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It is assumed that the submission of a manuscript to the WTR signals that it has not been, and will not be, submitted elsewhere at the same time. If a paper is under review elsewhere, this will be considered grounds for an *a priori* rejection of the manuscript. Papers scheduled for future publication in book form will be considered, *provided* they would appear first in the WTR (papers in this category must be clearly identified as such when they are first submitted).

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Multilateralism compromised: the mysterious origins of GATT Article XXIV

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Abstract: The GATT treaty's loophole for free trade areas in Article XXIV has puzzled and deceived prominent scholars, who trace its postwar origins to US aspirations to promote European integration and efforts to persuade developing countries to endorse the Havana Charter. Drawing from archival records, this article shows that in fact US policymakers crafted the controversial provisions of Article XXIV to accommodate a trade treaty they had secretly reached with Canada. As a result, the free trade area exemption was embedded in the GATT–WTO regime, even though neither the Havana Charter nor the US–Canada free trade agreement was ever ratified. Theoretically, the case is an important example of how Cold War exigencies altered the policy ideas of US officials.

1. Introduction

Article XXIV of the General Agreement on Tariffs and Trade (GAT) has been a source of vexation and puzzlement since the treaty's inception in 1947. This clause exempts free trade areas and customs unions from the obligation to accord most-favored nation (MFN) treatment in international trade. To its critics, Article XXIV is 'extremely elastic' (Curzon, 1965: 64), 'unusually complex' (Dam, 1970: 275), and 'full of holes' (Bhagwati, 1993: 44) due to language that is full of 'ambiguities' and 'vague phrases' (Haight, 1972: 397). Haight (1972: 398) impugns Article XXIV as an 'absurdity' and a 'contradiction', while Dam (1970: 275) brands it 'a failure, if not a fiasco'.

Scholars have long debated whether Article XXIV should be written differently, with Bhagwati (1991: 76–79), McMillan (1993), Krueger (1999), and others proposing changes in the rules for regional trading arrangements, while Lawrence (1996) instead calls for more effective enforcement of the existing provisions. What is clear is that the implementation of Article XXIV has not worked well in practice. In the GATT's 47-year history, only one working

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Table 1. Free trade areas and customs unions under Article XXIV

	Number notified to the GATT/WTO	Yearly average	Working parties convened	Reports adopted	Reports drafted but not adopted
GATT, 1948–1994					
Free trade areas	26	0.6	26	15	11
Customs unions	9	0.2	9	9	0
WTO, 1995–2004					
Free trade areas	128	12.8	82	0	60
Customs unions	5	0.5	5	0	2

Source: Compiled from 'Regional Trade Agreements Notified to the GATT/WTO and in Force as of 4 January 2005', available at http://www.wto.org/english/tratop_e/region_e/summary_e.xls.

party determined that a regional trading arrangement had satisfied Article XXIV,[1] yet none were found to be incompatible with GATT rules. A former GATT Deputy Director General complained, 'Of all the GATT articles, this is one of the most abused, and those abuses are among the least noted' (World Trade Organization [WTO], 1995: 63). The Leutwiler Group's 1985 report to the GATT Director General similarly noted:

> The exceptions and ambiguities which have thus been permitted have seriously weakened the trade rules. They have set a dangerous precedent for further special deals, fragmentation of the trading system, and damage to the trade interests of non-participants … GATT rules on customs unions and free trade areas should be examined, redefined so as to avoid ambiguity, and more strictly applied. (WTO, 1995: 63).

The Uruguay Round Agreements produced a 'Memorandum of Understanding on Article XXIV' and created a Committee on Regional Trade Agreements to conduct reviews under the WTO. Since then, free trade areas and customs unions have flourished, but a lack of consensus within the working parties has consistently prevented effective monitoring and enforcement of GATT rules for regional arrangements. As a result, the WTO has yet to adopt a single report on Article XXIV compliance, as shown in Table 1.

Throughout this inauspicious history, Article XXIV's origin and rationale have confused prominent scholars. At postwar conferences, accepted wisdom maintains, the United States assertively advanced multilateral principles and repudiated preferential trade. In this view, US officials accommodated insistent demands to allow latitude for regional arrangements for two reasons: they worried that Britain and developing nations would abandon the talks, and they wished to remove obstacles for European integration.

1 This was the 1993 customs union between the Czech and Slovak Republics, two countries that had been joined together as an independent state for the previous 75 years.

These arguments are incomplete. Drawing from archival records, this article shows that the United States did not compromise multilateral ideals to promote European integration or placate Britain and developing countries. Rather, US officials had secretly negotiated a trade treaty with Canada, and they pushed behind the scenes to amend the Havana Charter to allow free trade areas, a concept introduced at Havana. Their successful effort to shape global trade rules to accommodate the US–Canada trade treaty – which, fate would have it, was never signed or ratified – produced the curious text of Article XXIV that puzzles analysts to this day.

The story behind Article XXIV is not of merely historical interest; theoretically, it provides an illustration of how policymakers update or change prevailing normative views. In this account, I focus on the purposeful actions of individuals – officials in the US State Department – to explain why postwar trade rules shifted from a rigid, customs union-only stance to a more flexible standard that also sanctioned free trade areas as exceptions to MFN. My argument is that the opportunity for a trade treaty with Canada and concerns about national security led US officials to relax their causal belief that trade discrimination bred political conflict and their principled belief that discrimination was morally repugnant. Though it is methodologically challenging to evaluate the policy impact of ideas and human agency in a single case, the analysis establishes a temporal association between the change in ideas and the shift in policy position, and then demonstrates that officials justified the new policy stance based on these new ideas.

The next section details the drafting history of Article XXIV in the postwar conferences that culminated in the Havana Charter and reviews prominent explanations for why the United States compromised multilateral principles and accepted provisions excusing free trade areas from MFN. Section 3 situates the argument in a theoretical context. Sections 4 and 5 present archival evidence to demonstrate how US–Canada trade negotiations shaped the Havana Charter. Section 6 links changes in trade rules for preferential arrangements to shifts in thinking among key State Department officials. Section 7 evaluates alternative explanations, and Section 8 concludes.

2. Drafting Article XXIV

The GATT's origin lies in the State Department's 'Suggested Charter for an International Trade Organization' (ITO), released in September 1946. The Suggested Charter's first article proposed as its central tenet unconditional adherence to the MFN clause.[2] Toward the end, Article 33 noted a lone exception

2 Pursuant to a compromise with Britain in the 1945 'Proposals for Consideration by an International Conference on Trade and Employment', Article I allowed certain colonial preferences to remain in effect, pending negotiation. At Geneva, certain preferences in force between neighboring territories as of July

permitting 'the union for customs purposes of any customs territory and any other customs territory' (US Department of State, 1946).

Notably, this customs union provision was not grouped with the MFN clause in Article 1. Rather, it was part of a pro forma article defining the term 'customs territory'. Customs territories, not countries, would be the constituent bodies of the ITO, and the passage was designed to clarify that the Charter would apply to countries with separate tariff structures, even if they were under common sovereignty (as in a colonial system). Traditionally, customs unions had been treated as distinct territorial entities; because of their political status, MFN commitments did not apply to them (Viner, 1950: 5–14). At the time, there was 'no case of a customs union on record that was not accompanied or quickly followed by complete political unification', so merger into a larger customs area represented 'the first step towards a complete economic and political union' (Haberler, 1949: 433). Customs integration therefore 'was seen more as a question of frontiers and customs jurisdiction than as a commercial arrangement involving discrimination in the treatment of trade' (Haight, 1972: 392). Simply, this was an exercise of sovereignty that did not require an exception to MFN.

The State Department had debated giving the ITO broad authority to discipline even customs unions. A wartime planning memo doubted 'that all customs unions … merely because they involve the creation of a larger free-trade area within a single tariff structure, necessarily tend to promote international trade'. If the ITO were to review proposed customs unions on a case-by-case basis, the memo noted, 'we may in the future oppose any that we deem to be against the best interests of the United States or against the general program of the United Nations'.[3] This led the State Department to include provisions to regulate customs unions in its initial drafts of the proposed ITO Charter. The first condition was that the 'external trade barriers of the union shall not be higher than the average for the constituent territories'. Second, to preclude tariff assimilations in empires, a member could not unite with 'the customs territory of any area politically dependent upon it'. Third, countries forming a customs union would have to submit a proposal to the ITO, which would 'make recommendations to the contracting states as to the attitude they should adopt toward it'.[4]

These provisions, however, did not appear in the more simplified Suggested Charter that formed the agenda for the ITO negotiations. Revisions to the Suggested Charter's Article 33 at the London and Geneva conferences of 1946–47 broadened its scope to include 'interim agreement[s] … for the attainment of a

1947 were added to this list of exemptions. However, preferential arrangements covered in this 'grandfather clause' could not expand existing margins or introduce new preferences.

3 'Summary of the Interim Report of the Special Committee on Relaxation of Trade Barriers', 8 December 1943, and 'Report of the Subcommittee on Regional Preferences and Customs Union', 19 August 1943, RG 59, Records of Harley A. Notter, Box 53. Archival records cited herein appear in the Appendix.

4 'Draft Multilateral Convention' (Article XXIX), 19 February 1945, RG 59, 560.AL/2-1945.

Table 2. Timeline of the customs Union-free trade area exemption

Treaty or draft	Date	Article number	Exemptions from MFN
Suggested Charter	September 1946	33	Customs unions only.
London Draft	November 1946	38	Customs unions only.
New York Draft	February 1947	38	Customs unions only.
Geneva Draft	October 1947	42	Customs unions and interim agreements to form customs unions.
Havana Charter	March 1948	44	Customs unions, free trade areas, and interim agreements to form customs unions and free trade areas.
GATT	March 1948	XXIV	Identical to Havana Charter Article 44.

customs union'. This clause was added in recognition that countries could not instantly proceed to full customs union. But a proviso was inserted: tariffs and other trade barriers could not be 'higher or more stringent' than at the pre-union stage; and countries forming a customs union had to provide 'a definite plan and schedule' for its attainment (US Department of State, 1947). The revised version, Geneva Draft Article 42, represented a more rigid stance against trade discrimination than had been previously applied: while deviation from MFN was permissible in transition to customs union, the ITO could block proposed unions that threatened either to raise external trade barriers or languish at an interim stage.

Compared with Geneva Draft Article 42, GATT Article XXIV extended broad exemptions for myriad arrangements short of full customs union (as table 2 shows). Three critical additions require explanation. First, Article XXIV placed free trade areas on par with customs unions as exceptions to the MFN rule. While the customs union clause had been a longstanding convention, the free trade area text was novel. Even the expression 'free trade area', Viner (1950: 124) writes, was 'introduced, as a technical term, into the language of this field by the [Havana] Charter, and its meaning – must therefore be sought wholly within the text of the Charter'. Moreover, free trade areas, as defined, only had to eliminate barriers on 'substantially all the trade' between their members.[5]

Second, Article XXIV excused not just free trade areas, but also 'interim agreement[s]' to form free trade areas. The reason for interim agreements in

5 The stipulation was the same for customs unions, which had to liberalize 'substantially all the trade' between their members, 'or at least … substantially all the trade in products originating in such territories'.

the customs union case had been that customs harmonization entailed sharing sovereignty; this could be prolonged as constitutions were amended, institutions formed, and agencies created. Because free trade areas merely involved the elimination of border barriers, these kinds of transitional considerations did not apply. Yet interim agreements for both customs unions and free trade areas were given 'a reasonable length of time' to reach fruition.

Third, Article XXIV required customs unions to compensate nonmembers for tariff increases. No such obligation technically applied to free trade areas. While the general exhortation 'not to raise barriers to the trade of other contracting parties' concerned both customs unions and free trade areas, members in the latter case retained sovereign rights to implement tariff changes after the free trade area had been formed.

In sum, the text of Article XXIV is puzzling: the standards for free trade areas were lax and, once formed, they arguably faced less rigorous regulation than customs unions. Indeed, it is puzzling that free trade areas were recognized at all. As Haight (1972: 394) explains, placing free trade areas 'substantially on a par with customs unions' was 'a grave departure in policy'.

The provisions at issue were the GATT's inheritance from the 1948 Havana Charter. At Geneva, it was agreed that the Havana Charter's final text would supersede the corresponding articles in the GATT. At the first session of GATT contracting parties, this act was perfunctorily completed and Article 44 of the Havana Charter (so numbered because two articles had been added to the Geneva Draft) became GATT Article XXIV.

The origins of Article XXIV and its rationale have confused analysts since the GATT's inception. Contemporaries such as Gardner (1956) and Viner (1950) and recent studies by Odell and Eichengreen (1998) and Goldstein and Gowa (2002) suggest that where the United States compromised certain principles at Havana, it did so to win the support of other states. While these works cast light on some of the loopholes inserted in the Havana Charter, I argue that they do not explain the broad changes to GATT rules on regional arrangements that US officials mysteriously accepted.

Why was multilateralism compromised?

Were the exceptions in the Havana Charter due to 'the ineptitude of the [Truman] Administration – or to the bad faith of foreign governments?' Gardner (1956: 377) asked in *Sterling–Dollar Diplomacy*. His answer emphasized both. The State Department's main postwar priority was multilateralism. In practice, this involved a set of distinct but related objectives: ending imperial and regional trade preferences; reducing tariffs and quotas; restoring a system of currencies fixed in value to gold; and eliminating foreign exchange controls. Of these goals, non-discrimination took precedence, and US officials dogmatically 'pressed formal undertakings for the elimination of Imperial Preference, quantitative restrictions, and discrimination of all kinds'. Britain resisted and asserted its right to continue

trade preferences and policies for full employment. This mix of US miscalculation and British intransigence produced 'an elaborate set of rules and counter-rules that … satisfied nobody and alienated nearly everybody' (Gardner, 1956: 379).

Viner (1950) examined preferential arrangements specifically in *The Customs Union Issue*. The key postwar US objectives, he argued, had been a 'rehabilitation and strengthening' of the MFN principle and the elimination of trade preferences – these goals US officials 'supported, and supported tenaciously'. Yet there was the discrepancy that the Havana Charter allowed easier escapes from MFN than previously had been accepted, or indeed than had existed in the Geneva Draft. 'Where the final Charter departs from … or seriously compromises' US objectives, Viner (1950, 110–111) asserted, 'it must generally be attributed to the insistent demands of other countries to which the American negotiators felt obliged to make concessions if agreement was to be reached'.

Other accounts support this accepted wisdom that the need to build consensus compelled US officials to compromise multilateral principles. According to Odell and Eichengreen (1998: 183), the key to understanding the Havana Charter lies in 'the story of US concessions to keep Britain from exercising the imperial option'. If British officials thought the ITO would overly constrain policies to maintain full employment, they could abandon the talks and instead deepen links with the Commonwealth. By comparison, 'the United States did not have any obvious regional alternative for achieving its trade-related geopolitical goals' (Odell and Eichengreen, 1998: 183). In this sense, the exceptions for customs unions and free trade areas were part of the 'embedded liberal' compromise to reconcile US multilateral principles with Britain's and Europe's need for domestic stability (see Ruggie, 1982: 397–398).

A related claim is that US officials conceded to free trade areas because they wished to encourage European integration rather than thwart it. If the Havana Charter had raised too many obstacles to regional integration, Odell and Eichengreen (1998: 192–193) suggest, European countries would have spurned the ITO. Bhagwati (1991: 65) concludes, 'US tolerance of [free trade areas] seems to have been motivated by a presumption that European stability would be aided by economic integration and therefore the latter must be supported.'

Other accounts emphasize pressure from developing countries such as Lebanon, Syria, Argentina, and Chile to permit regional arrangements short of full customs union. That is the assessment of both Haight (1972: 393–394) and Mathis (2002: 37–42), and the WTO (1995: 8–9) advances this explanation in its report *Regionalism and the World Trading System*. In this vein, Goldstein and Gowa (2002) argue that the United States accepted free trade areas to make its commitment to an open, rule-based trading system credible. For small countries anxious about the possibility of opportunistic US behavior, the option to band together in trading blocs represented an 'insurance policy' to counter US power. Thus, the US concession on free trade areas was 'part of the package of concessions granted to developing countries' at Havana – an early form of special and differential

treatment to persuade these countries to join the trade regime (Goldstein and Gowa, 2002: 164–166).

In short, the conventional view maintains, the United States had to compromise certain principles because it wanted the ITO to succeed more than did its partners in the endeavor. This explains why several provisions of the GATT expansively departed from the State Department's Suggested Charter. But it does not solve the mystery of Article XXIV, the clause that has inspired the most intellectual criticism and puzzlement. Understanding why the GATT sanctioned free trade areas and imposed so little discipline on their formation requires a fuller picture of postwar US objectives and an appreciation of how an unexpected political opportunity – a trade treaty with Canada – transformed the US position on preferential arrangements.

3. Ideas and policy change

Existing explanations suggest that US officials at the Havana Conference made whatever concessions were necessary to assuage the concerns and secure the approval of dissenting countries at the talks. In these accounts, changes in bargaining stance were a matter of strategy. As Zeiler (1999: 143) puts it, US diplomats 'traded principles for expediency in Havana. If [they] had not done so, the talks would have broken down'. While conceding that negotiating strategy motivated many US concessions at Havana, this article contends that on preferential arrangements the ideals and principles of State Department officials significantly shifted in a matter of days. This shift, and at its core the development of the free trade area concept, changed international trade rules forever.

In the typical course of policymaking, the need to build domestic coalitions constrains the spread of ideas: the adoption of a new policy approach depends on the constellation of private interests, the institutional setting that mediates their interactions with state officials, and the leadership skills of policy agents. Gourevitch (1989: 87–88) explains, '[t]o become policy, ideas must link up with politics – the mobilization of consent for policy … Even a good idea cannot become policy if it meets certain kinds of opposition, and a bad idea can become policy if it is able to obtain support.'

Politics mattered, to be sure, in the ITO project – so much so that interest group pressure and Congressional dissent eventually doomed the Havana Charter. But the ITO and the GATT were not a single undertaking, and the GATT was not contingent on the Havana Charter's ratification: the negotiations proceeded on separate tracks, and by prior agreement the GATT subsequently inherited the Havana Charter's general articles. Rules designed for the ITO therefore found their way into the GATT, a three-year interim treaty that required no Congressional ratification or public consent. In short, the GATT was more insulated from domestic politics than the ITO; and the ITO could fail and yet key provisions still survive in the GATT.

Another important feature of the negotiations at Geneva and Havana is that the US delegation operated largely free of supervision. Though the Havana Charter would have to be presented for Senate ratification, Congress did not monitor discussions on specific treaty articles, and there was no legal requirement to consult industry or labor groups. Even State Department principals exercised little oversight. Assistant Secretary of State William Clayton, the lead US negotiator at Geneva, complained that 'he found considerable difficulty in getting … authorities at Washington to take any … interest in the Charter, their attention being … entirely devoted to Marshall Aid' (Aaronson, 1996: 94). When the Havana delegation appealed for some reaction from Secretary of State George Marshall, it was told that Marshall 'hadn't been bothering anybody, so … that means that he is satisfied with the way things are going'.[6]

These political factors created substantial room for the ideas of individual policymakers to leave their stamp on postwar trade rules. A large body of work has examined the role of ideas in the policymaking process. One set of studies seeks to establish that ideas, or 'beliefs held by individuals', exert important influences on policy to counter rationalist views of ideas as masks for self-interested motives. In these accounts, ideas are most likely to affect policy when they provide 'road maps' that specify relationships between means and ends, when they prescribe strategic behavior in situations with no equilibrium, and when they become encased in institutions (Goldstein and Keohane, 1993). Another area of scholarship (Legro, 2000) attempts to specify conditions under which political agents may succeed in altering prevailing ideas and the policy measures derived from them. In this approach, ideas shift through a process of collective consensus that the established belief structure produces undesirable results (collapse), followed by convergence around a 'replacement set of ideas' (consolidation). Unanticipated external shocks with unfavorable consequences often provide a necessary trigger for such shifts (Goldstein, 1993).

A key shared belief of postwar US policymakers was multilateralism. The multilateral ideal, Ruggie (1992: 586) writes, 'served as a foundational architectural principle on the basis of which to reconstruct the postwar world'. Simply, it was 'a deep organizing principle of international life' built on the norms of nondiscrimination, indivisibility, and reciprocity (Caporaso, 1992: 601–602). In economic matters, the goal of multilateralism was to end the discriminatory practices inherent in imperial and regional preferences, import quotas, and currency controls. Gardner (1956), Ikenberry (1992), Zeiler (1999), and others have demonstrated the State Department's tenacious commitment to these goals. Though this coterie was not an 'epistemic community'[7] in the strict sense – these

6 Oral History Interview with Winthrop G. Brown, Harry S. Truman Presidential Library, available at http://www.trumanlibrary.org/oralhist/brownwg.htm.

7 Haas (1992: 3) defines an epistemic community as 'a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area'.

officials were diplomats, lawyers, and Wall Street professionals, not scientists or technical experts – the group shared common beliefs and attitudes about how to build a peaceful and prosperous postwar world.

In part multilateralism reflected a set of 'causal beliefs'. According to Goldstein and Keohane (1993: 10), causal beliefs provide 'road maps' or prescribed strategies to achieve particular goals. Causal beliefs are the easiest to change because policymakers may update their ideas about cause–effect relationships based on new information. In its causal form, the multilateral ideal rested on the premise that multilateralism promoted peaceful international relations, while preferential trade produced division and conflict. Cordell Hull, the Secretary of State from 1933–44, regarded 'trade discrimination … as the handmaiden of armed aggression', and his Undersecretary Sumner Welles insisted, 'one of the surest safeguards against war is the opportunity of all peoples to buy and sell on equal terms' (Gardner, 1956: 8, 19). US plans for postwar reconstruction echoed this ethos. One memo noted:

> The elimination of tariff preferences and all other forms of discriminatory trade treatment has been a longstanding and fundamental objective of United States commercial policy. The United States has persistently sought to eliminate preferences not only because of the serious dislocation and injury which their inauguration and continuation have caused to world trade and economic well-being, but also because they have created intense international political frictions, sometimes out of all proportion to their economic importance.[8]

Thus, multilateralism as a causal idea was a method for promoting cooperation and tranquility by freeing the world of empires and exclusive trading arrangements.

A set of 'principled beliefs' fortified the multilateral ideal. Principled beliefs are normative ideas derived from basic moral canons. While they are more rigid than causal beliefs, changes in principled beliefs tend to have more profound consequences because they can provoke comprehensive shifts in value systems (Goldstein and Keohane, 1993: 9). Scholars have linked the commitment to multilateralism to progressive values like freedom and social justice. After the war, Woods (1990: 15) writes, 'multilateralism [represented an] ideological alternative to communism on the one hand and fascism on the other. It was a uniquely American strategem that combined humanitarian ideals with free enterprise and the profit motive.'

For US policymakers, multilateral ideals were dogma, not merely causal maps, and their promotion was a crusade. Multilateralism included a moral element in that it defined the terms of good citizenship in the world community: equality was conciliatory and fair; discrimination was offensive and disrespectful. In a meeting

8 'Position of the United States with Regard to Preferences in the Forthcoming Trade-Barrier Negotiations', 27 August 1946, RG 43, Box 119.

on dissolving imperial preferences with British officials at Geneva, Assistant Secretary Clayton had 'contrasted this iniquity with the purity of a customs union and left the first impression … that the United States regarded anything short of a full customs union as being equivalent to sin' (Hart, 1989: 32–33). Nondiscrimination, Gardner (1956: 20) observes, was 'a vital element in the moral armament of the democratic world'.

If US officials maintained a firm commitment to multilateralism, how was this ideal so easily compromised in the free trade area provisions drafted at Havana? Two puzzles stand out. First, studies find that collectively held ideas tightly constrain elite behavior because they are resistant to change, and amending them risks a high cost to public officials' reputations (Snyder, 1991). Second, unanticipated external shocks and bad outcomes are regarded as necessary conditions to dislodge ingrained beliefs (Legro, 2000; Goldstein, 1993).

In this case, neither condition was present. Rather, the drafting of Article XXIV demonstrates that ideas, even deeply held principled beliefs, are malleable when they are not deeply institutionalized, and when policy officials need not sacrifice reputations in a public about-face. While unanticipated external shocks and negative outcomes may be sufficient to trigger ideational shifts and resultant changes in policy, these conditions are not necessary if institutional constraints are weak and policy can be made in secret.

Critics of the importance of ideas and beliefs in policymaking contend that ideas operate as mere 'hooks' or 'intellectual rationales for material interests' (Jacobsen, 1995: 285). But material US interests did not change between November 1947 (when the US delegation prepared to defend the customs union-only rule at the Havana Conference) and January 1948 (when the State Department drafted the clause on free trade areas). Nor is there any indication that private interests called for the free trade area exemption. To the contrary, the provision, like many of the loopholes in the Havana Charter, harmed the prospects for Senate ratification by alienating pro-trade groups such as the National Foreign Trade Council.[9]

The evidence instead shows that the US position on preferential arrangements changed because an inner circle of State Department officials revised their views of how the organization of trade relations affects national security. Scholars such as Pollard (1985), Leffler (1992), Eckes (1995), and Zeiler (1999) have forcefully advanced the thesis that the Truman administration's efforts to build a peaceful world order drove its economic diplomacy. The ensuing sections of this article likewise demonstrate how postwar security concerns shaped a previously unexplained feature of the GATT, the exemption for free trade areas.

9 Among the Council's gripes when the group came out against the ITO was that it 'strongly opposed … the establishment of new preferential arrangements except as a means to the creation of a complete customs union among countries located in the same geographic area' because there was 'no place in a world of order and peace for arrangements under which certain countries discriminate against other members of the world community of nations' (National Foreign Trade Council, 1950: 65–66).

4. The US–Canada free trade agreement

At the GATT treaty's signing in Geneva on 30 October 1947, an accord between Canada and Britain dissolved each country's obligation in the Ottawa Agreements not to reduce or eliminate trade preferences for the other (Brown, 1950: 252–253). The previous day in Washington, Canadian officials had proposed a liberalization of tariffs on US–Canada trade. The Canadian government wanted a trade treaty 'even if it necessitated a major readjustment and reorientation of Canada's international economic relations', Tariff Board Chairman Hector McKinnon told US officials.[10]

This demarche sparked five months of negotiations for a trade agreement that was never signed, ratified, or publicly acknowledged. These talks in turn inspired significant changes to the Havana Charter – which itself failed to win ratification. The confluence of the two episodes remade GATT Article XXIV, which today survives as part of the world community's commercial constitution in the WTO. Archival records illuminate how this happened.

From customs union to free trade

State Department officials initially brushed off the Canadian initiative. The Truman administration lacked the authority to negotiate with Canada under the 1947 Trade Agreements Act, which meant that a trade treaty would have to garner two-thirds Senate support – a formidable task given implacable Republican hostility to the proposed ITO. Moreover, resistance to the tariff cuts negotiated at Geneva made it 'a most inopportune time to present such a treaty to Congress'.[11] The State Department therefore shunned any mention of trade discussions with Canada, because publicity could lead to 'exaggerated press reports' that might 'stir up Congress unnecessarily'.[12]

Canadian officials were not proposing free trade or anything like it; they merely wanted a free listing in the US tariff code for key exports such as plywood, lumber, fish, and cattle, or at least deeper cuts than had been achieved at Geneva. Canada needed to expand exports to the United States to avert a currency crisis: its reserves of dollars and gold, totaling $1.24 billion at the start of 1947, were falling by $100 million per month because exports to Britain were being financed on credit, while imports from the United States drained hard currency.[13] Canadian officials were reluctant to devalue the parity with the US dollar established in 1946, so they asked the United States for a $750 million loan. With Congress soon to consider the European Recovery Program (ERP), the State Department demurred that it could offer 'no magic cure', since large loans were 'not to be had for the asking in Washington these days', nor could it guarantee that ERP funds would be available

10 'United States–Canada Trade Relations', Memo, 29 October 1947, RG 59, 611.4231/10-2947.
11 'Canadian Dollar Problem', Memo, 29 November 1947, RG 59, 842.5151/11-2947.
12 'Customs Union with Canada', Memo, 18 December 1947, RG 59, 611.422/10-2649.
13 Telegram from Atherton to State Department, 11 September 1947, RG 59, 842.5151/9-1147.

for offshore purchases of Canadian goods.[14] Canada's government responded by instituting quotas and excise taxes on certain US imports and placing restrictions on personal travel in the United States. But these were temporary palliatives: if Canada could not earn hard currency on sales in Europe, eventually it would have to export more to the United States to finance needed imports.

After refusing Canadian entreaties for tariff reciprocity on the grounds that public and Congressional approval would be difficult to secure, the State Department countered in December by proposing a customs union. Canadian officials decisively rebuffed the suggestion: customs union with the United States would provoke charges that Canada sought to disband the Commonwealth; moreover, Canada could not compromise national sovereignty by entering an unequal arrangement with its larger neighbor.[15]

With customs union unthinkable, US officials seized another idea: 'a special form of customs union under which there would be substantially free trade between the two countries but each would retain its separate tariff *vis-à-vis* third countries'.[16] It could not be called a customs union, since 'the connotation of the word 'union'… would make difficulties on the Canadian side'.[17] But free trade without a common tariff system would safeguard Canada's autonomy and allow it to maintain long-standing preferences for the Commonwealth. On New Year's Eve, Woodbury Willoughby, Associate Chief of the Division of Commercial Policy, dined with John Deutsch of Canada's Department of Finance 'to sound him out on a strictly confidential and personal basis as to whether the Canadian Government might be favorably disposed to entering into a modified type of customs union'. Willoughby's memorandum continues:

> I emphasized that we were in no sense expounding a Departmental position; that on the contrary the matter had not even been discussed with top officials. Mr. Deutsch said that he would give careful consideration to the proposal and discuss it with a small number of officials. He said that the subject would be political dynamite in Canada and secrecy must be carefully preserved.[18]

State Department officials had compelling reasons to honor this request to keep the discussions quiet. To be sure, they did not want press attention to stir a Congressional inquiry or provide lead-time for interest groups to mobilize. But there was an additional motive for secrecy:

14 'Canadian Dollar Problem', RG 59, 842.5151/11-2947.

15 After a briefing on 'commercial union', Canadian Prime Minister Mackenzie King confided in his diary, 'the word "commercial" would soon be dropped in political discussions and the campaign be on the question of union with the States' (Pickersgill, 1970: 260).

16 'Customs Union with Canada' (18 December 1947), RG 59, 611.422/10-2649.

17 'Removal of Trade Barriers between the United States and Canada', Memo, 27 April 1948, RG 59, 611.422/10-2649.

18 'Customs Union with Canada', Memo, 31 December 1947, RG 59, 611.422/10-2649.

> deviation from the orthodox customs union … would not conform to that part of the definition of a customs union in Art. 42, par. 4 of the Charter and Art. XXIV, par. 4 of GATT which specifies that substantially the same tariffs and other regulations of commerce must be applied by each of the members to the trade of third countries.[19]

As stipulated in Geneva Draft Article XV, it was possible to seek special permission for preferential trade with Canada by a vote of two-thirds of ITO members, but '[t]his procedure … would be cumbersome and uncertain' due to the rigid criteria the United States had demanded to hold the line against new trade preferences. Instead, US officials resolved to pursue an amendment to the Havana Charter 'modifying the customs union provisions to permit the special type' of system the State Department was entertaining. Paul Nitze, Deputy Director of the Office of International Trade Policy, therefore instructed the head of the US delegation at Havana, Clair Wilcox, 'to keep our Canadian problem in mind' and find a way to adapt global trade rules to the endeavor at hand.[20]

There was a problem, however: taking a firm stand against preferences at Havana while simultaneously negotiating a preferential arrangement with Canada would appear hypocritical. Though Nitze wanted to 'try … without attracting too much attention to cause a minor amendment of the ITO Charter',[21] the significance of such a shift would not escape the delegations seeking broad exceptions for new preferences. As Willoughby cabled Wilcox on 7 January, 'Proposal by US or Can. to amend Art. 42 likely to evoke conclusion we expect to use it thus creating public relations problem.' State Department officials had drafted language to permit 'free trade areas' as an exception to MFN, but the US delegation could not offer it. 'Perhaps [it] could be planted with delegation from third country to sponsor', Willoughby suggested.[22]

At Havana on 8 January, the Lebanese and Syrian representatives submitted an amendment to exempt from MFN rules regional groups that eliminated restrictions on mutual trade without establishing a common customs system. This provided the opening wedge for the United States to push its desired exemption for free trade areas.

5. Free trade areas: the Havana compromise

The State Department's plan was to stage-manage the Lebanese and Syrian proposals, while appearing disinterested in their outcome. In the process, US

19 'Customs Union with Canada' (18 December 1947), RG 59, 611.422/10-2649.

20 'Customs Union with Canada' (18 December 1947), RG 59, 611.422/10-2649.

21 'Possible Customs Union with Canada', Memo, 23 December 1947, RG 59, 611.422/10-2649.

22 Telegram for Wilcox and Leddy from Willoughby, 7 January 1948, RG 59, 611.422/10-2649. The US delegation could not propose amendments, Willoughby concluded, because 'I did not see how we could reverse our position on the preference provisions of the Charter'. 'Customs Union with Canada', Memo, 7 January 1948, RG 59, 611.422/10-2649.

officials had three goals. First, they wanted the free trade area exemption to include interim agreements, so that free trade would not have to be established immediately. Second, they wanted a provision that free trade areas only had to eliminate customs restrictions on 'substantially all' trade – not all trade – so that protection for sensitive items could be retained. Third, they wanted to ensure that clauses banning tariff increases against third countries applied only at the time a free trade area was formed, and did not operate indefinitely. The US delegation was instructed to build on French amendments to the Lebanese and Syrian proposal to craft language to Washington's liking.[23]

The strategy worked exactly as intended: the United States was able to broker a compromise to allow leeway for free trade areas, but still turn back sweeping exceptions for new preferential arrangements that developing nations wanted. The US delegation provided critical input into the text, but left sponsorship of key amendments to France.[24] On 31 January, Wilcox cabled Washington: 'Discussion proceeding satisfactorily on French proposal to include, in Article 42, free trade areas as well as customs unions. There appear to be good prospects for an agreement.'[25] Ten days later, three areas of disagreement on the Havana Charter remained, the first of which was 'more latitude on new preferences, customs unions, free trade areas'.[26]

In the meantime, Canadian officials returned to Washington on 18 February to finalize the text of the free trade agreement. To prevent leaks, discussions were limited to a handful of US officials; a planning memo trenchantly warned, '[u]ntil the necessary amendment of the Charter has been effected, and the Havana conference over, security requirements preclude the expansion of this group'. The State Department even had a cover story ready in case reporters noticed the Canadian negotiators in town:

> Every effort will be made to keep their trip secret; however, if their presence is discovered, it will be stated that they are here to talk about problems arising out of the Havana conference, the meeting of GATT countries at the end of the conference and related matters.[27]

By 10 March, a draft treaty had been completed. Willoughby anxiously cabled Havana: 'Favorable progress project discussed my top secret communications to you make it imperative present Art. XXIV GATT be amended so as to correspond with new Havana Charter Art. 42 relating customs unions and free trade areas.'[28]

23 Telegram for Wilcox and Leddy from Willoughby, 19 January 1948, RG 59, 611.422/10-2649.

24 'Summary Report No. 42, January 28 Meetings', Telegram, 29 January 1948, RG 43, Box 150.

25 'Summary Report No. 43, January 29 Meetings', Telegram, 31 January 1948, RG 43, Box 150.

26 Telegram for Clayton and Brown from Wilcox, 10 February 1948, RG 59, 560.AL/2-1048.

27 'Suggested Timetable and Procedures for Preparing for Negotiations of Modified Customs Union with Canada', Memo, 16 February 1948, RG 59, 611.422/10-2649.

28 Telegram for Wilcox from Willoughby, 10 March 1948, RG 59, 611.422/10-2649.

Within days the final disputes were resolved and the Havana Charter was prepared for the signing ceremony, which occurred on 23 March.

The US–Canada trade treaty, and the planning behind it, illustrate why the State Department wished to adjust trade rules for preferential arrangements. The treaty's text and annexes were less than 100 pages, as officials sought to develop a comprehensive, simple agreement that would be easy for the public to understand, difficult for interest groups to modify, and impossible for the Senate to defeat. Yet political considerations demanded transitional protection, exceptions, or exemptions for certain products. These complicated measures in turn required changes to the Havana Charter to ensure that the ITO allowed room for this 'modified type of customs union'.

Interim agreements

The State Department's Plan A envisioned immediate free trade with Canada, with all tariffs and quotas eliminated at the treaty's execution. But speed was both asset and liability, as one memo tersely noted: 'Pro: Striking, brilliant move arousing acclaim by its drama. Would mean maximum speed in economic integration. Con: Would involve maximum economic disturbance. Probably would be turned down by Congress.'[29] Plan B, in contrast, would eliminate tariffs and quotas in stages over ten years. While this would limit adjustment costs, and hence minimize domestic opposition, it lacked the public relations benefits of a quick, decisive move to free trade; the favorable effects on Canada's balance of payments would be muted; and appeals for exemptions or temporary protection would flood the US Tariff Commission. The intermediate course, labeled Plan A(2), was a variation on Plan A with five-year transitional measures or special exceptions for the industries likely to mobilize the strongest opposition to free trade. By splitting the difference, this plan 'would have much of the appeal and rapid, broad-scale economic integration of proposal [A] and would be much easier to get through Congress'.[30]

With transitional arrangements, there was a danger of 'heavy special pressures from industries wanting to have their products receive exceptional treatment'.[31] US officials resolved to exempt as few products as possible to deter lobbying for special measures, reduce complaints of arbitrary or unfair treatment, and obviate the need for complex annexes. Exceptions were rejected if Senate votes were unlikely to be swayed; thus, import-sensitive products such as aluminum, zinc, frozen blueberries, silver fox furs, barley, oats, rye, lumber, and book paper were to be immediately exposed to free trade. Still, anticipated adjustment costs were a major barrier to winning two-thirds support of the Senate, particularly because the Republican majority regarded projects to liberalize trade with great suspicion. Stiff opposition was expected from Senators with rural constituents near the Canadian

29 'Treaty Articles', Memo, 16 February 1948, RG 59, 611.422/10-2649.
30 'Treaty Articles', RG 59, 611.422/10-2649.
31 'Treaty Articles', RG 59, 611.422/10-2649.

border: potato growers in Maine, Minnesota, and North Dakota; dairy farmers in Wisconsin, Minnesota, New York, and Vermont; Atlantic fisheries in Massachusetts and Maine; and cattle herders in Montana, North Dakota, and South Dakota.[32]

As a result, special measures were crafted to neutralize groups likely to issue the most forceful objections. Five-year transitional quotas were planned for potatoes, cattle, calves, groundfish fillets, milk, cream, and butter, with provisions to restore barriers if imports interfered with domestic price or income supports.[33] Though these exceptions violated Geneva Draft Article 42, one memo noted, 'Steps are being taken at Havana … to modify the Charter so as to permit reciprocal tariff arrangements such as we have in mind.'[34]

'*Substantially all*' trade

Even with transitional protection, certain products could not be liberalized at acceptable political cost. In particular, Section 22 of the Agricultural Adjustment Act established strict quotas for wheat and wheat flour, commodities that Canada produced in abundance. These quotas were exempted from the trade treaty, as were seasonal quotas on many fruits and vegetables. Antidumping and countervailing measures against Canadian goods also were to remain in force.[35]

Because the United States intended to retain protection on certain imports from Canada, it was critical that free trade areas not require total free trade. As a result, US negotiators were instructed to push for language in the Havana Charter stating that free trade areas would have to liberalize 'substantially all the trade' between their members.[36]

External tariffs

A third issue was to ensure that the Havana Charter allowed countries in free trade areas to retain full tariff autonomy. Under the rules for customs unions, members had to apply 'substantially the same duties' to other-country trade. But Canada could not adopt the US tariff code because such a great sacrifice of national sovereignty – which would have required raising tariffs against the Commonwealth for goods that the United States taxed at a higher rate – was politically intolerable. Authorization for the State Department to adjust MFN tariffs through bilateral negotiations with Canada was likewise out of the question; after all, Congress would have 'torpedoed' the GATT treaty at the first

32 'Possible Opposition to Canadian Pact in US Senate', Memo, 30 March 1948, RG 59, 611.422/10-2649.

33 'Discussion of Plan A', Memo, 27 March 1948, RG 59, 611.422/10-2649; 'United States Transitional Quotas', Memo, 2 April 1948, RG 59, 611.422/10-2649.

34 'Proposed Tariff Reciprocity Arrangement with Canada', Memo, 22 January 1948, RG 59, 611.422/10-2649.

35 'Proposed Trade Pact between the United States and Canada', Memo, 22 March 1948, RG 59, 611.422/10-2649.

36 Telegram for Wilcox and Leddy from Willoughby (19 January 1948), RG 59, 611.422/10-2649.

opportunity, one official had noted (Zeiler, 1999: 122). Thus, it was imperative that the provisions for free trade areas not require the harmonization of external trade practices.

If Canada and the United States were to maintain independent tariff systems, they needed to ensure that disparities in external tariffs did not allow the benefits of mutual free trade to leak abroad. US officials sought to limit trade deflection by adding third-country content requirements to prevent outsiders from exploiting gaps in the external tariff wall. State Department planners recognized that determining third country content would be a difficult task for customs authorities, particularly when finished products such as wool fabrics and aluminum were composed of inputs that were duty free in Canada but heavily taxed in the United States.[37] Yet the scope for potential abuse of content rules was not fully appreciated, as the records of the Havana Conference provide no evidence that the issue was raised at all. GATT Article XXIV therefore inherited no multilateral discipline on the use of so-called rules of origin.[38]

A related problem was the stipulation in the Geneva Draft that external tariffs in customs unions should not be 'on the whole higher or more restrictive than the general incidence of the duties' in the pre-union period. The 1947 Trade Agreements Act did not authorize such commitments in trade treaties, and Congress would never ratify provisions that precluded future adjustments in US tariffs. As a result, the addition of the phrase 'at the formation' made ITO–GATT rules prohibiting tariff increases in free trade areas immediate rather than indefinite. Moreover, while most provisions for customs unions were extended to free trade areas, a clause allowing third countries to seek compensation for tariff increases applied only to customs unions, not to free trade areas.

The challenge in relaxing the rules on tariff increases in free trade areas was to 'effectively control the traditional abuses in preferential systems and at the same time permit the achievement of the obvious economic benefits of regional economic unity'.[39] US officials wanted the Havana Charter to allow full tariff autonomy for countries in free trade areas, and yet still make clear that free trade area formation 'shall not constitute occasion for increase in tariffs and other trade barriers against third countries'.[40]

37 'Third-Country Content in US–Canadian Free-Trade Arrangement', Undated memo, RG 59, 611.422/10-2649.

38 The only mention of rules of origin in the GATT treaty was in an unrelated interpretive note to Article VIII ('Fees and Formalities Connected with Importation and Exportation'), which stated that 'the production of certificates of origin should only be required to the extent that it is strictly indispensable' (GATT, Text of the General Agreement, Annex I, Notes and Supplementary Provisions, ad Article VIII, Paragraph 2, available at http://www.wto.org/english/docs_e/legal_e/havana_e.pdf http://www.wto.org/english/docs_e/legal_e/havana_e.pdf). This left contracting parties to employ origin requirements as they saw fit, an omission that was not addressed until the Uruguay Round Agreement on Rules of Origin.

39 'Customs Union with Canada' (18 December 1947), RG 59, 611.422/10-2649.

40 Telegram for Wilcox and Leddy from Willoughby (19 January 1948), RG 59, 611.422/10-2649.

The solution was to amplify a passage on 'the desirability of increasing freedom of trade' into a broad exhortation for preferential arrangements to avoid raising external trade barriers. The French delegation drafted this text for inclusion in Article 1, but over France's opposition it was moved to the first paragraph of Article 44. Following this clause was another general statement 'that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories'. Finally, this paragraph was linked to the clause exempting customs unions and free trade areas with the addition of the word 'therefore' (later changed to 'accordingly') at the head of paragraph 2 (Haight, 1972: 393–396; Viner, 1950: 112–115).

