WTO Dispute Settlement: the System is Flawed and Must Be Fixed*

JOHN RAGOSTA, NAVIN JONEJA, AND MIKHAIL ZELDOVICH**

The Dispute Settlement Understanding (DSU) of the World Trade Organization (WTO), arising from the Uruguay Round negotiations, is generally considered to be the "crown jewel" of the WTO trading system. As Professor Raj Bhala notes, the literature on the subject has been "characterized by a near irrational exuberance—pace Alan Greenspan—about the new adjudicatory system." An indication of the importance and respect assigned to the DSU and the Dispute Settlement Body (DSB) is the moniker of "world trade court" used to describe its function.2

In theory, the DSU should provide a forum where aggrieved WTO Members can encourage noncompliant nations to live up to the substantive commitments made in the negotiated agreements. The binding nature of dispute settlement under the DSU should serve notice to Member nations that they must abide by the agreed-upon terms or face possible sanctions. Many have noted that the binding nature of the DSU can provide political cover...
for executives forced to make unpopular choices on trade issues. In sum, forced compliance via binding dispute settlement should, theoretically, ensure that each country receive all the benefits for which it negotiated, and that no country is required to make concessions to which it has not agreed and which have not been “paid for.”

Yet, this idyllic picture of the DSU hides serious flaws in the system’s structure and has, regrettably, been shattered by experience. The earlier identified risk that the DSB might adopt judicial activism and abuse its binding nature to create WTO “common law,” to which the Members never agreed, has been realized in a series of decisions. Litigation over how negotiated agreements should be interpreted has led in many instances not to Members getting the “benefit of the bargain,” but to exactly the opposite. Provisions for which Members specifically negotiated have been cast aside or ignored by WTO panels in favor of other more ambiguous (or what panelists may view as ambitious) interpretations. As a result, the DSB has become not simply an enforcer of negotiated agreements, but an international tribunal that, in violation of specific provisions and sound concepts of international law development, creates new obligations and imposes them on sovereign nations, obligations to which those nations never agreed.

American lawyers unfamiliar with international law may object because courts commonly “make law,” although even in the domestic setting this can be highly controversial. But there are fundamental problems with the DSB doing so: First, in international law there are sound reasons why panels should not (and cannot) create obligations to which the parties did not agree. Among other concerns, there is no functioning international governing system to control such law-giving “courts” through “democratic” means of amending of laws, reversal of inappropriate decisions, fair appointment of judges, etc. In U.S. constitutional terms, there are no effective checks and balances. In such a system, “judges” truly become “Platonic guardians.” Second, this danger is seriously enhanced by the often-ambiguous

3. For example, as Dean Michael Young explains:

Proponents of the more adjudicatory approach also argue that more rigorous and effective enforcement of GATT rules will help stave off protectionist pressures in various countries. . . . Some commentators believe that a more legalistic approach to GATT dispute resolution might even help reduce pressure within the EU for more protectionist measures now that parties within the EU are entitled to rely on the GATT in bringing complaints before the EU.


5. Ragosta, supra note 2, at 741; Kal Raustiala, Sovereignty and Multilateralism, 1 Chi. J. Int’l L. 401 (2000). Can one seriously argue, for example, that the members of the European Community (EC) would accept the authority of the European Court of Justice (ECJ) without the protections of the EC Parliament and the Community bureaucracy and executive functions which can effectively control undue “activism” by the ECJ?

6. Some commentators have somehow twisted such DSB authority to change or avoid domestic legislative pressures or the political realities of negotiations as “pro-democratic.” This is Orwellian (of the order of white is black, black is white, the WTO DSB is democracy enhancing . . . ). See Raustiala, supra note 5 (responding to John O. McGinnis, The Political Economy of Global Multilateralism, 1 Chi. J. Int’l L. 381 (2000)). Apparently the theory goes that the WTO DSB will be able to protect “the people’s” interest in free trade and consumer welfare when their own governments cannot do so domestically or in international negotiations and, thus, the system is democratic. As a preliminary matter, the assumption that trade protection in response to unfair trade is anti-consumer and, thus, also anti-democratic is flawed at several levels. In terms of the anti-consumer issue, Professor John Jackson has noted, for example, that countervailing duty law has contributed to a reduction in
nature of the WTO's substantive commitments. Such ambiguity, while a diplomatic necessity to obtain the consensus necessary for agreement, and the normal means of growth and development of international law, creates a very broad field on which activist judges might play. Third, because the WTO DSU has essentially evolved from the previous "diplomatic" GATT model of dispute settlement, it does not contain the procedural protections that are essential to due process, equity, and transparency in a binding judicial environment.

These crucial flaws in the DSU's design have manifested themselves in a number of failures. Panels have often simply constructed obligations where the Parties created none. This puts Members in an untenable position as they try to decide whether, in new negotiations, to insist on the provisions they have already negotiated for and achieved, to abuse the system by seeking to use dispute settlement to impose obligations on other parties to which those parties did not agree (consider that the EC's FSC and privatization claims against the United States reportedly, at least in part, were a response to the perceived "abuse" in U.S. claims on bananas and beef hormones), and/or to diminish the relevance of WTO dispute settlement. Judicial activism also undermines faith in the system and threatens support for additional liberalization.

subsidies that reduce world wealth. John H. Jackson, Perspectives on Countervailing Duties, 21 Law & Pol'y Intl’l Bus. 739, 742–43 (1990). Further, those that claim the WTO is democracy enhancing implicitly assume that wealth maximization of consumers is the only interest in a democratic society. Yet, as Raustiala points out, there are many other compelling "democratic" interests in the area of the environment and labor. We might add there are other interests in the area of production and fairness. See, e.g., John A. Ragosta, Natural Resource Subsidies and the Free Trade Agreement: Economic Justice and the Need for Subsidy Discipline, 24 Geo. Wash. J. Intl’l L. & Econ. 255 (1991) (discussing the right of workers to be free of foreign government unfair trade practices). (In fact, if welfare, read wealth, of the people was all that was at issue, one could also point out that there is such a thing as an "optimal tariff." See, e.g., Modecosi E. Kreinin, INTERNATIONAL Economics: A POLICY APPROACH 302 (1979)). Raustiala suggests that the only interest consistently served by binding international dispute settlement at the expense of domestic democracy is the profitability and flexibility of multinational firms. See Raustiala, supra note 5, at 415. In the end, one might as well argue that maintaining King George’s platonic guardianship of the American colonies was more “democratic” than the ugly specter of legislatures grappling with constituent interest.

7. Professor Hudec, in discussing the problems with GATT 1947 dispute settlement, noted that it’s “bad reputation was not entirely deserved, however, for the root problem in all these cases was that the underlying law being applied was seriously defective.” Thus, as to the source of the problems, “most important of all, is the law itself. GATT law is full of gaps, omissions, inconsistencies and outmoded provisions.” Robert Hudec, The Judicialization of GATT Dispute Settlement, in In Whose Interest? Due Process and Transparency in International Trade 16, 23 (Michael M. Hart & Debra P. Steger eds., 1992). See also Wolff & Ragosta, supra note 4, at 702.

8. As one trade scholar noted in 1995: “[I]mportant issues regarding dispute resolution remain unresolved... The procedural rules governing the panel, arbitration, and appellate body proceedings... receive only passing attention in the Understanding or, for that matter, in any other formal GATT document.” Young, supra note 3, at 406.

9. An excellent article analyzing the judicial activism of WTO panels and its potential effect on Members’ support for trade liberalization is Daniel K. Tarullo, The Hidden Costs of International Dispute Settlement: WTO Review of Domestic Anti-Dumping Decisions, 34 Law & Pol’l’l Bus. 109, 172 (2002). Tarullo engages in an extended discussion of the serious costs of such judicial activism in which he warns that the Appellate Body (AB), by “disregarding” the negotiated standard of review in antidumping cases has effectively revised the Uruguay Round Anti-Dumping Agreement. If the United States still wants the protection for its anti-dumping law administration that it thought it was getting in 1995, it will have to negotiate again for protections in the new round of negotiations... It looks, then, as if the United States must “pay” twice to obtain discretion to choose among “permissible” legal interpretations of its international obligations.
In short, the DSU is flawed, it has failed, and it needs to be fixed. Part I of this paper discusses the shortcomings inherent in a binding dispute resolution system lacking in fundamental democratic oversight in the context of ambiguous international agreements. Part II discusses some of the failures that this system has produced. Part III details the DSU's procedural deficiencies, and Part IV offers suggestions for reform.

I. The WTO Dispute Settlement Process is Conceptually and Institutionally Flawed

The very nature of the WTO Agreements makes the prospect of binding dispute resolution very dubious. Most of the negotiated provisions themselves are unclear, which leaves an arbitrator with two choices: simply to dismiss cases as being beyond the purview of WTO norms, or to create some obligation where none existed before. If the agreements were clearly defined, panels could simply determine the facts and apply the negotiated provision appropriately. But when different parties to an agreement have differences of opinion about the meaning of a negotiated provision (much of it intentional, resulting from an inability to reach more precise agreement in the Uruguay Round negotiations), judicial interpretation or "construction" becomes almost inevitable. Professor Raustiala has described this as the problem of "generativity," that is, that dispute settlement is likely to generate new, or at least evolved, legal interpretations.

... Having seen the AB nullify a provision that was supposed to protect national prerogatives, the United States may conclude that the "costs" of negotiating further restrictions on the use of its trade laws will increase as the WTO dispute settlement system consistently decides cases against the importing nation. ...

Note the relationship between AB practice and the potential for sub-optimal trade negotiations. By significantly "changing" the rules from what the United States expected it had negotiated, the AB has denied WTO members the ability to specify obligations in the way that maximizes the benefits each can obtain.

Suppose now that the AB's disregard of 17.6(ii) is read as part of a broader effort by the AB to establish the WTO as a potent constitutional regime. In that circumstance, the inhibitions upon negotiating new agreements may spread beyond the area of trade remedies.

Tarullo, supra.

10. The suggestion that this is an issue of a litigative versus a negotiation model can be somewhat simplistic. For example, as Professor Hudec has observed, GATT 1947 dispute settlement was more litigative than some would suggest. Robert E. Hudec, The New WTO Dispute Settlement Procedure: An Overview of the First Three Years, 8 Minn. J. Global Trade 1, 4 (1999). Equally, as discussed further in Part III, to portray the current system as completely litigative is misleading. See also Ragosta, supra note 2.

11. One commentator explains this as the difference between "standards" and "rules":

Where the applicable legal provision has the characteristics of a rule—clear, self-executing, fully specified in advance ... once the facts are determined, the dispute resolution process has little more to do.

Where, alternatively, the legal provision has the characteristics of a standard, with need of interpretation or even construction, then the determination of the law and the application of the law to the facts become much more complex.

Joel P. Trachtman, The Domain of WTO Dispute Resolution, 40 Harv. Int'l L.J. 333, 337-38 (1999). Trachtman goes on to note an important distinction for these purposes: "Another distinction between rules and standards, often de-emphasized in this literature, is the institutional distinction: with rules, the legislature often "makes" the decision; with standards, the adjudicator determines the application of the standard, thereby "making" the decision." Id. at 333. For these purposes, the Member States are the "legislature," panelists the adjudicators.

12. Raustiala, supra note 5, at 412. Domestically, of course, the same problem arises. For example, some of
Some commentators protest that the DSB is explicitly prevented by the text of the WTO Agreements from creating substantive obligations for Members. But the protests, and the limitation in the DSU, are simply in vain. Unless panels refuse to answer when the "law" is unclear—which would be the appropriate response as a matter of international law, but requiring extraordinary restraint on the part of panelists—then "law making" is inevitable. As discussed in Part II below, the cases demonstrate that law is clearly being made.

Of course, such judicial construction and the accretion of "judge-made law" is commonplace in a domestic context, and is a problem that can be relatively easily kept in check through checks and balances: legislative oversight and amendment, democratic processes for appointment of judges, impeachment in extreme circumstances, etc. Indeed, the mere existence of legislative oversight likely does much to constrain judges within a broad range of reasonable decisions. Yet, in an international context, and particularly in the WTO, the problem becomes much more serious for three reasons.


14. "[J]udicial law-making is a permanent feature of administration of justice in every society..." Trachtman, supra note 11, at 333 (quoting Hersch Lauterpacht, The Development of International Law by the International Court 155 (1982)). Yet, it is well to remember that even in a domestic context the development of "judge-made" law has not been without controversy. For example, in the time of Jackson, Democrats complained bitterly of the undemocratic nature of such lawgiving:

As Robert Rantoul pointed out, the common law "indefinitely and vaguely settled, and its exact limits unknown," gave far too much scope to the discretion of judges. Theophilus Fisk added harshly that the common law, "based upon deception, extortion, villainy and fraud," was "one of the most potent of all engines in the hand of an air bubble aristocracy, to rob the many to benefit the few." Even a Whig like Richard Hildreth, much influenced by Bentham, was moved to describe it as "directly hostile to the spirit of democracy." It should not so much be regarded as a system for the administration of justice, he said, "as a contrivance for setting aside the laws, . . . and those intentions fail to meet the approbation of the judges." "Under an enlightened democratical government," he concluded, "it is entirely out of place—becoming, in fact, a contrivance to enable the few to defeat the wishes of the many."

ARTHUR M. SCHLESINGER, JR., THE AGE OF JACKSON 330 (1945) (footnote omitted). Teddy Roosevelt also warned against judicial activism:

"[F]or the courts to arrogate to themselves functions which properly belong to the legislative bodies is all wrong, and in the end works mischief. People should not be permitted to pardon evil and slipshod legislation on the theory that the court will set it right; they should be taught that the right way to get rid of a bad law is to have a legislature repeal it, and not to have the courts by ingenious hair-splitting nullify it. . . . Under a popular government such as ours, founded on the theory that in the long run the will of the people is supreme, the ultimate safeguard of the nation can only rest in training and guiding the people so that what they will shall be right, and not in devising means to defeat their will by the technicalities of strained construction."


Of course, as explained below, the dangers of judicial activism are far greater in an international context than in the domestic context.
First, judicial interpretation raises far less serious concerns when considering a problematic term in an otherwise clear text (e.g., the meaning of "equality" within the context of an agreed-upon provision). Yet, the terms of the WTO codes are hardly clear and unambiguous.15 Granted, domestic statutory terms can also be riddled with ambiguities, but can anyone seriously suggest that domestic statutes are generally as ambiguous in their terms as the WTO codes?

In fact, even when domestic statutes are ambiguous, domestic courts can approach the problem with a high degree of shared values, shared means of interpretation (e.g., respect for legislative history), and shared learning which, while all of the litigants cannot be expected to agree completely, will generally be within the bounds of reasonable expectations. By comparison, the fundamental shared vision or expectations about the purpose or intent of a code in the international context are likely to diverge dramatically from developed to less developed nations, or from western to non-western nations.16 For example, the United States saw the Agreement on Subsidies and Countervailing Measures (SCM) and antidumping (AD) agreements as means to discipline trade distorting subsidies and dumping; much of the rest of the world saw them as a means to discipline countervailing duties (CVD) and AD remedies.

Perhaps no better example of the problem of inconsistent understandings of the fundamental scope and requirements of a text can be provided than in the area of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). It is fair to say there was

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15. Worries about the vagueness of these international agreements, among other things, was one of the prime reasons that some countries initially opposed binding dispute settlement in the Uruguay Round negotiations: "[H]ighlighting the ambiguity of GATT rules, the political sensitivity of trade disputes, and the complex trade-offs of competing interests that go into the formulation of any trade rule [some countries] have argued that GATT dispute resolution should not be particularly formal, legal, or adjudicatory." Young, supra note 3, at 390. Initially, it was the EU and Japan, in particular, that opposed binding dispute settlement with these concerns in mind. See CLAUDE E. BARFIELD, FREE TRADE, SOVEREIGNTY, DEMOCRACY 22-23 (2001).

16. Trachtman makes a similar point when he notes, "From a lawyer's perspective, perhaps the most salient difference between the international legal context and the domestic legal context . . . is the relative thickness of the domestic legal context. This thick domestic legal context is highly articulated and supplies a reliable and predictable mechanism to complete contracts." Trachtman, supra note 11, at 347.

In the context of the WTO and trade remedies, the differences are particularly sharp. There are countries that are deeply concerned about protecting their relatively open domestic market from unfair trade (e.g., the United States) and countries concerned primarily with access to large foreign markets regardless of unfair trade. There are countries that have a long and respected history of substantial government involvement in the economy and subsidization (e.g., the EC, Canada, Mexico, Brazil), and countries that are more concerned with stopping the entry of subsidized goods (e.g., the United States; while it certainly provides subsidies, particularly in the area of agriculture, a number of studies have shown that it does so far less than many of its major trading partners). There are countries that function in a highly open and transparent system of trade regulation (e.g., the United States and Canada) and those that have highly opaque systems that provide alternative means of protection that may avoid some WTO scrutiny (e.g., Korea, Japan, and the EC).

There is an even more fundamental difference in countries' expectation of the proper role and independence of the judiciary, not to mention means of judicial interpretation. Former D.C. Circuit Chief Judge Malcolm Wilkey discussed this problem between even relatively similar democratic nations (Canada, the United States, and Mexico) in the context of FTA/NAFTA chapter 19 dispute settlement. See In Re Certain Softwood Lumber Products from Canada, No. ECC-94-1904-01-USA, slip op. at 59-64 (U.S.-Canada FTA Extraordinary Challenge Comm. Aug. 3, 1994) (Wilkey, J., dissenting).

We recognize, of course, that there is far from complete homogeneity of view among citizens of any country, certainly not in the United States. Nonetheless, as a relative matter we submit that the observation holds true.
simply not a detailed consensus on the meaning of all of the terms, and a panel decision that sought to reach a definitive position on many of the TRIPs issues would be "making law" rather than reporting on it. The appropriateness of the precautionary principle in the area of phytosanitary requirements is another example, but these are hardly unique.

