An Introduction to the WTO Dispute Settlement System

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In this article two legal officers from the Department of Foreign Affairs and Trade provide a practical guide to the World Trade Organization's dispute settlement system and discuss Australia's participation in it since its inception in January 1995.

THE World Trade Organization provides security and predictability in the conduct of international trade through a common set of rules binding on Members. WTO Agreements cover over 90 per cent of world trade in 140 markets, including $100 billion of Australian exports per year. The accession of China, Taiwan and Russia to the WTO will further extend the Organization's disciplines to these important countries.

The purpose of this paper is to provide an overview of the WTO dispute settlement system, from a legal practitioner's perspective. The paper draws on Australia's experience in the *Australia – Salmon*,[1] *Howe Leather*,[2] and *Korea – Beef*[3] cases, as well as other cases in which Australia has participated.

Part I of the paper provides an introduction to the multilateral trading system and the WTO Agreements governing international trade. Part II examines in detail

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1. *Australia – Measures Affecting Importation of Salmon* WT/DS18/AB/R 20 Oct 1998 (adopted 6 Nov 1998).
2. *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather* WT/DS126/R 25 May 1999 (adopted 16 Jun 1999).
3. *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* WT/DS169/AB/R 11 Dec 2000 (adopted 10 Jan 2001).

the process for resolving a trade dispute, including the four stages of dispute settlement: consultations, the panel process, Appellate Body review, and the adoption and implementation of reports. Part III discusses Australia's participation in the WTO dispute settlement system, and provides an overview of the role of the Department of Foreign Affairs and Trade in the management of disputes to which Australia is a party. Part IV touches on some more fundamental questions relevant to the dispute settlement system, namely its effectiveness in resolving trade disputes and what many predict will be its increasingly litigious nature.

PART I: AN INTRODUCTION TO THE MULTILATERAL TRADING SYSTEM

1. The institutional framework

A multilateral trading system was established at the end of World War II in the form of the General Agreement on Tariffs and Trade (GATT). GATT was set up as part of negotiations for a more comprehensive agreement — the Havana Charter for an International Trade Organization. This was an ambitious undertaking which sought to establish rules not only to govern the conduct of international trade, but also employment, restrictive trade practices and general economic development. The Charter never came into force, but GATT took provisional effect on 1 January 1948.[4]

GATT established basic principles of non-discrimination in international trade – National Treatment and Most-Favoured-Nation status[5] – as well as specific rules regarding subsidies, dumping, the elimination of quantitative restrictions on imports, and tariff reduction commitments. Since 1948, successive Negotiating Rounds have expanded the body of rules applicable to international trade and improved market access through tariff reductions.[6] In the most recent of these Rounds – the Uruguay Round – new agreements were negotiated concerning agriculture, quarantine, technical barriers to trade, trade in services and dispute settlement.

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4. See generally World Trade Organization *Guide to GATT Law and Practice* (Geneva, 1995) 3-6; D Palmeter & PC Mavroidis *Dispute Settlement in the World Trade Organization: Practice and Procedure* (The Hague: Kluwer, 1999) ch 1; E Petersmann *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement* (London: Kluwer, 1997).
5. In principle, MFN status was granted to all parties to GATT, subject to narrowly drawn exceptions.
6. The eight Negotiating Rounds and their dates are: Geneva (1947), Annecy (1949), Torquay (1950), Geneva (1956), Dillon (1960-61), Kennedy (1962-67), Tokyo (1973-79), Uruguay (1986-94). Improvements to the dispute settlement were a major objective of the Uruguay Round.

The WTO was established as the successor to GATT on 1 January 1995 under the Marrakesh Agreement. The WTO formalised what was essentially a provisional system under GATT by providing a common institutional framework for the conduct of international trade under the WTO Agreements.[7] The WTO comprises both the WTO Agreement setting out rules for the conduct of international trade, and an institutional framework consisting of the Members in their administrative and decision-making capacities. Unless otherwise provided by the Agreements, decision-making is by consensus.[8]

2. The basic WTO rules

It is beyond the scope of this paper to provide a detailed discussion of the WTO rules governing international trade or to examine the specific facts and legal issues in the cases referred to.[9] It may be useful, however, to provide an overview of the principal WTO Agreements.

The general WTO rules applicable to international trade in goods and services are contained in Annex 1 to the Marrakesh Agreement. Annex 1A (the Multilateral Agreement on Trade in Goods) includes, inter alia, the General Agreement on Tariffs and Trade (GATT 1994), the Agreement on Agriculture, the Agreement on Technical Barriers to Trade, the Agreement on Subsidies and Countervailing Measures, and the Agreement on Sanitary and Phytosanitary Measures.[10] Annex 1B (the General Agreement on Trade in Services) and Annex 1C (the Agreement on Trade-Related Aspects of Intellectual Property Rights) extend WTO rules to trade in services and intellectual property.

The general principles of non-discrimination in international trade were originally established in GATT 1947 and are now reflected in many of the WTO Agreements. Article I of GATT 1994 (Most-Favoured-Nation status)[11] provides that any advantage, favour, privilege or immunity granted by one Member to the product of another Member must be accorded immediately and unconditionally to the like product of all other Members. In other words, Members may not discriminate between the products of trading partners.

Article III of GATT 1994 requires that in the application of their internal laws, regulations and policies Members must not accord imported products less favourable

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7. See the Marrakesh Agreement Establishing the World Trade Organization, Art II(1).
8. In effect this means that any one Member may veto a decision by formally objecting to it at the meeting where the proposed decision is to be made: DSU Art 2.4.
9. Further information is available on the WTO web-site at <http://www.wto.org>. See also Palmeter & Mavroidis supra n 4; B Hoekman & M Kostecki *The Political Economy of the World Trading System: From GATT to the WTO* (Oxford: OUP, 1995).
10. Altogether there are 13 separate agreements in Annex 1A.
11. GATT 1994 is contained in Annex 1A to the Marrakesh Agreement.

treatment than they accord to like domestic products. It follows that Members must not discriminate against imported products.

