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Balancing Judicial Economy, State Opportunism, and Due Process Concerns in the WTO

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STUDENT NOTE

BALANCING JUDICIAL ECONOMY, STATE OPPORTUNISM, AND DUE PROCESS CONCERNS IN THE WTO

*Ana Frischtak**

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INTRODUCTION

The dispute settlement system of the World Trade Organization (WTO) completed ten years of operation this past January. As arguably the most prolific of all international dispute settlement systems, and one of the few with any real “teeth” vis-à-vis both rich and poor countries, the efficient, fair, and transparent functioning of this system is essential

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to the future of world trade.¹ Since January 1995, 302 disputes have been brought to the WTO system for resolution.² This is a greater number of cases than was brought to the WTO's predecessor (the GATT) between 1948 and 1995.³ More importantly, developing countries have been major users of the system.⁴ In 1995, 2000, 2001, 2002, and 2003 developing country Members brought a greater number of disputes to the WTO as compared to developed country Members.⁵ In particular, in 39 percent of all disputes, developing country Members were complainants.⁶ Small developing country Members have brought, and won, cases against large developed country Members. An excellent example of this is the *US–Underwear* dispute, where Costa Rica was the complainant against the United States.⁷

Despite the relative success of the dispute settlement system for both developed and developing countries alike, there is still plenty of room for improvement. This fact was officially recognized by WTO Members in November 2001 at the Doha Ministerial Conference where formal negotiations on the Dispute Settlement Understanding,⁸ an Annex to the WTO Agreement which establishes the obligations and purposes of the dispute settlement body, were opened.⁹ The negotiations were to begin in January 2002.¹⁰ These negotiations are still underway and Member countries have submitted proposals that touch upon almost all aspects of the dispute settlement system, including: those relating to its institutions; its proceedings; and to systemic issues such as transparency concerns, the amicus curiae brief issue, and special and differential rights for developing country Members.¹¹

1. Peter Van den Bossche, *The Doha Development Round Negotiations on the DSU*, WTO Conference New Agendas in the 21st Century, Taipei, Nov. 28–29, 2003, 1.

2. *Id.*

3. *Id.*

4. *Id.* at 8.

5. *Id.*

6. *Id.* at 8–9.

7. See Panel Report, *United States–Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/ R, adopted Nov. 8, 1996.

8. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 2, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 33, 33 I.L.M. 112 (1994) [hereinafter DSU].

9. Doha Round Ministerial Declaration, 20 November 2001, WT/MIN(01)/DEC/1 at para. 30 (2001).

10. Van den Bossche, *supra* note 1, at 14.

11. *Id.* at 14–16. See also Dispute Settlement Body Special Session, *Contribution of the European Communities and Its Member States to the Improvement of the WTO Dispute Settlement System*, TN/DS/W/1 (Mar. 13 2002) [hereinafter European Proposal] (proposing more permanent panelists, addressing sequencing and the need for greater transparency, procedures to regulate the submission of amicus curiae submissions, and more general improvements); Dispute Settlement Body Special Session, *Text for the African Group on DSU Negotiations*,

This Note will focus on an aspect of the dispute settlement proceeding that has not been officially proposed for reform: the withdrawal of and amendments to measures being challenged by a complaining Member during the course of the proceedings.¹² This aspect raises issues of judicial economy, state opportunism, and due process. In particular, this practice, where the respondent country to a dispute withdraws or amends the measure being challenged during the course of proceedings, threatens to undermine the legitimacy of the dispute settlement system as a fair and transparent adjudicating body.

The first section of this Note will briefly describe how issues of judicial economy, state opportunism, and due process relate to the withdrawal of and amendment to contested measures in the dispute settlement proceedings. The second section will describe the main steps involved in bringing a claim in the WTO. This discussion provides important background information for the third section, which will describe and analyze the various situations that have arisen in WTO case law concerning withdrawn and amended measures and how the panels and Appellate Body have responded. Finally, the conclusion will reflect upon the responses of the panels and Appellate Body with regard to the various concerns expressed above and the possibilities for dispute settlement reform in this context, in particular, the issuance of advisory opinions by the Appellate Body.

I. JUDICIAL ECONOMY, STATE OPPORTUNISM, AND DUE PROCESS

Judicial economy is a concern for both domestic and international courts.¹³ Given the expense of undertaking litigation, particularly long

TN/DS/W/42 (Jan. 24, 2003) (proposing eleven specific areas for amendment including measures withdrawn before or during consultations, rights of third parties, and compensation).

12. It might also be the case that this issue has not even been proposed unofficially, however this is difficult to verify with any certainty.

13. Domestic courts often raise judicial economy concerns. See, e.g., *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 589 (1991) ("Because we find the forum selection clause to be dispositive of this question, we need not consider petitioner's constitutional argument."). With regard to international courts, the International Court of Justice (ICJ) has considered judicial economy issues in whether to issue an advisory opinion pursuant to Article 65 of the ICJ Statute. *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, para. 53 (Jul. 8) (Oda, J., dissenting):

[T]he Request should have been dismissed in the present case, on account of considerations of judicial economy If the flood-gates were thus opened for any legal question of a general nature which would not require immediate solution, in circumstances where there was no practical dispute or need, then the Court could receive many cases of an academic or intellectual nature with the consequence that it would be the less able to exercise its real function as a judicial institution.

and complex litigation, avoiding unnecessary costs is a common concern.¹⁴ The main way courts exercise judicial economy is by refraining from issuing decisions on matters that either cannot be adjudicated or no longer need to be adjudicated. Such a situation may arise for a number of reasons. For example, an issue may be moot, a party (or the parties) may lack standing, the same or a different court may have previously adjudicated the dispute (*res judicata*), or the concerned parties may have come to a settlement.¹⁵

In the WTO dispute settlement system, unlike domestic courts where parties may go to trial to receive damages and not merely for an injunction, the final remedy for breach of a provision of the WTO Agreement is the withdrawal or amendment of the offending measure.¹⁶ Once a measure has been withdrawn or amended, the complaining Member is rarely entitled to anything else, such as money damages for example.¹⁷ Accordingly, in cases where WTO Members decide to withdraw or amend contested measures during the course of proceedings, judicial economy concerns alone would generally support the termination of the adjudication as the measure affecting the complaining Member would no longer be in effect.

Id. In addition, judicial economy concerns are also acknowledged in the DSU. DSU, *supra* note 8, art. 3.7 (“Before bringing a case, a Member shall exercise its judgment as to whether action under these procedures would be fruitful.”).

14. Cost is an issue not only for the parties but also for the courts. In addition, it is important to note that cost is not the only reason courts decide to exercise judicial economy. For example, a court may decide not to exercise its jurisdiction for reasons of comity with regard to either a foreign state or a different political division within its own country.

15. In WTO case law, settlement is encouraged through the consultation process. For example the DSU states:

If a request for consultations is made pursuant to a covered agreement, the Member to which the request is made shall, unless otherwise mutually agreed, reply to the request within 10 days after the date of its receipt and shall enter into consultations in good faith within a period of no more than 30 days after the date of receipt of the request, *with a view to reaching a mutually satisfactory solution.*

DSU, *supra* note 8, art. 4.3 (emphasis added).

16. The DSU states:

In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement.

Id. art. 3.7.

17. In some instances, compensation and suspension of trade concessions are granted to the injured State (not the private parties who might also have been injured). However, these are only granted as countermeasures in circumstances where the losing party has failed to implement the specific remedy. *See id.* art. 22.

State opportunism is also a concern in the WTO dispute settlement system.¹⁸ As discussed above, once the WTO-inconsistent measure is withdrawn or amended, there are no remaining issues between the parties that would justify the continuance of the adjudication.¹⁹ Consequently, Member countries could conveniently amend or withdraw measures immediately before a dispute is brought before a panel, even if they intended to enact it again once the panel was dissolved. A country would be able to do this without violating its WTO obligations if the panel had in fact terminated the adjudication without making a decision regarding the measure. While the responding Member may also incur some costs during this process (depending upon the point at which it decides to withdraw the measure) it may be willing to do so if the political costs of permanently withdrawing the contested measure were too high. Alternatively, and even more likely, rather than withdrawing the measure and then reenacting the same measure at a later time, Members might instead enact a new measure with the same effect of the withdrawn measure.²⁰

The panels and the Appellate Body can be very formalistic with regards to the interpretation of the “measures at issue” in the dispute.²¹ A focus on the label of a measure by itself, without attention to its implementation or effect, can make panels and the Appellate Body even

18. Both panels and the Appellate Body have expressed such a concern. For example, in Appellate Body Report, Chile–Price Band System and Safeguard Measures Relating to Certain Agricultural Products, WT/DS207/AB/R, adopted Sept. 23, 2002, paragraph 144 [hereinafter Appellate Body Chile–Price Band], the Appellate Body stated: “[w]e emphasize that we do not mean to condone a practice of amending measures during dispute settlement proceedings if such changes are made with a view to shielding a measure from scrutiny by a panel or by us.”

19. See DSU, *supra* note 8, art. 4.3.

20. See, e.g., Panel Report, Argentina–Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items, WT/DS56/R, adopted Nov. 25, 1997 [hereinafter Argentina–Footwear and Textiles] (where Argentina withdrew a measure being challenged by a complaining Member only to subsequently enact a technically distinct measure whose effects to the former one were identical).

21. See, e.g., SOL PICCIOTTO, *THE WTO’S APPELLATE BODY: LEGAL FORMALISM AS A LEGITIMATION OF GLOBAL GOVERNANCE* 13 (School of Public Policy Working Paper Series: ISSN 1479-9472, Working Paper 14, 2005):

[The Appellate Body] has stressed a literal approach to interpretation. Basing itself on the rules of treaty interpretation in international law, it has emphasized that ‘the words of the treaty form the foundation of the interpretative process’ Emphasizing the importance of the words of the texts, it has frequently corrected the reasoning in Panel reports, although rarely altering outcomes. This approach can be regarded as formalist, in that it adopts an essentialist view of the meaning of the words, and assumes that the law is a closed and self-referential system of rules.

more vulnerable to state opportunism.²² This, however, does not need to be the case. According to Article 13 of the Dispute Settlement Understanding (DSU), each panel has the right to seek information and technical advice from any individual or body.²³ In addition, panels may seek information from any relevant source.²⁴ Therefore, panels and the Appellate Body should take advantage of the flexibility provided in the DSU to ensure a fair and reasonable outcome to a dispute and not one merely based on overly literal readings or on mere technicalities.²⁵

Due process concerns the rights of the parties to a dispute vis-à-vis the procedures of the court or adjudicating body.²⁶ Each party is entitled to a fair and transparent adjudication in accordance with the rules of the particular court or tribunal adjudicating the dispute.²⁷ Due process generally implicates, for example, the right of a party to be given reasonable notice of a claim against it and the right to prepare and present evidence in its defense.²⁸

One specific application of this concept in the WTO context concerns mid-dispute amendments. When a measure is amended in the middle of the proceedings and a panel allows the amended measure to constitute part of its jurisdiction, the complaining Member may be at a disadvantage.²⁹ Up until the time of the amendment, the complaining Member would have concentrated its know-how and resources on a particular measure which, as a result, may no longer be in dispute.³⁰

22. See *Argentina–Footwear and Textiles*, *supra* note 20, at para. 2.8 and 6.5.

23. DSU, *supra* note 8, art. 13.1.

24. *Id.* art 13.2.

25. See *Piccioro*, *supra* note 21, at 16, where the author argues that the Appellate Body's formalism is a result of the need to uphold its legitimacy, not as a global government, but merely to uphold global rules. In addition, he argues that "[t]he AB's caution is also due to its uncertainty about its accountability, expressed as a concern to avoid accusations that it has exceeded its mandate through judicial activism." *Id.*

26. See, e.g., U.S. CONST. amend. XIV § 1.; *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

27. *International Shoe Co.*, 326 U.S. 310, 316 ("due process requires only that . . . the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" (*quoting Milliken v. Meyer*, 311 U.S. 457, 463 (1940))).

28. *Milliken*, 311 U.S. 457, 463.

29. Panels have given consideration to such concerns. See, e.g., Panel Report, *Chile–Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/R, adopted May 3, 2002, at para. 7.120, [hereinafter *Chile–Price Band*], *modified*, Appellate Body *Chile–Price Band*, *supra* note 17.