Second, this interpretative problem, the generation of "common law," is greatly exacerbated by the character of the international regime and, in particular, the WTO regime. International law can develop effectively only with the consent of the nation states that participate. The late Professor Richard Lillich would explain patiently and repeatedly to his young law students that, "international law is, and it is only, what the community of nations agrees it to be." In terms of sovereign authority, the United States need not (and should not) give up, for example, its protection against unfair trade practices unless it agrees to do so, regardless of what the rest of the world says. Nor should India give up its right to impose compulsory licenses on pharmaceuticals unless it does so knowingly, intentionally, and based on a balance of concessions.

Some dismiss such concerns as limited to jurisprudens, but these issues are fundamental to democratic institutions. When a domestic court "makes law," it is subject to review by the legislature, oversight, and modification. It is subject to clear and binding limitations (not just laws, but overarching restraints, e.g., the Bill of Rights). In extreme circumstances, the decision can be reversed by the legislature (judges can even be impeached). A functioning system of appeals of both facts and law exists. More often than not, the prospect of such oversight itself limits the flexibility with which a judge might seek to impose his or her own views. Such protections are essential parts of a democratic system. Without them, judges become Platonic guardians. Yet, these fundamental democratic controls are lacking, or certainly ineffective, in the WTO.

It is true that WTO Members could revise or interpret the rules, should they decide that a panel had gone too far. Yet, WTO mechanisms for amending or interpreting new rules are inefficient and virtually impossible to utilize effectively, thus lacking the capacity to "rein in" activist panels. Certainly, given Members' differences of interests, losses in

17. See, e.g., Declaration on the TRIPS Agreement and Public Health, WT/MIN(01)/DEC/2, ¶ 6 (Nov. 14, 2001), available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.pdf, in which Members felt it necessary to clarify appropriate use of compulsory licensing of pharmaceuticals.

18. Author's recollections.

19. See Tarullo, supra note 9. These limitations grow directly out of the nature of sovereignty. See, e.g., E. de Vattel, THE LAW OF NATIONS xi (1796):

According to [Wolfius] the Voluntary Law of Nations would resemble the civil law of a grand Republic. This idea does not satisfy me; I do not find the fiction of such a republic, either very just, or solid enough to deduce the rule of Law of Nations universally and necessarily admitted among foreign states. It is essential to all civil society (Civitates) that each member has given up his right to the body of society, and that it has an authority of commanding all the members, of giving them laws, and of constraining those who refuse to obey. Nothing like this can be conceived or supposed to subsist between nations. Each sovereign state pretends to be, and actually is, independent of all others.

20. Trachtman suggests that these mechanisms protect "democratic" interests of members. [T]he representatives of member states continue to have substantial power over the dispute resolution process. One avenue of influence is the ability to establish new treaties or treaty provisions. A second avenue of influence is through the exclusive authority to adopt interpretations of WTO agreements. A third is to specify the "standard of review."

Trachtman, supra note 11, at 345 (footnote omitted). While interesting in theory, as explained below, the first two are impractical and the third has failed.

21. Claude Barfield of the American Enterprise Institute sums this problem up as follows:

Only the Ministerial Conference or the General Council can enact clarifications or interpretations of
dispute settlement of particular concern to developed countries (or countries with relatively open markets) may not be subject to remedy, even though it is evident that the "rule" adopted by a panel is one that could have never received consensus in negotiations in the first place. No wonder that there has not been a single successful attempt to revise or re-interpret any WTO rules.

Nor are the major revisions to WTO rules that result from exhaustive rounds of multilateral negotiations a good or timely mechanism for restraining judicial activism. In terms of correcting errant panels, at best, such negotiations force nations to "pay twice" for what they had already bargained for (or bargained not to give up). Furthermore, a new "obligation" imposed by dispute settlement panels may simply not be able to be reversed.

Thus, the WTO DSB is insulated from oversight, preventing the correction of "errors" and contributing directly to the willingness of panelists to "freestyle" decisions to fit their own perception of goals. Raustiala calls this problem "insularity."

This is, in part, the "sovereignty" issue that has been batted about so freely and often without careful consideration. In international law, these factors have traditionally dictated that in any form of dispute settlement nations be held only to that which they have definitely agreed. "[T]he view prevailing among writers is that there is no room for non liquet in international adjudication because there are no lacunae in international law." This perspective is important in light of the Lotus doctrine that the principle of sovereignty requires that what is not positively prohibited to states is permitted to them. In other contexts, the sovereign nature of negotiation participants, and the unwillingness of these participants to accept obligations imposed by sources other than the bargaining table, has usually precluded binding dispute resolution.

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Barfield, supra note 15, at 41.

22. Raustiala, supra note 5, at 410.

23. Trachtman, supra note 11, at 341 (footnotes omitted) (quoting Prosper Weil, The Court Cannot Conclude Definitively . . . Non Lique Prohibetur, 36 Colum. J. Transnat'l L. 109, 119 (1997)). Professor Tarullo discusses a related international interpretive doctrine, again honored in the breach by the WTO DSB, of "in dubio minius," i.e., "where a treaty provision is ambiguous, 'that meaning is to be preferred which is less onerous to the party assuming an obligation.'" Tarullo, supra note 9, at 152 (quoting Robert Jennings & Arthur Watts (eds.), 1 OPPENHEIM'S INT'L L. 1278 (9th ed. 1992)).


25. John Gaffney has described the importance of sovereignty in international law in the following terms: "[I]nternational courts have no jurisdiction in the absence of parties' consent; and sovereign equality is an unseverable component of the principle of sovereignty in international law." John P. Gaffney, Critical Essay: Due Process in the World Trade Organization: The Need for Procedural Justice in the Dispute Settlement System, 14 Am. U. Int'l L. Rev. 1173, 1183-84 (1999). See also Vattel, supra note 19, at xi. This is the reason that, as Claude Barfield has noted, "[t]raditionally, international law . . . has consisted of carefully circumscribed obligations and rights with few legal remedies for redress of grievances." Barfield, supra note 15, at 43.
In other words, it is not odd that the United States or some other country give up some sovereignty in entering into an international agreement. We were taught in International Law 101 that all international agreements involve the giving up of some sovereignty, in return for which we receive the benefits of the agreement. Similarly, citizens give up sovereignty (which, at least since the American Revolution, has been considered to arise from the people) to participate in a functioning society. What is odd about the WTO is the extent to which we gave up sovereignty without knowing precisely what the WTO would do with it and without the ability to place essential democratic controls on the results. With unclear codes and binding dispute settlement, the sacrifice of sovereignty was substantially open-ended.26

As Raustiala notes, many WTO obligations “go to the heart of what we might consider core domestic policy,” and “the WTO Agreements not only create positive regulatory standards but they do so by shifting some measure of policy-making power to an international quasi-judiciary.”27 These issues have been addressed most vocally in the United States in the areas of labor and the environment, but they are no less important in the areas of intellectual property protection (for AIDS-plagued African nations), currency controls (for Asian nations in crisis), or trade remedies (for U.S. workers that see their jobs threatened not by more efficient foreign production but by subsidies and pernicious dumping into the relatively open U.S. market).

Given national sovereignty and lack of democratic controls, binding dispute resolution can also undermine the negotiation process by chilling enthusiasm for major concessions. The then-Chairman of the U.S. Senate Finance Committee, Senator Max Baucus (D-MT), was making exactly this point when he noted that WTO dispute resolution is "looking more and more like a kangaroo court against U.S. trade laws."28

Third, while courts make law, they do so under strict, well-developed, and fundamental procedural rules, which protect the interests of the parties and the citizenry generally. Such procedures are essential for due process, equality, and transparency. In spite of the high-minded (or high-handed) moniker of "world trade court" given to the DSB, it is anything but a court.

Panels and the Appellate Body lack the procedural or even sound jurisdictional controls that constrain judicial bodies. Panelists are appointed ad hoc, and are often linked to Member

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26. The WTO should be concerned about these issues. They encourage the shrill cry of hegemony by faceless bureaucrats heard in the streets of Seattle.

27. Raustiala, supra note 5, at 405–06.

The contrast with the U.S. approach in other areas of foreign policy is striking. Other similar proposals for surrender of sovereign power to a supranational body include the International Court of Justice (ICJ) and International Criminal Court (ICC). Many world powers do not view the decisions of the former to be binding (the United States refuses to grant the ICJ jurisdiction), and the United States has certainly refused to ratify the latter because of sovereignty concerns. The United States is even more reticent to give up sovereignty in the areas of labor, human rights, and the environment. Yet, puzzlingly, the WTO has effectively overturned many U.S. laws and regulations without provoking a loud reaction from the sovereignty hawks in the U.S. Congress. One possible explanation is the general support for the WTO of corporate America (most of which perceives a net benefit from it). One is left wondering, however, about the abdication by Congress of its constitutional responsibilities for trade and the absence of sovereignty "hawks" on the question of WTO excesses.

nations or the Office of the Secretariat, which undermines any sort of "separation of powers." Active lobbying by foreign diplomats has occurred behind closed doors at the WTO. We certainly fail to insist upon the same protections for national actors in the WTO that we accord individuals in the context of municipal law; yet, the former are simply representatives of the latter in the international system. Notably, private parties have their rights compromised in the WTO without having the right to appear or protect their own interests.

These problems are further complicated by the fact that panel and Appellate Body reports have themselves been used directly as a new source of international law, that is, as precedent. This is so despite the fact that stare decisis per se, has traditionally been rejected in international law, which was to be established by the practice and negotiations of sovereign nations. For example, the statute of the International Court of Justice fails to list precedent (stare decisis) when it lists the authorities the court is to apply.29 And just to ensure that there was no doubt on the topic, a separate article in the statute states, "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case."30 Article 3.2 of the DSU, in mandating that panels cannot create obligations, also indicates the inappropriateness of strict stare decisis. Yet, WTO panels' reliance on prior decisions is unmistakable.31 As Raj Bhala, a professor at the George Washington University explains:

[W]e believe in a myth that the doctrine of stare decisis does not exist or operate in WTO adjudication, that it was excluded from the pre-Uruguay Round General Agreement on Tariffs and Trade ("GATT") dispute settlement system, and continues to be barred from the post-Uruguay Round WTO system. . . . It is high time to "come clean" about what is really happening at the WTO and adjust our doctrinal thinking, and the doctrine itself, accordingly.32

Given this environment of binding dispute settlement, unclear substantive provisions, lack of oversight, absence of procedural protections, and de facto (if not de jure) stare decisis, it is inevitable that the Appellate Body will carve out a role for itself as the ultimate arbiter of the WTO rules—Platonic guardians of international trade (with their own goals and visions).

Kal Raustiala summarizes the issue well when he notes:

[T]he difference between domestic courts and WTO panels is the long acceptance of domestic courts in the larger constitutional scheme of the US and the knowledge that we have transparent political procedures for staffing them, an active practice of dissent, extensive openness to amicus curiae, and the means to overrule judicial decisions . . . . 33

Thus, comparisons that have been made between the famed "Marshall Court" in the early years of the United States and the Appellate Body are, at best, inapt, and at worse, further evidence of dramatic overreaching.

Many have noted that the result of these various factors is "judge"-made law in the WTO. In the Shrimp-Turtle case, for example, the Appellate Body asserted that article XX must

30. Id. art. 59.
31. There are innumerable examples of this; for one, see the discussion below of article 15 of the Anti-dumping Agreement in US—Steel Plate, in which the panel relies almost exclusively on the determination of the prior EC—Bed Linen panel regarding the requirements of article 15.
33. Raustiala, supra note 5, at 413.
be read in an "evolutionary" manner. The problem is not the substance of that decision—after all, it is not surprising that a panel finds article XX protects some otherwise actionable activity—but rather with the nature of the Appellate Body's interpretation of its role and that of the texts that theoretically bind it. By this reading, the terms of the negotiated agreements could "evolve" into something that none of the original parties to the agreements ever anticipated. Again, this creates new legal obligations for WTO Members without normal controls on the ability to check and balance such "law-giving." As two Canadian trade lawyers noted in analyzing a panel's decision in Australia—Automotive Leather, even in case where all parties—the complainant, the respondent, third parties, etc.—were in agreement on interpretation of certain provisions, WTO panels have completely disregarded such consensuses of Members' views on what was negotiated to reach their own interpretations. As Raustiala has noted, the Shrimp-Turtle decision means that "the scope and meaning of the GATT exceptions, and hence of the core GATT rules themselves, can and do evolve. The competence to assess that evolution is apparently the Appellate Body's." Thus, while the system purports solely to interpret the existing agreements neither adding to nor diminishing the parties' obligations, the nature of the agreements and the role carved out for the panels and the Appellate Body make this an impossibility. While some of these theoretical concerns were expressed years ago, the past seven years of experience has demonstrated that, in fact, panels have grossly exceeded their mandate. Claude Barfield notes that such a system "is not sustainable politically because the imbalance between the ineffective rule-making procedures and the highly efficient judicial mechanisms will increasingly pressure the panels and the AB to 'create' law, raising intractable questions of democratic legitimacy." The second half of Barfield's caution has already proven true.

II. The Institutional Flaws in WTO Dispute Settlement Have Given Rise to Decisions That Do Not Reflect the Commitments Negotiated By WTO Members

These conceptual defects have become evident in a series of failures of WTO panels to constrain themselves to the agreement of the Members. In many instances panels and the Appellate Body have simply "got it wrong," ignoring negotiated concessions in the process of constructively interpreting the agreements to conform to their "Platonic" vision of free trade. The problem is not that there have been honest disagreements about the scope of some agreements—that is to be expected given the agreements' nature—but rather that the "judicial" bodies of the WTO have repeatedly gone contrary to what negotiators understood in the course of negotiations. Certainly the panels have largely ignored the standard international law doctrine that sovereignty demands that what is not "positively prohibited" is "permitted." Nor is the problem isolated to one or two incidents.

36. Raustiala, supra note 5, at 406.
37. E.g., Wolff & Ragosta, supra note 4, at 703–04; Hudec, supra note 7, at 22–24.
Some will argue we cannot expect panels to always be correct. Yet, that is exactly what we expect (and must expect) from a court. Moreover, while even courts fail, the pattern of judicial activism and error in the WTO is quite extensive (and all the more pernicious because of the inability to readily correct it, as discussed above). Even if one could argue that negotiators were somehow confused as to the meaning of the treaty they signed, this begs the question of whether WTO panels should be imposing obligations in cases where there is such an obvious disconnect between what was understood to be agreed to by different parties. One of the architects of the WTO’s DSU, Frieder Roessler, has also criticized the Appellate Body, which in his view “shifted decision-making authority from the political to the judicial organs of the WTO, and consequently changed the negotiated balance in the WTO.” In other words, a consensus-based approach would be more appropriate in such situations, so that all parties can actually agree to the obligations they undertake.

Of course, any review of panel decisions will be somewhat subjective. Here, simply as a limiting and analysis device, we consider primarily decisions relating to implementation of trade remedy laws. Many will argue that some (or all) of these decisions were soundly based and that the list and analysis demonstrates the authors’ bias. Generally, we will allow the criticisms to stand on their merits and disagreements concerning particular cases will have to be deferred until more detailed analyses of each decision is made. Yet, several points are worth noting.

First, others approaching this issue without the authors’ perceived “bias” have come to the same conclusion. For example, Claude Barfield of the American Enterprise Institute has done extensive work in this regard.

Second, the growing number of cases that raise serious problems demonstrates the degree of the problem. Even if the authors are wrong in one, or two, or even three cases, the problem is serious. Thus, after a recent decision in EC—Sardines, a number of WTO Members publicly criticized the DSB for judicial activism and creating rights and obligations in violation of article 3.2 of the DSU.

39. In this regard, one must be somewhat sympathetic to the EC’s position on Beef Hormones. See infra note and accompanying text. Without pretending to analyze the legal aspects of the myriad beef hormone decisions, accept for the sake of argument that the weight of the scientific evidence does not support the ban. Accept also that under the terms of the agreement, the EC practices are clearly violative. At the same time, as a matter of participatory democracy, there seems to be little question that the people of Europe would have never agreed to the terms of the SPS had they known that they would not be able to restrict the importation of hormone-laced beef, nor to even label it as imported. Equally, if asked, the people of Europe (and for that matter, Japan, Canada, and probably the United States) would likely have insisted that any rules on SPS be subject to some degree of precautionary principle. Others have equally pointed to concerns with phyto-sanitary concerns as a major problem with the WTO. See, e.g., Peter Hardstaff, The Precautionary Principle, Trade and the WTO, in Discussion Paper for the European Commission Consultation on Trade and Sustainable Development (2000).


41. Barfield, supra note 15. See also Tarullo, supra note 9; The Federal Trust for Education & Research, Enhancing the WTO’s Dispute Settlement Understanding: A Working Group Report (Dec. 5, 2002) (calling, inter alia, for greater deference to national agency action).

Third, the results are consistent with the theory discussed above, and warnings that predated the decisions.\(^4\)

Fourth, other work in areas outside of the unfair trade statutes shows similar results. For example, referencing Raustiala, Claude Barfield of the American Enterprise Institute wrote that WTO panels and the Appellate Body have incorporated "otherwise nonbinding international standards (e.g., food safety standards)—which themselves are evolving—into the binding WTO dispute settlement system."\(^4\) At the ABA conference giving rise to this paper, John Kingery of Crowell & Moring presented an extensive discussion of instances in which panels exceeded the scope of the WTO agreements by seeking to interpret customary international law as authoritative in the WTO context in cases not involving the trade remedies. Also, a pair of Canadian trade lawyers recently wrote a critique of the WTO's judicial activism concentrating their analysis primarily on non-trade remedy cases.\(^4\) While a full review of such concerns is beyond the scope of this paper, they certainly provide additional evidence that activist panelists are abusing the system. Following is a non-exhaustive discussion of areas in which trade panels have engaged in judicial activism (to undermine the negotiated agreements).

A. STANDARD OF REVIEW

One of the key components of any adjudicatory system is the standard that the reviewing body should utilize in deferring to reasonable factual determinations rendered by the relevant investigating authorities. The primary considerations for deference to factual determinations by investigative authorities include the technical expertise of the investigators,

\(^{43}\) James Bacchus, of the WTO's Appellate Body, has claimed that panel and Appellate Body reports do not create new obligations:

[The fact that the meaning that one member may happen to see, however clearly, for a particular word or provision or obligation does not happen to prevail after a full and fair hearing . . . does not mean that the DSB has either added or diminished the rights and obligations of that member that are provided in the covered agreement.]