WTO rules apply only to the actions or measures of Members, including their laws, regulations and 'requirements'.[12] They do not extend to the behaviour of corporations or private individuals except to the extent that the government of a Member mandates or directs private sector practices. Only the government of a Member may invoke WTO dispute settlement procedures to enforce WTO rules against another Member, and only Members may be parties to a WTO dispute.

PART II: THE DISPUTE SETTLEMENT PROCESS

The aim of the WTO dispute settlement system is to secure a solution which is acceptable to the parties and consistent with the Organization's rules. Article 3.3 of the Dispute Settlement Understanding (DSU)[13] declares the prompt settlement of disputes to be 'essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members'. To this end, the DSU provides for 'quasi-automaticity' in terms of the commencement of processes, and applies strict time limits to each stage of the process.

The dispute settlement process consists of four stages: (i) consultations; (ii) the panel process; (iii) Appellate Body review; and (iv) the adoption and implementation of reports – with established time-frames for each stage. If a panel decision is appealed, WTO processes could take up to 14 months from the date of the request for consultations to the date of adoption of the Appellate Body report by the Dispute Settlement Body (DSB).[14]

1. Consultations

Consultations (or negotiations) are the preferred means of dispute resolution. Article 3.7 of the DSU declares the aim of the WTO dispute settlement system to be 'to secure a positive solution to a dispute'. A mutually acceptable solution 'is clearly to be preferred'. Mutually agreed solutions must be notified to the DSB,[15]

12. WTO panels have interpreted these terms to include a broad range of government actions including legally binding written undertakings and statements giving administrative guidance.
13. The DSU was the pre-eminent achievement of the Uruguay Round, conferring compulsory jurisdiction on the Dispute Settlement Body for the purpose of resolving disputes between Members.
14. Article 2.1 of the DSU establishes a Dispute Settlement Body to administer all dispute settlement rules and procedures. The DSB is made up of all WTO Members. It has the authority to 'establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of tariff concessions or other obligations under the covered Agreements'.
15. DSU Art 3.6.

must be consistent with the WTO Agreements, and must 'not nullify or impair benefits accruing to any Member under those Agreements, nor impede the attainment of any objective of those Agreements'.[16]

Article 4 of the DSU sets out procedures and general principles for the conduct of consultations. Each Member undertakes to accord sympathetic consideration to, and afford adequate opportunity for, consultation.[17] Unless otherwise agreed, the responding Member must reply to a request for consultation within 10 days from the date of receipt of the request.[18] Consultations must be entered into in good faith within 30 days from the date of receipt of the request.[19] Consultations are confidential and 'without prejudice to the rights of any Member in any further proceedings'.[20]

In the event that consultations fail to settle the dispute within 60 days, the complaining Member may request the establishment of a panel.[21] In cases of urgency (eg, where perishable goods are concerned) consultations must be entered into within 10 days from the date of receipt of the request. In such a case the complaining Member may request the establishment of a panel if the consultations have failed to resolve the dispute within 20 days from the date of receipt of the request.[22]

The emphasis on negotiation in the settlement of disputes cannot be overstated. Most trade disputes are resolved by the parties without referral to a panel. As the Director-General of the WTO has noted:

> During the period 1995-1999 ... 77 disputes were resolved of which 41 were resolved without going to adjudication. Without this system, it would be virtually impossible to maintain the delicate balance of international rights and obligations. Disputes would drag on much longer, and have a destabilising effect on international trade, which, in turn, could poison international relations in general. The system's emphasis on negotiating a settlement could serve the same governments equally well in other areas of international relations.[23]

From a policy perspective, it is clearly preferable to resolve market access problems bilaterally, or through WTO consultations, rather than by formal arbitration. Australia successfully resolved its complaints against Hungary's export subsidies[24] and India's quantitative restrictions (import quotas) at the consultation stage.[25]

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16. DSU Art 3.5.
17. DSU Art 4.2.
18. DSU Art 4.3.
19. DSU Art 4.3.
20. DSU Art 4.6.
21. DSU Art 4.7. The 60 day period may be shortened with the agreement of the parties.
22. DSU Art 4.8.
23. See 'WTO's Unique System of Settling Disputes Nears 200 Cases in 2000': WTO Press Release (5 Jun 2000).
24. *Hungary – Export Subsidies on Agricultural Products* WT/DS35 30 Jul 1997.
25. *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* WT/DS91/8 23 Apr 1998.

2. The panel process

(a) Establishment and terms of reference

The establishment of a panel[26] can be described as 'quasi-automatic'. If requested by a complaining Member, a panel must be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda.[27] A complaining Member may request a special DSB meeting within 15 days of the request, provided that at least 10 days' advance notice of the meeting has been given.[28] While the language of the DSU is less than elegant, in practical terms a responding Member may block the establishment of a panel at the first DSB meeting but not at the second.[29]

Article 6.2 of the DSU provides certain requirements for a request to establish a panel. The request must be in writing and must indicate whether consultations have been held. It must identify the specific measures at issue, and it must 'provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly'.

