden of proof correctly," recognizing that (as occurred in *EC—Beef Hormones*), it is quite possible for a panel to undermine the burden of proof rule by shifting the burden prematurely to the challenged Member. *Id.*

vide a “detailed justification” supporting its allegations in order to shift the burden to the defending member.<sup>236</sup> In *EC—Beef Hormones*, the panel also applied the *Wool Shirts* framework, although the Appellate Body overturned the panel’s application of the burden of proof in the particular context of that case.<sup>237</sup> Of particular importance, the Appellate Body’s decision addressed the issue of whether a provision is an “exception” that shifts the burden of proof. The Appellate Body stated that:

The general rule in a dispute settlement proceeding requiring a complaining party to establish a *prima facie* case of inconsistency with a provision of the *SPS Agreement* before the burden of showing consistency with that provision is taken on by the defending party, is *not* avoided by simply describing that same provision as an “exception.”<sup>238</sup>

This decision appears to be aimed at discouraging the proliferation of arguments that a particular provision or agreement is an “exception” that shifts the burden of proof. However, the burden of proof will be imposed on the defending Member when the Member relies on an “affirmative defense.” In *United States—Shrimp*, the panel cited the “well-established practice” of allocating the burden of establishing an affirmative defense to the defending Member.<sup>239</sup> The panel quoted the Appellate Body’s *dictum* in *Wool Shirts* that:

Articles XX and XI:2(c)(I) are limited exceptions from obligations under certain other provisions of the GATT 1994, not positive rules establishing obligations in themselves. They are

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236. *Japan—Film*, *supra* note 98, para. 10.30.

237. The case involved a U.S. claim that an EC ban on beef and beef products treated with certain hormones was in violation of the WTO Agreement on Sanitary and Phytosanitary Measures [hereinafter *SPS Agreement*]. The panel had imposed the initial burden of proof on the United States to make out a *prima facie* violation of the *SPS Agreement* and stated that once this was done, the burden of proof shifts to the responding party, consistent with *Wool Shirts*. See *EC—Beef Hormones (Panel Report)*, *supra* note 148, para. LIX (citing the Appellate Body’s decision in *Wool Shirts*). However, the panel interpreted the *SPS Agreement* to mean that once the United States had established that there was an international standard with respect to the safety of the hormones at issue, and that the EC measure was not based on this standard, the burden of proof shifted to the EC. *Id.* para. XCV. The Appellate Body held that the panel had erred in allocating the burden of proof to the EC based on these findings, because the *SPS Agreement* should not be interpreted to mean that a *prima facie* violation exists where a national standard is not based on the relevant international standard. See *EC—Beef Hormones (Appellate Body)*, *supra* note 196, paras. 97–109.

238. *EC—Beef Hormones (Appellate Body)*, *supra* note 196, para. 104.

239. *United States—Shrimp*, *supra* note 3, para. 30 of Panel Findings. The panel in that case imposed the burden of establishing the applicability of Article XX on the United States, as the party asserting the affirmative defense. *Id.*

in the nature of affirmative defenses. It is only reasonable that the burden of establishing such a defense should rest on the party asserting it.<sup>240</sup>

A problem here may be how to determine that a provision is an "affirmative defense," which shifts the burden of proof. As yet, it is unclear what the standard will be for identifying an affirmative defense.<sup>241</sup>

Also the decisions have not resolved the question of what standard must be met in order to establish a prima facie case that a violation exists. The Appellate Body has said that a single standard should not be set and has stated that "precisely how much and precisely what kind of evidence will be required to establish such a presumption will necessarily vary from measure to measure, provision to provision, and case to case."<sup>242</sup>

### E. Panel Fact-Finding

The panel fact-finding issue relates to whether a panel has the authority to engage in fact-finding beyond the record presented by the disputing Members. DSU Article 13.1 provides that:

Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. . . . A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. . . .<sup>243</sup>

This provision appears to give panels latitude to request information from *any* individual or body—*i.e.*, the panel is not limited to seeking information from Members. However, the provision does not require that private persons comply (because the DSU is an agreement among governments), nor does it obligate Members to require private persons to comply. Indeed, even Members are not strictly required to comply with a panel request for information because Article 13.1 uses the term "should" rather than the term "shall."

As of yet, panels do not appear to have relied on Article 13.1 to request relevant information from Members. However, in *Argentina—Footwear*, the panel created a presumption against Argentina based on the fact that Argentina had not provided relevant documents when re-

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240. See *id.* n. 635.

241. See Pauwelyn, *supra* note 226, at 252 (stating that the Appellate Body "did not really explain" why certain provisions are deemed exceptions and others are not).

242. *United States—Wool Shirts (Appellate Body)*, *supra* note 94, at 14.

243. DSU, *supra* note 5, art. 13.1.

quested to do so by the complaining Member, the United States. As discussed earlier, an important factual issue in this case was whether Argentina's import duty scheme resulted in duties above Argentina's tariff binding. After presenting examples to demonstrate that the duties were excessive, the United States requested that Argentina produce additional customs invoices, which Argentina refused to do.<sup>244</sup> The panel held that the evidence presented by the United States, combined with "the fact that Argentina did not present any convincing evidence to the contrary," created a presumption that excess duties were imposed.<sup>245</sup> In reaching this conclusion, the panel made some general observations about the duties of Members to provide information to WTO panels:

Another incidental rule to the burden of proof is the requirement for collaboration of the parties in the presentation of the facts and evidence to the panel and especially the role of the respondent in that process. . . . In this context the most important result of the rule of collaboration appears to be that the adversary is obligated to provide the tribunal with relevant documents which are in its sole possession. This obligation does not arise until the claimant has done its best to secure evidence and has actually produced some *prima facie* evidence in support of its case. It should be stressed, however, that "'discovery' of documents, in its common-law system sense, is not available in international procedures."<sup>246</sup>

Given this discussion (for which the panel does not cite support in the DSU or GATT practice), *Argentina—Footwear* may serve as a seminal decision for imposing an obligation on Members to provide information to panels.<sup>247</sup>

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244. See *Argentina—Footwear (Panel Report)*, *supra* note 68, paras. 6.52–6.54.

245. *Id.* para. 6.61. A related point is that a Member cannot avoid a required burden of proof by arguing that the evidence is too confidential to be submitted to the panel. In *Indonesia—Autos*, the panel held that the United States had failed to demonstrate the existence of serious prejudice, as it was required to do. The panel rejected U.S. arguments that the necessary information was confidential, noting that DSU art. 18.2 allows Parties to designate information as confidential and stating that the United States was free to propose additional procedures to protect the confidentiality of the information. *Indonesia—Autos*, *supra* note 35, paras. 14.7, 14.235 (parties may not "invoke confidentiality as a basis for their failure to submit the positive evidence required").

246. *Id.* para. 6.40 (quoting MOJTABA KAZAZI, BURDEN OF PROOF AND RELATED ISSUES (1996)).