James Bacchus, Appellate Body Chair Dismisses Charges of Exceeding Mandate, INSIDE U.S. TRADE (May 31, 2002). Equally, the fact that a member of the AB says that the AB has not added to or diminished obligations does not make it so. Certainly, when Mr. Bacchus was a Member of Congress, he would have agreed that when U.S. negotiators told Congress that a certain result had been achieved, that prior GATT decisions supported that result, that other countries outside of dispute settlement conceded that result, that the texts supported or, at least, did not contradict that result . . . the WTO could not impose the result. But, as documented below, that has happened repeatedly. See also Hudec, supra note 7, at 22–24; Wolff & Ragosta, supra note 4, at 703; cf. Statement of Administrative Action for the Uruguay Round Agreements Act, reprinted in H.R. Doc. No. 103–316, 656, 1012 (1994) [hereinafter SAA]; 19 U.S.C. § 3512 (a)(1), (2) (making clear that Congressional legislation—and, thus, Congress' understanding—controls U.S. law and administrative action).

Of course, Mr. Bacchus' position makes it difficult for him to discuss particular cases. Yet, his public statements in support of the WTO and increased trade liberalization themselves raise serious questions about the independence of the WTO "judiciary." See, e.g., James Bacchus, The Bicycle Club: Affirming the American Interest in the Future of the WTO, Remarks to the Washington International Trade Association (Nov. 12, 2002) (manuscript on file with the authors). After all, setting aside problems with the cutely-named but unproven bicycle trade theory, claiming that everyone at the WTO supports greater trade liberalization, id., misses the point. We would, no doubt, be surprised if Chief Justice Rehnquist gave a speech promoting greater deregulation—while everyone in theory supports deregulation, complicated questions of costs, public health, participatory democracy, environmental impact, cost/benefit, etc. must be answered before deregulation occurs, and it would simply be inappropriate for Chief Justice Rehnquist to pontificate in this manner.

\(^{44}\) BARFIELD, supra note 15, at 45.

\(^{45}\) See Wilson & Starchuk, supra note 35.
the ability of the investigating authority to review the evidence firsthand (through written submissions or oral hearings), the investigating authority’s familiarity with the governing statute, the inefficiencies involved in having a de novo review of factual issues, and the accountability of the administering agency to the public (including democratic controls).

The importance of such considerations is naturally heightened in the international context, and in the area of trade remedies, given that internationally composed panels are reviewing detailed factual determinations administered by national government agencies, which inherently reflect political, social, and economic choices made by duly elected government officials. As Professor Jackson rightly points out, the standard of review question presents practical problems for trade negotiators in dealing with conflicting views over the sharing of power, as well as from a theoretical perspective by raising important questions about the very nature of international institutions and the need for checks and balances.

Given the factually intensive nature of trade remedy proceedings conducted by the United States’ administering agencies (investigations in antidumping and countervailing duty proceedings frequently take over a year, with multiple questionnaires and responses and on-site verification of data, and often scores of thousands of pages on the record), this was undoubtedly a key element for the United States in the Uruguay Round negotiations concerning dispute settlement.

Thus, the United States made negotiation of an appropriate standard of review a key element of any agreement; indeed, the standard of review question was on the short list of items deemed to be “deal breakers” for the entire negotiations. During the Uruguay Round negotiations, the United States made several proposals that would implement a restrictive standard of review to WTO dispute resolution.

Ultimately, the Members agreed to several instruments reflecting the appropriate standard of review for WTO dispute resolution. First, article 17.6(i) of the Antidumping Agreement stipulates:

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. ...

Article 17.6 of the Antidumping Agreement is accompanied by two relevant ministerial documents, also negotiated during the Uruguay Round. The first, a Ministerial Declaration on Dispute Settlement, provides, “with respect to 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

48. Id. at 135.

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Subsidies and Countervailing Measures, the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures.51

The second, a Ministerial Decision on article 17.6 provides: "The standard of review in paragraph 6 of Article 17 of the Agreement on Implementation of article VI of GATT 1994 shall be reviewed after a period of three years with a view to considering the question of whether it is capable of general application."52

The fact that the United States negotiated for these stipulations (presumably giving up other concessions to do so) has not stopped WTO panels from reviewing national investigating authorities essentially de novo—and thus ignoring the negotiated-for provision. The detrimental effect that such an approach would have on the dispute settlement process as a whole was predicted at the time of passage of the Uruguay Round Antidumping Agreement (URAA):

The United States has expressed the view in the GATT, and will maintain the view in the WTO, that in making its assessment of the case a panel should refrain from opining on complex, unsettled issues of domestic law. Panels that base their reports on opinions purporting to resolve such issues risk raising questions about the immediate and continued validity of their reports and may undermine confidence in the dispute settlement process.53

Nevertheless, more often than not, the valuable contribution made by investigating agencies to the dispute settlement process is largely ignored by WTO panels that are all too willing to allow parties to re-litigate at the WTO key factual and legal interpretations that had been properly rejected by national investigating authorities. Two examples are illustrative.

Perhaps the clearest example was in United States—Antidumping and Countervailing Measures on Steel Plate from India, where the panel concluded that the U.S. rejection of information submitted by the Steel Authority of India (SAIL) in a Title VII investigation was improper, even though substantially all of the information needed for the calculation of SAIL's dumping margin was not submitted timely and determined by the U.S. Department of Commerce (Commerce) after extensive on-site investigation (beyond both the purview and the ability of the WTO panelists), to be virtually completely unusable.54 During the extensive investigation, which included the issuance of multiple questionnaires, verification, etc., Commerce had determined that information submitted by SAIL suffered from numbers of infirmities:

[At] verification the Department discovered that SAIL failed to report a significant number of home market sales; was unable to verify the total quantity and value of home market sales; and failed to provide reliable cost or constructed value data for the products. . . . SAIL was provided with numerous opportunities and extensions of time to fully respond to the Department's

53. SAA, supra note 43, at 1012.

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original and supplemental questionnaires, as well as ample time to prepare for verification. However, even with numerous opportunities to remedy problems, SAIL failed to provide reliable data to the Department in the form and manner requested.

... we note that as a result of the widespread problems encountered at verification, SAIL’s questionnaire responses could not be verified.

... we gave SAIL numerous opportunities and extensions to submit complete and accurate data. As stated in the Preliminary Determination, SAIL’s questionnaire and deficiency questionnaire responses were found to be substantially deficient and untimely for purposes of calculating an accurate antidumping margin. ... However, subsequent to the preliminary determination we issued two additional questionnaires and further extensions to SAIL presenting it yet additional opportunities to submit a complete and accurate electronic database. Nevertheless, the Department found at verification that the final submission was again substantially deficient ... 

Nonetheless, in what the WTO panel itself labeled as a "highly fact specific issue," the panel determined that the U.S. agency had acted improperly in concluding that the numerous flaws in SAIL’s data submissions caused the information to be on the whole unreliable and inadequate to produce an accurate dumping margin. Such a conclusion, of course, properly resides with Commerce—the agency best equipped in terms of time, access to information, personnel, etc. and most experienced in administering the U.S. antidumping laws.

In another such example, the Appellate Body failed to allow reasonable discretion in United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, ruling that the United States violated article 6.8 of the Anti-Dumping Agreement by refusing to accept information from a Japanese respondent after the administrative deadline for submission of such information had passed.

Another case, EC—Beef Hormones, although not a trade remedies case, provides interesting learning concerning the trade remedy standard of review. There, both the panel and Appellate Body ruled that the EC restrictions on the importation of certain hormone treated beef, ostensibly instituted because the EC believed that the imported products posed a health risk, were contrary to the SPS Agreement. The panel, after declaring that the as-

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55. Certain Cut-To-Length Carbon-Quality Steel Plate Products from India, 64 Fed. Reg. 73,126, 73,127 (Dec. 29, 1999) (final det.).
56. Antidumping Report, supra note 54.
57. The U.S. Court of International Trade has labeled the Commerce Department the "master of antidumping law" based on the agency’s technical expertise and broad experience. See Daewoo Elec. Co. v. United States, 6 F.3d 1511, 1516 (Fed. Cir. 1993) (quoting SCM Corp. v. Silver Reed Am., Inc., 753 F.2d 1033, 1039 (Fed. Cir. 1985)).
assessment of risk to health required under the SPS Agreement necessarily involved a "scientific examination of data and factual studies," sixty examined such scientific evidence sua sponte, and concluded that the EC had not presented scientific results justifying the import ban.

Significantly, even though this investigation arose under the SPS Agreement, and was not covered by the stringent standard of review of article 17.6 of the AD Agreement, upon appeal to the Appellate Body, the EC argued that the panel failed to afford the appropriate level of deference to the EC's conclusion that the ban on hormone treated beef was necessary to avert a health risk. The EC argued that "all highly complex factual situations" require a "deferential 'reasonableness' standard" of review.

The Appellate Body, even without the application of AD article 17.6, stated that it was inappropriate for panels to conduct a de novo review of the findings of national authorities but noted that "total deference" was also not warranted. In the view of the Appellate Body, the appropriate standard of review consists of a panel's "objective assessment of the facts," pursuant to article 11 of the DSU. In explaining a panel's duty under article 11, however, the Appellate Body did not discuss the amount of deference afforded the findings of national authorities, but rather, assumed that the article 11 obligation not only permits, but in fact requires, a panel to affirmatively make factual findings: "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." sixty-four

In general, panels are ill suited to make factual findings of this nature and certainly must instead defer to any reasonable finding of expert agencies based on voluminous records and years of technical experience when the provisions of AD article 17.6 are at issue. The factual information received by panels is a small fraction of the administrative record, and is generally subject to the filtering of the parties to the dispute through briefs and attachments. Panels do not have the time or expertise to develop, much less analyze, a thorough official record of evidence. Panels do not have the power to order discovery of key documents; facts are generally not independently verified, etc.

The Appellate Body then went on to explain the deference afforded to a particular panel's factual findings, but not the findings of national investigating authorities.

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 their 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.

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61. Id. ¶ 9.1.
63. Id. ¶ 113.
64. Id. ¶ 133 (emphasis added).
65. See Hudec, supra note 7, at 39.

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Oddly, the AB has not seemed to mandate that the same deference be given by panels to administering agencies.67

The U.S. Congress has duly noted the inappropriate lack of deference exhibited by WTO panels towards national investigating authorities. As bluntly stated in the Senate Finance Committee's report accompanying “fast track” Trade Promotion Authority:

WTO panels and the Appellate Body have ignored their obligation to afford an appropriate level of deference to the technical expertise, factual findings, and permissible legal interpretations of national investigating authorities. . . . The record compiled so far in reviews of antidumping duty, countervailing duty, and safeguard measures reflects a bias against import relief . . . [and] is particularly troubling, because the right to act against dumped, subsidized, and surging imports is a fundamental part of the multilateral trade regime. . . . Foreign governments' successful use of dispute settlement procedures to erode bargained-for trade remedy protections negatively affects American firms, workers, and farmers and may jeopardize public support for a liberal trading system.68

Such stern warnings are likely to be wholly ineffective absent more aggressive Congressional oversight. Yet, it is highly relevant that a growing number of observers are voicing their concern about panels' disregard of the proper standard of review, especially in trade remedy cases where the standard of review is particularly deferential.69

Commentators may point out in defense of WTO decisions that, other than article 17.6 of the Antidumping Agreement and related Ministerial documents (discussed in more detail below), and article 11 of the DSU (discussed above), the WTO agreements do not contain specific language directing panels and the Appellate Body to an appropriate standard of review.70 Yet, under pre-WTO GATT decisions, when faced with the prospect that judicial activism would be blocked, panels viewed it as normal international procedure that there would be reasonable deference to national authorities even though no specific provisions in agreements mandated such deference.71 Thus, Roessler, the former head of the GATT Legal Affairs Division, sounded a warning to WTO panels on deference to national trade remedy laws and determinations:

Many decisions on trade policy matters that Members of the WTO take under their domestic law—such as the decision to impose safeguard measures or to grant adjustment assistance—are taken by specialised agencies with broad discretion. Just as the domestic courts respect the competence and discretionary powers of such agencies, WTO panels should respect the

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67. Professor Tarullo notes tellingly that the “most explicit application of the [art. 17.6] standard is found where the arguments of the importing country seem particularly weak, and thus quite clearly do not offer a ‘permissible’ reading of the text.” Tarullo, supra note 9, at 147. In other words, panels pay lip-service to the standard of review when they can do so without interfering with their judicial activism.


69. See, e.g., Tarullo, supra note 9; Barfield, supra note 15; Raustiala, supra note 5.


competence and discretionary powers of the political bodies established under the WTO agreements.72

Significantly, U.S. negotiators are now struggling with the question of whether to seek clarification of at least the trade remedies standard of review in the Doha Round of negotiations. Indeed, the recently passed legislation granting the President Trade Promotion Authority requires that such clarification be sought.73 There is, reportedly, a strong feeling among many that even if the standard is, again, clarified, panels will simply pay lip-service to the newly clarified standard and proceed to do what they want. Thus, the analysis suggests that no “chits” should be expended in correcting this problem (and “paying twice” for what should have been implicit in the nature of international dispute settlement). Given the performance of the DSB to date, this concern is understandable, but a suggestion that the United States should not seek a clarification is not. After all either panels will abide strictly by the standard of review if clarified in the agreements or they will not. If the latter is true as many apparently believe, then honesty (not to mention interest) and honor dictates that the United States seeks an end to the experiment of binding WTO dispute settlement as currently formulated. The alternative—continued binding dispute settlement recognizing the futility of providing direction to binding and uncontrollable panels—would evidence a sad charade. As Professor Tarullo notes: “To disregard a rule for dispute settlement that was plainly negotiated, and at least formally agreed, is to call into question the entire basis for positive international law.”74 The United States should insist upon clarification.

B. STANDARD OF REVIEW IN COUNTERVAILING DUTY CASES

A related problem arises with respect to panel decisions on the applicability of the article 17.6 (of the Antidumping Agreement) standard of review to countervailing duty cases. Having insisted that such a standard be incorporated expressly in the Antidumping Agreement (which, as a practical matter, was far more hotly contested than the Subsidies and Countervailing Measures agreement in the Uruguay Round negotiations), after the Geneva ministerial, which nominally concluded the Round, U.S. negotiators realized that the same standard, while clearly necessary and appropriate, had not been expressly incorporated in the SCM. Thus, prior to signing the final agreements, the United States insisted that this be corrected.

Recognizing the rationality and force of the U.S. claim the other Members agreed. Before signing the Marrakesh Agreements, the United States obtained a Ministerial Declaration confirming “the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures.”75 As the Antidumping Agreement lays out a clear standard of review in article 17.6, it would seem that a resolution of CVD cases that is “consistent” with the method used to decide anti-dumping disputes would provide for the use of that standard. The Administration’s and Congress’ understanding is expressed in the Statement of Administrative Action (SAA): “A Ministerial Declaration accompanying the Uruguay Round Agreements provides for the ‘consistent resolution’ of disputes arising from

72. Roessler, supra note 40.
74. Tarullo, supra note 9, at 171.
75. Declaration on Dispute Settlement, supra note 51.

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the imposition of antidumping and countervailing duty measures through the application of the Article 17.6 standard of review to both types of disputes.\textsuperscript{76}

In \textit{U.S.—Lead and Bismuth Carbon Steel Products}, however, the DSB was faced with this very question. The EU challenged the United States' application of its countervailing duty law against subsidized lead bar imports from the United Kingdom, arguing that the privatization of a state-owned manufacturer not only reduced the likelihood of future subsidies, but also extinguished prior subsidies. The SCM Agreement did not explicitly resolve the issue, and the only provision that expressly discusses change-in-ownership methodology appeared to favor the U.S. position that privatization does not extinguish prior subsidies to the state-owned enterprise.\textsuperscript{77}

Relying on these and other arguments, the United States further asserted that the EU has a heavy burden under the appropriate standard of review. The United States argued that, by virtue of the Ministerial Declaration, the article 17.6 standard of review is applicable to countervailing duty proceedings as well as antidumping proceedings.\textsuperscript{78} The United States pointed out that this was particularly appropriate given the EC's argument in \textit{Beef Hormone} (discussed above) where, even without the applicability of the Ministerial Declaration, the EC argued for the rationality of a deferential standard in international dispute settlement.

Yet, the Appellate Body, confirming the panel's contention that the article 17.6 standard should not apply equally to countervailing duty cases, reasoned that:

\begin{quote}
By its own terms, the Declaration does not impose an obligation to apply the standard of review contained in Article 17.6 of the Anti-Dumping Agreement to disputes involving countervailing duty measures. . . . The Declaration is couched in hortatory language; it uses the words "Ministers recognize." . . . It does not specify any specific action to be taken . . . it does not prescribe a standard of review to be applied.\textsuperscript{79}
\end{quote}

Here, to say that the Declaration is couched in hortatory language is to say that it means nothing at all, despite the fact that it was a key result of negotiations on which the United States and other nations relied. Moreover, language such as "recognize" is commonly used in international texts to denote agreement. The Appellate Body does not explain what the Ministerial Declaration means if not the applicability of the AD standard. Nor is there any

\begin{footnotesize}
\textsuperscript{76} SAA, \textit{supra} note 43, at 818.

\textsuperscript{77} Article 27.13 of the SCM Agreement provides:

The provisions of Part III [WTO challenges to subsidies as distinguished from countervailing duty actions] shall not apply to direct forgiveness of debts, subsidies to cover social costs, in whatever form, including relinquishment of government revenue and other transfer of liabilities when such subsidies are granted within and directly linked to a privatization programme of a developing country Member, provided that both such programme and the subsidies involved are granted for a limited period and notified to the Committee and that the programme results in eventual privatization of the enterprise concerned.

Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, WTO Agreement, Annex 1A, in \textit{Legal Texts—Results of the Uruguay Round of Multilateral Trade Negotiations} 231 [hereinafter SCM Agreement].


