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Sue Ann Mota

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The World Trade Organization: An Analysis of Disputes

Cover Page Footnote

International Law; Commercial Law; Law

The World Trade Organization: An Analysis of Disputes

Sue Ann Mota[†]

I. Introduction

The World Trade Organization (WTO) was established on January 1, 1995, by the Uruguay Round of the General Agreement on Tariffs and Trade (GATT).¹ As of September 1999, the Geneva based WTO had more than 130 members.² Over three-fourths of those members are developing or least-developed nations.³ Those nations receive special status, and, in addition to other benefits,

[†] Sue Mota, Professor, Department of Legal Studies and International Business, Bowling Green State University; J.D., University of Toledo College of Law, *Order of the Coif*; M.A. and B.A., Bowling Green State University. Sara Graziano, BGSU student, is acknowledged for her research assistance on this project.

¹ See Final Act Embodying the Results of Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125 (1994) [hereinafter Final Act]. The Uruguay Round was the eighth round of GATT. The first round, GATT 1947, was entered into by twenty-three contracting states in Geneva to reduce customs tariffs and other impediments to trade. The first five rounds: the Geneva Round in 1947; the Annecy, France Round in 1949; the Torquay, England Round in 1950-51; the Geneva Round in 1955-56; and the Dillon Round in Geneva in 1961-62 focused on tariff reductions. In addition to tariff reductions, the Kennedy Round in Geneva in 1964-67 produced an Anti-dumping Code. The Tokyo Round in 1973-79 cut tariffs and created codes to regulate non-tariff matters such as customs violations, subsidies and countervailing measures, antidumping, standard import licensing, and government procurement. The eighth round, the Uruguay Round, 1986-94, was signed in Marrakesh, Morocco in April 1994. See AN ANATOMY OF THE WORLD TRADE ORGANIZATION 3 (Konstantinos Adamantopoulos ed., Kluwer Law International 1997).

² See WTO, *About the WTO—History* (visited Sept. 3, 1999) <<http://www.wto.org/wto/inbrief/inbr01.htm>>. There are roughly thirty countries currently negotiating for membership. See WTO, *About the WTO—Organization* (visited Sept. 3, 1999) <<http://www.wto.org/wto/inbrief/inbr02.htm>>.

³ See WTO, *About the WTO—Developing Countries* (visited Sept. 8, 1999) <<http://www.wto.org/wto/inbrief/inbr04.htm>>. The European Union, the United States, and other industrialized members, however, have the greatest share of international trade. See WTO, *About the WTO—Statistics A* (visited Sept. 8, 1999) <<http://www.wto.org/wto/statis/de.htm>>.

they receive technical assistance and training, and are allowed more time to implement agreements as a result of that status.⁴

The WTO administers the WTO trade agreement;⁵ acts as a forum for ongoing multilateral trade negotiations;⁶ serves as a tribunal for resolving disputes;⁷ reviews the trade policies and practices of members;⁸ and cooperates with other international organizations such as the International Monetary Fund and the World Bank to standardize global economic policy making.⁹ The WTO is "the only international organization dealing with global rules of trade between nations,"¹⁰ and since the total volume of world trade in 1997 was fourteen times what it was in 1950,¹¹ the WTO is becoming an increasingly important organization.

The establishment of the WTO was guided in part by the procedures, customary practices, and decisions of the former GATT organization.¹² The GATT organization was a loose confederation of states, which contracted to promote the free trade in goods internationally.¹³ The WTO replaced the GATT organization, but in doing so adopted the GATT agreement regarding the trade of goods as one of its bases.¹⁴ The WTO, unlike its predecessor, also governs international trade for services and intellectual property, and provides a comparatively efficient framework for resolving trade disputes and enforcing dispute resolution decisions.¹⁵ The WTO is comprised of members rather

⁴ See WTO, *About the WTO—Developing Countries*, *supra* note 3.

⁵ See Marrakesh Agreement Establishing the World Trade Organization, art. III, para. 1, Legal INSTRUMENTS - RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 81 (1994) [hereinafter WTO Agreement].

⁶ See *id.* art. III, para. 2.

⁷ See *id.* art. III, para. 3.

⁸ See *id.* art. III, para. 4.

⁹ See *id.* art. III, para. 5.

¹⁰ WTO, *About the WTO—History* (visited Sept. 3, 1999) <<http://www.wto.org/wto/inbrief/inbr01.htm>>.

¹¹ See WTO, *About the WTO—Statistics B* (visited Sept. 8, 1999) <<http://www.wto.org/wto/statis/be.htm>>.

¹² See WTO Agreement art. III, para. 1.

¹³ See WTO, *About the WTO—Facts* (visited Sept. 8, 1999) <<http://www.wto.org/wto/about/facts6.htm>>.

¹⁴ See *id.*

¹⁵ See *id.*

than loose contracting parties.¹⁶ In essence, the WTO swallowed and then increased the scope of the GATT organization.

The dispute resolution process under the WTO is particularly innovative, compared to prior processes, and contributes more to global economic stability than does any other aspect of the WTO.¹⁷ This article will begin by describing the WTO's dispute resolution process.¹⁸ It will then present a statistical overview of the disputes that have been brought before the WTO,¹⁹ and discuss many of those cases and the extent to which they were resolved.²⁰ The article will conclude with some recommendations for improving the dispute resolution process.²¹

II. WTO's Dispute Resolution Process

"The dispute settlement system of the [WTO] is a central element in providing security and predictability to the multilateral trading system."²² The prompt settlement of disputes is essential to the effective functioning of the WTO.²³ The dispute resolution process seeks to produce positive, mutually acceptable solutions to problems.²⁴

The WTO Agreement established a Dispute Resolution Body (DRB) charged with creating panels, adopting panel and appellate body reports, and monitoring compliance with rulings and recommendations.²⁵ A dispute resolution begins when a WTO

¹⁶ See *id.*

¹⁷ See AN ANATOMY OF THE WORLD TRADE ORGANIZATION, *supra* note 1, at 23.

¹⁸ See *infra* notes 22-47.

¹⁹ See *infra* notes 48-64.

²⁰ See *infra* notes 65-235.

²¹ See *infra* notes 235-43.

²² WTO Agreement Annex 2, art. 3, para. 2.

²³ See *id.* Annex 2, art. 3, para. 3.

²⁴ See *id.* Annex 2, art. 3, para. 7. A proper balance between the rights and obligations of members is important. See *id.* Annex 2, art. 3, para. 3. Members should exercise judgment concerning whether an action would be fruitful before bringing a case. See *id.* Annex 2, art. 3, para. 7.

²⁵ See *id.* Annex 2, art. 2, para. 1; see generally Robert E. Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8 MINN. J. GLOBAL TRADE 1 (1999); Padideh Ala', *Free Trade or Sustainable Development? An Analysis of the WTO Appellate Body's Shift to a More Balanced Approach to Trade Liberalization*, 14 AM. U. INT'L L. REV. 1129 (1999); John Gaffney, *The Review of the*

member requests a consultation with the DRB and other relevant committees.²⁶ Any other involved member(s) must enter into the consultation in good faith.²⁷ These consultations are confidential.²⁸ If a dispute is not resolved within sixty days after a request for consultation, the member bringing a complaint may submit a written request for a panel.²⁹ The parties may voluntarily undertake other good offices, conciliation, or mediation, which may continue even while a panel proceeds.³⁰

The panel examines the matter before the DRB in light of the relevant provisions of the agreement in question, and produces findings to assist DRB in making recommendations.³¹ The three member panels are comprised of experienced governmental and/or non-governmental individuals from diverse backgrounds, who are selected to ensure independence.³² If a dispute is between a developed country and a developing country, the developing country may request that the panel include at least one panelist

WTO Understanding on Dispute Settlement: Some Reflections on the Current Debate, 14 AM. U. INT'L L. REV. 1223 (1999); Kim Vander Borgh, *The Review of the WTO Understanding on Dispute Settlement: Some Reflections on the Current Debate*, 14 AM. U. INT'L L. REV. 1223 (1999); Peter Lichtenbaum, *Procedural Issues in WTO Dispute Resolution*, 19 MICH. J. INT'L L. 1195 (1998); John H. Jackson, *The WTO Dispute Settlement Understanding-Misunderstandings on the Nature of Legal Obligations*, 91 AM. J. INT'L L. 60 (1997).

²⁶ See WTO Agreement Annex 2, art. 4, para. 4. Note that the agreement also provides for expeditious arbitration within the WTO as an additional means for resolving disputes. *Id.* art. 25, para. 1.

²⁷ See *id.* Annex 2, art. 4, para. 3.

²⁸ See *id.* Annex 2, art. 4, para. 6.

²⁹ See *id.* Annex 2, art. 4, para. 7. In urgent cases, such as disputes involving perishable goods, the panel may be requested within twenty days. See *id.* Annex 2, art. 4, para. 9. The member requesting the panel must identify the specific measures at issue and the legal basis for the complaint so as to present the problem clearly. See *id.* art. 6, para. 2.

³⁰ See *id.* Annex 2, art. 5, paras. 1, 5.