247. A related issue is whether Members are *allowed* to provide new evidence to panels in support of their action, even though that evidence was not relied on by the national authorities. In *EC—Beef Hormones*, the panel refused to consider "new evidence" presented to it by the EC during the panel process as justification for the EC ban on imports of beef

The outer limits of the obligation are as yet unclear because there are several other difficult issues that may arise: Can a complaining Member request that a Member gather information that is not already in the Member's possession? Can it request that the Member seek information from a private entity? Are the answers different in the context of antidumping, countervailing duty, or safeguards proceedings, which are formal proceedings with administrative records? If panels could require a Member to make an additional investigation on a particular factual issue in an antidumping case, for instance, this requirement would likely be quite controversial in the United States.<sup>248</sup>

#### IV. ISSUES RELATING TO REMEDIES

Once a panel has ruled in favor of the complaining Member, and the decision is not appealed or is affirmed by the Appellate Body, what should the panel require of the Member found to be in violation of its obligations? There are two principal issues: (1) what type of remedy may be required; and (2) what time period will be allowed for implementation.<sup>249</sup>

##### A. Nature of Remedies

In considering what type of remedies are permissible, it is useful to distinguish between retroactive remedies and specific remedies.<sup>250</sup>

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treated with hormones. *EC—Beef Hormones (Panel) Report*, *supra* note 148, para. CXXIII. However, the panel refused because the issue before the panel was whether the EC had based its import ban on a risk assessment regarding the hormones' safety; the panel reasoned that the EC could not have based its ban on this "new evidence" if it had only learned of this evidence during the panel process. *Id.* Thus, this decision turned on the legal issue presented in the case and does not represent a holding that new evidence not relied on by the national authorities cannot be presented to a panel.

248. In this way, the issue of "discovery" is related to the issue of "exhaustion" discussed in *supra* Section II.E: both issues raise the question of whether panels are allowed to inquire into matters that were not before the administrative agency.

249. This article does not address the controversial issue of whether a Member found to be in violation of its WTO commitments is legally bound to bring itself into compliance with the panel's recommendations, or whether it is sufficient for the Member to offer compensation or suffer the suspension of concessions. See DSU, *supra* note 5, art. 22. This issue has not been addressed by any WTO panels, and other commentators have already discussed the issue. See, e.g., John H. Jackson, *The WTO Dispute Settlement Understanding—Misunderstandings on the Nature of Legal Obligation*, 91 AM. J. INT'L L. 60 (1997); Judith Hippler Bello, *The WTO Dispute Settlement Understanding: Less is More*, 90 AM. J. INT'L L. 416 (1996).

250. These distinctions partly follow Hunter, *supra* note 43, at 579. Hunter suggests three categories: retroactive remedies, specific remedies, and exclusive remedies. See *id.* The approach here differs in that it does not address the issue of whether remedies should not apply in the particular case brought to the panel, but should only apply to the Member's

The possibility of retroactive remedies raises the question of whether a WTO panel may require a Member to "correct" its past conduct in some way, or whether remedies are to be wholly forward-looking. GATT practice was traditionally remedial and prospective in nature, with the aim of bringing Members into compliance with their commitments.<sup>251</sup> However, in the antidumping and countervailing duty context, several GATT 1947 panels recommended retroactive relief in the form of a recommendation that the Member involved refund past duties collected.<sup>252</sup>

In *Guatemala—Cement*, Mexico argued that because Guatemala had improperly initiated the investigation, all antidumping duties should be refunded and the antidumping order should be revoked.<sup>253</sup> The panel first noted that under DSU Article 19.1, its authority to "recommend" was limited to recommending that Guatemala "bring the measure into conformity with [the Antidumping Agreement]." <sup>254</sup> The panel then explained that it could go beyond the recommendation in making "suggestions" for implementation, under DSU Article 19.1, but that the implementation of Panel rulings is to be decided, "in the first instance" by the challenged Member.<sup>255</sup>

Based on this interpretation, the panel decided to suggest that Guatemala "revoke the existing anti-dumping measure" because "in our view, this is the only appropriate way of implementing our recommendation," *i.e.*, that Guatemala conform its actions to the Antidumping Agreement. However, the panel did not suggest that Guatemala refund antidumping duties collected, and it is not clear what the panel's basis was for distinguishing the two suggestions. Arguably, where initiation was inappropriate, all antidumping duties were improperly collected and should be refunded. If the panel's basis for rejecting this suggestion was

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future conduct in general. (Hunter calls this the "specific" versus "general" remedy issue.) See *id.* While this category may exist in theory, it is quite unlikely to exist in practice, as Hunter concedes. Devoting analytical attention to an approach that is far removed from current panel practice does not seem useful.

251. See *Panel Report adopted June 26, 1992 re Procurement of Toll Collection Equipment for the City of Trondheim*, Committee on Government Procurement, GPR.DS2/R.

252. See *Panel on New Zealand—Transformers*, July 18, 1985, GATT B.I.S.D. (32d Supp.) at 55 (1985); *Canada—Imposition of Countervailing Duties on Imports of Manufactured Beef from the EEC: Report of the Panel*, Oct. 13, 1987, SCM/85 (1987); *United States—Imposition of Antidumping Duties on Seamless Stainless Steel Hollow Products from Sweden* (unadopted), Aug. 20, 1990, ADP/47; *Panel on United States—Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada*, July 11, 1991, GATT B.I.S.D. (38th Supp.) at 30 (1991); *Panel on United States—Measures Affecting Imports of Softwood Lumber from Canada*, Oct. 27–28, 1993, GATT B.I.S.D. (40th Supp.) at 358 (1993).

253. *Guatemala—Cement*, *supra* note 96, paras. 4.402 *et seq.* and para. 8.1.

254. *Id.* paras. 8.1 and 8.2.

255. *Id.* para. 8.3.

that Guatemala should be allowed discretion "in the first instance" to implement the panel's ruling, then it is hard to see why the panel was willing to suggest that Guatemala revoke the order. This is an inconsistency in the panel's decision that is left unexplained.

The panel in *India—Patent Protection* arguably made a suggestion for a retroactive remedy. The panel ruled that India had violated Article 70.8 of the TRIPS Agreement by failing to put in place a "mailbox" system.<sup>256</sup> The panel did not consider it sufficient, however, for India to establish a "mailbox" system in order to conform to its obligations because U.S. companies would then be prejudiced in their future rights to patent protection. The panel explained that:

As it appears that a number of United States' [sic] pharmaceutical companies do not believe that India has established a mailbox application system, and consequently have not filed applications for patent protection of pharmaceutical products, it is reasonable to assume that potential applicants both in India and outside the country have lost opportunities for patent protection for their products in a belief that there is no mechanism to secure their rights. In this regard, we note that the interests of those persons who would have filed patent applications had there been an appropriate mechanism in place . . . should be protected, since the lack of an adequate mailbox application system has effectively deprived them of benefits they would have enjoyed in the future under the TRIPS Agreement.<sup>257</sup>

Thus, the panel took the position that India's willingness to conform to its obligations going forward was not sufficient, and that India should remedy the wrong done to the potential applicants who had not filed applications due to the ambiguity in the Indian patent system.<sup>258</sup> Of in-

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256. See discussion *supra*, at note 135 and accompanying text.

257. *India—Patent Protection*, *supra* note 75, para. 7.39; see also *id.* paras. 7.66 & 8.2 (panel suggests that in adopting a mailbox system, "India should take into account the interests of those persons who would have filed patent applications had an appropriate mechanism been maintained . . .").