\end{footnotesize}
logical reason to apply different standards of review in antidumping and countervailing duty proceedings. In the end, the WTO DSB simply decided, regardless of the Members’ decision in the Ministerial Declaration that no special deference was called for.

C. CAUSATION STANDARD FOR INJURY DETERMINATIONS

The Japan—Hot-Rolled Steel and Thailand—Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel H-Beams from Poland decisions on the causation standard for injury findings also provide good examples of judicial activism by WTO panels. In Japan—Hot Rolled Steel, criticizing the earlier GATT case of U.S.—Atlantic Salmon, the Appellate Body held that investigating authorities must separate and distinguish the harm caused by each factor contributing to a domestic industry’s injury, rather than simply determining that material injury found to exist is caused, at least in material and substantial part, by unfairly traded imports. “This requires a satisfactory explanation of the nature and extent of the injurious effects of the other factors, as distinguished from the injurious effects of the dumped imports.”

Given the potentially high number of major and minor “other factors,” this new standard appears effectively to impose a nearly impossible duty on the responsible national authorities. Not only does the Appellate Body seem to require national authorities to perform a nearly impossible analysis—one that specifies the precise amount of injury caused by each factor contributing to a domestic industry’s injury—it also overturned prior GATT cases on which Members reasonably relied in signing the Uruguay Round agreements and legislated new obligations not otherwise agreed to by the Members.

By contrast, in both cases concerning U.S. duties on Atlantic salmon (AD and CVD), a GATT panel ruled that the ITC was not obligated to identify the extent of injury from other factors or to somehow “isolate the injury caused by these factors from the injury caused by the imports . . . .” Analyzing the text of the Tokyo Round Subsidies Agreement, it had noted that article 6:4 did not contain a requirement of “identification of the extent of injury caused by these possible other factors,” but that it merely required that “injuries caused by other factors not be attributed to the imports under investigation.” The fact that the International Trade Commission (ITC) acknowledged that, “other factors may have contributed,” but still decided that the “imports from Norway . . . had contributed to price declines in the United States,” was sufficient for the panel to uphold the ITC causation

80. The causation of injury standard has been termed “the most important area of anti-dumping practice” on the basis that it is most often the decisive determination in antidumping duty proceedings. Horlick & Clarke, supra note 49, at 315.
82. Report of the Appellate Body on Hot-Rolled Steel Products from Japan, supra note 58.
84. Countervailing Duties on Salmon from Norway, supra note 83, ¶ 318; Anti-dumping Duties on Salmon from Norway, supra note 83, ¶ 552.
Even without an express standard of review, an appropriate and reasonable standard was applied.

Significantly, the relevant terms of the Uruguay Round agreements cannot justify such a radical departure from these prior GATT panel conclusions. For example, with respect to antidumping, the Tokyo Round Antidumping Code provided:

It must be demonstrated that the dumped imports are, through the effects [as set forth in paragraphs 2 and 3 of this Article] of dumping, causing injury within the meaning of this Code. There may be other factors which at the same time are injuring the industry, and the injuries caused by other factors must not be attributed to the dumped imports.\(^6\)

The same provision in the WTO Antidumping Agreement now reads essentially the same but the sentence highlighted below has been added:

It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, \textit{inter alia}, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.\(^7\)

The WTO SCM Agreement contains similar non-material changes from the Tokyo Round Agreements.\(^8\)

Thus, there is nothing that has changed in the text of the agreements to suggest that the causation standard reasonably relied upon by the Members itself had been materially or fundamentally altered during the Uruguay Round negotiations. U.S. negotiators and legislators confirmed this during the passage of the URAA. The SAA specifically provides that, "[a]rticle 3.5 of the Antidumping Agreement and 15.5 of the Subsidies Agreement do not change the causation standard from that provided in the 1979 Tokyo Round Codes."\(^9\)

The URAA SAA explained that "[t]he GATT 1947 Panel Report in the Norwegian Salmon case approved U.S. practice as consistent with the 1979 Codes. The panel noted that the [U.S. International Trade] Commission need not isolate the injury caused by other factors from injury caused by unfair imports."\(^9\) Yet the Appellate Body decided otherwise,

\(^5\) Counter-calling Duties on Salmon from Norway, supra note 83, ¶ 323; Anti-dumping Duties on Salmon from Norway, supra note 83, ¶ 557.

\(^6\) Agreement on Implementation of Article \(VII\) of the General Agreement on Tariffs and Trade, Apr. 12, 1979, art. 3(4), GATT B.I.S.D. (26th Supp.) at 171, 174 (1980) \(\text{[hereinafter Antidumping Code]}\) (citations included in text). Such factors include, \textit{inter alia}, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology, and the export performance and productivity of the domestic industry.

\(^7\) Anti-dumping Agreement, supra note 50.

\(^8\) Cf. Agreement on Interpretation and Application of Articles \(VI\), \(XVI\), and \(XXIII\) of the General Agreement on Tariffs and Trade, GATT B.I.S.D. (26th Supp.) art. 6(4), at 56, 65 (1980), \textit{with SCM Agreement, supra} note 77, art. 15.5.

\(^9\) SAA, supra note 43, at 851.

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this time ignoring GATT precedent and according no deference to the agency determination, and creating a significant new restraint never agreed upon by the Members.

Simply put: It has been the U.S. practice, accepted by GATT panels and shared by other Members that national investigating authorities would not have to separate, distinguish, and weigh harm caused by each potential factor relating to a domestic industry's material injury. They would simply need to find that material injury exists and that unfairly traded imports are among the material causes, while taking into account other possible causes.

While some U.S. court decisions have required that ITC decisions concerning alternative causes be supported by substantial evidence and otherwise in accordance with the law (the statutory standard of review), U.S. courts' criticisms of the ITC are much less activist than the newly-minted requirements sought to be imposed in Japan—Hot Rolled Steel, and certainly cannot be said to justify the DSB's actions. For instance, in Gerald Metals, Inc. v. United States, the Court of Appeals for the Federal Circuit criticized the ITC for not adequately addressing the "causal nexus" between dumped imports from the Ukraine and injury to the domestic industry. The court cautioned:

Determining the accurate causation of a disrupted market expectation . . . requires careful economic evidence and analysis. The antidumping statute requires that the Commission consider all relevant economic factors "within the context of the business cycle and conditions of competition that are distinctive to the affected industry."

. . . . [T]he statute requires adequate evidence to show that the harm occurred "by reason of" the . . . [dumped] imports, not by reason of a minimal or tangential contribution to material harm caused by . . . [dumped] goods.91

Such admonitions however are far less reaching than the decision in Japan—Hot Rolled Steel, which questions not merely the care and completeness of the agency's review of the record evidence, but rather the very standard under which the evidence is to be evaluated.

Separately, the Thailand—Steel H-Beams from Poland panel held that even after concluding that evidence relating to several of the fifteen injury factors listed in the Antidumping Agreement demonstrates material injury caused by dumping, an investigating authority is required to make specific findings concerning the other factors, and to supply a "persuasive explanation" of how evaluation of each one supported an affirmative determination.94 In essence, the panel sought to turn the Antidumping Agreement's list of relevant factors into something it was never intended to be—a series of fifteen hurdles over which an authority must jump before making an affirmative finding of causation of injury. The task outlined by the panel, if taken at face value, is, again, virtually an impossible one. More significantly, the WTO panel here engaged in legislating, not judicial decision-making. It created new obligations for the WTO Members without their consent.

D. The Practice of Zeroing in Antidumping Cases

In EC—Bed Linen, the WTO ruled that the common practice of "zeroing" instances of

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93. Id. at 721-22.
non-dumping when calculating average dumping margins was impermissible.95 "Zeroing" refers to the process of not offsetting dumped sales with sales that are not dumped. The reason for the practice is simple—to allow dumping in selected segments of the market (or during selected periods), because un-dumped sales elsewhere or at other times would permit the targeting of customers, and the use of dumping to gain market share.

Whatever the merits of the practice, it was certainly not the understanding when the Uruguay Round agreements were signed that it was prohibited, as major users of the anti-dumping law all engaged in the practice of "zeroing" and none modified their practice in light of the agreements.96 In fact, particular proposals to eliminate zeroing during the Uruguay Round negotiations were rejected.97

More to the point, the Antidumping Agreement cited by the WTO panel and Appellate Body do not contain any implicit or explicit renunciation by WTO Members of the right to use zeroing in AD calculations. Article 2.4.2 of the Antidumping Agreement requires only that weighted average normal value be compared with weighted average export prices for "comparable" transactions. "Article 2.4.2 provides no guidance as to how the 'dumping margins' determined for individual product types should be combined in order to calculate an overall rate of dumping for the product under investigation."98 While some might say this leaves the issue ambiguous, two compelling reasons demonstrate the panel's over-reaching.

First, generally, if a sovereign has failed to agree not to exercise particular authority, that authority remains. On appeal to the Appellate Body, the EC argued that the panel did not determine that the EC's practice of "zeroing" was an impermissible interpretation of article 2.4.2, a finding necessitated under the standard of review applicable to provisions of the Antidumping Agreement.99 The Appellate Body, however, assumed that the panel made this finding of "impermissibility" based on its determination that the practice of "zeroing" was inconsistent with article 2.4.2.100

Second, GATT panel decisions (adopted and unadopted) had found that the practice of zeroing was not inconsistent with the 1979 Anti-Dumping Agreement.101 In EC—Cotton Yarn, the GATT panel specifically determined that "zeroing" did not arise at the point at which the actual determination of the relevant prices was undertaken," but that it "was undertaken subsequently to the making of allowances necessary to ensure price comparability in accordance with the obligation contained in the second sentence of Article 2:6.102
Absent a very clear basis to find otherwise, these GATT decisions should have been understood to reflect the intent of the Members. The WTO panels, in their Platonic judgment, simply decided that the Members must have agreed to change the law despite the lack of clear requirement, the contrary decisions in prior GATT cases, and the evidence contained in the negotiating history of the WTO agreements.

E. ANTIDUMPING MARGINS FOR EXPORTERS NOT INDIVIDUALLY INVESTIGATED

In *Japan—Hot-Rolled*, the Appellate Body also held that investigating authorities may not include among the company-specific dumping margins averaged to establish an antidumping duty deposit rate for companies not individually investigated, any company-specific margin based even in part on “facts available.” (“Facts available” means the best information the investigating authority can get, usually, but not always, because the firm charged with dumping refuses to supply any information or supplies clearly erroneous information.)

Again, the constraint imposed by the WTO DSB simply has no basis in the text of the Antidumping Agreement, which expressly allows weight-averaging, based on numbers provided “by other exporters or producers” company specific margins. The code expressly recognizes the use of facts available. There is not a hint in the text that these two provisions cannot be read together. Moreover, often (and *Japan—Hot-Rolled Steel* is a good example) there are no company-specific margins that are 100 percent derived from the respondent’s own information. In such a situation, the investigating authority, under the new obligations created by the Appellate Body, is left without any means of establishing an “all others” margin. Clearly this was not intended, but demonstrating not only judicial activism but a lack of familiarity with the operation of the laws, the Appellate Body was undeterred. Lack of practical knowledge and judicial activism make a dangerous mix.

F. COUNTERVAILABILITY OF SUBSIDIES AFTER CHANGE IN OWNERSHIP (PRIVATIZATION)

A recent Appellate Body decision, *United States—Countervailing Duties on Certain EU Products*, vastly expands the erroneous, albeit ostensibly limited, ruling in the earlier *Lead and Bismuth* decision and essentially holds that an investigating authority must always excuse (i.e., may not countervail) pre-change-in-ownership subsidies.

The economic fallacy of the WTO decision, although clear, is not alone in the issue, and a full explication of the privatization issue will have to await a future article. The point here is that the SCM Agreement contains no such rule. The only mention of privatization in the SCM Agreement, article 27.13, gives special and differential treatment to developing

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103. Anti-dumping Agreement, supra note 50, art. 27.13.
104. Id. art. 6:8, SCM Agreement, supra note 77, art. 12.7.
country members by creating an exception providing that certain types of subsidies provided by a developing country during privatization is not actionable at the DSB after privatization. The only reasonable corollary as the United States pointed out is that the general rule under the SCM Agreement is that subsidies provided prior to privatization are actionable after privatization, that is, are allocable to the privatized company's production. With no other textual provision on privatization, this appeared to be compelling evidence.

The initial panel in the Lead Bar decision refused to consider article 27.13 because it conflicted with its own notion of how pre-privatization subsidies should be treated, stating:

We are particularly hesitant [to rely on Article 27.13] given that the conclusion we are asked to draw—namely that there is no requirement under Part V of the SCM Agreement for "benefit" to be re-identified or re-measured at some time subsequent to the initial bestowal of the "financial contribution"—is contrary to what we consider to be the proper interpretation of the term "benefit."108

In other words, the panel ignored a textual provision because its obvious implications were inconsistent with the added requirement that the panel had (wrongly) implied from the definition of "benefit." While agreeing that the subsidies were not actionable in that particular case, the AB in Lead Bar issued what seemed to be a very narrow ruling and avoided altogether the issue of article 27.13.109

The second panel, however, ignored the narrow reading possible under the AB's first decision and rejected the United States' reasonable interpretation, ignoring altogether article 27.13, the only provision referring explicitly to privatization.110 The panel even went a step further and held that section 1677(5)(F) of the Tariff Act of 1930 is itself inconsistent with the SCM Agreement because it requires the U.S. Department of Commerce to apply a methodology where the benefit from a prior financial contribution is not systematically found to be eliminated solely by virtue of an arm's length sale for fair market value privatization.

The United States had argued in the first case that nothing about the sale of a corporation's stock did anything to eliminate the market distortion caused by the subsidy—the same steel was made on the same subsidized equipment, with the same subsidized lower debt load, and the same workers benefiting from subsidized training, etc., the day before and after the privatization. There, the AB chose to ignore the market distortion and admonished that the current producer must be shown to have received a benefit. Thus, in the second case, the United States reasoned that if the post-sale entity was the same person that had originally received the subsidy (in terms of general business operations, production facilities, assets and liabilities, and personnel, for example), then the AB's requirement was met.111 The United States stressed that this interpretation was consistent with basic doctrines of successor liability in corporate law applied universally in developed and developing nations—without which regulatory liability for environmental or health and safety harm

108. Report of the Panel on Hot-Rolled Lead, supra note 78, ¶ 6.76. The panel did not explain how this refusal comported with the Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(1), 1155 U.N.T.S. 331, which provides that a treaty shall be interpreted in accordance with "the ordinary meaning to be given to the terms of the treaty in their context."


violations could be easily avoided—and that there was absolutely no indication that the SCM intended to deviate from such principles. The AB, however, relying only on provisions of the SCM Agreement dealing with the conduct of administrative reviews, rejected the U.S. argument.

In doing so, the AB promulgated a new rule under which it must be assumed that a sale of a company at fair market value “usually” extinguishes the remaining part of a benefit bestowed by a non-recurring financial contribution. The AB simply invented the following standard, and boldly asserts: “This is an accurate characterization of a Member’s obligations under the SCM Agreement” without citing any provision of the SCM Agreement in support:

We understand the Panel to be stating that privatization at arm’s length and for fair market value privatization presumptively extinguishes any benefit received from the non-recurring financial contribution bestowed upon a state-owned firm. The effect of such a privatization is to shift to the investigating authority the burden of identifying evidence which establishes that the benefit from the previous financial contribution does indeed continue beyond privatization. In the absence of such proof, the fact of the arm’s-length, fair market value privatization is sufficient to compel a conclusion that the “benefit” no longer exists for the privatized firm, and, therefore, that countervailing duties should not be levied.

Tellingly, the EC’s own state aids rules make clear that privatization does nothing to the actionability of subsidies; prior subsidies are deemed as automatically continuing, in full, to the benefit of the purchaser. Moreover, the history of the adoption of EC CVD regulations to implement the Uruguay Round demonstrates that privatizations do not change the countervailability of prior subsidies. Clearly this was the U.S. understanding at the time:

Section 771(5)(F) is being added to clarify that the sale of a firm at arm’s-length does not automatically, and in all cases, extinguish any prior subsidies conferred. Absent this clarification, some might argue that all that would be required to eliminate any countervailing duty liability would be to sell subsidized productive assets to an unrelated party. Consequently, it is imperative that the implementing bill correct and prevent such an extreme interpretation.

Such contemporaneous action by both the EC and the United States is further evidence of the meaning of the SCM terms. This evidence, too, was completely ignored by two WTO panels and two Appellate Body decisions. Finally, in the context of China’s accession to the WTO, the EC insisted on limiting China’s rights to claim the protection of article 27.13. This clearly indicates the EC’s understanding that pre-privatization subsidies continue to be actionable. Again, this was simply ignored by the DSB.

112. Id. ¶ 8.1(d).
113. Id. ¶ 147.
114. Id. ¶¶ 126–27, 138.
115. Id. ¶ 126.
117. AISI Submission, supra note 107, ¶ 148.
118. SAA, supra note 43, at 928.

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With respect to the issue of whether the statute, as such, violated the SCM Agreement, the AB nominally sided with the United States, noting that section 1677(5)(F) does not "automatically" require the Commerce Department to take action it found to be inconsistent with WTO rules. This is a curious "victory," however. The legislative history of the statutory provision, and the Administration's repeated statements in court about its meaning, make clear that the AB's decision is wholly inconsistent with the statute. Yet, by seeming to uphold the statute, the AB was able to strike down a large number of U.S. cases while seeking to avoid congressional oversight.

Whatever the merits of treating subsidies after a privatization, the issue properly presented is whether the Members agreed to cease countervailing in such a circumstance given the terms of the code. Again, setting aside the obvious legal errors, it is simply fantasy to say that the United States agreed to such a holding.

G. Exclusive Remedies

Recently, a panel held that the Continued Dumping and Subsidy Offset Act of 2000 (CDSOA), also known as the Byrd Amendment after its chief Senate co-sponsor, violates the WTO's antidumping and subsidy rules. CDSOA provides a mechanism by which injured U.S. producers, who supported a petition for imposition of countervailing or antidumping duties, can obtain a share of any final duties properly collected to cover "qualifying expenses," for example, investments made after imposition of duties. This provision has been vilified by U.S. trading partners as artificially encouraging the filing of cases (a proposition utterly without factual support).