³¹ See *id.* art. 7, para. 1. Agreements covered include the Agreement Establishing the World Trade Organization and Multilateral Trade Agreements such as Multilateral Agreements on Trade in Goods, the General Agreement on Trade in Services (hereinafter GATS), and the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter TRIPS). See *id.* app. 1.

³² See *id.* art. 8, paras. 1, 2. Citizens of members involved in the dispute may not serve on a panel involved in the dispute unless the parties to the dispute agree. See *id.* art. 8, para. 1.

from another developing country.³³ If more than one member requests a panel on a matter, a single panel will be established by such means as will not impair the rights of any of the disputing parties.³⁴

A panel may seek information and technical advice from appropriate bodies after informing the members involved.³⁵ Panel deliberations are confidential.³⁶ Panels issue interim reports to the parties. Parties may request that panels review sections of interim reports and/or hold further meetings with the parties on identified issues.³⁷ Unless a party wishes to appeal the panel recommendation, a final report is submitted to the Dispute Settlement Body (DSB) for approval.³⁸ Only parties to disputes may appeal,³⁹ and appeals are heard only on legal issues.⁴⁰

The seven-member appellate body hears appeals from panel cases in three-person groups.⁴¹ As with panel proceedings, appellate body proceedings are confidential.⁴² No *ex parte* communications with panels or the Appellate Body are allowed.⁴³

³³ *See id.* art. 8, para. 10.

³⁴ *See id.* art. 9, paras. 1, 2. Third party members with substantial interests in disputes shall also have the opportunity to be heard. *See id.* art. 10, para. 2.

³⁵ *See id.* art. 13, para. 1.

³⁶ *See id.* art. 14, para. 1. The panels meet in closed session and deliberations and documents are kept confidential. *See id.* app. 3, para. 2.

³⁷ *See id.* art. 15, para. 2.

³⁸ *See id.* art. 15, para. 4. A proposed timetable for this process follows: Five to nine weeks after the first written submission of the parties, the panel has the first substantive meeting with the parties. One to two weeks later, written rebuttals are received. A second meeting is held two to three weeks later, then two to four weeks later a preliminary report is issued to the parties, who have about two weeks to comment. The interim report is issued, and the parties may request to review this. There may be an additional meeting with the parties. Two weeks after that, the final report is issued to the parties, and then the final report is circulated to the members. *See id.* app. 3.

³⁹ *See id.* art. 16, para. 4.

⁴⁰ *See id.* art. 16, para. 6.

⁴¹ *See id.* art. 16, para. 1. These seven members are “persons of recognized authority, with demonstrated expertise in law, international trade, and the subject matter of the . . . agreement” in question. The seven are to be “broadly representative of membership in the WTO, unaffiliated with any government,” and free from conflicts of interest. *Id.* art. 16, para. 3.

⁴² *See id.* art. 16, para 3.

⁴³ *See id.* art. 18, para. 1.

The Appellate Body may “uphold, modify, or reverse the legal findings and conclusions” of a panel.⁴⁴ The DRB adopts or rejects the appellate body’s decision.⁴⁵

The Agreement establishing the WTO states that prompt compliance with recommendations or rulings of the DSB is “essential to ensure effective resolution of disputes.”⁴⁶ If an offending party fails to implement a ruling, the WTO may request voluntary compensation from, and/or temporarily suspend concessions that benefit that party.⁴⁷

III. Disputes Taken to the WTO

A. Statistical Overview

At the time of this writing, WTO members had requested 175 consultations regarding 134 distinct matters.⁴⁸ Developed countries requested 131 consultations regarding 101 distinct matters; developing countries made thirty-four requests regarding thirty distinct matters.⁴⁹ Ten requests were made by both developed and developing countries on four distinct matters.⁵⁰ The respondents to complaints brought by developed countries were seventy-five developed country members and fifty-six developing country members.⁵¹ The respondents to complaints brought by developing country members were twenty-two developed countries and twelve developing countries.⁵² All respondents to requests made by both developed and developing countries were developed countries.⁵³ In summary, 61% of the respondents were developed countries, and 39% of the respondents were developing countries.

⁴⁴ *Id.* art. 17, para. 13.

⁴⁵ *See id.* art. 17, para. 14.

⁴⁶ *Id.* art. 21, para. 1.

⁴⁷ *See id.* art. 22, para. 1.

⁴⁸ *See* WTO, *Overview of the State-of-Play of WTO Disputes* (visited Sept. 21, 1999) <<http://www.wto.org/wto/dispute/bulletin.htm>> [hereinafter Disputes Website].

⁴⁹ *See id.* summary.

⁵⁰ *See id.*

⁵¹ *See id.*

⁵² *See id.*

⁵³ *See id.*

Twenty-six complaints have been decided, and of those, developed countries brought sixteen, and developing countries brought nine.⁵⁴ The remaining case was brought by a combination of developed and developing countries.⁵⁵ Thus, developed countries brought 61.5% of the completed cases, developing countries brought 37.7 %, and one case was brought by a combination of developing and developed countries.⁵⁶ Of the sixteen complaints brought by developed countries, nine (56.3%) were against other developed countries,⁵⁷ with the remaining seven (43.8%) brought against developing countries. Developed countries won 81.3% of the cases they brought overall and 100% of their cases against developing countries.⁵⁸ Of the nine complaints brought by developing countries, two (22.2%) were against other developing countries.⁵⁹ The remaining seven (77.8%) were against developed countries.⁶⁰ Developing countries won 100% of their cases against developed countries, and 88.9% of all the cases they brought.⁶¹

Complainants won twenty-one of the twenty-six completed cases brought, or 80.8% of such cases.⁶² Of the four times a complainant lost, the United States lost three times, and the Philippines lost once.⁶³ Both pending and completed cases are summarized below, and the case summaries are grouped according to how far through the dispute resolution process each case has progressed.⁶⁴

B. Consultations & Panels Pending

As of this writing, seventy consultations are pending.⁶⁵ The

⁵⁴ *See id.*

⁵⁵ *See id.*

⁵⁶ *See id.*

⁵⁷ *See id.*

⁵⁸ *See id.*

⁵⁹ *See id.*

⁶⁰ *See id.*

⁶¹ *See id.*

⁶² *See id.*

⁶³ *See id.*

⁶⁴ *See infra* notes 65-235 and accompanying text.

⁶⁵ *See* Disputes Website, *supra* note 48.

United States filed a number of requests for consultation with the DRB in May and June of 1999. In May, the United States alleged that Indian measures affecting trade and investment in the motor vehicle sector were inappropriate.⁶⁶ That same month the United States filed complaints against the European Community (France in particular) and against Argentina.⁶⁷ Respectively, the complaints against France and Argentina alleged violative preferential domestic treatment in the form of aircraft industry subsidies, and inadequate pharmaceutical product patent protection coupled with the lack of an effective exclusive marketing system for such products in violation of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).⁶⁸ In June 1999, the United States complained that the European Community was not adequately protecting U.S. trademarks, and was allowing geographical labeling on agricultural products and foodstuffs in violation of TRIPS.⁶⁹ The United States has an additional consultation pending against Canada over Canada's patent term.⁷⁰

In March 1999, Canada filed a complaint against the United States over a countervailing duty investigation involving live cattle from Canada.⁷¹ India has a consultation involving South Africa over anti-dumping duties of certain pharmaceutical products from India.⁷² A Czech Republic complaint alleges that Hungary's quantitative restrictions on a broad range of steel products from the Czech Republic violate GATT.⁷³ Hungary contends that a Czech Republic's import duty on wheat from Hungary also violates GATT.⁷⁴

Brazil filed a complaint against the European Community contesting measures affecting the differential and favorable

⁶⁶ *See id.* § VII, para. 60.

⁶⁷ *See id.* § VII, paras. 57, 58(a).

⁶⁸ *See id.*

⁶⁹ *See id.* § VII, para. 59.

⁷⁰ *See id.* § VI, para. 23.

⁷¹ *See id.* § VII, para. 55.

⁷² *See id.* § VII, para. 57.

⁷³ *See id.* § VII, para. 54.

⁷⁴ *See id.* § VII, para. 46.

treatment of coffee.⁷⁵ Canada filed a complaint against the European Community over patent protection for pharmaceutical and agricultural products under TRIPS.⁷⁶ Mexico, whose case against Guatemala was dismissed in January 1999, has resubmitted its complaint regarding Guatemalan anti-dumping measures on gray Portland Cement from Mexico.⁷⁷

The European Community has complained about Argentine anti-dumping measures on imports of drill bits from Italy, and about Argentine measures relating to the export of bovine hides and the import of finished leather.⁷⁸ The European Community filed complaints against India for a series of increases in customs duties and import measures.⁷⁹ The European Community has also filed a complaint in response to U.S. rules of origin for textiles and apparel products.⁸⁰

As of this writing, twenty-one panels were active.⁸¹ The European Community and Japan have complained about certain Canadian measures, which allow only limited numbers of car manufacturers to import vehicles into Canada duty-free, under an Auto Pact between the United States and Canada.⁸² In January 1999, following a June 1998 request for consultation, the European Community requested a panel review of U.S. imposition of countervailing duties on certain hot-rolled lead and bismuth carbon steel products originating in the United Kingdom.⁸³ In February 1999, a panel was convened to review a U.S. complaint alleging improper imported beef restrictions by Korea.⁸⁴

A panel was established in February 1999 to examine European Community allegations that the U.S. Anti-Dumping Act of 1916 is still in effect, and is applicable to the import and

⁷⁵ *See id.* § VII, para. 51.