The US–Canada free trade agreement's demise

The motives for the free trade area exception in the Havana Charter are evident: it was written to conform to the secret US–Canada trade treaty. Ultimately the ITO never was established, as opposition from 'protectionists' and 'perfectionists' caused the Havana Charter to languish before the Truman administration quietly withdrew it from Senate consideration after the 1950 election (Diebold, 1952). But the rules for regional trading arrangements drafted at Havana survived in the GATT and remain in force today in the WTO.

The US–Canada free trade agreement never became law either. Though Prime Minister King had 'indicated his approval of the plan' when presented with the draft treaty,[41] as his retirement neared he grew preoccupied with his legacy in office, his mental and physical fitness for a strenuous campaign to ratify the treaty, the future prospects of the Commonwealth, and the territorial designs of the United States toward Canada. Cuff and Granatstein (1977: 477–480) detail King's growing irritability about the trade talks in spring 1948. On 1 April, just one week after the Havana conference's end, Canada's ambassador in Washington abruptly suspended plans for a ceremonial treaty signing set for May. Canadian Minister of Trade and Commerce C.D. Howe told US officials to wait out King's final months in office – which earned him a severe upbraiding when the Prime Minister found out (Bothwell and Kilbourn, 1979: 218–220). In his diary King complained that his advisors had 'got it into their heads' that free trade would alleviate Canada's currency problems and had tried to 'force the hands of the Government … without the least knowledge of the political side of matters'. It was all an 'absurd idea', the Prime Minister inveighed privately (Pickersgill, 1970: 272–273).

6. Explaining the shift in US policy

The preceding section demonstrates how the synergy between negotiations in Havana for the ITO Charter and secret discussions in Washington for a

41 'Proposed Elimination of Trade Barriers between the US and Canada', Memo, 1 April 1948, 611.422/10-2649, RG 59.

US–Canada trade agreement facilitated the exemption for free trade areas in the GATT. The US delegation arrived at Havana with a strict view that tariff preferences should be permissible only for customs unions and interim agreements to form customs unions; it left supporting a treaty that sanctioned free trade areas, a concept not previously recognized in international law, as an acceptable departure from MFN. In the intervening months, the prospect of a treaty with Canada that would have to stop short of a customs union caused the State Department to modify its stance on tariff preferences.

The shift in the US stance on preferential arrangements can be traced to Nitze, who conceived the free trade area idea in the hope that it would be 'sufficiently bold and striking to fire the imagination of the people and force favorable action by Congress'. Nitze appreciated that his 'proposal involve[d] basic changes in policy and raise[d] many problems with respect to our attitude toward preferences'. But he believed that 'some formula could … be devised in the orientation of the ITO' to accommodate the sort of arrangement the United States sought to establish with Canada.[42] This conviction pushed the policymaking process toward a rapid shift in the principles underlying the US negotiating position at Havana.

A number of institutional factors made policy change easier to accomplish. For one, there were few agents involved in the policymaking process: Nitze, four staff members in the Division of Commercial Policy, the chairman and vice-chairman of the US delegation at Havana, and one other State Department official. This group of eight formulated policy in total secrecy, and it did not require advance authorization from the political appointees at the top of the State Department hierarchy.

In addition, abhorrence for trade preferences, though pervasive in official circles, had not been firmly encased in domestic institutions. The Trade Agreements Act, which had been renewed five times since its passage in 1934, established MFN and reciprocity as core tenets of US policy, but this legislation merely authorized the negotiation of reciprocal trade treaties, not the creation of multilateral rules or an ITO. Likewise, the prohibition on preferential arrangements short of customs union had been advanced in State Department draft charters dating to 1943 but was never formally debated in public or written into US law.

More puzzling than how the stance on trade preferences was changed is why it changed. According to Goldstein (1993: 12), policy agents are most likely to reevaluate core ideas after extant policy choices have been de-legitimized; this stimulates a 'period of search', followed by 'experimentation' and finally 'institutionalization'. Legro (2000: 264) explains:

> When adhering to ideational prescriptions, the collective expectation is that events will match, that prescribed action will bring desirable consequences and proscribed action undesirable consequences. When the consequences of

42 'Customs Union with Canada' (18 December 1947), RG 59, 611.422/10-2649.

> experienced events do not match expectations of what should happen, there is pressure for collective reflection and reassessment.

Yet from fall 1947 to spring 1948, there was no external shock that proved old ideas wrong. Nor was there any discernible shift in the global balance of power, national leadership, bureaucratic positions, the partisan balance, or domestic coalitions.

Inside policymaking circles, however, official views on national security were evolving. By early fall 1947, the Truman administration had concluded that a Soviet invasion of Europe was unlikely in the foreseeable future; instead, the Soviet regime would use political and economic means of subversion. The immediate task was to prevent local communist parties from exploiting conditions of poverty and deprivation. In responding to this challenge, the administration deployed economic measures such as the Marshall Plan in an effort to avert the need for a military commitment to Europe. Even as Romania and Czechoslovakia fell into the communist orbit in winter 1948, the United States stood aside from mutual defense talks and initially declined to formally associate with the Brussels Treaty. Economic confidence building was regarded as the key to European security, not military mobilization.

As part of this approach, Leffler (1992: 17) writes, 'the Truman administration tried to mold multilateral political agreements and supranational institutions for the purpose of luring core industrial nations into an American-led community'. At Geneva and Havana, its primary objective was to demonstrate cohesion among market-oriented, democratic nations in the face of the Soviet threat. The Canadian trade initiative caused US officials to recognize that preferential arrangements could be employed to serve this larger Cold War strategy. This realization led policymakers to revise their beliefs about multilateralism. Previously, they had preferred a rigid MFN clause so the benefits of trade would be non-excludable: exclusion was repugnant, and it aroused hostility. But after the Canadian proposal, they concluded that international trade institutions, whether multilateral or regional, cemented political bonds among noncommunist countries, deepened commitments to the capitalist model, and mobilized a united front against the Soviet Union. Trade liberalization and supranational rulemaking signaled solidarity; failure to agree, in contrast, exposed disunity and irresolution.

Theoretical work suggests that preferential trade among military allies produces positive 'security externalities' by creating surplus wealth that can be invested in military capabilities (Gowa and Mansfield, 1993). Other studies find that states joined together in preferential arrangements are less likely to go to war (Mansfield and Pevehouse, 2000). In late 1947, State Department officials came to regard free trade areas in precisely these terms. In their new vision, trade agreements, both multilateral and regional, served as institutional devices to promote interstate cooperation. Moreover, they believed, the economic benefits of increased trade and market access through both multilateral and preferential arrangements would strengthen the defense capabilities of GATT members.

These attitudes are evident in State Department memos, which emphasized the political and strategic advantages of the free trade agreement. Willoughby placed the pact in the larger context of 'US moves for closer cooperation among the democracies' and argued for 'immediate action' due to the 'widespread popular concern over Russian policy'.[43] A planning paper for briefings with Senate leaders further explained:

> The proposed pact … would have widely recognized political and strategic implications. Politically the pact would be recognized as a bold step towards closer cooperation between two great democratic nations. It would be construed as paralleling for North America the economic aspects of the Western Europe Treaty … Strategically the pact would strengthen the industrial potential of the US and Canada and would assure free access to each other's resources in case of attack.[44]

Another memo noted: 'Following closely upon the formation of the Western European union for economic and military cooperation, the logic of North American economic cooperation will have increased force.'[45] Officials also expected that a US–Canada free trade area would 'give impetus to Western Europe customs union'.[46]

Thus, State Department officials concluded that the geopolitical goals involved in forming the ITO could accommodate preferential arrangements. Despite their hatred of colonial preferences and dedication to MFN rules, they came to regard free trade areas as instruments to achieve broader trade liberalization than was possible multilaterally and promote economic and political unity against the Soviet threat. Nitze noted: 'If … the Arab League or Western Europe were to adopt such unions, we are inclined to believe that the net effect would be beneficial.'[47] A new causal logic emerged, one in which free trade areas were an efficient means to open trade, an assertion of shared commitment to markets over state control, and an institutional device to promote cooperation. This vision gained instant approval in administration circles because it served the geopolitical needs of the moment given the uncertain security situation with the escalation of the Cold War. In short, the belief that preferential trade short of customs union should not be permitted was modified based on new information and a viable competing policy idea that 'good regionalism' (free trade areas) could be compatible with international peace and stability even if 'bad regionalism' (imperial preferences) was not.

In this political calculus, the material benefits of free trade with Canada were an implicit attraction – albeit a secondary one – for State Department officials. To be

43 'Proposed Pact with Canada', Memo, 30 March 1948, RG 59, 611.422/10-2649.

44 'Proposed Pact between US and Canada – Discussion with Senators Vandenberg, Taft, and Millikin', Undated memo, RG 59, 611.422/10-2649.

45 'Proposed Elimination of Trade Barriers between the US and Canada', RG 59, 611.422/10-2649.

46 'Plan I', Memo, 1 March 1948, RG 59, 611.422/10-2649.

47 'Customs Union with Canada' (18 December 1947), RG 59, 611.422/10-2649.

sure, 'knitting the two countries together', a briefing paper noted, had been 'an objective of United States foreign policy since the founding of the Republic'.[48] But other than one passing reference to 'business groups that would profit' in Nitze's seminal memo, the planning papers make no specific mention of firms or lobby groups that either lobbied for or were expected to support the free trade agreement. Moreover, US officials acceded to Canadian insistence on transitional protection for automobiles, refrigerators, radios, and other products that US companies assembled in Canada with imported parts – so these industries would have had to wait five years to reap the full benefits of free trade.

Domestic politics nevertheless were a persistent concern because the prospects for ratification were uncertain. One memo estimated that 53 Senators would support the treaty and 30 others would oppose it, with the disposition of the remaining 13 unknown; another tally anticipated 16 nays based on industry interests and 7 more on ideological grounds, well short of the 33 votes needed to defeat the treaty.[49] Because of the secrecy surrounding the negotiations, no effort was made to mobilize public support for the agreement. Officials instead trusted that the 'political and strategic implications of the pact in the international field will clearly override the limited secular interests which are likely to oppose the pact on the grounds of possible injury'.[50] But because of the Canadian Prime Minister's last minute change of heart, things never got that far.

7. Competing explanations: exit threats and insurance policies

Conventional arguments attribute the laxity of GATT Article XXIV to British, European, and developing country pressure. To be sure, the British, European, Latin, and Arab representatives at Havana generally sought greater leeway for regional and preferential arrangements. Moreover, the French and Belgian delegations formally sponsored the amendments that led to the free trade area exemption, and these provisions did help to alleviate Lebanese, Syrian, and Iraqi concerns regarding the Havana Charter.

Nevertheless, the exemption for free trade areas was not crafted to accommodate European integration. To the contrary, US officials were determined that Europe form a customs union, not a free trade area, subject to the tougher provisions for customs unions. Nor were the new rules intended as an insurance policy for developing countries, as the Havana Charter was designed to discipline preferential arrangements short of free trade by placing these pacts under a separate section relating to Economic Development. Nor was the compromise on free trade areas an attempt to dissuade Britain from using its exit option. Simply

48 'Proposed Elimination of Trade Barriers between the United States and Canada', Memo, 8 March 1948, RG 59, 611.422/10-2649.

49 'Guesses on Probable Attitude of Senators', Memo, 22 March 1948, and 'Possible Opposition to Canadian Pact in US Senate', RG 59, 611.422/10-2649.

50 'Summary Statement', Memo, 16 March 1948, RG 59, 611.422/10-2649.

stated, GATT rules were written to allow flexibility for the sort of preferential arrangement the United States was pursuing with Canada, while restricting the scope for potential abuse by Britain, Europe, and the developing countries.

European integration

The economic integration of Western Europe was a principal postwar goal of the US government and an important function of the Marshall Plan. US officials certainly did not want the ITO to stand in the way of measures to promote Europe's political unity and economic reconstruction. But neither did they want European integration to deteriorate into a 1930s-style preferential arrangement detached from the multilateral trading system.

Plans for European integration influenced one aspect of ITO rules for regional arrangements: the exception for interim agreements crafted at Geneva (see Wilcox, 1949: 71). The judgment of US officials was that European customs union 'would certainly be to our interest and equally certainly could not be achieved in a year, two years, or three years'. Customs union would require political integration, and political integration would take time. To ensure that Europe 'would actually carry it through and not simply have a series of corporatist arrangements', the United States insisted on the requirement to supply a plan and schedule, the prohibition against raising external tariffs, and the right of the ITO to block proposed arrangements that failed to meet these criteria.[51] Thus, the Havana Charter would permit the formation of a European customs union, but on rather strict terms.

Indeed, US officials resolved that European plans 'should receive close and continuing scrutiny to ensure that they are in accord with Charter principles and will not deteriorate into a system of indefinite regional preferences'. The State Department concluded that the plan and schedule for customs union would provide structure for the ERP, and it intended to use financial assistance to push Europe toward closer integration. Though policy planners recognized that customs union would be difficult, nevertheless they insisted that 'participating countries should be discouraged from adopting as part of the Recovery Program preferential arrangements of a non-customs union type'.[52]

In short, the United States was not prepared to tolerate an outcome short of full customs union. Moreover, European plans were fixed on customs union at the time that the ITO provisions for free trade areas were drafted. The work of the European Customs Union Study Group was well underway; and a month after the Havana Charter's signing, Article 5 of the Convention for European Economic Cooperation committed members to study customs union formation and work toward the rapid completion of the Belgium–Netherlands–Luxembourg customs

51 'Meeting of the American Delegation to the Havana ITO Conference', 17 November 1947, RG 43, Box 127.

52 'The European Recovery Program and the ITO', Memo, 6 October 1947, RG 43, Box 148.

union. The only decision at Havana to accommodate European integration was a clarification permitting ITO members to form customs unions with nonmembers, inspired by France's desire for a customs treaty with Italy (Brown, 1950: 242, 308). Though France and Belgium sponsored amendments for free trade areas – and US diplomats worked with the French and Belgian delegations to shape these proposals to their liking – the exceptions and safeguards in the Havana Charter had no relation to European integration per se.

Developing-country trade preferences

Another important consideration for US diplomats was that developing countries would have to broadly support the Havana Charter for the ITO to be viable. Fifty-six countries attended the Havana conference. By December, talk of an adjournment in mid-January circulated. In the end, delegates submitted almost 800 amendments to the Geneva Draft, with Latin American delegations proposing the most substantial changes. For the ITO to succeed, the US delegation had to concede enough to mollify the developing countries, without violating too many of the principles that motivated the endeavor's pursuit.

Pressure from developing countries to permit more extensive tariff preferences had been blunted at the London and Geneva conferences through special provisions in a new chapter on Economic Development, Article 15 of the Geneva Draft. This chapter 'was the only important concession made by the United States', US negotiator Wilcox reported to the State Department.[53] Yet the terms were onerous: countries could initiate tariff preferences only as needed for development or reconstruction; they had to be geographically contiguous or part of the same 'economic region'; and preferences had to be terminated within ten years, with the possibility of a five-year extension. Moreover, regional tariff groups had to remain open to accession by outsiders; they had to negotiate compensation with injured external parties; and, even then, they required the two-thirds approval of ITO members.[54]

At Havana, developing countries contesting the strict terms of Article 15 used the customs union provision as an outlet to secure leeway for tariff preferences. In particular, the Lebanese, Syrian, and Iraqi representatives wanted permission to pursue regional integration, but they felt that full customs union would be too difficult to establish.[55] US negotiators realized that adding an exception for free trade areas would satisfy the demands of the Arab states, and thereby blunt pressure for relaxing Article 15.[56] This made it possible to divide the developing

53 'Report of the United States Delegation to the First Meeting of the Preparatory Committee for an International Conference on Trade and Employment', 27 December 1946, RG 59, 560.AL/12-3046.

54 'Draft Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, January–February 1947', RG 43, Box 123.

55 Second and Third Committees, Joint Subcommittee of Committees II and III, Tariff Preferences, 24 December 1947, United Nations Conference on Trade and Employment, E/CONF.2/C.2&3/A/3.

56 'Summary Report No. 34, January 15 Meetings', Telegram, 16 January 1948, RG 43, Box 150.

countries in their efforts to modify provisions relating to tariff preferences and isolate delegations (such as Chile's) that sought a more permissive stance.

The US delegation's final report identified '23 amendments providing sweeping exceptions for new regional preferences', and added that defending the sanctity of MFN 'required the defeat of repeated attempts to permit, without prior approval by [the] ITO, the imposition of new tariff preferences to favor the development of new industries'.[57] More accurately, US negotiators carved out their desired exception for free trade areas, while ensuring that the amendments other delegations proposed would not weaken the rules against new preferences more than the United States could accept. 'Problem is to provide latitude for exceptions but not too much', Wilcox cabled the State Department at one point, as discussions to allow free trade areas progressed.[58]

Britain and the Commonwealth

The new provisions for free trade areas were least of all a concession to Britain. In fact, as the language of the free trade area exemption was finalized in the days before the Havana Charter's signing, British officials protested what they regarded as a double standard. From the start Britain had sought leeway for trade preferences in an attempt to hold together the system of Imperial Preference. But, while the Annex to Article I left these preferences intact pursuant to the compromise struck in the 1945 *Proposals*, British negotiators at Havana objected that the Commonwealth was blocked from forming new preferential arrangements, even as the same opportunities were opened for others.

For Britain, the exemptions for free trade areas and customs unions in Havana Charter Article 44 were of no use because members of the Commonwealth would never lift restrictions on 'substantially all' their trade or accept customs harmonization with Britain. British officials therefore focused their indignation on Article 15: allowing new preferences to promote reconstruction or development, they protested, was 'radically inconsistent with the "Washington Proposals" of December 1945'.[59] Their underlying objection was that Article 15 required countries forming preferential arrangements to be 'contiguous one with another' or at least located in 'the same economic region', which effectively excluded Britain due to the Commonwealth's geographic distance. As the US Ambassador in London cabled to Washington, 'British face serious political risk in Parliament unless way found in Article 15 meet requirement that Commonwealth must be able to be regarded as an economic region under paragraph 3(a)' (US Department of State, 1976: 881).

57 'Official Report of the Chairman of the United States Delegation to the Havana Conference', Undated Memo, RG 43, Box 105.

58 Telegram for Willoughby from Wilcox, 15 January 1948, RG 59, 611.422/10-2649.

59 US Department of State (1976: 870). Wilcox shot back from Havana: 'So were earlier drafts of same article which UK delegates accepted in London and Geneva' (US Department of State, 1976: 876).

In the eleventh-hour discussions to assuage Britain's last objections to the Havana Charter, quantitative restrictions (Article 13) and foreign exchange controls (Article 23) proved to be greater sticking points than preferential arrangements under Article 15. The British delegation accepted an interpretive note to Article 15 that read, 'the organization need not interpret the term 'economic region' to require close geographical proximity if it is satisfied that a sufficient degree of economic integration exists between the countries concerned'.[60]. Thus, while Britain did not challenge the free trade area clauses in Article 44, neither was it involved in seeking this compromise.

8. Conclusion: credibility versus flexibility in Article XXIV

Recent studies demonstrate that exceptions to general trade rules are rationally optimal when policymakers are uncertain about the domestic effects of liberalization or the probability of future shocks to the national economy (see Goldstein and Martin, 2000; Rosendorff and Milner, 2001). But, if escape is too costly, these studies argue, states will adhere to rules even when doing so is harmful, and domestic support for liberalization may deteriorate; if there are too many loopholes and escape is easy, on the other hand, cheating will multiply and systemic norms will be undermined. Achieving the right balance requires that states pay a cost proportionate to the gains associated with future cooperation in return for the right to escape from prior obligations.

These principles behind escapes from tariff concessions apply equally to escapes from MFN under Article XXIV. Negotiators at Havana faced considerable uncertainty about the likelihood of future international shocks and what sorts of trade rules their domestic publics would accept; as a result, they sought leeway to deal with unforeseen contingencies. In other words, European and developing country delegations demanded flexibility because they were unsure of the economic and political costs of commitment to nondiscrimination.

Once US officials decided that a strict MFN clause was less desirable than previously thought, the barriers to forming preferential arrangements were lowered. Simply, they wanted states with similar economic and political preferences to be able to establish free trade areas. The calculation was that if preferential arrangements were too costly, countries would rarely form them, or worse they might generally ignore MFN obligations; inflexibly binding rules would produce a less than optimal amount of trade liberalization and political cooperation. In this context, customs unions were politically too difficult for most countries to form, given the loss of sovereignty and the costs of institutional creation. Alternatively, if the costs of forming preferential arrangements were too

60 United Nations Conference on Trade and Employment, Final Act and Related Documents, Annex P, Interpretive Notes, ad Article 15, Paragraph 4(a), available at http://www.wto.org/english/docs_e/legal_e/havana_e.pdf.

low, discrimination would multiply; too much flexibility would erode the MFN clause's credibility. Thus, imperial systems and the limited preferential arrangements popular among developing countries had to be blocked.

The solution was to exact a cost for countries to invoke escapes from MFN. First, the Article XXIV provision for free trade areas required total rather partial preferences. Free trade was costlier than partial preferences, so this rule would limit derogations from MFN among more protectionist members such as the British Commonwealth. Second, 'substantially all' trade had to be freed, which meant that not too many industries could be excluded – a barrier for Latin American countries that wanted preferential trade in specific manufactured goods. These groups would find it difficult to meet the conditions of Article XXIV, and preferential arrangements that failed these criteria would have to qualify under the more closely monitored provisions of Havana Charter Article 15. Thus, countries that wished to deviate from MFN would have to bear the domestic political cost of complete free trade within the preferential area.

In compromising multilateral ideals, US officials sought to promote the creation of regional arrangements that would complement the goals of the GATT and reinforce peaceful political relations among its members. Yet it is doubtful that the framers of Article XXIV fully appreciated its long-term consequences: regional arrangements have flourished of late, and countries have shown distinct favoritism for free trade areas over customs unions. If the GATT had included the customs union-only rule that the United States initially advanced, it might have deterred many of these regional arrangements from forming. Whether that would have been desirable will remain hotly debated.

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Reviewing dispute settlement at the World Trade Organization: a time to reconsider the role/s of compensation?

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Abstract: The World Trade Organization provides a forum for the settlement of trade disputes arising between its 148 Members. Should consultations fail, the parties may choose to initiate formal proceedings in Geneva, and must do so in preference to taking unilateral action. The dispute settlement rules are presently under review with a view to their clarification and improvement, making this a natural time to ask whether the appropriate strategy has been identified. This article focuses on the functions of compensation in the overall context of WTO remedies. Particular attention is given to the prospects for new disciplines and increased practice connected with the granting of both trade compensation and financial compensation. Also considered is the extent to which financial compensation can and should be linked to reparation in the sense of correcting the injury caused by WTO violations. The discussion is informed by the general international law position, by proposals made during the on-going review process and by emerging dispute settlement practice.

1. Introduction

This article focuses on the present and evolving functions of compensation in the overall context of WTO remedies. It has emerged strongly from the on-going DSU review process[1] that many Members are dissatisfied with the present

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1 The WTO's website notes that, 'In November 2001, at the Doha Ministerial Conference, member governments agreed to negotiate to improve and clarify the Dispute Settlement Understanding. Ministers said that the new negotiations should be concluded not later than May 2003 … On 24 July 2003, acknowledging the fact that the DSB special session needed more time to conclude its work, the General Council agreed to extend the special session's timeframe by one year, to May 2004.'

This deadline was not met and no new date has been set for the completion of the negotiations. Various documents connected with the negotiations are referred to below. All are identifiable with the document code TN and all are available on the WTO's web-site. Also of note is the synopsis of proposals and other information available on the web-pages of the Institute of International Economic Law at Georgetown University http://www.law.georgetown.edu/iiel/current/dsureview/

For a general account of the negotiations, see Van den Bossche, 'The Doha Development Round Negotiations on the Dispute Settlement Understanding', WTO Conference New Agendas in the

functioning of WTO remedies. Particular concern has been expressed about the use or threatened use of the suspension of concessions as the most commonly used rebalancing and compliance inducement[2] device in the event of violations continuing beyond the expiry of implementation periods. Among the concerns discussed in Section 2 are that the suspension of concessions by the complaining state exacerbates the injury to it, and that suspension is more readily available to developed countries than developing countries. Such considerations raise the question of whether some form of compensation should either operate alongside or replace the suspension of concessions.

Section 3 distinguishes between trade compensation and financial compensation. The basic distinction is that trade compensation involves the defendant state lowering its tariffs in order to notionally rebalance negotiated concessions, while financial compensation involves the defendant state paying a monetary amount to the claimant state.[3] This section also briefly compares the merits of these different forms of compensation relative to each other and relative to the suspension of concessions. Section 4 considers the treatment of compensation in the DSU review negotiations, while Sections 5 and 6 address the unresolved issues which might prevent a stronger role for trade and financial compensation. These include the implications of provisions requiring most favoured nation (MFN) treatment, the notion that it may be politically more convenient for a state to endure the suspension of concessions than offer compensation and the problems connected with the calculation of compensation. Most of these issues have only recently begun to receive attention in the literature. Somewhat different analyses are presented in this article than have appeared to date.

Attention is then turned to the vital issue of whether WTO remedies should pay more attention to reparation in the sense of correcting the injury caused by WTO violations. This discussion arises naturally from the possibility that financial compensation might be disbursed in some way to the producers and importers who are actually injured by WTO violations. It is an important issue for a number of reasons. In discussing the difficulties with the calculation of financial compensation, Section 6 considers the concept of nullification or impairment. While the relevant language in the DSU directs the enquiry towards how the position of Members is affected by violations, this focus obscures the conceptual

21st Century, Taipei, 28–29 November 2003; available in the Trade Law Articles section of www.worldtradelaw.net.

2 These terms can be regarded as mutually exclusive although the present author does not subscribe to this view for reasons explained in Section 2.1, particularly in the final paragraph.

3 A possibility which is not discussed in this article is that the financial compensation could be provided either by the defendant state or another WTO Member at the conclusion of an auction of the right to retaliate run by the claimant state. Mexico has circulated a paper putting forward to the possibility of such tradable remedies in response to the difficulties faced by some Members in meaningfully exercising suspension rights. On this proposal, see K. Bagwell, P. C. Mavroidis, and R. W. Staiger, 'The Case for Tradable Remedies in WTO Dispute Settlement', World Bank Policy Research Working Paper No. 3314 (20 May 2004). http://ssrn.com/abstract=610359.

issue of whether and to what extent WTO violations cause adverse impact to states in addition to the adverse impact to private entities. This observation, coupled with the notion that it is only through the activity of private entities that the WTO Agreements can achieve their objectives, makes the absence of reparation in WTO law and practice somewhat surprising. Section 7 reinforces this impression by identifying an apparent disparity between the general international law position on reparation set out in the International Law Commission's Draft Articles on State Responsibility (ASR),[4] and the position with that in WTO law and practice.

Section 8 examines some of the possible explanations for why WTO remedies are a *lex specialis* with regard to reparation. Carmody's interesting theory that the distributive nature of WTO remedies explains their forward looking or prospective character is touched upon, as is the significance of the non-recognition of individual economic rights in the WTO texts and in the vocabulary of the WTO tribunals. Section 9 considers some of the problems with increased practice on reparation, which are in addition to those connected with financial compensation. The Appellate Body has confirmed that the disbursement of collected anti-dumping and countervailing duties is not permitted. This raises the question of whether the disbursement of both financial compensation, and the increased duties connected with the suspension of concessions outside the trade remedy context, is permitted at all. Section 9 also explains why states may be reluctant to grant financial compensation where it is understood that it will be disbursed with reparative effect. The explanation is not particularly satisfactory, but it may nevertheless operate in practice. It is that disbursement may undermine the protectionist intent underlying the violation. Section 10 concludes.

2. Problems with suspension as the WTO's primary rebalancing and compliance inducement device

For a number of reasons, there is a high level of support for the view that the suspension of concessions cannot credibly continue as the WTO's primary rebalancing and compliance inducement device.[5] The most obvious reason is

4 Adopted by the International Law Commission at its fifty-third session (2001) Supplement no. 10 (A/56/10) ch. IV.E.2). Text with Commentaries available at http://www.un.org/law/ilc/conventions.htm. On the State Responsibility Articles, see the symposium issues of the following journals: *European Journal of International Law*, 10(2) (1999); *American Journal of International Law*, 96(4) (2002).

5 Views to this effect have been expressed by much of the WTO Membership (particularly developing countries) in connection with the on-going review of the DSU. There is also much academic literature which has carefully examined the problems here. See, for example, J. Pauwelyn, 'Enforcement and Countermeasures in the WTO: Rules are Rules – Toward a More Collective Approach', 94 *American Journal of International Law*, 335 (1997); S. Charnovitz, 'Rethinking WTO Trade Sanctions', 95 *American Journal of International Law*, 792 (2001); S. Charnovitz, 'The WTO's Problematic ''Last

that suspension usually involves the raising of tariffs which contracts trade volumes. The other deficiencies are compiled below.

2.1 *Imbalance in the ability of states to retaliate*

Perhaps the most uncontested reason is that the effectiveness of retaliation (or the threat thereof) depends on the relative economic power of the disputants. Developing countries have made this point during the DSU review negotiations, noting the 'tremendous imbalance in the trade relations between developed and developing countries [which] places severe constraints on the ability of developing countries to exercise their rights [to suspend concessions].'[6] Lawrence, downplays the significance of this imbalance, with the argument that it is the 'mirror image' of smaller countries receiving WTO benefits without being required to make reciprocal concessions by virtue of negotiations based on the most favoured nation principle.[7] However, this point is not central to Lawrence's reform proposals, which would have the effect of removing the imbalance in the ability to retaliate. Perhaps more significantly, the possibility of cross-retaliation under Article 22.3 can go some way towards redressing this imbalance. This has previously involved Ecuador gaining the right to suspend the protection of intellectual property rights under the TRIPS in the context of non-compliance in the GATT/GATS related Bananas litigation.[8]

2.2 *Further injury to the retaliating state*

A further argument against suspension is the notion that it operates like a metaphoric boomerang in ill-trained hands. While the tariff increases may 'hit' the targeted industries in the responding state, at least where the retaliation is carried out by a large developed state, the problem is that they will more than likely return to 'hit' those who consume the targeted products in the state raising its import tariffs. This might involve private consumers in the complaining state paying more for toys, cutlery, and perfume, and its industry paying more for steel and nuclear reactors. Developing countries have again identified such internal efficiency losses as a key concern: 'The economic cost of withdrawal of concessions in the goods sector would have a greater adverse impact on the complaining developing-country Member than on the defaulting developed-country Member and would only further deepen the imbalance in their trade

Resort'' Against Noncompliance' originally published in *Aussenwirtschaft* December 2002, with a revised version of 14 August 2003, published on www.worldtradelaw.net.

6 TN/DS/W/19 of 9 October 2002. The imbalance has also been recognized in DSU Article 22.6 Arbitration proceedings. See, WT/DS27/ARB/ECU *European Communities-Regime for the Importation, Sale and Distribution of Bananas-Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, 24 March 2000, at para. 73.

7 R. Z. Lawrence, *Crimes and Punishments? Retaliation Under the WTO* (2003, Institute for International Economics), at 18.

8 Above note 6.

relations already seriously injured by the nullification and impairment of benefits.'[9]

2.3 *The equivalence principle*

A final problem which has been linked to suspension is that, even if a state can employ this remedy, it may have limited or no effect in inducing compliance. This is because the amount of retaliation must be equivalent to the level of nullification or impairment under DSU Article 22.4. Pauwelyn notes that, '[T]his is nothing more than a simple tit-for-tat or zero-sum game where, in principle, no more pressure is put on the violating country (by the trade sanction) than on the victim (by the original violation).'[10]

The equivalence principle can however be defended in a number of ways. It is notable that the position in the DSU on the suspension of concessions corresponds approximately with that set out in the ASR. In particular, Article 51 entitled 'Proportionality' provides that, 'Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question'. It can be questioned however whether the similarity in the language used should be taken to indicate that the DSU reflects the ASR, even on countermeasures. As will be seen below (Section 7), reparation is clearly envisaged in the ASR, in contrast to the DSU. Reparation may provide a powerful incentive for cessation in addition to the presence of countermeasures, since the scope for reparation will increase along with the duration of the illegal measure. Therefore, one of the possible explanations for commensurate countermeasures in the ASR is absent from the DSU.

Lawrence's analysis of the equivalence principle ultimately depicts it as a virtue of the present system, even though he initially establishes that the equivalent suspension of concessions alone does not provide deterrence against inefficient breaches of WTO obligations. The equivalence principle therefore lends itself to a situation whereby the defendant state rationally chooses to breach its obligations even though the cost of compliance is less than the injury to the claimant state. This is illustrated in the following passage.

> If politicians are concerned only about the trade balance, they may feel compensated but in terms of economic welfare, only (external) harm done to the plaintiff country due to the decline in its terms of trade can be taken care of by suspension. If it retaliates, the plaintiff country will not be compensated for the (internal) efficiency losses [such as less efficient levels of production and consumption] that will result from its higher tariffs. Instead of finding itself in the position it would have been in had the agreement been implemented, the

9 TN/DS/W/19 of 9 October 2002. This point was also recognized in the *EC–Bananas* arbitration, above note 6.

10 J. Pauwelyn, 'WTO Victory on Steel Hides Deficiencies', *Jurist Legal Intelligence*, 23 January 2004 http://jurist.law.pitt.edu/forum/Pauwelyn1.php

> plaintiff will find itself in the position it was prior to the negotiation that resulted in the agreement.[11]

It follows that, if inefficient breaches are to be discouraged, increasing the level of suspension of concessions beyond the level of nullification or impairment would not be satisfactory. This would have the counterproductive effect of increasing the internal efficiency losses. Lawrence therefore identifies the possible alternative of 'additional compensation equal to the efficiency costs incurred by the plaintiff when retaliating by raising its border barriers'.[12] This would bring WTO remedies close to expectation damages in contract, whereby the WTO member is placed in the position it would be in had there been no WTO violation. There would then be an economic incentive to avoid inefficient breaches.

Lawrence's analysis to this point supports stronger disciplines or increased practice on compensation, as an addition to the equivalent suspension of concessions. However, it then turns away from this conclusion and proceeds to explain why the equivalent suspension of concessions alone is preferable. In general, the argument is that strengthening the system of enforcement can influence the extent to which Members are prepared to liberalize in the first place. Lawrence refers more specifically to Ethier's work which argues that, 'rebalancing with commensurate responses is an optimal approach when countries negotiating trade agreements are subject to considerable uncertainty about whether they could find themselves out of compliance'.[13] Lawrence attaches great significance to this reasoning and elaborates upon it at various points in his text.[14]

This work therefore explains why compensation should not supplement the equivalent suspension of concessions. Lawrence's main reform proposal is rather that a specific form of trade compensation should substitute the suspension of concessions. Among other advantages, this would avoid the internal efficiency losses caused by the suspension of concessions and move the system closer towards achieving expectation damages. A problem with this substitution is discussed below (Subsection 5.1). States may be reluctant to grant trade compensation if, as is widely thought, it must be granted on a MFN basis, whereas, as is known, the suspension of concessions occurs bilaterally.

A further observation, which excuses the equivalence principle from being among the deficiencies of suspension, is that states which win the right to retaliate frequently do not do so.[15] When the right is exercised, states do not necessarily immediately retaliate to the full equivalent amount of the level of nullification or

11 R. Z. Lawrence, above note 7, at 37.

12 Ibid. at 38.

13 Ibid. at 45.

14 Ibid. at 18, 39, 44, and 45.

15 For a statistical analysis of this point see K. Bagwell, P. C. Mavroidis, and R. W. Staiger, above note 3, at 12–13.

impairment.[16] There are different possible explanations for these observations. One is that winning the right to retaliate and signalling strong discontent in the international community about the lack of good faith of a trading partner, may be more important than the precise value of trade which retaliation can affect. Another explanation is the awareness of states that suspension results in internal efficiency losses. Neither explanation need be seen as undermining the compliance inducement rationale of trade retaliation. On the one hand, the mere threat of retaliation may immediately induce compliance;[17] on the other hand, disproportionate retaliation may not have a significant impact. This latter point was acknowledged by the Arbitrator in *United States-Continued Dumping and Subsidy Offset Act of 2000*.[18] It therefore seems to be a reasonable position that, if suspension does not result in compliance, this will frequently not be because of the equivalence principle.

3. Substituting the suspension of concessions with compensation

There are valid reasons for why the suspension of concessions can be seen as a problematic rebalancing and compliance inducement device. This raises the issue of whether suspension should be substituted with some form of compensation.

What little the DSU does say about compensation is set out in Article 22:1:

> Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred

16 For example, in response to the failure of the United States to bring its tax treatment of foreign sales corporations (found to be a prohibited subsidy) into conformity with WTO obligations, the Dispute Settlement Body granted authorization to the EC to suspend concessions on US exports to the value of $4.043 billion. The Regulation specifies an initial additional duty of 5% on 1,608 US products. This duty is to rise automatically by 1% each month until it reaches a ceiling of 17% in March 2005. At that point, the EU will make a determination on its next course of action if the United States still has not complied with the WTO ruling. The EC has chosen to phase in the trade sanctions, with the additional amount collected in the first year of the sanctions amounting to less that one ninth of the total amount authorized. Council Regulation (EC) No. 2193/2003 of 8 December 2003, OJ 2003 L328/3.

17 S. Charnovitz, in the second article cited above (note 5), suggests (at p. 5 of the electronic version) that the threat to seek suspension may have prompted compliance and settlement in Canada's complaint against Australia on Salmon.

18 WT/DS217/ARB/BRA, 31 August 2004. See footnote 131 of the report. The Arbitrator could not 'exclude that inducing compliance is part of the objectives behind suspension of concessions', but also stated that, 'at most it can be only one of a number of purposes in authorizing the suspension of concessions' (para. 3.74) Little was said about the numerous purposes of suspension beyond compliance inducement, other than that the required equivalence, 'seems to imply that suspension … is only a means of obtaining some form of temporary compensation, even when the negotiation of compensation has failed' (para. 6.3). Also notable is the call from the Arbitrator that the 'object and purpose' of suspension of obligations should be expressly identified by the DSU (para. 6.5).

> to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements.

The DSU does not therefore dictate the form which compensation should take, but two types of compensation have emerged from practice: trade compensation and financial compensation.

3.1 Trade compensation

Trade compensation involves the defendant which has failed be bring a successfully challenged measure into conformity offering to lower its tariff levels on products exported by the complaining state.[19] Trade compensation is not tainted by all of the problems associated with suspension. Most notably, trade compensation creates rather than contracts trade. Unlike suspension, it is equally available to all WTO Members although in practice it may be difficult to secure agreement since compensation is entirely voluntary and the relative economic power of the disputants might have a bearing here. Also, unlike suspension, trade compensation does not aggravate the injury caused to the claimant state, and there are no innocent victims unless the producers in the defendant state facing greater import competition by reason of the reduced tariffs are so regarded. It is also possible to argue that trade compensation can have a higher compliance inducement effect than suspension. The complaining state may be inclined to argue that the extent to which tariffs are lowered by the defendant state should fully reflect the level of nullification or impairment. This is in contrast to the position with suspension where the complaining state may be reluctant to raise tariffs to reflect the full level of nullification because of the internal efficiency losses caused by suspension. In practice, the value of trade temporarily created by trade compensation may be higher than the value of trade temporarily lost through suspension. It is conceivable that this would lend a higher compliance inducement effect to trade compensation.

3.2 Financial compensation[20]

Financial compensation involves the defendant state paying monetary amounts to the claimant state or some representative industry body while the violation remains in place. Two indications of moves towards financial compensation can be noted. In the WTO context, such compensation was agreed upon after the DSU Article 25 arbitration proceedings in the *US–Copyright* case.[21] Outside

19 The limited practice on trade compensation is described in Sections 5.1 and 9.2.

20 See, M. Bronckers and N. van den Broek, 'Financial Compensation in the WTO: Improving the Remedies of WTO Dispute Settlement', 8 *Journal of International Economic Law*, 101 (2005).

21 WT/DS160/R, *United States Section 110(5) of the US Copyright Act*, adopted 27 July 2000; WT/DS160/ARB25/1 *Recourse to Arbitration Under Article 25 of the DSU*, 9 November 2001. See, G. M. Grossman and P. C. Mavroidis, 'United States-Section 110(5) of the US Copyright Act, Recourse to Arbitration under Article 25 of the DSU: Would've or Should've? Impaired Benefits due to

the WTO context, it is notable that the US has entered into a number of free trade agreements (FTAs), all of which expressly envisage the making of 'monetary assessments' in the event of non-implementation of panel reports.[22]

The *US–Copyright* case was brought by the EC as a result of representations from the Irish Music Rights Organisation (IMRO) with the support of Groupment Europeen Des Societes D'Auteurs et Compositurs (GESAC) members. It concerned provisions of the US Copyright Act providing exceptions to the exclusive rights of copyright holders to the public broadcast of their works. These exclusive rights are protected by TRIPS Article 9(1), which requires Members to comply with Articles 1–21 of the Berne Convention.

The largest exception was the so-called 'business exemption' dealing with the broadcast of non-dramatic musical work in business establishments by non-right holders without payment of royalties. Under the business exemption, this is not considered to be an infringement of copyright, provided (among other conditions) the establishments are below a certain size. The key legal issue was whether the US could successfully rely upon TRIPS Article 13, which permits Members to have limited exceptions to the exclusive rights in copyright. The panel found that the business exemption infringed all three criteria required to be met by the US.

Based on its findings, the Panel issued the standard DSU Article 19 recommendation that the US bring the business exemption into conformity with its obligations under the TRIPS Agreement. The reasonable time period for implementation was set at 12 months from the date of adoption of the panel report. Implementation was not forthcoming and the parties thereafter notified their intention to resort to arbitration under Article 25.

The Arbitrator set the level of nullification or impairment at $1.1 million per year. Nineteen months after this award, and 35 months after the adoption of the panel report, the parties notified a mutually satisfactory temporary arrangement.[23] This takes the form of a three-year compensation package. This period commenced with the expiry of the reasonable time period for implementation of the panel ruling. The compensation therefore takes account of the continuing injury, beyond the point where the WTO violation should no longer be in existence. The three years expires on 21 December 2004, whereupon the parties can either reach a final resolution or the EC can request the suspension of concessions.[24] The compensation consists of a lump-sum payment of $3.3 million

Copyright Infringement', 2 *World Trade Review*, 233 (2003); B. O'Connor and M. Djordjevic, 'Practical Aspects of Monetary Compensation: The *US–Copyright* Case', 8 *Journal of International Economic Law*, 127 (2005).

22 The texts of these free trade agreements are available on the web-pages of the United States Trade Representative at http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html

23 WT/DS160/23 of 26 June 2003.

24 As of April 2005, the WTO's web-pages detail a number of status reports from the US, all of which conclude with the following statement: 'Administration has been consulting with the US Congress

to a fund set up by GESAC in the EC for the provision of general assistance to their members and the promotion of authors' rights.

The FTAs noted above refer to 'annual monetary assessments' in their provisions on dispute settlement. Under these FTAs non-implementation of panel reports should first result in negotiations, 'with a view to developing mutually acceptable compensation'.[25] Failure to reach agreement here creates a right to the equivalent suspension of benefits. Suspension cannot however occur if the defendant Party promptly notifies its intention to pay 'an annual monetary assessment'.[26] Under Article 20.7, entitled Non-Implementation in Certain Disputes, the compensation procedure becomes stricter where the violation relates to environmental or labour laws. The lack of prompt implementation here allows the complaining Party at any time to 'request that the panel be reconvened to impose an annual monetary assessment on the other Party'. It is further provided that the assessments here be paid into a fund and expended on labour or environmental initiatives, including efforts to improve or enhance labour or environmental law enforcement.