122. Id. ¶ 159.
123. See AISI Submission, supra note 107.
124. Practically, undergoing a change in ownership does nothing to remove the benefit enjoyed by a company that has received a subsidy nor to offset nor diminish the deleterious market distortion caused by the subsidization itself. AISI Submission, supra note 107, ¶ 5. More to the point, the privatization ruling has essentially created a loophole in the existing WTO anti-subsidy regime and subverted disciplines which were supposed to have been secured, not discarded, in the Uruguay Round. The U.S. position is economically and philosophically consistent with the object and purpose of the SCM Agreement—to offset the trade distorting impact of subsidies. On the other hand, the panel had to ignore the object and purpose of the SCM agreement, spending a mere three short paragraphs on the topic and making only the observation that "countervailing duties are not designed to counteract all market distortions or resource misallocations which might have been caused by subsidization." Report of the Panel on Certain Products from the European Communities, supra note 105, ¶ 7.42 (emphasis added). Of course, the fact that countervailing duties did not correct "all" market distortions is a preposterous basis on which to treat the avowed purpose essentially as irrelevant.
125. Significantly, a substantial majority of U.S. countervailing duty investigations since adoption of the Uruguay Round involve a change in ownership. To say that Congress intended to adopt an agreement that eliminated those cases is, on its face, ridiculous.

Indicative of the sad state of WTO dispute settlement, rather than focusing on the merits, apparently a major issue before the Appellate Body in this case was the treatment to be provided to the amicus brief filed by the American Iron and Steel Institute. See discussion below.

126. See Daniel Pruzin et al., WTO Panel Shoots Down Byrd Amendment in Preliminary Ruling, Urges Straight Repeat, Daily Rep. for Executives (BNA) (July 18, 2002). An Appellate Body decision in the matter is now due on January 20, 2003, after this article will be completed but prior to its anticipated publication.
127. Reportedly, Canada cited a letter from Dewey Ballantine LLP to U.S. lumber companies, which observed that under CDSOA, petitioners might recover money if duties were imposed and upheld. See id. (Statement of Canada's International Trade Minister, Pierre Pettigrew). Canada's claim that this proves that CDSOA artificially encourages litigation is ridiculous. First, the cited letter was certainly accurate and simply a necessary warning as to the implications of participating in a case; failure to have provided this information would have
In fact, there seems little doubt that had the idea of CDSOA been brought up during the Uruguay Round, U.S. trading partners would have opposed it on the grounds that petitioners must not be provided an additional incentive to file cases. It may be just as likely that the U.S. Administration, had the issue arisen at that time, would have agreed, and the practice would have been prohibited.

Yet, the topic did not arise in the Uruguay Round, and the idea was novel when adopted in 2000. Whatever the merits of the provision, it cannot be said that the parties agreed that this is impermissible—they never discussed it (nor anything like it). The codes simply do not address the issue. As far as the codes are concerned, there is nothing that would prevent the President of the United States and Congress from awarding every petitioner in every case with a Freedom Medal, a free dinner, or a night in the Lincoln Bedroom to encourage U.S. citizens to enforce U.S. rights under the WTO against unfair trade.

Thus, legally, the U.S. trading partners' remedies should have been either to seek an amendment to WTO rules that would prohibit such activity, to claim that the funds paid out were an actionable subsidy, or to adopt parallel provisions in their own laws. But with binding and activist dispute settlement, in full faith and reliance on the Geneva Platonic Guardians, such legal action was unnecessary to attack a law that was highly unpopular internationally. Few cases perhaps better demonstrate the cynicism with which the DSB has been used to create new standards.

The panel based its decision on the concept of prohibiting double remedies articulated in United States—Anti-Dumping Act of 1916. In that case, the Appellate Body asserted that the 1916 Act was inconsistent with the article VI because it provided additional punishments for dumpers:

Article VI, and, in particular, Article VI:2, read in conjunction with the Anti-Dumping Agreement, limit the permissible responses to dumping to definitive anti-dumping duties, provisional measures and price undertakings. Therefore, the 1916 Act is inconsistent with Article VI:2 and the Anti-Dumping Agreement to the extent that it provides for 'specific action against dumping' in the form of civil and criminal proceedings and penalties.

While one could certainly take issue with the Appellate Body's decision in that case, the principle, at least, is clear, and it makes no sense whatsoever to apply it to the CDSOA. The Byrd Amendment provides only that disposition of lawfully collected U.S. duties (i.e., taxes) be made to particular U.S. producers. It dictates no additional punishment of any kind on imports or foreign producers; it simply mandates that the U.S. government spend some of its own funds on industries that have been hurt by injurious and WTO-inconsistent behavior of other nations.
Of course, trading partners could have claimed that CDSOA is a subsidy to particular industries, and Mexico did so in the case. The problem is that it is not an actionable subsidy as the panel has determined, and calling it a subsidy would be no basis to demand its elimination.

Even if one could show that the Byrd Amendment encouraged filing of cases (a highly dubious claim), this only encourages domestic industries to protect their rights by filing legitimate antidumping and countervailing duty petitions (only legitimate petitions would garner industry money)—rights the WTO specifically recognizes. Striking down what is essentially a domestic spending program on these grounds is not a proper interpretation of the negotiated agreements, and goes far beyond the matters that panels and the Appellate Body should be considering.

As Senator Byrd has noted:

The WTO has decided that it—and not the U.S. Congress—has the authority to determine how American tax dollars are spent... [this] ruling flies in the face of the authority of Congress to determine how funds, that are collected under the laws of the United States, should be used.

This cannot be characterized as squabbling over the meaning of a “particular word or provision,” in the words of Appellate Body member Bacchus. It is more accurate to say this decision created a new obligation for WTO Members. Given the nature of international law, such “judicial activism” is wrong. Furthermore, it undermines a WTO system dependent on good faith bargaining and the belief that Members will live up to the negotiated agreements. If Members believe that the concessions for which they have negotiated are meaningless, there is less incentive to participate.

H. Safeguards

The support of domestic business communities worldwide for GATT and the WTO was buttressed by the Safeguards provision, also known as the Escape Clause, contained in article XIX of the GATT 1947. Article XIX provides Members with an opportunity for relatively quick short-term relief from imports that are causing or threatening “serious...
injury" to a domestic industry.134 From 1947 through May 1993, the escape clause was used 151 times.135 It was clearly a well-recognized, legitimate tool of trade policy, and GATT dispute resolution bodies failed to strike any of the seven safeguards measures challenged between 1948 and 1989.136 Yet, not a single safeguard measure challenged under the WTO Dispute Settlement has managed to survive the scrutiny of the panels and the Appellate Body, which does not give the domestic investigating authorities any significant deference.

This is a very different approach to a very complex and technical area of trade law in which the GATT dispute panels traditionally, and properly, gave considerable deference to national authorities. In the Women's Fur Felt Hats and Hat Bodies GATT case, the Working Party discussed this deference at length:

the available data support the view that increased imports had caused or threatened some adverse effect to United States producers. Whether such a degree of adverse effect should be considered to amount to "serious injury" is another question, on which the data cannot be said to point convincingly in either direction, and any view on which is essentially a matter of economic and social judgment involving a considerable subjective element. . . . [T]he Working Party naturally could not have the facilities available to the United States authorities for examining interested parties and independent witnesses from the United States hat-making areas, and for forming judgments on the basis of such examination. . . . Moreover, the United States is not called upon to prove conclusively that the degree of injury caused or threatened in this case must be regarded as serious; since the question under consideration is whether or not they are in breach of Article XIX, they are entitled to the benefit of any reasonable doubt.137

The transition to WTO from GATT did not remove the protections of article XIX, although a new detailed Agreement on Safeguards was adopted.138 Yet, amazingly, twelve safeguard measures have been challenged in the WTO, and all have been found to be illegal.139 The recent decisions by the panels and the Appellate Body have eviscerated article

XIX and the Agreement on Safeguards, which the Members expected to be legitimate policy tools to be used in some circumstances.

Some commentators have seen these negative rulings as guidelines for Member governments in carefully formulating future safeguard actions. Yet, in reality, they have introduced draconian requirements that impose such a heavy burden of proof on national authorities that they are unlikely to ever be able to satisfy it. Part of the problem lies in the failure of panels to provide adequate deference to the foundational provisions of the GATT 1947. In the case of safeguards, the precise relationship between article XIX of the GATT and the new Agreement on Safeguards was not made explicit by the Parties, but under the Interpretative Note adopted at the establishment of the WTO, "in the event of conflict between a provision of the GATT 1994 and a provision of another agreement in Annex IA to the Agreement Establishing the WTO . . ., the provisions of the other agreement shall prevail to the extent of the conflict."141

Such a conflict arose in regard to the requirement of "unforeseen developments," which was present in article XIX but not in the newly negotiated Agreement on Safeguards. It is likely that if the Members wanted to maintain the "unforeseen development" requirement of article XIX, they would have included it in the far more elaborate and detailed Agreement on Safeguards, which, after all, reiterates all other major provisions of article XIX. They did not do so, thus creating an apparent conflict of laws between article XIX and the Agreement on Safeguards.

The panel in Argentina—Footwear determined that the Agreement on Safeguards "should be understood as defining, clarifying, and in some cases modifying" obligations under article XIX.142 The panel in Korea—Dairy reached a similar conclusion.143 Yet, the Appellate Body in Korea—Dairy decided instead that requirements of article XIX and the Agreement on Safeguards were cumulative because:

The ordinary meaning of the language in Article 11.1(a)—"unless such action conforms with the provisions of that Article applied in accordance with this Agreement"—is that any safeguard action must conform with the provisions of Article XIX of the GATT 1994 as well as with the provisions of the Agreement on Safeguards.144

The Appellate Body thus raised the bar on safeguard measures in a way that does not appear to have been intended by the Parties.
In Argentina—Footwear, the Appellate Body again engaged in legislating, ruling that the "language in both Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994, we believe, requires that the increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause 'serious injury.'" The requirements of suddenness and sharpness are entirely new; in fact, neither GATT article XIX nor the Agreement on Safeguards, referred to by the Appellate Body, includes the words "sharp" or "sudden." The Appellate Body, forgetting yet again its obligations under DSU article 3.2, created two new obligations for WTO Members in adopting safeguards measures.

The United States—Lamb case is another good illustration. The United States—Lamb panel found that the U.S. International Trade Commission acted inconsistently with Article XIX:1(a) by not finding that injury resulted from an "unforeseen development." The United States had argued, quite reasonably, that nothing in GATT article XIX required that the domestic authority explicitly consider and publish a decision on "unforeseen developments." Ignoring a prior panel opinion (not overturned by an Appellate Body ruling), and the plain absence of such a requirement on the face of the Agreement on Safeguards, the panel in United States—Lamb ruled that the national authority had to make an explicit determination of unforeseen circumstances in order to comply with WTO obligations.

Controversially, the panel relied in its decision on an unadopted GATT report, Canada—Beef, while going against some adopted ones.

Even if one accepts that conclusion, the question remains: What to do about it? Although the ITC did not explicitly find "unforeseen circumstances" (probably in part because it, and at least one other panel, saw no such specific requirement in the WTO Agreements or article XIX), the statistics it collected and analyzed imply such a finding. Yet, the panel moved on to determine that "USITC statements ... are simple descriptive statements, and cannot be construed as a conclusion as to the existence of 'unforeseen developments' in the sense of GATT Article XIX:1." In essence, the panel did not deny that the developments were unforeseen, but instead created a new requirement of such an explicit determination by the national authority and then examined and "flunked" ITC's determination based on this brand new requirement.

The pattern of refusing to accord deference to domestic authorities in charge of the investigations, inconsistent with the GATT precedent, continued in Korea—Dairy Products, where the AB stated for the first time that it was necessary, although not sufficient, for the investigating authorities to evaluate eight factors listed in article 4.2(a) of the Safeguards Agreement and include all that information in notification to the WTO. In United States—Wheat Gluten, the panel went further and required that all relevant factors enumerated in the Agreement on Safeguards, and all other relevant factors "that are clearly

145. Argentina—Footwear, supra note 139, ¶ 131.
147. Argentina—Footwear, supra note 139, ¶ 8.58.
149. Id. ¶ 7.95.
150. Id. ¶ 7.43.
151. These are: rate and amount of the increase in imports of the product in absolute and relative terms; share of domestic market taken by increased imports; changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.
152. Korea—Dairy, supra note 139, ¶ 111.
raised before them as relevant by the interested parties in the domestic investigation[s]," be expressly evaluated and discussed. Yet, the Appellate Body felt compelled to raise the plank higher. In reviewing United States—Wheat Gluten, the Appellate Body stated that national authorities must fully investigate all relevant factors, as selected by those national authorities themselves, regardless of whether the issue had been brought up by the parties involved so long as there is a chance it might be relevant. This is an extremely demanding requirement upon agencies with limited staffing and resources, especially for nations smaller than the United States or European Community. Although it appears to give considerable discretion to the national authorities in selecting additional factors to be considered, there is no evidence that the discretion came with any greater deference from the panels. Without providing any precise guidelines on how relevant or imminent a factor must be, the Appellate Body left itself broad leeway to strike down future safeguard measures. Little trace of deference seems to be left at the WTO and certainly not in the field of safeguards.

Unfortunately, one suspects that by the time this article is in print, there will be other examples. Moreover, similar problems exist in areas involving matters other than unfair trade remedies. The point is that panels and the Appellate Body have become activists and certainly are not abiding by the standard international legal admonition of non liquet.

III. The Dispute Settlement System's Procedural Deficiencies Contribute to the System's Failures

The binding nature of the DSU—and the tendency of panels and the Appellate Body to constructively expand the negotiated agreements—would not be as troubling if effective procedural controls were in place to provide transparent and fair access and due process that is expected of a court. If the WTO is to retain its apparent status as a "world court" for trade, appropriate steps must be taken to protect the rights of parties-in-interest. As one trade scholar noted, procedural justice is essential because of the important function it performs in assisting an adjudicatory body [to] reach a decision or resolution of the dispute. Procedural justice facilitates the effective conduct of the adjudication, provides sufficient fact-gathering opportunities . . . , and thereby enables a tribunal to provide a well-reasoned and just adjudication of the controverted claims.

In other words, an effective procedural framework does more than just protect the rights of litigants, it also enables a judicial body to both consider more effectively the legal problems at issue in a dispute, and develop the law in a rational and appropriate manner. Unfortunately, the absence of adequate procedural safeguards is also beginning to take a serious toll and encourage inappropriate, and sometimes simply erroneous, decisions.

A. Mandate to Decide Actual Disputes

In practice, WTO dispute settlement lacks basic jurisdictional limitations that restrain judicial activism. Specifically, the lack of clear standing, mootness, or ripeness doctrines

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155. Gaffney, supra note 25, at 1185 (footnotes omitted). Gaffney further explains that the need for procedural protections has arisen out of "the undoubted movement from the 'power oriented' GATT approach to a 'rule oriented' WTO system." Id. See infra section IV.
means that a WTO Member can bring a case despite having nothing immediately at stake in its outcome. Such a practice encourages litigation in the abstract, with advisory opinions particularly apt to "make new law." It also runs counter to the purpose of WTO dispute settlement—to secure a positive solution to a particular dispute. The Appellate Body explained as follows:

[T]he basic aim of dispute settlement in the WTO is to settle disputes. . . . Given 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. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute.

Yet, recent WTO rulings suggest that panels and the Appellate Body may not be content to limit their decisions to the resolution of actual disputes between adverse parties that present real consequences. In this regard, the Appellate Body (AB) in EC—Bananas specifically found that the DSU does not have a "legal interest" threshold requirement. As Peter Lichtenbaum notes: "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." At least one AB member has insisted that there are limits on the issues decided in dispute settlement, declaring: "We address only those issues that are raised on appeal. We rule only on what is necessary to resolve the dispute on appeal." The first factor has proved not to be a serious impediment and avoids the fact that substantive restrictions on jurisdiction and adjudication (e.g., standing, "political questions," advisory opinions, etc.) must of necessity arise with the "court." As to the AB's alleged forbearance, the AB's actions speak louder than its words. For example, little more than two weeks after the speech insisting that the AB limit its decisions to matters "necessary" for resolution, in a case involving the sunset review of countervailing duties on German flat-rolled steel, the AB went out of its way to pontificate on issues that were not presented by the parties or by the appeal. The AB noted expressly that, "no issues relating to the injury determination are raised in this case," but stated anyway:

158. For example, recently, the WTO issued its report in Report of the Panel, United States—Preliminary Determinations with Respect to Certain Softwood Lumber from Canada, WT/DS236/R (Sept. 27, 2002), available at 2002 WL 31151699 (W.T.O.), notwithstanding the fact that any duties imposed by the preliminary determinations had already been refunded to Canadian exporters as a result of the International Trade Commission's determination that lumber from Canada did not cause actual injury during the period of investigation.
At the same time, we wish to underline the thrust of Article 21.3 of the _SCM Agreement_. An automatic time-bound termination of countervailing duties that have been in place for five years from the original investigation or a subsequent comprehensive review is at the heart of this provision. Termination of a countervailing duty is the rule and its continuation is the exception. The continuation of a countervailing duty must therefore be based on a properly conducted review and a positive determination that the revocation of the countervailing duty would "be likely to lead to continuation or recurrence of subsidization and injury." Where the level of subsidization at the time of the review is very low, there must be persuasive evidence that revocation of the duty would nevertheless lead to injury to the domestic industry. Mere reliance by the authorities on the injury determination made in the original investigation will not be sufficient. Rather, a fresh determination, based on credible evidence, will be necessary to establish that the continuation of the countervailing duty is warranted to remove the injury to the domestic industry.

Similar advisory opinions have been issued in other cases, as discussed further below. The lack of a requirement that a genuine legal issue be present is even more troublesome given the erosion of the few self-imposed jurisdictional limitations to which panels have adhered. An illustrative example is the recent undermining of the mandatory/discretionary distinction. WTO cases provide that if a national law is discretionary, such that a WTO violation is not mandated by the legislation, panels should refrain from considering the WTO-consistency of the law unless the discretionary power had been exercised and an actual violation had occurred. On its face, the mandatory/discretionary doctrine provides at least one mechanism for restraining panels from opining on matters not germane to a genuine dispute.