⁷⁶ *See id.* § VII, para. 50.

⁷⁷ *See id.* § VIII(A), para. 15.

⁷⁸ *See id.* § VII, para. 52; *see also id.* § VI, para. 18

⁷⁹ *See id.* § VII, para. 48.

⁸⁰ *See id.* § VII, para. 49.

⁸¹ *See id.* § VI.

⁸² *See id.* § VI, paras. 9(a), 10(b).

⁸³ *See id.* § VI, para. 11.

⁸⁴ *See id.* § VI, para. 13(a).

internal sale of any foreign product irrespective of its origin.⁸⁵ The European Community alleges that this act violates GATT.⁸⁶

The European Community and the Japanese contend that a Massachusetts act that regulates state contracts with companies doing business with Burma (Myanmar) violates GATT.⁸⁷ The European Community also has questioned the validity of several sections of the U.S. Internal Revenue Code, which grant special tax treatment to Foreign Sales Corporations.⁸⁸ The United States has challenged a Mexican anti-dumping investigation of high-fructose corn syrup from the United States.⁸⁹ In May 1999, the European Community sought review of the U.S. imposition of 100% duties on certain products from the European Community.⁹⁰ As of this writing, all four of these challenges were before panels.

A number of panel reviews were requested in June 1999. First, the United States requested a panel to review Argentine measures affecting the importation of U.S. footwear.⁹¹ That same month the United States requested that another panel examine allegedly improper government procurement practices in Korea.⁹² In addition, in June 1999, Japan requested a panel, charging that in a number of cases involving affiliates of Japanese companies, U.S. courts had failed to apply procedural safeguards mandated by the Anti-Dumping Act.⁹³ Finally, the European Community requested a panel on U.S. definitive safeguard measures in the form of quantitative limits on imports of wheat gluten from the European Community.⁹⁴

C. WTO Complaints Resulting in Panel, Appellate Body, and Arbitrator's Reports

Five cases resulted in the issuance of a panel report, an

⁸⁵ *See id.* § VI, para. 8.

⁸⁶ *See id.*

⁸⁷ *See id.* § VI, para. 3(a).

⁸⁸ *See id.* § VI, para. 2.

⁸⁹ *See id.* § VI, para. 5.

⁹⁰ *See id.* § VI, para. 15.

⁹¹ *See id.* § VI, para. 21.

⁹² *See id.* § VI, para. 17.

⁹³ *See id.* § VI, para. 19.

⁹⁴ *See id.* § VI, para. 20.

appellate body report, and an arbitrator's report.⁹⁵ Developed countries brought three of these cases against other developed countries.⁹⁶ One case involved developed countries bringing suit against a developing country.⁹⁷ The fifth case was brought by both developing and developed countries against a developed country.⁹⁸ The complainants won 100% of the cases that they brought.⁹⁹ These cases are summarized in the subsequent paragraphs.¹⁰⁰

Prior to January 1999, the European Community and the United States complained about Korea's taxes on alcoholic beverages.¹⁰¹ Under the Korean tax guidelines, imported alcohol was taxed differently than domestic alcohol, and the complaining parties alleged that this was intended to protect domestic alcohol producers in violation of GATT.¹⁰² A panel and the appellate body upheld the joint complaint, and the DSB approved the reports in February 1999. In June 1999, an arbitrator gave Korea eleven months and two weeks to implement the ruling.¹⁰³

In another case, Canada requested that a panel review Australia's prohibition on the importation of fresh, chilled, or frozen salmon from Canada, under Australia's Quarantine Proclamation.¹⁰⁴ The panel found that Australia had violated the

⁹⁵ See WTO, *Panel and Appellate Body Reports* (visited Sept. 30, 1999) <<http://www.wto.org/wto/dispute/distab.htm>>.

⁹⁶ *See id.*

⁹⁷ *See id.*

⁹⁸ *See id.*

⁹⁹ *See id.*

¹⁰⁰ *See infra* notes 101-55 and accompanying text.

¹⁰¹ *See* WTO Appellate Body Report on Korea—Taxes on Alcoholic Beverages, WT/DS75/16, WT/DS84/14 (Jan. 18, 1999). Korea's Liquor Tax Law imposes an *ad valorem* tax on distilled spirits; the rate of tax differs for each of the eleven categories of alcoholic beverages. *See id.* para 2. The appellate body agreed with the panel, and recommended that the DSB request that Korea bring its laws into conformity with GATT. *See id.* paras. 169-70.

¹⁰² *See id.* para. 2.

¹⁰³ *See* WTO Award of the Arbitrator Claus-Dieter Ehlermann on Korea—Taxes on Alcoholic Beverages, Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes WT/DS75/16, WT/DS/84/14 para. 48 (June 4, 1999).

¹⁰⁴ WTO Appellate Body Report on Australia—Measures Affecting Importation of Salmon WT/DS18/AB/R 32 (Oct. 20, 1998) [hereinafter ABR Australia]. Under this act, passed in December of 1996, Australia's Director of Quarantine decided that uncooked,

Agreement on the Application of Sanitary and Phyto-Sanitary Measures (SPS) of GATT 1994.¹⁰⁵ The violation occurred because Australia had maintained a sanitary measure not based on a risk assessment, adopted arbitrary or unjustifiable distinctions in the levels of sanitary measures that it considered appropriate in different situations, and maintained a sanitary measure more trade-restrictive than necessary.¹⁰⁶ The appellate body reversed the panel's reasoning with respect to some sections of the SPS Agreement, but nonetheless found that Australia had acted inconsistently with other sections of the agreement, and recommended that the DSB request that Australia conform.¹⁰⁷ Canada requested arbitration, and the arbitrator gave Australia eight months to comply.¹⁰⁸ The eight-month compliance period expired on July 6, 1999.¹⁰⁹

In a third case, two panels, each composed of the same three persons, heard U.S. and Canadian complaints about the European Community's prohibition on imports of meat and meat products derived from cattle to which either the natural hormones oestradiol-17B, progesterone or testosterone, or the synthetic hormones trenbolone acetate, zeranol or melengestrol acetate ("MGA"), had been administered.¹¹⁰ The European Community banned the importation of U.S. beef in 1989 because these growth

wild, adult, ocean-caught Pacific salmon should not be imported into Australia. Quarantine Proclamation No. 86A, *Australian Government Gazette*, No. S33, Feb. 21, 1975.

¹⁰⁵ See ABR Australia, *supra* note 104.

¹⁰⁶ See *id.* at 218. The panel requested that the DSB ask Australia to bring its measures into conformity with the agreement. See *id.*

¹⁰⁷ See *id.* at 123-24.

¹⁰⁸ See WTO, Award of Arbitrator Said El-Naggar on Australia—Measures Affecting Importation of Salmon, Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, WT/DS18/9 (Feb. 23, 1999).

¹⁰⁹ See *id.*

¹¹⁰ WTO, Appellate Body Report on E.C.—Measures Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) [hereinafter ABR EC Meat]; see generally Vern R. Walker, *Keeping the WTO from Becoming the "World Trans-science Organization": Scientific Uncertainty, Science Policy and Fact-finding in the Growth Hormones Dispute*, 31 CORNELL INT'L L. J. 251 (1998); Layla Hughes, *Limiting the Jurisdiction of Dispute Settlement Panels: The WTO Appellate Body Beef Hormone Decision*, 10 GEO. INT'L ENVTL. L. REV. 915 (1998).

hormones were administered to U.S. cattle.¹¹¹ The panels issued similar reports concluding that the European Community, by maintaining sanitary measures not based on a risk assessment, and by adopting arbitrary or unjustifiable distinctions in the levels of sanitary protection in different situations, violated sections of the SPS Agreement.¹¹²

On appeal, the European Community alleged, among other things, that the panel allocated the burden of proof incorrectly and used an inappropriate standard of review under the SPS Agreement.¹¹³ The appellate body reversed the panel's ruling on the burden of proof, but affirmed its ruling on the standard of review. While the complaining party bears the initial burden of establishing a prima facie case of inconsistency with a particular provision of the SPS Agreement, the appellate body found that the panel's general interpretative ruling, that the member imposing an SPS measure has the evidentiary burden, was bereft of basis in the SPS Agreement, and reversed that ruling.¹¹⁴ The SPS Agreement is silent as to standard of review, but the appellate body concluded that the panel applied the appropriate standard.¹¹⁵ The panel must make an objective assessment of the facts under Article 11 of the WTO's Dispute Settlement Agreement, and the panel complied with this obligation.¹¹⁶ The appellate body left intact those panel conclusions that were not appealed, and recommended that the European Community bring the measures concerning meat hormones into conformity.¹¹⁷ The DSB adopted the reports.¹¹⁸

The European Community informed the DSB that it intended to comply, and the parties held discussions to set a reasonable time period for compliance. The parties, however, could not reach an

¹¹¹ See ABR EC Meat, *supra* note 110.