Relative to the suspension of concessions, financial compensation has comparable advantages to trade compensation. It does not contract trade. In principle, it is equally available to all states and it does not aggravate the injury to the claimant state. Financial compensation also has some advantages over trade compensation. It may have a higher compliance inducement effect, even if the amount paid is calculated with reference to the level of nullification or impairment. This is because the payment of a monetary amount may be felt more keenly than adjustments to tariff levels. However, the negative side of this possibly higher compliance inducement effect may be that states are more reluctant to agree to financial compensation. A second possible advantage is that the compensation could be disbursed to the private entities who are injured by WTO violations. Financial compensation could therefore be linked to reparation.

4. The treatment of compensation in the DSU negotiations

Proposals for stronger disciplines on compensation have featured heavily in the on-going negotiations on the clarification and improvement of the DSU. Significant differences remain, and some Members (particularly developing countries) are likely to consider that the eventual agreed text does not go far enough. However, there has been overwhelming support for the view that compensation is preferable to suspension as a rebalancing and compliance

and will continue to confer with the European Communities in order to reach a mutually satisfactory resolution of this matter.'

25 Article 20.6.1 of the Singapore Agreement. The other Agreements use the same language.

26 Article 20.6.5 of the Singapore Agreement.

inducement device.[27] This is reflected in the so-called 'Chairman's Text' which sets out possible revisions to the structure and content of the DSU.[28] It is useful to set out what will and will not likely change:

- The respondent will remain obliged to enter into consultations on compensation if so requested by the complainant.
- Reference is made to 'mutually acceptable trade or other compensation', adding to the existing text which refers to 'mutually acceptable compensation'. This makes it explicit that compensation can take a number of different forms and has probably been incorporated in light of the compensation package in *US–Copyright*, where (as noted above) a form of financial compensation was agreed.
- It is provided that, 'Within [A:30] [B: 20] days from the request, the Member concerned [shall] [should] submit to the other Member a proposal for mutually acceptable trade or other compensation'. This is a positive development. Under the existing text, there is no explicit obligation to submit such a proposal. While, even under the new text, the need for a proposal could be ignored if the respondent has decided to endure the suspension of concessions, it would then risk being confronted with an accusation of lack of good faith.[29] This might act as a powerful inducement to prepare a proposal.
- Where the complainant is a developing country, it is provided that, 'the suitable form of compensation should also be an important consideration'. This perhaps takes account of the fact that a number of developing countries have called for financial compensation,[30] sometimes on a retrospective basis.[31] Also significant is the recognition that least developed country Members encounter 'specific constraints … in finding effective means of action through the possible withdrawal of concessions or other obligations'.[32]
- Where there is disagreement on the level of nullification or impairment caused by a violation, the negotiations on compensation will need to be informed by the result of arbitration proceedings to determine this level. A problem at present is that 'it is only in requesting the suspension of concessions and in triggering an Article 22.6 DSU arbitration that the parties will know the level of nullification and impairment'.[33] The unusual manner in which this problem was avoided in *US–Copyright* shows that the general position is problematic.[34] The proposed text

27 This emerges clearly from the minutes provided by TN/DS/M/1 of 16 June 2002.

28 Chairman's text of as 28 May 2003 (Job(03)/91.Rev.1), available as an Annex to document TN/DS/9 of 6 June 2003.

29 Ecuador has expressed the questionable view that if no compensation proposal is submitted, an irrebutable presumption of good faith would apply, and that the DSB would assume that the respondent intended to compensate the complainant in cash. TN/DS/M/3 of 9 September 2002, at para. 29.

30 China – TN/DS/W/29; Ecuador – TN/DS/W/9.

31 Group of Developing Countries – TN/DS/W/17; African Group – TN/DS/W/15.

32 This concern was expressed most strongly by the African Group – TN/DS/W/15.

33 This problem was identified by the EC in TN/DS/W/1.

34 The case represents the only example of recourse to Article 25 in the WTO's history. This was a surprising development since it was not immediately obvious what could be achieved through the

remedies this by envisaging proceedings on the level of nullification or impairment before the request to suspend concessions is made.

These reform proposals seem to have the intention of steering parties locked in a dispute away from seeing the suspension of concessions as the only realistic option where there is a continuing violation. If successful, this might lead to the gradual substitution of the suspension of concessions with either trade compensation or financial compensation as the WTO's main rebalancing and compliance inducement devices. Bearing in mind the relative merits of these instruments, this would be a significant achievement. The text advises rather than mandates respondents to draft proposals on compensation, and might therefore be criticized for not going far enough. However, the desire to avoid an allegation of lack of good faith ought to provide enough suasion. There are however difficulties and challenges with the envisaged substitution, some of which do not yet seem to have been clearly identified or discussed, and others of which may have been overstated.

5. Problems with the replacement of the suspension of concessions with trade compensation

Two possible barriers to the gradual phasing out of the suspension of concessions in favour of trade compensation are identified below. They relate, first, to whether MFN treatment applies in this context and, second, to political difficulties associated with the lowering of import tariffs.

5.1 MFN treatment

Neither the existing DSU nor the proposed text makes any reference to compensation on a MFN basis. This omission is surprising since a number of Members have suggested that MFN compensation is appropriate.[35] Those arguing for MFN compensation probably have a two-stage argument in mind. DSU Article 22:1 states vaguely that, 'Compensation … shall be consistent with the covered

arbitration, as opposed to the continuation of the panel proceedings. The purpose of the arbitration was to calculate the level of nullification or impairment, but without any explicit linkage to the suspension of concessions. Under DSU Article 22, the calculation of the level of nullification or impairment is closely connected with setting the level of suspension of concessions, and it seems reasonably clear from the Arbitration report that the parties wished to distance themselves from this connection. Article 25 is suitable for this purpose because of its flexibility on the purposes for which it can be used, as well as the procedures to be followed.

35 See the views of Australia in TN/DS/M/1 of 12 June 2002, at para. 42; EC in TN/DS/W/7 of May 30, 2002; Thailand in TN/DS/M/3 of 9 September 2002, at para. 13. Other Members have viewed proposals relating to MFN compensation as too radical a departure from the present approach. See, for example, Norway TN/DS/M/3 of 9 September 2002, at para. 11. In this document, at para. 15, Japan sets out a more nuanced view, noting that the MFN compensation might depend on whether the, 'applicable measure was applied on a non-discriminatory basis'. This is probably an indication that MFN compensation ought to be a prospect where the measure affects imports generally rather than only imports from particular Members.

agreements.' The argument continues that compensation must therefore be consistent with the MFN provisions in the WTO Agreements. GATT Article 1:1 provides in part that, 'With respect to customs duties and charges' and 'all rules and formalities in connection with importation and exportation' which are 'imposed' … 'any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties'.[36]

For trade compensation, involving the responding Member lowering its import tariffs for certain products, the present position appears to be that all WTO Members will benefit from the tariff reductions, so that the compensation is therefore on a MFN basis. The limited practice on trade compensation indicates that tariff levels are simply lowered, rather than lowered in respect only of exports from the complaining state.[37] Practice therefore reflects the EC view that 'trade compensation, while based on a bilateral agreement, will have to be applied *erga omnes* on a MFN basis, whereas suspension of concessions is a measure only available to the parties of the dispute.'[38]

Because of this position, it is possible to envisage a difficulty with trade compensation replacing the suspension of concessions. The starting point here is to identify the overall value of additional trade which would be created by the trade compensation. The DSU is silent on this point, although the same approach as for the suspension of concessions can reasonably be suggested. The value of additional trade would then be equivalent to the level of nullification or impairment, which in turn normally corresponds with the value of trade lost by reason of the continuing violation.[39] The problem with MFN treatment here is that the claimant state does not receive all the benefit of the value of additional trade which is created. The benefit is rather dispersed among the WTO Membership on a MFN basis. The claimant state may therefore be reluctant to accept the benefit of a portion of MFN trade compensation when it can instead (at least in mercantilist terms) opt to receive the full 'benefit' of suspending concessions.

On the other hand, the fact that some claimant states may not be able to effectively suspend concessions, and the notion that suspension injures the retaliating state, may make the option of taking part of the benefit of MFN trade compensation an attractive option. Also, when trade compensation is discussed,

36 On the MFN provisions see, M. Matsushita, T. J. Schoenbaum and P. C. Mavroidis, *The World Trade Organization: Law, Practice and Policy* (Oxford University Press, 2002) at 143–154.

37 This is indicated, for example, by the solution notified in *Turkey – Restrictions on Imports of Textile and Clothing Products* (WT/DS34/14), 19 July 2001, described in Section 9.2.

38 TN/DS/W/7 of 30 May 2002. Regarding suspension of concessions, the DSU clearly supports the EC's point. Article 22.2 provides that, 'any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements'. This provision clearly places the suspension of concessions on a bilateral basis.

39 This point is discussed in Section 6.3.

it is for the disputants to identify the products whose tariffs will be reduced. Products which are only exported from the complaining state, or from a small number of states, could be identified thereby negating the formal requirements of MFN obligations. The apparent uncertainty here does indicate, however, that the negotiators might turn their attention to the whether MFN treatment does and should apply in the context of trade compensation. This is something of a dilemma since the lowering of tariffs is perhaps the classic situation in which MFN obligations apply. It does however seem to be anomalous that suspension is available on a bilateral basis, whereas trade compensation which serves the same rebalancing and compliance functions seems to be subject to MFN obligations. This is all the more so when this position may discourage recourse to trade compensation, and consolidate the reliance on suspension.

5.2 Political difficulties associated with the lowering of import tariffs

There is also a second, albeit lesser, problem with the envisaged substitution. Trade compensation will not be popular with the defendant state's producers who compete with the products whose import tariffs are lowered. Of course, the same producers will also not be happy with increased tariffs on their exports if the defendant state opts to endure the suspension of concessions. While these two situations may not in reality be different, it is perhaps easier for a defendant state to depict the raising of tariff barriers by another state as something beyond its control. In contrast, it may be politically difficult for the defendant state to lower its own tariff barriers. This possible problem applies to *ad hoc* trade compensation arrangements, whereby the tariffs which are lowered are selected in individual disputes. However, the problem becomes more pronounced as the trade compensation arrangements become more formalized. Lawrence has, for example, proposed a system of contingent liberalization commitments (CLCs), whereby WTO members might pre-announce (among other possibilities) the sectors in which liberalization would take place.[40] It is correctly noted that pre-announcement, 'would create domestic constituencies in each country that would lobby for compliance, motivated by the prospects of losing protection'.[41] It is perhaps the case however that the same producers would lobby even harder for their non-inclusion on the CLC list.

6. Problems with the replacement of the suspension of concessions with financial compensation

If adopted, the Chairman's text would open the door to negotiations on financial compensation. Collected monetary amounts might in turn have a reparative effect if disbursed to the private entities who are injured by violations. Most of the

40 R. Z. Lawrence, above note 7, at 86.
41 Ibid. at 87.

problems and unresolved issues in connection with a stronger role for financial compensation apply whether or not the compensation is eventually applied with reparative effect. These problems are discussed below.[42] Overall, it is felt that they have been overstated.

6.1 MFN treatment

An initial issue here is how the MFN obligations apply to arrangements for financial compensation.[43] It is difficult to conceive of a meaningful way in which MFN obligations could be applied to financial compensation. The language of GATT Article I refers to, 'any advantage, favour, privilege or immunity' connected with 'customs duties and charges', 'all rules and formalities in connection with importation and exportation' and 'all matters referred to in paragraphs 2 and 4 of Article III [internal taxes or other internal charges and all laws regulations and requirements affecting internal sale, offering for sale, purchase, transportation or use]'. The granting of financial compensation does not seem to fall under or correspond with this language. While it may be possible to demonstrate that financial compensation confers an 'advantage' on products originating in another country, it does not involve relaxing or removing a previously imposed custom duty, rule or formality, or internal tax. Thus, where the operating MFN obligation is GATT Article I, there seems to be an obvious reason for distinguishing between financial compensation and trade compensation. The language clearly applies to the lowering of tariffs associated with trade compensation. Equally clear is that the provision was not drafted with financial compensation in mind.

Even if certain MFN obligations can be interpreted as applying to financial compensation,[44] it is submitted that they should not be. O'Connor and Djordjevic defend their view that, 'compensation, whether or not offered in moneys, must be administered in accordance with non-discriminatory principles of the WTO'.[45] The analysis does not however clearly identify the practical implications of MFN obligations in the context of financial compensation, beyond a suggestion that MFN might require the establishment of, 'a general fund available to all WTO Members'.[46] To the present author, the development of this suggestion reveals why the implications of MFN obligations are a non-issue in this context. Surely, the entitlement of any WTO Member to access the fund would depend upon establishing that nullification or impairment has been sustained. As this

42 The treatment of these problems is not exhaustive. In particular, other authors have expressed views on problems connected with obtaining budgetary authorization for financial compensation. See M. Bronckers and N. van den Broek, above note 20; B. O'Connor and M. Djordjevic, above note 21.

43 For different analyses of this point to that presented here see M. Bronckers and N. van den Broek, above note 20 at 119; B. O'Connor and M. Djordjevic, above note 21 at 131.

44 For example, the MFN provision in TRIPS Article 4 is expressed in more expansive language than GATT Article I, and may therefore be capable of being interpreted as applying to financial compensation.

45 Above note 21, at 132. It is clear that the authors have MFN obligations in mind in referring to 'non-discriminatory principles of the WTO'.

46 Ibid. at 133.

has to be authoritatively determined, the real issue here is whether a Member is sufficiently connected with the proceedings for the tribunal to address whether it has been injured by the violation. At present this connection will probably only be sufficiently close for the main parties to the dispute.[47] The point for discussion then becomes whether it would be appropriate to have some kind of expedited arbitration procedure for third parties and/or non-parties to assert that they have been injured by an established violation.[48] On the whole, a rule that only the main parties to a dispute can assert a right to compensation would facilitate the smooth operation of the dispute settlement system.[49] It is not unreasonable to expect states with a strong interest in a case to join it as a main party, although greater flexibility should perhaps be accorded to developing and least developed Members.

The comments above are presented as plausible arguments rather than as final definitive solutions. Formal clarification of the position is required, not least because the Chairman's text seems to obliquely refer to financial compensation in the reference to 'trade or other compensation'.

6.2 *Calculating the amount of financial compensation*

The second issue involves the methodology for calculating the amount of financial compensation. The most obvious starting point is that the compensation should be based on the level of nullification or impairment caused by the violation. This would have the advantage that arbitrators have on a number of occasions been required to attribute a monetary value to the level of nullification or impairment in connection with the suspension of concessions. It is also notable that, after the *US–Copyright* arbitration proceedings, the parties agreed upon financial compensation which corresponded exactly with the figure reached by the arbitrator on the level of nullification or impairment.

47 Support for this view is provided by the present text of DSU Article 9 (*Procedures for Multiple Complainants*) and Article 10 (*Third Parties*). Article 9:1 envisages a single panel to consider multiple complainants related to the same matter. More pertinently, Article 10:4 provides that '[I]f a third party considers that a measure already the subject of a panel proceeding nullifies or impairs benefits accruing to it under any covered agreement, that Member may have recourse to normal dispute settlement procedures under this Understanding.' The implication of these provisions is that a WTO Member must be a main party to proceedings if it expects a panel to adjudicate on whether it has been injured by a WTO violation.

48 The present Article 25 entitled *Arbitration* could potentially serve this purpose, and, indeed, was instrumental in enabling the parties in *US–Copyright* to reach an agreement on compensation. It is also notable that Australia has proposed that third parties should have access to Article 25 to determine their rights to compensation (TN/DS/W/49 of 17 February 2003). However, the very flexibility of Article 25 is arguably a weakness if it is envisaged that recourse to arbitration on compensation will become commonplace. In this event, a new provision setting out procedures and time schedules would be preferable.

49 Third party rights in dispute settlement were discussed most extensively in TN/DS/M/4 of 6 November 2002. The present author is inclined towards the view of Ecuador (para. 18) that the rights of third parties cannot be elevated to those of the main parties to the dispute.

Finally, the FTAs described above clearly link the amount of the monetary assessment with the level of nullification or impairment, albeit that the amount of the assessment is set at a level equal to 50% of the level of nullification or impairment.[50]

The immediate suitability of a methodology based upon nullification or impairment depends on whether the considerations which arbitrators have taken into account in suspension proceedings apply equally to compensation. The starting point here is to identify exactly what a WTO violation nullifies or impairs. While there is no definite answer, guidance is provided by GATT Article XXIII:1 entitled *Nullification or Impairment*, and a number of DSU provisions.[51] The nullification or impairment which may result from a violation is to the benefits accruing to a WTO Member directly or indirectly under the covered agreements.[52] DSU Article 3:8 also establishes a presumption that infringement of WTO obligations will result in nullification or impairment which is described as an 'adverse impact' on Members.[53]

One point which can be made with certainty is that the relevant provisions focus on how the position of the Members is affected by the violation. However, this focus draws attention away from the conceptual issue of whether and to what extent WTO violations cause adverse impact to states independently from and in addition to the adverse impact to private entities.

This issue was alluded to in the *US–Copyright* arbitration.[54] The Arbitrators noted their awareness that:

> their task in this case is to determine the benefits which are denied to the *European Communities* rather than determining the benefits which are denied to *EC right holders*. However, there can be no question that the benefits which are denied to the European Communities include the benefits which are denied to EC right holders. What is more, the European Communities has not made out a claim to the effect that [the US measures are] nullifying or impairing benefits additional to those which EC right holders could otherwise derive from [certain provisions of the TRIPS and the Berne Convention 1971.][55]

50 Article 20.6.5 of the Singapore Agreement. This provision probably reflects the more pronounced political difficulties with paying financial compensation as opposed to allowing for trade compensation or enduring the suspension of concessions. A further possible explanation links back to the points made in Section 2.3 that states sometimes either do not exercise the right to suspend concessions at all, or do not immediately suspend concessions to the full extent permitted. Interestingly the 50% guideline does not apply to labour law and environmental law disputes, reflecting perhaps the priority given to compliance in these areas. See Article 20.7.2.

51 See DSU Articles 3:5; 22:8; 23 and 26:1.

52 This is representative of the language used in the various provisions.

53 The terms 'violation' and nullification or impairment' are therefore separate and distinct, although there is a presumption that the latter will follow from the former.

54 Above note 21. This was an Article 25 arbitration. However, the level of nullification or impairment was calculated and so, to this extent, the position is the same as if it had been an Article 22.6 arbitration.

55 Ibid. at para. 3.19.

The Arbitrators acknowledge here that they were not called upon to consider any injury to the EC, independent of the injury suffered by the exclusive right holders. A possible explanation for the non-identification of the state injury is that the TRIPS is concerned with protecting exclusive rights which are normally held by private entities. It is therefore natural that the level of nullification or impairment was assessed with reference to the economic value of the denied exclusive rights (in the form of foregone royalties), rather than with reference to state injury.[56]

The focus on how the violation impacts upon private entities is not as strong and direct in other arbitrations, where the level of nullification or impairment has been calculated. The *US–Copyright* arbitrators themselves identified the benefits nullified or impaired in all the previous cases. They collectively read as, 'benefits nullified or impaired: losses in US exports of goods and losses by US service suppliers in services supply; losses by Ecuador of actual trade and of potential trade opportunities in bananas and the loss of actual and potential distribution service supply; foregone US and Canadian exports of hormone treated beef and beef products'.[57] In these cases, nullification or impairment was equated with trade effects, which in turn refers to the total value of trade annually excluded. This methodology distances the concept of nullification or impairment from how the violation impacts upon private entities. Were this the focus, other considerations, such as lost profits, would be more relevant. However, trade effects are felt most directly by private entities so that it remains difficult to clearly distinguish the injury to the state as a whole from the injury to private entities.

The most recent Article 22.6 arbitration, *United States-Continued Dumping and Offset Act of 2000*,[58] adopts a slightly different approach in that the trade effect of the violation on the Requesting Parties was not exclusively equated with the resulting direct trade loss. Rather, the calculation of the trade effect, and hence the level of nullification or impairment, was partly based on[59] the value of the violation, which in this case was the value of the anti-dumping duties collected

56 Ibid. at para. 3.3.

57 Ibid. at note 39.

58 WT/DS217/ARB/BRA of 31 August 2004.

59 It is necessary to explain here why it is deemed appropriate to use the phrase 'partly based on'. It is arguably inappropriate since the Arbitrator rejected the contention of the Requesting Parties that there was a right to suspend concessions up to the full amount of the disbursements (Paras. 3.18–3.56). Also notable, however, is that the Arbitrator did, 'not agree with the United States that nullification or impairment is to be limited in all instances to the direct trade loss resulting from the violation'. The same paragraph concludes, '[P]revious arbitrators' decisions based on direct trade impact are not binding precedents' (para. 3.70). The Arbitrator then proceeded to produce an economic model to identify a coefficient which, 'when multiplied by the amount of the disbursements over a given period, would produce a figure corresponding to a trade effect which could reasonably be deemed to correspond the level of nullification or impairment for that period' (para. 3.80). The phrase 'partly based on' seems to be defensible given the centrality of the value of the disbursements to the calculation of the level of nullification or impairment, the fact that a high coefficient of 0.72 was decided upon, and the fact that, '[I]f no disbursements are made, the level of suspension will have to be ''zero''' (para. 4.24).

by the US and then wrongfully disbursed to US firms contrary to various WTO obligations. However, using the value of the violation as a partial basis for setting the level of suspension does not negate the possible presence of injury to private entities. Firms competing with US firms who have wrongfully received the disbursed duties might encounter a competitive disadvantage. Rather, a possible explanation for this alternative basis is that, where a value *can* be attributed to the violation with certainty, it is more objective to base the level of nullification or impairment on this rather than the volume of trade lost, which is more speculative.[60]

It seems therefore that the methodology used in arbitration proceedings to set the level of suspension of concessions can be directly relevant to financial compensation. The *US–Copyright* arbitration provides an example of this, albeit that it is atypical. Other cases show that the concept of nullification or impairment is sufficiently broad and flexible to accommodate a methodology which would respond more directly to injury caused to private entities by WTO violations. Whether such a methodology is acceptable depends in part on the view taken on the conceptual issue identified above. It is plausible to contend that any adverse impact upon states caused by WTO violations occurs by reason of the adverse impact on private entities. There is arguably no state injury in the same sense as, for example, when a military aircraft is shot down.[61] If this is accepted, then there is nothing to absolutely prevent arbitrators from setting the level of financial compensation under the banner of calculating the level of nullification or impairment. Absent any absolute bar, practical difficulties would undoubtedly be encountered. It is true that the figure arrived at would be

60 Strong support for this explanation can be found in the SCM Article 4.11 arbitrations on the level of appropriate countermeasures. Footnote 58 of *the Brazil–Aircraft* arbitration states that, 'The Arbitrators were of the view that, if the calculation of appropriate countermeasures based on the amount of the subsidy were compatible with Article 4.10 of the SCM Agreement, it would be preferable to follow this approach since it could lead to a more objective result', WT/DS46/ARB of 28 August 2000. Subsequently in the *Canada–Aircraft* arbitration, Brazil argued that the level of countermeasures should be based on the level of lost sales/competitive harm as this would produce higher figures and therefore a more pronounced compliance inducement effect than countermeasures based on the amount of the subsidy. The Arbitrator preferred however to use the amount of the subsidy as the starting point noting (at para. 3.48) the, 'uncertainty as to the level of countermeasures that would result in compliance'. This basis resulted in a figure of around $206.5 million, or around one sixteenth of the figure requested by Brazil. This figure was then revised upwards to take account of Canada's indication that it had no intention of withdrawing the subsidy, and the need to reach a level of countermeasures, 'which can reasonably contribute to induce compliance' (para. 3.119). WT/DS222/ARB of 17 February 2003.

61 It is acknowledged however that WTO violations may cause pronounced injury to states. This might be the position, for example, when the injured state is a small developing country which is highly dependent on the exports lost by reason of the WTO violation. This is illustrated in chastening terms by Ecuador's comments during the Bananas arbitration. 'Ecuador emphasizes that the banana sector is the lifeblood of its economy. Ecuador is the largest exporter of bananas in the world and the largest exporter to the European market. Banana production is also the largest source of employment and the largest source of foreign earnings. Nearly 11 per cent of Ecuador's population is totally dependent on this sector … In Ecuador's view, the banana industry is of greater importance to its economy than the whole agricultural sector in most developed countries.' Above note 6 at para. 129.

nothing more than a very approximate reflection of the injury caused by the violation,[62] that there is significant scope for disagreement on the exact methodology and economic modelling to be used,[63] and that fine-tuning may be necessary.[64] However, the difficulties and uncertainties seem to be comparable, regardless of why the level of nullification or impairment needs to be known, be it for setting the level of trade compensation, financial compensation, or the suspension of concessions.

6.3 Retrospective compensation

If it were thought desirable that compensation should address the nullification or impairment caused by challenged measures prior to the outcome of formal proceedings, a number of points would have to be clarified either on an *ad hoc* basis, or through more formal disciplines. The questions here apply equally to trade compensation and financial compensation.

Clarification would firstly be required on when compensation should be regarded as retrospective as opposed to prospective. A certain stage in WTO proceedings would need to be identified, and only if the compensation is connected with injury occurring before this point should it be regarded as retrospective. The earliest point can be regarded as the date of adoption of panel or Appellate Body recommendations.[65] Perhaps the most likely watershed, however, is the expiry of the time period for the implementation of findings on the basis that the offending measure should by then no longer be in existence. Compensation

62 The *US–Copyright* Arbitrators noted that they had to make, 'a number of estimations, and, in some cases certain assumptions based on what [they] perceived to be the most reasonable estimate in light of the arguments of the parties' (Para. 4.36). There is nothing unusual about this type of caveat. In the *Canada–Aircraft* arbitration, the arbitrators noted that, 'adjustments such as the one we are making cannot be precisely calibrated. There is no scientifically based formula that we could use to calculate the adjustment. In that sense, the adjustment might be viewed as a symbolic one' (above note 60, at para 3.122). Bronckers has suggested that difficulties in calculating financial compensation could be relieved with the introduction of liquidated damages in the form of a set sum that a country would have to pay for each year of non-compliance. See M. Bronckers, 'Towards Remedies which Expand rather than Contract Trade', 5 *Journal of World Investment and Trade* (2004).

63 See, for example, the discussion in Section III of the recent *United States–Offset Act* arbitration (above note 58).

64 Trachtman has noted that calculations based on the gross value of foregone exports overlooks 'things that are really at stake in trade negotiations', such as the profitability of the particular exports which are lost, or the number of jobs involved. J. P. Trachtman, 'Bananas, Direct Effect and Compliance', 10 *European Journal of International Law* 655 at 673674 (1999). In his treatment of financial compensation, Lawrence questions, 'how much, for example, should the United States be paid when its exporters are denied the ability to sell their hormone-fed beef in Europe?' (above note 7 at 85) He then goes on to suggest that, at the very least, some kind of mitigation principle would have to apply whereby lost exports would not be fully counted towards the level of injury if the beef could be sold to another market. These are valid points, but they apply equally to any proceedings where a value has to be attributed to the level of nullification or impairment.

65 The US noted in WT/DS60/R, *Guatemala–Cement I*, adopted 25 November 1998 (at note 172) that a retroactive remedy, 'means a remedy that requires a party to take a particular, specific action relating to transactions that occurred prior to the adoption of a panel report'.

taking account of the continuing injury beyond this point would then be regarded as prospective.[66]

The second and more difficult issue would be to identify the point in time from which retrospective compensation should commence. The earliest point is when the measure starts to cause injury which may coincide with when it comes into force. This could be objected to on various grounds. For example, account would have to be taken of any delay in challenging the measure. Also, it is probably the case that measures cannot be inconsistent with WTO obligations before the date when these obligations came into force. The latest point in time for commencement depends on the point to which retrospective compensation runs up to. If (as suggested above) it runs up to the date of expiry of the period for implementation, then the latest point for commencement would be the adoption of panel or Appellate Body findings. It is submitted that developments here are more likely to be led by practice than new disciplines.

7. Financial compensation and reparation

A key reason for why serious consideration needs to be given to new disciplines and increased practice on reparation has already been established above – that violations primarily injure private entities. Other reasons are developed below, including that the trading activities of private entities are crucial to the success of the WTO Agreements, and that reparation is an important component in international law generally. This section compares the general position on reparation with that found in WTO law and practice.

7.1 The general international law position on reparation

The 2001 ASR and the Commentary thereto authored by Special Rapporteur James Crawford are presented here as indicative of the general position in international law with regard to reparation. The remits of this influential document would seem to justify this reliance. Paragraph 1 of the introduction to the ASR specify its purpose as seeking, 'to formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of States for their internationally wrongful acts'. Shelton views the ASR provisions on reparation as clearly representing existing law rather than

66 In the case below, both parties attributed significance to the date of implementation of an adverse WTO ruling in their discussion of exactly when the ruling should be regarded as having retrospective effect. It was not necessary for the panel to consider this point.

WT/DS221/R, *United States-Section 129(c)(1) of the Uruguay Round Agreements Act*, adopted 30 August 2002, at paras. 3.47–49 and 3.96–117. More recently, it is significant that the three-year financial compensation package agreed after the *US–Copyright* proceedings commenced with the expiry of the reasonable time period for implementation of the Panel ruling. It is reasonable to infer that the parties regarded this payment as prospective.

attempts to 'reinforce broader community interests in international legality'.[67] It can be added however that close examination of the ASR leads to the exercise of observing and explaining different practices depending in part on the international law context in question. Thus perhaps not very much has changed since Gray observed in 1990 that, 'there are no uniform rules governing reparations [in international law]' adding that '[t]he determination of the consequences of a breach of international law is left initially to the discretion of the injured state'.[68] Shelton too refers to the 'paucity of law on reparation' and observes that the ASR does not provide a complete answer to questions about the theoretical foundation and practical application of the law.[69] She also notes a further theme which resonates with the WTO context: that states may regard the principal purpose of proceedings as securing the cessation of the breach for the future, rather than to secure remedies for past injury.[70] The position in the ASR on reparation is summarized below, focusing on the aspects most relevant to comparisons with the WTO position.

Article 31.1 of the ASR provides that, 'The responsible state is under an obligation to make full reparation for the injury caused by the internationally wrongful act.' The Commentary refers to the *Chorzów Factory* case of 1927[71] – the leading and most frequently cited authority on reparations involving the expropriation of a German owned match factory by the Polish government. The following passage is cited:

> It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.[72]

This obligation was further elaborated upon in the merits phase of the same case:

> The essential principle contained in the actual notion of an illegal act … is that reparation must, so far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, or damages for loss sustained which would not be covered by restitution in kind or payment in place of it-such are the principles

67 D. Shelton, 'Righting Wrongs: Reparations in the Articles on State Responsibility', 96 *American Journal of International Law* 833 at 835 (2002).

68 C. D. Gray, *Judicial Remedies in International Law* (1990, Oxford University Press), at 5.

69 Above note 67, at 833.

70 Ibid. at 834.

71 PCIJ, Series A, No. 9 (1927).

72 Ibid. at para. 21.

> which should serve to determine the amount of compensation due for an act contrary to international law.[73]

Article 34 divides reparation into three components being restitution, compensation, and satisfaction, while the Commentary notes that these components will discharge the obligation to make full reparation either separately or in combination.

Restitution

The ASR envisages restitution as the preferred form of reparation. This is evident from the reliance on the second *Chorzów Factory* extract above. Article 35 defines restitution as an obligation to, 're-establish the situation which existed before the wrongful act was committed'. This is necessary save to the extent that it 'is not materially impossible', or 'does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation'. The commentary distinguishes between material and 'juridical' restitution.[74]

Examples of material restitution are the release of persons wrongly detained or the return of property wrongly seized. Juridical restitution is defined as requiring or involving, 'the modification of a legal situation either within the legal system of the responsible State or in its relations with the injured State'. It is not immediately apparent how this kind of relief could fulfill the requirement of full reparation, but two possibilities come to mind. First is that the objectionable measure has yet to be applied and has not therefore produced any tangible detrimental effects.[75] The second possibility relates *inter alia* to how the injury is defined, and what the parties in dispute regard as the purpose of the proceedings. If the parties are content to define the injury as the maintenance in force of certain measures, and see the purpose of the proceedings as the removal of these measures, full reparation is arguably accomplished without examining losses attributable to the measures. In this situation, cessation would also result in reparation.

Compensation

The ASR briefly deals with compensation in the two paragraphs comprising Article 36:

> The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
>
> The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

73 PCIJ, Series A, No. 17 (1928), at 47.

74 See para. 5 of the Commentary under Article 35, at 240.

75 The Commentary to Article 12 (at para. 12) provides a starting point for further reading on whether a law can be successfully challenged independently of its application. For discussion of this question in the WTO context, see, K. K. Sim, 'Rethinking the Mandatory/Discretionary Legislation Distinction in WTO Jurisprudence', 2 *World Trade Review*, 33 (2003); Y. Naiki, 'The Mandatory Discretionary Doctrine in WTO Law The US–Section 301 Case and its Aftermath', 7 *Journal of International Economic Law*, 23 (2004); A. Davies 'Mandatory and Discretionary Legislation in WTO Law: A Distinction Worth Preserving?', 31 *Legal Issues of Economic Integration*, 185 (2004).

The first paragraph here reinforces the primacy of restitution, although the Commentary notes that compensation is the most commonly sought form of reparation in international practice.[76] It goes on to provide that:

> Financially assessable damages encompasses both damage suffered by the State itself (to its property or personnel or in respect of expenditures reasonably incurred to remedy or mitigate damage flowing from an internationally wrongful act) *as well as damage suffered by nationals, whether persons or companies, on whose behalf the State is claiming within the framework of diplomatic protection*. (emphasis added)

In the WTO context, the financial loss to private entities is clear. Whether the subject matter is an import ban on hormone treated beef, safeguard measures on steel imports, or the right in national law of restaurateurs to play music without paying royalties to the artist, the financial damage to nationals is self-evident. Less evident, however, is the presence of any additional injury to the State itself.

The Commentary to the ASR proceeds to detail the fields in which diplomatic protection has gained prominence.[77] States are most likely to take up the cause of their nationals and seek an effective remedy for them where the internationally wrongful act has resulted in wrongful death, deprivation to liberty, personal injury, and taking of, or damage to, tangible property. Compensable personal injury is described as encompassing, 'not only associated material losses, such as loss of earnings and earning capacity, medical expenses and the like, but also non-material damage [including] loss of loved ones, pain and suffering as well as the affront to sensibilities associated with an intrusion on the person, home or private life'.

These forms of injury are not analogous to the loss of profit caused by WTO violations, but are mentioned for this very reason. Human rights abuses, personal injury, and connected non-material injury are of a different and more serious order than loss of profits alone, without this involving any taking of physical property.[78] Section 8.2 nevertheless contends that there are good reasons why compensation to those injured by WTO violations should be considered.

76 Para. 2 of Commentary to Article 36.

77 Paras. 16 to 33 of the Commentary to Article 36.

78 Space does not permit an overview of the debate on the extent to which 'economic rights' can either themselves be regarded as fundamental human rights, or as indispensable to the enjoyment of fundamental human rights. On this debate see, for example, E. U. Petersmann, 'The WTO Constitution and Human Rights', 3 *Journal of International Economic Law* 19 (2000); E. U. Petersmann, 'Human rights and International Economic Law in the 21st Century: the Need to Clarify Their Interrelationships', 4 *Journal of International Economic Law*, 3 (2001); E. U. Petersmann, 'Time for a United Nations ''Global Compact'' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration', 13 *European Journal of International Law* 621 (2002); P. Alston, 'Resisting the

Article 36:2 of the ASR envisages recovery of, 'loss of profits in so far as it is established'. The Commentary emphasizes the difficulties which are likely to be encountered in recovering lost profits, noting that profits are 'vulnerable to commercial and political risks'.

There are perhaps few activities which are more vulnerable to commercial risks than international trade, given the possibilities of variations in interest rates, consumer demand, and input prices. These possible explanations for a reduction of profits may make it difficult to establish a strong enough causative link between profit losses and a WTO illegal measure. Even if a large part of the explanation for loss of profits *is* a WTO illegal measure, some might regard this possibility as a known political factor, which is just as inherently a risk of international trade as the factors just noted.

Examining the ASR and the Commentary is effectively an exercise in observing and explaining differences between international law contexts. Significant components which together form any particular international law context include the content of the international obligations assumed, and the manner in which these obligations have been interpreted by the Treaty Members and adjudicative tribunals. In the WTO context, these factors combine to demonstrate that little emphasis has been placed on reparation.

7.2 Reparation in WTO law and practice

Central to both restitution and compensation in the ASR is the idea of identifying and repairing the injury caused by an internationally wrongful act with retrospective effect. With few exceptions, remedies under the DSU have been forward looking. They have not been concerned to provide retrospective compensation to those injured by violations. Furthermore, even the prospective remedies have not been used to compensate those injured by violations continuing beyond the time by which they ought to have been removed. The only part of the treatment of reparation in the ASR bearing any resemblance to WTO law and practice is juridical restitution. The idea of modifying a legal situation indicates that this form of restitution is only intended to have prospective effect. This corresponds with the view that WTO remedies are primarily intended to secure the withdrawal of successfully challenged measures for the future, which in turn is evidence by the required standard recommendation in DSU Article 19 that the 'Member concerned bring the [offending] measure into conformity with the [infringed] Agreement'. The present author's view is that this recommendation is clearly forward looking and aimed at achieving the cessation of offending measures. This view seems to have been confirmed by the implementation panel in *Automotive*

Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann', 13 *European Journal of International Law*, 815 (2002); R. Howse, 'Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann', 13 *European Journal of International Law*, 621 (2002).

Leather,[79] even though a very different view has been taken of the relevant passage from the case.

Mavroidis considers that the implementation panel in *Automotive Leather* held that DSU Article 19 'does not disallow retroactive remedies'[80] and that, 'the panel unambiguously rejected the argument by the United States that DSU Article 19 circumscribes the time function of WTO remedies'.[81] The phrasing here is misleading since it gives the impression that the panel intended its views to apply outside of the subsidies context, to WTO remedies generally. Mavroidis cites the following passage:

> However, we do not believe that Article 19(1) of the DSU, even in conjunction with Article 3(7) of the DSU, requires the limitation of the specific remedy provided for in Article 4(7) of the SCM Agreement [Agreement on Subsidies and Countervailing Measures] to purely prospective action.[82]

The panel here was undertaking a contextual analysis of SCM Article 4.7, and the DSU provisions were found to be part of this context. The passage is consistent with the view that, where the recommendation which can be issued is governed only by DSU Article 19, remedies can only be prospective. Indeed, this seems to be the only interpretation of the sentence cited by Mavroidis when it is read with the sentence which follows it:

> An interpretation of Article 4.7 of the SCM Agreement which would allow exclusively 'prospective' action would make the recommendation to 'withdraw the subsidy' under Article 4.7 indistinguishable from the recommendation to 'bring the measure into conformity' under Article 19.1 of the DSU, thus rendering Article 4.7 redundant.

The panel seems to indicate here that a characteristic of DSU Article 19 is that the recommendation can only be prospective, but that SCM Article 4.7 does not share this characteristic.

Even if the jurisprudence does leave open the time function of WTO remedies, the far more telling point is that retrospective remedies have not generally been requested.[83] The one instance where an implementation panel recommended

79 WT/DS126/RW, *Australia–Subsidies Provided to Producers and Exporters of Automotive Leather*, adopted 11 February 2000, para. 6.49; on which see Goh and Ziegler, 'Retrospective Remedies in the WTO After *Automotive Leather*' 6 *JIEL* (2003) 545.

80 P. C. Mavroidis, 'Remedies in the WTO Legal System: Between a Rock and a Hard Place' 11 *European Journal of International Law*, 763 (2000), at 789.

81 P. C. Mavroids, above note 36, at 83.

82 *Automotive Leather*, above note 79, at para. 6.31.

83 In the WTO context, Mexico argued in the case below for panel recommendations, first that the anti-dumping measure be revoked and, second, that the already collected duties be refunded – this latter request constituting the retrospective element. The panel declined to issue both recommendations on the basis that DSU Article 19.1 circumscribes the content of the recommendation which can be made. The panel did, however, suggest that revocation take place. While suggestions under Article 19 were expressly identified as being non-binding, the panel also concluded with the opinion that revocation was the only

such a remedy in the *Automotive Leather* implementation proceedings led to the disputants settling the case in a manner wholly unreflective of the panel recommendation, and consternation among most of the third party WTO Members who cared to comment.[84]

Also reinforcing the prospective character of WTO remedies is the absence of provisional measures in the DSU to suspend the application of challenged measures pending the resolution of proceedings. A notable exception to this position is provided in Article XX of the plurilateral Agreement on Government procurement. It is provided here that national challenge procedures shall provide for, 'rapid interim measures to correct breaches of the Agreement and to preserve commercial opportunities'. 'Compensation for the loss or damage suffered is also contemplated', which clearly indicates the potential availability of retrospective remedies in this context.[85]

8. Explaining the disparity between the ASR and the WTO position

The Commentary to Article 55 of the ASR entitled *Lex specialis* provides the WTO dispute settlement rules as an example of treaty language, making it

means of implementing the recommendation. No suggestion was made that the already collected duties be refunded, and no explanation was offered for the absence of this suggestion. The explanation may be that Article 19 only allows prospective remedies. WT/DS60/R, *Guatemala–Anti-Dumping Investigation Regarding Portland Cement From Mexico*, 19 June 1998, at paras. 8.1–8.6. The case may represent a break from GATT history. A quintet of cases in the anti-dumping and countervailing duty fields where requests for reimbursement of illegally imposed duties were made and recommended by the panels, has frequently been cited. See E. U. Petersmann, 'International Competition Rules for the GATT/WTO World Trade and Legal System', 27 *Journal of World Trade*, 35 (1993); P. C. Mavroidis, above note 80. The *Trondheim* government procurement case is also a much cited example of retrospective remedies (annulment of a wrongfully awarded contract and recommencement of the procurement) being requested and denied. GATT Panel Report, *Norway–Procurement of Toll Collection Equipment for the City of Trondheim*, GPR/DS2/R, adopted 13 May 1992. On this case, see R. Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (Salem, N. H.:Butterworths, 1993), at 583; C. Schede, 'The "Trondheim" Provision in the WTO Agreement on Government Procurement: Does this "Major Revision" live up to the needs of the Private Sector?', 5 *Public Procurement Law Review*, 161 (1996).

84 The implementation panel in *Automotive Leather* interpreted the phrase 'withdraw the subsidy' as requiring repayment of all the subsidy even though the United States and Australia considered that repayment in full would have to operate retrospectively and that this was undesirable. By the end of the implementation proceedings, no repayment of the grant had occurred and full repayment was required. It is difficult to see how any other solution could fully meet the terms of the implementation report. It is striking therefore that the ensuing mutually agreed solution fell far short of the strong guidance provided by the implementation panel. The only repayment component amounted to 7.2 million Australian Dollars, which was less than a third of the full amount of the grant contract found to be a prohibited subsidy. Given that both parties had requested only the repayment of what they considered to be the prospective part of the grant, the sum agreed upon probably reflects a compromise on the amount of that sum, rather than any attempt at full repayment. The United States would also have been satisfied with the second component of the solution which involved the removal of automotive leather from eligibility for support and subsidies. *Automotive Leather*, above note 79 at para. 6.

85 See, S. Arrowsmith, 'The Character and Role of National Challenge Procedures under the Government Procurement Agreement', 4 *Public Procurement Law Review*, 235 (2002).

clear that only the consequences specified are to flow from a breach. It is noted that, '[F]or WTO purposes, "compensation" refers to the future conduct, not past conduct and involves a form of countermeasures.'[86] This raises the question of why the WTO position is a *lex specialis*.