Yet, in _United States—Measures Treating Export Restraints as Subsidies_, the panel turned the mandatory/discretionary doctrine on its head. Canada brought a WTO claim against the United States, arguing that U.S. countervailing duty law and "practice" mandated that an export restraint be treated as a countervailing subsidy, which, according to Canada, was contrary to the _SCM Agreement_. The claim proceeded under WTO dispute settlement rules notwithstanding the fact that there were no countervailing duties in place against any export restraint regime. While properly dismissing Canada's complaint as premature, based on the mandatory/discretionary doctrine, the panel nevertheless wrongly saw fit to issue an abstract opinion on the circumstances in which an export restraint may constitute an indirect subsidy under the _SCM Agreement_. The panel attempted to justify its decision to discuss the substantive arguments of the parties on the basis that such an analysis was necessary to determine the mandatory/discretionary question:

Identifying and addressing the relevant WTO obligations first will facilitate our assessment of the manner in which the legislation addresses those obligations, and whether any violation is involved. That is, it is after we have considered both the substance of the claims in respect of WTO provisions and the relevant provisions of the legislation at issue that we will be in

163. Id. ¶ 88 (footnote, noting that the issue was not presented, omitted).
165. Indeed, at the time Canada brought the WTO complaint, the United States was prohibited by international agreement from imposing countervailing duties based on Canada's export restrictions on logs used to make softwood lumber.
the best position to determine whether the legislation requires a treatment of export restraints that violates those provisions.  

This is ridiculous: If the provision is not mandatory, as the panel ultimately found, the substantive question is irrelevant.

The panel's discussion amounted to an "advisory opinion" as there was no current dispute, let alone an actual WTO violation. Even more clearly than in other cases, given its decision that Canada's complaint was in any event premature, the panel blatantly sought to legislate by articulating new obligations for WTO Members without their consent and without an actual dispute to resolve.

Thankfully, an even more recent panel has disavowed the reasoning in Export Restraints. For instance, in United States—Section 129, the panel stated:

We note that the Panel in [Export Restraints] first considered whether certain action was in conformity with WTO requirements and only then addressed whether the measure at issue mandated such action... [W]e do not see how addressing first whether certain actions identified by Canada would contravene particular WTO provisions would facilitate our assessment of whether section 129(c)(1) mandates the United States to take certain action or not to take certain action.

Nevertheless, the report in Export Restraints demonstrates the need to develop jurisdictional doctrines in WTO dispute settlement such as standing, mootness, and justiciability in order for the DSB to stay true to its mandate.

The DSB also has no way of recognizing a given dispute as not being suited to resolution through litigation, the equivalent of the "political question" doctrine in domestic law or strict application of the doctrine of non liquet. For example, the United States might well have argued that the WTO DSB was not the proper forum to resolve the problems concerning the U.S. FSC law. Similarly, the EC might have argued that Beef Hormones was not an appropriate decision for panel resolution. (Arguably, it was application of such a doctrine that ultimately led the EC not to press its claim on Helms-Burton.) The fundamental point is that the WTO was not set up to dictate nations' tax policies. Yet in United States—FSC, the panel and the Appellate Body effectively curtailed the authority of the U.S. government to make tax policy.


167. Id. ¶¶ 8.77–8.132.

168. It should be noted that the panel’s dicta is not nearly as substantively far-reaching as some have claimed. For instance, the opinion considers only export restraints as that term had been defined very narrowly by Canada in the litigation. Id. ¶¶ 8.16–8.17. While the opinion was heavily criticized by the United States, it was not the subject of an appeal, as Canada's case was dismissed. In any case, however, the matter should simply have been dismissed without a substantive discussion.


170. Accepting for the sake of argument that the FSC program does represent an export subsidy, the United States had reason to believe that it had reached an understanding with the EU regarding it being an exception from the trade rules. The case has a long and complex history. See Hearing on the WTO's Extraterritorial Income Decision Before the House Comm. On Ways and Means, 107th Cong. (2002) (statement of Peter Davidson, General Counsel, Office of the United States Trade Representative); see, e.g., Cecilia B. Skeen, Knock Knock Paddy Whack Leave the FSC Alone: An Analysis of the WTO Panel Ruling That the U.S. Foreign Sales Corporation Program is an Illegal Export Subsidy Under GATT, 35 New Eng. L. Rev. 69 (2000).
B. Right of Real Parties in Interest to Participate

At the heart of the fairness of any adjudicatory process is the right of real parties in interest to participate in the proceedings. The U.S. Supreme Court has succinctly explained the basis for this principle:

"[T]here are persons who are merely formal parties without real interest, and there are those who have an interest in the suit, but which will not be injured by the relief sought, and there are those whose interest in the subject-matter of the suit renders them indispensable as parties to it. . . . [T]his latter class . . . [consists of] "persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without affecting that interest, or leaving the controversy in such a condition that its final disposition may be wholly inconsistent with equity and good conscience.""

Under the old GATT system, with limited substantive rules, the ability of a sovereign nation to block the adoption of a rule or a panel decision and the clearly non-binding nature of panel decisions, it was understood that only Members were parties in interest. The cases included major elements of negotiations. Yet, with the expansion of the substantive rules at issue, their particularity, the binding nature of WTO dispute settlement, and the undeniable direct impact of WTO decisions on important commercial interests, this fiction can no longer be maintained.

Even at the most basic level, unless private parties are provided a right to observe and access WTO proceedings, there is no way of ensuring that their interests are appropriately represented by participating government officials.

If WTO panels are to issue binding rulings, real parties in interest have the same need for access that they have in domestic adjudicatory settings. Absent these parties, decisions and arguments can be made based upon concerns that go well beyond the relevant legal question at issue or that fail to fully and adequately address key concerns. Assuming one accepts that WTO dispute settlement operates as an adjudicatory system, as opposed to a diplomatic system, the crucial legal interpretation of a judicial or quasi-judicial body should not be based upon other, extraneous factors, such as what might be in a nation's perceived best interest at the time or at interest in another case in which the government is involved.

Private parties should not be subject to binding "judicial" decisions without the opportunity to have their day in court.

In any case, refusal to grant a clear right to observe is utterly indefensible. If the private parties who are affected by trade agreements cannot even observe the judicial proceedings

172. See generally Ragosta, supra note 2, at 746–49.
173. See Jessica C. Pearlman, Note, Participation of Private Counsel in World Trade Organization Dispute Settlement Proceedings, 30 Law & Pol'y Int’l Bus. 399, 414 n.75 (1999); see also Ragosta, supra note 2.
174. See, e.g., Young, supra note 3, at 406 (“If the goal is to depoliticize completely the dispute resolution process, then the advantages of recognizing complaints by nonstate actors must be seriously weighed.”).
from which binding pronouncements issue, pressure will mount upon national governments not to enter into such agreements in the first place. Seattle is a prime example.

C. NEED FOR TRANSPARENCY

Another principal procedural deficiency with the DSU is its lack of transparency. This is an ongoing issue that became a major concern after the debacle at Seattle. The Doha Ministerial Declaration commits Ministers "to promote a better public understanding of the WTO," and "to making the WTO's operations more transparent, including through more effective and prompt dissemination of information." Yet, proposals for real transparency in the dispute settlement system are continually opposed by many of the Members.

Numerous proposals in this area have already been made, from opening the dispute settlement hearings to the general public, to requiring parties to make their submissions public (redacted, of course, for truly confidential business information). As then-Ambassador Barshefsky explained:

[M]any people see trade policy, and especially the World Trade Organization, as opaque and unresponsive to the public. And again, they are not entirely wrong. The trading system must . . . become more open to civil society. There is no reason the interested public should be excluded from observing dispute settlement proceedings. 178

Unfortunately, efforts to increase transparency after the Uruguay Round have not been particularly successful. If the system is going to continue to perform an adjudicatory function, it is essential to adopt judicial procedures. Whereas a diplomatic system requires some level of secrecy and limited access in order to encourage compromise and in recognition of the extent to which the codes are "standards" more than "rules," and to protect negotiators from public backlash, that same secrecy is destructive in a judicial environment. In such an environment, secrecy must give way to transparency in order to maintain faith in the system.

U.S. private interests have been effectively foreclosed from even observing proceedings by USTR, while foreign private interests are often observers.


177. As Dean Young has noted, "the Understanding basically maintains the confidential, closed nature of GATT dispute-resolution proceedings. . . . [M]any groups whose interests are immediately and directly affected by GATT decisions and rulings do not find this arrangement satisfactory." Young, supra note 3, at 406; see also Ragosta, supra note 2, at 752. Canada's position on this issue would be mildly amusing were the issue not so important: The Canadian federal officials have spoken of their intent to push for greater transparency at the WTO. Pierre Pettigrew, Address to the Toronto Board of Trade on the Future of World Trade: How the WTO Can Help Your Business (Oct. 22, 2001), at http://webapps.dfait-maeci.gc.ca/minpub/Publication.asp?FileSpec=/Min_Pub_Docs/104614.htm. Yet, Canada continues to maintain the utter confidentiality of all of the briefs in the recent lumber dispute partially it would seem, to frustrate the access of its own natives and environmentalists to effective participation in the WTO process.


President Clinton urged that "the WTO had been seen as a 'private priesthood for experts' and now must open up to hear the views of diverse parties." John Burgess, Activist Group Public Citizen Joins Attack on WTO, WASH. POST, Oct. 14, 1999, at E1 (quoting William J. Clinton, President of the United States).

179. Young provides a relevant explanation of the difference between diplomacy and adjudication. The former is "characterized by consultations, negotiations, and diplomatic compromises," while the latter is better suited to "create clear-cut, binding rules or rigorous applications of the law." Young, supra note 3, at 390.

180. See Ragosta, supra note 2, at 750-51. Similarly, John Gaffney has described the "undoubted movement
In August 2002, the United States emphasized the need for greater transparency in dispute settlement as a priority in the negotiations concerning reform of WTO dispute settlement rules and procedures. The United States properly noted that other international fora that deal with intergovernmental issues, including the International Court of Justice, the International Tribunal for the Law of the Sea, the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the European Court of Human Rights, and the African Court on Human and Peoples' Rights, are each open to the public. There is no reason for WTO disputes, the outcomes of which significantly impact civil society, to be any different.

D. Real and Consistent Opportunity for Amicus Briefing

The DSU does not expressly provide for the submission of amicus briefs, but the Appellate Body has determined (in U.S.—Srimp) that they can be accepted. Yet, even that small step toward legitimating a "judicial" process has engendered great controversy among WTO Members. The reaction of WTO Members to the decision to allow amicus briefs, as well as the decision in EC-Asbestos to issue "Additional Procedures" on amicus brief submission, is telling. Most Members complained bitterly about these developments, accusing the Appellate Body of going beyond its mandate.

The irony is telling. When panels create entirely new substantive norms restricting the ability of the United States, the European Community, and others to defend against unfair trade, often in contravention of the texts, not a peep of protest is heard about panels exceeding their mandate. Yet, when a simple procedural rule is created to permit panels to better understand an issue and to provide non-government organizations with the most minimal of opportunities to participate, there is an enormous outcry of protest. This is hardly comparable to judicial activism on substantive norms. Greater access to a judicial system in the form of amicus briefs, such as that created in the DSU, is desirable, and courts and arbitral panels both domestically and internationally have always had the authority to set their own procedural rules.

from the 'power oriented' GATT approach to a 'rule oriented' WTO system." Gaffney, supra note 25, at 1185 (footnotes omitted).

181. U.S. Paper on Transparency Submitted for WTO Dispute Settlement Negotiations (Aug. 9, 2002), at http://www.ustr.gov/enforcement/dispute.shtml. Officials at the USTR are to be commended for their efforts in this regard. At the same time, if that is all that is achieved in WTO dispute settlement reform, given the significant shortcomings of the institution, reform efforts will have come up very short.

182. Id.


184. This was not the first time the Appellate Body addressed the issue. In Shrimp-Turtle it ruled that a "panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, whether requested by a panel or not." Id. ¶ 108 (emphasis in original). Yet, its decision to create a set of rules governing amicus briefs drew particularly harsh criticism.


186. A good example of the latter can be found in the United Nations Commission on International Trade Law arbitration rules: "Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceeding each party is given a full opportunity of presenting his case." UNCTITAL Arbitration Rules, G.A. Res. 31/98, UNCITRAL, § III, art. 15(1) (1976).
Unfortunately, the procedural rules on this subject are still in dispute. In Canada-Lumber, for example, both Native Americans and environmentalists were interested in filing amicus briefs in support of the U.S. position. The Native Americans’ brief was accepted, as it was filed at the same time as the first U.S. briefs (although their comments were almost completely ignored). The environmentalist’s brief, however, was rejected ostensibly on the basis of being late, despite the fact that it came two and a half weeks prior to the second oral arguments and a month prior to final written submissions. It is ridiculous for a panel to reject an amicus as “late” when there are no time limits or published procedures for its filing amicus. It is the arbitrary nature of the decision and the lack of firm procedural rules that is so discouraging. If the Appellate Body or panels want to impose a timeframe for amicus submissions they should do so, but panels should refrain from arbitrarily deciding that some briefs are timely while others are late without basing that decision on a rule that has been made known to the membership of the WTO, or without at least providing a reasoned basis.

A considerable amount of opposition to participation by amici in dispute settlement proceedings has come from lesser developed countries (LDCs) on the assumption that amicus practice, presumably by non-governmental organizations (NGOs) from rich, developed countries, would more often than not be biased against the positions of LDCs. This view is ill founded. The assumption that, on balance, the wide and diverse range of non-governmental interests would consistently espouse a particular viewpoint has hardly been proven. NGOs from developed nations frequently take positions opposite that of their own governments and would have less incentive to participate in dispute settlement proceedings if their views were already accounted for. Moreover, one can anticipate greater participation from NGOs that promote the interests of LDCs and can effectively advocate positions that reflect the interests of their citizenry (e.g., intellectual property rights under TRIPs concerning AIDS vaccines).

E. IMPROVING THE RIGHTS OF LDCS TO EFFECTIVE REPRESENTATION

Allowing private parties to represent their interests in front of WTO panels must be accompanied by other steps designed to increase the availability of effective counsel for all DSU disputants. The lack of availability of top-flight counsel, or ability of LDCs to pay for such counsel, should also be addressed. Currently, the WTO Secretariat must make "qualified legal experts" available to such countries, but those experts must maintain their impartiality, thereby limiting the effectiveness of their advice. Moreover, they could not possibly have adequate time to devote to representation of LDC interests in actual litigation.

A number of proposals have been offered to improve LDC participation in the WTO dispute settlement process. Venezuela proposed the establishment of a trust fund to finance the hiring of defense counsel to assist developing countries in dispute settlement proceedings before the WTO. The UN Conference on Trade and Development (UNCTAD),

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188. Ragosta, supra note 2, at 756 (citing World Wildlife Federation, Reform of the WTO’s Dispute Settlement Mechanism for Sustainable Development 3 (1999)).
189. DSU, supra note 13, art. 27.2.

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recognizing the importance of the dispute settlement process to LDCs, proposed an extensive training program for individuals from LDCs.\textsuperscript{191} Others proposed the formation of an independent Advisory Center for LDCs.\textsuperscript{192} The international treaty establishing the Advisory Center on WTO Law (ACWL) was signed in December 1999 by ministers at the ill-fated WTO ministerial meeting in Seattle. The ACWL has been operational since July 2001 and has assisted a number of developing countries in their WTO dispute settlement proceedings.\textsuperscript{193} These are important efforts that should be zealously pursued, although Venezuela should not limit its proposal to defense counsel. After all, the inability to enforce rights is equally deleterious to the inability to defend them.

As DSB decisions are binding, the system is undermined both by disputants’ inability to retain effective counsel and by private parties’ inability to represent their interests before the tribunal. In both cases, dispute resolution does not rely upon the best legal arguments and presentation of the facts and litigants cannot effectively defend their own interests. This situation is avoidable by opening the system to private-party litigants and ensuring that effective counsel is available to LDCs.

\section*{F. IMPARTIALITY OF PANELS}

The DSU’s Rules of Conduct provide that a person serving on a panel or Standing Appellate Body, including arbitrators and experts participating in dispute settlement proceedings, “shall be independent and impartial [and] shall avoid direct or indirect conflicts of interest.”\textsuperscript{194} The Rules of Conduct impose on such individuals “self-disclosure requirements” to reveal any information that may cast “justifiable doubts as to their independence or impartiality.”\textsuperscript{195} Further, \textit{ex parte} communication with a panel or Appellate Body—albeit, apparently not expressly with Secretariat staff—is prohibited concerning matters under consideration.\textsuperscript{196} Notwithstanding the importance of these procedural protections, serious questions about conflicts of interest, representations, and unnecessary contact with Secretariat officials remain.

At minimum, Members should strip WTO Secretariat officials of their current dispute settlement functions (e.g., advising panels and helping to choose panelists).\textsuperscript{197} In more than one instance, it has been suggested that “secretariat staff” appear to oppose a particular position. Of course, in theory, this should be utterly irrelevant. Under the current system, however, it is anything but. While Secretariat officials would urge that they play an

\begin{thebibliography}{99}
\bibitem{192} Advisory Center on WTO Law Proposed As Resource for Poorer Member Nations, 16 Int’l Trade Rep. (BNA) 970 (June 9, 1999).
\bibitem{193} For a general discussion of the purposes of the ACWL, see Kim Van der Borght, \textit{The Advisory Center on WTO Law: Advancing Fairness and Equality}, 2 J. Int’l Econ. L. 723 (1999). Nonetheless, the ACWL also operates under a number of inappropriate restraints, particularly as to supporting complaints.
\bibitem{194} Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, art. II(1), WT/DSB/RC/1 (Dec. 11, 1996).
\bibitem{195} Id. art. VI(2).
\bibitem{197} Professor Lowenfeld, commenting on institutional reform within the WTO has warned: “Nothing is said about the secretariat’s role in the appellate process, and I think it is important that there be no such role.” Andreas F. Lowenfeld, Comment, \textit{Remedies Along with Rights Institutional Reform in the New GATT}, 88 Am. J. Int’l L. 477, 483 (1994).
\end{thebibliography}
important role in preventing panelists from even more aggressively creating new law, the
efficacy of this restraint has certainly not been demonstrated. If panels would even more
aggressively engage in judicial activism but for the Secretariat's restraint, perhaps they
should be permitted to do so, with all of the likely consequences. Alternatively, as suggested
below, effective diplomatic restraints must be placed on panels.