258. The United States had not argued this position. As discussed below, the United States consistently argues against retroactive remedies largely out of a concern that such remedies could require refunds of antidumping and countervailing duties improperly collected. This position is reflected in a little-noticed provision in the U.S. legislation implementing the Uruguay Round results. Section 129 of the Uruguay Round Agreements Act precludes the U.S. Commerce Department from refunding any antidumping or countervailing duties in response to an adverse WTO panel decision. See 19 U.S.C. § 3538(c) (1994). Section 129 only authorizes the Commerce Department to revoke the underlying order, or modify the duty rate, as to "unliquidated entries of the subject merchandise . . . that are entered, or withdrawn from warehouse, for consumption on or after" the date on which

terest, the Appellate Body appears, *sub silentio*, to have modified the panel's suggestion in this regard. India did not appeal the panel's suggestion as to a retroactive remedy. However, the Appellate Body—without any discussion of this issue—did not include the suggestion and, instead, merely recommended that the DSB request that India bring its legal regime into conformity under the TRIPS Agreement.<sup>259</sup>

With specific remedies, a question arises as to whether panels are allowed to recommend particular actions as appropriate ways for a Member to conform to its obligations, or whether panels must confine themselves to a more general recommendation that the Member conform its conduct to its obligations.<sup>260</sup>

In *United States—Underwear*, the panel granted Costa Rica's request that the panel recommend a specific remedy. Costa Rica had requested that if the panel found that a U.S. safeguard measure violated the ATC, the panel should recommend that the United States withdraw the illegal act. In response, the United States argued that DSU Article 19.1 prohibits panels from recommending such specific remedies.<sup>261</sup>

The panel noted that the second sentence of Article 19.1 allowed it to “‘suggest ways in which the Member concerned could implement the recommendations.’”<sup>262</sup> The panel then suggested “‘that the United States bring the measure challenged by Costa Rica into compliance with US obligations under the ATC by immediately withdrawing the measure.’”<sup>263</sup> This suggestion for a specific remedy was significant because the safeguard measure was due to expire in any event in March 1997.<sup>264</sup>

The United States has consistently argued against any specific and retroactive remedies in the antidumping and countervailing duty area, based on DSU Article 19.1. For instance, in *Brazil—Desiccated Coconut*, the

the U.S. Trade Representative directs the Commerce Department to revoke the order or modify the duty rate. *Id.* § 3538(c)(1).

259. See *India—Patent Protection (Appellate Body)*, *supra* note 144, para. 98.

260. Hunter terms this the “exclusive” remedy issue, since a panel suggestion that a Member take a particular act may imply that that act is the *only* way to conform to its obligations. See Hunter, *supra* note 43, at 579.

261. *United States—Underwear (Panel Report)*, *supra* note 178, paras. 3.2, 3.4–3.6. DSU Article 19.1 states that:

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

The United States argues that Article 19.1 precludes panels from offering specific recommendations regarding how Members should conform with their obligations.

262. *United States—Underwear (Panel Report)*, *supra* note 178, para. 8.2.

263. *Id.* para. 8.3.

264. See *id.* para. 7.1.



United States argued against the Philippines' request that Brazil should reimburse countervailing duties collected and took the position that the panel should merely make a "general recommendation . . . that Brazil bring its countervailing duty order into conformity . . ."<sup>265</sup> The United States argued that the DSU does not demonstrate any intention to treat antidumping and countervailing duty disputes differently than other types of disputes, and that the panel should not accord "any weight" to three panel reports adopted before the WTO entered into force, which had required the refund of duties.<sup>266</sup> However, the panel did not reach this issue and the decision was affirmed by the Appellate Body.<sup>267</sup>

In *Japan—Film*, interestingly, the United States argued for a specific suggestion regarding the appropriate means of implementing a panel decision.<sup>268</sup> The United States said that if the panel found Japan had violated its WTO commitments, it "could suggest that Japan take steps to undo the exclusionary aspects of the distribution system for photographic materials that its measure have brought about."<sup>269</sup> Similarly, if the panel found that Japan's actions had "nullified or impaired" benefits granted to the United States, the United States said that the panel should recommend a "mutually satisfactory adjustment" under DSU art. 26.1.<sup>270</sup> Due to the panel's ruling against the United States, the panel did not address the U.S. arguments.

The no-retroactive-remedy rule is problematic in certain instances. As an example, assume that a Member provides a large subsidy in a single year. The WTO Agreement on Subsidies and Countervailing Measures ("SCM Agreement") makes clear that such a subsidy should be actionable. The SCM Agreement provides that "[s]ubsidies granted prior to the date of entry into force of the WTO Agreement, the benefits of which are allocated to future production, shall be included in the overall rate of subsidization."<sup>271</sup> The overall rate of subsidization is relevant to the determination of whether a subsidy has caused "serious prejudice" to the complaining member. Because a past subsidy must be considered for purposes of determining serious prejudice, the subsidy is actionable. However, even though the subsidy is actionable, the Member

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265. *Brazil—Desiccated Coconut (Panel Report)*, *supra* note 148, para. 220.

266. *Id.* para. 221. The panel reports are listed *supra* note 252.

267. More recently, the United States took the same position in *Guatemala—Cement*. See Third-party Submission of the United States (June 25, 1997), in *Guatemala—Cement* *supra* note 96 (available from Office of the United States Trade Representative).

268. *Japan—Film*, *supra* note 98, paras. 6.39–41.

269. *Id.* para 6.39.

270. *Id.* para. 6.40.

271. SCM Agreement, Annex IV, *supra* note 62, Annex IV, para. 7.

can argue that, going forward, the member will conform to its WTO obligations because it is no longer providing the subsidy.<sup>272</sup> This situation inappropriately results in a finding that the subsidy is actionable, but denies any effective remedy.

### B. Compliance with WTO Rulings

Under the DSU, WTO Members are required to implement the decisions of WTO panels and the Appellate Body and must do so within a "reasonable time."<sup>273</sup> These requirements have already led to significant controversies over the nature and timing of Members' implementation of adverse rulings. Practice regarding implementation has not had much time to develop, given the newness of the WTO system and the small number of cases that have had time to get through the entire dispute resolution process. Consequently, the procedures for settling disagreements over implementation are still evolving.

The DSU states that "[p]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members."<sup>274</sup> Article 21 states that losing Members shall communicate to the DSB their intentions to comply with the rulings within thirty days of the ruling's adoption. The exact nature of the compliance, as discussed below, may be subject to negotiation with the complaining Members and may vary significantly from case to case.

Members will have a "reasonable time" to comply with an adverse ruling. A "reasonable time" is either: (1) the period of time proposed by the Member concerned, if approved by the DSB; (2) a period of time mutually agreed by the parties to the dispute within forty-five days after the date of adoption of the recommendations and rulings; or (3) if no period is established under (1) or (2), then a period of time determined through binding arbitration within ninety days after the date of adoption of the recommendations and rulings.<sup>275</sup> A guideline for the arbitrator in Article 21.3(c) states that the reasonable period of time for implementation "should not exceed fifteen months from the [date of] adoption of a

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272. See also *id.*, art. 7.8, which requires a Member in this situation to "withdraw" the subsidy or remove the adverse effects of the subsidy. Under the "no retroactive remedy" approach, the Member could argue that it has withdrawn the subsidy since it is no longer providing the subsidy. *Id.*

273. DSU, *supra* note 5, art. 21.1.

274. *Id.*

275. See *Id.* art. 21.3.

panel or Appellate Body report.”<sup>276</sup> Special circumstances may give rise to a shorter or longer implementation period.<sup>277</sup>

The DSB is required to “keep under surveillance” compliance with panel and Appellate Body reports under Article 21.6. Issues with regard to implementation may be raised with the DSB at any time by any Member. If a ruling is not satisfactorily implemented within a reasonable time, compensation and retaliation are available to the injured Member under Article 22 of the DSU. These are considered temporary measures. Compensation is voluntary on the part of the compensating member, and if no compensation is offered or agreed upon, the injured Member may ask the DSB for permission to retaliate by suspending concessions or other obligations under the covered agreements. The DSU states that neither compensation nor the suspension of concessions is preferred to full implementation of panel rulings.<sup>278</sup>

Practice under the WTO system to date has shown that the fifteen-month time frame cited in the DSU is becoming the de facto definition of “reasonable time” for implementation. In the cases that have been decided so far, the offending Member has either complied within that period or has provided compensation to the complaining Member.