A panel has standard terms of reference unless the parties to the dispute agree to different terms within 20 days of the establishment of the panel.[30] The DSB may also authorise its Chairman to draw up terms of reference in consultation with the parties.[31] Panels must 'address the relevant provisions in any covered Agreement or Agreements cited by the parties to the dispute'.[32]

The Appellate Body in *European Communities – Regime for the Importation, Sale and Distribution of Bananas* emphasised that —

> It is incumbent upon a panel to examine the request for establishment of the panel very carefully to ensure its compliance with both the letter and spirit of Article 6.2 of the DSU. It is important that a panel request be sufficiently precise for two reasons: first, it often forms the basis for the terms of reference of the panel pursuant to Article 7 of the DSU; and, second, it informs the defending party and the third parties of the legal basis of the complaint.[33]

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26. A panel may be described as a 'court of first instance'. Its function is to interpret and apply the rules of the WTO to a specific dispute. A panel is usually comprised of three individuals with relevant commercial or legal experience. A new panel is formed for each dispute.
27. DSU Art 6.1.
28. DSU Art 6.1, n 5.
29. DSU Art 6.1.
30. These terms of reference are: 'To examine, in the light of the relevant provisions in (name of the covered Agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those Agreement(s)': DSU Art 7.1.
31. DSU Art 7.3.
32. DSU Art 7.2.
33. WT/DS27/AB/R 9 Sept 1997 (adopted 25 Sept 1997) para 142.

In *Korea – Definitive Safeguard Measures on Imports of Certain Dairy Products*, the Appellate Body considered that in some situations the mere listing of treaty articles may not be sufficient:

> There may also be situations in which the circumstances are such that the mere listing of treaty articles would not satisfy the standard of Article 6.2. This may be the case, for instance, where the articles listed establish not one single, distinct obligation, but rather multiple obligations. In such a situation, the listing of articles of an Agreement, in and of itself, may fall short of the standard of Article 6.2.[34]

Article 9 of the DSU provides procedures for multiple complainants. Where more than one Member requests the establishment of a panel relating to the same matter, a single panel should be established 'whenever feasible', taking into account the rights of all Members concerned.[35] In practice, whether multiple complaints are heard by the same panel, or by different panels, will depend on the different stages of preparedness of complainants. A later complainant would not, for example, be able to make submissions to a panel that had already received first and rebuttal submissions from the original parties to the dispute.

(b) Panel selection

Panels are composed of three panellists unless the parties agree to a panel of five.[36] The WTO Secretariat maintains a list of possible panellists. This includes Geneva-based representatives of Members, academics from a range of different fields, lawyers, economists and senior trade officials of Members.[37] Panel members are selected with a view to ensuring experience, independence and diversity of background.[38]

Unless otherwise agreed by the parties, a citizen of a Member state whose government is party to the dispute (or a third party) may not serve on a panel concerned with that dispute.[39] Panellists serve in their individual capacities and not as government representatives or as representatives of any organization.[40] In disputes between a developed Member state and a developing Member state, the developing Member state may request the inclusion of at least one panellist from another developing Member state.[41]

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34. WT/DS98/AB/R 14 Dec 1999 (adopted 12 Jan 2000) para 124.
35. DSU Art 9.
36. DSU Art 8.5.
37. DSU Art 8.1.
38. DSU Art 8.2.
39. DSU Art 8.3.
40. DSU Art 8.9.
41. DSU Art 8.10.

The actual process of panel selection involves the WTO Secretariat nominating panellists who are either accepted or rejected by the parties. While Article 8.6 of the DSU states that parties must not oppose nominations except for 'compelling reasons', the selection process can take up to three months, particularly in disputes involving multiple complainants.

The fact that the United States and European Community are involved in the majority of disputes ensures that their citizens are rarely selected as panellists. In addition, there is the problem of a diminishing pool of expertise as the parties to a dispute are often reluctant to accept panellists who have made findings against them in a previous dispute. Where no agreement on panel members is reached within 20 days from the date of the panel's establishment, a party may request the WTO's Director-General to determine the composition of the panel in consultation with the Chairman of the DSB.[42]

(c) Working procedures

Panels follow the standard Working Procedures in Appendix 3 of the DSU. These may be varied by the panel after consultation with the parties to the dispute.[43] The Working Procedures provide for (among other things): written submissions 'in which [the parties] present the facts of the case and their arguments'; two 'substantive meetings' with the parties, including a third party session; publication of an interim report (which includes the provisional findings and conclusions); issue of the final report to the parties; and circulation of the final report to other Members of the WTO.

The panel meets in closed session: its deliberations and the documents submitted to it are confidential.[44] While parties to the dispute are required to treat as confidential information submitted by other parties and so designated by them, any party is free to make public statements about its own position. A party may also request that another party provide a non-confidential summary of the information in its submissions suitable for disclosure to the public.[45]

A panel has significant investigative authority under Article 13 of the DSU. It may seek 'information and technical advice from any individual or body which it deems appropriate', and may consult experts. However, as stated by the Appellate Body in *Japan – Measures Affecting Agricultural Products*,[46] 'This authority cannot be ... used by a panel to rule in favour of a complaining party which has not

42. DSU Art 8.7.
43. DSU Art 12.1.
44. DSU Appendix 3, para 2.
45. Ibid, para 3.
46. WT/DS76/AB/R 22 Feb 1999 (adopted 19 Mar 1999).

established a prima facie case of inconsistency based on specific legal claims asserted by it'.[47]

A panel should aim to issue its final report within six months, or within three months in cases of urgency.[48] Delays and the reasons therefor must be notified to the DSB. In no case should the 'period from the establishment of the panel to the circulation of the report to the Members exceed nine months'.[49] In practice, it is not uncommon for panel reports to be delayed beyond the six month time period, particularly where the subject matter involves complex technical or scientific issues such as those which often arise under the Sanitary and Phytosanitary Agreement. Delays in the translation of panel reports from English into the other two official languages of the WTO (French and Spanish) are another factor.