¹¹² See *id.* para. 6.

¹¹³ See *id.* para. 96.

¹¹⁴ See *id.* para. 102.

¹¹⁵ See *id.* para. 253(b).

¹¹⁶ See *id.* para. 253(e).

¹¹⁷ See *id.* paras. 254, 255. The Appellate Body upheld most of the findings and conclusions of the panels, but reversed on a few findings and conclusions, and modified the panel's interpretation of sections of the SPS Agreement. See *id.* para. 253.

¹¹⁸ See Disputes Website, *supra* note 48, § I, para. 9.

agreement.¹¹⁹ Thereafter, an arbitrator determined that fifteen months was a reasonable time period in which to comply.¹²⁰ In April 1999, one month prior to the expiration of the compliance period, the European Community informed the DSB that it would consider offering compensation if it could not comply by the deadline.¹²¹ In June 1999, the United States and Canada requested authorization from the DSB to suspend concessions to the European Community valued at U.S. \$202 million and Can. \$75 million.¹²² The European Community requested arbitration on these monetary valuations and the DSB referred the issue to the original panel for arbitration.¹²³ Arbitrators fixed amounts at U.S. \$116.8 million and Can. \$11.3 million per year.¹²⁴

The best known WTO dispute, the so-called "Banana Wars," tested the strength of the WTO as a dispute resolution mechanism.¹²⁵ Prior to 1973, the European Community, the second largest banana market in the world, maintained a free market in bananas. However, in 1973 the European Community developed a banana preference regime with former European colonies in Africa, the Caribbean, and the Pacific (ACP countries).¹²⁶ The trade preference was implemented under the 1975 Lomé Convention,¹²⁷ which approved a package of European

¹¹⁹ See WTO Award of Arbitrator on E.C.—Measures Concerning Meat and Meat Products (Hormones), Original Complaint by Canada, Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU, WT/DS26, WT/DS48 paras. 1, 2 (July 12, 1999) [hereinafter AARB EC Meat].

¹²⁰ See *id.* para. 48.

¹²¹ See Disputes Website, *supra* note 48, § I.

¹²² See AARB EC Meat, *supra* note 119, para. 1.

¹²³ See Disputes Website, *supra* note 48, § I, para. 9.

¹²⁴ See AARB EC Meat, *supra* note 119, paras. 15, 17.

¹²⁵ WTO Appellate Body Report on European Communities—Regime for Importation, Sale and Distribution of Bananas, WT/DS27/AB/R (Sept. 9, 1997) [hereinafter ABR Bananas]. Following a panel decision, there was a dispute between the complainants and the respondent over whether the respondent had complied with the panel recommendations. See *infra* notes 140-45 and accompanying text.

¹²⁶ See *id.* The ACP countries account for 19% of European Community banana imports. See *id.*

¹²⁷ See *id.* paras. 96, 100. The E.C. was granted a waiver to certain obligations under GATT 1947 with respect to the Lomé Convention. See *id.* para. 14. This Lomé waiver is in effect until February, 2000. See *id.* The ACP countries are Belize, Cameroon, Cape Verde, Cote d'Ivoire, Dominica, Grenada, Jamaica, Madagascar,

Community aid programs to seventy-one ACP countries, thirty-nine of which are among the world's forty-eight poorest nations.¹²⁸

The United States, Guatemala, Honduras, and Mexico requested consultation in September 1995. Ecuador, the producer of 32% of the world's bananas in 1997 and the leading Latin American supplier of bananas to the European Community,¹²⁹ requested consultation on the same issue in February 1996, after Ecuador joined the WTO.¹³⁰ A panel was formed, and issued four reports. The reports held that the European Community's regime for the import of bananas, and its licensing procedure were inconsistent with GATT, the General Agreement of Trade in Services (GATS), and the import licensing agreement.¹³¹ The reports advised the DSB to request that the European Community conform its banana import regime.¹³²

The European Community appealed the panel recommendation on several grounds. First, the European Community claimed that the United States did not have standing to bring its claim under GATT 1994 because, although the United States grows bananas in Puerto Rico and Hawaii for internal consumption, the United States is not a banana exporter.¹³³ The European Community based its appeal on the proposition that, under any system of law, including international law, a claimant must have a legal right or

Somalia, St. Lucia, St. Vincent and the Grenadines, and Suriname. See WTO Subsequent Panel Report on European Communities—Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R tbl. 1 (April 12, 1999) [hereinafter SPR bananas]. The first 857,700 tons of bananas from these countries are duty-free. See *id.* Over this amount, non-traditional ACP bananas are also given a preferential structure. See *id.*

¹²⁸ Raj Bhala, *Preference for Its Former Colonies*, LEGAL TIMES, Feb. 8, 1999, at S36. There was an overall tariff-rate quota of 851,000 tons of bananas at reduced or zero tariff. See *id.* Latin American bananas were excluded, but four banana-exporting Latin American countries, Columbia, Costa Rico, Nicaragua, and Venezuela, negotiated a separate Banana Framework Agreement (BFA) with the European Community. See *id.* The European Community also has a complex licensing system whereby the firms holding the licenses are authorized to import bananas. See *id.* The World Bank views this as inefficient; the European licensees profit more than the ACP countries. See *id.*

¹²⁹ See *id.* Ecuador's share of world exports of bananas grew from 23% in 1990 to 32% in 1997. See SPR Bananas, *supra* note 127, Annex 2, tbl. 1.

¹³⁰ See Disputes Website, *supra* note 48, § VII, para. 7.

¹³¹ See ABR Bananas, *supra* note 125.

¹³² See *id.* para. 2.

¹³³ See *id.* paras. 14-15.

interest in a claim.¹³⁴ The panel and appellate body disagreed on the grounds that no provision of the WTO Agreement contains an explicit provision that members have a legal interest as a prerequisite for requesting a panel.¹³⁵

The European Community raised several additional issues on appeal, but the appellate body agreed with the panel's conclusion that the European Community could not violate GATT 1994.¹³⁶ Under the Lomé Convention, the European Community is required to grant duty-free access to some ACP bananas.¹³⁷ The panel and appellate body agreed that the import licensing agreement is subject to both GATT 1994 and GATS.¹³⁸

The DSB adopted the panel and appellate body reports in September 1997.¹³⁹ An arbitrator decided that a reasonable period of time for the European Community to implement the recommendations and rulings would expire on January 1, 1999.¹⁴⁰ The European Community revised its measures and informed the DSB that the new system would be fully operational as of that

¹³⁴ See *id.* para. 15. The European Community referred to judgments of the Permanent Court of International Justice and the International Court of Justice. The appellate body, however, did not read these cases to stand for such a general principal. See *id.* para. 133.

¹³⁵ See *id.* para. 132. A member has broad discretion in deciding whether to bring a case against another member. See *id.* para. 135. Since the U.S. produces bananas, the internal market could be affected, and there is a potential export market, the U.S. has standing. See *id.* para. 136. U.S. corporations account for 70% of Latin America's banana exports to the European Community. See Bhala, *supra* note 128, at S36.

¹³⁶ See ABR Bananas, *supra* note 125, para. 158. The GATT rule on non-discriminating administration of quantitative/restrictions and tariff quotas prohibits allocation of tariff quota shares to some but not all members. See *id.* para. 152.

¹³⁷ The 4th ACP-BBC Convention of Lomé, Declaration of the Contracting Parties, Dec. 9, 1994, L/7604. Duty-free access for 90,000 tons of non-traditional ACP bananas, a margin of tariff for 100 ECU/tons for all other non-traditional ACP bananas, and tariff quota shares in the amount of their pre-1991 *best ever export values* are required. See ABR Bananas, *supra* note 125, para. 255(g).

¹³⁸ See ABR Bananas, *supra* note 125, para. 22. The panel finding that GATS claims made by Mexico, Guatemala, and Honduras were not within the scope of this case was reversed. See *id.* para. 175.

¹³⁹ See Disputes Website, *supra* note 48, § I, para. 7.

¹⁴⁰ See WTO Arbitrator Decision on European Communities—Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/ARB para. 20 (Jan. 7, 1998) [hereinafter ARB Bananas].

date.¹⁴¹ On January 14, 1999, however, the United States claimed that the European Community had failed to implement the panel ruling, and requested the suspension of concessions to the European Community in the amount of U.S. \$520 million.¹⁴² The European Community requested arbitration and the DSB referred the issue to the original panel for arbitration.¹⁴³ The arbitrator's report calculated that the level of impairment suffered by the United States was U.S. \$191.7 million per year.¹⁴⁴ On April 9, 1999, the United States requested that the DSB authorize suspension of concessions in that amount, and on April 19, 1999, the DSB so authorized.¹⁴⁵

The final case for which a panel report, an appellate body report, and an arbitrator's report were issued was brought by the United States, the European Community, and Canada against Japan.¹⁴⁶ The complainants challenged Japan's liquor tax law.¹⁴⁷ The panel concluded that Japanese Shochu and imported vodka, whisky, brandy, rum, gin, genever, and liquors were similar, or at least directly substitutable products,¹⁴⁸ and that taxing the imports in excess of the domestic product violated GATT.¹⁴⁹ The panel advised the DSB to request that Japan bring its liquor tax law into conformity with GATT 1994.¹⁵⁰

¹⁴¹ See Disputes Website, *supra* note 48, § I, para. 7.