In the *United States—Gasoline*<sup>279</sup> case, the United States took the entire fifteen-month period to comply with an adverse Appellate Body ruling. Venezuela and Brazil challenged a U.S. law that required foreign gasoline refiners to adhere to a statutory pollutant baseline but allowed domestic refiners to choose to establish a baseline corresponding to their 1990 gasoline quality. The WTO panel concluded that the U.S. law discriminated against foreign refiners, and the Appellate Body affirmed. The United States accepted the ruling, and the EPA issued regulations implementing the decision just one day before its deadline, on August 19, 1997.<sup>280</sup> In September of that year, Venezuela and Brazil requested

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276. *Id.*

277. *See id.* Determination of what constitutes a “reasonable time” in a particular case should be made within fifteen months of the establishment of the panel. *See* DSU, *supra* note 5, art. 21.3.

278. *See* DSU, *supra* note 5, art. 22.1. This may mean that implementation is preferred to the other alternatives, but the language is far from clear. The provision raises the important issue of whether members have an international law obligation to implement panel rulings. *See* note 249, *supra*.

279. WTO Secretariat, *United States—Standards for Reformulated and Conventional Gasoline: Appellate Body Report and Panel Report*, WT/DS2/9 (May 20, 1996) (last downloaded May 19, 1998) <<http://www.wto.org/dispute/bulletin1.htm>> [hereinafter *United States—Gasoline (Panel Report)* and *United States—Gasoline (Appellate Body)*].

280. *See U.S. Meets Deadline in WTO Gas Case But Rule Could Face Suit From Refiners*, INSIDE U.S. TRADE, Aug. 22, 1997, at 3. These regulations are being challenged by domestic gasoline refiners, who maintain that EPA violated its statutory mandate when it

an update on the implementation process. The United States said it considered its obligations to have been met with the implementation of the EPA regulations, but that it would submit an update at the DSB the following month.<sup>281</sup>

*Japan—Alcohol Taxes* was the first case to involve a ruling on implementation of a WTO decision. In *Japan—Alcohol Taxes*, the United States complained to the DSU that Japan was taxing imported vodka and other liquors at a rate higher than a domestic like product, shochu. After losing the case before the panel and the Appellate Body, Japan told the DSB that Japan intended to comply with the ruling but proposed an implementation plan that would take five years due to the complex changes that would need to be made to its tax code.<sup>282</sup> The United States objected to this time frame and cited U.S. compliance in the required fifteen months in the *United States—Gasoline* case and the danger of setting a bad precedent for compliance with WTO rulings.<sup>283</sup> After several unsuccessful negotiation attempts, the United States requested Article 21 arbitration—the first such request under the new WTO system. Because the two countries could not agree on an arbitrator, WTO Director-General Ruggiero appointed one.<sup>284</sup> On February 14, 1997, the arbitrator ruled that Japan was required to comply within fifteen months, compensate the United States, or be subject to the United States' retaliation.<sup>285</sup>

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took into account non-environmental factors in writing regulations implementing the WTO ruling. *U.S. Gas Refiners Challenge EPA's Implementation of WTO Ruling*, INSIDE U.S. TRADE, Nov. 7, 1997, at 25. The effect on the WTO system as a whole, and on the "reasonable time" requirements specifically, of a Member's implementation measures being challenged domestically has not yet been tested.

281. See *EU Accepts Banana Ruling But Reveals Little About Future Response*, INSIDE U.S. TRADE, Sept. 26, 1997, at 6.

282. The Japanese plan was to change the taxes in stages. The first stage with respect to one kind of shochu would take place October 1, 1997, and the second stage would take place October 1, 1998, thirteen months after the adoption of the Appellate Body report. Corresponding reductions in tariffs on imported brandy and whiskey would occur on those dates as well. With respect to a second kind of shochu, three stages were proposed. The first two would correspond to the above dates, but the third stage would not take place until October 2001, five years after the adoption of the Appellate Body report. See *U.S. Disputes Japanese Plan to Implement Liquor Panel*, INSIDE U.S. TRADE, Jan. 10, 1997, at 21–22.

283. See *U.S. Keeps Heat On Japan to Implement Liquor Panel By February*, INSIDE U.S. TRADE, Oct. 3, 1997, at 9.

284. See *U.S. Requests Arbitration Over Japan's Implementation of Liquor Panel*, INSIDE U.S. TRADE, Jan. 10, 1997, at 1, 21–22.

285. See *Japan—Taxes on Alcoholic Beverages, Arbitration under Article 21(3)(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes* (Feb. 14, 1997). See also *Japan Searching for Response to WTO Arbitration Ruling on Liquor*, INSIDE U.S. TRADE, Feb. 21, 1997, at 8–9.

The United States and Japan had several more rounds of negotiations<sup>286</sup> after the arbitration ruling came down. The United States threatened to seek permission to retaliate against Japan, and negotiations were ongoing regarding Japan's payment of compensation to the United States in the event of noncompliance. The two countries eventually agreed that Japan would comply within four years and pay the United States compensation in the interim.<sup>287</sup> The case demonstrates that compliance taking more than fifteen months is likely to require the payment of compensation to the complaining Member.

There are a few ongoing implementation disputes in the WTO. One such dispute concerns the *EC—Bananas* case, which raises an interesting issue as to negotiations between the parties during the implementation period. In that case, the Appellate Body found that the EU was regulating banana imports in violation of WTO rules through imposition of restrictions on Latin American bananas. The EU indicated its intent to comply with the Appellate Body ruling but did so in cryptic terms, saying only that the EU intended to respect its "international obligations."<sup>288</sup> When informal talks proved unproductive, the United States requested that an arbitrator be appointed by the WTO Director-General, both to gain a stronger commitment from the EU on implementation and to speed that implementation. The complaining parties argued that full implementation of the ruling was "practicable" in only nine months, and therefore the EU's request for the full fifteen months was excessive. The arbitrator ruled that the EU had the customary fifteen months in which to comply.<sup>289</sup>

The United States and the four other complainants in the *EC—Bananas* case requested that the EU begin settlement talks with them and insisted that the EU give interested parties the opportunity to par-

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286. The EU, which, along with Canada and the United States, was a complainant in the *Japan—Alcohol Taxes* case, claimed the right to participate in the United States arbitration and negotiation with Japan over implementation. Before the arbitrator ruled, the EU and Japan agreed that, in exchange for the lowering of Japanese tariffs on European whiskey and brandy, the EU would give Japan up to five years to implement the Appellate Body's decision. A provision of the agreement stated that if the United States were to accept a more attractive offer from Japan in the arbitration process, the EU would have the right to negotiate for more concessions. See *EU, Japan Agree on Implementation of WTO Liquor Tax Decision*, INSIDE U.S. TRADE, Feb. 7, 1997, at 14–15.