30. See Panel Report, *European Communities–Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, adopted Oct. 30, 2000, para. 6.17 [hereinafter *EC–Bed Linen*] (concluding that a Member must prove that it suffered some kind of unfairness in this regard in order to exclude from its jurisdiction a treaty provision not listed in the request for establishment of the panel). This makes it clear that the Panel was aware of the potential for unfairness to the respondent as a result of allowing an amended measure to become part of its jurisdiction.

Furthermore, the complaining Member may not have the capacity to “re-group” in sufficient time to successfully litigate the dispute. Accordingly, the amendment or enactment of similar measures during the proceedings can produce significant due process concerns for the responding party if the WTO adjudicator fails to give full consideration to the new situation at hand.³¹

II. BRINGING A CLAIM: A BRIEF INTRODUCTION TO THE WORKINGS OF THE DISPUTE SETTLEMENT PROCEDURE

In order to better understand the various cases and implications discussed in the course of this Note, I will begin with a brief explanation of the main procedures Members must follow in order to successfully bring a dispute before a panel.

A. Consultations

The first step to adjudicating a claim before a WTO panel is for the complaining Member to bring a formal request for consultations.³² The purpose of the consultations is to enable the parties to gather relevant and correct information so that they can reach a mutually agreed solution, or in the case that the parties are not able to agree, so that they can present accurate information to the panel.³³ Through consultations, parties exchange information, assess the merits of their positions, and work to narrow contested issues.³⁴

Requests for consultations should be in writing and a copy should be provided to the dispute settlement body (DSB) in addition to the relevant WTO councils and committees in each case.³⁵ The DSB was created during the Uruguay Round to deal with disputes arising among WTO

31. Panels have given consideration to this issue in a number of cases. *See, e.g.*, Panel Report, United States–Subsidies on Upland Cotton, WT/DS267/R, adopted Sept. 8, 2004 [hereinafter US–Cotton Subsidies]; Chile–Price Band, *supra* note 29; Panel Report, Brazil–Export Financing Programme for Aircraft, WT/DS46/R, adopted Apr. 14, 1999, [hereinafter *Brazil–Aircraft*], *modified*, Appellate Body Report, WT/DS46/AB/R, adopted Aug. 2, 1999 [hereinafter Appellate Body *Brazil–Aircraft*].

32. DAVID PALMETER & PETROS C. MAVROIDIS, *DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION: PRACTICE AND PROCEDURE*, 86 (2004).

33. *Id.* at 87, *citing* Panel Report, Korea– Taxes on Alcoholic Beverages, WT/DS75/R, WT/DS84/R, adopted Sept. 17, 1998, para. 10.23 [hereinafter Korea–Alcoholic Beverages], *modified*, Appellate Body Report, Korea– Taxes on Alcoholic Beverages, WT/DS75/AB/R, WT/DS84/AB/R adopted Jan. 18, 1999.

34. *Id.* at 89, *citing* Appellate Body Mexico–Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States–Recourse to Article 21.5 of the DSU by the United States, WT/DS132/AB/RW, adopted Oct. 22, 2001 [hereinafter Mexico–Corn Syrup].

35. *Id.* at 87.

Member States (under the WTO Agreements) and in accordance with the provisions of the DSU.³⁶ The DSB is composed of representatives of all WTO Members³⁷ and “consensus” is the process by which its decisions are taken.³⁸ It has the authority to, among other things, establish panels and to adopt panel and Appellate Body reports.³⁹

A Member State’s request for consultations should specify the relevant WTO agreements and the particular articles under which consultations are sought.⁴⁰ Article 4.4 of the DSU requires that a complaining party “give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint.”⁴¹ Article 6.2 of the DSU requires that the request for the establishment of a panel indicate whether consultations have been held and identify the specific measures at issue.⁴² The relationship between Article 4.4 and 6.2 is not entirely clear. While on the one hand it seems that there is an obvious and necessary connection between these two requirements, it is not clear to what extent the two requests need to be identical.⁴³

This debate is important from a jurisdictional perspective, and for the purposes of this Note, because it helps explain how the panels and the Appellate Body derive their terms of reference and the extent to which WTO adjudicators will consider new claims.⁴⁴ There is an important parallel between WTO adjudicators’ initial analysis of what measures are to be included in its jurisdiction at the time of the request

36. *Id.* at 15.

37. *Id.*

38. *Id.* Consensus occurs when no Member present at the DSB meeting formally objects to any decision being made.

39. *See Id.*

40. *Id.* at 87.

41. DSU, *supra* note 8, art. 4.4.

42.

The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference.

Id. art. 6.2.

43. PALMETER & MAVROIDIS, *supra* note 32, at 87–88.

44. This question first arose in *US-DRAMS* when the United States claimed that it should be able to refer a claim to a panel if it was actually raised during consultations despite the fact that it had not been included in the written request for consultations. However, no response to this question was ever reached by the Panel since it was able to make a ruling without reaching this issue. Panel Report, United States–Anti-Dumping on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea, WT/DS99/R, adopted Mar. 19, 1999, para. 6.8 [hereinafter *US-DRAMS*].

for the establishment of the panel (in cases where these measures were not raised in the consultations) and their subsequent analysis, the subject of this Note, regarding what measures are to constitute part of its jurisdiction during the course of proceedings (when measures are amended or withdrawn). The adjudicators' initial analysis usually relates to those measures not included in consultations but included in the request for the panel, while the latter analysis usually encompasses those measures that were part of the consultations but arguably no longer part of the panel's terms of reference since they were either amended or withdrawn.

For example, in deciding whether and on what basis to exclude or include particular measures within its jurisdiction (i.e. terms of reference), the panels and the Appellate Body must deal with issues of due process in both their initial and subsequent analyses. In their analysis noting the strictness with which the Appellate Body interpreted the requirements of DSU Art. 6.2, Horlick and Butterson state: "[t]he Appellate Body's desire to impose a hard procedural constraint by narrowly interpreting the requirements of article 6.2 is not surprising; rudimentary considerations of due process will seem to most lawyers, not to mention diplomats, to demand as much."⁴⁵ It is this precise issue—whether WTO adjudicators should allow withdrawn or amended measures to remain or become part of its jurisdiction in light of concerns such as due process—that is analyzed, along with others, in this Note.

The following cases illustrate how the panels and Appellate Body have dealt with this initial analysis to date. In *Japan—Agricultural Products II*, the requests for consultations used the phrase “including, but are not limited to” Articles 2, 4, 5 and 8, yet the Panel accepted the subsequent inclusion of Article 7 in the request for the establishment of the panel, even though the article was not listed in the consultation request (presumably, the language “not limited to” was sufficient in that case).⁴⁶

A slightly different question was posed in *Brazil—Aircraft*.⁴⁷ Unlike the cases above, where consultations were in fact held about the subject matter but where the measure was simply not formally included in the request for consultations, here there were simply no consultations about

45. Gary N. Horlick & Glenn R. Butterson 6 *A Problem of Process in WTO Jurisprudence: Identifying Disputed Issues in Panels and Consultations*, at <http://www.law.georgetown.edu/journals/lpib/symp00/documents/horlick.pdf>.

46. PALMETER & MAVROIDIS, *supra* note 32, at 88, *citing* Panel Report, *Japan—Measures Affecting Agricultural Products*, WT/DS76/R, adopted Mar. 19, 1999, para. 8.4, *modified*, Appellate Body Report, *Japan—Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 22 February 1999. *See* *India—Patent Protection For Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted Dec. 19, 1997, para. 90 [hereinafter *Appellate Body India—Patents*].

47. *Brazil—Aircraft*, *supra* note 31, at para. 7.8.

the specific measures.⁴⁸ The Panel held that the measure at issue that was neither included in the request for consultations nor in the actual discussions but included in the request for the panel was deemed to be within the Panel's jurisdiction. The Appellate Body, in affirming the Panel's decision, stated:

We do not believe . . . that Articles 4 and 6 of the DSU, or paragraphs 1 to 4 of Article 4 of the *SCM Agreement*, require a *precise and exact identity* between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel.⁴⁹

From such a holding one may be tempted to conclude that measures not included in the consultations (either in the request itself or the actual discussions) yet included in the request for the panel would be within a panel's jurisdiction. It may be the case, however, that such a holding is particular to *Brazil–Aircraft*. There, both the Panel and Appellate Body concluded that the measures in question were mere subsequent regulatory measures dealing with the same underlying subsidies which had been identified in the consultation request and which were the actual subject of the consultations.⁵⁰ The Panel stated: “[w]e consider that the consultations and request for establishment relate to what is fundamentally the same ‘dispute’, because they involve essentially the same practice, i.e., the payment of export subsidies under PROEX [the government program for the financing of aircraft for export].”⁵¹ In other words, the Panel never dispensed with the requirement that there be a relationship between Article 4.4 and 6.2 in substance since the measures at issue were in substance the same as those that had been included in the request for consultations and discussed at that time. It did dispense with the relationship requirement on technical terms, however (since technically, the new measures were not included in the request or during the consultations themselves yet the adjudicators decided to consider them to be part of their jurisdiction anyway).

The requirement that the request for establishment of the panel be strictly limited to the matters explicitly set forth in the request for consultations should not be strictly enforced by WTO adjudicators.⁵² First,

48. PALMETER & MAVROIDIS, *supra* note 32, at 89.

49. Appellate Body *Brazil–Aircraft*, *supra* note 31, at para. 132.

50. *Id.* at para. 196.

51. *Brazil–Aircraft*, *supra* note 31, at para. 7.11.

52. Support for this view can be found in DSU, *supra* note 8, articles 4.3 and 6.2, and in *Mexico–Corn Syrup*, *supra* note 34, at paragraph 63.

The recently released US–Cotton Subsidies Appellate Body report bears on this point as well:

Article 4.3 of the DSU allows Members to request a panel if the respondent Member does not respond to the request for consultations or does not enter into consultations within a certain timeframe.⁵³ This suggests that adjudication can go forward without consultations. The DSB has not found the prejudice to parties' rights from a lack of consultations to be harmful enough to justify impeding the litigation. This point was emphasized in *Mexico–Corn Syrup* where the Appellate Body noted that “the DSU has explicitly recognized circumstances where the absence of the consultations would not deprive the panel of its authority to consider the matter referred to it by the DSB.”⁵⁴ In addition, the notion that consultations are not necessary for the establishment of the panel is also acknowledged in Article 6.2 DSU, which states that the request for the establishment of the panel shall indicate whether consultations were held.⁵⁵ Accordingly, Article 6.2 may be satisfied “by an express statement that no consultations were held” and therefore it “envisages the possibility that a panel may be validly established without being preceded by consultations.”⁵⁶

Second, the DSU does not recognize the concept of “adequacy of consultations.”⁵⁷ As explained above, the DSB has the authority to establish panels and, in doing so, the adequacy of consultations is a matter that can be addressed in its meeting before the panel is established. In other words, a panel is not in a position to know what was actually discussed during the consultations, and therefore should not attempt to resolve the dispute between the parties at that time. What takes place in the consultations is “not the concern to the panel.”⁵⁸ Accordingly, it is odd to rely so heavily on this step in framing the panel's jurisdiction. In addition, through Article 4.6 of the DSU, which states that consultations are confidential and without prejudice to the rights of a Member in any

As long as the complaining party does not expand the scope of the dispute, we hesitate to impose too rigid a standard for the “precise and exact identity” between the scope of consultations and the request for the establishment of the panel, as this would substitute the request for consultations for the panel request.

Appellate Body Report, *United States–Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted Mar. 3, 2005, para. 293 [hereinafter Appellate Body US–Cotton Subsidies] quoting *Brazil–Aircraft*, *supra* note 31, at para. 132 (emphasis omitted)(footnote omitted).

53. DSU, *supra* note 8, art. 4.3.

54. *Mexico–Corn Syrup*, *supra* note 34, at para. 63 (emphasis omitted).

55. DSU, *supra* note 8, art. 6.2.

56. *Mexico–Corn Syrup*, *supra* note 34, at para. 62 (emphasis omitted).

57. *PALMETER & MAVROIDIS*, *supra* note 32, at 90, citing *Korea–Alcoholic Beverages*, *supra* note 33, at para. 10.19.