8.1 The evolution of dispute settlement from the GATT to the WTO

Dispute settlement was considerably strengthened as part of the Uruguay Round negotiations, which gave birth to the WTO. There were remarkable achievements. In the pre-WTO era, the adoption of panel reports by the GATT Contracting Parties required a positive consensus, meaning that any Party (including the losing Party in any dispute) could block the adoption of a panel report. This situation was reversed during the Uruguay Round so that adoption is now virtually automatic and can only be blocked with the negative consensus of all 147 WTO Members.[87] Notwithstanding that adoption and implementation of reports are two different concepts, this aspect of the legalization of dispute settlement was clearly a dramatic shift. It is also notable that Robert Hudec's account of the negotiating history emphasizes that, surprisingly, the legalization of dispute settlement may not have been the result of a stronger commitment to enforcement.[88]

8.2 The WTO and distributive justice

Carmody considers that the WTO legal system is concerned more with distributive than corrective justice. This is because the WTO Agreements embody a collective interest for the common good, thereby taking them away from a system of corrective justice primarily concerned with protecting an individual's interest in private property. Within a system of corrective justice, the emphasis is on providing the victim with what they are entitled to, so that much the same remedies as for a breach of contract – such as specific performance, or, more commonly, an award of damages – would be expected. In contrast, where a collective right is breached, the remedy should have a more distributive character. In broad terms this involves denying the wrongdoer of their proportionate share. More specifically the remedy should involve changing the behaviour of the wrongdoer at every point in the future so that, 'the central idea is not to punish wrongdoers, but to encourage them to return to compliance in order to safeguard the common good'.[89] This analysis provides a way of understanding the standard DSU recommendation that the inconsistent measure be brought into conformity.

86 Footnote 863.

87 DSU Article 16:4 in respect of panel reports and Article 17:14 in respect of Appellate Body reports.

88 R. Hudec, 'Broadening the Scope of Remedies in WTO Dispute Settlement', Originally published in F. Weiss & J. Wiers (eds), *Improving WTO Dispute Settlement Procedures* (Cameron May, 2000), at 345–376. Also available at http://www.worldtradelaw.net/articles.htm at 5–8.

89 Cited from work on file with the author which builds upon ideas presented in C. Carmody, 'Remedies and Conformity under the WTO Agreement', 5 *Journal of International Economic Law*, 307 (2002).

It also seems to provide a means of understanding an argument made in a number of cases that 'GATT rules and remedy recommendations are designed to protect expectations on the competitive relationship between imported and domestic products, rather than expectations on export volumes'. Some of this language, in certain contexts, is firmly established in GATT/WTO jurisprudence, and it has been invoked in support of the view that WTO remedies can only have prospective effect.[90]

The present author is comfortable with the view that the WTO Agreements embody a global public good, to be understood as the protection of the 'distribution of expectations about the trade-related behaviour of governments'.[91] Carmody then posits however that because of this collective good, it is appropriate that the standard WTO remedy should be a recommendation of conformity, and that the emphasis is rightly on re-establishing the conditions originally upset rather than on the consequences of the wrongful behaviour. The identification of the common good, leads more towards distributive than corrective justice, which in turn leads to a greater emphasis on correcting future behaviour than retrospective relief.

In response, it seems to be possible to argue that the common good would be more fully protected through the availability of retrospective remedies. This would provide a deterrent against upsetting expectations, since future compliance is more likely if compensation must be paid for non-compliance in the past. Trade is also more likely to flourish if traders have the secure knowledge that some form of remedy, which is meaningful to them will be available in the event of an internationally wrongful act. It therefore seems to be arguable that retrospective remedies support the collective interest embodied in the WTO Agreements.

A possible answer to this view can be found in Carmody's work relating to the nature and content of the 'expectations about the trade-related behaviour of governments', which Members and traders can legitimately have. The expectations are described as 'vast and incalculable and therefore essentially indeterminate'.[92] This makes it clear that the expectations which give rise to the global

90 The extracted passage was relied upon by the US to support its view that the panel ought not to recommend the reimbursement of wrongfully collected countervailing duties because of the retroactive connotations of such a recommendation. *Brazil–Measures Affecting Desiccated Coconut* (WT/DS22R), adopted 20 March 1997, para. 220. The origin of the distinction indicated in the extract is the GATT panel report in the *Superfund* case. It is vital to note that the panel did not claim that its reasoning was applicable to all or even most GATT rules and remedy recommendations. The panel was addressing a GATT Article III:2 violation, and carefully explained why the contrast between expectations on the competitive relationship between products, and expectations on export volumes was required in this context. It also noted that Article III:2 is unlike other provisions in the General Agreement, '[since] it does not refer to trade effects'. Further, the panel was addressing the question of whether there was a violation, not whether any remedy should have a retroactive effect. *United States–Taxes on Petroleum and Certain Imported Substances* L/6175–34S/136, 17 June 1987, para. 5.1.9. The *Superfund* language and reasoning, but not the significant extension to it argued for by the US, has been approved by the Appellate Body. See WT/DS8/AB/R *Japan–Taxes on Alcoholic Beverages*, adopted 1 November 1996, at page 16.

91 Cited from work on file with the author.

92 Ibid.

public good are not to be exclusively equated with the expectation that governments will adhere to their WTO obligations. This is confirmed by a later passage providing that, 'WTO members may not expect conformity in every case. This is because of the need to respect sovereignty, or because the benefit of compliance may be outweighed by the burden of doing so, or possibly because the existing framework of the WTO Agreement promotes other values, such as ambiguity, coherence and compromise, that make the law tolerable.'[93]

If this position is accepted, it can still be argued that WTO members and traders sometimes do have a legitimate expectation of full compliance. This might occur when the WTO obligation in question is very well understood and where most WTO Members would agree that deviation is not permissible. Examples of such obligations might be the prohibitions on quantitative restrictions or discriminatory internal taxation. Here the indeterminate expectations might crystallize into expectations of full conformity, thereby permitting a supportive role for corrective remedies. There is support in the literature for the view that relatively uncontested WTO obligations should have direct effect in the sense that national and regional courts should attribute a higher status to WTO obligations than inconsistent national and regional measures.[94] This is not considered desirable because of the problems associated with direct effect, connected with the separation of powers and interference with the delicate process of intergovernmental dispute settlement.[95] However these problems do not apply at the intergovernmental level, because of the state control which is exercised over the architecture of the remedy.

8.3 What 'rights' does a breach of WTO obligations infringe?

The third explanation relates to a point made above. The ASR indicates that the likelihood of diplomatic protection leading to reparation increases along with the importance of the right infringed. WTO tribunals have not spoken

93 Ibid.

94 See, T. Cottier, 'A Theory of Direct Effect', in A. V. Bogandy, P. C. Mavroidis and Y. Mény (eds.), *European Integration and International Co-ordination* (Kluwer Law International, 2002), 99, at 121.

95 On the direct effect of WTO obligations, see, for example, G. A. Zonnekeyn, 'EC Liability for Non-Implementation of WTO Dispute Settlement Decisions – Are the Dice Cast?', 7 *Journal of International Economic Law*, 483 (2004); S. Griller, 'Enforcement and Implementation of WTO Law in the European Union', in F. Breuss, S. Griller and E. Vranes (eds.), *The Banana Dispute. An Economic and Legal Analysis* (Springer, 2003) 247; P. Eeckhout, 'Judicial Enforcement of WTO Law in the European Union – Some Further Reflections', *5 Journal of International Economic Law*, 91 (2002); N. van den Broek, 'Legal Persuasion, Political Realism, and Legitimacy: The European Court's Recent Treatment of the Effect of WTO Agreements in the EC Legal Order', 4 *Journal of International Economic Law*, 411 (2001); S. N. Lester, 'WTO Panel and the Appellate Body Interpretations of the WTO Agreement in US Law', 35 *Journal of World Trade*, 521 (2001); T. Cottier and K. N. Schefer, 'The Relationship Between World Trade Organization Law, National Law and Regional Law', 1 *Journal of International Economic Law*, 83 (1998). Jackson has also provided an enduring account of the broad policy issues in this area. See, J. H. Jackson, 'Status of Treaties in Domestic Legal Systems: A Policy Analysis', 86 *American Journal of International Law*, 310 (1992).

in terms of the individual rights of traders to, for example, import and export products unimpeded by state violations of WTO obligations. Rather, the language has been more directed towards the legitimate expectations of the WTO Members regarding the conditions of competition in the multilateral trading system. Even if the language of individual rights were to enter the vocabulary of WTO Members and tribunals, the right exemplified above (and similar rights granting more room for state manoeuvre) might not be widely described as fundamental. The consequences of its infringement (loss of profits) will frequently appear trivial compared with those resulting from human rights violations.[96] It is considered however that a separate argument offsets the triviality point.

The argument is that the activities of traders and companies are fundamental and indispensable to the success of the WTO Agreements in achieving their objectives. The following is an extract from *US-Section 301* which can be regarded as among the most fascinating pronouncements from a WTO tribunal to date.

> Under the doctrine of direct effect … obligations addressed to States are construed as creating legally enforceable rights and obligations for individuals. Neither the GATT nor the WTO has so far been interpreted by GATT/WTO institutions as a legal order producing direct effect. Following this approach, the GATT/WTO did *not* create a new legal order the subjects of which comprise both contracting parties or Members and their nationals. However, it would be entirely wrong to consider that the position of individuals is of no relevance to the GATT/WTO legal matrix. Many of the benefits to Members which are meant to flow as a result of the acceptance of various disciplines under the GATT/WTO depend on the activity of individual economic operators in the national and global market places. The purpose of many of these disciplines, indeed one of the primary objects of the GATT/WTO as a whole, is to produce certain market conditions which would allow this individual activity to flourish.[97]

The success of the WTO Agreements is highly dependent on the positive conduct of traders and companies in taking advantage of the trading conditions created. It is submitted that this observation has a significant offsetting effect on the view that the WTO Agreements do not seek to protect fundamental rights, and can therefore be used to support stronger disciplines on reparation.

96 It is possible that some commentators would take issue with this statement, or at least argue that economic rights or market freedoms should not be thought of as significantly less important than civil and political rights. For example, Petersmann rhetorically asks whether, 'the broad trade policy discretion of governments (e.g. to restrict welfare-increasing trade transactions, to treat citizens as mere objects of trade policies, to avoid references to human rights in WTO rule-making and trade policies) [is] consistent with their human rights obligations to respect, protect, and fulfil human rights and basic human needs in the trade policy area.' E. U. Petersmann, 'The "Human Rights Approach" Advocated by the UN High Commissioner for Human Rights and by the International Labour Organization: Is it Relevant for WTO Law and Policy?', 7 *Journal of International Economic Law*, 605 at 612 (2004).

97 WT/DS152, *United States-Sections 301–310 of the Trade Act of 1974*, adopted on 27 January 2000, paras. 7.72 and 7.73. See also paras 7.76; 7.77; 7.84; 7.90 and note 662.

9. Problems with greater practice on reparation

Several of the explanations for the lack of reparation in WTO law and practice can be contested. This section considers two problems which could stand in the way of greater practice on disbursement to private entities injured by WTO violations. These are in addition to the problems discussed above which apply whether or not the compensation is disbursed with reparative effect.

9.1 Do WTO rules prevent disbursement?

The claimant state can receive monetary amounts following a WTO violation, either from the defendant state or from its producers and exporters. The defendant state may agree to pay financial compensation, or its producers may have to endure the increased tariffs associated with the suspension of concessions, or the collection of anti-dumping and countervailing duties. The issue here is that the Appellate Body has interpreted identical provisions in the Anti Dumping Agreement (ADA) and the Agreement on Subsidies and Countervailing Duties (SCM) as prohibiting the disbursement of collected duties. The findings raise the question of whether and how they apply outside the ADA and SCM contexts.

The *United States–Continued Dumping and Subsidy Offset Act of 2000* case[98] involved a challenge by 11 Members of certain provisions in the Offset Act. Under the Act, those who have petitioned for investigations into dumping or subsidization are eligible to receive the duties which might later be collected. The main legal issue was whether this measure was consistent with ADA Article 18.1 and SCM Article 32.1. Article 18.1 provides that:

> No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.[24]
>
> [24] This is not intended to preclude action under other relevant provisions of GATT 1994, as appropriate.

The Appellate Body first considered whether the challenged measures were 'specific' to dumping or subsidization. This was interpreted as a requirement that the measure be, '… inextricably linked to, or have a strong correlation with, the constituent elements of dumping or of a subsidy.' This requirement was found to be clearly satisfied from the text of the Offset Act.[99] The requirement that the measure should operate 'against' dumping was also found to be satisfied. The measure was found to be 'opposed to' dumping in the sense of 'dissuading the practice' or creating 'an incentive to terminate such practices'.[100] Finally, it was found that the measure was not in accordance with the ADA or the SCM. The permissible responses to dumping and to countervailable subsidies were

98 WT/DS217,234/AB/R adopted 27 January 2003.
99 Ibid. at paras. 241–245.
100 Ibid. at paras. 254–256.

limited by these Agreements to definitive anti-dumping duties and countervailing duties, provisional measures, price undertakings and multilaterally sanctioned countermeasures under the dispute settlement system. The disbursement envisaged by the Offset Act was not one of these permitted responses.

Whether this case has any impact upon disbursements of monetary amounts outside of the ADA and SCM contexts is a moot point.[101] On balance, it is considered that the approach taken has no generally applicable implications.

A possible explanation of the policy underlying the identical ADA and SCM provisions is that the expressly envisaged remedies are permitted only to prospectively remove the perceived distortion of trade caused by dumping or subsidies.[102] This would be achieved even if the increased duties collected were to be, for example, donated to a charity or applied to international emergency relief.[103] These disbursements would be permitted. While they might well be 'specific' to dumping or subsidization, they would not operate 'against' these practices. Beyond the prospective removal of the distortion, any additional remedial purpose of any benefit to those injured, including the disbursements under the Offset Act which have reparative effect, would likely be regarded as an impermissible specific action against the dumping or subsidization.

The DSU does not expressly limit the permissible responses to violations in the same way as the ADA and SCM limit the permissible responses to dumping and subsidization. On this basis alone, it is arguable that the disbursement of both financial compensation and collected duties following suspension is permitted. It is clear from this case that the Appellate Body was interpreting an express prohibition (which is absent from the DSU) rather than identifying the possible implications of equivocal provisions. If it is nevertheless appropriate to search for an implicit limitation on disbursement in the DSU, only Article 22:4 seems to be potentially relevant. This requires equivalence between the suspension of concessions and the level of nullification or impairment. The convoluted question then raised is whether and when disbursement of increased tariff revenues generated through suspension increases the level of suspension so as to affect the balance between suspension and nullification and thereby possibly breach the equivalence

101 In some cases, it may also be a point of no practical significance. If suspension leads to the imposition of 100% tariffs (as was the position with the US retaliation in Hormones, and as may be the position with the Canadian retaliation in case presently under consideration), this may effectively operate as an import ban so that no duties are collected. However, suspension can also involve modest tariff levels which are gradually increased. See note 16 above.

102 This policy seems to be indicated by the Appellate Body. In applying the 'against' criterion, it was emphasized that, the Offset Act, 'effects a transfer of financial resources from the producers/exporters of dumped or subsidized goods to their domestic competitors'. This was demonstrated by a number of factors including that, 'the recipients of … offset payments are entitled to use this money to bolster their competitive position *vis-á-vis* their competitors, including the foreign competitors subject to anti-dumping or countervailing duties' (para. 255).

103 The Appellate Body explained that international emergency relief would not operate 'against' dumping at para. 245.

principle. No decisive answer readily comes to mind. It is considered that, in the absence of an express prohibition and until such time as the object and purpose of suspension is clarified,[104] the disbursement of increased tariff revenues generated by suspension is permitted.

With regard to financial compensation there is no DSU provision which even implicitly limits disbursement. The parties are free to mutually agree upon the purposes which financial compensation will serve.[105] In practice however, there may be a significant restraint on the prospects of parties reaching agreement on the disbursement of financial compensation as discussed below.

9.2 *Undermining the policy objective underlying the violation*

Defendant states may be reluctant to agree to financial compensation where it is understood that it will be disbursed in some way to the private entities injured by the violation. This is because reparative compensation may reduce or nullify the achievement of the policy objective underlying the violation. If there is protectionist intent at work, manifested for example in the wrongful collection of anti-dumping duties or the wrongful imposition of safeguard measures, willingness to compensate the victims of this protectionism is unlikely to be forthcoming. This point can of course be countered with the well-understood position that protectionism is not a valid policy objective.[106] The question then becomes whether this is quite the correct time for negotiators to develop stronger disciplines on compensation,which might both have a strong deterrent effect against protectionism, and nullify its impact when it does occur. The present author concurs with Lawrence's view that careful regard must be had to the extent that strengthening the system of enforcement can influence the extent to which Members are prepared to liberalize in the first place. It is demonstrated below however that financial compensation will not always defeat the policy objective underlying the violation. It follows that the reference to 'trade or other compensation' in the Chairman's text, need not cause undue concern that broadening the range of WTO remedies will adversely affect trade liberalization.

The view that the type of compensation likely to be agreed upon is connected with the policy objective underlying the violation can be demonstrated with reference to the following cases. *Turkey–Textiles*[107] concerned quantitative restrictions on imports of textiles and clothing from India. These were introduced

104 See note 18 above.

105 In the suspension context, it would therefore seem to be irregular to argue that equivocal provisions implicitly limit the disbursement of duties collected. There is no apparent justification for a difference in approach as between the disbursement of collected duties and financial compensation.

106 Petersmann refers to the, 'infamous Smoot–Hawley–Tariff Act of 1930 when ''rent-seeking'' protectionist coalitions and log-rolling in the US Congress led to a dramatic increase in import protection triggering a breakdown of the international payments and trading system, ushering in widespread unemployment and World War II.' Above note 96, at 612.

107 WT/DS34/AB/R, *Turkey–Restrictions on Imports of Textile and Clothing Products*, adopted on 19 November 1999.

by Turkey in connection with the formation of a customs union with the European Communities. As of January 1996, Turkey applied quantitative restrictions on 19 categories of textiles and clothing products from India, in order to harmonize EC and Turkish treatment of goods originating from outside the customs union. Turkey had argued that without its restrictions on Indian imports, the EC would exclude all imports of textiles and clothing from Turkey (even if of Turkish origin) in order to uphold the EC restrictions on the volume of imports from outside the customs territory. This would be inconsistent with GATT Article XXIV:8(a)(i), which requires the removal of internal restrictions on 'substantially all the trade' occurring within the customs territory.

The Appellate Body found that these restrictions were not necessary for the formation of a customs union and therefore could not be justified under GATT Article XXIV. Turkey had therefore failed to demonstrate that the formation of the customs union would be prevented were it not allowed to introduce the quantitative restrictions. The Appellate Body concluded that this situation was avoidable if Turkey were to adopt rules of origin for imports allowing the EC to distinguish textiles and clothing of Turkish origin (which would be free of internal restrictions) from those of third country origin (which would be subject to quantitative restrictions). These findings were adopted in November 1999.

A mutually satisfactory solution involving trade compensation was notified in July 2001.[108] The first component of the compensation package would be better described as a step towards implementation, since it involved the removal of quantitative restrictions on two categories of textile imports from India. However, Turkey also agreed to tariff reductions on 15 categories of chemicals by way of trade compensation. There is no indication that these tariffs have been reduced only in respect of chemicals from India. The trade compensation appears therefore to have been granted on a MFN basis. Also, it is not possible to determine whether the trade compensation is intended to be equivalent to the level of nullification or impairment, since there were no proceedings on this question.

If the policy underlying the restrictions is connected with Turkey's erroneous view that they are necessary for the customs union, the policy is left intact by the trade compensation. However, it may not be too cynical to suggest that the underlying policy is to protect Turkish textile and clothing manufacturers from their Indian competitors. This is a possible explanation for why the solution proposed by the Appellate Body has not been adopted. Both the removal of the restrictions and the possible alternative of financial compensation to Indian producers would defeat this policy objective.

Turkey–Textiles can be contrasted with *Japan–Taxes on Alcoholic Beverages*,[109] where there was a much more significant overlap between the products which

108 WT/DS34/14 of 19 July 2001.

109 Cases were brought by the EC, Canada and the US. Single panel and Appellate Body reports were issued. The document codes are WT/DS8, WT/DS10, and WT/DS11.

were the subject matter of the dispute and those which attracted trade compensation. Japan was required to remove discriminatory internal taxes on spirits. Because of delayed implementation, trade compensation was granted in the form of reduced import tariffs on spirits, thereby dissolving the adverse effect on imported spirits caused by the tax differential.[110] However, this was entirely consistent with Japan's intention to achieve compliance as quickly as its legislative system would allow. Put another way, whatever the policy objective underlying the violation, by the time of agreement on compensation, Japan was clearly prepared to quickly desist from pursuing this objective via impermissible means. This is also therefore a case where financial compensation might have been negotiated.

WTO violations are not always connected with protectionism. In such cases, there is an immediate role for financial compensation. *US–Copyright* can be seen as an example, when the policy objective underlying the WTO inconsistent 'business exemption' is understood. There was no protectionism or discrimination here. Indeed, American artists have probably lost far more by way of royalties than EC artists. Rather, two policy objectives which might have led to the business exemption can be suggested. The US may have decided that the benefits (in terms of providing sufficient incentives to create new works) of collecting a large number of small amounts from establishments below a certain size was outweighed by the costs.[111] The US may also have been concerned to reduce the outgoings of businesses below a certain size. While the 'business exemption' was not compatible with the TRIPS, the compensation payment does not nullify the possible policy objectives underlying it. It remains the case that no costs are incurred in collecting royalties from establishments falling under the exemption, and that the outgoings of certain establishments remain lower than they would otherwise be.

10. Conclusion

Compensation in the WTO is already serving a variety of functions. Strikingly, these functions emerge more from the content of mutually agreed temporary solutions to disputes and national laws than the present text of the DSU. The lowering of tariffs associated with trade compensation serves rebalancing and compliance inducement functions. To date, the suspension of concessions has played a much stronger role than trade compensation in trying to achieve these

110 See WT/DS8/17, WT/DS10/17, WT/DS11/15, Mutually Acceptable Solution on Modalities for Implementation of 30 July 1997.

111 This is a very plausible explanation since the US pointed out during the Arbitration (above note 21) that the private collective management organization which collect royalties on behalf of copyright holders do not find it profitable to license all of the potential users of their works. Before the business exemption, less than 20 per cent of restaurants were licensed to transmit music, while almost three quarters of restaurants actually played music. Paras 3.25–3.27.

functions. It is well understood that this position is highly unsatisfactory. It is very optimistic to consider the main explanation for the reliance on suspension as being the link which presently exists in the DSU between proceedings to determine the level of nullification or impairment and the suspension of concessions. While this does not help, and the problem is likely to be rectified, it is submitted that other reasons are more important. There is little doubt that trade compensation has to be granted on a MFN basis, and certainty that suspension operates on a bilateral basis. The claimant state may therefore be reluctant to accept the benefit of a portion of MFN trade compensation when it can instead (at least in mercantilist terms) opt to receive the full 'benefit' of suspending concessions. From the perspective of the defendant state, it may be easier to endure suspension than offer trade compensation. Whether trade compensation will play a stronger role in the future depends therefore upon the extent to which MFN treatment can be sidestepped, the extent to which the internal efficiency losses caused by suspension can be explained at the domestic level, and the extent to which the very real concerns of developing countries are internalized.

Financial compensation can also serve the same rebalancing and compliance inducement functions as trade compensation and is similarly unaffected with the problems associated with suspension. It is likely to have a higher compliance inducement effect since the payment of a monetary amount to the claimant state is likely to be felt more keenly than trade compensation. A further advantage is that MFN obligations have no relevance in the context of financial compensation, so that the states which can establish nullification or impairment would be entitled to the full amount agreed upon. Possible problems with calculating the amount of compensation are surmountable. It is acknowledged that securing budgetary authorization for this form of compensation may prove difficult for many Members, although the growing number of bilateral free trade agreements entered into by the United States, which expressly envisage financial compensation, exemplify that this problem too can be overcome.

The extent to which financial compensation can and should be linked to reparation is an important issue. The language of nullification or impairment accruing to a WTO Member disguises the fact that WTO violations primarily injure private entities. While the frequently cited passages from *US-Section 301* have not been approved by the Appellate Body, they neither seem to have been contested in the literature. The issue of reparation at the multilateral level ties in with established and emerging debates about the status of economic rights and the nature of WTO remedies. It is also the flip side of the debate on the direct effect of WTO obligations at the national and regional levels. Some preliminary views have been sketched in this article. It is not considered that the disbursement of financial compensation with reparative effect is prevented by WTO rules. Indeed, it can already be regarded as a possible option, particularly where it does not undermine the policy objectives underlying the original violation.

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Participation of NGOs before the WTO and EC tribunals: which court is the better friend?

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Introduction

The dispute settlement system of the European Community (EC) is undeniably much more elaborate than that of the World Trade Organization (WTO). The reasons for this are evident. First, unlike the WTO the EC, being a supranational organization, has the competence to adopt legislative and administrative acts in its own right. Democratic principles require that the legality of these acts can be examined by a judicial body. Second, legislative and administrative acts of the EC frequently have a direct impact on EC citizens. It would be contrary to democratic principles if citizens affected by legislative or administrative acts of the EC were not able to have the legality of such measures examined by a judicial body. By way of contrast, the inter-State nature of WTO proceedings is such that its dispute settlement system is exclusively open to WTO Members. Third, the EC institutions are capable of beginning legal proceedings against each other and against EC Member States. In particular, if the EC Commission considers that an EC Member State has failed to fulfill an EC Treaty obligation, it may bring the matter before the ECJ. In WTO law, there is no opportunity for inter-institutional proceedings or proceedings between the WTO and its Members.

The most remarkable difference between the dispute settlement systems of the EC and the WTO is that the EC explicitly has created a number of procedures allowing private parties to participate in proceedings before its Court of Justice (the ECJ) and the Court of First Instance of the European Community (the ECFI) (together referred to as the European courts), whilst WTO dispute settlement in principle takes place exclusively between WTO Members. The contrast between the EC and the WTO with respect to access to justice by private parties has however been softened by the WTO Appellate Body's decision to allow private parties to submit *amicus curiae* briefs in proceedings between WTO Members before the WTO dispute settlement organs. This development was in particular intended to

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enable non-governmental organizations (NGOs) to participate in WTO dispute settlement proceedings.[1] Notwithstanding the introduction of *amicus curiae* briefs into WTO law, it is still fair to state that, given the existence of a number of procedures open to private parties, the EC dispute settlement system is much more elaborate than that of the WTO as regards the participation of private parties. One might therefore have expected that NGOs would enjoy more access to justice before the European courts than before the WTO dispute settlement organs.

The first section of the present contribution examines whether this expectation that the European courts are better friends to NGOs than the WTO dispute settlement organs has any foundation in reality. It compares the formal participatory role in proceedings before the WTO dispute settlement organs and the European courts.[2] Surprisingly, the first section concludes, as far as disputes on an EC level can be compared with WTO dispute settlement (i.e., proceedings between EC Member States or, much more frequently, between EC institutions and between EC Member States and EC institutions), that NGOs are in a better position before the WTO dispute settlement organs than in the European courts. Whilst NGOs have no right of intervention in disputes between EC Members, between EC institutions and between EC Member States and EC institutions, they may be able to submit unsolicited *amicus curiae* briefs in proceedings between WTO Members before the WTO dispute settlement organs (Section 1).

The second section of this contribution argues, to start with, that the WTO Appellate Body was incorrect in making the WTO dispute settlement organs better friends to NGOs than the European courts. More precisely, it argues that the WTO Appellate Body's interpretation of the present WTO dispute settlement rules to allow NGOs to participate in WTO proceedings by means of unsolicited *amicus curiae* briefs or otherwise was wrong. Subsequently, it concludes that the present WTO dispute settlement rules should not be changed as to allow NGOs to submit unsolicited *amicus curiae* briefs (Section 2).

1. Which court is the better friend?

This section first gives an overview of all the opportunities for NGOs to participate in dispute settlement proceedings before the European courts (1.1). It then summarizes both the present law and future proposals in respect of NGO participation in WTO dispute settlement by means of *amicus curiae* briefs (1.2). This section

1 References to NGOs in this contribution are to all non-profit citizens and other organizations and/or agencies unaffiliated with government. These include NGOs defending civil society as well as NGOs representing elements of the business community.

2 By doing so, it focuses on formal procedures open to NGOs and not on the effects of informal, more indirect NGO involvement in dispute settlement, for instance by lobbying WTO Members to start proceedings against other WTO Members (see for their informal involvement in WTO dispute settlements, G. Shaffer, *Defending Interests, Public–Private Partnerships in WTO Litigation*, Brookings, 2003.

concludes by comparing the respective access to justice accorded to NGOs in EC and WTO law (1.3).

1.1 Participation by NGOs in proceedings before the European courts

There are several ways in which NGOs may, at least theoretically, participate in proceedings before the European courts.[3] First, in specific circumstances NGOs may challenge legislative and administrative acts adopted by EC institutions and the European Central Bank (the 'ECB') before the European courts (A). Second, an NGO may complain to the European courts that an EC institution has failed to act after being called upon to do so (B). Third, NGOs are sometimes able to appear before the European courts as an intervener in proceedings between other parties (C). Fourth, they may in principle claim damages for illegal acts adopted by the EC institutions and the ECB (D). Fifth, NGOs may come before the ECJ in an indirect manner by starting litigation before the national courts in order to raise questions on the interpretation of EC law or the illegality or interpretation of acts of the EC institutions or the ECB. The national courts of the EC Member States may – and sometimes are obliged to – refer such questions to the ECJ by means of a preliminary reference (E). This subsection ends with some general findings on the rights of NGOs to participate in proceedings before the European courts (F).

(*A*) *Direct appeal by NGOs*

Article 230(4) EC provides: 'Any natural or legal person may institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.'[4] Notwithstanding the wording of Article 230(4) EC, an action for annulment pursuant to Article 230(4) EC can also be brought against regulations, directives, and decisions adopted by EC institutions. Further, any other acts of the EC institutions or the ECB having legal effects vis-à-vis third parties are in principle subject to appeal. An action can also lie against *sui generis* acts of the EC institutions and the ECB.[5]

The term 'any natural or legal person' in Article 230(4) EC covers NGOs to the extent that they have legal personality. However, the mere fact that under Article 230(4) EC, NGOs may have standing does not mean that it is easy for NGOs to

3 For the sake of completeness it is worth mentioning that no formal procedures exist which enable NGOs to request the EC Commission (or other EC institutions) to act on their behalf in proceedings before the European courts. The position of NGOs at a European level contrasts in this respect with their position on an international trade level. Indeed, pursuant to Regulation 3286/94 (OJ 1994, L 349/71) laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization, NGOs and other private parties may request the EC Commission to take action against obstacles to trade created by third countries.

4 For a detailed analysis of direct appeal, actions pursuant to Article 230 EC, see A. Albors-Llorens, *Private Parties in European Community Law*, Oxford, 1996.

5 See Paul J. G. Kapteyn and P. VerLoren van Themaat, *Introduction to the Law of the European Communities*, Kluwer International, third edition, 1998, at p. 460.

start an action against legislative or administrative acts of the EC. Article 230(4) EC prevents NGOs from contesting the legality of EC acts before the European courts, unless they are the addressees of that act or are directly and individually concerned by the act. In most cases, the NGO seeking to contest an EC measure, which in its view violates the general interests it aims to defend (e.g., the environment) will not be the addressee of that EC measure. The EC measure (e.g., a regulation or a directive), will normally be of general application and will not have any addressees other than the EC Member States. Therefore, NGOs only have access to justice pursuant to Article 230(4) EC if the EC measure they want to challenge before the European courts is – notwithstanding the general nature of that measure – 'of direct and individual concern' to them.

- Direct concern

The requirement that the EC act must be of direct concern to the NGO demonstrates that an application by the NGO may be brought only against acts of EC institutions which have direct legal effects for that NGO. In practice, this requirement implies that the contested EC act may leave no real discretion to the addressees that are entrusted with the implementation of the act (in most relevant cases being the EC Member States).[6] Provisions of directives will generally leave such a discretion to EC Member States, and will thus by their nature be difficult to challenge by NGOs. In the context of other EC legislation of general application, such as regulations, there is usually little difficulty in showing an element of direct concern to those caught by their provisions.[7]

However, the absence of any discretion in the application of the act in question is not proof in itself – as far as NGOs are concerned – that the act is of direct concern to the NGO. When an NGO is established to protect the general rights of a group of citizens and the EC measure has a legal impact on the rights of these citizens, the European courts will in general take the view that it is not the NGO but rather the citizens that are directly concerned. It may be difficult for an NGO to convince the European courts in such cases that, along with the citizens it represents, the NGO is itself directly concerned by the EC measures it is seeking to challenge.

- Individual concern

Perhaps an even greater problem for NGOs is the requirement that the act must be of individual concern. The ECJ has consistently upheld its so-called *Plaumann formula*: 'Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they

6 See F. Ragolle, 'Access to Justice for Private Applicants in the Community Legal Order: Recent (R)evolutions', *ELR* (2003), at p. 92.

7 See J. A. Usher, 'Direct and Individual Concern – an Effective Remedy or a Conventional Solution?', *ELR* (2003), at p. 577.

are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed'.[8] In practice, the Plaumann formula has been applied very narrowly by the European courts. The strict approach adopted by the ECJ with regard to the notion of individual concern in relation to private parties in general and to NGOs in particular has given rise to much criticism. Attempts – not particularly related to the standing of NGOs – by both the ECFI in *Jégo-Quéré*[9] and Advocate-General Jacobs in *Unión de Pequeños Agricultores*[10] to overcome this criticism by relaxing the notion of individual concern were not followed by the ECJ in *Unión de Pequeños Agricultores* and the appeal in *Jégo-Quéré*. In these cases, the ECJ reaffirmed its previous case law and stated that a regulation can only be of individual concern to private applicants if they meet the criteria set out in the above-mentioned Plaumann formula.[11]

As far as NGOs are concerned, the ECJ has clarified in its case law that an NGO is individually concerned and thus entitled to contest an EC measure before the European courts only if it represents individuals who are themselves entitled to bring an action for annulment under Article 230(4) EC[12] or if special circumstances exist which sufficiently distinguish the NGO in question. An example of such special circumstances could be that the NGO undertook a particular role in the procedure which led to the adoption of the EC measure. Mere consultation by the EC institutions, however, is not sufficient to afford an NGO the right to contest the legality of the EC measure. There must either have been an adverse effect on the negotiating position of the NGO,[13] or secondary EC law must exist, distinguishing the NGO by explicitly granting it specific procedural rights to participate in the decision-making process preceding the adoption of the challenged act.[14] An NGO is thus not individually concerned merely because the general interests it represents are at issue.[15]

- An example: the *Greenpeace* case

In the *Greenpeace* case,[16] the ECFI found Greenpeace's action against an EC measure under Article 230(4) EC inadmissible. The ECJ confirmed the

8 See case 25/62, *Plaumann* v. *Commission* [1963] ECR 95.

9 See T-177/01, *Jégo-Quéré* v. *Commission* [2002] ECR II-2365, annulled by case C-263/02 P, *Commission* v. *Jégo-Quéré* of 1 April 2004, not yet published.

10 See C-50/00 P, *Unión de Pequeños Ågricultores* v. *Council* [2002] ECR I-6677.

11 See Usher, 'Direct and Individual Concern', at p. 576. See also Ragolle, 'Access to Justice', at p. 99. See also, on the *Jégo-Quéré* and *Unión de Pequeños Agricultores* saga, N. Van den Broek, 'A Hot Summer for Individual Concern?', *LIEI* (2003), at pp. 61–79.

12 See for instance case 19–22/62, *Fédération Nationale de la Viande en Gros* v. *Council* [1962] ECR 943.

13 See for instance cases 67, 68 and 70/85, *Van der Kooy* [1988] ECR 219.

14 See for instance case 207/86, *Apesco* v. *Commission* [1988] ECR 2151, at § 12.

15 See cases 16/62 and 17/62, *Confédération Nationale des Producteurs de Fruits et Légumes a.o.v. Council* [1962] ECR 901.

16 See case C-321/95 P, *Greenpeace* v. *Commission* [1998] ECR I-1651.

finding of the ECFI on appeal. The EC measure concerned the decision to provide EC funding to the Spanish Government for the construction of two power stations that Greenpeace considered were being built in violation of the EC's environmental impact assessment directive.[17] According to the ECJ, the citizens represented by Greenpeace were not individually concerned, as the measure in question concerned them only in a general and abstract fashion. The ECJ was not willing to take into account the nature and specific characteristics of the environmental interests underpinning Greenpeace's action. Furthermore, Greenpeace was found not to be directly affected by the EC measure, since it was the decision of the Spanish authorities to build the power stations, rather than the EC measure financing the construction of the two power stations, which was liable to affect the environmental rights that Greenpeace sought to protect.[18]

In view of the above, it will generally be very difficult for an NGO to defend its interests by way of an action based on Article 230(4) EC and only in rather exceptional cases will an NGO be able to obtain standing pursuant to this article.[19] First, an NGO may have its own independent legal interest in challenging a decision when that decision violates its negotiating position by not respecting procedural rights, created in secondary EC legislation, enabling the NGO to represent its members' interests.[20] Second, an NGO's action may be admissible if it puts itself in the place of its members and the members themselves are (directly and) individually concerned.

17 See Directive 85/337, OJ 1985 L175/40.

18 See case C-321/95 P, *Greenpeace* v. *Commission*, *supra*, footnote 16, at §§ 27–31.

19 This situation will not change if Article III-270 (4) of the draft Treaty establishing a Constitution for Europe enters into force. This provision is more liberal with respect to *locus standi* for individuals in relation to so-called 'regulatory acts'. Pursuant to Article III-270 (4) of the draft Treaty an individual may challenge regulatory acts which require no further implementation if the individual is able to prove direct concern. Unlike in the case of 'legislative acts', in the case of 'regulatory acts' individual concern will not be required. As explained above, though most NGOs will not be directly concerned by EC measures. This will most likely also apply to 'regulatory acts', although there is no definition in the draft Treaty of regulatory acts. In any event, it is far from clear that the draft Treaty will ever enter into force, since it must be ratified by all 25 EC Member States. A number of EC Member States are holding referenda in 2005 and 2006. They will ratify the draft Treaty only in case of a positive outcome of their national referendum.

20 The Commission's proposal for a Regulation implementing the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters (COM (2003) 622 final) creates procedural rights for certain qualified environmental NGOs to request an internal review of EC administrative acts (and not EC legislation) that, in their opinion, contravene environmental law. Where the relevant EC institutions reject the request for internal review or where the qualified entity considers that the decision allowing internal review is insufficient to ensure compliance with environmental law, that entity is entitled to appeal to the ECJ (Articles 9–12 of the proposal). Following adoption of the Regulation, environmental NGOs may have a slightly better chance of bringing a direct action before the ECJ (see J. Peel, 'Giving the Public a Voice in the Protection of the Global Environment', *Colo. J. Int'l Envtl. L. & Pol'y* 12 (2001), at pp. 59–60). However, the action before the ECJ would be limited to challenging the decision on the request for internal review and would not extend to challenging the administrative acts as such.

(*B*) *Failure to act*

Pursuant to Article 232(3) EC, NGOs may 'complain to the Court of Justice that any institution of the Community has failed to address to that person any act other than a recommendation or an opinion'. The conditions for admissibility of an action based on Article 232(3) EC are just as strict for NGOs as they are under Article 230(4) EC (see (A) above).[21] Furthermore, Article 232(3) EC states that an action for failure to act is admissible only if the institution concerned has first been called upon to act. If, within two months of being so called upon, the institution concerned has not defined its position, an action may be brought before the ECFI. However, once the institution has defined its position, irrespective of whether it has adopted the act in question or not, the European courts will declare an action based on Article 232(3) EC inadmissible. For all these reasons, an action based on Article 232(3) EC is in practice not very useful to NGOs.

(*C*) *Intervention*

A third possibility for NGOs to stand up for their general interests before the European courts is an intervention. In certain circumstances, third parties may intervene in proceedings pending before the European courts. Article 40 of the Statute of the ECJ provides: 'Member States and institutions of the Communities may intervene in cases before the Court. The same right shall be open to any other person establishing an interest in the result of any case submitted to the Court, save in cases between Member States, between institutions of the Communities or between Member States and institutions of the Communities … An application to intervene shall be limited to supporting the form of order sought by one of the parties.'

An applicant that has been allowed to intervene before the European courts receives copies of the parties' statements. This applicant may lodge a statement of intervention to which the parties to the dispute will normally reply. The intervener is also allowed to submit its observations during an oral hearing, if such hearing takes place.[22]

The requirement that the intervening party has an 'interest in the result of [the] case' means that that party should have an interest in the operative part of the final judgement, which the parties to the dispute are seeking from the ECFI or the ECJ.[23] As far as NGOs are concerned, this requirement has been construed rather widely by the European courts: in contrast to intervention by other private parties, the ECJ does not require that intervening NGOs demonstrate that their own legal position or economic situation is affected. NGOs may have an interest to intervene provided that the persons they represent have

21 See, for instance, case C-68/95, *T. Port* [1996] ECR I-6065.

22 See Article 93 of the Rules of Procedure of the ECJ and Article 115 of the Rules of Procedure of the ECFI.

23 See, for instance, case 111/63, *Lemmerz-Werke* v. *High Authority* [1965] ECR 193.

one.[24] But, even when none of its individual members is directly affected, an NGO representing collective interests may still intervene in proceedings before the European courts. Indeed, NGOs are generally allowed to intervene in cases where the outcome of the proceedings is such as to affect a collective interest represented by the NGO and the case is thus held to be of general importance.[25] In some cases, even the mere fact that the judgment might be used as a precedent in later cases was sufficient to allow intervention by an NGO.[26] Furthermore, an NGO's right to intervene can also arise from the fact that it participated in the preparation of the contested act.[27] Thus, the notion of 'interest' within the meaning of Article 40 of the Statute of the ECJ seems to be much wider than the notion of 'direct and individual concern' within the meaning of Article 230(4) EC.

At first sight, one could therefore be led to believe that intervention provides a useful means of participation for NGOs which – as seen above (A) – are generally not entitled to institute proceedings before the European courts in their own name for the protection of the collective interests of their members. Nevertheless, the possibilities for NGOs to intervene in proceedings before the European courts are in fact rather limited. First, the intervention of NGOs is limited to supporting the conclusions of one of the parties and NGOs may not introduce new claims. Yet this rule may not prove to be a very relevant limitation in practice. Although there is little authority on the question, it appears that an intervening party can rely on all pleas, objections, and arguments which the party to the action could have raised, save where the party to the action has already expressly conceded the point or renounced any reliance on it.[28] Second, and more importantly, the instances where NGOs may intervene are limited: Article 40 of the Statute of the ECJ does not grant a right to private parties (including NGOs) to intervene in actions between EC Member States,[29] in actions between EC institutions or in actions between EC Member States and EC institutions. In other words, NGOs only have a right to intervene in disputes before the European courts between private parties and EC institutions.[30]

24 See, for instance, cases 16/62 and 17/62, *Confédération Nationale des Producteurs de Fruits et Légumes a.o.* v. *Council*, *supra*, footnote 15, at 488–489.

25 See, for instance, case T-192/94, *Maurissen and European Public Service Union* v. *Court of Auditors* [1996] ECR-SC I-425 and II-1229.

26 See case C-241/91 P and C-242/91 P, *Radio Telefis Eireann and Independent Television Publications Ltd* v. *Commission* [1995] ECR I-74 with regard to the intervention by Intellectual Property Owners Inc.

27 See D. Lasok, *The European Court of Justice, Practice and Procedure*, Butterworths, 2nd edition, 1994, at p. 161.

28 See Lasok, *The European Court of Justice*, at p. 172. See, for instance, T-459/93, *Siemens* [1995] ECR II-1675, at §§ 21–23.