287. See *U.S. Claims Victory in WTO Settlement With Japan Over Liquor Tax*, INSIDE U.S. TRADE, Dec. 19, 1997, at 1, 17–18.

288. *U.S. Asks For Arbitrator in Fight With EU Over WTO Banana Ruling*, INSIDE U.S. TRADE, Dec. 5, 1997, at 11.

289. See *EU Commission Readies Proposal to Comply With WTO Banana Ruling*, INSIDE U.S. TRADE, Jan. 9, 1998, at 1–2.

ticipate in the process of changing its banana regime.<sup>290</sup> The EU claims that the pressure placed on it by the United States “amount[s] to a change in the dispute settlement rules.”<sup>291</sup> The EU maintains that it is not required to negotiate the substance of its rules-change during the implementation period and argued that a country is only obligated to negotiate substantive issues when a country fails to bring its measures into compliance after a reasonable time, or within fifteen months; then, if no compensation can be agreed upon, the complainants may request the right to retaliate.<sup>292</sup> The EU developed a plan for implementation without consultations with the complainants, to which the United States objects, saying that the plan continues to discriminate against Latin American bananas.<sup>293</sup> Criticisms back and forth have not produced agreement, and the United States and other complainants still claim the EU is “dragging its feet” in implementing the decision.<sup>294</sup> Recently, the United States has threatened to reconvene the WTO panel in order to obtain full implementation of the panel report.<sup>295</sup>

The two above completed cases and the arbitrator’s ruling in *EC—Bananas* suggest that WTO Members are willing to comply with panel and Appellate Body rulings and that in most circumstances the fifteen-month implementation period will constitute the time frame in which compliance or compensation must occur. What factors must be considered in implementation and whether interested parties must be allowed to participate in implementation decisions remains undecided.

Also ongoing is the *EC—Beef Hormones* case. In that case, the United States challenged the EU’s ban on beef raised with growth hormones as violation of the WTO. The panel and the Appellate Body ruled against the EU and said that the ban is not scientifically justified under the WTO Agreement on the Application of Sanitary and Phytosanitary Measures. The United States has argued that the ban should be lifted immediately because of the lack of scientific evidence and the ease of compliance. Thus far, the EU has refused to specify how it will comply with the ruling and has said only that the EU will “honor its WTO obli-

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290. See *EU, U.S. to Make Case to Arbitrator on Bananas for Decision Next Week*, INSIDE U.S. TRADE, Dec. 19, 1997, at 17.

291. *U.S. Asks For Arbitrator in Fight With EU Over WTO Banana Ruling*, INSIDE U.S. TRADE, Dec. 5, 1997, at 11. The rules in question are DSU Articles 21 and 22.

292. See *EU, U.S. to Make Case to Arbitrator on Bananas for Decision Next Week*, INSIDE U.S. TRADE, Dec. 19, 1997, at 17.

293. See *U.S. Rejects New EU Plan For Banana Regime as Violating WTO Rules*, INSIDE U.S. TRADE, Jan. 16, 1998, at 1, 14.

294. *WTO DSB Reviews Lingering Disputes*, WASH. TRADE DAILY, Mar. 26, 1998, at 1.

295. See *U.S. Threatens to Re-submit EU Banana Case to WTO*, Washington Trade Daily, July 24, 1998, at 2.

gations" in "as short a time as possible."<sup>296</sup> While keeping the ban in place, the EU is planning to carry out four new risk assessment studies on the hormones, which the United States claims is evidence of the EU's intention not to comply.<sup>297</sup> The progression of this and other disputes as to proper implementation will set the stage for future WTO cases and determine the strength of the new WTO system in forcing compliance with panel and Appellate Body decisions.<sup>298</sup>

As a final point, there have been no cases that have involved a request for permission from the DSB to retaliate because of a Member's noncompliance. Had the United States and Japan not finally reached a mutually acceptable solution in *Japan—Alcohol Taxes*, those procedures might have been used for the first time. This possibility is not foreclosed in the *EC—Bananas* case either, as the fifteen-month implementation period will not run until January 1, 1999.

## V. ISSUES IN APPELLATE BODY REVIEW

This section addresses three issues that have arisen in Appellate Body proceedings: the scope of the substantive claims before the Appellate Body, how to decide whether a particular issue is legal (rather than factual), and the standard of review to be applied.<sup>299</sup>

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296. *EU to Reveal Few Details of Plans to Comply With Hormone Panel*, INSIDE U.S. TRADE, Mar. 13, 1998, at 3.

297. See *Highlights*, 15 INT'L TRADE REP. (BNA) 449 (1998). The United States has threatened unilateral retaliation or further action under WTO dispute settlement. See also, Gary G. Yerkey, *U.S. Threatens Trade Action Against European Union Over Beef Import Ban*, 15 INT'L TRADE REP. (BNA) 510 (Mar. 25, 1998). The EU has recently asked for WTO arbitration to decide the issue of how long it will have to implement the Appellate Body's decision. See *EU Asks for WTO Arbitration on Implementation of Hormone Panel*, INSIDE U.S. TRADE, April 10, 1998, at 3.

298. Another such case is WTO Secretariat, *Canada—Certain Measures Concerning Periodicals: AB-1997-2*, WT/DS31/AB/R (June 30, 1997) (last downloaded May 20, 1998) <<http://www.wto.org/dispute/bulletin1.htm>> [hereinafter *Canada—Periodicals*]. In that case, a Canadian measure was found to discriminate against periodicals from the United States. The United States claims that Canada is delaying implementation and not providing enough information about how it intends to comply, which risks prolonging the settlement date. See *WTO DSB Reviews Lingering Disputes*, WASH. TRADE DAILY, Mar. 26, 1998, at 2.

299. Of course, other issues may be litigated regarding Appellate Body procedure. For instance, with respect to standing, DSU Article 17.4 allows third parties to intervene at the appellate stage if they have "notified the DSB of a substantial interest in the matter. . . ." Whether the "substantial interest" claim is itself subject to review by the Appellate Body, *i.e.*, whether the Appellate Body might exclude third parties from intervention, is an interesting question. DSU art 17.4.

### A. Scope of Review

In a fashion similar to panels (as discussed in Section III.A above), the Appellate Body will only consider issues that are identified in a Member's notice of appeal. The Appellate Body's Working Procedures require that a notice for appeal shall include "a brief statement of the nature of the appeal, including the allegations of errors. . . ." <sup>300</sup> In addition, the Working Procedures require that an appellant's first submission shall set out "a precise statement of the grounds for the appeal, including the specific allegations of errors in the issues of law covered in the panel report . . . and the legal arguments in support thereof." <sup>301</sup> Therefore, if an appellant fails to include a claim in the appeal request, the Appellate Body normally will refuse to rule on the issue.