58. *Id.*

further proceedings,⁵⁹ the DSB explicitly diminishes the value of consultations to the overall panel process as the substance of the consultations cannot be referred to during the subsequent adjudication.

Finally, the DSU operates in similar fashion to a civil law court where the judge takes on a much more involved role in the settling of the dispute at the expense of what the common law systems call the “adversarial” nature of civil procedure.⁶⁰ While the proceedings are still adversarial, this characterization of the adjudicator’s involvement suggests that the consultations themselves, where the adjudicator has no role (as the consultations are confidential between the parties to the dispute only),⁶¹ are thus quite separate from the panel’s proceedings. Accordingly, the request for the panel should be the main focus of the jurisdiction of the panel. The consultations and their requests, on the other hand, should be a separate aspect of the proceedings; their main focus should be on achieving a settlement between the parties in order to eliminate the need to resort to litigation.⁶² The substance of the requests for consultations and consultations themselves should not strictly determine the nature of the subsequent dispute. Given the centrality of the panel request for determining the jurisdiction of the panel,⁶³ as will be seen below, the need to require such inter-relatedness between the request for consultations and the request for the establishment of the panel is not clear.

Both the panels and the Appellate Body, however, have emphasized the importance of the inter-relatedness between the request for consultations, the consultations themselves, and the requests for the establishment of the panel.⁶⁴ In particular, the Appellate Body has underscored the importance of consultations in shaping the substance of the

59. DSU, *supra* note 8, art. 4.6. Thus, for example, a Member’s offer for compromise would not constitute an admission that a particular measure is inconsistent with its WTO obligations.

60. See PALMETER & MAVROIDIS, *supra* note 32, at 116 (discussing the panel’s right to seek evidence on its own initiative). See also DSU, *supra* note 8, art. 13. With regard to the adversarial nature of civil procedure,

The central feature of [the adversarial system] is the almost total responsibility placed on the parties to the controversy for beginning suit, for shaping issues, and for producing evidence; the court almost takes no active part in these facets of the process By contrast, the judicial system in civil law countries employ the inquisitorial system. Under the inquisitorial model, the court conducts an active and independent inquiry into the merits of each case

COUND, JOHN ET AL., CIVIL PROCEDURE at 2 (8th ed., 2001) (emphasis omitted).

61. See DSU, *supra* note 8, art. 4.6 (“Consultations shall be confidential, and without prejudice to the rights of any Member in any further proceedings.”).

62. See *id.* at art. 3.7 and 4.2.

63. PALMETER & MAVROIDIS, *supra* note 32, at 94.

64. See, e.g., Appellate Body India–Patents, *supra* note 46, at para. 87 and para. 94.

panel proceedings, emphasizing that the demands of due process implicit in the DSU make full disclosure of facts during consultations especially important. “[T]he claims that are made and the facts that are established during consultations do much to shape the substance and scope of subsequent panel proceedings.”⁶⁵

This, however, is not dispositive: the Appellate Body’s view does not necessarily negate the claim that the request for the establishment of the panel should not be strictly limited to the matters explicitly set forth in the request for consultations. Indeed, the very fact that consultations can shape the panel proceedings should be reason to allow a more flexible approach to the requests for the establishment of the panel, which should be influenced by, and not circumscribed by, the previous consultations.⁶⁶

B. Request for Establishment of a Panel

The complaining Member’s request for the establishment of a panel plays an important role in determining the subject matter jurisdiction of the panel as it is incorporated into its terms of reference.⁶⁷ In addition, the request for establishment of a panel fulfills the due process objective of placing the responding party and any potential third parties on notice regarding the claims at issue.⁶⁸

The formal requirements of a request for the establishment of a panel are set out in Article 6.2 of the DSU: a request must be in writing; it must indicate whether consultations were held; it must identify a specific measure at issue; and it must provide a brief legal basis for the complaint sufficient to present the problem clearly.⁶⁹ The “measure at issue” refers to a law or regulation, or an action that applies to a law or regulation which is the subject of the dispute.⁷⁰ The “legal basis for the complaint” or the “claim” together with the “measure at issue” constitute the “matter” before the panel, which is referred to in the standard terms of reference set out in Article 7.1 of the DSU.⁷¹

The extent of a panel’s jurisdiction is dependent upon both the subject matter of the dispute and the parties to the dispute.⁷² In particular, the

65. PALMETER & MAVROIDIS, *supra* note 32, at 91 (quoting Appellate Body India–Patents, *supra* note 46, at para. 94).

66. Support for this view can be found in the DSU, Articles 4.3 and 6.2, DSU, *supra* note 8, and the Mexico–Corn Syrup case, *supra* note 34, at para. 63.

67. PALMETER & MAVROIDIS, *supra* note 32, at 94.

68. *Id.*

69. DSU, *supra* note 8, art. 6.2.

70. PALMETER & MAVROIDIS, *supra* note 32, at 97.

71. *Id.* at 97, citing Appellate Body Report, Guatemala–Anti-Dumping Investigation Regarding Portland Cement from Mexico, WT/DS60/AB/R, adopted Nov. 25, 1998, para. 75.

72. *Id.* at 17.

request for the establishment of the panel determines its jurisdiction.⁷³ Any dispute as to what should or should not be included in the panel's jurisdiction is ultimately decided by a WTO adjudicator and not the DSB; the latter only decides whether the panel should be established in the first place.⁷⁴ In *India—Patents*, the Appellate Body stated that “a panel has the discretion to determine the claims it must address in order to resolve the dispute between the parties—provided that those claims are within that panel's terms of reference.”⁷⁵ In addition, the Appellate Body stated:

A panel's terms of reference are important for two reasons. First, terms of reference fulfill an important due process objective—they give the parties and third parties sufficient information concerning the claims at issue in the dispute in order to allow them an opportunity to respond to the complainant's case. Second, they establish the jurisdiction of the panel by defining the precise claims at issue in the dispute.⁷⁶

WTO jurisprudence has addressed the question of the required level of specificity in a panel request for adequate identification of both the measure and the claim at issue. This specificity analysis provides critical insight into the issues surrounding jurisdiction and withdrawn or amended measures that will be explored in the next section of this Note. For example, in *Japan—Film*, Japan argued that eight measures listed in the panel request were inadmissible as they were only mentioned for the first time in the United States' first written submission to the Panel.⁷⁷ The Panel disagreed, stating that Article 6.2 requirements are met when a measure is a subsidiary of or so closely related to another measure specifically identified so that the responding party can reasonably have had adequate notice of the claims asserted by the complaining party.⁷⁸ There are limits to this finding, however. In *Indonesia—Autos* for example, the Panel ruled that a loan, not identified in the panel request, was not within

73. *Id.*

74. *Id.* at 108.

75. Appellate Body *India—Patents*, *supra* note 46, at para. 87.

76. *Id.*, quoting Appellate Body Report, *Brazil—Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted Feb. 21, 1997, at 22 [hereinafter Appellate Body *Brazil—Coconut*].

77. PALMETER & MAVROIDIS, *supra* note 32, at 97, citing Panel Report, *Japan—Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R and Corr.1, adopted Feb. 19, 2002, para. 10.2 [hereinafter *Japan—Film*].

78. *Id.* at 98 (citing *Japan—Film*, *supra* note 77, at para. 10.8).

its terms of reference, despite the fact that it was one aspect of the larger program which was at issue before the Panel.⁷⁹

Regarding the claim or legal basis of the complaint, the Appellate Body has stated that the phrase “including but not limited to” is not sufficient to meet the complainant’s burden to identify the specific measures at issue and provide a brief summary of the legal basis of the complaint to present the problem clearly, as required by Article 6.2 of the DSU.⁸⁰ In addition, while it is necessary for the panel request to identify the provisions that constitute the basis of the Member’s claims, simply listing the provisions may not be sufficient.⁸¹ This must be determined on a case-by-case basis, however, taking “into account whether the ability of the respondent to defend itself was prejudiced, given the actual course of the panel proceedings, by the fact that the panel request simply listed provisions claimed to have been violated.”⁸²

Interestingly, in *EC–Bed Linen*, when faced with a failure in the request for a panel to list a specific treaty article alleged to have been violated, the Panel held that claims based on that article were outside its terms of reference, even if the omission was inadvertent.⁸³ It made no difference to the Panel that the article had been listed in the request for consultations, discussed in consultations, and covered in the complaining party’s first written submission.⁸⁴ The Panel argued that a “failure to state a claim in even the most minimal sense, by listing the treaty Articles alleged to be violated, cannot be cured by reference to subsequent submissions.”⁸⁵ This harsh brightline standard, however, is relaxed if there is no evidence of prejudice to complaining or third parties by the simple listing of an article. Then the request that the claim be dismissed for lack of specificity will be denied; still, questions regarding which

79. *Id.* at 98 (citing Panel Report, Indonesia–Certain Measures Affecting the Automobile Industry, WT/DS54/R, WT/DS55/R, WT/DS59/R and Corr.1, 2, 3, and 4, adopted Dec. 19, 2002, para. 14.3 [hereinafter Indonesia–Autos]).

80. *E.g.*, Appellate Body India–Patents, *supra* note 46, at para. 90.

81. PALMETER & MAVROIDIS, *supra* note 32, at 99, citing Appellate Body Report, Korea–Definitive Safeguards Measure on Imports of Certain Dairy Products, WT/DS98/AB/R, adopted Jan. 12, 2000, para. 124 [hereinafter Appellate Body Korea–Dairy].

82. *Id.* at 99 (quoting Appellate Body Korea–Dairy, *supra* note 81, at para. 127).

83. *Id.* at 101 (citing EC–Bed Linen, *supra* note 30, at para. 6.17). This is an interesting result, particularly compared with particular instances in American law, such as cases involving contracts, where courts do not usually allow parties to profit from an adverse party’s clerical mistakes. *See, e.g.*, *Elsinore Union Elementary Sch. Dist. v. Kastorff*, 353 P.2d 713, 717 (Cal. 1960).

84. PALMETER & MAVROIDIS, *supra* note 32, at 101 (citing EC–Bed Linen, *supra* note 30, at paras. 6.14, 6.15).

85. *Id.* (quoting EC–Bed Linen, *supra* note 30, at para. 6.15).

party has the burden of proof to show or disprove prejudice in such situations are unclear.⁸⁶

While the general rule is that a party asserting a particular claim carries the burden of proof,⁸⁷ a party invoking an exception to justify action that would otherwise be inconsistent with its WTO obligations shifts the burden on to itself.⁸⁸ The question therefore becomes whether proving or disproving prejudice in these cases (where the adjudicator has ruled that the complaining party's request is not sufficient) should be viewed as a general rule or an exception. There is room to argue that it is an exception because it is the complaining party that has not complied correctly with DSU procedures yet still wants to maintain its claim. In such cases, it would be unfair, as well as a waste of scarce judicial resources, to ask the responding party to prove prejudice in the face of the possibility that the claim itself may not stand.

Despite this suggestion, however, the Panel in *United States–Shrimp* broadly interpreted the terms of reference and placed the burden of proof on the responding party.⁸⁹ In that case, the complainant Malaysia argued that the Panel, in the Article 21.5 proceedings, was not limited to considering whether or not the United States had complied with the DSB recommendations and to rulings which had been based on the original terms of reference.⁹⁰ Instead, it argued that the mandate of the Panel under Article 21.5 was to examine the existence or the consistency of the measures the United States had taken with Articles XI and XX of the GATT 1994.⁹¹ The United States in turn argued that the issue in the proceeding was more limited—it was merely to determine whether it had complied with the rulings and recommendations of the DSB by modifying the application of the law in question.⁹²

86. *Id.* (citing *EC–Bed Linen*, *supra* note 30, at para. 6.29). This is certainly a potential safeguard and advantage to countries with less resources, less skilled individuals and less experience in bringing claims.

87. *Id.* at 143.

88. *Id.* at 148.

89. Panel Report, *United States–Import Prohibitions of Shrimp and Shrimp Products—Recourse to Article 21.5 by Malaysia*, WT/DS58/RW, adopted June, 15 2001 [hereinafter *United States–Shrimp*], paras. 3.4 and 5.9.

90. *Id.* at para. 3.1. Additionally, DSU article 21.5 reads, in part: “[w]here there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel.” DSU, *supra* note 8, art. 21.5. Therefore, recourse to this article is invoked when a Member country is unsatisfied with the compliance of another Member country with the recommendations given by the panel or Appellate Body (and ultimately by the DSB) in an earlier dispute.