29 Proceedings between EC Member States before the European courts pursuant to Article 227 EC are extremely rare (there are only two instances of court proceedings between EC Member States, see cases 141/78, *France* v. *UK* [1979] ECR 2923 and C-388/95, *Belgium* v. *Spain* [2000] ECR I-3123).

30 See Article 40 of Statute of the ECJ. See, for example, case C-181/95, *Biogen* [1996] ECR I-717.

Finally, it is worth noting that NGOs may always have recourse to an unofficial, indirect means of intervention in proceedings before the European courts outside the context of an Article 40 intervention. There is nothing to prevent interested third parties, including NGOs, which for whatever reason cannot or do not want to apply for leave to intervene in proceedings before the European courts pursuant to Article 40 of the Statute of the ECJ, from asking a party to the proceedings (a private party, an EC Member State or even an EC institution) to file their *amicus curiae* brief before the ECFI or ECJ as a document attached to and in support of that party's pleading. The applicable procedural rules before the European courts require, at least implicitly, that such *amicus curiae* briefs support the party's written plea.[31] There is obviously no obligation on the party receiving an *amicus curiae* brief from an NGO to actually present that brief in their pleading.

(*D*) *Preliminary references*

Article 234 EC confers on the ECJ jurisdiction to give preliminary rulings on the interpretation of the Treaty and of acts of the Community institutions and the ECB and on the validity of such acts. The second paragraph of that Article provides that national courts of each EC Member State may refer such questions to the ECJ. Further, the third paragraph of Article 234 EC obliges national courts to do so where there is no judicial remedy under national law against their judgments.

Article 234 EC grants NGOs (and other private parties), therefore, an indirect means to bring their case before the ECJ. For example, in the *Greenpeace* case, the ECJ explicitly referred to the possibility of a preliminary ruling under Article 234 EC in response to Greenpeace's argument that the ECJ's narrow interpretation of Article 230(4) EC would deprive Greenpeace of effective judicial protection. The ECJ noted that Greenpeace actually brought proceedings before the national courts, challenging the Spanish administrative ruling relating to the construction of two power stations. The ECJ found that, although 'the subject-matter of these [national] proceedings and of the action brought before the [ECFI] is different, both actions are based on the same rights afforded to individuals by [the environmental impact directive], so that in the circumstances of the present case these rights are fully protected by the national courts which may, if need be, refer a question to this Court for a preliminary ruling under Article [234] of the Treaty'.[32]

Thus, NGOs may start proceedings before the national court of an EC Member State against a national measure that, in the opinion of the NGO, either infringes EC law or applies an EC act that itself infringes EC law. In such national proceedings, the NGO in question may provoke questions on the validity or

31 See Article 37(4) of the Rules of Procedure of the ECJ and Article 43(4) of the Rules of Procedure of the ECFI: 'To every pleading there shall be annexed a file containing the documents relied on *in support of it*, together with a schedule listing them' (emphasis added). See, for example, the *amicus curiae* brief of the International Trademark Association in case C-143/00, *Boehringer Ingelheim* [2002] ECR I-3759, http://www.inta.org/policy/amicus.html.

32 See case C-321/95, *Greenpeace* v. *Commission*, footnote 16, at §§ 32–33.

interpretation of the disputed EC measure, suggesting to the national court that a preliminary reference to the ECJ is desired or (as far as the highest court is involved) obligatory. Whether the claims of the NGO are admissible before the national courts or not depends on the different national procedural rules. The rules of most, if not all, EC Member States on *locus standi* are more relaxed in respect of NGOs than those of the European courts.

For example, Fedesa, an animal health NGO, challenged the EC hormones legislation before the ECJ. This direct action by Fedesa before the European courts was declared inadmissible.[33] Simultaneously, however, Fedesa used an indirect line of attack on the legislation. Before the English courts, Fedesa challenged the validity of British regulations which implemented the EC hormones legislation on the basis that the EC hormones legislation was invalid.[34] The English court decided to request a preliminary ruling from the ECJ on the validity of the legislation. Thus, Fedesa succeeded indirectly in contesting the legality of the EC hormones legislation before the ECJ, although its earlier, direct action, had been declared inadmissible.[35]

It is far from certain, though, that a national court will refer questions on the interpretation of the EC Treaty or EC acts or on the validity of EC acts to the ECJ pursuant to Article 234 EC. The national courts of the EC Member States ultimately have discretion whether or not to make a preliminary reference to the ECJ. Even the highest courts have some discretion on the basis of the *CILFIT* case law on '*acte clair*' and '*acte éclairé*'. This jurisprudence provides that, notwithstanding the third paragraph of Article 234 ECJ, the highest national court is not obliged by EC law to refer to the ECJ a question on the interpretation and/or validity of EC law if the answer is clear from legislation or from the case law of the ECJ. It is not for the ECJ to direct national courts on this issue.[36]

A practical barrier to the effectiveness of preliminary rulings is their long duration. A preliminary ruling before the ECJ takes on average 25 months. The need to translate documents into a larger number of languages as a result of the accession of new EC Member States will certainly not make this process any quicker. The duration of the preliminary ruling has to be added to the duration of

33 See case 160/88, *Fedesa* v. *Council* [1988] ECR 6399.

34 See case 331/88, *The Queen* v. *Minister of Agriculture, Fisheries and Food and Secretary of State, for Health, ex parte: Fedesa and others* [1990] ECR I-4023. See for a discussion of the substance of this case (and the *Hormones* case before the WTO dispute settlement organs) M. M. Slotboom, 'The Hormones Case: An Increased Risk of Illegality of Sanitary and Phytosanitary Measures', *CMLRev.* 36 (1999), 471–491; and M. M. Slotboom, 'Do Public Health Measures Receive Similar Treatment in European Community and World Trade Organization Law?', *JWT* (2003), 553–596.

35 Ultimately, the ECJ found that the EC hormones legislation was valid (see footnote 34). See for another example of an NGO attacking EC legislation indirectly by means of a preliminary proceeding, case C-6/99, *Greenpeace France and others* v. *Ministère de l'Agriculture et de la Pêche and others* [2000] ECR I-1651 on the interpretation of EC directive 90/220 on the deliberate release into the environment of genetically modified organisms.

36 See case 238/81, *CILFIT* [1982] ECR 3415, at §§ 13 and further.

national proceedings, which will often last for a number of years as well. Altogether, an NGO will need patience and sufficient financial resources if it hopes to pursue a preliminary ruling. For these and other reasons, Advocate-General Jacobs in *Unión de Pequeños Agricultores* found that the preliminary ruling procedure was not a realistic alternative to direct action in challenging acts of the EC institutions before the European courts.[37]

(*E*) *Compensation for damages*

An even less practical route for NGOs is to claim compensation for damages pursuant to Articles 235 and 288 EC. These provisions enable private parties to claim compensation for damages suffered as a consequence of an illegal act of the EC. This action is in principle open to NGOs. Such a claim would not result in the annulment of the EC measure, but the NGO would receive some form of compensation from the EC.

Although the requirements for admissibility pursuant to Articles 235 and 288 EC are less severe than they are for applying Article 230 EC,[38] in practice the option for an NGO to claim damages is merely theoretical. Indeed, the European courts have rejected the principle that there should be a collective right of an NGO to damages with regard to personal damages of its members.[39] An NGO can therefore only claim damages if it has suffered damages itself[40] or if the NGO is assigned to claim compensation for damages suffered by its members.[41] The reality is that proceedings by NGOs to claim compensation for damages have been rare.

(*F*) *Conclusions with regard to the different possibilities for NGOs to participate before the European courts*

In practice, there are only two real means by which NGOs can effectively participate in proceedings before the European courts.[42]

First, NGOs may intervene in proceedings before the European courts, but only if these proceedings have been started by private persons, which themselves are directly and individually concerned by a legislative or administrative act adopted by an EC institution or the ECB. In that case, their action is confined to supporting the conclusions of one or more of the parties.

Second, NGOs may try to obtain a preliminary ruling from the ECJ by starting proceedings before the national court, either by directly challenging the validity of an EC measure or by questioning the compatibility of a national measure with EC

37 See §§ 36–49 of his conclusion in C-50/00 P, *Unión de Pequeños Agricultores*, *supra*, footnote 10.

38 See E. I. Mead, *The Action for Damages in Community Law*, 1997, at pp. 243–258.

39 See case 72/74, *Union Syndicale – Service Public Européen a.o.* v. *Council* [1975] ECR 401, at §§ 20–22.

40 See, for instance, case 289/83, *GAARM* [1984] ECR 4295, at §§ 3–5.

41 See, for instance, cases T-481/93 and T-484/93, *Exporteurs in Levende Varkens* [1995] ECR II-2941, at § 77.

42 The more theoretical means of participation being a direct action for annulment, action for failure to act and a claim for damages.

law. However, national courts may exercise discretion in making a preliminary reference. It is therefore far from evident that an NGO will succeed in being heard by the ECJ by means of a preliminary ruling. Moreover, preliminary rulings cause considerable delays to national proceedings which are themselves often rather lengthy. In view of (i) the uncertainty as to whether the national courts will make a preliminary reference and (ii) the considerable delays involved in a preliminary reference, NGOs may be reluctant to choose this route as a means of participation in proceedings before the ECJ.

Surprisingly, given the fact that in theory there exist a number of means private parties have to participate in opportunities before the European Courts, this subsection concludes that the possibilities for NGOs to participate in proceedings by the European courts are in practice rather limited.[43]

1.2 Participation by NGOs in proceedings before the WTO dispute settlement organs

The WTO dispute settlement mechanism is intended to settle disputes between WTO Members. Consequently, the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) does not contain procedures regulating the participation of NGOs (or any other private party) in the WTO dispute settlement process.

(A) In principle, WTO dispute settlement is an exclusive matter between WTO Members

Although Article 1 (Coverage and Application) of the DSU does not explicitly exclude the *locus standi* of private parties, it is clear from this provision that dispute settlement pursuant to the DSU should take place exclusively between WTO Member governments.[44]

Indeed, the first sentence of Article 1(1) DSU sets out that the DSU applies to disputes brought pursuant to the consultation and dispute settlement provisions of the WTO agreements listed in Appendix 1 to the DSU. The latter provisions refer to Articles XXII and XXIII of the General Agreement on Tariffs and Trade 1994 and these provisions relate to disputes between WTO Members only. The second sentence of Article 1(1) DSU states that the rules and procedures of the DSU are applicable to disputes between WTO Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization and of the DSU itself. Article 1(2) DSU states that the rules and

43 Advocate-General Jacobs went so far as to suggest in *Unión de Pequeños Agricultores* (see, *supra*, footnote 10) that the limited possibilities for individuals to stand before the European courts does not provide effective judicial protection of individual applicants and is therefore incompatible with fundamental human rights as recognized by Articles 6 and 13 of the European Convention of Human Rights (see §§ 39, 40, and 86 of his opinion).

44 See the report by the WTO Appellate Body on *US–Importation of Certain Shrimps and Shrimp Products* (‘*US–Shrimp*’), 12 October 1998, WT/DS58/AB/R, at § 101: ‘It may be well to stress at the outset that access to the dispute settlement process of the WTO is limited to the Members of the WTO.’

procedures of the DSU to covered agreements as identified in Appendix 2 apply to the DSU, although specific provisions on dispute settlement in these covered agreements shall prevail. The dispute settlement provisions of these agreements refer also to disputes between WTO Members only.

Article 10 DSU deals with intervention by third parties during the WTO panel process. Equally, Article 17(4) DSU allows third parties which have notified the Dispute Settlement Body (DSB) of a substantial interest in the matter pursuant to Article 10(2) DSU to intervene in proceedings before the WTO Appellate Body. Neither Article 10 DSU nor Article 17(4) DSU allow NGOs to appear as third parties in WTO dispute proceedings. Indeed, Article 10(2) DSU defines third parties within the meaning of the DSU as WTO Members having a substantial interest in a matter before a panel and having notified their interest to the DSB.

(*B*) *Unsolicited* amicus curiae *briefs are nevertheless allowed in certain circumstances*

The fact that the DSU excludes private parties in general and NGOs in particular from participating in WTO dispute settlement proceedings does not mean that NGOs are completely sidelined in such proceedings. Indeed, the WTO Appellate Body has decided that both the WTO panels and the WTO Appellate Body itself are allowed to consider unsolicited *amicus curiae* briefs submitted by private parties.[45]

First of all, *amicus curiae* briefs may be attached to the submission of a WTO Member that is a party to WTO dispute settlement. In that case, *amicus curiae* briefs become part of that party's submission, also when it concerns an *amicus curiae* brief from a private party (including NGOs). Such *amicus curiae* briefs will only be accepted by the WTO dispute settlement organs if they support a claim already raised by the WTO Members with whom the private party sides.[46] As in the case of attached *amicus curiae* briefs in proceedings before the European courts, there is obviously no obligation on a WTO Member receiving an *amicus curiae* brief from an NGO to actually incorporate that brief in their submission.

45 See on this matter generally A. Appleton, 'The Amicus Curiae Submissions in the Carbon Steel case: Another Rabbit From the Appellate Body's Hat', *JIEL* (2000), 691–699; G. Marceau and M. Stilwell, 'Practical Suggestions for Amicus Curiae Briefs Before WTO Adjudicating Bodies', *JIEL* (2001), at pp. 155–187; P. Mavroidis, 'Amicus Curiae Briefs Before the WTO: Much Ado About Nothing', Jean Monnet Working Paper 2/01; Stern, 'The Intervention of Private Entities and States as 'Friends of the Court's in WTO Dispute Settlement Proceedings', in A. Appleton and P. Macrory (eds), *The World Trade Organization; Legal, Economic and Political Analysis*, Springer, 2005, Chapter 32; G. C. Umbricht, 'An "*Amicus Curiae* Brief" on Amicus Curiae Briefs at the WTO', *JIEL* (2001), at pp. 773–794; G. Zonnekeyn, 'The Appellate Body's Communication on Amicus Curiae Briefs in the Asbestos Case – an Echternach Procession?', *JWT* 3 (2001), 553–564.

46 See the report of the WTO panel on *EC–Measures Affecting Asbestos and Asbestos-Containing Products* ('*EC–Asbestos*'), 10 September 2001, WT/DS135/R, at § 8.12. See also the WTO Appellate Body in *US–Shrimp*, *supra*, footnote 44, at § 91, indicating that arguments in an attached *amicus curiae* brief are only taken into consideration to the extent that the WTO Member attaching the brief to its submission has agreed with the arguments put forward by the *amicus curiae*.

In practice, governments will only be prepared to attach an NGO brief to their submission, if that brief agrees with all their arguments. As a result in such briefs the NGO appears less as a friend of the 'court' than as a friend of one of the litigants.

The WTO Appellate Body has however also found that unsolicited *amicus curiae* briefs from private parties (including NGOs) can be accepted for consideration in proceedings both before the WTO panels and the WTO Appellate Body, even if they are not attached to the submission of one of the parties to the dispute settlement proceeding.[47] The WTO Appellate Body decided to allow for the consideration of such unsolicited *amicus curiae* brief submissions on the basis of Article 13.1 DSU. Pursuant to this provision, a WTO panel has the right 'to seek information and technical advice from any individual or body'. The WTO Appellate Body stated that 'authority to seek information is not properly equated with a prohibition on accepting information which has been submitted without having been requested by a panel. A panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, whether requested by a panel or not.'[48]

In *US–Carbon Steel*, the WTO Appellate Body concluded that not only WTO panels but also the WTO Appellate Body itself could accept unsolicited *amicus curiae* briefs. It based its conclusion on Article 17.9 DSU, which provides: 'Working procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information.' In the opinion of the WTO Appellate Body, this provision makes it clear that the WTO Appellate Body 'has broad authority to adopt procedural rules which do not conflict with any rules and procedures in the DSU or the covered agreements'. Accordingly, the WTO Appellate Body found that, as long as it acts consistently with the provisions of the DSU and the covered agreements, it has 'the legal authority to decide whether or not to accept and consider any information that is pertinent and useful in an appeal'.[49] In the *EC–Asbestos* case,[50] the WTO Appellate Body chose not to rely on Article 17.9 DSU, but instead emphasized that it acted pursuant to Rule 16(1) of the Working Procedures for Appellate Review. This provision states that 'where a procedural question arises that is not covered by these Rules, a division may adopt an appropriate procedure for the purposes of that appeal only, provided that

47 See, for instance, the report of the WTO Appellate Body in *US–Shrimp*, at § 108 as far as *amicus curiae* briefs in WTO panel proceedings are concerned and the report of the WTO Appellate Body in *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismouth Carbon Steel Products Originating in the United Kingdom* ('*US–Carbon Steel*'), 10 May 2000, WT/DS138/AB/R, at § 43 as far as *amicus curiae* briefs in WTO Appellate Body proceedings are concerned.

48 See the report of the WTO Appellate Body in *US–Shrimp*, *supra*, footnote 44, at § 108.

49 See the report of the WTO Appellate Body on *US–Carbon Steel*, footnote 47, at § 39.

50 See the report of the WTO Appellate Body on *EC–Asbestos*, WT/DS135/AB/R, 12 March 2001, at §§ 50–58.

it is not inconsistent with the DSU, the other covered agreements and these Rules '.[51]

In view of the submission of unsolicited *amicus curiae* briefs in the WTO panel proceedings in the *EC–Asbestos* case, the WTO Appellate Body expected to receive further, and possibly numerous, briefs in the appeal proceedings. The WTO Appellate Body therefore adopted a document, called Additional Procedure Adopted under Rule 16(1) of the Working Procedures for Appellate Review.[52] The document was designed to regulate *amicus curiae* submissions by non-parties to the WTO Appellate Body for the appeal in *EC–Asbestos*. The WTO Appellate Body emphasized that the Additional Procedure was 'for the purposes of this appeal only'.[53] The Additional Procedure sets out a number of requirements for applications for leave to file *amicus curiae* briefs:

- a deadline of eight days to apply for leave to file an *amicus curiae* brief was given to apply for leave to file a written *amicus curiae* brief;
- the submission had to be in writing and be no longer than three typed pages;
- the submission had to contain a description of the applicant, including its legal status, activities, and financing;
- the applicants had to announce any relationship 'financial or otherwise' with any of the parties or third parties to the dispute.

The two other requirements of the Additional Procedure were substantive:

- those applying to submit an *amicus curiae* brief had to explain their interest in the appeal and to identify the specific legal issues they intended to address from among those set out in the notice of appeal filed by Canada;[54]
- applicants had to demonstrate why their *amicus curiae* submission would be desirable in 'the interest of achieving a satisfactory settlement of the matter at issue' and that it would not be repetitive of any submission made by a party or third party to the dispute.

On the basis of this *Additional Procedure*, the WTO Appellate Body received 17 applications to submit *amicus curiae* briefs in the *EC–Asbestos* case. Six missed the deadline and were for that reason rejected. The 11 other applications were all

51 The WTO Appellate Body has also allowed WTO Members to submit *amicus curiae* briefs, even though Articles 10 and 17(4) DSU already provide for intervention by WTO Members as third parties (see the report of the WTO Appellate Body in *EC–Sardines*, WT/DS231/AB/R, 6 September 2002, at § 160). Although this finding of the WTO Appellate Body raises very interesting legal aspects with regard to *amicus curiae* briefs, this contribution, focussing on NGO participation, will not further discuss *amicus curiae* briefs submitted by WTO Members.

52 See WT/DS135/9, 8 November 2000. See M. Footer and S. Zia-Zarifi, 'Case Note: EC–Asbestos', *Melbourne Journal of International Law* 3 (2002), 120–142, at p. 128.

53 See the report of the WTO Appellate Body in *EC–Asbestos*, *supra*, footnote 50, at §§ 50–51. Pursuant to Rule 16(1) of the Working Procedure appropriate procedures may only be taken for the purpose of a particular appeal.

54 See *Canada, EC–Asbestos*, Notice of Appeal, WT/DS135/8, 23 October 2000.

refused for failure to comply sufficiently with other requirements set forth in the Additional Procedure.

The approach of the WTO Appellate Body in this case led to protests from both NGOs and WTO Members. On the one hand, NGOs were incensed that the WTO Appellate Body had first put in place a procedure to admit *amicus curiae* briefs and subsequently refused to consider their submissions. On the other hand, a large number of WTO Members took the position that 'the decision that had been taken [i.e., to allow amicus curiae briefs] went far beyond the Appellate Body's mandate and powers'.[55]

In the absence of procedural rules on unsolicited *amicus curiae* briefs, NGOs willing to submit such briefs have little guidance as to what practice to expect in future cases. As two authors have observed, thus far WTO panels and the WTO Appellate Body seem to accept *amicus curiae* briefs only where convenient and do not always explain why they have chosen to accept or reject them.[56] Until now they have accepted *amicus curiae* briefs in only a very few cases.[57]

(C) *Will the Doha Round negotiations on amending the DSU lead to the codification of rules on the submission of* amicus curiae *briefs?*

WTO Members have not yet reached an agreement on proposals to include explicit rules on the submission of unsolicited *amicus curiae* briefs within the framework of the Doha negotiations reviewing the DSU.

As part of the Doha Round negotiations on the review of the DSU, the EC has proposed to include in the DSU an Article 13bis dealing with unsolicited *amicus curiae* briefs.[58] This proposed provision would confirm the competence of WTO panels and the WTO Appellate Body to consider unsolicited *amicus curiae* briefs. The proposed conditions that would need to be fulfilled by an applicant in order to obtain leave to file an *amicus curiae* brief are to a large extent inspired by the *Additional Procedure* developed by the WTO Appellate Body in the *EC–Asbestos*

55 See the Egyptian representative's statement in WTO General Council, Minutes of Meeting Held in Centre William Rappard on 22 November 2002, WTO Doc WT/GC/M/60, 23 January 2001.

56 See Marceau and Stilwell, 'Practical Suggestions for Amicus Curiae Briefs', at p. 163.

57 In three cases the WTO Appellate Body seems to have accepted unsolicited *amicus curiae* briefs, but did not find these briefs to be of assistance in deciding the appeal (see *US–Carbon Steel*, at § 42, *US–CVDs on Certain Products from the EC*, WT/DS/212/AB/R, 9 December 2002, at § 76, and *US–Steel*, WT/DS248 (and others)/AB/R, 10 November 2003, at § 268 and *EC–Sardines, supra*, footnote 51, at § 160). The WTO panels have taken a similar approach in *EC/Cotton-Type Bed Linen from India, WT/DS141/R*, 30 October 2000, at footnote 10, *US–Preliminary Determination with respect to Certain Softwood Lumber*, WT/DS/236/R, 27 September 2002, at § 7.2, *US–Final Determination with respect to Certain Softwood Lumber*, WT/DS/257/R, 19 January 2004, at footnote 10. In *US–Final-CVD Determination with respect to certain Softwood Lumber from Canada*, WT/DS/257/R, 29 August 2003, at footnote 75, and *US–Investigation of the International Trade Commission in Final CVD Determination with respect to Softwood Lumber from Canada*, WT/DS/277/R, 22 March 2004, at footnote 75 the WTO panel found that they would consider any arguments raised by *amici curiae* only to the extent that those arguments were incorporated in the written submissions and/or oral statement of any party or third party. No further reference is made in the reports to *amicus curiae* briefs.

58 See EU/TN/DS/W/1.

case.[59] In contrast, the African Group of WTO Members and India have proposed language that would explicitly prohibit both WTO panels and the WTO Appellate Body from accepting and considering unsolicited *amicus curiae* briefs.[60] In the absence of a sufficiently high level of support, none of the proposals on *amicus curiae* briefs were retained in the so-called 'Chairman's Text'.[61] This 'Chairman's Text' contains proposals for reform of WTO dispute settlement prepared by the Chairman of the Special Session of the DSB.

Negotiations on the review of the DSU were due to end in May 2004, but this deadline was (again) missed. Following a Special Session of the DSB it appeared that, even in the absence of any proposal on *amicus curiae* briefs, the 'Chairman's Text' could not be agreed upon, since a number of WTO Members indicated that they still had conceptual difficulties with certain proposals contained in the document.[62] The Chairman of the Special Session of the DSB therefore proposed to the WTO Trade Negotiations Committee that work should continue in the Special Session without any specific target date.[63]

In light of these developments, it is likely that, for the time being, NGOs will still be able to file *amicus curiae* briefs on the basis of the 'jurisprudence' of the WTO Appellate Body. Their means of doing so before the WTO panels and the WTO Appellate Body, however, will be decided on an *ad hoc* basis[64] and the WTO dispute settlement organs have in practice not been very eager to grant leave to file an unsolicited *amicus curiae* brief.[65]

1.3 Comparison between NGO participation in proceedings before the WTO dispute settlement organs and the European courts[66]

On the basis of the analyses of the previous subsections 1.1 and 1.2, this paragraph will compare the possibilities of NGOs to participate in proceedings before the WTO dispute settlement organs and the European courts.

59 The proposed Article 13bis DSU is not an exact copy of the Additional Procedure. For instance, the Additional Procedure prescribed a period of eight days to file an *amicus curiae* brief, while the proposed Article 13bis(5) DSU provides that persons granted leave to file an *amicus curiae* submission must make their submission to the WTO panel within 15 days of the date of receipt of the notification and to the WTO Appellate Body within three days from such date.

60 See TN/DS/W/15 and TN/DS/W/18.

61 Job (03)/91/91/Rev.1. See for a description of negotiations on the review of the DSU, P. Van den Bossche, 'The Doha Development Round Negotiations on the Dispute Settlement Understanding', WTO Conference Paper, Taipei, November 2003.

62 See special session of the Dispute Settlement Body, TN/DS/9.

63 See TN/DS/10 and TN/DS/11.

64 In my view, though, it seems likely that the WTO Appellate Body would continue to adopt *Additional Procedures* similar to the *Additional Procedure* in the *EC–Asbestos* case.

65 If only in view of the purely inter-State nature of the WTO dispute settlement system, this situation should in my view not raise the human rights issues Advocate-General Jacobs referred to in relation to the standing of individuals before the European courts (see, *supra*, footnote 43).

66 See for another comparison of NGO participation in EC and WTO dispute settlement, Peel, 'Giving the Public a Voice', pp. 47–75. The author claims that both before the ECJ and the WTO dispute settlement organs new avenues for greater NGO participation in environmental decision making are evolving. The following Section 2 demonstrates that my own conclusions are much more reserved.

As a preliminary matter, one could question whether it is legitimate to compare procedural aspects of the WTO dispute settlement organs and the European courts, given the different nature of these fora. While the European courts are undeniably 'courts', there is no *opinio communis* with regard to the *status* of the WTO dispute settlement system. Does this system still resemble more an international arbitration procedure rather than a judicial system? The majority of authors nowadays consider the WTO dispute settlement organs as a judiciary.[67] Irrespective of the exact legal *status* of the WTO dispute settlement organs, it is in my view legitimate to compare the formal participatory role NGOs can play before the WTO dispute settlement organs and the European courts. Indeed, the objectives of the European courts and the WTO dispute settlement organs are very much the same. Both fora settle disputes with regard to acts and legislative instruments of States (and, in the case of the EC, institutions) in the light of public international law treaties that aim to liberalize trade.[68] From this point of view, the European courts and the WTO dispute settlement organs can be better compared with regard to NGO participation than for instance the European courts and national courts.

Given that the dispute settlement system of the EC remains generally more open to private party participation than the WTO, one might have expected that NGOs enjoy better access to justice before the European courts than before the WTO dispute settlement organs. As will be set out in the following subsections, this expectation is not well founded in reality.

(*A*) *Both in EC law and in WTO law, NGOs are in practice only allowed to participate as 'third parties' in dispute settlement*

In practice, there is no great difference between EC and WTO law with regard to the participation by NGOs in dispute settlement proceedings.

Neither WTO nor EC law allows NGOs to directly challenge acts of States before the WTO dispute settlement organs or European courts. From this point of view, no difference exists between EC and WTO law.

Admittedly, in theory a number of actions are in principle available to NGOs in EC law that do not exist in WTO law. This does not however mean that NGOs enjoy many more possibilities to participate in proceedings before the European courts than before the WTO dispute settlement organs. Notably, actions to challenge acts of the EC institutions directly before the European courts – for failure to act by EC institutions or to claim compensation for damages – are seldom of any practical use to NGOs. An indirect challenge to acts of the EC

67 See, for instance, J. Weiler, 'The Rule of Layers and the Ethos of Diplomats – Reflections on the Internal and External Legitimacy of the WTO Dispute Settlement', Jean Monnet Working Paper 9-2000, 'And yet the Appellate Body is a court in all but name'. See also M. Matsushita, T. J. Schoenbaum, and P. C. Mavroidis, *The World Trade Organization*, Oxford, 2003, at p. 18.

68 The fact that, as is well-known, the EC Treaty has nowadays also other objectives than trade liberalization, only does not lead to a different conclusion.

institutions (and EC Member States) by means of a preliminary reference before the ECJ does not constitute a practicable alternative either.

WTO and EC law in fact only allow NGOs to participate in dispute settlement as 'third parties' (as an intervener in privately brought actions in EC law or as an *amicus curiae* in WTO law) to defend the interests they represent.

(*B*) *The possibilities for an NGO to participate as a 'third party' seem to be more or less similar in EC and WTO law*

Does an NGO have a greater chance to participate in proceedings before the European courts than as an *amicus curiae* before the WTO dispute settlement organs? In answer to this question, the following observations can be made.

Firstly, both the EC courts and the WTO dispute settlement organs allow *amicus curiae* briefs to be incorporated in a party's written submission, to the extent the party in question agrees with such incorporation. While WTO Members have accepted to attach *amicus curiae* briefs to their submissions in WTO dispute settlement proceedings, neither EC Member States nor the EC institutions seem to have been willing to attach such briefs to their pleadings in proceedings before the European courts.[69] In any event, as noted above, *amicus curiae* briefs appended to submissions of the principal litigants cannot be compared with *amicus curiae* briefs that are directly submitted to, and accepted by, a tribunal. The first type of (appended) briefs are written by friends of the litigants. Only the second type of briefs can be said to be written by friends of the court. Friends of the court are expected to draw attention to facts and arguments that, although ultimately support the claims of one or more of the parties, may not necessarily be shared by them.

Secondly, – as far as *amicus curiae* briefs are concerned that are not attached to party's submissions – it has been correctly noted that 'the amicus concept is more freewheeling than other forms of participation, for example ''intervention'' in the European Community Courts, which is open to Community institutions or person [sic] establishing an interest in the result of a proceeding before the European Court of Justice'.[70] As the Doha review of the DSU has not yet resulted in any agreement on the formation of explicit rules on the submission of unsolicited *amicus curiae* briefs,[71] this situation is unlikely to change in the coming years. One could argue that this is evidence that NGOs have greater rights of participation as third parties in EC law than in WTO law. Indeed, given the rather unclear, uncodified rules on unsolicited *amicus curiae* briefs, the WTO dispute settlement organs have been very reluctant to accept such briefs, while the European courts have been relatively flexible in allowing requests for intervention by private

69 The example cited in, *supra*, footnote 31 concerned an *amicus curiae* brief that was attached to a submission of a private litigant in proceedings before the ECJ following a preliminary reference by a national court.

70 See the observations made by the editors of the *Journal of International Economic Law*, 'Issues of *Amicus Curiae* Submissions', *JIEL* (2000), 701–706, at p. 704.

71 See, *supra*, text accompanying footnote 58.

parties. On the other hand, the 'freewheeling' concept of *amicus curiae* briefs potentially gives them a broader scope.

Rather than participating as an *amicus curiae*, an intervener in proceedings before the European courts has 'standing'. Interveners are given an opportunity to make written and oral statements to the European courts and to submit relevant evidence. They even receive a copy of the parties' submissions. As a result, NGOs are in a better position to prepare their written and oral statements before the European courts than before the WTO dispute settlement organs. From this point of view, NGOs arguably have further-reaching rights of effective participation in proceedings before the European courts than in WTO dispute settlement.

However, NGOs can only make use of their rights of participation as an intervener before the European courts in proceedings which have been initiated by private parties against acts of EC institutions. EC law does not grant private parties the right to intervene in disputes between Member States, or – as happens much more frequently – in disputes between EC institutions and between EC Member States and EC institutions. Consequently, the further reaching rights of NGOs to participate as an intervener before the European courts cannot be exercised in cases which bear comparison with WTO dispute settlement cases. By definition, the participation of NGOs before the WTO dispute settlement organs relates to disputes between WTO Members, i.e. between States.[72]

(C) *Which court is the better friend?*

In answer to the question in its title, the present contribution concludes that neither the WTO dispute settlement organs nor the European courts can be called the 'best friend' of an NGO as far as the participation of NGOs in dispute settlement is concerned. In practice, NGOs can only participate in dispute settlement before the European courts and the WTO dispute settlement organs as 'third parties', and even then subject to important limitations. The differences between the EC and the WTO dispute settlement systems in respect of NGO participation are in practice small, with important limitations to the rights of such participation applying in both EC and WTO law.

NGOs have greater and more transparent procedural rights as 'third parties' before the European courts than before the WTO dispute settlement organs. However, while NGOs may participate in WTO disputes between States by submitting *amicus curiae* briefs, in the EC they may only participate in proceedings initiated by private parties. Thus, NGOs are completely excluded from participation with respect to dispute settlement on an EC level that can be compared with WTO dispute settlement (i.e., proceedings between EC Member States or – much more frequently – between EC institutions and between EC Member States and EC institutions). From this point of view, the WTO dispute settlement organs appear to be more receptive to NGO participation than the European courts. This

72 Or, exceptionally, parts of States, like Hong Kong or the Netherlands Antilles.

conclusion may well be surprising, particularly given that, unlike the WTO, the EC is well known for its private party participation in proceedings before European courts. One might have expected that, in view of all procedures in EC law that are in principle open to private parties, NGOs would have better access to justice before the European courts than before the WTO dispute settlement organs. The comparison in this current contribution demonstrates that this expectation does not correspond to reality.

At least in theory, one could perhaps go one step further and not only compare the formal possibilities of private party participation in the proceedings before the European Courts and the WTO dispute settlement proceedings, but also try measuring the actual influence NGOs have by participating in these proceedings. It is, however, difficult, if not impossible, to measure such influence. In particular, given the small number of accepted, unsolicited *amicus curiae* briefs of NGOs, it is difficult to draw any conclusions yet about the influence of such *amicus curiae* briefs in WTO proceedings.[73] Moreover, as said before, the rights of NGOs to participate as an intervener before the European courts cannot be exercised in cases which bear comparison with WTO dispute settlement cases. For these reasons, a comparison evaluating the effects of NGO participation in the WTO and EC dispute settlement cannot lead to any meaningful conclusions.

2. Should the WTO dispute settlement organs be the better friend to NGOs?

The conclusion that NGOs may participate in WTO dispute settlement proceedings by submitting an unsolicited *amicus curiae* brief, where they would be excluded in equivalent proceedings before the European courts (i.e., proceedings between EC Member States and, more frequently, between EC institutions and EC Member States and between EC institutions) leads to discussions on a WTO level as to whether participation by NGOs in WTO dispute settlement proceedings should be allowed at all.[74]

73 As a general observation, the WTO dispute settlement organs do not or very rarely refer in their reports to arguments raised in unsolicited *amicus curae* briefs that they have accepted. The European courts do in their judgments refer to interventions when summarizing the arguments raised by the different parties, but it is impossible to measure to what extent interventions have played a role in the materialization of judgments of the European courts.

74 See, for instance, J. Bacchus, 'The WTO Must Open Up its Trade Dispute Proceedings', *European Affairs*, Spring 2004 (available on www.europeanaffairs.org); S. Charnovitz, 'Participation of Non-Governmental Organizations in the World Trade Organization', *U Pa J Intl. Econ. L* 17 (1996), 33, at pp. 349–350; S. Charnovitz, 'Opening the WTO to Non-Governmental Interests', *Fordham Int'l L. J.* 24 (2000), 173–216; J. L. Dunoff, 'The Misguided Debate over NGO Participation at the WTO', *JIEL* (1998), 433–456; D. C. Esty, 'Non-Governmental Organisations at the World Trade Organisations: Cooperation, Competition or Exclusion', *JIEL* (1998), 123–147; D. Steger, 'The Struggle for Legitimacy in the WTO', in J. M. Curtis and D. Ciuriak (eds), *Trade Policy Research*, Canada: Ministry of Public Works and Government Services, 2003, at pp. 111–141; Stern, 'The Intervention of Private Entities and States', pp. 1451–1457; Umbricht, 'An "*Amicus Curiae* Brief" ', at pp. 783–784.

I will first argue that the WTO Appellate Body has incorrectly interpreted the DSU rules, i.e. by allowing NGOs to submit unsolicited *amicus curiae* briefs in WTO dispute settlement proceedings in violation of the rules on treaty interpretation (2.1). Subsequently, I will argue that the rules of WTO dispute settlement should not be changed to allow NGO participation in WTO dispute settlement proceedings (2.2).

2.1 Did the WTO Members give the WTO dispute settlement organs the authority to allow the submission of amicus curiae *briefs by NGOs?*

According to public international law, States (and organizations created by them, if appropriate conditions exist) are able to exercise rights and duties in the international legal order. They can, *inter alia*, make international claims, participate in international adjudication and engage in both the formation and application of international law. In other words, it is the conduct of States, by treaty or by practice, that determines the rules of public international law.[75] Private actors may therefore only play a role in public international law to the extent that States have permitted them to play that role.[76] As a result, inter-State tribunals, like the International Court of Justice, the International Tribunal on the Law of Sea and the North American Free Trade Agreement Chapter 20 orbitral panels, which have no formal rules on private party participation, do not have an established practice of accepting *amicus curiae* briefs from NGOs.[77] From this point of view, the fact that two NAFTA arbitral tribunals have determined that they have authority to accept *amicus curiae* briefs[78] is less controversial, since the disputes in question were between private parties on the one hand and States on the other. In other words, with respect to these cases States had already permitted private parties to play a role.

The public international law principle that private actors may only play a role in public international law to the extent that States permit them to do so also applies to the WTO. In other words, WTO Members determine who may participate in the legal order of the WTO. Consequently, the WTO Appellate Body's decision to allow NGO participation in the WTO dispute settlement system by means of

75 See Ian Brownlie, *Principles of Public International Law*, 6th edn, Oxford University Press, 2003, at pp. 57–58.

76 See Duncan B. Hollis, 'Private Actors in Public International Law: Amicus Curiae and the Case for the Retention of State Sovereignty', *Boston College International and Comparative Law Review* (2001), 235–256.

77 See Marceau and Stilwell, 'Practical Suggestions for Amicus Curiae Briefs, at p. 164, Umbricht, 'An "*Amicus Curiae* Brief", at p. 781. The fact that the International Court of Justice has accepted during its 60 years of existence and unofficially one *amicus curiae* brief eight years ago, is in the opinion of Umbricht insufficient to conclude otherwise with regard to the International Court of Justice. See for a different opinion R. L. Howse, 'Membership and Its Privileges: The WTO, Civil Society, and the Amicus Curiae Brief Controversy', *ELJ* (2003), at pp. 496–510.

78 *Methanex* (Decision of the Tribunal on the Petition of Third Persons to Intervene as '*Amicus Curiae*', UNICTRAL Arb., § 89, 2001) and *UPS* (Decision of the Tribunal on Petitions for Intervention and Participation as *Amicus Curiae*, UNICTRAL, Arb. § 60, 2001).

unsolicited *amicus curiae* briefs can only be correct if the WTO Members have granted the WTO dispute settlement organs the right to permit such participation.

Undeniably, WTO Members have *not* decided either, during or following the Uruguay Round, to *explicitly* introduce a procedure into the DSU for NGO participation. There was apparently no agreement on the introduction of such a procedure.[79] At the WTO General Council session on 22 November 2000, convened to consider the legitimacy of the procedure established by the WTO Appellate Body to allow *amicus curiae* briefs in the *EC–Asbestos* case, many WTO Members reiterated their view that the WTO Appellate Body had not acted within its competence, demonstrating that no consensus on the matter existed at that time. The subsequent discussions on amending the DSU rules within the framework of the Doha Round once again demonstrate that an accord between WTO Members on this issue is lacking.[80]

Given the principle of public international law that only WTO Members have the authority to determine whether private parties may participate in the WTO legal order, it seems at least at first glance unusual that the WTO Appellate Body has been able to find a legal basis in WTO law allowing NGO participation in WTO dispute settlement proceedings. However, protests alone of WTO Members against this decision are – from a legal point of view – not sufficient to find that the WTO Appellate Body's decision is incorrect.[81] By the same token, the fact that other WTO Members (including two heavy-weight WTO Members, the US and the EC[82]) as well as the Consultative Board in their 2004 report to the Director-General Supachai Panitchpakdri of the WTO[83] have accepted the legal interpretation by the WTO Appellate Body of the DSU allowing unsolicited *amicus curiae* briefs is not decisive either from a legal point of view.

The WTO dispute settlement provisions have to be interpreted in light of the general rules on treaty interpretation as codified in Article 31 of the Vienna Convention on Treaties (the 'Vienna Convention'). Article 31 of the Vienna Convention provides: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' Article 31 of the Vienna Convention is generally considered to be a codification of public international law rules on treaty interpretation as a matter of customary international law. Indeed, the WTO Appellate Body has found the rules of Article 31 of the Vienna Convention to be

79 See statement by India at the General Council session of 22 November 2000, at § 4.

80 See, *supra*, text accompanying footnote 58.

81 Indeed, the WTO Appellate Body on other occasions has made surprising or controversial interpretations as well, not least when the WTO rules have been awkwardly drafted (see M. Bronckers, 'Better Rules for a New Millennium', *JIEL* (1999), 547–566).

82 The EC was still against the admission of *amicus curiae* briefs in *US–Carbon Steel*. At a later stage it has changed its opinion and is now favour of the admission of *amicus curiae* briefs in WTO dispute settlement (see also, *supra*, the text accompanying footnote 57).

83 See the report by the Consultative Board to the Director-General Supachai Panitchpakdri, 2004, at § 200.

'customary rules of interpretation of public international law'. Further, article 3.2 DSU provides that WTO panels and the WTO Appellate Body are to apply these rules when interpreting 'covered agreements', including the DSU.[84]

The critical question is therefore whether the WTO Appellate Body correctly interpreted the relevant WTO dispute settlement rules in light of Article 31 of the Vienna Convention, in finding that both the WTO panels and the WTO Appellate Body have the authority to allow NGOs to submit unsolicited *amicus curiae* briefs. This question will be dealt with in two parts: firstly in the context of WTO panel proceedings (A) and secondly in the context of WTO Appellate Body proceedings (B).

(*A*) *Is the WTO Appellate Body's finding that Article 13.1 DSU gives WTO panels the right to allow unsolicited* amicus curiae *briefs compatible with Article 31 of the Vienna Convention?*

Did the WTO Appellate Body in *US–Shrimp* interpretate Article 13.1 DSU correctly in light of Article 31 of the Vienna Convention when it found that Article 13.1 DSU allows WTO panels to grant permission to NGOs to file unsolicited *amicus curiae* briefs?

Article 13.1 DSU provides that 'Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate'. In *US–Shrimp*, the WTO panel declined to accept an unsolicited *amicus curiae* brief. It took the view that the use of the verb 'to seek' in Article 13.1 DSU implied that the provision should be interpreted so as to apply only to cases where WTO panels intend to request information. The WTO Appellate Body disagreed and stated that the power to 'seek' information should be interpreted as including the power to accept and consider unsolicited *amicus curiae* briefs, even in cases where WTO panels did not intend to request information. It found the WTO panel's interpretation of the word 'seek' unnecessarily formal and technical in nature.[85] The WTO Appellate Body seemed to have reasoned that if an 'individual or body' (e.g., an NGO) first asks a WTO panel for permission to file an *amicus curiae* brief and the WTO panel grants permission, the WTO panel can still be considered as having 'sought' the *amicus curiae* brief within the meaning of Article 13.1 DSU.