For instance, in *EC—Bananas*, Ecuador argued that the EC did not properly set out a particular allegation of error in Ecuador's Notice of Appeal or in Ecuador's first submission and thereby failed to meet the requirements of the Working Procedures. The Appellate Body agreed that there was no "specific mention" of this allegation in either document, so that Ecuador had no notice that the EC was appealing on this issue. The Appellate Body excluded this allegation from the scope of the appeal. <sup>302</sup> Similarly, in *United States—Gasoline*, the Appellate Body listed particular issues that were "dealt with in the Panel proceedings but which have *not* been brought before the Appellate Body in this appeal, and which we accordingly exclude from consideration in this Appellate Report." <sup>303</sup>

In *Canada—Periodicals*, the Appellate Body was willing to rule on a provision that was not cited in the appeal request, given the provision's close relationship with a provision that had been cited. <sup>304</sup> The notice of appeal had referred to the first sentence of GATT Article III:2; the Appellate Body agreed to consider an argument based on the second sentence of this Article. The Appellate Body viewed the two provisions as "part of a logical continuum." <sup>305</sup> This approach is similar to the prac-

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300. WTO Secretariat, *Working Procedures for Appellate Review*, WT/AB/WP/3, para. 20(2)(d) (Feb. 28, 1997) (last downloaded May 19, 1998) <<http://www.wto.org/wto/dispute/ab3.htm>> [hereinafter Working Procedures].

301. *Id.* R.21(2)(b)(i).

302. See *EC—Bananas (Appellate Body)*, *supra* note 28, paras. 148–52.

303. *United States—Gasoline (Appellate Body)*, *supra* note 279, at 9. The Appellate Body also specifically refused to consider two issues raised by Venezuela and Brazil in that case because those Members had not appealed the panel's decision but had instead argued in their Appellees' Submissions that the panel had erred in two respects. *Id.* at 11–12.

304. See *Canada—Periodicals (Appellate Body)*, *supra* note 298, at 25–26.

305. *Id.* at 25. The Appellate Body cited its prior decision in *United States—Gasoline*, where it had considered the chapeau of Article XX even though the panel had not ruled on



tice of panels, discussed earlier, of considering legal claims as long as they relate to the same "problem."<sup>306</sup> However, the Appellate Body may be applying a more flexible standard in its own proceedings than in panel proceedings because in the panel context the Appellate Body has mandated that panel requests must identify the specific provision involved.<sup>307</sup>

### B. *Issues of Law vs. Issues of Fact*

Under DSU Article 17.6, an appeal is limited to "issues of law covered in the panel report and legal interpretation[s] developed by the panel."<sup>308</sup> Article 17.6 therefore raises the difficult distinction between issues of law and issues of fact.<sup>309</sup>

In *EC—Beef Hormones*, the Appellate Body provided an extensive discussion of this issue:

Findings of fact, as distinguished from legal interpretations or legal conclusions, by a panel are, in principle, not subject to review by the Appellate Body. The determination of whether or not a certain event did occur in time and space is typically a question of fact; for example, the question of whether or not Codex has adopted an international standard, guideline or recommendation on MGA is a factual question. Determination of the credibility and weight properly to be ascribed to (that is, the appreciation of) a given piece of evidence is part and parcel of the fact finding process and is, in principle, left to the discretion of a panel as the trier of facts. The consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision is, however, a legal characterization issue. It is a legal question. Whether or not a panel has made an objective assessment of the facts before it, as required by Article 11 of the

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this issue and, therefore, the issue was not appealed. *Id.* In *United States—Gasoline*, the Appellate Body had to address the chapeau of Article XX even though it had not been discussed by the Panel. This raises the problem of the issue of "judicial economy," discussed above: because the Appellate Body lacks remand authority, it can find itself in the situation where it must address an issue for the first time on appeal.

306. See discussion *supra*, Part III.A.

307. See *EC—Bananas (Appellate Body)*, *supra* note 28, paras. 141–43.

308. DSU, *supra* note 5, art. 17.6.

309. See Croley & Jackson, *supra* note 54, at 200 n.32 (describing the law/fact distinction as "troublesome", in the context of Article 17.6 of the Antidumping Agreement); Petersmann, *supra* note 2, at 68 (stating in the context of DSU Article 17.6 that "distinguishing law from fact, and defining the limits for new legal arguments, are notoriously difficult").

DSU, is also a legal question which, if properly raised on appeal, would fall within the scope of appellate review.<sup>310</sup>

Based on this, the Appellate Body proceeded to consider the legal question of whether the panel in that case had made an "objective assessment" of the facts, in response to the EC's argument that the panel had disregarded evidence submitted to it.<sup>311</sup>

The Appellate Body's explanation, above, of law versus fact does not acknowledge the inherent ambiguities and difficulties involved in this distinction. A decision regarding the "weight" or "appreciation" of evidence is likely to dictate, in many cases, whether the underlying facts are consistent with the "requirements of a given treaty provision." In other words, there are many mixed questions of fact and law.<sup>312</sup>

In some cases, the law/fact distinction is not particularly difficult. For instance, in *EC—Bananas*, the Appellate Body refused to consider the EC's appeal of several aspects of the panel's rulings on the ground that these issues were "all factual conclusions."<sup>313</sup> However, in other situations, the law/fact problem can become very important, especially because the Appellate Body apparently lacks power to remand the case to the panel for further proceedings. DSU Article 17.13 provides that "[t]he Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel."<sup>314</sup> This provision does not appear to authorize the Appellate Body to remand to the panel for further proceedings, a conclusion reinforced by the absence of any remand procedures in the DSU.<sup>315</sup>

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310. *EC—Beef Hormones (Appellate Body)*, *supra* note 196, para. 132.

311. Despite the Appellate Body's articulation of this standard, the Appellate Body later in its decision appears to engage in the "[d]etermination of the credibility and weight" of evidence that it says it cannot do. See *EC—Beef Hormones (Appellate Body)*, *supra* note 196, paras. 197 nn.180, 222–25. See also discussion *infra*, notes 320–322.

312. See *AMAN & MAYTON*, at 441–43 (1993) (discussing the "mixed question of fact and law" that arises where a court reviews whether the agency correctly applied the law to the facts).

313. *EC—Bananas (Appellate Body)*, *supra* note 28, para. 239. The EC had tried to style these challenges as involving the panel's misapplication of the "burden of proof." In other words, the EU had argued that the panel had improperly found that the Complaining Parties had satisfied their burden of proof on these issues, under the standard set forth in *United States—Wool Shirts (Appellate Body)*. See *EC—Bananas (Appellate Body)*, *supra* 28, paras. 53–55.