91. *United States–Shrimp*, *supra* note 89, at para. 3.2.

92. *Id.* at para. 3.4.

In other words, Malaysia argued in favor of expanding the jurisdiction of the panel by asking it to review the United States' action in relation to the GATT articles above, in addition to the rulings and recommendations of the DSB. In holding that it was fully entitled to address all Malaysia's claims under the above GATT articles, the Panel noted that the United States did not argue that Malaysia's claims were insufficiently specific or that its request for the establishment of an Article 21.5 panel otherwise failed to meet the requirements of Article 6.2 of the DSU.⁹³ Citing the Appellate Body's decision in *Canada–Aircrafts (21.5)*, it stated:

[A] panel [under Article 21.5] is not confined to examining the measures taken to comply from the perspective of the claims, arguments and factual circumstances that related to the measure that was subject to the original proceedings. [. . .] Article 21.5 proceedings involve, in principle, not the original measure, but rather a new and different measure which was not before the original panel. [. . .] It is natural, therefore, that the claims, arguments and factual circumstances which are pertinent to the “measures to comply” will not, necessarily be the same as those which were pertinent in the original dispute.⁹⁴

This decision makes it clear that, at least in Article 21.5 proceedings, the jurisdiction of the panel may not be limited to the terms of reference of the original panel. Perhaps if the United States had raised the issue of lack of specificity and/or that the request for the Article 21.5 panel failed to meet the jurisdictional requirements set out in Article 6.2 of the DSU, the Panel might have decided differently. Given that the United States was the responding party, and thus Malaysia, as the complaining party, was arguing for this exception, the burden of proving that the terms of reference were pleaded with sufficient specificity and that they comported with the panel's original terms of reference should have been on Malaysia.⁹⁵ If that had been so, the United States' silence in this regard would not have been damaging to its position.

Accordingly, one may be tempted to conclude from this decision that panels do not interpret these issues to be exceptions using the standard

93. *Id.* at paras. 3.4, 5.9.

94. *Id.* at para. 5.8, quoting Appellate Body Report, *Canada–Measures Affecting the Export of Civil Aircraft–Recourse by Brazil to Article 21.5 of the DSU*, WT/DS46/AB/RW, adopted Aug. 4, 2000, para. 41 [hereinafter Appellate Body, *Canada–Aircraft (21.5)*] (alterations in original).

95. See PALMETER & MAVROIDIS, *supra* note 32, at 143 (“In the WTO, as in any mature legal system, the party asserting a fact, whether claimant or respondent, is responsible for providing proof of that fact.”).

rules of burden of proof or that the panel's original terms of reference are not always so strictly confined, as *India-Patents* seemed to suggest.⁹⁶ More likely, however, is that the rules regarding the panel's original terms of reference, and thus its jurisdiction, are simply different in Article 21.5 proceedings than in ordinary proceedings. This notion is supported by the *United States-Shrimp* case itself, which further states:

Indeed the utility of the review envisaged under Article 21.5 of the DSU would be seriously undermined if a panel were restricted to examining the new measure from the perspective of the claims, arguments and factual circumstances that related to the original measure, because an Article 21.5 panel would then be unable to examine fully the "consistency with a covered agreement of the measure taken to comply", as required by Article 21.5 of the DSU.⁹⁷

Finally, with regard to the establishment of the panel, a panel will be established no later than the second meeting after the request for its establishment first appears on the DSB's agenda.⁹⁸ Once a panel issues its recommendations and rulings, the responding party has the right to appeal the decision to the Appellate Body.⁹⁹

III. SCENARIOS AND IMPLICATIONS

A. Measures Withdrawn During the Course of Proceedings

Panels can still make rulings on withdrawn measures provided that the measure is within the panel's terms of reference.¹⁰⁰ While there is no rule on this issue, many panels have decided to continue the adjudication even after the measure is withdrawn, so long as the parties have not agreed to the contrary.

In *US-Wool Shirts*, for example, the United States imposed a safeguard on imports of India's woven wool shirts and blouses which was to

96. There, the Appellate Body noted that "a claim *must* be included in the request for establishment of a panel in order to come within a panel's terms of reference" and where it stated that "[a]ll parties engaged in dispute settlement under the DSU must be fully forthcoming from the very beginning both as to the claims involved in a dispute and as to the facts relating to those claims." Appellate Body *India-Patents*, *supra* note 46, at paras. 89, 94.

97. *United States-Shrimp*, *supra* note 89, at para. 5.8 (quoting Appellate Body *Canada-Aircrafts* (21.5), *supra* note 94, at para. 41).

98. *PALMETER & MAVROIDIS*, *supra* note 32, at 105.

99. DSU, *supra* note 8, art. 17.4.

100. *PALMETER & MAVROIDIS*, *supra* note 32, at p. 26.

become effective April 18, 1995 for a period of one year.¹⁰¹ India requested that the United States withdraw the measure, alleging particular inconsistencies with the agreement at issue (the Agreement on Textiles and Clothing).¹⁰² Before the Panel distributed its final report to the parties, however, the safeguard measure was withdrawn.¹⁰³ The Panel nevertheless decided to adjudicate the case, stating that:

In the absence of an agreement between the parties to terminate the proceedings, we think that it is appropriate to issue our final report regarding the matter set out in the terms of reference of this Panel in order to comply with our mandate . . . notwithstanding the withdrawal of the US restraint.¹⁰⁴

The Panel further stated that this had been the practice of a number of GATT panels in the past.¹⁰⁵

Similarly in *India—Autos*, India argued to the Panel that the licensing regime, public notice, and trade balancing provisions in question had been abolished after the request for the establishment of the panel.¹⁰⁶ The Panel emphasized that the regulations in question were in existence at the time of the establishment of the panel.¹⁰⁷ It then stated:

A WTO Panel is generally competent to consider measures in existence at the time of its establishment. This power is not necessarily adversely affected simply because a measure under review may have been subsequently removed or rendered less effective. Panels in the past have examined discontinued measures where there was no agreement of the parties to discontinue the proceedings.¹⁰⁸

The Panel came to a similar conclusion in *Chile—Price Band*. The Chilean government had imposed a provisional measure consisting of *ad valorem* tariff surcharge which corresponded to the difference between the general applied tariff added to the *ad valorem* equivalent of the specific duty determined by the price band system (PBS) and the bound

101. Panel Report, United States—Measures Affecting Imports of Woven Wool Shirts and Blouses from India, WT/DS33/R, adopted Jan. 6, 1997, para. 2.8 and para. 3 [hereinafter US—Wool Shirts], *upheld by*, Appellate Body Report, United States—Measures Affecting Imports of Woven Wool Shirts and Blouses from India, WT/DS33/AB/R, adopted Apr. 25, 1997 [hereinafter Appellate Body US—Wool Shirts].

102. *Id.* at para. 3.1.

103. *Id.* at para. 6.2.

104. *Id.*

105. *Id.*

106. Panel Report, India—Measures Affecting the Automotive Sector, WT/DS146/R, WT/DS175/R, adopted Dec. 21, 2001, para. 7.25. [hereinafter India—Autos].

107. *Id.* at para. 7.29.

108. *Id.* at para. 7.26.

WTO tariff for these products.¹⁰⁹ In other words, whenever the PBS duty, in conjunction with the eight percent applied tariff rate exceeded the 31.5% bound rate, the portion of duty in excess of that bound rate was to be considered to constitute the safeguard measure.¹¹⁰ Subsequently, definitive safeguard measures which took the same form as the provisional measures were imposed for one year on wheat, wheat flour, and edible vegetable oils.¹¹¹ The safeguard measures were then extended.¹¹² During the course of the proceedings, however, Chile withdrew the definitive safeguard measures.¹¹³

On the question as to whether to continue the adjudication of these safeguards, Chile argued that since the provisional and definitive measures were no longer in effect on the date of Argentina's panel request, the Panel did not have jurisdiction over the challenged measure.¹¹⁴ The Panel disagreed. It stated that while Article 19.1 DSU prevents panels from making *recommendations* (i.e. suggesting appropriate remedies and other action) on measures that are not currently in force, the Panel did not believe that the same article prevented it from making *findings* regarding the consistency of an expired provisional safeguard measure, if making such a finding would be necessary "to secure a positive solution to the dispute."¹¹⁵ It emphasized that it would not set forward *recommendations* with regard to those expired measures.¹¹⁶

The Appellate Body, in its recent ruling in *US-Cotton Subsidies*, stated the point a bit differently. Here, it collapsed the distinction between recommendations and findings and instead made a distinction delineating the types of recommendations WTO adjudicators can make regarding expired measures.¹¹⁷ It found that "the fact that a measure has expired may affect what recommendation a panel may make. It is not, however, dispositive of the preliminary question of whether a panel can address claims in respect of that measure."¹¹⁸ Notwithstanding the subtle difference with the Panel's statement in *Chile-Price Band*, the Appellate Body emphasized that its ruling was consistent with the approach taken by prior GATT and WTO panels on questions relating to the expiration of measures after the initiation of dispute settlement proceedings. At root, WTO adjudicators have decided similarly with regard to withdrawn

109. Chile-Price Band, *supra* note 29 at paras. 2.2, 2.3.

110. *Id.*

111. *Id.* at paras. 2.10-2.12.

112. *Id.* at para. 2.14.

113. *Id.* at para. 2.15.

114. *Id.* at para. 7.110.

115. *Id.* at para. 7.112.

116. *Id.*

117. Appellate Body *US-Cotton Subsidies*, *supra* note 52, at para. 272.

118. *Id.*

or expired measures: “[i]n none of these cases has a panel or the Appellate Body premised its decision [whether or not to adjudicate a case or an issue] on the view that, *a priori*, an expired measure could not be within a panel’s terms of reference.”¹¹⁹

In addition, the Appellate Body in its review of the Panel decision in *Chile–Price Band*, noted that if panels were not entitled to review expired measures, provisional safeguard measures would often escape review by a WTO dispute settlement panel.¹²⁰ This same functional concern would apply to any other measure that a country was relatively able to repeal in the face of threatened action by another WTO member.

The cases above are an interesting insight into the panels’ approach to withdrawn measures. In *US Wool Shirts* and *India–Autos* for example, the panels treated the option to continue adjudication as the default rule—this is evident from the particular language utilized in the reports: “[i]n the absence of an agreement between the parties to terminate the proceedings . . .”¹²¹ and “where there was no agreement of the parties to discontinue the proceedings.”¹²² These cases also highlight the importance of the parties’ understanding or agreement on whether to continue the adjudication, an important consideration in the panel’s decision to dismiss or continue forward in the adjudicatory process.

It may be argued that continuing adjudication of the dispute should not be the default rule in light of judicial economy concerns. In particular, when a case involves the imposition of safeguards, precisely because their temporary imposition is a legally accepted measure in the WTO Agreements (so long as appropriately justified),¹²³ the dispute should end as soon as they are withdrawn, especially since a panel, pursuant to Article 19.1 of the DSU, is quite limited regarding the recommendations, if any, it can issue.¹²⁴ As the Panel in *Chile–Price Band* noted, however, a decision to not adjudicate provisional safeguard cases would, in effect, allow them to escape the scrutiny of WTO adjudicators as they can be easily repealed.¹²⁵ In this sense then, one can see the adjudication of

119. *Id.* at para. 272, n. 214.

120. *Chile–Price Band*, *supra* note 29, at para. 7.114.

121. *US–Wool Shirts*, *supra* note 101, at para. 6.2.

122. *India–Autos*, *supra* note 106, at para. 7.26.

123. See Agreement on Safeguards, in WTO Agreement, *supra* note 8, at 275 [hereinafter Safeguards Agreement].

124. See *supra* text accompanying note 29 (discussing *Chile–Price Band*) and note 117 (discussing Appellate Body *US–Cotton Subsidies*) on the adjudication of withdrawn or expired measures. In addition, in *Chile–Price Band*, Chile argued that given that the measure at issue had been withdrawn, “it is difficult to understand how, in terms of the purpose of the dispute settlement system, there could be a more ‘positive solution’ to the dispute for Argentina . . .” *Chile–Price Band*, *supra* note 29, at para. 7.4 (quoting Chile’s Oral Statement at the second meeting of the parties).