The WTO Appellate Body's interpretation of Article 13.1 DSU in *US–Shrimp* does not seem to respect Article 31 of the Vienna Convention, which obliges the WTO Appellate Body in the first place to establish the *ordinary meaning* of 'to seek … from' and, subsequently, to consider the ordinary meaning in the *context* of Article 13.1 DSU, as well as the *object and purpose* of the WTO agreements in general and the DSU in particular.

84 See, e.g., the report of the WTO Appellate Body on *United States Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 1996 at § 17.

85 See *US–Shrimp*, *supra*, footnote 47, at § 104.

First, according to Brown's *New Shorter Oxford Dictionary* the ordinary meaning of 'to seek' if followed by the word '*from*' – as is the case in Article 13.1 DSU – is 'to ask for, demand, request'.[86] The ordinary meaning of 'to seek … from' clearly implies that the WTO panel should take the initiative in obtaining information or technical advice from an individual or body. The WTO panel's reading of 'seek' in *US–Shrimp* is much more in line with the 'ordinary meaning' of the words than the WTO Appellate Body's artificia reading of the same.[87] The WTO Appellate Body's interpretation implies that, pursuant to Article 13.1 DSU, WTO panels could act upon a request from an NGO to supply information. The WTO Appellate Body's interpretation of 'to seek … from' is in stark contrast with its approach in *EC–Hormones*, where it sought the ordinary meaning of 'based on' by reference to Brown's *New Shorter Oxford Dictionary*: 'A thing is commonly said to be "based on" another thing when the former "stands" or "builds" upon or "is supported" by the latter'.[88] It is not commonly said that someone seeks information from somebody, in a case when the 'somebody' itself is actively seeking to provide information to the 'someone'.[89] Therefore, Article 13.1 DSU can in my view not be used as a basis for admission of unsolicited *amicus curiae* briefs. On the contrary, the provision in question seems to exclude any admission of unsolicited *amicus curiae* briefs.

Second, the *context* of Article 13.1 DSU does not support the WTO Appellate Body's broad interpretation of this article. On the contrary, a number of DSU provisions favour the WTO panel's narrow interpretation of 'to seek'. Article 3.2 DSU stipulates that rulings of the DSB – and therefore also those of the WTO dispute settlement organs – cannot add to or diminish the rights and obligations of WTO Members provided for by, i.e. the DSU. This stipulation stands in the way of the WTO Appellate Body's interpretation of Article 13.1 DSU which, to an extent, diminishes WTO Members' rights under the DSU. By allowing private parties to participate in WTO dispute settlement on their own initiative by means of *amicus curiae* briefs, the WTO Appellate Body has clearly weakened the right of WTO Members to decide whether private actors may play a role in WTO dispute settlement. Moreover, Article 10 DSU explicitly limits third party participation to WTO Members. Consequently, the context of Article 13.1 DSU seems to indicate that no third parties other than WTO Members may be involved in WTO dispute settlement. The WTO Appellate Body cited Article 12 DSU in a contextual support

86 See L. Brown, *The New Shorter Oxford Dictionary on Historic Principles*, 2002 at p. 2. The WTO Appellate Body generally uses this dictionary when it wants to establish 'the ordinary meaning to be given to the terms' of the WTO agreements.

87 See also E. Vermulst, P. Mavroidis, and P. Waer, 'The Functioning of the Appellate Body After Four Years – Towards Rule Integrety', *JWT* (1999), 1–50, at p. 3. See for an opposite view Howse, Membership and Its Privileges, at p. 498.

88 See the report of the WTO Appellate Body in *EC–Measures concerning Meat and Meat Products* (*EC–Hormones*), WT/DS26/AB/R and WT/DS48/AB/R, at § 163 (see also, *supra*, footnote 34).

89 For this reason I used the expression 'unsolicited *amicus* brief' in this article.

of its interpretation of Article 13.1 DSU. Article 12.1 DSU gives WTO panels the discretion to depart from and to add to the Working Procedures set out in Appendix 3 of the DSU. Pursuant to Article 12.2 DSU, WTO panels should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process.[90] The WTO Appellate Body found that pursuant to Article 12 and 13 DSU, taken together, WTO panels have the authority to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts.[91] Against this context of broad authority vested in the WTO panels, the WTO Appellate Body found that WTO panels should also have the authority to allow unsolicited *amicus curiae* briefs. I am not convinced by the WTO Appellate Body's reasoning.[92] Articles 12 and 13 DSU are completely silent on NGO participation in any form whatsoever. Given the public international law principle that private actors may only play a role in public international law to the extent States have permitted them to do so, the absence of any reference to private participation in the context of Article 13 DSU should in my view be given more weight than the implied powers reasoning of the WTO Appellate Body based on Articles 12 and 13 DSU. Therefore, I would argue that Articles 12 and 13 DSU give much less support to the liberal interpretation by the WTO Appellate Body of 'to seek … from' than that given by Articles 3.2 and 10 DSU to the ordinary meaning of these words as described above.

Third, the *object and purpose* of the DSU, regulating disputes between WTO Members on the rules of the multilateral trading system alone (i.e., between States), make the WTO panel's interpretation more acceptable than that of the WTO Appellate Body. It is clear that the drafters of the WTO Agreements intended to create a purely intergovernmental dispute settlement system. The recitals of the Agreement establishing the World Trade Organization repeatedly stress the wholly intergovernmental character of the WTO (e.g. 'their relations in the field of trade and economic', 'endeavour, reciprocal and mutually advantaged arrangements', 'multilateral trading system' etc.). Article II. I of that Agreement also emphasizes the intergovernmental character of the WTO: 'The WTO provides the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement.'[93] The WTO Appellate

90 See *US–Shrimp*, *supra*, footnote 47, at § 105.

91 See the report of the WTO Appellate Body in *US–Shrimp*, *supra*, at footnote 47, at § 106.

92 See for an opposite view Howse, 'Membership and its privileges', at p. 498.

93 As the WTO panel noted in *US–Section 301*, private operators are 'merely' indirectly affected by the agreements establishing the WTO (see the report of the WTO panel in *US–Sections 301–310 of the Trade Act of 1974*, WT/DS152/R (1999), § 7.78). This does of course not mean that private operators are unimportant to international trade. On the contrary, without private initiative the WTO's economic objectives (increasing the world's economic welfare) could obviously not be achieved (see M. Bronckers and N. van den Broek, 'Financial Compensation in the WTO', *JIEL* (2005), 101–127, at p. 112; the authors refer to § 7.78 of the report of the WTO panel in *US–Section 301*). Yet Article II: 1 of the WTO

Body argued in *US–Shrimp* that Article 11 DSU describes the object and purpose of the WTO panel's mandate. Article 11 DSU provides that a WTO panel should 'make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements'.[94] In my view, the mere fact that Article 11 DSU obliges WTO panels to make an objective assessment of the matter in no way justifies the acceptance of unsolicited *amicus curiae* briefs, for which there is no textual basis. Moreover, as I will set forth below,[95] it is incorrect to regard NGOs as objective resource enhancers; NGOs will generally defend a specific policy or business interest and will thus have a partisan opinion. From this perspective, allowing unsolicited *amicus curiae* briefs will not necessarily support WTO panels in making an objective assessment within the meaning of Article 11 DSU.

In view of the above, I respectfully disagree with the WTO Appellate Body's finding in *US–Shrimp* that Article 13.1 DSU gives the WTO panels a right to accept unsolicited *amicus curiae* briefs from NGOs. Its finding is at odds with the general rules on treaty interpretation, as codified in Article 31 of the Vienna Convention.[96]

(*B*) *Is the WTO Appellate Body's finding that it has itself the authority to accept unsolicited* amicus curiae *briefs compatible with Article 31 of the Vienna Convention?*

The WTO Appellate Body's confirmation in *EC–Asbestos* of its own right to permit submission of unsolicited *amicus curiae* briefs is in my view unconvincing as well. The WTO Appellate Body cited Rule 16(1) of the Working Procedures for Appellate Review as authority: 'In the interest of fairness and properly procedure in the conduct of an appeal where a procedural question arises that is not covered by these Rules, a division may adopt an appropriate procedure for the purpose of that appeal only provided that it is not inconsistent with the DSU, the other covered agreements and these Rules'. Does Rule 16(1) give the WTO Appellate Body the right to invite NGOs to submit *amicus curiae* briefs on a case-by-case basis? Any answer to this question should respect the rules on treaty interpretation of Article 31 of the Vienna Convention.[97]

First, the ordinary meaning of the wording 'procedural question … that is not covered by [the Working Procedures for Appellate Review]' used in Rule 16(1) of the Working Procedures clearly does not give the WTO Appellate Body the power to introduce procedures which are not foreseen in the DSU or the Working Procedures for Appellate Review. As explained above, the DSU and the Working

Agreement expresses that the object and purpose of the WTO agreements establishing the WTO is to create rules regarding the conduct of trade relations among WTO Members only.

94 See *US–Shrimp*, *supra*, footnote 47, at § 106–107.

95 See, *infra*, the text accompanying footnote 101.

96 Howse, 'Membership and its privileges', comes to an opposite conclusion.

97 The following reasons apply *mutatis mutandis* with regard to Article 17.9 DSU invoked by the WTO Appellate Body in *US–Carbon Steel* (see, *supra*, the text accompanying footnote 49).

Procedures for Appellate Review do not foresee a procedure for unsolicited *amicus curiae* briefs submitted by NGOs. Therefore, the interpretation given by the WTO Appellate Body in *EC–Asbestos*, i.e. granting authority to the WTO Appellate Body to adopt an *ad hoc* Working Procedure for the submission of *amicus curiae* briefs is inconsistent with the ordinary meaning of a 'procedural question … that is not covered by [the Working Procedures for Appellate Review]'. Consequently, in *EC–Asbestos* the WTO Appellate Body has not dealt with a procedural question within the 'ordinary meaning' of Rule 16(1) of the Working Procedures – instead, it introduced a new procedure and therefore exceeded its powers.[98]

As far as the *context* of Rule 16(1) of the Working Procedures for Appellate Review and the object and purpose of the WTO Agreements and DSU are concerned, the observations made above on the interpretation of Article 13.1 DSU here apply *mutatis mutandis*: neither the context of Rule 16(1) of the Working Procedures nor the object and purpose of the WTO Agreements in general and the DSU in particular give support to the broad interpretation given by the WTO Appellate Body to Rule 16(1) allowing *amicus curiae* briefs in proceedings before the WTO Appellate Body.[99] The context of Rule 16(1) as well as the object and purpose of the WTO Agreements and the DSU point to the true inter-State character of WTO dispute settlement.

(C) *Concluding observations*

In short, as far as any form of private party participation in the public international order is concerned, it is the States themselves that determine who may participate in that order. Given the absence of wording in the DSU or elsewhere referring to procedures on the submission of unsolicited *amicus curiae* briefs, the WTO Appellate Body was wrong in *US–Shrimp* and *EC–Asbestos* to ignore the WTO Members' right to determine who may participate in public international law.

Why the possible participation of NGOs in WTO dispute settlement proceedings should not be incorporated into the WTO dispute settlement rules

If – as has been argued in the preceding subsection – there is no legal basis for any form of NGO participation in WTO dispute settlement proceedings, participation by NGOs in WTO dispute settlement proceedings would need amendment of the WTO dispute settlement rules. In this subsection I will argue, by discussing the most relevant policy arguments that have been advanced *in favour* of admitting

98 An example where – in my view – Rule 16(1) of the Working Procedures for Appellate Review has been applied correctly is provided by the report of the WTO Appellate Body in *US–Lead and Bismuth Carbon Steel*, WT/DS130/AB/R, (2002), at § 8. In this paragraph it is explained that, given that a Member of the Division of the WTO Appellate Body was replaced, pursuant to Rule 16(1) of the Working Procedures for Appellate Review (and in the interests of fairness and orderly procedure in the conduct of the appeal), a second oral hearing was held.

99 See, *supra*, the text accompanying footnote 92.

such briefs in WTO dispute settlement proceedings,[100] that there is no particular reason for changing the DSU in order to allow unsolicited *amicus curiae* briefs (A–D). I conclude by discussing policy concerns which argue *against* such a change of the WTO dispute settlement rules (E).

(*A*) *NGOs as 'resource enhancers'*

Proponents of NGO participation in WTO dispute settlement proceedings have argued that information from every source should always be welcomed in order to facilitate the decision-making process. This would be especially true in considering complex issues of wide-reaching impact, as is often the case under WTO law. It would be impossible for representatives of WTO Members and members of the WTO dispute settlement organs to be experts in all of the fields involved in a trade dispute. NGOs may provide information, arguments, and perspectives that governments cannot themselves advance, thereby enhancing the breadth and quality of information available to the WTO dispute settlement organs. Armed with the best information and the fullest set of resources, there would be much less chance of any mistaken analysis or errors in fact, thus enriching the quality of reports of the WTO dispute settlement organs.[101]

For the following three reasons, there is in my view no need to allow unsolicited *amicus curiae* briefs by NGOs in order to enhance the resources at the disposal of WTO Members and the WTO dispute settlement organs.

First, NGOs are quite capable, 'outside the court room', of disseminating relevant information and arguments with regard to the legitimate interests that they represent. Indeed, lobbying for their interests is an essential part of the *ratio vivendi* of NGOs. NGOs are equally able to channel such relevant information and arguments to the WTO Members involved in the dispute. To the extent that a WTO Member considers information and arguments provided by NGOs to be of any use, it may decide to incorporate them into its written submissions or to attach documents prepared by NGOs to its written submissions. The WTO dispute settlement organs will in those cases of course take note of the information provided by the NGO.

Second, the DSU provides WTO panels with a means of collecting any necessary information. If WTO panels believe that in order to resolve a dispute they need information not provided by the WTO Members involved in the dispute, they may pursuant to Article 13.1 DSU seek (in the ordinary meaning of the word, i.e. on their own initiative) information and technical advice from any individual or body which they deem appropriate.

100 The authors quoted, *supra*, in footnotes 74 and 77 are all in favour of NGO participation in WTO dispute settlement.

101 See, for instance, Charnovitz, 'Participation of Nongovernmental Organisations', at 349–350, Dunoff, 'The Misguided Debate', at pp. 436–437 and Umbricht, 'An "*Amicus Curiae* Brief" ', at pp. 783–784.

Third, NGOs defend certain specific interests. As such, NGOs that submit unsolicited *amicus curiae* briefs are not simply 'resource enhancers', but mostly will be, by their very nature, 'parties' to the dispute. From this point of view, they cannot be considered *objective* resource enhancers.

In short, there is no real need for information to be provided by NGOs by means of unsolicited *amicus curiae* briefs in WTO dispute settlement proceedings. In any event, given their partiality, the function of NGOs as 'resource enhancers' is limited.

(*B*) *Fair representation*

Advocates of NGO participation in WTO dispute settlement have argued that fair representation by governments before the WTO dispute settlement organs of every minority forming part of their constituency is a fiction: it is important to lend a voice to all communities, groups, and entities directly or indirectly affected by the outcome of a dispute. This is especially true because there is no guarantee that legitimate interests will be represented fairly by governments.[102]

The argument based on fair representation is in my opinion based on a flawed view of democracy. In societies with a representative democracy, governments are chosen by citizens to act in their interests and to take account of all legitimate concerns. This principle applies on a domestic level, and there is no reason why this should not apply when governments defend their States' interests in dispute settlement on an international level.

It is true that not all WTO Members operate in a fully functioning representative democracy, which in turn supports an argument that NGOs should participate in order to guarantee fair representation. But this is not enough to render the argument valid. Proponents of this argument are trying to resolve the democratic deficit of a number of WTO Members by changing the international dispute rules which apply to *all* WTO Members. In other words, changing dispute rules to allow NGO participation for lack of a fully functioning representative democracy attempts a 'treatment of the symptoms', not of the 'disease' itself.

(*C*) *Increasing the legitimacy of the WTO*

It has also been argued that, since NGOs often speak for stakeholders concerned with non-trade interests and values at issue in a WTO dispute, the legitimacy of a decision that adjudicates competing values might well be enhanced as a result of their input to the extent that their arguments are seen to be taken seriously and carefully debated.[103] This argument focuses on the WTO's perceived lack of legitimacy. Legitimacy concerns have increased as the WTO has imposed disciplines on governments in an increasing number of areas that were formerly considered part of the domestic domain.

102 See, for instance, Umbricht, 'An "*Amicus Curiae* Brief" ', at p. 783.

103 See R. L. Howse, 'Adjudicative Legitimacy and Treaty Interpretation in International Trade Law, The Early Years of WTO Jurisprudence', in J. H. H. Weiler (ed.), *The EU, the WTO and the NAFTA*, Oxford, 2000, at p. 47.

Concerns about the legitimacy of the WTO should of course be taken seriously. However, such concerns will in my view not be allayed by allowing NGOs to participate in WTO dispute settlement proceedings. First of all, a large number of NGOs speak on behalf of stakeholders with purely commercial interests. Legitimacy questions are less relevant in relation to these 'business NGOs', since they do not represent non-trade interests and values. Moreover, as far as NGOs representing more general interests are concerned, as Howse explained in relation to the legitimacy of the WTO dispute settlement proceedings, the question is whether the three following elements are present in WTO dispute settlement proceedings: fair procedures, coherence, and integrity in legal interpretation, and institutional sensitivity. Howse argued that NGO participation by means of unsolicited *amicus curiae* briefs in WTO dispute settlement is an appropriate judicial right. NGO participation by means of such briefs would therefore enhance the legitimacy of the WTO dispute settlement proceedings.[104] I do not believe, though, that NGO participation in WTO dispute settlement is required by fair procedures. In public international law, it is accepted that international disputes between States are in principle settled as between States. Admittedly, the phenomenon of *amicus curiae* is quite common in international penal jurisdictions.[105] However, in other international, notably inter-State, dispute settlement systems it is not.[106] One can therefore not assume that NGO participation automatically forms part of fair procedures in dispute settlement between States.

If WTO Members are keen to increase the legitimacy of the WTO, they should do something about the lack of transparency and the secrecy with which the WTO dispute settlement organs are required to operate under the DSU. Opening up the oral hearings would not only eradicate the perception of a non-transparent process, lacking in due process and guarantees of fairness, but would also improve public understanding of the system.[107]

(*D*) *Compensation for the inter-governmental nature of the WTO rule-making process*

Another argument in favour of NGO participation in WTO dispute settlement proceedings is based on the fact that individuals, including NGOs, are precluded from any other direct participation at the WTO level.[108] As such, it would be even

104 See Howse, 'Adjudicative Legitimacy', at p. 49.

105 See H. Ascensio, *L*'amicus curiae *devant les juridictions internationales*, Revue générale de droit public (2001), 897–930, at pp. 902–905.

106 See, *supra*, the text accompanying footnote 77.

107 See Steger, The Struggle for Legitimacy', at p. 127. See also H. McRae, 'What is the Future of the WTO Dispute Settlement?', *JIEL* (2004), 3–21, at pp. 11–12.

108 See the WTO Guidelines for arrangements on relations with Non-Governmental Organisations, WT/L/162, sub VI: 'Members have pointed to the special character of the WTO, which is both a legally binding intergovernmental treaty of rights and obligations among its Members and a forum for negotiations. As a result of extensive discussions, there is currently a broadly held view that it would not be possible for NGOs to be directly involved in the work of the WTO or its meetings. Closer consultation and co-operation with NGOs can also be met constructively through appropriate processes at the national

more important to allow NGOs to present their views by means of unsolicited *amicus curiae* briefs in the international arena than at a domestic level. In other words, in order to compensate for the lack of a voice in the formation of WTO rules, NGOs should arguably have some say in the interpretation and application of these rules.[109]

This argument in my view contains a fallacy. Its proponents tend to argue concurrently that NGOs should have a formal say at a 'legislative' and 'executive' level within the WTO. Whether or not plans to formalize NGO participation in relation to the 'executive' and 'legislative' functions of the WTO are desirable falls outside the framework of this contribution. However, it is contradictory to argue that NGOs should have a greater, more formal say in 'executive' and 'legislative' WTO matters, and, at the same time, should be able to participate in WTO dispute settlement proceedings because they lack a say in 'executive' and 'legislative' WTO matters.

(*E*) *Policy concerns arguing against the admission of* amicus curiae *briefs in WTO dispute settlement*[110]

It has been argued *against* the admission of *amicus curiae* briefs in WTO dispute settlements that opening up the WTO dispute settlement system to NGOs may result in the developed WTO Members gaining power at the expense of developing WTO Members. Following this line of argument, participation in WTO dispute settlement in general requires access to significant financial and technical resources. Multinational NGOs and NGOs based in developed WTO Member countries would be most likely to have such access. These NGOs supposedly would be more likely to support the viewpoints of developed countries than those of developing countries (for instance, by supporting developed WTO Members in WTO dispute settlement initiated by WTO Members against environmental protection laws of developed WTO Members, which developing WTO Members consider protectionist). Participation of NGOs in WTO dispute settlement would therefore force developing WTO Members to assume the added logistical burden of defending themselves against the arguments of the '*amici*' of developed WTO Members. Therefore, participation of NGOs would further increase the existing North–South imbalance in the WTO.[111]

level where lies primary responsibility for taking into account the different elements of public interest which are brought to bear on trade policy-making.'

109 See, for instance, Umbricht, 'An "*Amicus Curiae* Brief" ', at p. 784.

110 Practical concerns about unsolicited *amicus curiae* briefs have been mentioned as well (see, for instance Stern, 'The Intervention of Private Entitities', at pp. 1456–1457), notably possible floods of *amicus curiae* briefs. If there were no legal and political concerns, I believe that such practical problems could be solved by way of procedures such as the additional procedure used by the WTO Appellate Body.

111 See Umbricht, 'An "*Amicus Curiae* Brief"', at pp. 785–786. See also the 10th point of the Statement of the Egyptian Chairman of the Informal Group of Developing Countries before the Special Meeting of the General Council of 22 November 2000.

I am not convinced by this argument.[112] These commentators have not adduced any evidence to suggest that NGOs would exclusively take the side of developed WTO Members. For instance, 15 environmental NGOs have filed an *amicus curiae* brief in the dispute between the US and the EC on the EC's *de facto* moratorium on the approval of genetically modified food and crops. The NGOs claim that the decision on the dispute may have far-reaching implications for developing countries.[113] Nevertheless, the concern expressed by developing WTO Members cannot be dismissed altogether. It demonstrates that NGOs that participate by means of *amicus curiae* briefs would not only be resource enhancers'.[114] They might in a certain way well become 'parties' to the dispute in a way unforeseen by the WTO Agreements.

Conclusion

NGOs have a better chance at participation in the WTO before the WTO dispute settlement organs than in the EC before the European courts in intergovernmental dispute settlement. On the one hand, unsolicited NGO participation in disputes before the European courts between EC Member States, between EC institutions and between EC Member States and the EC institutions is excluded. Moreover, possibilities for NGOs to initiate direct action against EC legislative and administrative acts before the European courts are in practice non-existent. On the other hand, the WTO Appellate Body has held that NGOs may be allowed to submit unsolicited *amicus curiae* briefs in WTO disputes between WTO Members.

Having said that, the WTO Appellate Body is in my view wrong in trying to behave as a better friend to NGOs than the European courts, since the WTO Members have not given the WTO dispute organs the authority to allow unsolicited *amicus curiae* briefs in WTO dispute settlement. Furthermore, there seems to be no compelling reason for WTO Members to change the WTO dispute settlement rules in order to grant WTO dispute settlement organs such authority.

Rather than allowing NGOs to participate in WTO dispute settlement, the WTO should make its dispute settlement system more transparent and less secretive. Such a change would guarantee fair procedure and would thus increase the WTO's legitimacy. Opening up the WTO dispute settlement system would make the WTO as a whole a better friend of civil society, and the public at large.

112 See also Howse, 'Membership and Its Privileges', at p. 509.
113 See WT/DS 291, DS 292 and DS 293, pending.
114 See, *supra*, at § 2.2.A.

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From the trenches

This rubric is intended for occasional contributions from on-the-ground practitioners in Geneva and national capitals. Our hope is that this category will inspire other practitioners to submit notes and articles – typically in the range of 2,000 to 10,000 words – to the *World Trade Review*. As with all notes and articles submitted to the *World Trade Review*, manuscripts in this category will be reviewed by independent referees. However, the focus is intended to be practice oriented and at least one of the two referees will be a fellow practitioner.

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The WTO decision-making process and internal transparency

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Introduction

Over the past few years the focus on the substantive agenda of the multilateral trading system has increasingly been matched, and sometimes even superseded, by the amount of attention accorded to institutional or systemic issues. Most prominent among these is the discussion of internal transparency and participation of all Members in the work and decision-making processes of the WTO.[1]

The spectacular collapses of the Seattle and Cancún Ministerial Conferences in 1999 and 2003 respectively, amid accusations of an undemocratic decision-making process, prone to both gridlock and brinkmanship, have provided ample

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1 Internal transparency and participation of Members refers to the Member-to-Member and Member-to-Secretariat working procedures and practices.

evidence that the multilateral trading system is facing a serious institutional challenge. From a purely mechanical point of view, the recent focus on transparency in the decision-making process at the WTO is hardly surprising, given the numerical increase of the membership. The WTO of today, with its 148 Members, is a very different institution compared with the 23 original Contracting Parties of the GATT in 1948. The relative homogeneity, which characterized the original founders of the GATT, has been replaced by a membership with very diverse developmental characteristics and ideological persuasions. Importantly, Members that previously participated only sporadically in the work of the GATT are becoming increasingly assertive in defending their rights in the WTO.[2]

The debate regarding the legitimacy of the WTO, its decisions and its ideological foundation, has grown increasingly sophisticated over the past decade, with the initial focus on external transparency and public accountability having been replaced by scrutiny of the informal consultative processes that play a crucial role in the WTO. For an organization which takes its decisions on the basis of consensus and operates on the principle of one Member–one vote, this challenge to the legitimacy of the decision-making process by some of its own stakeholders is serious and has placed the issue of internal transparency and participation of all Members at the core of the WTO agenda.

Critics of the WTO have argued that small groups of countries effectively impose their will on the full membership and that, as a result, both the process of decision making and the decisions themselves lack legitimacy. The legitimacy of WTO rules crucially depends on the extent to which all Members feel they have participated in the process that produced these common and legally enforceable rules. Ownership of the process that leads to these rules is paramount for their recognition which, incidentally, is a much-utilized argument against voting in the WTO context. Some observers of the WTO believe that the first step towards reforming the organization's decision-making process, and thus the credibility of its decisions, would include the elimination of informal small group consultations. Proponents of this school of thought believe that a formalization of the WTO consultation processes will enhance transparency, improve decision making and therefore increase the legitimacy of its decisions.[3]

Others believe that the lack of a formal limited membership steering group, such as the Bretton Woods executive boards and the UN's Security Council, is a fundamental shortcoming of the WTO and a significant reason behind the near paralysis of the organization's legislative branch over the past few

2 Michalopoulos, Constantine, 'Developing Countries' Participation in the World Trade Organization', World Bank Policy Research Working Paper No. 1906, March 1998.

3 See for example Sharma, Shefali, 'WTO Decision-Making: A Broken Process', WTO Cancún Series Paper no. 4, Institute for Agriculture and Trade Policy, 2003. Jawara, F. and Kwa, A., *Behind the Scenes at the WTO: The Real World of International Trade Negotiations*, London and New York: Zed Books, 2003.

years.[4] Proponents of this belief argue that the Green Room tradition in the GATT as well as the WTO simply has been an attempt to compensate for the absence of such a formal mechanism. They believe that if the WTO had a formal steering group which could discuss, debate and even negotiate, but not take decisions that bind the full membership, many of the issues and problems treated in this paper would disappear, or at least diminish considerably. However, while the GATT did for some time operate with an informal limited consultative group, it is difficult to see how a more formalized steering committee could be constituted. In the Bretton Woods organizations, membership of the boards is more or less limited to those holding the biggest shares of the institutions' capital resources. In the WTO, basing such membership on, for example, share of world trade would be problematic because it would exclude a large number of developing countries that have recently become very important players in the WTO. We shall return to both of these arguments later.

The issue of internal transparency and participation of all WTO Members, WTO jargon for the wide range of issues related to its internal decision-making processes, first surfaced at the WTO's Ministerial Conference in Singapore in December 1996. However, it was the collapse of the 1999 Seattle Conference that placed WTO decision-making procedures under close scrutiny and ensured that internal transparency received a separate platform under the auspices of the General Council. Subsequent ministerial conferences in Doha and Cancún saw a number of issues related to decision making and transparency surface again and accentuated the extent to which the profile and prominence of this systemic issue remain closely, although not exclusively, linked to the preparation and the conduct of Ministerial Conferences.

This essay begins with an outline of the origins of the issue of internal transparency and participation of Members in WTO decision making and the events that established this matter on the WTO agenda. It will discuss how the WTO and its Members have responded to this systemic challenge through dedicated discussions on internal transparency in the General Council. The second section will analyse how the conclusions reached during these discussions have influenced and improved the decisions-making processes at the WTO. The third section addresses a number of alternative suggestions on institutional reform of the WTO. The concluding section will take a closer look at current decision-making processes in the on-going Doha Round.

1. Origins of the issue of internal transparency and decision making

Although the GATT decision-making process encountered a number of problems throughout its almost 50 year existence, many of its practices were subsequently

4 Blackhurst, R. and Hartridge, D., 'Improving the Capacity of WTO Institutions to Fulfil Their Mandate', *Journal of International Economic Law* 7(3) 2004, 705–716.

institutionalized in the WTO. Whereas the practice of decision making by consensus was not articulated anywhere in the GATT, Article IX of the WTO Charter states 'the WTO shall continue the practice of decision making by consensus followed under GATT 1947'.[5] Significantly, the footnote to this Article actually defines what consensus means. Articles IX and X specify when voting is possible.[6]

The GATT decision-making process relied heavily on informal consultations. Although the practice of the Director-General hosting Green Room meetings[7] among a few delegations had been initiated in the Tokyo Round, these informal consultations became both more frequent and involved more Contracting Parties throughout the Uruguay Round. In addition, numerous informal groups began meeting outside the GATT to discuss how to move the negotiations forward.[8] There was never any pretence that these groups would engage in actual decision making, but they did perform an important function in terms of gradually exposing ideas and proposals which would have died an instant death had they been aired in meetings among all the Contracting Parties. Such limited meetings also underscore the fact that then, as well as today, effective discussion, debate, and negotiation is impossible when the group exceeds 25–30 Members.

Informal consultations among a limited number of countries have continued in the WTO, but the practice has become increasingly controversial as a result of two factors in particular. First, with a few exceptions, agreements reached in the WTO impose obligations on all Members. The perception that the trade-offs and compromises discussed in the Green Room meetings will be imposed on other Members without their participation have made delegations outside the room wary of sanctioning the practice. Second, the demand for active participation in WTO decision-making processes has increased drastically among a large number of Members, particularly developing countries. Although small group consultations remain as common in the WTO as in the final years of the GATT, the practice is now under closer scrutiny than ever and has been at the heart of the criticism of a 'democratic deficit' and a 'legitimacy problem' at the WTO.[9]

It is important to make a clear distinction between the frequent small group consultations held by Chairpersons in the day-to-day work of the WTO and the

5 The Results of the Uruguay Round of Multilateral Trade Negotiations, The Legal Texts, page 11.

6 Where not otherwise specified, and where a consensus cannot be established, simple majority voting is sufficient. In addition, there are three different methods of voting: (i) amendments to general principles, e.g. MFN and national treatment, require unanimity; (ii) amendments to issues other than the general principles require a two-thirds majority, and (iii) interpretations of the provisions of the WTO agreements, including decisions on waivers, require a three-fourths majority vote.

7 The term Green Room takes it name from the original colour of the walls of the Director-General's meeting room at the WTO in Geneva.

8 These included a number of groups named after Geneva hotels where they had held their first meeting, e.g. the De la Paix Group and the Beau Rivage Group. Another group was the so-called Invisibles Group.

9 For an overview of the Green Room process see Jones, K., 'Green Room Politics and the WTO's Crisis of Representation', Conference Paper for the Centre for the Study of International Institutions, 2004.

Green Room. The WTO membership will regularly request a Chairperson of a WTO body to consult on one or more specific issues and report back. Such consultations are encouraged and tolerated because they are recognized as necessary and because they have a better chance of producing results and generating momentum than deliberations among the full membership. The composition and size of small group consultations will vary depending on the specific issue,[10] but it is generally rather predictable. These consultations perform a facilitating or bridge-building role and there is never any pretence that they have some sort decision-making power. The Chairperson will generally announce the intention to hold such consultations and will report back, if not immediately, then at the end of a consultation cycle.

The Green Room, on the other hand, is generally linked to the final stages of a negotiating process, covers a broader agenda, and is therefore more controversial. Traditionally the Director-General has called and chaired such meetings which have provided an effective forum for a few delegations to discuss and negotiate informally. However, over the past four or five years, Green Room consultations among senior Geneva Permanent Representatives have repeatedly ended in grid-lock and failed to make the progress required for eventual ministerial decisions. Although the term Green Room remains part of the Geneva trade vocabulary, such consultations have declined in number and importance. The real Green Room meetings take place among Ministers and address a crosscutting agenda where most outstanding decisions are of a political nature.[11] Ministerial Green Rooms are generally slightly smaller than the comparable consultation among Geneva Permanent Representatives, although developing countries still make up a large majority.[12] The controversy and antagonism they have generated since the creation of the WTO stem from the perception that the outcomes of these meetings are presented as a *fait accompli* for the membership to accept. The fact that these consultations normally take place under intense time pressure adds to their controversial nature.

The vilification of the Green Room process also stems from criticism on the part of some WTO observers, many of whom have only a rudimentary insight into the role and composition of this process. Occasionally, even the participants of these consultations feel obliged to criticize the process for political reasons or out of solidarity with delegations that were not involved. At the same time, the ability of these Ministerial Green Rooms to deliver has been vastly exaggerated. As

10 Speculation abounds as to the selection of such small groups. In reality, it is fairly straightforward and involves a combination of the principal actors in WTO and countries with particular interest in the issue. Efforts to ensure geographical representation are also made.

11 The increasing number of mini ministerial meetings outside Geneva and the proliferation of meetings among senior capital-based officials reflect misgivings about the ability of the Geneva process to deliver results.

12 From 1999 to 2004 the percentage of developing countries in Ministerial Green Rooms was consistently above 70%.

indicated previously, the failure of two out of three Ministerial Conferences since 1999 has underscored that a Green Room process offers no guarantee of success.

The 1996 Singapore Ministerial Conference

Early strains of the WTO decision-making process became apparent at the 1996 Singapore Ministerial Conference as the formal plenary sessions[13] were complemented by an informal consultative process among around 34 countries.[14] This exclusive group effectively provided the core-negotiating forum in which the draft ministerial declaration took shape. Although the existence of this group was highly controversial, the antagonism it generated was neither coherent nor rebellious enough to seriously jeopardize its operation. Nevertheless, at the final informal session on 12 December 1996, designed to reach the consensus required for adoption of the Singapore Ministerial Declaration, a large number of those countries which had not been involved in the small group consultations articulated their dissatisfaction with the manner in which the text had been prepared and indicated that they were no longer willing to accept this lack of inclusiveness and transparency. However, no Member opposed the final declaration and, although the Chairman of the conference made a specific reference to 'the need to improve the procedures to be applied at the next Ministerial Conference',[15] the issue was placed on the back burner.[16]

A number of factors help explain why the lack of transparency of the consultative process in Singapore did not result in the sort of protests seen at later WTO meetings. Above all, in 1996 developing country Members, many of whom had never participated in a GATT/WTO Ministerial Conference before, were poorly prepared substantively and logistically for the kind of intense around-the-clock activity which has come to characterize WTO conferences.[17] Lack of organization within individual delegations in turn made effective coordination with other developing countries difficult.[18] In addition, those developing countries which were involved in the core consultative process were spending most of their energy fighting a controversial agenda of a number of developed countries on labour, environment, and investment and had little time for coalition building among

13 These are on-the-record meetings of all WTO Members, observers and a handful of international intergovernmental organizations. The plenary sessions are not interactive and consist of five-minute statements by Ministers.

14 Determining the membership of this limited group is generally argued to be the prerogative of the Chairman of the Ministerial Conference in conjunction with the Director-General.

15 WT/MIN(96)/SR/9.

16 Although some delegations, and a considerable number of NGOs, made an initial attempt to keep the issue of internal transparency on the agenda, such efforts quickly lost momentum and no significant discussion of the issue took place during most of 1997.

17 The experience that many of these countries had gained from UN meetings did not prepare them well for the rhythm and intensity of WTO ministerial meetings.

18 Interestingly, a number of developing country NGOs identified the lack of coordination at Singapore as the principal obstacle to effective developing country participation.

other delegations. Finally, the objective of the Singapore meeting was not to launch a new comprehensive round of trade negotiations and, as such, significant and controversial trade-offs were not envisaged.

Throughout 1997 and 1998 the issue of internal transparency did not appear on the WTO agenda. The fact that the 1998 Geneva Ministerial Conference was also being planned as the 50th Anniversary Commemoration of the multilateral trading system, and as such more of a ceremonial event, explains, to a large degree, why the preparatory process and the Ministerial Conference itself did not give rise to any debate on internal transparency and decision making.

Seattle Ministerial Conference

Much has been written about the comprehensive, complex, and divisive substantive agenda before the WTO membership prior to Seattle and the extent to which the 14-month preparatory process in Geneva was being severely hampered by the protracted struggle between Mike Moore of New Zealand and Supachai Panitchpakdi of Thailand for the post of Director-General. Between 1 May and 1 September the WTO was effectively without a head[19] and the burden of the entire preparatory process fell on the shoulders of the General Council Chairman who was alone in facing the considerable pressure from all Members to accommodate their specific concerns. The combination of a very broad and contentious substantive agenda, the strong ambition of some Members to launch a new negotiating round, an unusually divided membership, and a stuttering preparatory process left the WTO with an uphill battle before Seattle.[20]

The issue, which sparked off the procedural debate more than any other was the transfer of the ministerial text from the Geneva process to Ministers at Seattle. The weeks preceding the first draft of the declaration saw a series of smaller group consultations on both specific and more cross-cutting issues. The overall objective of these consultations was to make enough progress on the agenda and to narrow differences among Members so as provide Ministers with a manageable basis for making the political decisions that only they could make. Members had endorsed this approach in both 1996 and 1998.

When the General Council Chairman circulated his first draft of the ministerial declaration on 7 October 1999,[21] explicitly stating that he was submitting the document on his own responsibility and that the draft was only intended to advance the work of delegations, it created an outcry among a large number of delegations that felt severely short-changed by the lack of detail in the area of

19 A senior WTO Secretariat director was appointed Acting Director-General during this period, but his functions were limited to those of a caretaker.

20 For one of the most complete descriptions of the Seattle Conference, see Odell, John, 'The Seattle Impasse And Its Implications For The World Trade Organization', January 2001. Kennedy, Daniel and Southwick, James (eds.), *The Political Economy of International Trade Law*, Cambridge University Press, 2002.

21 Job (99)/5868.

implementation. Such was the anger caused by the omission that, four days later, the Chairman felt compelled to issue an addendum to the first draft which listed virtually every specific implementation issue raised in the preparatory process.[22] What followed was quickly dubbed the 'Christmas Tree' approach as a large number of delegations submitted new proposals that they wanted to see reflected in a revised draft.

In many ways the second revision of the draft text on 19 October, with its 34 pages and scores of square brackets, foreshadowed the disarray that would characterize the Seattle Ministerial Conference. The reaction of many delegations to the Chairman's draft text showed that delegations remained deeply entrenched in their substantive positions. The length and nature of the preparatory process had created a sense of expectation among delegations to see their own specific language reflected in the Chairman's text, regardless of the degree of convergence among Members. The dissatisfaction of many delegations with the 19 October text further indicated a fundamental lack of confidence in the preparatory process, and it was becoming increasingly clear that delegations in Geneva had decided to leave further negotiations to their political masters, despite the fact that more than a month remained before the Ministerial Conference.

The final meeting of the preparatory process on 23 November reinforced the impression that, if anything, delegations in Geneva had taken the substance backwards.[23] After 53 formal and informal open-ended meetings and a total of 300 hours since September 1998 as well as 35 small group consultations over the final 30 days, the absence of a manageable product for presentations to ministers was perhaps the biggest failure of the Geneva preparatory process. Another casualty had been the role played by the Director-General. Whereas the preparatory processes for the Singapore and Geneva meetings had been led by an experienced Director-General, Mike Moore became involved too late and his mandate was too weak to allow for an effective leadership role. Finally, the preparatory process had also suffered from the lack of authority of the Chairman of the General Council.

The Seattle preparatory process had demonstrated that most developing countries were more actively engaged in the work of the WTO. The creation of the Like-Minded Group (LMG),[24] the enhanced coordination of a number of developing country groups, such as the African Group, the African, Caribbean and Pacific Group of States (ACP) Group and the Least Developed Country Group

22 Job (99)/5868/Add.1.

23 It is characteristic of the chaos of the Seattle preparatory process that the drafting phase began only eight weeks before the opening of the conference. The drafting phase resulting in the launch of the Uruguay Round in 1986 lasted four and a half months.

24 The informal Like-Minded Group was formed in 1999 to provide a platform for a common approach on implementation. Its composition has varied somewhat over time. The coordination of the Group is understood to be undertaken by Group members on rotation. In October 1999 the membership of the Group appeared to be Cuba, Dominican Republic, Egypt, El Salvador, Honduras, India, Indonesia, Malaysia, Nigeria, Pakistan, Sri Lanka, and Uganda. Subsequently, countries such as Jamaica, Kenya, Sri Lanka, Tanzania, and Zimbabwe were associated with the Group.

(LDC), as well as their increased use of external analytical expertise,[25] were all important elements in explaining the growing assertiveness and confidence of developing countries in the run up to Seattle. The fact that the Seattle Ministerial Conference had been billed as the launch pad of a new round of trade negotiations, including on contentious issues such as investment and competition, clearly focused the developing countries in their approach to the preparatory process.

As ministers began arriving in Seattle it was clear that developing countries were expecting to carry over the momentum established in Geneva. Although it is beyond the scope of this paper to outline the substantive progress made at Seattle, it is clear that the outstanding differences were too numerous and profound to be solved in what was effectively three days.[26] The original five open-ended working groups, which had been established reluctantly by the Conference Chairperson, began work under their respective facilitators on the second day of the conference, but it quickly became clear that delegations were using these forums to repeat known positions rather than negotiate. The decision by the Chairperson to establish a working group on labour issues, despite the well-known and long-standing opposition by a large majority of WTO Members, was widely seen as a slap in the face of developing countries.[27] A large number of developing countries that were not included in the small group consultations by either the facilitators or the Conference Chairperson publicly denounced the process and, in an un-precedented move, signalled their readiness to veto any substantive outcome by the small group consultations on the basis of procedural objections.[28] This threat was, of course, never tested as a substantive outcome from consultative processes never materialized and a draft text never appeared. However, it did send a very strong message that a large number of developing countries would no longer accept watching the substantive agenda evolve from the sidelines. As the Seattle Ministerial Conference ended inconclusively on 3 December 1999, the issue at the forefront for a majority of WTO delegates was how to improve the internal transparency of, and participation in, the decision-making processes of the WTO.

The immediate aftermath of the Seattle meeting saw some attempts to allocate the blame for the collapse of the Seattle meeting, but eventually the focus turned towards understanding and addressing how the process had fallen short. Although a number of delegations argued that an extensive discussion of process would further delay progress on the substantive agenda, a majority of the membership

25 Including by a number of important developing country NGOs.

26 Schott, Jeffrey J. and Watal, Jayashree, 'Decision Making in the WTO', in Jeffrey J. Schott (ed.), *WTO After Seattle*, Washington DC: Institute for International Economics, June 2000.

27 This was one of several examples of the management style of the Chairperson at Seattle. The 2000 discussion of the role of the Chairperson at Ministerial Conferences was clearly inspired by the experience at Seattle in November–December 1999.