314. DSU, *supra* note 5, at art. 17.13.

315. See *also id.* art. 17.14 (providing for adoption of an Appellate Body report unless the DSB decides by consensus not to adopt the report). The adoption of the Appellate Body report appears to conclude the proceedings. However, Petersmann views the question of remand authority as an open issue that will require clarification by the Appellate Body. He acknowledges that implying such remand authority probably "would imply that the strict

The absence of remand authority could create a serious risk of difficulties when combined with both the Appellate Body's inability to make factual findings and the practice of panels of engaging in "judicial economy" and thereby avoiding the discussion of arguments that they consider as unnecessary. As a result, the Appellate Body could reverse a panel decision on an issue of law, but finds itself unable to address other contentions made by the parties because the necessary factual record does not exist. The Appellate Body also finds itself unable to remand to the panel for further proceedings.<sup>316</sup>

In *Canada—Periodicals*, the Appellate Body appears to have encountered this problem. The panel had found that imported United States "split-run" periodicals and Canadian "non-split-run" periodicals were like products under GATT 1994 Article III:2, first sentence. The Appellate Body rejected the panel's reasoning that had led to this conclusion.<sup>317</sup> This holding presented the Appellate Body with the question of whether the U.S. periodicals and the Canadian periodicals were actually like products, even if the panel had reasoned incorrectly in reaching this conclusion. The Appellate Body stated that:

We are mindful of the limitation of our mandate in Articles 17.6 and 17.13 of the *DSU*. According to Article 17.6, an appeal shall be limited to issues of law covered in the Panel Report and legal interpretations developed by the Panel. The determination of whether imported and domestic products are "like products" is a process by which legal rules have to be applied to facts. In any analysis of Article III:2, first sentence, this process is particularly delicate, since "likeness" must be construed narrowly and on a case-by-case basis. We note that, due to the absence of adequate analysis of the Panel Report in this respect, it is not possible to proceed to a determination of like products.<sup>318</sup>

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time-limits for decisions of the DSB cannot be met." Petersmann, *supra* note 2, at 68 (citing *DSU* art. 20).

316. See Debra P. Steger and Susan M. Hainsworth, *New Directions in International Trade Law: WTO Dispute Settlement*, in *DISPUTE RESOLUTION IN THE WORLD TRADE ORGANIZATION*, *supra* note 161, 28, 56–57 ("Given the Appellate Body's limited jurisdiction to questions of law, it is sometimes difficult for the Appellate Body, in situations where it has reversed a legal conclusion of a panel, to decide how to modify the panel's conclusions."); David Palmeter, *The WTO Appellate Body Needs Remand Authority*, 32 *J. WORLD TRADE* 41 (1998). See also McGovern, *supra* note 53, § 2.233 (suggesting that "[i]t is possible that, at least in uncomplicated disputes, panels will seek to avoid this outcome by suggesting what their conclusion would have been had they adopted alternative interpretations of the legal framework"). As discussed *supra* at notes 162–164, this suggestion already has been taken up by one panel, in *India—Patent Protection*.

317. See *Canada—Periodicals (Appellate Body)*, *supra* note 298, at 23.

318. *Id.* at 23–24.

Thus, the Appellate Body acknowledged that the United States and Canadian products *might* be like products, but found that it could not make a finding on this issue due to the absence of a sufficient record. Because remand was not possible, the result was to prevent a finding that the products were “like.” This result seems problematic because it shows the real potential for issues to be resolved one way or the other based simply on procedural developments rather than substantive rulings on the merits.

Conversely, in *EC—Beef Hormones*, the Appellate Body may have engaged in factual findings in order to resolve the dispute, after it reversed the panel on a question of law. As discussed earlier, the Appellate Body found that the panel had erred in assigning the burden of proof to the EC in that case and held that the panel should have required the United States to make a *prima facie* case that the EC had violated its obligations. However, the Appellate Body could not remand to the panel for a determination whether the United States had established this *prima facie* case, due to the absence of remand authority. Instead, the Appellate Body itself engaged in “careful consideration of the panel record” and pronounced itself “satisfied that the United States . . . , although not required to do so by the Panel, did, in fact, make this *prima facie* case . . . .”<sup>319</sup> This review of the “panel record” appears to walk a narrow line between questions of fact and law because the Appellate Body inevitably had to consider questions of the significance of certain pieces of evidence in order to decide whether a *prima facie* case existed.

Also in *EC—Beef Hormones*, the Appellate Body decided that it was authorized to make a factual finding in order to resolve an ultimate question of law decided by the panel. The panel had declined to decide whether the difference in the levels of protection set by the EC for hormones used as growth promoters (*i.e.*, in cattle) and for hormones used for other purposes was justified, because the panel had decided that *any* difference in the level of protection was unjustifiable discrimination under Article 5.5 of the SPS Agreement.<sup>320</sup> The Appellate Body disagreed that any difference in the level of protection was unjustifiable discrimination and therefore was faced with the question of whether the difference in the levels was justified, a question that the panel had not reached. The Appellate Body found it “appropriate to complete the Panel’s analysis in order that we may be in a position to review the Panel’s conclusion concerning consistency with Article 5.5 as a

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319. *EC—Beef Hormones (Appellate Body)*, *supra* note 196, para. 197, n. 180.

320. *See id.* para. 222.

whole.”<sup>321</sup> The Appellate Body then found that the difference in the levels of protection was not arbitrary discrimination, and in so doing, made several factual findings based on its review of the facts contained in the panel record.<sup>322</sup>

In its most recent interpretation of its jurisdiction, *EC—Poultry*, the Appellate Body appeared to take a somewhat inconsistent position. On the one hand, the Appellate Body ruled that under DSU art. 17.13, where there is “no finding by the Panel or legal interpretation by the Panel . . . there is, therefore, no finding nor any ‘legal interpretation developed by the panel’ that may be the subject of an appeal of which the Appellate Body may take cognizance.”<sup>323</sup> Essentially, the Appellate Body stated that because the panel had made no findings on the issue raised by the appellant, Brazil, the Appellate Body lacked jurisdiction over the issue. On the other hand, the Appellate body also held in *EC—Poultry* that where the Appellate Body had reversed the panel’s interpretation of a legal issue, the Appellate Body had the authority to make a finding on a legal issue that was not addressed by the panel for reasons of judicial economy.<sup>324</sup> From the textual perspective, it is unclear how to reconcile these two conclusions: if the lack of a panel finding precludes Appellate Body jurisdiction, this rule should also apply in the situation where the lack of a panel finding was due to the application of the judicial economy approach.

### C. Standard of Review of Panel Decisions

Is the Appellate Body charged with a de novo review of the panel’s legal conclusions, or is any deference due to the panel’s more in-depth review of the record and arguments? In the cases that have come before it, the Appellate Body has essentially applied de novo review, modifying panel legal reasoning with which it disagreed.

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321. *Id.* The Appellate Body noted that this factual issue “was fully argued before the Panel,” apparently to emphasize that there was a complete factual record before it (the Appellate Body). *Id.* However, the Appellate Body’s *ability* to make a factual finding, based on the completeness of the record, does not answer the question of whether the factual finding should be made, given the limitations on Appellate Body jurisdiction.

322. *See id.* paras. 223–25. The Appellate Body found that there were significant differences between the use of hormones for growth purposes and for other purposes, with respect to (a) the frequency and scale of the treatment, and (b) the mode of administration of the hormones. *Id.*

323. *Id.* para. 107.

324. *See id.* para. 156. The Appellate Body stated that “[i]n certain appeals, however, the reversal of a panel’s finding on a legal issue may require us to make a finding on a legal issue which was not addressed by the panel.” *Id.* The Appellate Body cited as authority its decisions in *United States—Gasoline* and *Canada—Periodicals*, discussed above. *See id.*

In *Canada—Periodicals*, the Appellate Body reversed a panel conclusion that had been reached without proper legal reasoning and on inadequate factual analysis, noting that the panel “did not base its findings on the exhibits and evidence before it.”<sup>325</sup> In *EC—Beef Hormones*, the Appellate Body reversed a panel’s finding as “unjustified and erroneous as a matter of law.”<sup>326</sup>

A more lenient standard of review applies with respect to review of procedural decisions by the panel. The Appellate Body will require a showing of “prejudice” before reversing a panel’s decision on “matters of procedures”—*i.e.*, matters relating to the panel’s own proceedings.<sup>327</sup> On such procedural matters, an appellant’s demonstration that the panel made an error of law apparently will not be sufficient; the appellant will also have to demonstrate that the error caused “prejudice” to the appellant’s case.