125. *Id.* at para. 7.114.

withdrawn measures as a form of judicial economy because they make a clear statement about the particular measure and, in doing so, provide guidance to the legality of similar measures that may be enacted in the future.¹²⁶

It should be noted, however, that the above argument assumes either that Members are able to know whether potential future measures are similar enough to those found to be WTO-inconsistent or that Members will be deterred from implementing measures of a similar quality, even if they are unsure of their precise legality. If a Panel could not adjudicate withdrawn measures, however, Members would still be better off taking their chances by imposing provisional measures that might be WTO inconsistent, and then simply repealing them if another Member challenged them at the WTO. As the Panel emphasized in *Chile-Price Band*, this would effectively allow such measures to escape Panel scrutiny.¹²⁷ Therefore, such measures should be available for adjudication even after their withdrawal.

B. Measure is Withdrawn but New Measure Enacted Raises Similar Issues

Notwithstanding the above, WTO adjudicators have not always allowed the continuation of the adjudication in the face of a withdrawn measure. *Argentina-Footwear and Textiles* provides an example of a case where a panel did not allow the adjudication of specific issues to continue.¹²⁸ There, the United States argued that even though the new measure imposed by Argentina was technically distinct from the one it replaced, the effects of the new measure would have been identical to the withdrawn one.¹²⁹ In particular, the United States challenged a series of specific duties imposed by Argentina on the grounds that they violated rates bound under Article II of the GATT.¹³⁰ Argentina revoked the measure that imposed the

126. For example, in *Chile-Price Band*, the Panel continued the adjudication of the dispute and thus found the Chilean measures at issue to be WTO-inconsistent. *Id.* at para. 8.1. Despite the fact that the measures at issue had already been withdrawn, this decision provides guidance to Chile and other WTO Members, were they to would consider enacting similar or identical measures in the future.

127.

We are concerned that if the conformity of such measures cannot, as a matter of principle, be addressed by panels solely because they are no longer in effect . . . then provisional safeguard measures generally will escape panel scrutiny Members could then adopt provisional safeguard measures, the WTO-inconsistency of which, could never be examined by panels.

Id. at para. 7.114.

128. *Argentina-Footwear and Textiles*, *supra* note 20, at para. 6.13.

129. *Id.*, at para. 6.9.

130. *Id.* at para. 3.1.

specific duties after circulation of the request for the establishment of a panel but before the panel was established by the DSB.¹³¹ On the day the measure was revoked, however, Argentina re-imposed the same duties as a provisional safeguard measure.¹³² Even though the same specific duties were referred to in the terms of reference, the Panel declined to consider the revoked measure, quoting the Appellate Body in *US–Wool Shirts*, noting that the aim of the dispute settlement is not:

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.¹³³

While at first glance this case may seem to be at odds with prior WTO jurisprudence, it can be reconciled with the above cases and their concern for judicial economy.¹³⁴ Here, Argentina revoked the measure before the establishment of the Panel, that is, before the Panel began work on the original matter at issue.¹³⁵ Accordingly, judicial economy concerns were not significantly implicated. In fact, these concerns would have been exacerbated had the Panel continued with its original terms of reference—terms which would have required it to analyze the complaint according to different standards. A safeguard measure would have been challenged and defended based on the Safeguards Agreement, a related but different treaty; different grounds than a complaint alleging the imposition of duties above bound rates in violation of Article II GATT. To have continued the dispute with the original terms of reference would not allow Argentina to defend its measure as it currently stood as a safeguards measure, unless the Panel were to allow an amendment to the terms of reference. Such a concept of amendment does not exist in the DSU.¹³⁶ Therefore, there

131. *Id.* at para. 3.4.

132. *Id.* at para. 6.5.

133. *Id.* at para. 6.13 (quoting the Appellate Body in Appellate Body *US–Wool Shirts*, *supra* note 101, at 19).

134. *See for example*, *US–Wool Shirts*, *Chile–Price Band*, and *Brazil–Aircraft*, where the panels decided to continue adjudication of the dispute in the case of withdrawn or changed measures.

135. *Argentina–Footwear and Textiles*, *supra* note 20, paras. 3.4, 6.13.

136. Amendments do not exist in anyway akin to that in many domestic systems, such as Rule 15 in the Federal Code of Civil Procedure of the United States. Rule 15(a) states, in relevant part:

A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is on to which no responsive pleading is permitted and action has not been placed upon the trial calendar, the party may so amend at any time within 20 days after it is served. Otherwise a party

would have been no possible way to allow the dispute to go forward on different terms of reference.¹³⁷

On the other hand, the Panel's acceptance and reliance on such a technicality raises concerns regarding the panelists' method of interpretation.¹³⁸ How much weight should such technical concerns hold in light of overarching public policy and judicial efficiency concerns? Are the panelists and the Appellate Body properly equipped to make this determination? As Picciotto states, "[t]he AB's power to review the validity of national regulations allows it in effect to overrule even laws enacted by legislatures. This in turn raises the issue of accountability. . . . The legitimacy of the adjudications is indeed crucial."¹³⁹

Additionally, concerns of state opportunism are also raised.¹⁴⁰ It was no doubt convenient for Argentina to make such a change in its legislation in an effort to avoid litigation and a potential adverse judgment. While changes in domestic policy to avoid WTO disputes are usually welcome (for example, where a Member takes preemptive, corrective action to remedy the alleged free trade infraction), changes that maintain the same trade-restrictive measure at issue with mere cosmetic alterations are not actions that the DSB should encourage.

[The Appellate Body's] dilemma illustrates a more general disadvantage to the adoption of a mechanistic and closed approach to the interpretation of legal provisions in international agreements. An important merit of delegating the interpretation of legal obligations on a case-by-case basis to an adjudicative body is to introduce a necessary flexibility which allows incremental adaptation. Otherwise, it has been pointed out that legalization which takes the form of locking states in to detailed and rigid

may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

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

137. See DSU, *supra* note 8, art. 6.

138. See Panel Report, European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/R, adopted Sept. 18, 2000, (where the Panel accepted Canada's argument that France was violating its WTO obligations by placing a ban on asbestos containing products despite its obvious health risks; Robert Howse & Elisabeth Tuerk, *The WTO Impact on Internal Regulations—A Case Study of the Canada-EC Asbestos Dispute*, in *THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES* (De Búrca Gráinne & Joanne Scott eds., 2001) (where the authors state that the Panel's approach to Canada's claim in the EC Asbestos dispute resulted from its strict interpretative approach to the analysis under the article at issue, leaving it no room to distinguish between legitimate domestic policy objectives and protectionist motives of member States).

139. Picciotto, *supra* note 21, at 6.

140. See Argentina—Footwear and Textiles, *supra* note 20, where the Panel allowed the dismissal of the complaint despite the fact that Argentina only formally changed the label of the measure at issue.

obligations may have a range of negative effects, making it harder to manage the social and political impact of trade agreements, and facilitating mobilization by powerful domestic lobbies to deter liberalization concessions, secure favourable wording, and pressurize governments to insist on a strict application.¹⁴¹

Not only are these actions opportunistic and manipulative, they are also a significant waste of judicial resources, both on the part of the DSB (that mobilizes to undertake consideration of the complaint) and the responding Member country (that is likely to have spent time in consultations and in general preparation for the dispute). In fact, the very same rationale for not allowing amendments in the DSU provides support for disallowing Members to avoid adjudication on the basis of merely technical or cosmetic changes.¹⁴² Since many Member States are at various times both complainants and respondents, it is not unrealistic to assume that they would have an interest in prohibiting this practice for fear of having it used against them.

This suggests that the DSU could include a provision allowing amendments in cases where merely the name or some equally cosmetic element of a measure has changed, but the effect on the complaining party remains virtually the same.¹⁴³ In these cases, because the complaining party is the one that would benefit the most from maintaining the dispute, and because it continues to be the party with the burden of proof to state a claim, the burden to show that the substantial weight (if not all) of the new measure's effects will be the same should remain on the complaining Member.¹⁴⁴ If the Member is not able to make such a showing, then the panel should dispose of the dispute, just as it did in *Argentina-Footwear and Textiles*.¹⁴⁵ This would ensure that responding parties do

141. PICCIOTTO, *supra* note 21, at 15.

142. The rationale for not allowing amendments to terms of reference in the DSU is often that given the inequality of Members' resources, skills and experience with the WTO system it is reasonable to require a relatively early framing of the particular complaint in the proceedings, an argument that also helps explain the requirement that requests for consultations and requests for the establishment of the panel be so similar. For example, the Appellate Body has noted that it is important that a panel request be sufficiently precise.

[T]erms of reference fulfill an important due process objective—they give the parties and third parties sufficient information concerning the claims at issue in the dispute in order to allow them an opportunity to respond to the complainant's case.

Appellate Body *India-Patents*, *supra* note 46, at para. 87 (quoting Appellate Body *Brazil-Coconut*, *supra* note 76, at 22).

143. See *Argentina-Footwear and Textiles*, *supra* note 20, at paras. 2.8 and 6.5.

144. See PALMETER & MAVROIDIS, *supra* note 32, at 143 (discussing burden of proof within the GATT/WTO).

145. See *Argentina-Footwear and Textiles*, *supra* note 20, at para. 6.15.

not take advantage of the WTO by efficiently repealing legislation that will essentially be reenacted in another form, while also allowing for the possibility that the responding Member is acting in a legitimate fashion.

C. Measure Remains in Effect but its Provisions Are no Longer Applied to the Complaining Member

Contrast the cases above, in particular *US–Wool Shirts*, to the GATT case of *US–Tuna from Canada*.¹⁴⁶ In the latter, the complaining party, Canada, had to convince the Panel to continue adjudication of the dispute, even though the statute in question was never withdrawn.¹⁴⁷ With regard to judicial economy concerns, it would seem easier to make a case for the continuation of the adjudication in this case than in *US–Wool Shirts*, where continuing the proceedings was the default rule.¹⁴⁸ The dispute arose as a result of the United States' prohibition on imports of tuna and tuna products from Canada.¹⁴⁹ This was a reaction to the seizure of nineteen American fishing vessels and the arrest by Canadian authorities of American fishermen for fishing in what Canada believed to be its fisheries jurisdiction.¹⁵⁰ An American statute provided that the Secretary of State should take action to prohibit the importation of fish and fish products from a foreign country when an American fishing vessel was seized by a foreign nation as a consequence of a claim of jurisdiction which was not recognized by the United States.¹⁵¹ Thus, as the United States did not recognize Canada's claim, it moved to prohibit tuna imports from Canada.¹⁵²

Subsequently, the United States decided to lift the prohibition on Canadian imports of tuna and tuna products and, in light of this, argued that a panel decision was no longer needed.¹⁵³ Canada disagreed, arguing that the possibility of further embargoes against Canada continued to exist.¹⁵⁴ This threat would remain so long as the U.S. statute required the imposition of import prohibitions on fish and fish products in response to such actions by Canada.¹⁵⁵ In addition, although the United States and Canada had concluded an interim agreement that would ensure that the Pacific Albacore tuna fishery, the matter at issue, would not be subject to

146. GATT Panel Report, United States–Prohibition of Imports of Tuna and Tuna Products from Canada, BISD 29S/91, adopted Feb. 22, 1982 [hereinafter United States–Tuna].

147. *Id.* at paras. 2.8, 2.9.

148. *US–Wool Shirts*, *supra* note 101, at para. 6.2.

149. *United States–Tuna*, *supra* note 146, at para. 2.3.

150. *Id.* at para. 2.1.

151. *Id.* at para. 2.2.

152. *Id.* at para. 2.3.

153. *Id.* at paras. 2.7, 2.8.

154. *Id.* at para. 2.8.