(d) Objective assessment and burden of proof

A panel's function is to make an impartial assessment of the issues before it, including 'an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered Agreements', and to make 'such other findings as will assist the DSB in making recommendations' and rulings.[50]

The rules regarding burden of proof were articulated by the Appellate Body in *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*:

> The burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.[51]

In short: (i) it is for the complaining party to establish the violation it alleges; (ii) it is for the party invoking an 'exception' or an 'affirmative defence' to prove that the conditions contained therein are met; and (iii) it is for the party asserting a fact to prove it.[52]

(e) Stare decisis

What is the status of an *adopted* panel report? A decision to adopt a panel report did not, under GATT 1947, constitute an endorsement by the contracting

47. Ibid, para 129.
48. DSU Art 12.9.
49. Ibid.
50. DSU Art 11.
51. WT/DS33/AB/R 25 Apr 1997 (adopted 23 May 1997) 17.
52. *Turkey – Restrictions on Imports of Textile and Clothing Products* WT/DS34/R 31 May 1999 (adopted 19 Nov 1999) para 9.57.

parties[53] of the legal reasoning in that report. While the conclusions and recommendations in an adopted panel report bound the parties to the dispute in the particular case, subsequent panels were not legally bound by the findings and reasoning of a previous panel report.[54] For example, the 1989 GATT panel report on *European Economic Community – Restrictions on Imports of Dessert Apples* stated:

> The panel took note of the fact that a previous panel, in 1980, had reported on a complaint involving the same product and the same parties as the present matter and a similar set of GATT issues.... It would take into account the 1980 panel report and the legitimate expectations created by the adoption of this report, but also other GATT practices and panel reports adopted by the contracting parties and the particular circumstances of this complaint. The panel, therefore, did not feel it was legally bound by all the details and legal reasoning of the 1980 panel report.[55]

The Appellate Body in *Japan – Taxes on Alcoholic Beverages*[56] also rejected the proposition that panel reports adopted by the GATT contracting parties, or by the WTO's DSB, constitute 'subsequent practice' within the meaning of Article 31 of the Vienna Convention on the Law of Treaties.[57] However, while adopted GATT and WTO panel reports are not binding, except between the parties to a particular dispute, they are an important part of the GATT/WTO dispute resolution process. As the Appellate Body has said:

> They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute.[58]

In the European Community's complaint in *India – Patent Protection for Pharmaceuticals and Agricultural Chemical Products*,[59] certain measures of the Indian government had already been the subject of an earlier complaint by the United States.[60] The Director-General appointed the same panel members as in the earlier dispute, with the exception of the chairman of the original panel who was no

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53. The signatories to GATT 1947 were known as 'Contracting Parties'; under the WTO the signatories are known as 'Members'.
54. See discussion by the Appellate Body in *Japan – Taxes on Alcoholic Beverages* WT/DS8/AB/R 4 Oct 1996 (adopted 1 Nov 1996) 12-15.
55. BISD 36S/93 (adopted 22 Jun 1989) para 12.1.
56. Supra n 54.
57. Article 31(3)(b) of the Vienna Convention states that 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' is to be 'taken into account together with the context' in interpreting the terms of the treaty.
58. *Japan – Taxes on Alcoholic Beverages* supra n 54, 13.
59. WT/DS79/R 24 Aug 1998 (adopted 22 Sep 1998).
60. WT/DS50/AB/R 19 Dec 1997 (adopted 16 Jan 1998).

longer available. On the issue of whether the second panel was bound by the earlier panel and Appellate Body reports on the same subject-matter, the panel concluded:

> Panels are not bound by previous decisions of panels or the Appellate Body even if the subject-matter is the same. In examining dispute WT/DS79 we are not legally bound by the conclusions of the panel in dispute WT/DS50 as modified by the Appellate Body report. However, in the course of 'normal dispute settlement procedures' required under Article 10.4 of the DSU, we will take into account the conclusions and reasoning in the panel and Appellate Body reports in WT/DS50. Moreover, in our examination, we believe that we should give significant weight to both Article 3.2 of the DSU, which stresses the role of the WTO dispute settlement system in providing security and predictability to the multilateral trading system, and to the need to avoid inconsistent rulings (which concern has been referred to by both parties). In our view, these considerations form the basis of the requirement of the referral to the 'original panel' wherever possible under Article 10.4 of the DSU.[61]

In contrast, *unadopted* panel reports 'have no legal status in the GATT or WTO system since they have not been endorsed by the Contracting Parties to the GATT or WTO Members'. However, a panel could 'find useful guidance in the reasoning of an unadopted panel report that it considered to be relevant'.[62]

(f) Claims and arguments

The Appellate Body has recognised a distinction between 'claims' and 'arguments'. A 'claim' is an allegation that the responding party violated, nullified or impaired the benefits arising from an identified provision of a particular Agreement. This is distinguished from the 'arguments' adduced by a complaining party to demonstrate that the responding party has indeed violated, nullified or impaired the identified provision. Arguments supporting a claim are set out and progressively refined in the first written submission, the rebuttal submission and the first and second meetings of the panel with the parties.[63] Where a claim has not been specified in the request for the establishment of a panel, the defective request cannot subsequently be rectified by the complaining party's arguments. A party cannot seek to introduce new claims which fall outside the terms of reference of the panel.[64]

While panels are prevented from addressing legal claims falling outside their terms of reference, a panel is free to use arguments submitted by any of the parties

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61. *India – Patent Protection for Pharmaceuticals and Agricultural Chemical Products* supra n 59, para 7.30 (footnotes omitted).
62. *Japan – Taxes on Alcoholic Beverages* supra n 54, 14-15.
63. *Korea – Definitive Safeguard Measures on Imports of Certain Dairy Products* supra n 34, para 139.
64. *European Communities – Regime for the Importation, Sale and Distribution of Bananas* supra n 33, para 143.