¹⁴² See *id.*

¹⁴³ See *id.*

¹⁴⁴ See *id.*

¹⁴⁵ See WTO Dispute Settlement Board Report European Communities—Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/DSB para. 20 (Apr. 9, 1999).

¹⁴⁶ See WTO Panel Report on Japan—Taxes on Alcoholic Beverages, WT/DS8, WT/DS10, WT/DS11 para. 7.2 (July 11, 1996) [hereinafter PR Alcohol].

¹⁴⁷ Shurzdihō Law No. 6 (1953) (Japan).

¹⁴⁸ See PR Alcohol, *supra* note 146, para. 7.1. The first sentence of GATT 1994, Article III:2 establishes that taxing imported products in excess of like domestic products, is inconsistent with Article III. See *id.*

¹⁴⁹ See *id.* The second sentence of GATT 1994, Art. III:2 contains a general prohibition against the imposition of internal taxes or other internal charges to imported products, where substantially similar or directly competitive domestic products are not so taxed, where the purpose is to protect domestic production. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, Legal Instruments—Results of the Uruguay Round vol. 1 (1994) 33 I.L.M. 1125 (1994).

¹⁵⁰ See PR Alcohol, *supra* note 146, para. 7.2.

Pursuant to an appeal by Japan, the appellate body concluded that the panel erred in law on some issues,¹⁵¹ but nevertheless recommended that the DSB ask Japan to bring its liquor tax law into conformity with GATT 1994. The appellate body agreed with the panel that Shochu and the imported alcoholic beverages were like products, that Japan had taxed the imported products at higher rates than the domestic products, and that Shochu and most other distilled spirits are directly competitive or substitutable products.¹⁵² The DSB accepted the panel and appellate body reports in November 1996.¹⁵³ An arbitrator found that a reasonable period for implementation was fifteen months.¹⁵⁴ Japan presented modalities for implementation that were accepted by the complainants.¹⁵⁵

D. Complaints Resulting in Panel and Appellate Body Reports

At the time of this writing, eleven cases have resulted in panel and appellate body reports.¹⁵⁶ Of those eleven, developed

¹⁵¹ See WTO Appellate Body Report on Japan—Taxes in Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R para. I(b) (Oct. 4, 1996). The panel erred in law by failing to take into account Article III.1 in interpreting Article III:2. See *id.* In so concluding, the appellate body looked at the WTO Agreement as an international contract. See *id.* para. F. In exchange for the benefits derived as a WTO member, the countries agree to the commitments so made. See *id.* Under Article 31, a treaty is interpreted in good faith according to the ordinary meaning of the terms of the treaty, taken in context and in the light of the treaty's object and purpose. See *id.* Doing so, the panel erred in the conclusion alone. See *id.* para. D. The panel's conclusion regarding directly competitive or substitute products were erroneous as a matter of law, and the panel report failed to address the full range of alcoholic beverages. If imported and domestic products are not "like products" for the purpose of Article III:2., first sentence, then they may still be "directly competitive or substitutable products" under Article III:2, second sentence. The panel was correct to look at physical characteristics, common end uses as shown by elasticity of substitution, and tariff classification to make this determination. See *id.* para. H(2)(a).

¹⁵² See Ramon Q. Gupta, *Appellate Body Interpretation of the WTO Agreement: A Critique in Light of Japan—Taxes on Alcoholic Beverages*, 6 PAC. RIM L. & POL'Y J. 683 (1997).

¹⁵³ See WTO Award of Arbitrator on Japan—Taxes and Alcoholic Beverages, WT/DS8/ARB, WT/DS10/ARB, WT/DS11/ARB para. 1 (Feb. 14, 1997).

¹⁵⁴ See *id.* para. 27.

¹⁵⁵ See Disputes Website, *supra* note 48, § I, para. 2.

¹⁵⁶ See *id.* § I, summary.

countries brought three cases against developing countries.¹⁵⁷ One was brought by a developing country against a developing country. Developed countries brought two cases against a developing country.¹⁵⁸ Five were brought by developing countries against developed countries.¹⁵⁹ Developing countries won their cases against developed countries in 100% of the cases.¹⁶⁰ Developed countries also won their cases against developing countries in 100% of the cases.¹⁶¹ Overall, complainants won 81.8% of the cases.¹⁶²

The United States complained that Japanese prohibitions on agricultural products imports, via quarantine restrictions, violated GATT.¹⁶³ The panel determined that the Japanese measures did violate GATT.¹⁶⁴ The appellate body upheld the finding that Japan's varietal testing of apples, cherries, nectarines, and walnuts was without scientific basis.¹⁶⁵ The DSB adopted the reports in March 1999.¹⁶⁶ Japan is studying ways to implement the recommendations.

In a complaint brought by the European Community against India, over the alleged absence of patent protection for pharmaceutical and agricultural chemical products, the panel found that India had not complied with TRIPS; the panel report subsequently was adopted.¹⁶⁷ A similar complaint was brought by the United States; panel and appellate body reports in favor of the complainant were adopted by the DSB.¹⁶⁸ In April 1999, India

¹⁵⁷ *See id.*

¹⁵⁸ *See id.*

¹⁵⁹ *See id.*

¹⁶⁰ *See id.*

¹⁶¹ *See id.*

¹⁶² *See id.*

¹⁶³ WTO Appellate Body Report on Japan—Measures Affecting Agricultural Products, WT/DS76/AB/R para. 2 (Feb. 22, 1999).

¹⁶⁴ *See id.*

¹⁶⁵ *See id.* The United States alleged violations of Articles 2, 5, and 8 of the SPS Agreement, Article XI of GATT 1994, and Article 4 of the Agreement on Agriculture. *See id.*

¹⁶⁶ *See Disputes Website, supra* note 48, § VIII, para. 18.

¹⁶⁷ *See* WTO Panel Report on India—Patent Protection for Pharmaceutical and Agricultural Chemical Products, WT/DS79/R p. 79 (Aug. 24, 1998).

¹⁶⁸ *See* WTO Appellate Body Report on India—Patent Protection for

reported that legislation had been enacted in accordance with both reports.¹⁶⁹

When an appellate body ruled against the United States in a dispute over a U.S. prohibition on the importation of certain shrimp and shrimp products, it opened the door to allow for the consideration of amicus briefs from non-state parties.¹⁷⁰ That panel heard arguments by India, Malaysia, Pakistan, and Thailand, and concluded that the U.S. ban was not consistent with GATT 1994.¹⁷¹ On appeal, the United States claimed that the panel erred by not accepting non-requested submissions from non-governmental organizations.¹⁷² The appellate body agreed with the

Pharmaceutical and Agricultural Chemical Products, WT/DS50/AB/R (Dec. 19, 1997). The United States claimed violations of sections 23, 65, and 70 of the TRIPS Agreement. The appellate body in the U.S. case stated that members are free to determine how best to meet their obligations under the TRIPS Agreement. India contended that its "administrative instructions" were sufficient, but the panel found that the current administrative practice in India created a certain degree of legal insecurity. The appellate body thus upheld the panel's conclusion that India had not complied with TRIPS. *See id.* paras. 23-36.

¹⁶⁹ *See* Disputes Website, *supra* note 48, § I, paras. 8, 15.

¹⁷⁰ *See* WTO Panel Report on U.S.—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58 (May 15, 1998) [hereinafter PR Shrimp]. The U.S. issued regulations, 52 Fed. Reg. 24244 (June 29, 1987), pursuant to the Endangered Species Act (ESA), 16 U.S.C. 1531 *et. seq.* (1996), requiring all U.S. shrimp trawl vessels to use turtle excluder devices or tow-time restrictions in specific areas where there was a significant mortality of sea turtles in shrimp harvesting. Section 609 of the ESA, 16 U.S.C. §1537 (1996) was enacted in 1989 and imposed an import ban on shrimp harvested with commercial fishing technology which may adversely affect sea turtles, unless the harvesting nations are certified. Guidelines specified the two types of certification, and 1996 guidelines provide that all shrimp imported into the U.S. must be accompanied by a Shrimp Exporter's Declaration attesting that the shrimp were harvested in waters of a certified nation or under conditions that don't adversely affect sea turtles. 56 Fed. Reg. 1051 (Jan. 10, 1991); 58 Fed. Reg. 9015 (Feb. 18, 1993); 61 Fed. Reg. 17342 (April 19, 1996). In 1995, the U.S. Court of International Trade held that the 1991 and 1993 Guidelines violated Section 609 by limiting the geographical scope to shrimp harvested in the Caribbean/western Atlantic region, and directed the Department of State to extend the law worldwide by May, 1996. *See* Earth Island Institute v. Christopher, 913 F. Supp. 559 (Ct. Int'l Trade 1995). In 1996, the court refused a request by the State Department to extend the deadline. *See* Earth Island Institute v. Christopher, 922 F. Supp. 616 (Ct. Int'l Trade 1996). In 1998, however, the Court of Appeals for the Federal Circuit vacated this decision. *See* Earth Island Institute v. Albright, 147 F.3d 1352, 1354 (1998).