155. *Id.*

the Fishery Conservation and Management Act, Canada stressed that this treaty only laid the ground work for a long-term agreement which had still to be negotiated and would require Congressional ratification.¹⁵⁶ As such Canada argued, there remained a risk that the prohibitions on imports could be imposed or even expanded to other products (salmon, for example).¹⁵⁷

The Panel eventually agreed with Canada, despite the prevailing GATT practice to confine panel reports to a brief description of the case indicating the parties had come to a solution when a bilateral settlement to a dispute had been reached.¹⁵⁸ It stated that “panels [have] on occasion presented a complete report even if the measure giving rise to the dispute had been disinvoked.”¹⁵⁹ It noted in particular that in this case, Canada did not accept that the results obtained bilaterally constituted a satisfactory solution.¹⁶⁰ Although the Panel had to be “convinced” to continue the adjudication, the fact that it did so suggests that adjudicators are willing to consider the broader context in which the dispute arises and Member country concerns beyond the conclusion of the dispute.¹⁶¹

D. Amendments to Measures During the Course of Proceedings

A closely related issue concerns measures amended during the course of proceedings. WTO jurisprudence suggests that amendments to measures will be allowed when the wording of the panel request is broad enough and when it is necessary in order to secure a positive solution to a dispute.¹⁶² In *Chile—Price Band* the Panel, in deciding to adjudicate the amended measure stated that “where a measure included in the terms of

156. *Id.* at para. 3.22.

157. *Id.*

158. *Id.* at para. 4.3.

159. *Id.*

160. *Id.*

161. Such a continuation of the adjudication should be a default rule, or at least a presumption in favor of continuing the adjudication, particularly when the statute itself remains in effect. *See* United States—Tuna, *supra* note 146, at paragraph 4.3 and Argentina—Footwear and Textiles, *supra* note 20, at paragraphs 6.12–6.14, where the Panel discusses its considerations in not continuing the adjudication of the dispute, in particular the fact that Argentina objected and that there was no evidence of a clear threat of reoccurrence, as the United States was arguing.

162. Please note that “amendments to measures” are distinct from “amendments to a complaint” as mentioned in Part B above. Amendments to a complaint are not currently allowed under the DSU. *See* Appellate Body Report, European Communities—Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R, adopted Sept. 9, 1997, para. 143 (“If a claim is not specified in the request for the establishment of a panel, then a faulty request cannot be subsequently ‘cured’ by a complaining party’s argumentation in its first written submission to the panel or in any other submission or statement made later in the panel proceeding.”).

reference was otherwise terminated or amended after the commencement of the panel proceedings, panels have nevertheless made findings in respect of such a measure.”¹⁶³

On appeal, the Appellate Body in the *Chile—Price Band* case considered whether the subject of the appeal was Chile’s price band system as amended or as it existed before the entry into force of the amendment.¹⁶⁴ Argentina’s request referred to the price band system under Law 18.525 (the original law under which it was enacted) “as well as regulations and complementary provisions and/or amendments.”¹⁶⁵ Based on this language, the Appellate Body stated that broad scope of the panel request suggests that Argentina intended the request to cover the measure even as amended.¹⁶⁶ Therefore, it concluded that Law 19.772 (the new law amending Law 18.525) fell within the Panel’s terms of reference.¹⁶⁷ In addition, the Appellate Body stated that:

generally speaking, the demands of due process are such that a complaining party should not have to adjust its pleadings throughout the dispute settlement proceedings in order to deal with a disputed measure as a “moving target.” If the terms of reference in a dispute are broad enough to include amendments to a measure—as they are in this case—and if it is necessary to consider an amendment in order to secure a positive solution to the dispute—as it is here—then it is appropriate to consider the measure *as amended* in coming to a decision in a dispute.¹⁶⁸

The Appellate Body also expressed judicial economy concerns and voiced its interest in securing a positive solution to the dispute.¹⁶⁹ To this effect, it cited DSU Article 3.7 (stating that “the aim of the dispute settlement mechanism is to secure a positive solution to the dispute”) and Article 3.4 (providing that rulings should be aimed at “achieving a satisfactory settlement of the matter”).¹⁷⁰ Finally, the Appellate Body emphasized that that Argentina and Chile did not object to its consideration of the price band system as amended.¹⁷¹ The parties’ agreement, or

163. Chile—Price Band, *supra* note 29, at para. 7.6 (quoting Indonesia—Autos, *supra* note 79, at para. 14.9.

164. Appellate Body Chile—Price Band, *supra* note 8, at para. 127.

165. *Id.* at para. 175.

166. *Id.* at para. 135.

167. *Id.*

168. *Id.* at para. 144.

169. *Id.* at paras. 140–43.

170. *Id.*

171. *Id.* at para. 143.

lack thereof, to consideration of the measure as amended was also a relevant factor under the GATT.¹⁷²

In *Brazil–Aircraft* both the Panel and the Appellate Body demonstrated their ability to focus on substance over form in deciding whether an amended measure should continue to constitute part of their jurisdiction.¹⁷³ There the Appellate Body held, while affirming the ruling of the Panel, that certain regulatory changes made to the measure after consultations, but before the Panel was established, “did not change the essence” of the measure being challenged and therefore were part of its jurisdiction.¹⁷⁴ Brazil argued that certain regulatory instruments relating to its aircraft financing program PROEX were not properly before the Panel as those instruments came into effect after consultations were held with Canada.¹⁷⁵ Canada, however, argued that those instruments were properly before the Panel because Canada’s request for consultations and its request for the establishment of a panel referred to the same matter.¹⁷⁶ The Appellate Body found that the regulatory instruments that came into effect after the consultations had taken place, and that related to the administration of PROEX, did not change the essence of that regime, and as such they were properly before it.¹⁷⁷

Similarly, in *Chile–Price Band*, while the amendment at issue had been enacted after the panel was established, the Appellate Body stated that this difference should not affect its approach in determining the identity of the measure at issue since the amendment did not alter the nature of the price band system. Instead, the amendment simply clarified the system by making “explicit that there is a cap on the amount of the total tariff that can be applied under the system at the tariff rate of 31.5 per cent *ad valorem*. . . .”¹⁷⁸

In a more recent ruling, the Panel followed the Appellate Body’s lead in continuing the adjudication of an amended measure if the effect of the measure remained the same. In *Dominican Republic–Cigarettes*, the Dominican Republic had replaced the challenged measure and thus

172. PALMETER & MAVROIDIS, *supra* note 32, at p. 24. See also GATT Panel Report, United States–Section 337 of the Tariff Act of 1930, BISD 36S/345, 383, adopted Nov. 7, 1989; GATT Panel Report, United States–Restrictions on Imports of Tuna, DS33/1, June 10, 1994, 33 I.L.M. 839 (1994) (unadopted).

173. Appellate Body *Brazil–Aircraft*, *supra* note 31, at para. 132.

174. *Id.* at paras. 132 (referencing *Brazil–Aircraft*, *supra* note 31, at para. 7.11).

175. *Id.* at para. 127.

176. *Id.*

177. *Id.* at paras. 132–33.

178. Appellate Body *Chile–Price Band*, *supra* note 818, at para. 137.

argued that it was no longer in force.¹⁷⁹ Honduras, the complainant, argued that what was relevant for the Panel's terms of reference was the substance of the measure involved, not the legal acts in their original or modified forms.¹⁸⁰ In determining that the new law did not change the essence of the initially challenged measure, the Panel referred to the previous panel decisions in *Chile-Price Band* and *Brazil-Aircraft* examining measures amended either after the consultations or after the establishment of the panel.¹⁸¹ It therefore concluded that:

The Panel considers that in this dispute, the terms of reference for this Panel refer to the transitional surcharge for economic stabilization measure [the original measure challenged by Honduras], which is essentially the same as the measure amended by Law 2.04. The parties also explicitly agree that the amendment by Law 2-04 does not change the essence of the surcharge. The terms of reference of this Panel are broad enough to include the new law The Panel therefore considers that the measure to be examined is the transitional surcharge for economic stabilization measure as provided by the new legal instrument Law 2-04.¹⁸²

The decisions above provide support for the idea that due process concerns are often important factors in panel and Appellate Body decisions, as adjudicators are concerned about providing sufficient information to responding parties' so that they have an adequate opportunity to respond to the case.¹⁸³ The *Chile-Price Band* and *Dominican Republic-Cigarettes* cases also makes it clear that WTO adjudicators will give serious consideration to the broadness or specificity of the language in the complaining Member's request when considering amended provisions. This suggests that the parties' intent and understanding as to what constitutes the dispute (i.e. notice) is a significant factor in the WTO rulings.¹⁸⁴ Furthermore, as the *Brazil-Aircraft* and the *Dominican Republic-Cigarettes* cases illustrate, WTO adjudicators appear to give a just amount of consideration to whether the essence of a measure has been changed in determining its subject matter jurisdiction.¹⁸⁵ This posi-

179. Panel Report, *Dominican Republic-Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/R, adopted Nov. 26, 2004, para. 7.15 [hereinafter *Dominican Republic-Cigarettes*].

180. *Id.* at para. 7.16.

181. *Id.* at para. 7.20.

182. *Id.* at para. 7.21.

183. See *supra* text accompanying note 76.

184. Appellate Body *Chile-Price Band*, *supra* note 18, at para. 135.

185. Appellate Body *Brazil-Aircraft*, *supra* note 31, at para. 127; *Dominican Republic-Cigarettes*, *supra* note 179, at para. 7.21.

tion is helpful in limiting the concerns with technicalities (i.e. a literal analysis in the interpretation of the measures at issue) expressed in the *Argentina—Footwear and Textiles* ruling discussed above.

*E. Measures that Expired Before the
Request for Consultations*

The fact that a measure has expired before the request for consultations does not prevent the Panel from considering the measure within its jurisdiction. In *US—Cotton Subsidies*, the United States argued that particular payments made by the American government to farmers were not within the Panel's terms of reference because they expired prior to Brazil's request for consultations.¹⁸⁶ It emphasized that Brazil could not dispute the expired legislation because Article 6.2 of the DSU requires that the complaining party identify the "measures at issue" and, in the view of the United States, if the measure had expired it could not be at issue.¹⁸⁷

In response, the Panel first clarified that Brazil was not challenging the legislation itself but only the subsidies and domestic support provided under the expired programs and authorizing legislation (i.e., the actual payments).¹⁸⁸ Accordingly, the only question before the Panel was whether the payments were within its terms of reference.¹⁸⁹ In addition, the Panel emphasized that Brazil was not seeking any recommendation that the payments were to be brought into conformity with the Agreement on Agriculture or GATT.¹⁹⁰ Instead, it noted that Brazil was only requesting findings that those payments made during the 1999–2001 marketing years were not exempted from actions by Article 13 of the same agreement and that they caused and continue to cause serious prejudice to Brazil's interests in violation of the Subsidies and Countervailing Measures Agreement and of the GATT.¹⁹¹

The Panel ultimately concluded that because the payments resulting from the measures at issue (those being adjudicated) had already been made at the date of the establishment of the Panel, they had not expired but only been made in the past.¹⁹² In addition, regarding Article 6.2, the Panel stated that this article does not address the issue of the actual

186. *US—Cotton Subsidies*, *supra* note 31, at para. 7.104.

187. *Id.* at para. 7.113.

188. *Id.* at para. 7.108.

189. *Id.*

190. *Id.* at para. 7.109.

191. *Id.*

192. *Id.* at para. 7.110 (noting that that this would be true of most subsidies challenged in a claim of actual serious prejudice).

status of the measures (i.e., whether they are expired or in effect) but instead focuses on whether the measures are “at issue.”¹⁹³

In its recent decision, the Appellate Body confirmed the Panel’s analysis with regard to Article 6.2 and the expired measures.¹⁹⁴ In particular, it stated that:

The relevant context for Article 6.2 in this regard includes Articles 3.3 and 4.2 of the DSU [T]hose provisions do not preclude a Member from making representations with respect to measures whose legislative basis has expired, if that Member considers, with reason, that benefits accruing to it under the covered agreements are still being impaired by those measures. If the effect of such measures remains in dispute following consultations, the complaining party may, according to Article 4.7 of the DSU, request the establishment of a panel, and the text of Article 6.2 does not suggest that such measures could not be the subject of a panel request as “specific measures at issue.”¹⁹⁵

Given the nature of subsidies, this ruling could very well be limited to similar instances where particular payments have been made, even if the actual legislation has been repealed.¹⁹⁶ Indeed, this was confirmed by the Appellate Body:

It is important to recognize the particular characteristics of *subsidies* and the nature of Brazil’s claims against the production flexibility contract and the market loss assistance subsidy payments [these are the measures at issue]. Article 7.8 of the *SCM Agreement* provides that, where it has been determined that “any subsidy has *resulted* in adverse effects to the interests of another Member”, the subsidizing Member must “take appropriate steps to *remove the adverse effects* or . . . withdraw the subsidy”. (emphasis added) The use of the word “resulted” suggests that there could be a time-lag between the payment of a subsidy and any

193. *Id.* at para. 7.121.