– or to develop its own legal reasoning – to support its findings and conclusions on the matter referred to it.[65]

(g) Third parties

Any Member of the WTO having a 'substantial interest' in a matter before a panel – and having notified that interest to the DSB – has the right to be heard and to make written submissions to the panel.[66] In addition, third parties have the right to receive the submissions of the principal parties to the dispute.

Third party submissions must be provided to the principal parties and must be reflected in the panel report. In practice, third party participation is automatic upon notification of an interest in the dispute to the DSB. A Member need not demonstrate a commercial trade interest in the dispute or a special interest in the WTO Agreement under examination.

(h) Participation by non-Members in WTO disputes

As previously mentioned, only Members may invoke the WTO's dispute settlement procedures and only Members may directly participate in a dispute. Non-Members, including non-government organizations (NGOs), may nevertheless participate *indirectly* in three ways. First, Article 13 of the DSU confers on panels a broad discretion 'to seek information and technical advice from any individual or body which it deems appropriate' or 'from any relevant source' (eg, a NGO). This power is necessary so that a panel may discharge its duty under Article 11 to 'make an objective assessment of the matter before it, including an objective assessment of the facts'. Secondly, a party to a dispute may attach a NGO brief to its own submission. In this case, the NGO brief is simply considered as part of that party's own submission. Thirdly, a NGO may make a submission to the panel as amicus curiae.

The issue of amicus submissions remains highly contentious. Most Members accept the need for panels and the Appellate Body to have much clearer guidelines on how such submissions should be handled, to ensure due process for the parties to the dispute. However, a recent decision by the Appellate Body to draft new procedures for handling amicus submissions attracted a critical response from many Members.

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65. *European Communities – Measures Concerning Meat and Meat Products (Hormones)* WT/DS26/AB/R 16 Jan 1998 (adopted 13 Feb 1998) para 156.
66. DSU Art 10.

3. The Appellate Body

(a) Jurisdiction

Article 17 of the DSU provides for Appellate Body review of panel reports.[67] The Working Procedures for appellate review contain detailed provisions on the duties, responsibilities and rules of conduct of Appellate Body members, the process of appellate review, and timetables.[68] As a general rule, proceedings must not exceed 60 days 'from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report'.[69] Only parties to the dispute may appeal a panel report. However, a third party who has notified the DSB of a substantial interest in the matter may make written submissions and be given an opportunity to be heard by the Appellate Body.[70]

An appeal is limited to 'issues of law covered in the panel report and legal interpretations developed by the panel'.[71] 'Issues of law' include not only the panel's legal interpretation of WTO Agreements, but also the conduct of its processes under the procedural requirements of the DSU. The Appellate Body will, for example, review claims that the panel failed to accord due process to a party, or that the panel failed to make an 'objective assessment of the facts of the case' under Article 11 of the DSU.

(b) Examination of procedural claims

A failure by a complainant to comply strictly with the procedural rules of the DSU (eg, those governing the initiation of the dispute) does not automatically nullify the panel process. The Appellate Body has emphasised that Article 3.10 of the DSU commits the parties to a dispute to engage in dispute settlement procedures 'in good faith in an effort to resolve the dispute'. This applies to both complaining and responding parties:

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67. The Appellate Body is a standing body comprised of seven persons, three of whom serve on any one appeal: DSU Art 17.1. Appellate Body members are appointed by the DSB for four year terms, and a member may be re-appointed once. A person appointed to replace an Appellate Body member whose term has not expired holds office for the remainder of the predecessor's term. The current membership of the Appellate Body includes prominent judges, academics and trade officials with extensive commercial and legal expertise. They are: GM Abi-Saab (Egypt), C-D Ehlermann (Germany), AV Ganesan (India), Y Taniguchi (Japan), F Feliciano (Philippines), J Bacchus (United States) and JL Muro (Uruguay).
68. *Working Procedures for Appellate Review* WT/AB/WP/3 28 Feb 1997.
69. DSU Art 17.5.
70. DSU Art 17.4.
71. DSU Art 17.6.

> By good faith compliance, the complaining Members accord to the responding Members the full measure of protection and opportunity to defend contemplated by the letter and spirit of the procedural rules. The same principle of good faith requires that responding Members seasonably and promptly bring claimed procedural deficiencies to the attention of the complaining Member, and to the DSB or the panel, so that corrections, if needed, can be made to resolve disputes. The procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes.[72]

The Appellate Body has also required some evidence of *substantial* prejudice, for example to the responding Member's ability to defend itself. In *Korea – Definitive Safeguard Measures on Imports of Certain Dairy Products*, the Appellate Body rejected Korea's claim that the panel erred in finding that the European Community's request for the establishment of a panel met the requirements of Article 6.2 of the DSU. Korea had failed to demonstrate 'that the mere listing of the articles asserted to have been violated has prejudiced its ability to defend itself in the course of the panel proceedings. Korea did assert that it had sustained prejudice, but offered no supporting particulars in its submission or at the oral hearing'.[73]

(c) Examination of the panel's 'objective assessment of the facts'

The Appellate Body has construed its jurisdiction narrowly to avoid opening up the appeals process to claims based solely on a panel's weighing of the evidence. An allegation that the panel failed to comply with Article 11 'is a very serious allegation [which] goes to the very core of the integrity of the WTO dispute settlement process itself'.[74] What is required is a deliberate disregard, wilful distortion or misrepresentation of evidence by the panel. It is not simply an error of judgment in the evaluation of the evidence but 'an egregious error that calls into question the good faith of a panel'.[75] Clearly, a claim that a panel had acted in bad faith is one that would be difficult to sustain.