One way to improve the independence of the panels is to create independent clerks, as
discussed below. Over the long-term, action should also be taken to ensure a more approp-
riate balance of representation in the Secretariat.

Another seemingly small, but quite important reform to encourage impartial and quali-
ified panelists is to increase the pay of panelists so that serving on a panel is not a substantial
financial hardship for many of those best qualified. One prior panelist noted that a particu-
larly complex case required a substantial commitment of time over a six-month period, all
for the princely sum of about $12,000. While many may wish to serve on a panel for the
prestige or for the benefit of the system, creating a serious financial hardship for the best
possible panelists, who certainly have the option of collecting hundreds of dollars an hour
in consulting fees, can only impair the overall quality of the panelists. Given what is at
stake, dramatically increasing the fees paid to panelists will have little impact on the WTO's
budget, but will help to maintain and improve the quality of panelists.

G. AN INDEPENDENT AND SUFFICIENTLY STAFFED STANDING JUDICIARY

It is indeed quite remarkable that WTO Members entrust matters of such great impor-
tance—matters that are hotly debated and negotiated over many months at the most senior
levels of government—to an adjudicatory system based on ad hoc panelists. A standing ju-
diciary may seem counter-intuitive to those concerned with issues of national sovereignty,
but sovereignty issues must be addressed by panelists, and the issue is whether a standing
judiciary would be more likely to respect the limitations under which it is intended to
operate. Problems of bias and conflicts (or the appearance or suspicion of bias and con-
flicts) would be dealt with more readily by a small group of judges serving a reasonable
term, and subject to approval or removal by a significant portion of the General Council.
This would improve somewhat the freedom of panel members to interpret the agreements
without fear of reprisals when they return to their native countries, although no doubt
individual panelists would inherently reserve some sense of loyalty to their homeland. These
are natural "biases" that may only be mitigated. While we harbor no illusions that
independent judges would solve the problems of judicial activism discussed above—indeed,
depending on the panelists, it could exacerbate the problem—if the system is to function
as adjudicatory, permanent panelists should at least be seriously considered.

It is also important that judicial panels be staffed with independent law clerks that are
not part of the regular WTO bureaucracy. As previously suggested, a staff of law clerks

198. For anecdotes, see Ragosta, supra note 2, at 761.
199. Bias in this context is a broad issue. For instance, a panelist may come from a society where government
subsidies and intervention in the market place are very much a part of everyday life. This may tend the panelist
to lean towards excusing disciplines on injurious subsidies.
200. In the United States, the impartiality of federal judges is sought to be preserved, at least in part, by
tenure and salary protection. The notion was that federal judges could see themselves as citizens and guardians
of the United States, rather than their individual states. It is not likely that the same rationale could apply any
time in the foreseeable future to the WTO.
201. Ragosta, supra note 2, at 760-62.
would be quite economical and would provide immense assistance in ensuring that WTO panelists and the AB better understand the underlying legal issues and the factual circumstances of individual cases (both of which can be highly complex and time-consuming).

H. Publication of Dissenting Opinions

The DSU currently provides that "[p]anel deliberations shall be confidential" and that "[o]pinions expressed in the panel report by individual panelists shall be anonymous."202 The practice has developed such that panel decisions very rarely indicate any type of disagreement among individual panelists, although such disagreement is reportedly quite evident at panel hearings. In fact, over fifty years of GATT and WTO jurisprudence failed to elicit even a single dissent. This suggests only two possibilities: First, all of the issues were so clear and straightforward, and the reasoning subject to such universal approbation, that no panelist ever disagreed. Second, that dissent was effectively squelched by a culture (led by the Secretariat) more concerned with diplomatic appearances and "resolution" than with proper legal development. Of course, such a system may have been more appropriate in the old diplomatic model of dispute settlement, but it has no place in a "world trade court." In the WTO, this is another important restraint on the transparency and rational legal development of the dispute settlement process.

In domestic U.S. law, the publication of dissents plays an important function in the development of jurisprudence. As one commentator notes: "Unanimity may have helped to bolster the credibility of the weak, fledgling Supreme Court, but it would have been detrimental to the legitimacy of the Court if that system had prevailed in the long run."203 Dissents often contain a philosophy that can alter the course of legislative enactment or possibly even drive the call for a constitutional amendment.204 Perhaps the most notable instance was the powerfully worded dissent by Justice Iredell in Chisholm v. Georgia,205 which galvanized public opinion and led to the adoption of the Eleventh Amendment.206 Justice Harlan’s dissent in Plessy v. Ferguson207 is another example of the importance of published dissents.

Encouragingly, the WTO has more recently had to take cognizance of dissenting viewpoints. For instance, in United States—German Steel CVDs, the full dissenting view of an unnamed member of the panel was published as part of the panel's report.208 Notably, the dissenting opinion criticizes the rest of the panel for imposing on Members obligations that are not apparent from the text of the WTO Agreements. That case concerned whether or

202. DSU, supra note 13, art. 14(1), (3).
204. Neal Kumar Katyal, Judges as Advocates, 50 Stan. L. Rev. 1709, 1805 n.449 (1998) (citing numerous, significant cases in U.S. jurisprudence where the dissenting opinion was ultimately adopted as the law).
205. 2 U.S. (2 Dall.) 419, 429-49 (1793).
206. Katyal, supra note 204. In fact, Justice Iredell’s opinion opens the decision, being written in the days when Justices still wrote individual opinions, instead of writing an “opinion of the Court.”
207. 163 U.S. 537, 552 (1896).
not Members were obliged to extend the countervailing duty de minimis standard applicable to CVD investigations to five-year sunset reviews conducted by the national investigating authorities. The entire panel agreed that, "nothing in the text of Article 21.3 specifically provides that the de minimis standard applicable to investigations is also applicable to sunset reviews." The EC argued, however, that the context of article 21.3 of the SCM Agreement, in light of article 11.9, required that the two proceedings be adjudicated consistently. The majority of the panel agreed with the EC and held that sunset reviews should be conducted according to the same de minimis standard as CVD investigations, reasoning that "such silence in the relevant provision as to the applicability of a de minimis standard to sunset reviews is not dispositive given an examination of the text of Article 21.3 in its context and in light of the object and purpose of the SCM Agreement." The dissenting view took a much less expansive, and more correct, approach to the source of international legal obligations:

The context of a legal provision—that is, other paragraphs of the provision or related provisions elsewhere in the text—does not in and of itself create a legal obligation. The legal obligation must be found first and foremost in the text of the provision. Otherwise, one would be forced to accept the view that consistency reasons may constitute sufficient grounds for the so-called "implication" of obligations.

While I do not disagree that application of the same de minimis standard to sunset reviews as to investigations would ensure a certain balance between the disciplines applicable to investigations and those applicable to sunset reviews, it is difficult to conclude on that basis alone that the same de minimis standard applies to both instances. Policy arguments alone are not sufficient for me to find that this is the case; rather, I would have to find that there is a proper legal basis for the European Communities' position, interpreting Article 21.3 pursuant to the customary rules of treaty interpretation. While it would not be illogical—and it would reflect a degree of consistency in the treatment of investigations and sunset reviews—to apply the same de minimis standard to sunset reviews as to investigations, I cannot conclude on those grounds alone that that is the case, and I consider that the text of the SCM Agreement does not require investigating authorities to do so. I consider that the text of Article 21.3—literally and in its context—clearly fails to establish an obligation on investigating authorities to apply a de minimis standard to sunset reviews.

It is apparent that the publication of dissent is a positive step forward and, in certain respects, validates the dissenting viewpoint. At a minimum, the Appellate Body and future WTO panels would have to be cognizant of this perspective.

Similarly, in EC—Poultry, the panel's report contained a brief dissenting view of one unnamed panelist, under the heading "Opinion by a member of the Panel," concerning the interpretation of article 5.1(b) of the Agreement of Agriculture. The interpretation

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209. Id. ¶ 10.2.
210. Id. ¶ 10.8.
211. Id. ¶ 10.9.
212. Id. ¶¶ 10.8, 10.9 (emphasis in original). In fact, the views of the dissent were effectively adopted by the Appellate Body on appeal. See Report of the Appellate Body, U.S.—Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany, WT/DS213/AB/R (Nov. 28, 2002), available at 2002 WL 31670105 (W.T.O.).
advocated by the majority of the panel would limit the instances in which the EC could impose safeguard measures on imports. The unnamed panelist was not persuaded that the term “the price at which imports may enter the customs territory of the Member granting the concession, as determined on the basis of the c.i.f. import price of the shipment concerned expressed in terms of its domestic currency”\(^\text{214}\) means the c.i.f. price plus the duties paid. The panelist stated:

If the drafters of this provision had intended to include customs duty, they could have referred to the “duty paid c.i.f. import price,” a notion that appeared in preliminary discussion papers of the negotiators. The Panel’s interpretation, in my opinion, is inappropriate in light of the context of Article \(5.1\)(b), including its footnote 2 and Article 5.5, which unambiguously refer to “the average c.i.f. unit value” and “the c.i.f. import price” respectively. Article 5.1(b), footnote 2 and Article 5.5 must be interpreted in a consistent and coherent manner in order to have a meaningful functioning of the special safeguard provisions within the framework of tariffication process while avoiding undue restraint on the possible recourse to those provisions.\(^\text{215}\)

Upon appeal, the Appellate Body, without explicitly stating that the dissenting view was correct, relied on much of the same reasoning as the unnamed panelist in reversing the panel’s interpretation of article 5.1(b).

It is noteworthy that the drafters of the Agreement on Agriculture chose to use as the relevant import price the entry price into the customs territory, rather than the entry price into the domestic market. . . . The ordinary meaning of these terms in Article 5.1(b) supports the view that the “price at which that product may enter the customs territory” of the importing Member should be construed to mean just that—the price at which the product may enter the customs territory, not the price at which the product may enter the domestic market of the importing Member. And that price is a price that does not include customs duties and internal charges. . . .

We think it significant also that ordinary customs duties are not mentioned as a component of the relevant import price in the text of Article 5.1(b). Article 5.1(b) does not state that the relevant import price is “the c.i.f. price plus ordinary customs duties.” Accordingly, to read the inclusion of customs duties into the definition of the c.i.f. import price in Article 5.1(b) would require us to read words into the text of that provision that simply are not there.\(^\text{216}\)

U.S.—German Steel CVDs and EC—Poultry provide illustrative examples of the benefits achieved by encouraging the publication of dissenting opinions. As appropriate, the WTO must continue with this development and, indeed, begin to provide information concerning the names of dissenters. Given the ad hoc nature of WTO panels and the panelist selection process, a country has a right to know if a former panelist under review for a new appointment was the author of a majority or dissenting view.

I. Improving the Clarity of Panel and Appellate Body Reports

A variety of factors have conspired to produce WTO reports that are long-winded and tedious at best, and nearly incomprehensible at worst. The gradual shift from the more diplomatic GATT dispute resolution system has engendered the current panel practice of

\(^{214}\) Id. ¶ 290.

\(^{215}\) Id.

repeating every argument raised by disputants expressly, no matter how illogical or baseless it might be.\textsuperscript{77} When the dispute settlement process was diplomatically oriented, and the GATT needed to worry about "offend[ing] the sensibilities of government-trade lawyers,"\textsuperscript{218} this made some sense. Today, it does not.

What has resulted are some spectacularly long, and difficult to fathom, reports. In 1990, Robert Hudec bemoaned a 1979 panel report that required "39 printed pages in the BISD to state the parties' arguments and counterarguments."\textsuperscript{219} By today's standards, however, thirty-nine pages to state the arguments would be mercifully svelte. The sheer size of panel and Appellate Body reports is one indication of the seriousness of the problem. The average length of panel reports has ballooned from seven pages between 1948 and 1969 to 184 pages between 1995 and 1999. Moreover, the longest decision by 1999 weighed in at an astonishing 579 pages,\textsuperscript{220} while up until 1980 the high mark was only thirty-nine pages. The length of these reports alone diminishes their value to scholars and practitioners. It is impracticable to follow the cases closely and carefully due to the amount of time necessary for such an undertaking.

Average Length of GATT/WTO Opinions\textsuperscript{221}

<table>
<thead>
<tr>
<th>Complaints Filed in</th>
<th>No. of Published Full Decisions</th>
<th>Average Length of Decisions</th>
<th>Longest Decision</th>
</tr>
</thead>
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\textsuperscript{*This reflects only the first half of 2002.}

Even more serious is the fact that this drafting style often makes it difficult to determine where discussion of the parties' views ends and the panel's decision begins.\textsuperscript{222} Again, this

\textsuperscript{217.} Ragosta, supra note 2, at 765.

\textsuperscript{218.} Id. Professor Hudec explains this problem well:

One annoying little consequence of greater political attention that persists to this day is governments' insistence that panel reports record absolutely everything that they have argued. A professional tribunal would trim, reshape and restate the parties' arguments in a way that would most sharply define the issues being decided by its ruling. GATT panel reports, by contrast, are burdened with everything a government has said, no matter how little sense it makes, how repetitive it is, or how much it may confuse understanding of the panel decision. Government officials feel they must make a record for all the interested parties back home.

Hudec, supra note 7, at 9, 13.

\textsuperscript{219.} Id. at 12.


\textsuperscript{221.} An earlier edition of this table is provided in Hudec, supra note 7, at 11, which is relied upon up to the WTO experience.

\textsuperscript{222.} See Ragosta, supra note 2, at 767.
situation is unacceptable given the judicial cast of the DSU, as it hampers the development of the body of WTO law. If panel decisions have binding effect and precedential value, then a basic step that must be taken to improve the system would be to improve the quality of drafting so that those decisions may be studied and interpreted more effectively.223

IV. Correcting the Imbalance: A Question of Survival for the WTO Dispute Settlement System

Whether binding dispute settlement can work in an international regime with sovereign actors has always been a subject of great debate and concern. As V.S. Mani explained: “An international tribunal cannot afford to deal with [sovereign states] in the same way in which a municipal tribunal does with private litigants. For, cooperation of the litigant States is an essential prerequisite for successful adjudication of disputes. To secure their cooperation their sovereign sensibilities have to be respected . . .”24

These concerns are particularly important given that international regimes, like the WTO, are usually based upon agreements that are negotiated under heavy time constraints and political pressures from a variety of directions. The conciliatory character of international negotiations inevitably results in language that is deliberately vague and often contradictory,225 as opposed to national legislation that places more primacy on clarity and predictability in a relatively transparent process.226

More importantly, the current system allows the DSB—through its binding interpretations of the negotiated agreements—to create legal obligations where none existed before, and without any democratic participation by WTO Members or their constituencies. This is wrong, in a legal (and even moral) sense, but also dangerous: what Professor Raustiala has termed “generativity,” establishes a source of centralized, unaccountable power. Without the necessary accountability, the undermining of international authority is a real possibility. If the WTO DSB continues to create new obligations without democratic participation, it is only a matter of time before the cries from the streets of Seattle find their way to London, Paris, Berlin, Tokyo, Seoul, Buenos Aires, etc. As Professor Raustiala put it, there is a growing “sense of bait-and-switch—WTO critics argued that they thought they were getting international trade agreements and instead discovered roving, quasi-constitutional rules (generativity) emanating from inaccessible tribunals in Geneva (insularity).”227

In short, the system is characterized by a fundamental imbalance between the credence afforded WTO DSU decisions, and the relative lack of legitimacy of the decision-making process. WTO decisions are routinely touted by academics, lawyers, and some governments as the “law” even though WTO dispute settlement clearly does not live up to the democratic

223. The recently issued panel report in United States—German Steel CVDs is an encouraging example of a relatively concise (albeit flawed) decision that totaled approximately fifty pages.
224. Quoted in Gaffney, supra note 25, at 1184.
225. See Ragosta, supra note 2, at 740.
226. The system as it exists now undermines the central goals of the WTO system. By breeding uncertainty among WTO members about whether negotiated concessions will be upheld in later panel and Appellate Body reports, it creates unwillingness to enter into more expansive agreements. Yet, the careful and comfortable accretion of increasingly broad and clear obligations through repeated rounds, not judicial declarations, is the means by which the international trade regime grew so rapidly and effectively in the post-war era.
227. Raustiala, supra note 5, at 415.

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requirements of a "law-making" body, in terms of both its institutional structure and rules of procedure.

One way or the other, the imbalance must be corrected. Either the WTO must undergo the necessary institutional and procedural reforms to justify Members' acceptance of WTO decision-making, or the binding nature of DSB decisions must be altered to more appropriately reflect the true nature of the DSB as a non-judicial body. Whatever its merits, or lack thereof, the former appears to be out of reach for at least the foreseeable future. Changes necessary to elevate the WTO DSB to a legitimate "world court" would entail reforms that border on the notion of a one-world government, for example, direct or indirect participation of the citizenry, an effective legislative function, accountability (by election or otherwise) of the selection of decision-makers, regulation of lobbying activities, etc.

The second alternative—a shift towards recognition of the political nature of WTO dispute settlement—is much more plausible and much less revolutionary. The simplest and surest method to rectify the imbalance would appear to be a move toward a consensus-based Dispute Settlement (DS) system. Put simply, this would be GATT dispute settlement "plus," with the new codes. Two key observations must be made: First, the ability to use codes and procedures that are far more developed than the Tokyo Round codes would itself dramatically improve old-style GATT dispute settlement. Second, contrary to the convenient myth of a failed GATT dispute settlement system, the system really operated quite well. In almost all cases, it functioned as designed and aggrieved parties obtained vindication of their rights. When it did not, it was often because the nature of the dispute, given the international reality, was simply not subject to appropriate resolution by dispute settlement panels at the time, for example, EC agricultural subsidies and DISC. (Notice, for example, that the provision in the Agricultural Agreement on subsidies would, in part, provide a basis for more effective dispute settlement.) An improvement from this very successful system would prove to be very effective dispute settlement.