194. Appellate Body US–Cotton Subsidies, *supra* note 52, at para. 277.

195. *Id.* at para. 270.

196. US–Cotton Subsidies, *supra* note 31, at para. 7.110. The Panel explicitly acknowledged the issue of the adjudication of expired measures in the context of subsidies:

We note that in any given moment in time some payments of subsidies have occurred in the past while others have yet to occur in the future. If we were to consider that past subsidies were not relevant to our serious prejudice analysis as they were “expired measures” while future measures could not yet have actually have caused actual serious prejudice, it is hard to imagine any situation where a panel would be able to determine the existence of actual serious prejudice.

Id. (quoting Indonesia–Autos, *supra* note 79, at para. 14.206).

consequential adverse effects. If expired measures underlying past payments could not be challenged in WTO dispute settlement proceedings, it would be difficult to seek a remedy for such adverse effects Removal of adverse effects through actions other than the withdrawal of a subsidy could not occur if the expiration of a measure would automatically exclude it from a panel's terms of reference.¹⁹⁷

It is interesting to note that due process concerns were not presented in this case. The issue was not whether the measures were within the terms of reference or the request for consultations—only that the measures should not have been allowed in to begin with.¹⁹⁸ Accordingly, the United States was aware of Brazil's claim from the start of the dispute and was able to prepare itself for the adjudication of the measure's legality in case the Panel (now affirmed by the Appellate Body) allowed it to become part of its jurisdiction.¹⁹⁹

F. Measures Not Included in Requests for Consultations and/or Requests for the Establishment of the Panel

WTO jurisprudence has suggested that a panel may choose to adjudicate measures not included in a Member's request for consultations or in the request for establishment of the panel if it is sufficiently related to the measure at issue.²⁰⁰ For example, in *Chile–Price Band* the Panel allowed a measure extending a previous measure's duration, which had not been part of the requests for consultations nor for the establishment of a panel,²⁰¹ to become part of its jurisdiction.²⁰²

Chile argued that the Panel could not examine this new measure because it was not included in Argentina's consultations request.²⁰³ The Panel, in rejecting this argument, relied on the fact that the extension in this case was not a distinct measure, but merely a continuation in time of the definitive safeguards measures.²⁰⁴ Therefore the definitive safeguard measures were not terminated prior to Argentina's panel request and were thus included in its request for consultations as Argentina had

197. Appellate Body US–Cotton Subsidies, *supra* note 52, at para. 273 (footnotes omitted) (quoting Agreement on Subsidies and Countervailing Measures, in WTO Agreement, *supra* note 8, at 229, art. 7.8 [hereinafter SCM Agreement]).

198. US–Cotton Subsidies, *supra* note 31, at para. 7.104.

199. *Id.*

200. The measure will be sufficiently related to the measure at issue when it does not change the essence of the measure, emphasized by the Appellate Body in previous case law discussed above. *See, e.g.,* Brazil–Aircraft, *supra* note 31; Chile–Price Band, *supra* note 29.

201. Chile–Price Band, *supra* note 29, at paras. 7.111, 7.116.

202. *Id.* at para. 7.119.

203. *Id.* at para. 7.116.

204. *Id.* at para. 7.119.

properly identified the definitive safeguard measures under Article 4.4.²⁰⁵ Further, because the extension of the measures did not alter the content of the definitive safeguards measures and the extension was in fact discussed during consultations, even if the extension were to be considered a separate measure, Chile's due process rights would not have been infringed upon.²⁰⁶

A similar situation arose in *US-Cotton Subsidies*. There, the United States argued that payments under programs unrelated to cotton were not within the panel's terms of reference because they were not mentioned in the request for consultations or in the request for the establishment of the panel.²⁰⁷ Additionally, the United States submitted that Brazil's attempt to raise the issue of these payments at the end of the proceeding worked to deprive the United States of its due process rights.²⁰⁸ The Panel disagreed.²⁰⁹ It noted that the payments in question were related to the programs identified in the requests and that the request for the establishment of the panel did not limit the scope of the claims to those programs unrelated to cotton.²¹⁰ In reviewing Brazil's request, the Panel stated that "[t]hese paragraphs contain no reference to payments on upland cotton base acres and there is nothing that would imply such a limitation."²¹¹

Regarding the United States' due process claim, the Panel noted that the programs identified in the panel request, and those related to the payments unrelated to cotton, had been central in the dispute since the parties' first written submissions.²¹² In addition, both parties had addressed the issue of payments to non-upland cotton base acreage in their prior responses to Panel questions and Brazil had raised this issue during the first substantive meeting, to which the United States had responded.²¹³ Therefore the Panel concluded that "this matter was not raised at the very end of the proceedings and that the United States has in fact responded to it."²¹⁴

205. *Id.*

206. *Id.* at para. 7.120.

207. *US-Cotton Subsidies*, *supra* note 32, at para. 7.129.

208. *Id.*

209. *Id.* at para. 7.132. These issues were not challenged on appeal, see Appellate Body *US-Cotton Subsidies*, *supra* note 52.

210. *US-Cotton Subsidies*, *supra* note 31, at para. 7.132.

211. *Id.*

212. *Id.* at para. 7.134.

213. *Id.* at para. 7.135.

214. *Id.* at para. 7.136.

*G. Measures not yet Enacted at the Time of the Request
for the Establishment of the Panel*

A panel may allow a specific measure that has not been included in the consultation or panel request to be part of its jurisdiction when it is appropriately related to the other measures at issue to not surprise the responding party and thus deprive it of due process. A different result may arise, however, when the measure is not mentioned in the panel request because it has not yet been enacted, even if the newly enacted measure is sufficiently similar to the subject matter of the dispute.

In *US–Cotton Subsidies*, the Panel ruled that a measure enacted after the request for the establishment would not constitute part of its jurisdiction.²¹⁵ In particular, the United States had requested the Panel to rule that any measure under the Agricultural Assistance Act of 2003 was not within its terms of reference because the measure was not consulted upon nor enacted until after Brazil presented its request for the establishment of the panel.²¹⁶ The Panel agreed with the United States.²¹⁷ It noted that the Agricultural Assistance Act of 2003 was enacted on February 20, 2003, that Brazil submitted its request for the establishment of the panel on February 6, 2003, and that the Panel was established on March 18, 2003.²¹⁸ The matter referred to by Brazil consisted of measures and claims set out in that document which was dated February 6, 2003.²¹⁹

The Panel concluded:

On that date, the Agricultural Assistance Act of 2003 did not exist, had never existed and might not subsequently have ever come into existence. Brazil anticipated adoption of that Act in its panel request and its claim in respect of that Act was entirely speculative. Therefore, Brazil could not refer it to the DSB at that time and it does not form part of the Panel's terms of reference.²²⁰

In support of its conclusion, the Panel stated that its ruling was consistent with Article 3.3 of the DSU and therefore “the Agricultural Assistance Act of 2003 could not possibly have been impairing any

215. *Id.* at para. 7.160. This ruling was not challenged on appeal. See Appellate Body *US–Cotton Subsidies*, *supra* note 52.

216. *US–Cotton Subsidies*, *supra* note 31, at para. 7.155 (citing the United States' submissions).

217. *Id.* at para. 7.160.

218. *Id.* at para. 7.158.

219. *Id.*

220. *Id.*

benefits at the date of Brazil's referral of its complaint to the DSB because it did not yet exist.²²¹

This is a welcome decision by the Panel. Hypothetical or yet to be enacted measures should not constitute part of a panel's jurisdiction as this would be inconsistent with Article 3.3 of the DSU. Further, it is also in conflict with Article 6.2, which requires requests for the establishment of the panel to indicate the specific measures at issue.²²² In particular, regarding measures that have not yet been enacted, there is simply no measure at issue to begin with. In addition, judicial economy concerns might also be presented as measures that have not yet been enacted might never be enacted in the first place. To adjudicate on the basis of hypothetical scenarios may unnecessarily waste DSU resources. Hypothetical measures are distinct from withdrawn or amended measures in that they do not and nor have ever existed. As such, they have never presented an issue for any WTO adjudicator and to actually adjudicate on this basis would be extremely speculative and wasteful.

Finally, state sovereignty concerns may also be implicated by the adjudication of yet un-enacted or hypothetical measures. WTO Members have agreed to settle matters according to the DSU when laws and regulations are actually affecting other Member countries. They have not agreed, however, to permit the DSU to examine hypothetical measures or those still being debated in their legislatures. In fact, this is recognized by Article 3.2 of the DSU which states:

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add or diminish the rights and obligations provided in the covered agreements.²²³

221. *Id.* at para. 7.160. In addition, Article 3.3 of the DSU reads:

The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.

DSU, *supra* note 8, art. 3.3.

222. *Id.* art. 6.2.

223. *Id.* art. 3.2.

It is true that States also have not agreed to be bound to DSU proceedings with regard to withdrawn measures. States have, however, agreed to be bound to the DSU when measures are in existence, and at the time of the commencement of the proceedings, unlike hypothetical measures, withdrawn measure existed and, in fact, raised serious concerns to the complaining Member. Accordingly, adjudication of withdrawn measures is more akin to the continuation of the adjudication of an existing measure than consideration of a non-existent (or as yet un-enacted) measure. The former, and not the latter, as discussed above, is a well established practice in the WTO.

In the following section the possibility of providing *advisory* jurisdiction to the Appellate Body will be discussed. Permitting such jurisdiction would allow the Appellate Body to provide a legal opinion regarding hypothetical measures without actually issuing a binding ruling against a particular Member. This would most likely avoid the problems discussed above, such as judicial economy and state sovereignty concerns, as the issuance of legal opinions would not require a full-fledged panel adjudication and the ruling would have no legal effect on any Member State.

IV. ADVISORY JURISDICTION AND PROPOSALS FOR REFORM

Judicial economy, state opportunism, and due process concerns need to be well-balanced in the dispute settlement body. While panels and the Appellate Body should always strive to exercise judicial economy when the rights of parties are not affected, in cases of withdrawn or amended measures, they should complete the adjudication of the dispute if the complaining party so requests and issue a finding as opposed to a recommendation.²²⁴ This suggestion may at first glance seem superfluous, but it could prevent future disputes involving the same measure were the responding country to implement it again. The threat of state opportunism, as well as the need for certainty with regard to the outcome of WTO litigation, cautions against giving judicial economy concerns too much

224. A recommendation would no longer be needed at any rate. See, e.g., DSU, *supra* note 8, art. 19.1; Appellate Body US–Cotton Subsidies, *supra* note 52, at para. 272; Chile–Price Band, *supra* note 29, at para. 7.112. DSU Article 19.1 states in part that a recommendation is issued “[w]here a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement” and accordingly that it shall be recommended that “the Member concerned bring the measure into conformity with that agreement.” DSU, *supra* note 8, art. 19.1. In contrast, a finding is only the adjudicator’s basis for the recommendation; the latter of which is essentially a ruling prescribing action on the part of the member State.

weight in such situations.²²⁵ Finally, when measures are amended during the course of proceedings, panels should pay extra attention to the resulting due process concerns.²²⁶ By and large however, it seems as if due process concerns have been given fair consideration in DSB proceedings.

The DSB should, however, give greater attention to judicial economy and state opportunism concerns.²²⁷ One potential way of doing so and a proposal for future reform would be to provide the Appellate Body with advisory jurisdiction to review questions of law and hypothetical measures. With regard to questions of law, the Appellate Body would be available to provide opinions to questions posed by Member States arising under the covered agreements. In the case of hypothetical measures, the Appellate Body would issue an opinion with regards to the legality of the hypothetical measure, as if it were enacted by a member government. Indeed, no actual action would be taken against any Member State.

If and when such a measure (or a substantially related one) were in fact enacted, the Appellate Body's findings and/or recommendations would be highly persuasive. These advisory findings would not be binding; the complaining Member would still have to bring a case to the DSB through the usual procedures established in the DSU. The flexibility of the panels to adjudicate the case in a manner not bound by the Appellate Body would be particularly important in cases where the responding party had in fact taken the Appellate Body's previous recommendations into account and on that basis had changed particular aspects of the same measure to conform to its ruling.