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72. *United States – Tax Treatment for 'Foreign Sales Corporations'* WT/DS108/AB/R 24 Feb 2000 (adopted 20 Mar 2000) para 166.
73. *Korea – Definitive Safeguard Measures on Imports of Certain Dairy Products* supra n 34, para 131.
74. *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R 13 Jul 1998 (adopted 23 Jul 1998) para 133.
75. *European Communities – Measures Concerning Meat and Meat Products (Hormones)* supra n 65, para 133.

4. IMPLEMENTATION

(a) Findings and recommendations

Where a panel or the Appellate Body concludes that a measure or policy adopted by a Member is inconsistent with a covered Agreement, it must recommend that the Member bring the measure into conformity with that Agreement.[76] The panel or Appellate Body may also suggest ways in which the Member in question should implement the recommendation.

However, consistently with the sovereignty of Members, the manner of implementation remains the prerogative of the Member. Generally speaking, the DSB cannot direct a Member on how to implement a recommendation in a given dispute. Thus, while changes may be necessary to a Member's laws, regulations or other measures in the light of a finding of inconsistency with a WTO Agreement, the right to decide upon the best means of bringing about compliance remains the Member's. There is an exception under Article 4.7 of the Agreement on Subsidies and Countervailing Measures.[77] Where a measure is found to be a prohibited subsidy, the panel 'shall recommend that the subsidising Member withdraw the subsidy without delay'.

(b) Reasonable time for implementation

In the event of a finding of inconsistency with a WTO Agreement, a Member has a 'reasonable period of time' to implement the recommendations and rulings of the DSB – that is, to bring its measures into conformity with the Agreement.[78] Where the parties fail to agree on what that reasonable period of time is, this is determined by arbitration.[79]

The guideline for the arbitrator is that the 'reasonable period of time' should not exceed 15 months from the date of adoption of the panel or Appellate Body report. This period may be 'shorter or longer, depending upon the particular circumstances'.[80] In *Australia – Measures Affecting Importation of Salmon*[81] the arbitrator determined the reasonable period of time to be eight months for Australia to bring its measures into conformity because implementation could be effected by administrative or regulatory means.[82] Conversely, arbitrators have provided the parties with a longer time-frame where implementation necessitated legislative action.

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76. DSU Art 19.1.
77. Marrakesh Agreement, Annex 1A.
78. DSU Art 21.3.
79. Ibid.
80. DSU Art 21.3(c).
81. WT/DS18/9 23 Feb 1999.
82. Ibid, paras 38-39.

In *Canada – Patent Protection of Pharmaceutical Products*[83] the arbitrator explained how the reasonable period of time is calculated. Implementation should be the shortest period of time possible for implementation within the legal system of the implementing Member. The arbitrator concluded:

> If implementation is by *administrative* means, such as through a regulation, then the 'reasonable period of time' will normally be shorter than for implementation through *legislative* means. It seems reasonable to assume, *unless proven otherwise due to unusual circumstances in a given case*, that regulations can be changed more quickly than statutes. To be sure, the administrative process can sometimes be long; but the legislative process can often times be longer.[84]

The arbitrator emphasised that the political, economic or social consequences of the required action are not pertinent considerations. The reasonable period of time would not, for example, include time for 'structural adjustment' of an affected domestic industry.[85] Nor would it include time to undertake studies or a risk-assessment. Claims that the summer vacation period should be taken into account in calculating the reasonable period of time have also been rejected.[86]

(c) Panels to review implementation

Article 21.5 of the DSU provides for an accelerated panel procedure to examine implementation by a Member. In the event of a disagreement as to the existence or consistency of measures taken to comply with the recommendations or rulings of the DSB, that disagreement is examined by a panel, which includes, wherever possible, members of the original panel. This panel must circulate its report within 90 days from the date of referral of the matter to it. This is considerably shorter than the six month period for panel procedures under Article 12.

5. Compensation and suspension

Where a Member fails to implement the recommendations and rulings of the DSB within a reasonable period of time, Article 22 provides for 'compensation and the suspension of concessions'. These concepts are reviewed below.

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83. WT/DS114/13 18 Aug 2000.
84. Ibid, para 49 (emphasis added). In our view, the distinction between legislative and administrative implementation arbitrarily discriminates between different systems of government. It is incorrect to assume that administrative implementation is necessarily quicker. Most non-legislative systems embrace strong natural justice and other administrative law requirements – eg, the Administrative Decisions (Judicial Review) Act 1977 (Cth). This significantly limits the extent to which administrative decision-making time-frames can be compressed.
85. *Canada – Patent Protection of Pharmaceutical Products* supra n 83, para 52.
86. Ibid, para 61.

(a) Compensation

Compensation takes the form of improved access to the responding Member's domestic market; it is voluntary, and, if granted, must be consistent with all relevant WTO Agreements.[87] For example, compensation in the form of tariff reductions must be applied on a Most-Favoured-Nation basis (that is, it must be extended to the like products of *all* WTO Members, not just those of the complainant).[88] If compensation is not agreed within 20 days of the expiry of the reasonable period of time, the complainant may request DSB authorisation for the suspension of concessions.

Considerable disagreement exists between Members on the proper sequencing of Article 21.5 and Article 22 rights. The DSU provisions are unclear as to whether a complaining Member may request suspension *before* the completion of the procedures under Article 21.5 examining the consistency of implementing measures. A related issue is whether Article 21.5 panel processes encompass appeal rights, that is, whether suspension may be applied pending the outcome of an appeal. This tension reflects a fundamental divergence of views between, on the one hand, a concern that a complaining Member may unilaterally determine that a responding Member has been guilty of non-implementation and apply suspension, and, on the other, the possible abuse by a responding Member of Article 21.5 processes to delay implementation.