Under the prior GATT regime, the threat of blocking could prove to be an aid, rather than an impediment, to the legitimacy of the dispute settlement system. WTO panels subject to similar constraints would be much more careful to consider the implications of their decisions. Such restraint by the DSU would, itself, make the prospect of blocking even less likely. This type of system would conform to the norms of international law already discussed: parties would be held only to those obligations to which they specifically agree. And the WTO membership would have a way to constrain panels, keeping them from imposing new obligations. Moreover, with better procedures for decision-making, and clearer rules than prior to GATT 1994, the success of the institution would likely continue to improve.

228. Claude Barfield correctly notes that "a move toward a more 'diplomatic' approach to dispute settlement, one that would complement the legal system and provide a safety valve, is essential for the survival of the WTO as a viable institution." Barfield, supra note 15, at 112.

229. See Hudec, supra note 7, at 16, 23.

230. Hudec notes that the GATT was actually fairly successful at resolving disputes despite its perceived problems. Id. at 16-17, 19; see also William J. Davey, The World Trade Organization's Dispute Settlement System, 42 S. Tex. L. Rev. 1199, 1199 (2001) (noting about GATT dispute settlement that "eighty to ninety percent of complainants that were legitimate had their complaint totally or partially resolved in the system.").

231. As Raj Bhala notes, the older GATT system, which allowed for blocking by just one Member, was a system where Members "threw [their] weight behind" adopted panel reports. Bhala, supra note 1, at 869.

232. After all, were there no Congressional oversight of the judiciary, would we not be able to expect that judicial decisions would deviate even further from statutory norms?
An alternative approach would be to permit a blocking potential but not blocking simply by any single Member. For example, if some specified percentage of WTO Members (by number or share of trade) voted to block a panel report, the report would not be adopted. This would force panels and the Appellate Body to consider the actual ramifications of expansive decisions that reflected substantive changes to the agreements negotiated by the Members. This approach has been proposed by others, including Claude Barfield.233

A third proposal which has been suggested, and could be implemented with or without other reforms, is to move cases that are particularly politically divisive because of their magnitude (e.g., FSC) or their sensitivity (e.g., Beef Hormones, Shrimp-Turtle) out of the DSB’s jurisdiction.234 This would simply be a means of preventing the panels from constructing obligations in cases where it is clear that the litigating parties do not have the same understanding of the agreed-upon obligations. While some might see such a move as a failure of the DSU, it would in actuality be an improvement for all the reasons why constructing binding agreements in such cases is bad in the first place. It is far better to leave some cases, particularly those that most starkly pit a Member’s WTO obligations against truly immovable forces, undecided than to undermine the entire system by the perception that the DSU has the power to impose obligations where none existed through the agreements themselves. In effect, this is exactly what happened with respect to the EC’s threatened challenge of the Helms-Burton law. The problem with this approach is who is to decide that a case is too divisive for the WTO, and when it would be decided? Would such a right end up being effectively exercised only by the United States, the EC, and Japan?

A fourth and more plausible approach would entail a hybrid scheme that would continue to build upon the progress that has been made while also addressing the fundamental flaws that have arisen in the DSU and the DSB. Under this proposal, Parties would not be able formally to prevent the formation of a panel but, prior to creation of a panel, a party to the dispute could specify whether the ensuing dispute settlement should proceed upon a legal model, with a binding, enforceable adjudicated result, or a diplomatic model the results of which could ultimately be blocked.

Some will say that, under this hybrid scheme, most cases would inevitably proceed on the second track, the old GATT model. This is not necessarily the case. For example, while cases that are either too politically sensitive because they reflect differences in fundamental values (e.g., Beef Hormones, Shrimp-Turtle), or are too far-reaching (e.g., FSC), might not proceed on a binding, litigation track, the majority of tariff disputes, for example, those which involve the highly technical issues for which enforceable litigation is the appropriate avenue, would proceed within a binding adjudicatory framework. Indeed Parties might prove reticent to invoke such protection. In any event, with improved codes and procedural protections, the results of old GATT-style dispute settlement would be even more effective and robust than the very successful, but much maligned, GATT dispute settlement. As for controversial trade remedy cases, parties would insist upon non-binding processes until the

233. Barfield, supra note 15, at 127 (proposing that if at least one-third of DSB members, representing at least one-quarter of total trade among WTO members, express disagreement with a panel or AB decision, then that decision should be blocked). Robert Hudec expressed a similar idea in devising a system to replace the original panel report adoption procedures of the GATT, which required a consensus of all members. Hudec, supra note 7, at 31.

234. Wolff & Ragosta, supra note 4, at 704–05.
panels demonstrated an appropriate appreciation of the standard of review and, over time, as rules are more clearly developed, binding dispute settlement would likely become the norm.

The hybrid approach has several advantages. First, it retains the flexibility to adapt a binding litigation or diplomatic model to particular trade disputes as the parties deem appropriate. Second, while remaining within the overall framework of WTO dispute settlement, it provides a check against the ability of panels to overstep their bounds. If parties view WTO panels as exceeding their mandates and thus have less confidence in the dispute settlement system, WTO panel decisions will be accorded less weight in the future. And third, and perhaps most importantly, it permits something of a “release valve” to alleviate the pressure placed on the DSB as a whole brought about by “controversial” cases. Members might be wise to sacrifice the highly acclaimed achievement of fully binding dispute settlement in all cases for the sake of preserving WTO dispute settlement as a viable institution.

With respect to procedural defects, the need for reform is clearer (albeit not simple). Barring substantive changes in the nature of the DSB—that is, if the DSB in whatever form is to continue to serve the international community as a binding forum for resolving trade disputes—then there needs to be concrete procedural rights and protections afforded to parties in interest. The most basic of these rights implicate better access to the system. The DSU could allow for private causes of action, private counsel participation in or at least observation of panel and Appellate Body proceedings, and amicus briefs. All of these changes would allow more input into the decision-making process, which is essential if the WTO is to maintain its “judicial” character. This would increase worldwide support for expansive trade agreements because it would assure governments and private actors that they would be able to submit (and the panels will be forced to consider) the best information and legal arguments available should a dispute arise. On a more fundamental “justice” level, this would give private parties affected by the WTO agreements the assurance that they will be able to defend their interests in the “court” of the DSU.

Another critical avenue for reform lies in changing jurisdictional requirements. The primary way this could be done would be to institute clear rules on standing, mootness, and ripeness. These sorts of rules would force panels and the Appellate Body to consider disputes about the agreements only in the context of cases that have legitimate international trade effects, that is, cases that affect the movement of goods and services across national boundaries. It would preclude advisory opinions and force parties alleging that a domestic law is not in conformity with the WTO agreements to show actual injury. As previously discussed, this would improve the quality of the opinions.

Another essential reform is to allow the Appellate Body to remand cases. This would be another means of controlling panels that have decided to construct agreements inappropriately and create obligations. It is a way for the Appellate Body to tell a panel that it in effect got it wrong, and needs to make a decision that conforms to the agreements and the law.

Lastly, the Appellate Body should be given authority to consider serious factual as well as legal error. This is another means of control over inappropriate panel decisions. With proper Appellate Body oversight, this type of control could eliminate, for example, the disregarding of national investigating authority determinations that has already occurred in AD/CVD cases. At the same time, concern over expanding the Appellate Body’s role to the point of making the panels irrelevant can be addressed through an appropriate standard
of review for appeals. Of course, all of this assumes that the Appellate Body itself ceases to overstep its bounds.

V. Consequences of Inaction: Is the WTO Headed for a Showdown?

Of course, this all begs the question: what if reform is not made? What if panels and the Appellate Body continue to ignore the expertise of agencies? What if WTO decisions continue the near-universal pattern of wholesale rejection of unfair trade remedies and safeguards? What if the DSB continues to create obligations where none were agreed upon through its divine "Platonic guardianship" of its own views of free trade?

If real reforms are not made, the United States should announce that it would initiate a political process to review its participation in the WTO itself. The WTO Dispute Settlement Review Commission, endorsed by President Clinton and Congressional leaders, could have effectively done so, but there is no reason that such concerns should be ignored even without a "commission." Moreover, proposals for such a commission have resurfaced.

Of course, this is not to say that the United States would withdraw. It is possible that the very consideration by the United States of this step would finally induce serious negotiations and consideration of the WTO DSU shortcomings. If not, the United States must seriously consider both as a substantive matter, and as a matter of sovereignty, whether it can support trade Platonic Guardians writing law in closed hearings in Geneva.

The United States has chosen this tactic, with some success, in other fora; for instance, the much publicized debate concerning U.S. participation in the International Criminal Court (ICC). Concerned with the dilution of U.S. sovereignty over dispensation of criminal justice to its nationals, especially soldiers, the United States has refused to recognize the jurisdiction of the court, although its lawyers had been instrumental in drafting its statute (a situation similar to the WTO). To prevent its peacekeepers serving in United Nations missions abroad from being hauled into The Hague to stand trial, the United States demanded immunity for its soldiers serving in UN-authorized operations. Its request was rejected with near unanimity by fellow members of the UN Security Council and other nations. Protecting U.S. interests in this case required playing "hard ball." Facing opposition in the UN Security Council from nations supporting the ICC, the United States threatened to withdraw its troops and vital logistical support from all UN missions and vetoed, "with great regret," the renewal of a UN mandate for the Bosnia peacekeepers. Although the United States was vilified, as is the usual custom, over its unilateralism, a

235. For more on these topics, see Ragosta, supra note 2, at 765.
236. In fact, this process may have already begun. In passing TPA legislation, the U.S. Congress insisted upon a provision that "requires the Secretary of Commerce to submit a report to Congress outlining a strategy for correcting instances in which dispute settlement panels and the Appellate Body have added to obligations or diminished rights of the United States." See Finance Committee Report, supra note 68, at 8.
240. Id.
compromise was reached where the United States continued its participation in UN peacekeeping, and the UN Security Council unanimously voted to exempt all U.S. peacekeepers from ICC prosecution for a year, while negotiations would continue. Indeed, the manner in which the United States has stood at odds with jurisdiction of the ICC, some would say in an almost cavalier attitude, is all the more remarkable given U.S. acquiescence in WTO judicial activism.

The point is not to justify or criticize the U.S. position on the ICC; that is a complex matter far beyond the purview of this article. The point is that in a very parallel situation, the ICC case makes it clear that the international community is far more likely to pay attention to U.S. concerns about potential international judicial activism when it becomes clear to some nations that they stand to lose something. Similarly, WTO Members agreed to seriously consider GATT dispute resolution reform only after the United States enacted “Super 301” in 1988. A public statement that the United States is reviewing its participation in the unreformed WTO would send a similar message and has a higher chance of bringing about reform.

Of course, it is highly unlikely that the United States would ever be forced to withdraw. Yet, what if it did? Contrary to the blind screams of outrage and prophecies of doom, this would hardly collapse the world trading system. First, U.S. Bilateral Investment Treaties (BITs) would continue, as would NAFTA and other regional or bilateral arrangements. Second, as the United States represents the largest consumer market in the world, it would be foolish for its trading partners to refuse to give it Most Favored Nation (MFN) status. One could quickly return to a GATT system. Third, over the very short-term, one could imagine negotiation of a GATT “plus” regime such as that advocated herein to bring the United States back into the fold.

More likely is the possibility that, without a change in Geneva, the United States will start to view WTO dispute settlement as largely irrelevant in practical terms, and refuse to acknowledge that its decisions carry any legitimacy. Rumblings by U.S. lawmakers and commentators in this vein have already commenced:

- The then-chairman of the Senate Finance Committee—the leading U.S. lawmaker responsible for trade matters—publicly touted WTO dispute settlement as nothing more than a “kangaroo court.”
- The U.S. Congress recently warned the Administration of the necessity of addressing dispute settlement in ongoing negotiations, expressing:

the view that continued support for trade expansion requires a preservation of the balance of rights and obligations negotiated in trade agreements. It identifies a growing concern that this balance may be upset by decisions of dispute settlement panels convened in the World Trade Organization (“WTO”) and the WTO Appellate Body. This concern is prompted by recent decisions placing new obligations on the United States, ... which are not found anywhere in the negotiated texts of the relevant WTO agreements.

Congress finds that WTO panels and the Appellate Body have ignored their obligation to
afford an appropriate level of deference to the technical expertise, factual findings, and permissible legal interpretations of national investigating authorities...  

• A conservative think tank published an important volume criticizing the process as wrongly compromising countries’ sovereignty.  
• Academics increasingly note the institutional and practical problems with the system.

None of these criticisms were seriously imaginable a few short years ago.

In any event, the possibility of U.S. withdrawal, or other significant action, should be met with neither unbridled horror, nor dismissed as impossible. The United States might ultimately have no choice but to withdraw, given the ever growing cost of its WTO commitments, the refusal of the DSB to constrain its judicial activism, and the lack of any effective democratic oversight of such activism. During the drafting of this article, the WTO authorized the European Community to retaliate against more than $4 billion in U.S. exports as part of the FSC case, a case the EC had previously agreed not to initiate in the first place. When the cost of a single decision, one that should have never been issued, goes into a ten-digit dollar figure, no credible diplomatic options should remain off the table.

VI. Conclusion

The early work of the Dispute Settlement Body, as Professor Bhala notes, was accompanied by a “near irrational exuberance.” The system was lauded by many in the beginning as a “world court for trade.” In fact, in those heady days, the U.S. Trade Representative’s office was fond of talking glowingly of the U.S. win/loss record, although even then there was a tendency to treat minor technical victories on small cases as the equivalent of a major commercial loss. Even today, U.S. officials claim relative parity in results, ignoring the clear trend and commercial imbalance in wins and losses. More fundamentally, if the WTO DSB is to be seen as a court, its success cannot simply be measured by a win/loss scorecard. We have a right, indeed an obligation, to expect appropriate judicial behavior in all cases.

Much has changed though. Not only have panels almost universally been deciding against the United States for several years (something that many, including many in the U.S. bar, would welcome in the abstract), but the bases for the decisions are at best dubious and, when the appropriate standard of review and international legal doctrines are considered, are wholly untenable. WTO panels are “making law” as if they were Platonic Guardians

248. See Bhala, supra note 1; Raustiala, supra note 5; Tarullo, supra note 9.
249. A few analysts did note early on the dangers inherent to a dispute settlement system that lacked adequate democratic and procedural protections. See, e.g., Wolff & Ragosta, supra note 4, at 705–08.
251. Bhala, supra note 1, at 856.
252. See Ragosta, supra note 2.
253. See 1998 Trade Policy Agenda and 1997 Annual Report, United States Trade Representative, at 56–69. Interestingly in the introduction to the section addressing the disputes brought by the United States, the report terms the WTO dispute settlement “an effective tool in combating barriers to U.S. exports.” Id. at 56. However, in the introduction to the section on the cases brought against the United States, the USTR makes no comparable comment.
of trade sitting in secret in Geneva. Nowhere is this clearer than in the area of trade remedies.

But another change has occurred, and it is one that may ultimately be even more important. This is that the WTO dispute settlement system is no longer immune from criticism.

As noted above, while different people identify different aspects of the problem, the fundamental issue seems to be an imbalance in the WTO's "judicial" powers and its "legislative" and "executive" function. If one wanted and were able to obtain one world government (functioning in an appropriate and democratic manner), there would hardly be a basis to object to a binding judicial system. As the world is, however (and as most governments appear to want to keep it that way for the foreseeable future), there is an enormous problem in having a powerful "judicial" function, unclear or ambiguous substantive provisions, lack of effective procedural protections, etc. The inevitable result—a result that has occurred—is judicial activism.

Unfortunately for the United States (and the millions of Americans who rely on the effective operation of rules against unfair trade), these judicial activists have decided in their wisdom, and contrary to the negotiated texts, that trade remedies expressly provided for in the agreements should be gutted. Environmental and labor activists are not entirely wrong when they bemoan the fact that it may be environmental and labor rights that suffer in future decisions—at least there is no way to ensure otherwise given the current system.

The question is, of course, what is to be done about it? In that regard, there are several possibilities. First, the system could simply muddle through. Panelists will continue to rewrite (or "interpret" actively) the current agreements. Trade laws will continue to be impaired. Subsidies and dumping will be protected (rather than those suffering from such practices). The United States, with the world's most open market, will suffer economically (although given the size of its economy, many of the bureaucrats in Washington will be able to ignore it). The Platonic Guardians will win, and the Court of International Trade judges and U.S. trade bar can cease their unnecessary function.

Alternatively, the United States could insist upon changes to bring into balance the WTO's various government functions. This would demand that WTO dispute settlement be fundamentally reformulated. First, as previously discussed, countries must have some ability to block implementation of panel decisions that are fundamentally inconsistent with important provisions. Second, clear restrictions on panels' judicial activism—for example, a strict standard of review and jurisdictional limitations—need to be provided. Third, procedural reforms such as protecting real parties in interest are essential. If these cannot be achieved, the United States should seriously reconsider its role in the WTO (including funding and participation).

Finally, even if nothing is done to correct the imbalance in the WTO dispute settlement system, at a minimum, a body that has "judicial" power should have judicial procedures. The WTO suffers from a surfeit of moot and irrelevant cases. The WTO suffers from issues of legitimacy that accompany a lack of transparency. The interested parties suffer from a lack of effective rules and procedures. Whatever else is done, these problems should be addressed. The USTR's efforts to create a more transparent system are only the beginning of that process.

Of course, there are other possibilities. Perhaps panels will start to obey their obligation to refrain from creating new international legal requirements. Perhaps panels will remem-
ber that sovereigns cannot be prevented from taking action unless they have specifically agreed not to take action. Perhaps panels will learn to refrain from making decisions when the rules simply do not bear a particular mandate. One must suspect not, however. Without a real threat of a major reformation, one suspects that being a secret Platonic Guardian is enjoyable. Perhaps another result awaits: The WTO dispute settlement will become increasingly irrelevant. That, too, would be unfortunate.