Both powers could potentially resolve some of the issues faced by the DSB.²²⁸ By conferring to the Appellate Body the power to provide answers to questions of law raised under the WTO Agreements, the certainty and predictability of the dispute settlement system would be enhanced.²²⁹ Member countries would have a better sense of the meaning

225. State opportunism concerns have been expressed by WTO adjudicators, see the Appellate Body Report *Chile—Price Band*, *supra* note 29, at paragraph 144. With regard to the stability issue, see DSU Article 3.2, which provides that the dispute settlement system is central to providing security and predictability to the trading system, DSU, *supra* note 8, art. 3.2.

226. Both panels and the Appellate Body have in fact done so. See, e.g., *supra* discussion in note 29.

227. See *United States—Tuna*, *supra* note 146, at paragraphs 2.8–2.9, where continuing the adjudication of the dispute was not the default rule, and *Argentina—Textiles and Footwear*, *supra* note 20, at paragraphs 2.8 and 6.5, on the state opportunism issue, as well as the discussion in sections III(b) and (d) above.

228. These issues include judicial economy, state opportunism and due process discussed in section III of this paper and in WTO case law, see *supra* notes 13, 18, and 29.

229. The certainty and predictability of the system is an ongoing concern for the WTO. See for example, the Appellate Body's recent decision in *United States—Corrosion-Resistant Carbon Steel*, where it stated that:

of particular provisions and their likely interpretation by WTO adjudicators.²³⁰ This provides greater opportunities for judicial economy, the benefits of which would outweigh the potential costs of this proposed advisory function. The more informed Member States are regarding the interpretation of WTO law, the more confident they would be in predicting the outcome of WTO disputes.²³¹ Accordingly, they might be less willing to incur the costs of adjudication, particularly if a would-be complaining Member perceived it was likely to lose.²³² Even in cases where a Member was confident of success, there would be greater incentives to settle or resolve the dispute through consultations: more accurate estimations regarding the chances of success would provide a better indicator to those involved of what an appropriate settlement would be.²³³

Furthermore, providing the Appellate Body with advisory jurisdiction might also help avoid the problem of state opportunism.²³⁴ Member States might be less willing to enact and withdraw measures strategically if they had a better sense of the likely interpretation of particular agreements by the Appellate Body. The same would be true regarding hypothetical measures. This knowledge, combined with the awareness that DSB proceedings against the violating Member would be highly likely given that other Members would know the probable outcome of any future dispute (and thus their likelihood of success on the claim), would be a major barrier to the strategic enactment and withdrawal of measures.

Some Member countries have proposed a similar role for the WTO General Council, as opposed to the Appellate Body. For example,

the disciplines of the GATT and the WTO, as well as the dispute settlement system, are intended to protect not only existing trade but also the security and predictability needed to conduct future trade Thus, allowing claims against measures, as such, serves the purpose of preventing future disputes by allowing the root of WTO-inconsistent behaviour to be eliminated.

Appellate Body Report, United States–Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products From Japan, WT/DS244/AB/R, adopted Dec. 15, 2003, para. 82.

230. See Dispute Settlement Body Special Session, *Jordan's Contributions to the Improvement of the DSU*, TN/DS/W/43 (Jan. 28, 2003) [hereinafter *Jordanian Proposal*].

231. This might be particularly advantageous for poorer countries that have fewer resources to bring disputes in the first place.

232. See Mark J. Ramseyer and Minoru Nakazato, *The Rational Litigant: Settlement Amounts and Verdict Rates*, 18 J. LEG. STUD. 263–90 (1989), where the authors argue that the relatively low litigation rates in Japan can be explained by the fact that individuals are more likely to settle since they know what the results will be in court; the certainty with regard to the outcome of the litigation makes going to trial useless.

233. *Id.*

234. See *supra* discussion in note 18.

Jordan's recent proposal suggests the addition of a new Article 5 in the DSU entitled "Questions of Interpretation."²³⁵ It states, in part, that:

1. Parties and third parties to a dispute may at any stage of the proceedings refer questions of interpretation to the General Council in accordance with this Article.
2. Question(s) shall be laid before the General Council by means of a written request containing an exact statement of the queries upon which the interpretation is requested, accompanied by all documents likely to assist in addressing and answering the question(s).²³⁶

With regard to advisory jurisdiction *per se*, Jordan proposes that the Appellate Body or the DSB be granted the power to seek advisory opinions from the International Court of Justice,²³⁷ as opposed to giving WTO Member States the authority to seek advisory opinions from the Appellate Body, as suggested above. Jordan proposes that these advisory opinions would "be considered as an instrument of interpretation that aims at assisting the relevant bodies in recommending or adopting a report on a certain dispute."²³⁸ Importantly, these proposals reflect the necessity of greater guidance with regard to the interpretation of WTO Agreements.²³⁹

While there appear to be no specific proposals on preventing the strategic withdrawal of or amendments to measures during the course of the proceedings, Member countries have expressed concern with regard to the enactment of measures with similar effects as those previously adjudicated. For example, Brazil's proposal to the DSB suggests the addition of a new article following Article 20 of the DSU entitled "Procedures Related to Measures Already Held Inconsistent with the Covered Agreements."²⁴⁰ It would in read, in part:

1. A Member may request the establishment of a panel by the DSB under an expedited procedure whenever its rights are being nullified or impaired by the same Member taking a measure that has already been found to be inconsistent with a covered agreement by an adopted report. The panel shall be established at the same DSB meeting where it first appears on the

235. Jordanian Proposal, *supra* note 230, at paras. 39–42.

236. *Id.* at para. 42.

237. *Id.* at para. 40.

238. *Id.* at para. 41.

239. See, e.g., *supra* discussion in note 25 (considering the issues surrounding the interpretation of the WTO Agreements).

240. Dispute Settlement Body Special Session, *Contribution of Brazil to the Improvement of the DSU*, TN/DS/W/45/Rev.1 (Mar. 4, 2003), para. 6.

agenda, unless the parties agree otherwise. Prior consultations are not required.

2. This panel shall be composed, whenever possible, by the same panelists having served in the panel that has already ruled on the measure at issue. In any case, the panel shall be composed within [10] days of the establishment of the panel.

....

5. If the panel finds that the measure at issue is different from the measure previously declared WTO inconsistent, the expedited procedure is terminated, and the complaining party may start panel procedures provided in Article 4 et seq of this Understanding.
6. If the panel finds that the measure at issue is the same as the measure previously declared WTO inconsistent, a hearing shall be held within [x] days in order for the parties to present their oral arguments related to the facts concerning the measure at issue.²⁴¹

This article would have the effect of accelerating the DSB proceedings when Members enact measures that present the same issues as measures previously found to be WTO-inconsistent. While the suggestion presented in this Note, that of continuing the adjudication of withdrawn or amended measures would not eliminate all cases of newly enacted measures with the same effect as previous ones, it may limit them.²⁴² The responding member would have an explicit panel or Appellate Body ruling with regard to the previous measure at issue and if the ruling were in its favor, it would be less willing to risk another round of proceedings by the (victorious) complaining Member. Providing the Appellate Body with advisory jurisdiction over hypothetical measures would most likely have the same, if not greater, effect given that the Appellate Body would have effectively issued an opinion (though unenforceable) with regard to a newly enacted measure.²⁴³

241. *Id.* (footnotes omitted) (alterations in original).

242. See United States–Tuna, *supra* note 146, paragraph 3.27, where Canada argued that not continuing the adjudication of the dispute, despite the fact that a treaty was concluded with the United States on this particular matter and thus solved the issue at hand, would result in the continuance of a threat to Canada, as the measure at issue had not been withdrawn. Therefore, Canada wanted an explicit ruling on the measure at issue by the GATT Panel, even if it no longer affected Canada.

243. The European Union proposes that a panel be dismantled if a *complaining* party withdraws its request for the establishment of the panel at any time before the panel issues its final report:

Japan's proposal to the DSU raises similar considerations. In particular, it relates to the prevention or repeated application of WTO-inconsistent measures under discretionary law. Japan proposes the addition of a new footnote to the first paragraph of Article 19, which would state:

When the panel or the Appellate Body finds that it is likely that such a inconsistent measure will be repeatedly taken based upon an administrative discretion provided by laws or regulations of the Member concerned, it shall recommend that the Member concerned take action necessary to ensure that such a discretion not be exercised in a manner inconsistent with its obligations under the covered agreements.²⁴⁴

While Japan's proposal is limited to situations involving discretionary laws (i.e., those that are not mandatory and thus are not immediately challengeable as such under WTO law), the purpose of its proposal is to prevent Members from repealing measures under mandatory laws that have been found to be violations of WTO laws and enacting the same measures under discretionary law.²⁴⁵ The proposal provides that when a panel or the Appellate Body considers the repetition of the same violation to be highly probable, it may recommend that the Member concerned take

A request for the establishment of a panel may be withdrawn at any point in time by the complaining party before the issuance of the final report. If the request is withdrawn, the authority for the establishment of the panel shall lapse.

European Proposal, *supra* note 11, at 9. While providing the complaining party with this authority is less harmful than providing it to the respondent party, it still has its costs. In particular, it could still disadvantage the respondent. The latter may have an interest in receiving a recommendation or finding with regard to the measure at issue so that it can have some closure with regards to the adjudication and both some knowledge and certainty with regards to the inconsistency (or lack thereof) of the originally contested measure. Given that the responding Member has also invested the time and resources into the settlement of the dispute, it would seem only fair that if it so desired, it should be entitled to an opinion by the adjudicators.

244. Dispute Settlement Body Special Session, *Amendment of the Understanding on Rules and Procedures Governing the Settlement of Disputes*, TN/DS/W/32 (Jan. 22, 2003), para. 22, page 11 [hereinafter Japanese Proposal].

245. *Id.* at 2. With regard the mandatory/discretionary legislation, it is a long-standing principle in the GATT and WTO dispute settlement that if a complainant alleges that a law is WTO inconsistent, the complainant must show that the law by its terms mandates official conduct and that there is no possibility for officials to exercise their discretion to apply the law in a manner that avoids any violation. *See* Panel Report, United States—Measures Treating Exports Restraints as Subsidies, WT/DS194/R, adopted June 29, 2001 at paras. 8.126–8.132; Appellate Body Report, United States—Anti-Dumping Act of 1916, WT/DS162/AB/R, adopted Aug. 28, 2000 at paras. 88–89; Appellate Body Report, Section 211 Omnibus Appropriations Act of 1998, WT/DS176/AB/R, adopted Jan. 2, 2002 at para. 269.

necessary steps to prevent the repetition of WTO-inconsistent measures under the discretionary law.²⁴⁶

While the proposed amendments above reflect both an awareness and concern on the part of member States of the some of the issues addressed above, they fail to directly address the concerns highlighted in this Note; namely, those relating to judicial economy, due process and state opportunism that are likely to arise when the withdrawal of or amendment to measures at issue during the course of proceedings are left unchecked by WTO adjudicators.

CONCLUSION

This Note has attempted to shed light on the withdrawal of and amendments to challenged measures during the course of proceedings, an aspect of the dispute settlement proceedings that, to date, has not been given sufficient attention. If left unchecked, such actions by Member States could threaten to undermine the legitimacy of the DSB, an increasingly important dispute settlement body for the international community. As the Appellate Body's recent affirmation of the Panel's ruling in the *US-Cotton Subsidies* case illustrates, the DSB is an important and influential vehicle for both rich and poor countries as it permits all Member States to successfully challenge potential trade infractions covered under the WTO Agreements. In the case of agricultural subsidies, in particular, this is no small feat as the DSB's impact on developing countries' economies has the potential to be quite significant.²⁴⁷

With regard to the particular issues addressed in this Note, while the panels and the Appellate Body appear to give fair consideration to due process, WTO Members would benefit from greater attention to judicial economy and state opportunism, issues some Member States are attempting to address in the context of DSU reform, as evidenced from the proposals in the preceding section. Such an effort is particularly timely as the WTO completes its first ten years of successful operation. To continue on this path, the dispute settlement body needs to further cement its reputation as a fair and transparent institution, a reputation that could be at risk if concerns about procedure, as well as other aspects of its operation, are not addressed in the near future.

246. *Id.*

247. *See, e.g.,* OXFAM, WHO WILL BE LEFT TO CHEER THE END OF ILLEGAL US COTTON SUBSIDIES? (Oxfam Briefing Note, 2005).