In the absence of clear guidance from the DSU, parties in individual disputes have agreed to what procedures they will apply. For example, in *Brazil – Export Financing Programme for Aircraft*,[89] Brazil and Canada agreed: (i) that Brazil would not object to the establishment of an Article 21.5 panel; (ii) that Canada would not request authorisation to suspend concessions until after circulation of the Article 21.5 report; and (iii) that in the event of a finding of non-conformity by the Article 21.5 panel, Canada would request authorisation for suspension and Brazil could request arbitration under Article 22.6 of the DSU.[90] A similar agreement was reached in Brazil's complaint in *Canada – Measures Affecting the Export of Civilian Aircraft*.[91]

Following the finding by the Article 21.5 panel in *Brazil – Aircraft Subsidies* that Brazil's measures were still inconsistent with WTO Agreements, Brazil notified its intention to appeal at the DSB meeting held on 24 May 2000, and requested arbitration on the level of nullification or impairment. At the same time, Canada stated that it would not seek to apply suspension pending the Appellate Body and

87. DSU Art 22.2.
88. See supra p 53.
89. WT/DS46/13 26 Nov 1999.
90. Ibid, Annex.
91. WT/DS70/RW 9 May 2000.

arbitration reports.[92] In the event, the Appellate Body rejected Brazil's appeals in both *Brazil – Aircraft Subsidies* and *Canada – Aircraft Subsidies*.

In the *Australia – Salmon* dispute,[93] Canada challenged the new measures adopted by Australia to implement the recommendations and rulings of the DSB. At a meeting of the DSB on 28 July 1999, Canada requested authorisation to suspend concessions and the establishment of an Article 21.5 panel to examine Australia's measures. Australia requested Article 22.6 arbitration on the level of nullification suffered by Canada. It was agreed that the Article 22.6 arbitration would be suspended until circulation of the Article 21.5 panel report and that Canada would not apply suspension pending a determination by the arbitrator under Article 22.6.[94]

(b) Suspension

Suspension usually takes the form of punitive 100 per cent tariffs on selected products. This is applied over and above the normal rate. In most cases this has the effect of eliminating the responding Member's exports of the particular product. On the level of suspension that may be authorised, Article 22.4 requires that suspension be equivalent to the level of the nullification or impairment suffered by the complaining Member as a result of the measure that has been found to be WTO-inconsistent. In the event of any disagreement between the parties on the level of proposed suspension, the DSU provides for arbitration to determine the appropriate level.[95]

In practice, arbitrators have substantially discounted the level of suspension requested by a complaining Member. In the *European Communities – Measures Concerning Meat and Meat Products (Hormones)*[96] arbitration, the level of nullification or impairment was assessed by the arbitrator at US$116.8 million per year and CN$11.3 million per year for the United States and Canada respectively. This compares with the US$202 million and CN$75 million claimed by the United States and Canada. Similarly, in *European Communities – Regime for the Importation, Sale and Distribution of Bananas*,[97] the arbitrator calculated the level of nullification and impairment to be US$191.4 million per year compared to the US$520 million per year claimed by the United States.

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92. DSB Minutes WT/DSB/M/81 22 May 2000.
93. WT/DS18/14 3 Aug 1999.
94. For a detailed discussion of Article 21.5 and Article 22 sequencing issues, see: C Valles & B McGivern 'The Right to Retaliate under the WTO Agreement: The "Sequencing" Problem' (2000) 34 Journal of World Trade 63.
95. DSU Arts 22.6–22.7.
96. Supra n 65.
97. Supra n 33.

PART III: AUSTRALIA'S PARTICIPATION IN THE DISPUTE SETTLEMENT SYSTEM

> As a medium sized trading nation, Australia has much to gain from the rules-based framework of the World Trade Organization.... WTO rules give greater certainty for access to international markets and protect us from unilateral and arbitrary behaviour by other WTO Members that can negatively impact on Australia's export performance.[98]

Australia is an active participant in the WTO dispute settlement system. Since the inception of the WTO in January 1995, Australia has been involved in 28 disputes. Australia was also involved in 16 disputes in the previous decade under GATT. This level of participation far exceeds Australia's participation in other international law forums such as the International Court of Justice.

In common with other WTO Members, Australia has had to respond to the increased level of dispute settlement activity in the WTO. The capacity to utilise WTO dispute resolution processes has been significantly strengthened in the Department of Foreign Affairs and Trade (DFAT) – for example, by the establishment of the Trade Law Branch in the Trade Negotiations Division of DFAT.

The Commonwealth government has also improved the processes by which Australian exporters can exploit their WTO rights. In September 1999, the Minister for Trade, the Honourable Mark Vaile MP, established the WTO Disputes Investigation and Enforcement Mechanism. This allows any Australian exporter to bring problems encountered in another Member's market to DFAT's attention for investigation. The problem may then be resolved either by negotiations between Australia and the other Member, by initiating formal WTO dispute settlement procedures or by a combination of both.

1. Australia's experience in WTO disputes

(a) Australia as a complainant

Australia has been successful in all four WTO complaints it has prosecuted to date. Two complaints were successfully settled at the consultation stage. Australia's complaint against India was settled in March 1998, resulting in India phasing out quantitative restrictions (quotas) on the importation of a range of agricultural and manufactured goods.[99] Similarly, Australia's complaint against Hungary regarding

98. M Vaile, Cth Minister for Trade 'The WTO Disputes Investigation and Enforcement Mechanism: A Government-Industry Partnership' Press Release (Dec 1999).
99. *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* supra n 25.

agricultural export subsidies was settled in July 1997 following successful consultations.[100]

Australia initiated a formal complaint against Korea regarding restrictions on the importation of beef into that country.[101] In July 2000, the panel found that these measures discriminated against Australian beef, imposed unlawful quotas on imports, and exceeded Korea's reduction commitments under the Agreement on Agriculture.[102] Australia's complaint was upheld by the Appellate Body in December 2000.[103]

Australia's complaint against the United States regarding the importation of lamb was upheld by a panel in December 2000.[104] The United States appealed. In May 2001 the Appellate Body upheld the panel's finding that the United States measure was inconsistent with WTO Agreements.