28 A number of such small group consultations became almost farcical as several countries gatecrashed the meetings. One such consultation on the issue of implementation, at one stage saw over 100 delegates in a room with a seating capacity of around 50.

clearly felt that the Seattle experience had demonstrated a number of important systemic flaws in the WTO decision-making process and that the issue of internal transparency and effective participation of all Members warranted a dedicated track on the agenda of the General Council.

2. Internal transparency discussions in 2000 and 2002

In early 2000, and with the Seattle collapse still fresh, the Chairman of the General Council and the Director-General initiated an intensive series of open-ended consultations on how to improve internal transparency and the participation in WTO decision making. This process was initiated by an invitation to Members for specific suggestions on how to make the consultative processes in the WTO more transparent and inclusive. From the 20, mostly informal, non-papers received from individual or groups of delegations, it was clear that a large number of Members considered the issue of paramount importance to the functioning of the multilateral trading system.

In July the Chairman provided Members with a progress report[29] that summarized the main points articulated in the non-papers and during the informal discussions. The report emphasized the general recognition among delegations that significant improvements in the overall consultative processes following Seattle had taken place.[30] In his report, the Chairman also concluded that Members: (i) in general saw no need for radical reform of the WTO; (ii) firmly supported the fundamental principles of the multilateral trading system, including the practice of reaching decisions by consensus; and (iii) believed that informal consultations continued to be a useful tool, provided that certain principles regarding inclusiveness and transparency were applied. These principles included that: (i) Members should be advised in advance of such consultations; (ii) Members with an interest in the specific issue under consideration should be given the opportunity to make their views known; (iii) no assumption should be made that one Member represented any other Members, except where the Members concerned had agreed on such an arrangement; and (iv) the outcome of such consultations should be reported back to the full membership expeditiously for its consideration. The Chairman emphasized that, while such tangible progress on internal transparency was important, the full membership had a collective responsibility to keep this issue under close scrutiny. These general interim conclusions were supported by Members and were generally accepted to provide further useful guidance for the day-to-day work of the WTO.

29 Job (00)/6591.

30 The WTO decision-making process after Seattle was characterized by a very high level of sensitivity towards the need to ensure that all consultative processes were announced in advance and were followed up by reports back to the full membership.

In addition to the generic discussion of transparency in decision making, the WTO membership also engaged in a focused exchange of views on issues relating to the preparation and organization of Ministerial Conferences. The Seattle experience and its potential impact on the process towards the next Ministerial Conference made this discussion particularly pertinent.[31] Although few delegations harboured expectations of concrete rule changes, the informal assessment of the Chairman regarding areas of convergence was widely acknowledged as accurately reflecting the ground covered by delegations during the debates.

The Chairman's assessment[32] pointed to a high degree of convergence of views on a number of issues: First, WTO Members generally seemed to agree that the main functions of Ministerial Conferences were to allow for political involvement in the ongoing work of the WTO. Second, the membership recognized the merit of having a maximum degree of flexibility in the process leading up to, and including, Ministerial Conferences. Any guidelines for the preparation and conduct of Ministerial Conference should be broad and flexible, taking into account the agenda of each Conference. Third, there was broad acknowledgement of the need to establish an efficient, Geneva-based preparatory process that would allow for solutions to be worked out in advance for most issues, particularly when decisions by Ministers were required. The creation of any negotiating structure and working groups at the Ministerial Conference, including the allocation of chairmanships for these, should ideally also be agreed during the preparatory process. Fourth, there was agreement among Members that the Chairman of the General Council, with the support of the Director-General and the Secretariat, should assume a central role in the preparatory process as well as during the Ministerial Conference, especially in the negotiation of any agreed outcome. A host country would normally provide the Chairperson of the Conference who would preside over the ministerial debate. Fifth, Members generally considered that the Marrakesh Agreement already provided the flexibility needed regarding the frequency of Ministerial Conferences. Sixth, Members reiterated that Ministerial Conferences should be held at the WTO Headquarters unless the Ministerial Conference or the General Council decided to accept an offer by a Member to host the meeting. Seventh, it remained clear that a strong, inclusive, and transparent process leading up to, and including, Ministerial Conferences, was fundamental in order to ensure a successful outcome. Furthermore, there was a common understanding that the working methods during the preparatory process, as well as during the Ministerial Conference, should build on the improvements of the

31 Of particular concern in the context of the organization of Ministerial Conferences was the fact that substantive discussions in Seattle began too late and eventually ran out of time. Instead of a five-day conference, Members in Seattle effectively had only three days. As seen later in both Doha and Cancún, the organization of Ministerial Conferences and the optimization of time for substantive discussions remain a serious problem. Another issue discussed by delegations related to the frequency of Ministerial meetings.

32 Job (00)/7891.rev1.

consultative practices and the conclusions of the internal transparency discussions since early 2000.

The above points of convergence reflect what the market could bear in 2000. They clearly fell short of the kind of institutional reform that a number of delegations publicly had argued was necessary, but which would have been impossible to adopt by consensus. However, the articulation of these practices and guidelines was significant at the time, since the WTO was about to embark on another preparatory process for a Ministerial Conference. Equally important, the discussions on internal transparency and WTO decision making in 2000 had firmly established this systemic issue at the core of the WTO agenda and as such would provide important input and guidance for the approach taken to the preparatory process for the 2001 Ministerial Conference in Doha and beyond.

In early 2002, following the Doha Conference, the intensive consultations towards establishing the Trade Negotiations Committee brought the internal transparency discussion back into the mainstream of the WTO agenda. During these consultations it became clear that events prior to and during the Doha Conference had prompted several delegations to prepare more formal submissions to advance the discussion on internal transparency and participation of Members. The principles and practices section in the Chairman's statement, which was endorsed by Members at the first meeting of the TNC on 1 February,[33] not only recalled the conclusions on internal transparency from 2000, but also went further in articulating the role and obligations of chairpersons in ensuring inclusiveness and fair representation of different positions.[34]

In response to submissions by Bulgaria,[35] India *et al.*,[36] and Australia *et al.*,[37] the General Council Chairman initiated consultations in the autumn of 2002. Although the submissions and the discussions to a large extent repeated many of the points of the 2000 debate, they also sought to build on the practices that subsequently had developed. Following the first open-ended informal consultation, Members agreed that the Chairman should undertake further consultations on this issue in a smaller group and report back with appropriate recommendations.[38] The basis of these discussions was a draft paper prepared by the Chairman

33 TN/C/1. See also TN/C/M/1. Rules for selecting officers and some broad references to their role are outlined in WT/L/510.

34 The Chairman's consultative process, which led to these principles and practices, confirmed the Director-General in an ex-officio capacity as TNC Chairman and established the negotiating structure under the TNC. This process was conducted in small groups or with individual delegations. During the month of January the Chairman met with 98 delegations.

35 WT/GC/W/422, Bulgaria, 13 November 2000 (re-submitted).

36 WT/GC/W/471, Cuba, Dominican Republic, Egypt, Honduras, India, Indonesia, Jamaica, Kenya, Malaysia, Mauritius, Pakistan, Sri Lanka, Tanzania, Uganda, and Zimbabwe (hereafter LMG), 24 April 2002.

37 WT/GC/W/477, Australia, Canada, Hong Kong, China, Korea, Mexico, New Zealand, Singapore, Switzerland, 28 June 2002 (Chile was added to the list of co-sponsors on 16 July 2002).

38 There is, of course, a certain irony in the decision to have the Chairman hold consultations on transparency among a small and exclusive group of countries.

which sought to capture a number of elements where the transparency debate had moved forward and where some convergence was appearing. The small group consultations on internal transparency were useful and underlined the importance of open-ended informal meetings supported by smaller consultations. Significantly, there was general agreement that small group consultations continued to be an important tool towards building a broader consensus. However, key differences as to the need for the adoption of specific rules or procedures to guide the informal consultative processes in the end prevented the endorsement of the Chairman's conclusions.[39] The failure to obtain an endorsement of the revised statement[40] was a disappointment but also reflected that some delegations did not feel comfortable endorsing a statement that fell short of the specific procedures and rules they believed were required for the preparatory process and for Ministerial Conferences. Although the 2002 process on internal transparency added little of substance to the points of convergence established in 2000, it did confirm the centrality of the issue to the overall functioning of the WTO system.

Another important lesson from the 2002 internal transparency discussions was the increasing recognition among delegations that the behavioural impact of a core set of principles and practices *vis-à-vis* the consultative process can be significant. Although the proposals on internal transparency in 2002 were both more formal and in some cases pushed for specific changes to the WTO Rules of Procedure, there was general recognition that any formal change would most likely be at the lowest common denominator and considerably inferior to the changes seen as a result of improved practices.

As we shall see in the following section, the practices and principles for consultative processes that were originally outlined in 2000 would have a significant impact on the preparation for, and conduct of, Ministerial Conferences.

3. New practices in the WTO decision-making process

As preparations for Doha began on 8 March 2001, it was clear that all WTO Members wanted to ensure that the lessons learned from Seattle would not be forgotten and in launching the process the General Council Chairman made a specific reference to the work undertaken on internal transparency. A similar emphasis on the need to keep the practices and principles that underpinned the consultative processes under close scrutiny was articulated by the Chairman throughout the Cancún preparatory process.

39 Although 'endorsement' is semantically stronger than 'taking note' it carries no legal weight in the WTO. The decision to seek an endorsement was a mistake, since it forced some delegations to reiterate points of divergence rather than convergence.

40 Job (02)/197.rev1.

The Doha Ministerial Conference

The principal feature of the Doha preparatory process was informal open-ended General Council or Heads-of-Delegation (HODs) meetings,[41] supplemented by other smaller-scale consultations.[42] This approach was pursued in recognition of the inefficiency of the formalized preparatory process before Seattle and was not opposed by any delegation. The Chairman also consulted bilaterally and plurilaterally throughout the process[43] but adhered rigorously to the practice of announcing his intention to hold such consultations and of reporting back to the full membership on the outcome of these consultations.[44] Throughout the preparatory process and until a few weeks before the Ministerial Conference, there was widespread appreciation among delegations for the efforts by the Chairman and the Director-General to ensure transparency and inclusiveness. However, as with the pre-Seattle process, issues related to the transfer of the draft text to Ministers shifted the discussions from substance to procedure. Following the second draft, the Chairman and the Director-General decided, amid some controversy, to forward the draft to the Chairman of the Doha Conference and to Ministers.[45] The letter from the General Council Chairman and the Director-General to Ministers clearly stated that the draft declaration was 'under their responsibility', did not enjoy consensus, and that some Members favoured the inclusion of several square brackets to indicate the areas where disagreement remained. They also expressed their belief that the Geneva process had taken the document as far as was possible and that it was only a basis for further work among Ministers.[46] Despite criticism by some delegations it was informally acknowledged that the Geneva process would not bridge the remaining differences.

Compared with Seattle, the conference in Doha kicked off with an unprecedented effort to provide delegates with an overview of activities. Hence, at

41 The HODs format has traditionally been used to conduct informal discussions among the Permanent Representatives (most often Ambassadors) of Members. HODs are open to all Members. Normally delegations are requested to limit their attendance to the Permanent Representative plus one delegate, which is the number of seats allocated to each delegation at HODs meetings. This rule is, however, not enforced rigidly and some delegations often find room along the walls of the meeting rooms. No written record is produced for informal meetings, although the WTO Secretariat produces informal summaries for the WTO non-resident Members.

42 In the Doha preparatory process, some 50 open-ended consultations or meetings were held (179 hours in total). This does not include the open-ended meetings on implementation (13 open-ended consultations/meetings, 61 hours total).

43 In a two-week period in early September 2001, the Chairman saw over 60 delegations.

44 All Members welcomed this system of reporting back to open-ended meetings as an important new feature of internal transparency, despite the fact that it had already been used in the pre-Seattle process. Nevertheless, the automaticity of this was a significant and positive trait.

45 A small number of delegations argued that a further (third) revision of the draft was needed.

46 This belief was based on the lack of progress in consultations in Geneva and the overall political nature of a number of the decisions required. There was also a growing sense that the Geneva representatives did not have the political mandates required for some decisions.

the first HODs meeting early on Saturday 10 November the Chairman of the Conference, Minister Kamal of Qatar, informed Members of the scenario envisaged for the informal process, including the Ministers who would act as Friends of the Chair on different issues. Although these Friends would consult in a variety of formats, a daily reporting mechanism was established to ensure that information would be fed back to the full membership at regular intervals. This mechanism was intended to mirror the Geneva preparatory process, which, despite some late criticism by a handful of Members, had stood up to scrutiny and was generally applauded by delegations. In addition, delegations were assured that two one-hour slots each day would be 'meeting-free' so as to allow groups to coordinate among themselves. This latter initiative was an innovation in the context of the Ministerial Conference and was a direct response to a request by some Members and Group coordinators.

An informal HODs meeting the following day received fairly substantial reports by the Friends of the Chair on their activities so far and of their intentions regarding the future process. These Friends emphasized their availability if delegations wished to see them, and, in response to specific requests, provided practical guidance on how to go about soliciting such meetings. Although these initial steps to ensure some transparency may seem modest, there was widespread recognition among Members that they nevertheless represented very significant improvements over previous conferences in terms of transparency and inclusiveness.[47]

Beyond a much-improved preparatory process and a more predictable consultative environment at the Ministerial Conference, there are a number of reasons why procedural wrangling at Doha took a back seat. The widespread feeling among Members that a second consecutive failure to launch a comprehensive negotiating round would do serious damage to the WTO as well as the geo-political situation following the events of 11 September 2001 have often been mentioned as factors. It is clear that to a vast majority of WTO Members the Doha Conference represented a rescue mission for a Negotiating Round with development issues at the core. In addition, the largest trading nations, developing as well as developed, came to Doha with enough flexibility and determination to make a deal happen.

Such was the pressure for a successful Ministerial Conference that the infamous Green Room among a group of 22 Ministers continued for nine hours on Tuesday 13 November without any information to the rest of the membership.[48] The controversial decision to extend the conference by 24 hours was made by the Chairman and on 14 November the WTO obtained the result a majority of

47 Privately, some NGOs also welcomed these initiatives as it provided them with additional predictability for interacting with delegations.

48 Although several trade officials from countries not invited to the meeting were waiting around elsewhere in the conference centre, most had gone to their respective hotels.

Members had been seeking. The final HODs meeting to pave the way for the formal adoption of the Ministerial Declaration and the launch of the Doha Round did hear some complaints about the lack of inclusiveness which had characterized the end game, but there was no appetite among delegations to see a procedural issue derail the substantive outcome.

Much has been written about the negotiations at Doha and about the pressure exerted on delegations to sign the final declaration. However, this criticism overlooks the significant improvements, explicitly acknowledged by WTO delegations, to the decision-making process that had characterized the Doha preparatory process and the conference itself. It could be argued that the 13 November Green Room did not represent a systemic failure in the context of GATT–WTO history of decision making, insofar as it replicated a long-standing and high-risk tradition of brinkmanship in trade negotiations. Nevertheless, the end game of the Doha Conference did illustrate that a number of systemic problems regarding the decision-making process remained unresolved. However, they also demonstrated that a large number of WTO Members were willing to accept an imperfect process in order to secure a substantive outcome. At Doha, the significance of the substantive outcome was simply too great for anyone to open another negotiating front on procedural issues.

The Cancún Ministerial Conference

The issue of internal transparency did not feature prominently in 2003 as preparations got under way for the Ministerial Conference scheduled to mark the halfway mark in the Doha Round. One important factor in explaining this was the absence of a formal announcement of the preparatory process for the Cancún conference. The decision not to create a separate track for the preparatory process was fuelled principally by the desire to avoid lengthy procedural discussions on such a process and to focus on the substantive mandates facing Members at the Fifth Ministerial Conference. A procedural discussion would inevitably have attempted to pin down specific dates for stocktaking exercises in advance of the conference, and, given that the WTO had already missed several important deadlines in 2002, it was felt that substantive and technical work should drive the process and not vice-versa. Another reason for adopting this approach was to play down the Cancún meeting as a scheduled stocktaking exercise.[49] Like the preparatory process for Doha, informal HODs meetings constituted the backbone of the substantive work in the lead up to Cancún – supported by a multi-level consultative process. Significantly, the full membership backed this informal

49 It can be argued that Cancún was more than just a stocktaking exercise, as some delegations looked to the conference to push for negotiations on the four so-called Singapore Issues (relationship between trade and investment, interaction between trade and competition policy, transparency in government procurement, and trade facilitation) and on the extension of protection of geographical indications to products other than wine and spirits.

approach. The letter from the Chairman and the Director-General that transmitted the draft declaration to the Chairman of the Ministerial Conference was sent on 31 August and broadly followed the model used previously. Invariably, this led some delegations as well as a number of NGOs to question the legitimacy of the process and the integrity of the Chairman and the Director-General, but these complaints did not reflect the sentiments of the overwhelming majority of Members. Interestingly, many of those who called for another revision also signalled their unwillingness to compromise any further.

From the point of view of transparency and inclusiveness, the 2003 preparatory process and the Cancún meeting itself represented a series of significant improvements. The participation of the Conference Chairperson in the July General Council meeting was an unprecedented sign of commitment to ensuring continuity with the Geneva process, including the practices on transparency in consultations. Similarly, the Chairman's outline of the formal and informal tracks at the conference and the decision to announce his roster of facilitators prior to the Ministerial Conference were significant improvements in terms of transparency.[50] At the inaugural informal HODs meeting in Cancún the Conference Chairperson provided delegations with a more detailed and practical overview of the informal process, including the subjects on which the five facilitators would assist him. These new initiatives went a great deal further than what had been done at previous meetings and combined with the preservation of the meeting-free slots reserved for coordination and consultation among or within delegations initiated at Doha, provided clear examples of how many transparency practices had become embedded in the organization of Ministerial Conferences.

Ironically, this adherence to transparency effectively delayed the process of more focused and result-oriented consultations at Cancún. By the time the open-ended consultative processes were drawing to an end and a more consolidated consultative group of 36 delegations met, the conference was already in its last day. This, incidentally, may represent the most significant mistake of the Cancún Ministerial Conference. The failure to begin a consolidated end game consultative process late on 13 September resulted in a decisive loss of momentum. When the group assembled in the morning of 14 September, it never managed to establish the atmosphere that had proved decisive to clinching a deal at Doha. This loss of momentum was compounded by the inability of individual players to negotiate and make decisions within a given mandate in the vacuum of the end game consultations. The effectiveness of the end game depends on such flexibility. The Cancún end game, on the contrary, was severely hampered by the absence of clear mandates for a number of Ministers who coordinated the efforts of larger constituencies, but who did not appear to have a negotiating mandate to go with it. This was particularly problematic because the dynamics of the Cancún end game, to a large extent, were dictated by a number of late but substantial concessions,

50 WT/MIN(03)/8. Minister Derbez selected these Friends/Facilitators.

which required some groups to revisit their mandates in a short space of time. When genuine negotiations finally began to happen, the turn-around time for some delegations and groups was too long and irritation over the brinkmanship and late concessions by some Members was mounting.

The preparatory work for Cancún raised a number of important questions with respect to the Geneva process and its ability to deliver on substance. From a procedural point of view, it appeared that the overwhelming majority of delegations agreed that the informal nature of the Geneva preparatory process provided the most suitable format for a preparatory process. However, the foremost failure of the Geneva preparatory process was that it never reached a point where the full range of potential concessions and trade-offs were understood and factored into the negotiating strategies of all Members. The inevitable result in Cancún, not unlike Seattle, was that Ministers were asked to solve a large number of technical issues rather than address a few overall political decisions.

From a decision-making and process point of view, the collapse of Cancún was particularly disconcerting. The transparency and procedural predictability of the preparatory process and ministerial conference had arguably been superior to anything previously seen in the context of a WTO negotiation, but the numerous open-ended consultations at Cancún never saw delegations engage in direct negotiations. In some respects the failure of the Cancún meeting highlighted the organizational conundrum of WTO Ministerial Conferences. Although open-ended meetings allow for a high degree of transparency, nobody is under the illusion that they will actually narrow substantial differences and serve as drafting sessions. The long hours spent in HODs meetings in Cancún were utilized by delegations to repeat well-known positions and did not provide any specific guidance as to possible compromises. The absence of a mechanism which could have fed possible compromise texts that were known to enjoy considerable backing and which could have focused discussions ensured that the HODs meetings went around in circles. In this regard it is significant that most delegations in Cancún probably would have been comfortable with a small group process, which at least could have indicated possible trade-offs and forced delegations to review their positions and bottom lines. However, by the time this process got under way, it was too late. There is little doubt that the process and organizational experience of the Cancún meeting will provide useful input for the Hong Kong Ministerial Meeting.

One final observation concerning the preparatory process and the Cancún Ministerial Conference itself relates to the unprecedented level of coordination seen among groups such as the ACP Group, African Group, LDC Group, and G90. The coordinators of these groups appeared to operate more efficiently than previously – at the Geneva level and ministerial level. The creation and rise to prominence of the G20 in response to a US–EU framework agreement in agriculture and the decline of the Cairns Group were other significant features of 2003.

Post-Cancún – August 2004

As in the immediate aftermath of Seattle, the weeks following Cancún were characterized by criticism of the inadequacies of the decision-making process and of the delegations that had proved unable or unwilling to make the necessary compromises in the final hours of the conference. However, the mutual recriminations subsided as Members agreed to focus on those substantive issues which were considered to be fundamental to unlocking the broader agenda.[51] The work for the remainder of 2003 was organized as a single-track consultative process, characterized by a focus on four issues, i.e. agriculture, non-agricultural market access, cotton, and Singapore Issues.[52] As a result, during this period the TNC and its subsidiary negotiating bodies remained suspended. Importantly, substance drove the consultative process conducted by the Chairman, which included 42 meetings with groups, three open-ended HODs meetings and two formal General Council meetings. In addition, the Chairman held countless bilateral meetings and even engaged in shuttle diplomacy to a number of ministerial gatherings and capitals. The post-Cancún process placed great emphasis on transparency, but it is equally clear that Members were looking to the Chairman for the leadership required to bring the WTO agenda back on track and in that process were unwilling to engage in procedural wrangling. The post-Cancún process also confirmed the growing importance of different groups and their coordinators within the WTO framework and among trade ministers.

In February 2004 the new General Council Chairman embarked on a comprehensive consultative process which, over a period of six months, would encompass 11 informal HODs, 54 meetings with smaller groups, and 81 bilateral meetings in addition to the two formal meetings of the General Council. In late April he provided the first comprehensive overview of his consultations and previewed future activities. It was quickly established that the process and the substantive focus of the immediate post-Cancún process still provided the best basis for making progress and that delegations were in broad agreement that a target date of end July was an appropriate aim. As had become customary, the Chairman's statement outlining the future process was circulated in the interest of transparency.[53]

One of the most salient characteristics of the process was also the extent to which external ministerial gatherings provided constant, albeit not always clear, input to the Geneva negotiations. In addition to mini-ministerial meetings in Davos and Paris, high-level meetings of the African Union, LDCs, ACP, and the G90 all contributed to the Geneva process.[54] Furthermore, a number of key players

51 Since the focus of the substantive agenda had been decided at the General Council level, the General Council Chairman rather than the Director-General chaired the consultative process.

52 Trade and Investment, Trade and Competition Policy, Trade Facilitation, and Transparency in Government Procurement.

53 The circulation of such statements is of great importance to WTO's non-resident Members in particular.

54 Meetings of the G8 and UNCTAD also provided strong input during this period.

engaged in unprecedented shuttle diplomacy. In early June, the Chairman presented delegations with a list of ideas for elements to be included in this outcome[55] and previewed the organization of the further process, including issues related to transparency. At no point during this process did Members complain about lack of transparency or exclusion. While this was probably due to the comprehensive nature of the Chairman's consultations, the group coordinators worked hard to keep their constituencies informed.[56]

In general, the process leading up to the circulation of the first draft of the July Package on 16 July,[57] and the revision on 30 July,[58] was as transparent and inclusive as could reasonably be envisaged. A series of small group consultations would be followed by an informal open-ended HODs meeting, where the Chairman, the Deputy-Director General, who was acting as a facilitator on Trade Facilitation, and the individual negotiating Chairs would report on substance and process. Consultations among delegations were also taking place around the clock outside the WTO. Despite the fact that the July General Council meeting was never billed as a ministerial event, a number of Ministers and senior officials arrived in Geneva to provide the final push for a successful outcome. In many respects the entire approach and commitment to avoiding another failure resembled the 'rescue mission' of 2001 that had launched the Doha Round.

The July 2004 end game reinforced a number of lessons learned from previous preparatory processes and from Ministerial Conferences. It confirmed the efficiency and value of small group consultations when there is enough political will and determination among the delegations involved. However, the July end game also emphasized that this political will has to be prevalent among those delegations that are not present in the Green Room. The final Green Room on 30 July was no secret and everybody knew where it was taking place, what the agenda was and who was present. In fact, a significant number of delegations had installed themselves just outside the area where the consultation was taking place and received periodic briefings from 'insiders'. With this scenario, however, July also showed that, despite the progress made in improving decision making and transparency, the basic nature and brinkmanship of the end game had not changed.

Towards Hong Kong 2005

The General Council Decision of 1 August 2004 injected new life into the Doha Round and, in a sense, provided the negotiating Chairpersons with a new mandate

55 Job (04)/69.

56 From March to July the Chairman met four times with the ACP coordinator and once with the ACP group; eight times with the African coordinator and four times with the African Group; four times with the LDC coordinator and twice with the LDC group, twice with the ASEAN coordinator and once with this group as a whole.

57 Job(04)/96.

58 Job(04)/96/rev1.

to push for substantive progress in the negotiating groups. With a specific deadline for the completion of the Doha Round negotiations no longer looming,[59] there was general agreement among delegations in Geneva to let the technical work of the individual negotiating groups drive the WTO agenda. In this context it is no surprise that the post-August 2004 process has largely been driven by developments in the agriculture negotiations. As usual in the WTO, tangible progress in agriculture is widely seen as necessary to unlock the overall Doha agenda in general and in non-agricultural market access (NAMA) and services in particular.

The organization of the work in the agriculture negotiations has been illustrative of how the focus on substance and technical details has dictated the work in Geneva since August 2004 and the extent to which there has been very little appetite for procedural wrangling among delegations. The consultative approach adopted by the Agriculture Chairman has involved a three-stage process of which Stage One has been a first reading of an issue in the 1 August agriculture framework in so-called open-ended informal special sessions. Stage Two has seen more technical discussions of the issues raised in the first reading, and, although these meetings have taken place in a smaller room, they remain open to all interested delegations. Stage Three of the process has involved smaller group consultations on highly complex and technical issues. The agenda for each of these meetings has generally been clearly communicated by the Chairman in advance and the results or conclusions from these deliberations are resubmitted to all participants for their consideration.

The above process has not given rise to complaints and has been reproduced in other negotiating groups as a practical approach for generating momentum. Members have granted Chairpersons considerable freedom to consult selectively and they have in turn been meticulous in both announcing meetings and in reporting back to the full membership on any substantial developments.[60] This practice is hardly new in the WTO, but the trust upon which it rests represents a significant positive development in the decision-making processes of the organization. Since March 2005, a string of so-called informal mini-ministerial meetings among some 30–35 countries have taken place in Davos, Mombasa, Paris, and Dalian. Similarly, several meetings among senior capital-based officials from a limited number of countries have taken place in and around Geneva. All of these meetings have focused on how to move the Doha Round forward.

In the past, mini-ministerial meetings, especially prior to Seattle and Cancún, have often generated fierce criticism from those who were not invited. There is little doubt that the increasing frequency of mini-ministerial meetings can be seen

59 The August Decision did not set a new deadline for the Doha Round.

60 For an excellent analysis of options available to a Chairman of a WTO committee, see Odell, J. S., 'Chairing a WTO Negotiation', in Ernst-Ulrich Petersmann (ed.), *Reforming the World Trading System Legitimacy, Efficiency and Democratic Governance*, 2005, Oxford University Press.

as a direct response to the gridlock that has characterized the Geneva process over the past few years. As mentioned previously, the latter stages of the Uruguay Round offered plenty of evidence of in-house process difficulties, leading to consultations outside the GATT framework. These informal mini-ministerial meetings generally bring together some 25–40 Ministers from a cross-section of WTO Members. Normally the Director-General and the General Council Chairman are invited, but it would be unthinkable, and potentially very damaging to their credibility, if either of them ever hosted a meeting of a select group of countries. The controversy surrounding the decision of the Director-General of the World Intellectual Property Organization (WIPO) to invite a select group of countries to Casablanca to adopt an action plan on global patent harmonization is very illustrative of why the head of a multilateral organization cannot take the lead in any endeavour that does not involve all stakeholders.[61]

Similarly, although mini-ministerial meetings will discuss matters on the WTO agenda, and even see bilateral negotiations between participants, there is never any pretence that the meeting can somehow feed results directly into the Geneva process as *faits accomplis* for adoption. However, sometimes these gatherings can result in the political push necessary to move the Geneva process into a higher gear. While the term 'mini-ministerial' has traditionally been associated with meetings on the sidelines of other international gatherings, such as the OECD Ministerial Meeting[62] and the World Economic Forum, this is changing. Over the past few years an increasing number of developing country Members of the WTO, including Kenya and China, have hosted such meetings, thereby effectively dispelling the notion that these meetings remain 'rich country' gatherings. Nevertheless, the track record of mini-ministerial meetings providing constructive input into the Geneva process and generating negotiating momentum is rather patchy. But these meetings can provide direction and impetus for the Geneva negotiators. The relative absence of criticism of the mini-ministerial meetings held throughout 2005 is certainly a change compared with the post-Seattle period. This is all the more remarkable since at least one of these meetings generated a direct substantial input to the agriculture negotiations in Geneva.

The preparatory process for the Ministerial Conference in Hong Kong effectively began in August 2004 with the General Council Decision providing guidance on a number of issues. However, although the revival of the Doha Round appeared to have generated a common sense of purpose among delegations to

61 The meeting, held in mid-February 2005, and its outcome was strongly rejected by a number of developing countries that had not been invited. This outcry effectively discredited the initiative. See http://www.ictsd.org/weekly/05-02-23/story5.htm.

62 WTO mini-ministerials at the sidelines of the OECD are normally hosted by an OECD member (other than an EU member State). In fact, OECD countries make up a very small number of the total participants and normally developing countries represent more than 50%. The Swiss have traditionally hosted mini-ministerial meetings at the WEF in Davos.

focus on making substantive progress in Geneva, tangible substantive progress in important areas such as agriculture and non-agricultural products has been disappointing. The original ambition to produce so-called 'first approximations' of modalities in these two areas by the end of July 2005 did not materialize and the absence of progress in these key areas has, in turn, slowed progress on the wider Doha negotiating agenda.

Interestingly, the situation in September 2005, three months before the Hong Kong Ministerial Conference in several ways resembled September 1999 before Seattle, i.e. a heavy and grid-locked substantive agenda and a change of leadership at the top of the WTO. Although process discussions and procedural issues relating to the WTO decision making did not feature to any significant degree in the first nine months of 2005, experience has shown that, as the Ministerial Conference looms and pressure on delegations for substantive concessions mounts, the temptation to open a new negotiating front on procedural issues becomes very real. The final three months of the preparatory process in Geneva remains crucial to the eventual outcome, as this is where the draft ministerial declaration will be produced. In this context, the transfer of the draft text to ministers will, as with previous conferences, be a key moment. However, the fact that in May 2005 WTO Members managed to select a new Director-General without a divisive and prolonged procedural squabble is certainly a significant achievement and should ensure that the final stages of the preparatory process can focus on the substantive negotiating agenda and a result in Hong Kong.

4. Alternative suggestions for reforming decision-making at the WTO

As with the 'in-house' debate on internal transparency, the Seattle debacle sharpened the focus of external observers on this issue. Initial reactions by several observers suggested that the failure of Seattle was a direct result of an undemocratic and un-transparent decision-making process designed to marginalize the less powerful Members of the WTO. Some concluded that the WTO decision-making process was in dire need of a dramatic overhaul. Although the entire Seattle process exposed a number of institutional problems, such conclusions fail to acknowledge that even a perfect process would have been unable to bridge the substantive differences among Members in 1999.

The dedicated discussions on internal transparency among WTO Members in 2000 and 2002 featured very few of the proposals and solutions provided by WTO observers on how to improve WTO's decision-making processes. Below a number of the external proposals for reform of the WTO's decision-making process will be analysed.

Elimination of Green Room type consultations

Over the past two years a number of NGOs have argued that the practice of Green Room meetings has undermined the legitimacy of WTO decisions and that a more

democratic model should be adopted.[63] Such a model would rely almost exclusively on open-ended formal meetings for negotiation among WTO Members and would restrict smaller group meetings by Chairpersons, unless explicitly approved by the full membership. While such an approach could theoretically improve transparency, there are a number of problems associated with this model. First, the pre-Seattle experience clearly illustrated that a formal process does not provide an appropriate forum for negotiations. Second, formalizing a preparatory process is unlikely to enhance transparency for those delegations that do not have representation in Geneva, as the formal records, also known as 'Minutes', from a full-day meeting on average take around two weeks to process and translate into the WTO's three working languages. Third, and perhaps most importantly, an increasingly unwieldy and formal process will inevitably lead a number of delegations to take the consultative process outside the framework of the organization. Unlike in-house consultations, these processes will operate with no transparency or reporting obligation. Finally, formalizing the WTO decision-making process would be contrary to the very real concern of many delegations, that the general proliferation of meetings is hampering their efforts to participate effectively.

During the discussion on transparency in 2000 and 2002 some delegations did call for more open-ended meetings at which Chairpersons could report back and this practice is now solidly embedded in the WTO decision-making practices. The debate on transparency among the WTO membership has clearly illustrated that delegations do not believe that fundamental reform to the decision-making processes is necessary.

WTO steering committee/executive board

The idea to establish a steering committee or an executive board with a rotating membership has some historical precedent in the so-called 'Consultative Group of 18' of the GATT.[64] This may, to some extent, explain why this idea continues to receive considerable attention by some WTO pundits.[65] The fundamental idea behind these proposals is that such a body would provide a more transparent and predictable consultative mechanism compared with *ad hoc* Green Rooms. The proponents of such a mechanism all emphasize that it would not take decisions that bind the full membership, but would rather make recommendations based on thorough consultations.

63 Third World Network *et al.*, 'Memorandum on the need to improve internal transparency and participation in the WTO', July 2003. Sharma, 'WTO Decision-Making', Jawara and Kwa, *Behind the Scenes at the WTO*.

64 Blackhurst and Hartridge, 'Improving the capacity of WTO institutions to fulfil their mandate', 705–716.

65 Schott and Watal, 'Decision Making in the WTO'.

In October 2003, the European Commission circulated a reflection paper to the 133 Committee on WTO Organizational Improvements, which called for the creation of an advisory group to prepare negotiating options.[66]

An executive board with a pre-determined membership could perhaps add an element of predictability to the consultative process. It has been argued that the creation of such a group would reduce the risk of bigger players abandoning the multilateral approach on certain issues in favour of a bilateral or plurilateral negotiation outside the WTO. However, although the creation of such a mechanism appears to have significant benefits in theory, it is almost certain that questions such as the criteria for representation and the status of the discussions in the body would make its establishment very difficult. The principal opposition to a steering committee or an executive board would most likely come from a sub-set of countries which historically have been able to get into any Green Room they are interested in, but which would struggle to gain their own seat on such a board. This group might include countries such as Argentina, Australia, Canada, Chile, Colombia, Hong Kong (China), Korea, Mexico, Norway, New Zealand, South Africa, and Thailand. These countries have a long tradition as strong supporters of the multilateral trading system along with the EU, US, and Japan.

It is therefore no surprise that the creation of such a mechanism has not been raised in any detail among Members during discussions on internal transparency. In addition, the past few years have seen a much more assertive membership insisting on the WTO being 'member-driven', and it is difficult to see how anything that could be seen to encroach on this notion could be successful. Significantly, the idea of a consultative board would appear to address the issue of efficiency rather than transparency.

Regional representation

The idea of organizing the decision-making process of the WTO around regional representation has often been linked with the creation of a consultative board and the formalization of a consultative forum. This idea has failed to generate any interest among those countries which would be encouraged to organize themselves along regional lines. Despite the proliferation of regional trade agreements regional coordination in the WTO remains a very marginal activity. The notion of regional representation has not been raised in the context of the transparency discussions at the WTO. An important reason why the idea of regional representation is unlikely to flourish is simply that negotiating interests in the WTO do not always coincide with the geographic location of countries.

Weighted voting

The introduction of a variant of weighted voting along the lines of the IMF and the World Bank or even the EU would certainly provide for a more predictable and

66 European Commission, 'Reflection paper on WTO organizational improvements', Note to 133 Committee, October 2003.

stable balance between participation and efficiency. However, this idea would fundamentally undermine the rule and practice of decision making by consensus, break with the principle of equality among states, and exacerbate what many countries see as existing asymmetries. It would also seem very unlikely that developing countries would sacrifice their surge in importance at the WTO to a system of weighted voting, e.g. based on share of world trade, which would reduce their influence. Finally, a system of weighted voting would certainly not be the answer to criticism regarding the legitimacy of WTO decisions. It should be recalled that one of the first intermediary conclusions of the consultations on internal transparency in 2000 was that Members did not see the need for any fundamental change to the consensus rule and the issue has not featured in any detail since.

Flexible integration/plurilateral approach

The idea of returning to the more flexible integration or 'a la carte' approach of the 1970s gained some currency among a limited group of Members recently in the context of the Singapore issues. It was argued that those countries that had the interest and the capacity to move ahead with negotiations should be allowed to do so. The WTO has been down this road before with some success[67] and a recent report by the Consultative Board to the Director-General endorses the idea of 'variable geometry', i.e. allowing some Members to take on more extensive obligations than others.[68]

However, given the strong opposition to any plurilateral negotiations on the Singapore Issues, it seems unlikely that this approach could generate support in the WTO.[69] Developing countries in particular are adamant that they do not wish to see a 'two-tier' WTO. Nevertheless, considering the difficulty of launching comprehensive trade rounds, the possibility of small groups of interested countries seeking a plurilateral deal outside the multilateral framework may not be that far-fetched. The proliferation of Free Trade Agreements over the past few years would suggest that plurilaterism may have a role to play.

Enhancing coalition building – concentric circles model

The basic idea behind the concentric circles model is to work towards a situation where existing coalitions among Members play important roles in building consensus on difficult issues.[70] The work of such groups would support and complement

67 The Tokyo Round resulted in nine agreements to which only some of GATT's Contracting Parties subscribed. Of these only two remain in force, i.e. on government procurement and civil aircraft. In addition, in 1996 a large number of WTO Members signed on to the Information Technology Agreement.

68 Both before and after Cancún the EC Commission often argued in favour of allowing a 'coalition of the willing' to move ahead with negotiations on the Singapore Issues.

69 Consensus is required in order for a plurilateral negotiation to take place within the WTO.

70 Blackhurst, R., 'Reforming WTO Decision-Making: Lessons from Singapore and Seattle', in *The World Trade Organization Millennium Round: Freer Trade in the Twenty-First Century*, London: Routledge, 2001.

the small group consultations and their coordinators would be closely involved in these. The weakness of this model is its focus on achieving internal agreement in such groups rather than conciliation with groups of opposing views. Viability of this model relies heavily on the extent to which group coordinators are able to 'win' a mandate to represent and, above all, speak for their constituencies. The concentric circles model in many ways reflects what has been happening over the past years in the WTO. The growing influence of such groups as the African Group, the LDC Group, and the ACP in Geneva, and at the ministerial level over the past few years, has been an important feature of the decision-making process in the WTO. Similarly, the emergence of a number of informal coalitions around specific issues or platforms, e.g. the LMG (implementation), the G20 (agriculture), and Friends of The Round[71] would suggest that such groups have a role to play.

The above has shown that there is no shortage of ideas and models for improving the decision-making processes at the WTO. However, it is noteworthy that most of the ideas and suggestions for change articulated by observers of the WTO have only rarely featured in the discussions among Members on the issue of internal transparency. At the recent off-the-record discussion of the report by the Consultative Board to the Director-General,[72] Members appeared to reject some of the recommendations on WTO decision making, including a modification of the consensus principle. Indeed, most observers tend to ignore the significance that WTO Members attach to the notion of a 'Member-driven' organization. In this context it is also significant that WTO observers have rarely bothered to analyse the incremental but nevertheless significant improvements to WTO decision making and internal transparency since 2000.

5. Conclusion

Over the past decade issues related to internal transparency and the decision-making processes of the WTO have emerged as the foremost institutional challenge facing the multilateral trading system. This paper has attempted to provide an overview of the origins of these issues, the manner in which the WTO membership have responded to this challenge, and the practices which now characterize the conduct of the consultative processes.

The WTO decision-making process remains imperfect and will most certainly require further improvements in the future. However, with internal transparency and decision making now important systemic issues in their own right, there is little doubt that they will continue to be scrutinized by the membership as well as by observers of the WTO.

71 A group of ten developing and five developed countries.

72 Consultative Board to the Director-General Supachai Panitchpakdi, 'The Future of The WTO', WTO, 2005.

Contrary to what many observers of the WTO decision-making process argue, WTO Members have spent considerable time and effort on this issue. Much of the criticism of the decision-making process in the WTO is either dismissive of the progress made, or simply chooses to ignore the fact that the membership has engaged substantively to improve the transparency of the multilateral trading system. Discussions on internal transparency in 2000 and 2002 reaffirmed that Members did not believe the fundamental principle of consensus decision making should be changed, but that the informal decision-making processes, particularly in the context of Ministerial Conferences, were in need of reform. The current practices, and the guidelines within which consultations take place at the WTO, are the direct result of what a large number of Members believed was wrong with the decision-making processes. Although these practices have little legal status, their behavioural impact on the way the WTO operates is considerable. There is enough evidence in the day-to-day work of Chairpersons and the Director-General in the WTO to demonstrate adherence to a culture of increased transparency and participation.

The way in which Members have approached the issue of internal transparency contains a number of parallels to how they have dealt with the challenge of opening up the WTO to greater public scrutiny. The approach to improving the external transparency and the relationship with NGOs over the past decade reflects a similar preference on the part of the WTO membership for improved practices and guidelines, rather than specific institutional amendments. The practices for dealing with civil society groups, developed and refined over the past decade, but with no legal foundation, have become so embedded in the operation of the multilateral trading system that it would be unthinkable that they could be rescinded. Similarly, insistence on specific and formal rules for consultative processes in the WTO would not only result in a lowest common denominator outcome, but would also undermine the moral authority embodied in the current practices and guidelines. It may be argued that what is in place is the least bad of the workable alternatives.

Experience at the WTO shows that the legitimacy of the decision-making process requires that there is an adequate degree of open-ended and inclusive activity to balance other more restrictive consultative processes. Critics of the WTO often appear to single out the decision-making processes of the organization as uniquely exclusive in comparison with other international institutions. This is disingenuous. All international intergovernmental organizations face challenges when it comes to finding the right balance between efficiency and inclusiveness.

Small group consultations by Chairpersons and Green Rooms will continue to play important roles in the overall WTO process, since, on balance, they offer important forums for making progress. WTO Members in general recognize this. However, their legitimacy hinges on the ability to ensure an adequate degree of transparency and inclusiveness, as well as a guarantee that such mechanisms are understood to be coalition building and not decision-making forums. It is also

clear that any attempt to short circuit or deviate from the guidelines and practices on transparency will continue to require some general acceptance among WTO Members. Past experience has shown that in some cases, and faced with a high-stake substantive agenda, the WTO membership appears willing to accept such a temporary deviation. However, muddling through and experiencing negotiating collapses on a regular basis is unsustainable for the multilateral trading system and the legitimacy of its decisions. In this respect it will be crucially important that the progress made so far on internal transparency and the decision-making processes in the WTO is bolstered by further improvements. Some of these will be relatively straightforward, e.g. previewing organizational features of Ministerial Conferences sufficiently ahead of time and ensuring consistent adherence to the consultative practices of the Geneva process. Other issues, such as the transfer of a workable draft text to Ministers prior to the Ministerial Conference, will be more difficult. Of course, a certain degree of flexibility will always be required, but provided certain practices are maintained such flexibility will most likely also be granted.