¹⁷¹ *See* PR Shrimp, *supra* note 170, paras. 8.1, 8.2. The ban is inconsistent with Article VI:1 and Article XX of GATT 1994. *See id.*

¹⁷² *See* WTO Appellate Body Report on U.S.—Import Prohibition of Certain

United States and reversed the panel on the issue of accepting submissions from non-state parties.¹⁷³ The appellate body nevertheless concluded that the U.S. measure failed to meet the requirements of GATT 1994.¹⁷⁴ The U.S. ban, as applied, imposed a single, rigid, and unbending requirement without inquiring into the appropriateness of the condition in the exporting country, thus constituting arbitrary discrimination in violation of GATT 1994; the effect was plainly discriminatory and unjustifiable.¹⁷⁵ In addition to opening the door to non-governmental submissions, the appellate body also stated what they did not decide in the appeal.

We have *not* decided that the protection and preservation of the environment is of no significance to the Members of the WTO. Clearly, it is. We have *not* decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should. And we have *not* decided that sovereign states should not act together bilaterally, plurilaterally or multilaterally, either within the WTO or in other international fora, to protect endangered species or to otherwise protect the environment. Clearly, they should and do.¹⁷⁶

The DSB approved both reports and the parties agreed to an implementation period, which expires on December 6, 1999.¹⁷⁷

In a dispute between the United States and Costa Rica over trade in cotton and man-made underwear, the United States requested consultation and provided Costa Rica with a *Statement of Serious Damage*, in which the United States proposed to

Shrimp and Shrimp Products, WT/DS58/AB/R paras. 9, 98 (Oct. 12, 1998) [hereinafter ABR Shrimp]. The U.S. also raised the issue of whether the panel erred in its conclusion concerning Art. XX of GATT 1994. See generally, Daniel Esty, *Linkages and Governance: NGOD at the WTO*, 19 U. PA. J. INT'L BUS. L 709 (1998).

¹⁷³ See ABR Shrimp, *supra* note 172, para. 187(a). While the dispute settlement process is limited to WTO members, and a panel is obliged to accept and consider only submissions by WTO members as parties and third party participants, panels may seek information and advice that the panels deem appropriate. See *id.* para. 101. According to the appellate body, authority to seek information is not properly equated with a prohibition on information submitted but not requested by a panel. See *id.* para. 108.

¹⁷⁴ See *id.* para. 187(c). The measure is not justified under Article XX of GATT 1994. See *id.*

¹⁷⁵ See *id.* paras. 172, 177.

¹⁷⁶ *Id.* para. 185 (emphasis added).

¹⁷⁷ See Disputes Website, *supra* note 48, § I, para. 16..

introduce restraints on imports of underwear from Costa Rica.¹⁷⁸ When consultations did not result in a mutually acceptable solution, the United States introduced a safeguard measure, but a Textile Monitoring Board found that the United States failed to demonstrate serious damage to the U.S. domestic industry.¹⁷⁹ Costa Rica requested a panel and the panel concluded that the United States violated the Agreement in Textiles and Clothing¹⁸⁰ by imposing a restriction on Costa Rican exports without having demonstrated serious damage to the U.S. domestic industry.¹⁸¹ Costa Rica appealed certain issues of law relating to the starting date of the restraint period; the appellate body agreed with Costa Rica in February 1997 and left intact the issues not raised on appeal.¹⁸² The DSB adopted both reports and the United States complied.¹⁸³

In February 1997, another appellate body report was issued in a dispute brought by the Philippines against Brazil over countervailing duties imposed by Brazil on imports of desiccated coconut from the Philippines.¹⁸⁴ The appellate body upheld the legal findings of the panel, which held that the Philippines' claims were not properly before the panel because those claims were under GATT 1994 and the Agreement on Agriculture, which were not applicable law for the dispute.¹⁸⁵ The DSB adopted both reports.¹⁸⁶

¹⁷⁸ WTO Appellate Body Report on U.S.—Restrictions on Imports of Cotton and Man-Made Fibre Underwear, WT/DS24/AB/R (Feb. 10, 1997) [hereinafter ABR Cotton].

¹⁷⁹ *See id.* § I.

¹⁸⁰ Establishment of an Import Limit for Certain Cotton and Man-Made Fibre Textile Products Produced or Manufactured in Costa Rica, 60 Federal Register 32653 (1995).

¹⁸¹ *See* ABR Cotton, *supra* note 178, § VII.

¹⁸² *See id.* § VII.

¹⁸³ *See* Disputes Website, *supra* note 48, § VIII, para. 3.

¹⁸⁴ WTO Appellate Body Report on Brazil—Measures Affecting Desiccated Coconut, WT/DS22/AB/R (Feb. 21, 1997).

¹⁸⁵ *See id.* paras. 280, 294, 295. Article VI of GATT 1994 was at issue. The measures were written consistent or inconsistent with Article VI, rather they were not subject to Art. VI. *See id.* para. 280.

¹⁸⁶ *See* Disputes Website, *supra* note 48, § VIII, para. 4. There was no implementation issue in view of the result. *See id.*

In April 1997, an appellate body upheld a panel report in a case brought by India against the United States challenging U.S. measures that affected imports of woven wool shirts and blouses from India.¹⁸⁷ The United States imposed a transitional safeguard on imports of woven wool shirts and blouses from India, under the agreement on Textiles and Clothing, “after bilateral consultation . . . did not result in a mutually agreed solution.”¹⁸⁸ India requested a panel and the interim panel report was released. After the report was released, the United States announced the withdrawal of the safeguard due to the steady decline in imports of such items.¹⁸⁹ Nonetheless, India requested that the panel continue. The panel concluded that the “U.S. measure nullified and impaired the benefits of India under the WTO Agreement, in particularly under the Agreement on Textiles and Clothing.”¹⁹⁰ India appealed alleged errors in law concerning the burden of proof and other issues, but the appellate body upheld the legal findings and conclusions of the panel.¹⁹¹ The DSB approved both reports, but because the measure was withdrawn there were no implementation issues.¹⁹²

In a 1996 case the United States complained that Canada prohibited or restricted the importation of certain periodicals into Canada and gave favorable postal rates to certain Canadian periodicals in violation of GATT.¹⁹³ The panel found that certain Canadian measures were inconsistent with GATT.¹⁹⁴ In June 1997,

¹⁸⁷ WTO Appellate Body Report on U.S.—Measures Affecting Imports of Woven Wool Shirts and Blouses from India, WT/DS33/AB/R § VII (Apr. 25, 1997) [hereinafter ABR Shirts].

¹⁸⁸ *Id.* § 1, para. 5. The Textiles Monitoring Body concluded, and confirmed on review, that the safeguard “was imposed in accordance with the Agreement on Textiles and Clothing.” *Id.*

¹⁸⁹ *See id.*

¹⁹⁰ WTO Panel Report on U.S.—Measures Affecting Imports of Woven Wool Shirts and Blouses from India, WT/DS33 para. 8.1 (Jan. 6, 1997).

¹⁹¹ *See* ABR Shirts, *supra* note 187, § VII.

¹⁹² *See* Disputes Website, *supra* note 48, § I, para. 5.

¹⁹³ WTO Panel Report on Canada—Certain Measures Concerning Periodicals, WT/DS31 para. 6 (Mar. 14, 1997).

¹⁹⁴ *See id.* paras. 6.1, 6.2. The panel concluded that Canada’s Tariff Code 9958, which prohibits the importation into Canada of certain periodicals, including split-run editions, “is inconsistent with Article XI:I of GATT 1994 and cannot be justified under Article XX (d) of GATT 1994.” *Id.* para. 6. Also, part “V.I of the Excise Tax Act is

an appellate body recommended that the findings and conclusions of the panel that were not subject to the appeal be left intact. The appellate body also upheld one finding, reversed two findings, and modified a third finding.¹⁹⁵ The DSB accepted the appellate body reports and the panel report as modified; Canada withdrew the contested measure.¹⁹⁶

A panel was established to review a U.S. complaint against Argentina regarding Argentine imposition of specific duties on various textile, apparel, and footwear import items. The United States alleged that Argentina charged duties in excess of the bound rate of 35% *ad valorem*, and imposed statistical 3% taxes *ad valorem* on all imports from non-MERCOSUR countries.¹⁹⁷ The panel concluded that “the minimum specific duties imposed by Argentina on textiles and apparel” and the 3% *ad valorem* tax on imports “were inconsistent with GATT.”¹⁹⁸ The appellate body modified, but upheld, the panel report in March 1998.¹⁹⁹ The

inconsistent with Article III:2, first sentence of GATT 1994.” *Id.* Further, “the application by the Canada Post of lower ‘commercial Canadian’ postal rates to domestically-produced periodicals than to imported periodicals [including additional discount options available only to domestic periodicals] is inconsistent with Article III:4 of GATT 1994.” *Id.* The panel concluded that Canada’s funded postal scheme is consistent with GATT 1994. *See id.*

¹⁹⁵ WTO Appellate Body Report on Canada—Certain Measures Concerning Periodicals, WT/DS31/AB/R (June 30, 1997). The appellate body upheld the panel recommendation on the applicability of GATT to the excise tax, but reversed the panel’s conclusions on Article III:2, first sentence of GATT 1994. *See id.* para 6. The appellate body modified the panel recommendation on Article 2, second sentence of GATT 1994, and reversed its decision on the funded postal rate scheme, concluding that it is not justified by GATT 1994. *See generally* Richard L. Matheny III, *In the Wake of the Flood: “Like Products” and Cultural Products after the WTO’s Decision in Canada Certain Measures Concerning Periodicals*, 147 U. PA. L. REV. 245 (1998).