In *Argentina—Footwear*, Argentina argued that the panel had committed errors of law on several issues by failing to make an “objective assessment of the matter” under Article 11 and by failing to “set out . . . the basic rationale behind any findings and recommendations that it makes.”<sup>328</sup> The Appellate Body rejected each of these arguments. The Appellate Body did not discuss the standard of review that is generally applicable to panel rulings. The Appellate Body did state that “while another panel could well have exercised its discretion differently, we do not believe that the Panel here committed an abuse of discretion amounting to a failure to render an objective assessment of the matter as mandated by Article 11 of the DSU.”<sup>329</sup> However, this statement was made in the context of an argument regarding a procedural error by the panel, and probably reflects the wide latitude the Appellate Body extends to panels in their procedural operations, as reflected in the *EC—Beef Hormones* decision discussed above.

An interesting question arises as to whether there is a standard of review for a panel’s factual findings. As discussed earlier, the Appellate Body’s jurisdiction is limited to issues of law and legal interpretations by the panel. However, it appears that at least to some degree, the Appellate Body could review a panel’s factual findings albeit under a quite deferential standard of review. Article 12.7 of the DSU provides that

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325. *Canada—Periodicals (Appellate Body)*, *supra* note 298, at 22.

326. *EC—Beef Hormones (Appellate Body)*, *supra* note 196, para. 246.

327. *Id.* para. 152, n. 138 (reasoning that the DSU “leave[s] panels a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated”).

328. *Argentina—Footwear (Appellate Body)*, *supra* note 74, paras. 66, 75, 82.

329. *Id.* para. 81.

“the report of a panel shall set out the findings of fact, the applicability of relevant provisions, and the basic rationale behind any findings and recommendations” that the panel makes.<sup>330</sup>

The requirement for a “basic rationale” behind the panel’s factual findings may provide an implicit standard of review, in conjunction with the requirement that a panel conduct an “objective assessment” of the facts, under DSU Article 11. Taken together, these provisions suggest that a panel must act reasonably in making factual findings. For example, as argued by the EC in *EC—Beef Hormones*, the Appellate Body could find that a panel’s findings were not made in good faith and therefore were not reasonable. However, the requirement for a “basic rationale” and an “objective assessment” could be violated even where the panel acts in good faith, if the panel ignored relevant facts or used incorrect reasoning.<sup>331</sup> Conversely, it would be inappropriate for the Appellate Body itself to conduct an “objective assessment” of the facts to determine whether the panel was correct or not, rather than simply determining whether the panel acted reasonably.<sup>332</sup>

One commentator argues that the Appellate Body should develop “some concept of a ‘standard of review’” and “might adopt a less intrusive, more deferential standard of review.”<sup>333</sup> He argues that such deference to panel decisions is warranted given the many new provisions in the WTO Agreements that “need honing and refining over time,” and that interpretation “is not an exact science.”<sup>334</sup> So far, the issue is a difficult one, as it requires the Appellate Body to balance the value of early, clear statements of law, against the value of permitting the gradual evolution of jurisprudence in a complex area. Ultimately, it may be appropriate for the WTO Members to consider this issue as they review the WTO dispute settlement process.

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330. DSU, *supra* note 5, art. 17.2, cited in *EC—Bananas (Appellate Body)*, *supra* note 28, para. 251 (stating that a panel is required to provide a “basic rationale” for its decision).

331. See Maurits Lugard, *Scope of Appellate Review: Objective Assessment of the Facts and Issues of Law*, 1 J. INT’L ECON. L., 323–27 (1998) (criticizing the *EC—Beef Hormones* decision for limiting review of panel factual findings to whether the panel acted in bad faith, and noting that this approach appears to mandate an inquiry into the panelists’ subjective intent).

332. One commentator argues that “[a] review of how the Appellate Body applied this standard to the facts of *Beef Hormones* . . . indicates that the standard was not applied in a particularly deferential way. The Appellate Body engaged in a thorough and searching inquiry, adopting some factual findings of the Panel and rejecting others.” Paul Rosenthal, “Comments on Scope for National Regulation,” in 32 INT’L LAWYER (1998).

333. McRae, *supra* note 161, at 109–10.

334. *Id.* at 110.

## CONCLUSION

As discussed in the introduction, this article has aimed to identify the particularly significant issues that are arising in WTO dispute resolution and provide a useful analysis of the decisions issued to date. The topic does not lend itself to conclusions of a general nature, given the diverse nature of the issues, ranging from the right-to-counsel of WTO Members to the burden of proof in WTO proceedings. General conclusions are also problematic due to the fact that the WTO dispute settlement system has been in operation for only three years. Nonetheless, a few observations may be appropriate.

Probably the most important aspect of the initial decisions is that WTO panels and particularly the Appellate Body have demonstrated an intention to follow the DSU text quite closely. The Appellate Body has been critical of panels that, in the Appellate Body's judgment, have varied from the DSU text, as evidenced, for instance, by the reversals of the panel decisions in *Japan—Alcohol Taxes* and *India—Patent Protection*. This approach is not surprising in a new institution, particularly one that is as controversial as the World Trade Organization because the judicial bodies are likely to be quite cautious in order to establish their legitimacy.

The strict obedience to the DSU text, interestingly, has resulted in panels and the Appellate Body allowing substantial procedural leeway in areas that are not addressed by the DSU text. For instance, in *EC—Bananas*, the Appellate Body allowed Saint Lucia to be represented by counsel in part because nothing in the DSU addressed this issue. Also in the *EC—Bananas* case, the panel found that the United States had standing to challenge the EC's bananas regime, in part because the DSU did not contain any express requirement that a Member must have a "legal interest" in order to request a panel.

The strict adherence to the DSU text, however, may deny panels adequate discretion to maneuver in areas that are addressed by the DSU. For instance, if a panel's scope of review is tightly constrained by the terms of reference, this may allow Members to circumvent their WTO obligations by abolishing measures just before the terms of reference are set and then revising them after the panel ruling. A strict interpretation of a panel's terms of reference could also deny panels any ability to consider claims raised in response to facts disclosed for the first time in the panel proceedings, as in *India—Patent Protection*. Similarly, in the standard of review area, as discussed earlier, allowing panels to apply a different standard of review to factual issues, depending upon the national procedures involved, seems appropriate. Yet it is unclear whether



the requirement of an “objective assessment” of the facts, if strictly applied, would allow panels to tailor their approach to the diversity of legal contexts.

Finally, the close obedience by panels and the Appellate Body to the DSU text increases the importance of the review of the WTO dispute settlement system that is ongoing in 1998.<sup>335</sup> If the panels and the Appellate Body are to take a “plain meaning” approach to the DSU text, then it becomes incumbent upon the WTO Members to consider the terms of that text extremely carefully in light of the decisions that have issued to date, and to decide whether any changes are warranted.

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335. This review is mandated by the Ministerial Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes, which requires a “full review of dispute settlement rules and procedures” within four years after the entry into force of the WTO Agreement—*i.e.* by January 1, 1999. This decision is available on the WTO’s website at <<http://www.wto.org/wto/dispute/dsu.htm>>.