As the WTO moves towards its Sixth Ministerial Conference in Hong Kong in December 2005 and beyond, issues related to transparency and decision making will remain important. Whether these issues become a separate negotiating item on the WTO agenda will, in part, be determined by the extent to which all delegations feel sufficient ownership of the process and the substantive outcome. This places a significant responsibility on the shoulders of the various Chairpersons and the Director-General, but it also depends on the willingness of all Members, including the large groups which have come to play important roles in the WTO, to take and accept leadership responsibility in the context of the multilateral trading system.

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Dispute settlement corner

WTO Case Law: The American Law Institute Reporters' Studies

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These new annual volumes are part of an ALI project on World Trade Organization Law. The project will undertake yearly analyses of the case law from adjudication bodies of the WTO. Each of the cases is jointly evaluated by an economist and a lawyer, both well-known experts in the fields of trade law and international economics. The Reporters critically review the jurisprudence of the WTO adjudicating bodies and evaluate whether the ruling in each case 'makes sense' from an economic as well as a legal point of view, and, if not, whether the problem lies in the interpretation of the law or the law itself. The Studies do not always cover all issues discussed in a case, but they seek to discuss both the procedural and the substantive issues that form the 'core' of the dispute.

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European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India: Recourse to Article 21.5 of the DSU by India

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1. Introduction

This paper addresses the dispute brought to the World Trade Organization (WTO) by India concerning antidumping duties imposed by the European Communities

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(EC) on cotton-type bed linen. An earlier complaint brought by India challenged the antidumping duties on a number of points, including the EC practice of 'zeroing' for the computation of dumping margins (which had the effect of assigning a negative dumping margin a weight of zero when computing a weighted average dumping margin).[1] India prevailed in that dispute,[2] and the EC responded with Council Regulation (EC) No. 1644/2001, amending the original antidumping measure on bed linen from India. India was of the view that the amended measure did not comply with EC obligations under the WTO Antidumping Agreement, and brought the proceeding under Article 21.5 of the DSU that is the subject of this paper.

Several issues were raised before the Article 21.5 panel, but only three issues reached the Appellate Body. First, India argued that although the EC had corrected the 'zeroing' problem, it had failed to ensure that injury attributable to 'other factors' had not wrongly been attributed to dumped imports, in violation of Article 3 of the Antidumping Agreement. Second, India argued that in conducting its revised injury analysis, the EC violated Article 3 when it presumed that all imports from exporters not individually investigated were 'dumped', even though 53% of the imports from exporters that were individually investigated were found not to have been dumped once the 'zeroing' method of calculation was abandoned. Finally, India argued that the EC had not properly considered certain factors bearing on injury that it was required to consider under Article 3.

The Appellate Body ruled in favor of the EC on the first issue, holding that it had been resolved definitively in the original proceeding. It ruled in favor of India on the second issue, however, concluding that imports from producers not individually investigated could not be presumed to be dumped for purposes of injury analysis when some of the individually investigated exporters were not dumping. On the third issue, the Appellate Body upheld the finding against India by the panel, deferring to its resolution of what the Appellate Body considered an essentially factual issue.

From a legal perspective, the Appellate Body's decision on the first issue raises some interesting questions about the proper scope of *res judicata*, issue preclusion, and waiver in WTO jurisprudence, but provides few answers. The case breaks new ground with respect to the second issue noted above as well, and we quibble somewhat with the Appellate Body's legal and logical reasoning there. Finally, the Appellate Body's deference to the panel on the third issue seems appropriate as best we can determine.

From an economic perspective, we find the procedural issue to be an interesting one. Little analytical work has been done by economists on the proper scope of *res judicata* and the related notions of issue preclusion and waiver. We develop

1 The decision in the earlier proceeding is the subject of an earlier paper in this series. See Janow and Staiger (2003).

2 See European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, WT/DS141/AB/R, adopted 12 March 2001.

some simple points about these issues below, which provide some basis for questioning the refusal of the compliance panel to entertain India's arguments on 'non-attribution'. Regarding the second issue, the antidumping laws make so little economic sense in general that it is difficult to offer any guidance as to their 'proper' administration. The ruling in favor of India on the presumption of dumping issue seems reasonable from a statistical standpoint, however, although it may in the end prove a pyrrhic victory since the material injury standard in the antidumping arena is both a low and elastic threshold. The EC may well be able to reimpose the duties simply by rephrasing its injury analysis. Finally, the Appellate Body's deference to the factual conclusion of the panel on the third issue raises no economic issues of note.

We lay out the legal issues and their resolution by the panel and the Appellate Body in Section 2. Section 3 offers a critical analysis of the case from a law and economics perspective.

2. Factual and legal issues and their disposition

2.1 Non-attribution of injury caused by 'other factors'

Article 3.5 of the Antidumping Agreement provides that investigating authorities must 'examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports'. In the original proceeding, India challenged the EC's duties, *inter alia*, on the grounds that the EC had failed to ensure that injury attributable to 'other factors' was not attributed to dumped imports from India, although it did not pursue the issue very actively. The original panel dismissed the one substantive point raised by India under this rubric, and otherwise said that India had failed to make out a *prima facie* case on the issue. That finding was not appealed.

The EC did not conduct a new analysis of 'other factors' as part of its revised injury analysis when it promulgated Regulation No. 1644/2001, and had simply relied on its previous discussion of the matter. India then argued again that the EC had failed to ensure that injury caused to 'other factors' was not attributed to dumped imports. In particular, it pointed to various 'other factors' that had not been a subject of discussion before the original panel, including rising input costs for European firms and the failure of output prices in the EC to keep up with inflation.

The EC requested a preliminary ruling from the panel to the effect that such matters could not be raised in an Article 21.5 proceeding, and the panel agreed:

> To rule on this aspect of India's claim under Article 3.5 in this proceeding would be to allow India a second chance to prevail on a claim that it raised, but did not pursue, in the original proceeding. We cannot conclude that such a result is required by Article 21.5 of the DSU, or any other provision. The possibility for

> manipulative or abusive litigation tactics that would be opened by allowing Members an opportunity to obtain a ruling in an Article 21.5 proceeding that they could have sought and obtained in the original dispute would, in our view, be inestimably harmful to the effective operation of the dispute settlement system.[3]

Although the panel did not use these terms, its reasoning invokes notions of *res judicata*, issue preclusion and waiver.

The Appellate Body affirmed the panel's ruling on this issue. In doing so, it emphasized that new claims *can* at times be raised before an Article 21.5 panel. The purpose of such panels is to review the WTO consistency of measures taken to comply with prior rulings. Many such measures will differ significantly from the measures originally challenged, and may be inconsistent with WTO obligations in ways that the original measures were not. New inconsistencies of that sort are the proper subject of discussion before an Article 21.5 panel. But '[h]ere, India did not raise a *new* claim before the Article 21.5 panel; rather, India reasserted in the Article 21.5 proceedings the *same* claim that it had raised before the *original* panel in respect of a component of the implementation measure which was the same as the original measure. The *same* claim was dismissed by the original panel, and India did not appeal that finding.'[4] The Appellate Body went on to hold that when the original panel report was adopted by the DSB, it became a final resolution of the dispute on the 'other factors' issue.[5]

Like the panel, the Appellate Body relied for its ruling not so much on any treaty text that addresses the issue, but on policy considerations and on its earlier decision reviewing a similar issue that had arisen before the *Shrimp–Turtle* compliance panel. The Appellate Body emphasized that India had raised the 'same' claim earlier and lost, and put less emphasis than the panel on the notion that the particular issues raised by India could have been raised before but were not.

2.2 *Injury due to exporters not individually investigated*

In the second investigation as in the first, the EC did not investigate every Indian exporter of cotton-type bed linen. Article 6.10 of the Antidumping Agreement allows importing nations to investigate only a sample of all exporters in cases where an individual investigation of all of them would be 'impracticable'. Accordingly, the EC conducted individual investigations of five of the larger Indian exporters, and applied a weighted average antidumping duty to exports from other exporters as is allowed by Article 9.4 of the Antidumping Agreement.

The most important change between the original investigation and the second was to eliminate the practice of 'zeroing' in the computation of weighted average dumping margins. When zeroing was eliminated, two of the five exporters subject

3 Panel Rep. ¶6.43.
4 AB Rep. ¶80.
5 AB Rep. ¶99.

to individual investigation, accounting for 53% of the imports from the five individually investigated importers, were found not to be dumping at all. The issue before the compliance panel was how this new finding should affect injury analysis by the EC.

Article 3.5 requires that the importing nation establish a causal link between the dumped imports and injury. In purporting to establish this link when promulgating Regulation No. 1644/2001, the EC assumed that all imports from Indian exporters not individually investigated had been dumped, even though 53% of the imports from the exporters individually investigated had not been dumped. India argued that the EC thereby violated Article 3.1, which requires that the determination of injury be based on 'positive evidence', including an 'objective examination' of the 'volume of dumped imports'. India argued that the EC should presume that dumping was occurring by exporters not individually investigated in the same proportion as imports from exporters who were individually investigated (47%). This would suggest a smaller volume of dumped imports than the EC had presumed to be present, and might reverse the conclusion that dumped imports were causing material injury.

The EC argued that the presumption of dumping by exporters not investigated individually is permissible under the Antidumping Agreement. Its principal argument was based on Article 9.4 of the Antidumping Agreement, which permits an antidumping duty to be imposed on exporters not individually investigated as long as it does not exceed 'the weighted average margin of dumping established with respect to the selected exporters'. The EC contended that because it is allowed to impose an antidumping duty on those exports, it must also be allowed to consider them 'dumped' for purposes of injury analysis. It argued secondly that the group of exporters that it had chosen to investigate individually were not selected to be a statistically valid sample, but rather represented the 'largest percentage of the volume of the exports … which can reasonably be investigated', one of the options under Article 6.10. Thus, the percentage of exports found to be dumped by the individually investigated exporters could not be assumed to reflect the amount of dumping by exporters not individually investigated.

The panel agreed with the EC. 'We can find no textual obligation in the AD Agreement to separate out the unexamined producers' imports into dumped and not dumped for purposes of the injury analysis.'[6] It also found India's position to be logically flawed given the fact that all non-investigated imports could be subjected to a positive antidumping duty under Article 9.4: 'Under India's approach, only a portion of imports from producers subject to that anti-dumping duty could be considered as "dumped" for injury purposes. This effectively treats the imports from the same producers as dumped for purposes of duty assessment, and not dumped for purposes of injury analysis. In our view, this is an unacceptable outcome, suggesting that the analysis which leads to it is untenable.'

6 Panel Rep. ¶6.139.

The Appellate Body reversed. It emphasized the requirement for an 'objective examination' of the volume of dumped imports, and noted that imports not sold at dumped prices are specifically enumerated in Article 3.5 as one of the 'other factors' which may cause injury should not be attributed to dumped imports. It was also unpersuaded that imports from exporters not individually investigated could be presumed to be dumped simply because Article 9.4 permits them to be subjected to an antidumping duty – '[w]e do not see why the volume of imports that have been found to be dumped by non-examined producers, for purposes of determining *injury* under paragraphs 1 and 2 of Article 3, must be *congruent* with the volume of imports from those non-examined producers that is subject to the *imposition of antidumping duties* under Article 9.4'.[7] The Appellate Body stopped short of endorsing India's proposed method for calculating the volume of dumped imports from exporters not individually investigated, however, allowing for the possibility that 'positive evidence' of that volume might be based on something other than the percentage of exports dumped by the individually investigated exporters.[8]

Along the way, the Appellate Body was mindful of the standard of review under the Antidumping Agreement. Article 17.6(ii) of the Agreement provides that '[w]here the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests on one of those permissible interpretations'. The EC argued that its interpretation of the injury provisions was at least a 'permissible' interpretation that was entitled to deference, but the Appellate Body disagreed:

> [W]hatever methodology investigating authorities choose for calculating the volume of 'dumped imports', that calculation and, ultimately, the determination of injury under Article 3, clearly must be made on the basis of 'positive evidence' and an 'objective examination'. These requirements are not ambiguous, and they do not 'admit of more than one permissible interpretation' within the meaning of the second sentence of Article 17.6(ii).[9]

2.3 *Consideration of all 'relevant factors' bearing on injury*

Article 3.4 of the Antidumping Agreement requires importing nations to base their injury analysis on an examination of 'all relevant economic factors having a bearing on the state of the (domestic) industry'. It then provides a non-exhaustive list of such factors. India asserted that the EC failed to gather data on and to evaluate two 'relevant factors', stocks and capacity utilization, when it promulgated Regulation No. 1644/2001. The EC asserted that such data had been before the investigative authorities, and had been properly considered. The panel ruled for the EC on this point, and India argued that the panel abused its discretion in

7 AB Rep. ¶126.
8 Id. ¶146.
9 AB Rep. ¶118.

doing so by, in effect, accepting the EC's unsupported assertions on the matter rather than conducting a more thorough investigation.

The Appellate Body upheld the panel, which had concluded that it was clear that the European Communities had 'in its record' information on stocks and capacity utilization – the two factors India had focused on – and that 'unlike the original determination, the EC's consideration of these factors is clearly set out on the face of the redetermination'.[10] While India wished to characterize the panel's conclusion as an abuse of its discretion, the Appellate Body saw it as a factual conclusion by the panel that was within its proper discretion and should not be disturbed on appeal.

3. Critical analysis

3.1 Non-attribution and the procedural issue

One can quibble with the willingness of the Appellate Body to permit the EC to rely on its original 'other factors' analysis. In light of its resolution of the second issue in the case, discussed below, the EC is required to restate its assessment of the quantity of dumped imports, revising the estimate downward. The quantity of fairly traded imports, an 'other factor' that might cause injury, must be revised upward. One might thus argue that the EC should redo both its analysis of harm attributable to 'dumped imports' *and* its analysis of harm due to 'other factors'. The Appellate Body does not reach this conclusion, however, perhaps because India's arguments focused on EC input and output prices as the 'other factors' to be considered.

The much more interesting aspect of the ruling on this issue, however, is its procedural implications. WTO treaty text does not specifically address *res judicata* and related issues, leaving to panels and to the Appellate Body the task of evolving sensible principles in the area. In this case, the Appellate Body insisted that 'India did not raise a *new* claim before the Article 21.5 panel; rather, India reasserted in the Article 21.5 proceedings the *same* claim.' At some level, it is difficult to quarrel with the proposition that parties to WTO disputes should not be permitted to relitigate the *same* claim over and over again. What the Appellate Body masks with this language, however, is that the concept of 'sameness' can be interpreted broadly or narrowly.

Recall the facts: India had raised the 'non-attribution' issue in its original complaint, but did not advance factual arguments in relation to that issue sufficient to make out a *prima facie* case. Then, before the compliance panel, it sought to make those arguments seriously for the first time, pointing to 'other factors' such as high EC input prices and low EC output prices. Here, to say that India had already lost the *same* claim earlier is to imply that all arguments relating to a particular legal issue are part of the 'same' claim, and are waived if they are omitted from

10 AB Rep. ¶154.

the first round of litigation in which that issue appears. The panel opinion hinted at an even broader principle when it stated that it would not afford India 'an opportunity to obtain a ruling in an Article 21.5 proceeding that they could have sought and obtained in the original dispute'. This language suggests that all legal issues that could have been raised in the earlier proceeding, but were not, are waived. For terminological simplicity, we refer to these principles as rules of waiver, although the reader should be aware that civil procedure treatises often attach the labels *res judicata*, issue preclusion, or claim preclusion to these types of rules.

Rules of waiver have the obvious consequence of encouraging litigants to raise issues sooner rather than later, and can hasten the final resolution of a dispute. Many legal systems have them, and certainly the modern trend in American civil procedure is to force litigants to bring all sufficiently 'connected' claims at once. It is possible that such rules are economically desirable when all the costs and benefits of the legal system are taken into account, but that is not obvious. We have found no treatment of the issue in the existing law and economics literature on procedure, perhaps because a complete accounting of all the relevant considerations in any particular context is exceedingly difficult to provide. An exhaustive treatment is beyond the scope of this comment as well, but we will sketch some of the pertinent considerations that bear on the design of optimal waiver principles. Before addressing waiver, however, we set forth our understanding of the justification for *res judicata* in its narrower sense.

Res judicata. Compliance with the law generally has social value, and the prompt resolution of legal proceedings can hasten valuable compliance. This observation seemingly applies as much to the WTO as to other legal contexts. But legal decision makers are imperfect, and may make errors in their findings of law or fact. When litigants are required to comply with erroneous decisions, error costs arise, often of the same nature as the gains from compliance with correct decisions. A desire to avoid errors motivates principles of 'due process' in many legal systems. Process itself is costly, however, and so it is unrealistic for most legal systems to avoid error altogether. The task of designing an optimal procedure thus balances competing considerations: the value of resolving legal issues sooner and of reducing process costs on the one hand, against the costs of errors on the other.

Because of concerns about error, it is not uncommon for litigants to be permitted to raise issues more than once. The usual setting for revisiting issues is the 'appeal', a common feature in many legal systems including the WTO. But there will generally be diminishing returns to reopening issues that have decided previously – at some point, the likelihood of error becomes sufficiently small that the benefits of ending the dispute and the associated process costs predominate over any concerns about error. Thus, rights of appeal are always limited (and some matters may not be appealable at all).

Res judicata in its narrowest sense simply precludes a litigant from raising an *identical* claim in a new proceeding when the claim was previously adjudicated. It

can be understood as a presumption that the legal system in question already provides an appropriate error correction mechanism through its appellate process. Once a litigant has raised an argument, lost, and exhausted all available appeals, no further delays and litigation costs are likely to be justified.

To be sure, scenarios may arise in which concern for error is particularly acute, and the limits on the process available in typical cases may appear too stringent. The usual solution to such problems, however, is for the legal system to add more appellate process for particular categories of cases rather than to permit tribunals to retreat from *res judicata* in its narrow form. Capital cases in the United States provide a nice example – because the costs of error are great and irreversible, capital defendants are afforded additional layers of appeal as a matter of course that are not made available to other criminal defendants.

Waiver. The rationale for rules of waiver must be somewhat different. By definition, waiver applies to arguments and issues that were *not* adjudicated previously but could have been. There can be no presumption that their prior disposition was correct if there was no prior disposition.

But rules of waiver might be based on a related presumption – if a litigant did not bother to raise an argument previously, perhaps the litigant has revealed it to be weak, so that the likely error cost of ignoring it is small. Rules of waiver encourage litigants to bring all potentially meritorious arguments before the court at once so that the dispute can be resolved with dispatch and the gains from compliance with the law can be realized more quickly; any claims 'waived' are presumed to be so weak that they need not be addressed.

This simple intuition may have much to do with the justification for doctrines of waiver, but it is incomplete for two reasons. First, to the degree that complainants internalize the costs of delay in bringing other parties' behavior into conformity with the law, the legal system seemingly has no interest in encouraging complainants to pursue compliance at a faster clip. Second, litigation becomes more expensive as more claims are brought. Each claim must be researched, briefed and argued. Factual support must be amassed. Even if the adjudicative body can exercise 'judicial economy' to avoid issues that need not be reached to resolve the case, the parties to the proceeding must still bear additional costs as the number of issues and arguments grows. Hence, if a complainant prefers to start with what it believes to be its strongest claims, and to leave others in abeyance should the initial claims fail, some of the costs of litigation (including some that are externalized) will be avoided if the initial claims succeed and resolve the dispute. This consideration, too, seems to argue for allowing the complainant to bring claims at its own pace, in preference to rules of waiver that penalize claimants for failing to bring issues before the dispute process at the outset.

An important countervailing consideration arises, however, if litigation exhibits economies of scale in relation to the number of claims in each proceeding. It seems quite likely that dispute proceedings have considerable fixed costs. For the WTO in particular, panelists must be selected and assembled for hearings. Each panelist

will invest considerable time in learning the (often complex) background facts of the dispute. Many of these costs will be the same whether the dispute involves a single legal claim or many. And, like other costs of litigation, a complaining nation does not bear all of these fixed costs.

The presence of considerable fixed costs to litigation can supply a positive externality to the consolidation of claims in an initial proceeding. Plausibly, a complainant might prefer to proceed more or less *seriatim* with its claims to save itself the variable costs of litigating matters that may prove unnecessary. But if considerable economies of scale are lost when the complainant proceeds in this fashion and those costs are borne by others, the system may gain by foreclosing such a strategy.

Of course, the mere existence of fixed costs is not sufficient to justify rules of waiver. Their magnitude must be considered in relation to the added variable costs of litigating more claims at once, claims that may prove unnecessary to litigate *ex post*. Roughly speaking, the greater the fixed costs of a proceeding in relation to the variable costs per claim, the stronger the case for insisting that more issues be raised at once.

These points also suggest the possibility of more refined waiver rules. Some types of claims may have very low marginal litigation costs, perhaps because they resolve themselves readily with reference to facts already in evidence. Others may require much additional fact-finding or investigation. Similarly, some claims may be legally straightforward, and others may be highly debatable and complex. The case for a rule of waiver is stronger with respect to the relatively cheaper factual and legal claims.

Likewise, the fixed costs of each proceeding may vary with the nature of the proceeding. With particular reference to Article 21.5 compliance panels, we note that these panels are comprised of the same members as the original dispute panel. Each panelist is presumably familiar with the facts and basic legal issues of the case already. Under these circumstances, it may make sense to have somewhat more lenient rules of waiver, because the fixed costs of the second proceeding will tend to be smaller in relation to the variable costs of litigating more issues initially.

We note one further consideration that may have some bearing on rules of waiver. The compliance panel in the Bed Linen case noted its concern for 'manipulative and abusive' litigation tactics. It did not detail its fears in this regard, but its phrasing hints at concern for vexatious proceedings, brought not because of their potential legal merits but because of their capacity to harass the respondent. There is a considerable economic literature on the use of frivolous litigation to extract settlements, and it is possible that complainants in the WTO might hope to extract trade concession in meritless cases from respondents anxious to avoid litigation costs. For such a strategy to justify rules of waiver, of course, it must be the case that litigation is more expensive *seriatim* than in a consolidated proceeding, presumably because of the fixed costs noted above – otherwise, vexatious claims brought all at once would be just as effective 'harassment'.

Although waiver rules may make vexatious litigation less troublesome in the presence of fixed costs, other procedural devices are better tailored to address the problem of vexatious claims. Parties who bring claims that are adjudged to be frivolous can be sanctioned in a variety of ways ('Rule 11 sanctions' in the parlance of American civil procedure). A potentially effective sanction is fee shifting, where the complainant must pay the litigation costs of the respondent. Such measures target frivolous litigation directly, without affecting the timing of potentially meritorious claims. Hence, waiver rules are at most a 'second-best' response to vexatious litigation.

Modeling the effect of waiver rules in the WTO. Following the literature on efficient legal procedure, we would ideally like to model the problem of designing optimal rules of waiver. One would ask the question whether, in the absence of waiver rules, WTO complainants would bring too few claims at a time from a social standpoint. If so, one would then inquire whether waiver rules could correct the problem.

Such an analysis would be extremely complex, however, requiring attention to the social gains from litigation, the timing of those gains, and the magnitude and timing of litigation costs. The matter becomes all the more complicated in cases with multiple legal claims, in that the social returns to the proper adjudication of each claim may vary. Yet another complication is the fact that WTO litigants are governments. It is a commonplace in the procedure literature to treat litigants as expected profit maximizers, but governments cannot be presumed to behave in this fashion. Indeed, in WTO litigation, money rarely changes hands.

We thus limit ourselves to a very simple treatment of one piece of the puzzle that abstracts from these difficult issues. Our focus is on the question of how a rule of waiver affects the number of claims brought before the dispute resolution process, and thus the total variable costs of litigation.

Consider a two-period model. If the claimant wins at least one claim in period 1, it wins an award that it values at B_1. If it fails to win one claim in period 1 but wins at least one claim in period 2, it wins an award that it values at B_2, $B_2 < B_1$. The difference between B_1 and B_2 reflects the cost to the claimant of delay in receiving the remedy. Assume that there are many potential arguments available to the claimant, and approximate these by a continuum of claims with measure M. The (small) claim i has the (small) probability $p(i)di$ of success. It is brought at marginal cost $c(i)di$. It is optimal for the claimant to brings its 'best' claims first; i.e., those with the highest $p(i)/c(i)$. Thus, we order the claims so that $p(i)/c(i)$ is a non-increasing function. Let $C(x)$ be the total cost of bringing the set of claims $[0, x]$.[11]

In a judicial system with waiver, the claimant must raise all arguments in a single 'case'. The case comprises the claims $[0, x]$, where x is a decision variable

11 That is, $C(x) = \int_0^x c(i)di$.

for the claimant. In a judicial system without waiver, the claimant may return to the adjudicating body with additional claims in period 2, if it fails to win at least one of its claims in period 1. In this setting, the claimant brings claims $[0, x_1]$ in period 1 and claims $[x_1, x_1+x_2]$ in period 2 (if there has been no success in period 1).

Let $F(x)$ be the probability that there is at least one successful claim from among those in $[0, x]$; $F(0)=0$, $F(M)\leqslant 1$. The density, $f(x)$, is the probability that the first success comes on claim x. The hazard rate, $f(x)/[1-F(x)]$ is the probability that a success comes on x, given that there has been no success on any claims before x. Since the claims are independent, this is just $p(x)$. Bayes Rule tells us that the probability of at least one success before x_1+x_2, $F(x_1+x_2)$, is equal to the probability of at least one success before x_1, plus the probability of no successes before x_1 times the probability of at least one success between x_1 and x_2, or

$$F(x_1+x_2)=F(x_1)+[1-F(x_1)]\,[\Pr\{\text{at least one success between } x_1 \text{ and } x_2\}]$$

or

$$\Pr\{\text{at least one success between } x_1 \text{ and } x_2\}=\frac{F(x_1+x_2)-F(x_1)}{1-F(x_1)}.$$

Judicial system with rule of waiver. Here, the claimant must make any claims that it wishes to advance in the first period. The claimant chooses $x\geqslant 0$ to maximize

$$F(x)B_1-C(x).$$

The first-order condition is

$$f(x)B_1=c(x);$$

that is, the claimant chooses the marginal claim x to equate the probability that the first success will come on that claim times the award from winning the case to the marginal cost.

Judicial system without rule of waiver. Here the claimant can spread claims over the two periods, coming back in period 2 if the claims brought in period 1 do not succeed. The claimant chooses $x_1\geqslant 0$ and $x_2\geqslant 0$ to maximize

$$F(x_1)B_1+[1-F(x_1)]\left\{\frac{F(x_1+x_2)-F(x_1)}{1-F(x_1)}\right\}B_2$$

$$-C(x_1)-[1-F(x_1)][C(x_1+x_2)-C(x_1)]$$

Here, the first term is the probability of success in the first case times the first period award. The second term is the probability of no success in the first case times the probability of at least one success from among claims $[x_1, x_1+x_2]$ (see above) times the reward from a victory in case 2. The third term is the total cost of the first case. The last term is the incremental cost of the second case multiplied by the probability of a second case.

The first-order conditions are

$$\begin{aligned} &f(x_1)(B_1-B_2)+f(x_1+x_2)B_2-f(x_1)C(x_1)-F(x_1)c(x_1)\\ &\quad-[1-F(x_1)]c(x_1+x_2)+f(x_1)C(x_1+x_2)=0 \end{aligned} \tag{1}$$

and

$$f(x_1+x_2)B_2-[1-F(x_1)]c(x_1+x_2)\leqslant 0 \tag{2}$$

where (2) holds with equality if and only if $x_2>0$. Assume that it is profitable to bring a second case, which requires a sufficiently large B_2 (if a second case is not profitable, a rule of waiver has no effect). Then $f(x_1+x_2)B_2-[1-F(x_1)]c(x_1+x_2)=0$, which we can substitute into (1) to obtain

$$f(x_1)(B_1-B_2)-f(x_1)C(x_1)-F(x_1)c(x_1)+f(x_1)C(x_1+x_2)=0. \tag{3}$$

An example. Consider the case of a constant hazard rate, which arises when the probability of success in each claim is the same. Then $F(x)=1-e^{-\lambda x}$ for some $\lambda>0$. Suppose also that every claim has the same cost, so that $c(x)=c$ and $C(x)=cx$. All claims are symmetric under these assumptions, but there are still diminishing returns to filing more and more claims and the claimant generally will not file all of them.

The example with waiver. The first-order condition becomes

$$\lambda e^{-\lambda x}B_1=c$$

or

$$e^{\lambda x}=\frac{\lambda B_1}{c}.$$

For convenience, define $\theta_i=\lambda B_i/c$, so the last expression can be written as $e^{\lambda x}=\theta_1$ or $x=\log\theta_1/\lambda$.

The example with no rule of waiver. If $x_2>0$, then (2) implies

$$\lambda e^{-\lambda(x_1+x_2)}B_2=e^{-\lambda x_1}c$$

or

$$e^{\lambda x_2}=\frac{\lambda B_2}{c}=\theta_2$$

Taking logs, $x_2=\log\theta_2/\lambda$.

Now, for the choice of x_1, (3) becomes

$$\lambda e^{-\lambda x_1}(B_1-B_2)-\lambda e^{-\lambda x_1}cx_1-(1-\lambda e^{-\lambda x_1})c+\lambda e^{-\lambda x_1}c(x_1+x_2)=0$$

or

$$ce^{\lambda x_1}=\lambda B_1-\lambda B_2+c(1+\log\theta_2),$$

where this last expression uses $\lambda x_2 = \log \theta_2$ from the solution for x_2. We can now write

$$e^{\lambda x_1} = \theta_1 - (\theta_2 - 1 - \log \theta_2).$$

The term in parentheses is positive for all $\theta_2 > 1$ (and unless $\theta_2 > 1$, $x_2 = 0$). Thus, comparing the solution for the case with a rule of waiver, the claimant files more claims in the first round under a rule of waiver than without waiver, as one might expect.

Note further that

$$e^{\lambda(x_1 + x_2)} = e^{\lambda x_1} \cdot e^{\lambda x_2} = \theta_2(\theta_1 - \theta_2 + 1 + \log \theta_2),$$

thus

$$e^{\lambda(x_1 + x_2)} - \theta_1 = (\theta_1 - \theta_2)(\theta_2 - 1) + \theta_2 \log \theta_2 > 0,$$

which implies that the total number of claims filed in two cases without a rule of waiver (if the second case is necessary) exceeds the number of claims that will be filed in a single case under a rule of waiver.

Finally, consider the expected number of claims brought under each regime. With no rule of waiver, expected claims are $x_1 + [1 - F(x_1)]x_2 = x_1 + e^{-\lambda x_1} x_2$. Using the results above, this expression becomes

$$\frac{\log \theta_2}{\lambda(\theta_1 - \theta_2 + 1 + \log \theta_2)} + \frac{\log(\theta_1 - \theta_2 + 1 + \log \theta_2)}{\lambda}.$$

This expression can be greater or smaller than the solution for x (the expected and actual number of claims) under a rule of waiver, $\log \theta_1/\lambda$. We have evaluated the difference numerically, and find that its sign depends on the sizes of the two parameters, θ_1 and θ_2.

For example, setting $\theta_1 = 3$ and allowing θ_2 to vary over its full possible range (from 1 at the lowest given that x_2 positive requires $\theta_2 > 1$ to 3 at the highest since $\theta_1 > \theta_2$), we find that the difference rises steadily from zero. In this case, the expected number of claims without a rule of waiver is higher for all $\theta_2 \in (1,3)$, and the difference is larger the greater is θ_2. This suggests that a rule of waiver will reduce the variable costs of litigation.

But when $\theta_1 = 5$, a somewhat different picture emerges. The difference between the expected number of claims without and with a rule of waiver rises above zero as θ_2 rises initially, but it reaches a maximum and turns negative as θ_2 approaches θ_1. And when $\theta_1 = 10$, the difference is negative for all θ_2 above approximately 4.0, so that the expected number of claims with a rule of waiver can clearly exceed the number without a rule of waiver for some parameter values. In particular, when θ_1 is 'high' and the cost of delay is not too great ($\theta_1 - \theta_2$ is not too big), a rule of waiver actually increases the expected number of claims filed.

The explanation for these findings is rather subtle. Fix θ_1 and consider an increase in B_2, which increases θ_2. Clearly, this has no effect on the number of claims brought in a regime with a rule of waiver. When there is no rule of waiver, an

increase in θ_2 reduces the number of claims brought in a first case, but it increases both the probability that there will be a second case and the number of claims brought in such an event. The net effect on the expected number of claims can be positive or negative. We calculate that an increase in θ_2 actually decreases the expected number of claims in a regime without rule of waiver if and only if $1+(\theta_1-\theta_2)(2-\theta_2)-(\theta_2-1-\log\theta_2)<0$. If $\theta_1-\theta_2$ is small (little cost of delay), this inequality is satisfied for $\theta_2>2+\log\theta_2$; i.e., θ_2 bigger than approximately 3.15. Thus, when θ_1 and θ_2 are both large and the difference is small, the expected number of claims in a system without a rule of waiver is relatively small compared with the large number of arguments that the claimant brings with a rule of waiver.

Our results are only the beginning of a full treatment of the issues for reasons noted earlier – we have not modeled the social returns to litigation or any litigation cost externalities. But even the modest piece of the problem that we explore is quite complex as the reader will no doubt have noticed. We can offer little definitive advice other than to urge caution in the evolution of rules of waiver in the WTO (and more generally). It is not at all obvious that social welfare will improve if tribunals insist that claimants bring all claims to an initial proceeding, lest they be waived. Particularly when the fixed costs of additional proceedings are modest, it may be better to proceed on the strongest claims first and then to litigate others later only if necessary. And because the fixed cost aspects of Article 21.5 compliance panels may tend to be relatively modest, special caution is appropriate there. Compliance panels should perhaps employ a rather narrow conception of what constitutes the 'same' claim when following the Appellate Body's directive to deny claimants a second bite of the apple.

Returning to the facts of the Bed Linen case, it is not obvious to us that India's failure to develop its case fully on the non-attribution issue during the first proceeding should preclude it from raising the issue again in the compliance proceeding. Its arguments regarding 'other factors' such as EC input and output prices had not been vetted earlier, nor is it clear that the EC would suffer any serious prejudice if forced to address them before the Article 21.5 panel. The decision by the panel and the Appellate Body to foreclose those arguments may encourage WTO litigants to throw the 'kitchen sink' into their initial complaints and arguments, so that initial panel proceedings become even more (and perhaps unduly) cumbersome. This is particularly true if, as we imagine being the case, the rules of *res judicata* and waiver that apply before compliance panels will apply more generally within the system, and bar the filing of a new claims relating to the same facts when an initial set of claims proves unsuccessful.

3.2 *Injury caused by exporters not individually investigated*

From an economic perspective, we agree with the Appellate Body that if only 47% of the goods from the Indian exporters actually investigated were dumped, it is most unlikely that 100% of the goods from exporters not investigated were dumped. It is also clear from the Antidumping Agreement that fairly traded

imports constitute one of the 'other factors' that may cause injury to an industry, and that such injury should not be attributed to dumped imports. To allow the EC to presume that all exporters not investigated were dumping under these circumstances would almost certainly inflate the quantity of 'dumped imports' above its true value, and might in theory produce an erroneous finding that material injury resulted from dumping.

We nevertheless have one reservation about the ruling in India's favor on this issue, one legal and one logical. First, the panel was persuaded by the argument that India's position implies an odd lack of parallelism in the Antidumping Agreement between the imports that are considered dumped for purposes of injury analysis, and the imports that are considered dumped for purposes of duty collection. The Appellate Body found this disjunction less jarring, and we might agree if the issue was simply one of construction in the face of textual ambiguity. But as noted earlier, the Antidumping Agreement contains a special standard of review Article 17.6(ii), which requires deference to national implementation of WTO law that rests on a 'permissible' interpretation. The Appellate Body's suggestion that the terms 'positive evidence' and 'objective examination' are not ambiguous, and do not 'admit of more than one permissible interpretation', is a bit facile. The EC position is essentially that in defining the quantity of 'dumped imports', it can rely on the 'objective evidence' provided by the set of imports to which antidumping duties may apply. We are hard pressed to conclude that such an interpretation of the Agreement is not 'permissible'.

3.3 Deference to the panel on the 'relevant factors' issue

The Appellate Body's deference to the panel on the question whether the EC considered all 'relevant factors' in its injury analysis raises no issues of note. Deference to the 'trier of fact' on factual issues is routine in many legal systems, and is certainly a central tenet of appellate review in the WTO. Absent a showing of bias or abuse by India, the Appellate Body presumed that the panel had satisfied itself on this essentially factual question, and would not allow the issue to be revisited under the guise of an argument that the panel failed to make an adequate investigation as a 'procedural' matter. We can imagine cases where a panel might so fail in its duties to investigate factual issues that a reversal of its findings might be warranted, but India did not make enough of a showing here to convince the Appellate Body, and we would have no basis for second guessing that judgment.

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Movie review

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The Yes Men

directed by Chris Smith, Dan Ollman and Sarah Price.
MGM 2003, video 2005.

It is certainly rare for the WTO to be featured in the movies, and readers of the *World Trade Review* will be surprised to learn from the recent film *The Yes Men* that the WTO has been working with McDonald's Corporation to recycle human excrement for sale as 'recycled hamburgers' in developing countries. The WTO Secretariat will likewise be surprised to learn that its research staff has designed a futuristic 'leisure suit' for the manager of the 21st century, complete with an inflatable phallus-like appendage containing a television monitor to keep an eye on the slaving third-world workers he controls. We will all be startled to hear the latest press release from Geneva announcing that the WTO will cease its destructive trade-liberalizing operations and devote all its resources (its generous budget, perhaps?) to ending world poverty. This disinformation campaign about the WTO is the work of *The Yes Men*, two self-styled anti-globalization 'pranksters', who document their elaborate scams in the film. The movie is less troubling for its anti-WTO views than for the fact that the audiences can never quite figure out that they're being duped, and it shows us that the WTO is sorely in need of a public awareness campaign, just to explain to a broader audience simply what it is.

The two Yes Men are Igor Vamos and Jacques Servin, who go by their anti-globalization *noms de guerre* Michael Bonanno and Andy Bichlbaum, respectively. Vamos is a professor of media studies at Rensselaer Polytechnic Institute in New York, and does most of the behind-the-scenes organizing, usually in the form of invited presentations at professional conferences or media appearances. Servin is the main actor, posing as WTO officials under outlandish names such as Hank Hardy Unruh, Granwyth Hulatberi, and Kinnithrung Sprat. They both have a history of staging various types of hoaxes, involving fake political websites and tampering with popular toys and video games. In this regard they prove themselves to be professionals as pranksters but amateurs at anti-globalization protest, as they show little understanding of the institution they are lampooning. *The Yes Men*, according to their website (theyesmen.org) present themselves as 'honest people' who 'impersonate big-time criminals to publicly humiliate them'. The real villains of globalization, they seem to have concluded, are officials from the WTO Secretariat.

The movie begins with none other than Michael Moore (that is the film-maker of *Fahrenheit 911* fame, not the former WTO Director-General) explaining that the WTO began with the 'Global [sic] Agreement on Tariffs and Trade'. The film makers adopt a familiar anti-trade platform, maintaining that (1) trade liberalization is responsible for world poverty and global pollution, (2) trade rules are made by multinational corporations, and (3) governments that support WTO trade rules

and negotiations have sold out to multinationals and willfully harm their own populations.

Curiously, the two found it easy to impersonate WTO officials without detection. They copied the format of the official WTO website on to one of their own and appropriated the internet URL 'GATT.org'. The homepage featured fractured versions of WTO topics and news that appeared legitimate at first glance, and provided contact information to which credulous visitors to the website would respond. This set-up provided the Yes Men with invitations to speak at various conferences and appear on news programs. Fake identification documents, intercontinental travel, elaborate props and presentation materials, and mock-serious oratory completed the mischief. The film received financial support primarily through foundations sponsoring media projects.

This is anti-globalization protest as performance art. The genuine humor in the film comes from watching the befuddled audiences wonder what is going on. In one scene, Servin presents a bizarre lecture at a textile conference in Helsinki on the virtues of modern slavery, which can now be organized more efficiently by keeping the slaves in sweatshops in their home countries – an arrangement facilitated by WTO-sponsored trade liberalization, of course. Thinking perhaps that the WTO had sent an eccentric professor to pontificate on obscure theories of management, the conference participants appear to be lulled into passive acceptance of the idea, and then applaud politely when Servin bursts, superman-style, into his gold-lamé 'leisure suit', complete with inflated phallic appendage. One must wonder, however, whether viewers of this spectacle, who genuinely believed that it was an official WTO presentation, quietly harbored doubts about the sanity of anyone associated with the WTO. In most cases, the audiences in the film are all too ready to accept the progressively outrageous presentations because of their expectations that trade institutions are inherently arcane and obscure, providing the Yes Men a wide margin of credulity to play with.

A conference of accountants in Australia is similarly willing to accept the sudden announcement that the WTO is closing down, after its supposedly public *mea culpa* of complicity in exploiting and impoverishing the developing world. If that is what our invited WTO guests have decided, the audience seems to conclude, then they must have good reasons to do it, as many of them go on camera immediately after the false announcement to support the idea. As agit-prop, however, the movie is unlikely to be effective in furthering the protesters' political agenda. The movie shows that the Yes Men's emphasis lies ultimately on pulling off the scam and getting publicity for it, not in showing the evils of globalization. After the joke has run its course, there is no opportunity for the pranksters to drive home any lasting anti-trade message. What, indeed, is the audience supposed to think after realizing they have been fooled into believing the phony WTO presentation? They are more likely to marvel or perhaps be angered at being hoodwinked, rather than to ponder the deeper issues of globalization. Vamos and Servin appear to measure the success of their antics largely in terms of the amount of media attention they attract: their website, for example, consists mainly of links to news articles covering their activities.

Perhaps because of its emphasis on self-satisfied theatrics and deception, the film – and the antics of the Yes Men in general – seems not to have achieved much resonance among anti-globalization activists. Indeed, this nonsense would hardly be worthy

of anyone's attention in the trade policy community, except for the fact that it reveals the serious gap in public knowledge about the WTO, even among educated professionals. While the WTO website has gone a long way towards providing the public with information on its activities, there is still much work to be done. This is a task that an international organization cannot accomplish on its own. Governments could do more to educate their citizens about the role of trade institutions and negotiations in furthering economic goals, but they often appear reluctant to support the WTO system itself publicly. Domestic trade politics still tend to be dominated by mercantilist posturing, with the sitting government eager to claim all the credit for trade 'victories' at the negotiating table. Furthermore, the WTO dispute settlement system may at times be at loggerheads with a given member country's political interests on a specific trade issue, and so the WTO rarely receives the unqualified blanket support of governments, even though it is a member-driven organization.

Support for the public's education on trade issues and institutions – and their link to economic growth and prosperity for *all* countries – probably needs to come more from private pro-trade constituencies, including importing associations, exporters, consumers' groups, and multinational corporations, perhaps through the sponsorship of non-profit organizations devoted to trade information campaigns. In the absence of such efforts, protectionist and anti-globalization doomsayers will have far too many opportunities to present their one-sided case without an adequate response. The goal should be to make knowledge of the WTO and the benefits of trade widespread enough so that there will be always be someone in the Yes Men's target audience who can stand up and say, 'Wait, that's ridiculous, the WTO is not what you say it is at all, you must be phonies …'

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Errata

The following acknowledgement was inadvertently dropped from Donald Maclaren's paper. 'The role of the WTO in achieving equity and efficiency in international markets for agricultural products', published in the July 2005 issue of the *World Trade Review*:

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