¹⁹⁶ *See* Disputes Website, *supra* note 48, § VIII, para. 14.

¹⁹⁷ *See* WTO Panel Report on Argentina—Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items, WT/DS56 para. 1.1 (Nov. 25, 1997).

¹⁹⁸ *Id.* para. 7.1. The minimum duties are inconsistent with Article II of GATT and the 3% *ad valorem* tax is inconsistent with Article VIII of GATT. *See id.*

¹⁹⁹ *See* WTO Appellate Body Report on Argentina—Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items, WT/DS56/AB/R para. 87 (Mar. 27, 1998). The panel was upheld, but the finding on GATT Article II was modified. Argentina acted inconsistently with its obligations under Article II(b), first sentence, of GATT 1994, because import customs duties were levied in excess of the bound rate of 35% *ad valorem*. *See id.*

modified reports were adopted by the DSB.²⁰⁰ Argentina and the United States agreed that Argentina would cap specific duties on textiles and apparel at 35% by October 1998, and would reduce its statistical tax to 0.5% by January 1, 1999. In May 1999, Argentina notified the DSB that no import transactions covered by the statistical tax would be taxed above the amounts agreed to by Argentina and the United States.²⁰¹

A panel considered U.S. complaints against the European Community, Iceland, and the United Kingdom concerning tariff treatment of local area network (LAN) equipment and personal computers with multimedia capabilities.²⁰² The panel concluded that the European Community was in violation of GATT 1994, “by failing to accord imports of LAN equipment from the U.S. treatment no less favorable than provided under the GATT schedule.”²⁰³ In June 1998, the appellate body reversed the panel’s finding.²⁰⁴ The DSB adopted the appellate body report and the modified panel report; there was no implementation issue in light of the result.²⁰⁵

A panel convened to consider Brazil’s complaint concerning the European Community’s regime for the importation of certain frozen poultry products and its implementation of tariff-rate quotas on such products.²⁰⁶ The panel found that Brazil did not establish that the European Community had failed to administer the tariff

²⁰⁰ See Disputes Website, *supra* note 49, § VIII, para. 14.

²⁰¹ See *id.*

²⁰² WTO Panel Report on E.C.—Customs Classification of Certain Computer Equipment, WT/DS62, WT/DS67, WT/DS68 (Feb. 5, 1998).

²⁰³ See *id.* para. 9.1. The European Community gave LAN equipment no less favorable treatment than required under heading 87.71 or 87.73 in Part 1 of Schedule LXXX. See WTO Agreement, at 1125.

²⁰⁴ WTO Appellate Body Report on E.C.—Customs Classification of Certain Computer Equipment, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R para. 111 (June 5, 1998). The United States did not have “‘legitimate expectations’ that LAN equipment would be accorded the same tariff treatment as ADP machines in the European Community” and thus the European Community did not act inconsistently with the provisions of Article II:1 of GATT 1994 by failing to accord the LAN imports no less favorable treatment than that provided for in schedule LXXX. *Id.*

²⁰⁵ See Disputes Website, *supra* note 48, § VIII, para. 12.

²⁰⁶ WTO Panel Report on E.C.—Measures Affecting the Importation of Certain Poultry Products, WT/DS69 (Mar. 12, 1998) [hereinafter PR Poultry].

rate quota in accordance with the WTO Agreement.²⁰⁷ In July 1998, the appellate body upheld most of the panel's report.²⁰⁸ The DSB adopted the modified reports and the parties agreed on a reasonable implementation period ending in March 1999.²⁰⁹

Another panel reviewed Venezuelan and Brazilian allegations that the United States discriminated against complainants' gasoline imports.²¹⁰ The panel found that a U.S. regulation violated GATT.²¹¹ The appellate body modified the panel report then adopted it.²¹² The DSB adopted the modified reports and the U.S. announced implementation in August 1997.²¹³

Mexico's complaint against Guatemala over that country's anti-dumping investigation regarding Portland cement from Mexico was not considered in the *Statistical Overview*, because the appellate body concluded, in November 1998, that the dispute

²⁰⁷ See *id.* paras. 274-98. The European Community, Brazil, and nine other countries negotiated quotas and licensing requirements for relevant poultry products. European Community Schedule LXXX provides for a duty-free tariff rate quota for certain tons of frozen poultry. See WTO Agreement, at 1125. The panel held that Brazil did not demonstrate that the European Community failed to implement and administer the tariff rate quota in accordance with the obligations under the WTO agreement, Article XIII of GATT, the licensing agreement, and Article 5.1(b) of the Agreement on Agriculture. See PR Poultry, *supra* note 206, paras. 274-98.

²⁰⁸ WTO Appellate Body Report on E.C.—Measures Affecting the Importation of Certain Poultry Products, WT/DS69/AB/R para. 172 (July 13, 1998). Most of the panel report was upheld. The appellate body reversed the panel decision on the European Community's violation of Article 5.1(b) of the Agreement on Agriculture, but concluded that the European Community acted inconsistently with Article 5.5 of the Agreement on Agriculture. See *id.*

²⁰⁹ See Disputes Website, *supra* note 48, § I, para. 13.

²¹⁰ WTO Panel Report on U.S.—Standards for Reformulated and Conventional Gasoline, WT/DS2, WT/DS7 (Jan. 29, 1996).

²¹¹ See *id.* para. 8.1. The U.S. regulation discriminated against complainants' gasoline in violation of GATT Article III, and the Agreement on Technical Barriers to Trade, Article 2. See *id.*

²¹² WTO Appellate Body Report on U.S.—Standards for Reformulated and Conventional Gasoline, WT/DS2, WT/DS4 (Apr. 22, 1996). GATT Art. XX(g), the exception, was not applicable. See generally Hans J. Crosby, *The WTO Appellate Body—U.S. v. Venezuela: Interpreting the Preamble of Art. XX—Are Possibilities for Environmental Protection Under Art. XX(g) of GATT Disappearing?* 9 VILL. ENV'T'L L. J. 283, (1998); Telisa Webb Schelin, *U.S.—Standards for Reformulated and Conventional Gasoline: The Effect of the WTO Decision on the U.S. and its Administrative Agencies*, 33 TULSA L.J. 421 (1997).

²¹³ See Disputes Website, *supra* note 48, § I, para. 1.

was not properly before the panel.²¹⁴ Therefore, the appellate body came “to no conclusions as to whether the panel was right or wrong in finding that Guatemala had acted inconsistently with its obligations under the . . . *Anti-Dumping Agreement*.”²¹⁵ The DSB adopted the appellate body report and the panel report as reversed by the appellate body.²¹⁶

D. Complaints Resulting in Panel Reports

At the time of this writing, nine complaints have resulted in panel reports, and one complaint has resulted in a panel report and an arbitrator’s report.²¹⁷ The complaint that resulted in a panel report and an arbitrator’s report was brought by the United States, Japan, and the European Community against Indonesia.²¹⁸ The complainants prevailed in their claims that Indonesia’s National Car Programme violated Indonesia’s obligations under GATT 1994.²¹⁹ The arbitrator gave Indonesia twelve months to implement the panel recommendations.²²⁰

Of the nine complaints resulting in panel reports thus far, 77.7% of the complainants have won their cases.²²¹ Of the nine cases in this section, three were brought by developed countries against developed countries.²²² Developed countries brought three cases against developing countries.²²³ One case pitted a

²¹⁴ WTO Appellate Body Report on Guatemala—Anti-Dumping Investigation Regarding Portland Cement from Mexico, WT/DS60/AB/R para. 89 (DS60 Nov. 2, 1998).

²¹⁵ *Id.*

²¹⁶ See Disputes Website, *supra* note 48, § I, para. 18. A request for consultation was made in January, 1999. See *id.*

²¹⁷ See WTO Panel Report on Indonesia—Certain Measures Affecting the Automobile Industry, WT/DS54, WT/DS55, WT/DS59 (July 2, 1998).

²¹⁸ See *id.* The three complainants are developed countries, while Indonesia is a developing country.

²¹⁹ See *id.* para. 15.1. The panel found that Indonesia was in violation of Articles I and III:2 of GATT 1999, Article 2 of the TRIMs Agreement, and Article 5(c), but not Article 28.2, of the SCM Agreement. Indonesia had not violated TRIPS. See *id.*

²²⁰ WTO Arbitrators Report on Indonesia—Certain Measures Affecting the Automobile Industry, WT/DS54/ARB, WT/DS55/ARB, WT/DS59/ARB (Dec. 7, 1998).

²²¹ See Disputes Website, *supra* note 48, para. VIII, summary.

²²² See *id.*

²²³ See *id.*

developing country against another developing country. Finally, developing countries brought two cases against developed countries.²²⁴

The developing countries won their cases against developed countries in each of the two cases,²²⁵ and developed countries also won all of their cases against developing countries.²²⁶ Korea prevailed in a complaint that it brought against the United States over DRAMs.²²⁷ India prevailed in complaints that it brought against Turkey over textiles.²²⁸ Australia suppressed a U.S. claim over leather subsidies.²²⁹ The United States and New Zealand prevailed in a complaint brought against Canada over milk and dairy products.²³⁰ A panel sided with Canada in a complaint

²²⁴ *See id.*

²²⁵ *See id.*

²²⁶ *See id.*

²²⁷ WTO Panel Report on U.S.—Anti-Dumping Duty on DRAMS of One Megabyte or Above from Korea, WT/DS99 para. 4.95 (Jan. 29, 1999). Korea filed a complaint against the United States after the U.S. Department of Commerce decided not to revoke an anti-dumping duty on dynamic random access memory (DRAM) semi-conductor chips of one megabyte or above from Korea. Korea alleged that DRAM producers haven't dumped for over three and one half years, and won't dump in the future. A panel found that the U.S. measures violated the anti-dumping agreement. *See id.* The panel's report was adopted in March, 1999, and in April of 1999, the United States stated that it was studying ways to implement the panel's report. *See Disputes Website, supra* note 48, § I, para. 21.

²²⁸ WTO Panel Report on India—Restrictions on Imports of Textiles and Clothing Products, WT/DS29 para. 10.1 (May 31, 1999). India requested a panel having claimed that that Turkey's imposition of quantitative restrictions on imports on a broad range of textile and clothing products was inconsistent with GATT 1994 Articles XI and XIII. The panel found that Turkey's measures were inconsistent with GATT and Article 2.4 of the Agreement on Textile and Clothing. *See id.* paras. 1.3, 10.1.

²²⁹ WTO Panel Report on Australia—Subsidies Provided to Producers and Exporters of Automotive Leather, WT/DS126 para. 10 (May 25, 1999). The U.S. lodged a complaint over prohibited subsidies allegedly provided to Australian producers and exporters of automotive leather. *See id.* para 1.3. The subsidies alleged consist of preferential governmental loans of A\$25 million and non-commercial grants of A\$30 million. *See paras.* 2.3, 2.4. A panel found the loan made by the Australian government is not a subsidy, but the grants were. *See id.* para. 10.1.

²³⁰ WTO Panel Report on Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products, WT/DS103, WT/DS113 para. 8.1 (May 17, 1999). The U.S. and New Zealand complained about Canada's export subsidies commonly called the "special milk classes" scheme, and the U.S. complained about Canada's administration of the tariff-rate quota on milk. One panel was formed, which found that these measures were inconsistent with Canada's obligations under Article II.1(b) of

brought against Brazil over export subsidies on aircraft,²³¹ and Brazil's complaint against Canada over export aircraft resulted in a panel report in favor of Brazil.²³² The United States prevailed in a complaint against India over import restrictions,²³³ and the European Community prevailed against India in a dispute over the enforcement of patents.²³⁴ The United States brought an unsuccessful claim against Japan regarding film.²³⁵

GATT 1994, and Articles 9.1(a) and (c) of the Agreement on agriculture. *See id.* paras. 1.5, 1.6.

²³¹ WTO Panel Report on Brazil—Export Financing Programme for Aircraft, WT/DS96 (Apr. 14, 1999). Canada requested consultations with Brazil, claiming that Brazilian export subsidies to foreign purchasers of Brazil's Embraer aircraft violate both the Subsidies Agreement and GATT 1994. *See id.* para. 1.2. Canada requested a panel; Brazil objected. *See id.* para. 1.1. Canada then modified its request, limiting its request to the Subsidies Agreement. *See id.* para. 1.4. The panel found the Brazilian measures to be inconsistent with Art 3.1(a) and 27.4 of the Subsidies Agreement. *See id.* para. 8.1. The panel's overall conclusions were upheld on appeal. *See* WTO Appellate Body Report on Brazil—Export Financing Programme for Aircraft, WT/DS96/AB/R para. 196 (Aug. 2, 1999).

²³² WTO Panel Report on Canada—Measures Affecting the Export of Civilian Aircraft, WT/DS70 (DS70 April 17, 1999). Brazil requested a panel over allegations that Canada supports the export of civilian aircraft in violation of the Subsidies Agreement. A panel agreed, and in May, 1999 Canada appealed. Appellate body upheld decision on appeal. *See* WTO Appellate Body Report on Canada—Measures Affecting the Export of Civilian Aircraft, WT/DS70/AB/R para. 220 (Apr. 17, 1999).

²³³ WTO Panel Report on India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products, WT/DS90 (Apr. 6, 1999). The U.S. requested a panel to investigate whether India violated GATT 1994, the Agreement on Agriculture, and the Agreement on Import Licensing Procedures by quantitative restrictions on the imports of over 2,700 agricultural and industrial products. The panel found that the measures were inconsistent with India's obligations under Arts, XI and XIII of GATT 1994 and Art. 4.2 of the Agreement on Agriculture. The decision was upheld on appeal. *See* WTO Appellate Body Report on India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products, WT/DS90 (Aug. 23, 1999).

²³⁴ *See* Disputes Website, *supra* note 48, § I, para. 15.

²³⁵ WTO Panel Report on Japan—Measures Affecting Consumer Photographic Film and Paper, WT/DS44 paras. 10.402-10.403 (Mar. 31, 1998). The United States requested consultation with Japan over Japan's laws affecting imported consumer photographic film and paper. The United States alleged that Articles III and X of GATT were violated because Japan treated imported film and paper less favorably. The panel, however, concluded that the United States did not demonstrate that the Japanese measures nullified or impaired either individually or collectively, "benefits accruing to the U.S. within the meaning of GATT Article XXIII:1(b)." *Id.* para. 10.402. Further, the United States did not demonstrate "that Japan failed to publish administrative rulings of general application in violation of GATT Article X:1." *Id.* para. 10.404.

IV. Conclusion

One of the greatest strengths of the WTO is its dispute resolution mechanism. Since its inception there have been 175 requests for consultations involving 134 distinct matters.²³⁶ Developed countries made 77% of these requests for consultations.²³⁷ The author expected this result upon undertaking her research. The author also expected, however, that developed countries, and particularly the United States, would have generally prevailed in the dispute resolution process. This was not the case. Of the twenty-six cases analyzed, developing countries prevailed 100% of the time against developed countries, and 89% of the time in all cases they brought.²³⁸ Complainants prevailed in twenty-one out of twenty-six cases, or 80.8% of the time.²³⁹ Of the four times a complainant lost, three times that complainant was the United States, and the United States lost eight of the nineteen cases in which it was a party.²⁴⁰

Since complainants win the vast majority of the cases in which they are involved, it is expected that complainants will continue to bring disputes to the WTO. One weakness of the dispute process, however, is the relative unenforceability of the WTO's decisions. This can escalate into trade wars among the parties. The reluctance of many countries to give up some degree of national sovereignty,²⁴¹ the fact that Russia and China are not WTO members,²⁴² and the lobbying and pressure that corporations and

²³⁶ See *supra* note 48 and accompanying text.

²³⁷ See *supra* note 49 and accompanying text.

²³⁸ See *supra* note 61 and accompanying text.

²³⁹ See *supra* note 62 and accompanying text.

²⁴⁰ See *supra* note 63 and accompanying text.

²⁴¹ See generally William R. Sprance, *The WTO and U.S. Sovereignty*, 13 AM. U. INT'L L. REV. 1225 (1998).

²⁴² See Christian L. Broadbent and Amanda M. McMillian, *Russia and the WTO: Will TRIPS be a Stumbling Block to Accession?* 8 DUKE J. COMP. & INT'L L. 519 (1998); William J. Kovatch, Jr., *Joining the Club: Assessing Russia's Application for Accession to the WTO*, 71 TEMPLE L. REV. 995 (1998); Julia Cheng, *China's Copyright System: Rising to the Spirit of TRIPS Requires an Internal Focus and WTO Membership*, 21 FORDHAM INT'L L. J. 1941 (1998); David Blumenthal, "Reform" or "Opening"? *Reform of China's State-Owned Enterprises and WTO Accession-The Dilemma of Applying GATT to Marketizing Economies*, 16 UCLA PAC. BASIN L. J. 198 (1998).

individuals placed on governments to bring complaints to the WTO,²⁴³ are all additional impediments to the effective resolution of disputes under the WTO. Despite these weaknesses and impediments, the WTO's dispute resolution process will continue to develop, and the WTO will certainly hear many more complaints in the future.

²⁴³ See generally Glen T. Schleyer, *Power to the People: Allowing Private Parties to Raise Claims before the WTO Dispute Resolution System*, 65 FORDHAM L. REV. 2275 (1997).