(b) Australia as a respondent

Australia has been a respondent in two panel disputes – the *Howe Leather*[105] dispute and the *Australia – Salmon*[106] dispute. While Australia's measures were found to be inconsistent with the WTO Agreements, both disputes were resolved without recourse to WTO-sanctioned retaliation against Australia.

The salmon dispute involved a complaint by Canada against Australia's quarantine restrictions on imported salmon. In 1998, a panel and the Appellate Body upheld Canada's complaint on the ground that Australia's measures were not based on a proper scientific risk-assessment. A risk-assessment was subsequently conducted by the Australian Quarantine and Inspection Service and 11 new measures introduced on 19 July 1999. In an Article 21.5 panel process, Australia successfully defended all but one of the 11 measures. Importantly, the panel confirmed Australia's right to maintain quarantine standards in excess of the international standard, consistently with Australia's strict approach to quarantine requirements. A bilateral settlement with Canada was reached on 1 June 2000.

The *Howe Leather* dispute involved a complaint by the United States against grants provided by the Commonweatlh government to the Howe Leather company. In May 1999, a panel held that these grants were a prohibited export subsidy under the Subsidies and Countervailing Measures Agreement. Subsequent measures taken by Australia to implement the panel's findings were also found to be WTO-

100. *Hungary – Export Subsidies on Agricultural Products* supra n 24.
101. *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* WT/DS169/1 19 Apr 1999.
102. WT/DS169/R 31 Jul 2000 (adopted 10 Jan 2001).
103. Supra n 3.
104. *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia* WT/DS178//R 21 Dec 200 (adopted 16 May 2001).
105. Supra n 2.
106. Supra n 1.

inconsistent. A mutually agreed solution was reached in May 2000, settling the dispute and removing the threat of retaliation by the United States against Australia.

(c) Australia as a third party

Australia has participated as a third party in 16 disputes. This has achieved important market access wins, including access to the lucrative United States prawn market and the protection of royalty rights for Australian musicians whose music is heard in the United States. Australia's legal submissions have influenced the interpretation of WTO rules in areas such as agricultural export subsidies, trade and the environment, and trade-related intellectual property. Outcomes in other disputes in which Australia has been a third party have served to confirm the consistency of Australia's industry and trade policies with WTO Agreements.[107]

2. The role of the Minister for Trade and DFAT

The Commonwealth Minister for Trade has the responsibility for Australia's involvement in the WTO dispute settlement system. The Minister decides whether Australia initiates a formal complaint against another Member or joins a dispute as a third party. In the event that another Member challenges an Australian measure – Commonwealth, State or Territory – there is no choice as to whether to defend the challenge.

In addition to having responsibility for the conduct of WTO disputes, DFAT provides advice on a daily basis to Commonwealth ministers, State and Territory governments, and to industry organizations on the WTO consistency of Australian policies, and on WTO-consistent options for achieving policy goals and objectives. DFAT also examines the laws and policies of other Members for WTO consistency.

3. The management of WTO disputes

The broad national interest is the primary consideration in prosecuting and defending claims under the DSU. The management of disputes by DFAT is intended to reflect this. Invariably, there is no single stakeholder involved in a WTO dispute. In the case of the *Australia – Salmon* dispute, for example, stakeholders with a direct interest in the outcome of the dispute included the Australian salmon and trout industries, the South Australian tuna industry, the Western Australian lobster industry, the live ornamental fish industry, and the recreational fishing industry. Exporters who were subject to potential retaliation by Canada were also interested stakeholders.

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107. Eg, the outcome in *Canada – Patent Protection of Pharmaceutical Products* supra n 83 confirmed the consistency of Australian legislation with this area of intellectual property.

Australia adopts a 'task-force' approach in dealing with disputes. DFAT works closely with other government agencies, industry organizations and individual companies in prosecuting and defending WTO complaints. This reflects the need for a co-ordinated, 'whole-of-government' approach to dispute resolution.

DFAT's practice is to assemble a team of officers to manage the dispute, to undertake factual and legal research, and to draft formal submissions. Where appropriate, other specialist advice may be called upon, for example from DFAT's International Legal Division, or the Attorney-General's Department on matters of international or domestic law; from the Department of Industry, Science and Resources on industry policy; and from the Department of Agriculture, Forestry and Fisheries on agricultural and related matters. DFAT also draws on Australia's extensive overseas network of consulates, embassies and trade missions to assist in information-gathering and to assess the potential for a negotiated settlement to the dispute.

For example, in the *Australia – Salmon* dispute, DFAT led a team which included representatives from the Australian Quarantine and Inspection Service, the Department of Agriculture, Forestry and Fisheries, the Australian Bureau of Agricultural and Resource Economics, the Attorney-General's Department, and the Australian Government Solicitor's Office. Australia's delegation to the *United States – Lamb*[108] Appellate Body hearings included officials from DFAT, the Department of Agriculture, Forestry and Fisheries and the Attorney-General's Department. Private sector lawyers engaged by industry also assisted in preparing legal submissions to the Appellate Body in this case.

4. The role of industry

Industry input is critical in establishing whether the particular trade problem should be pursued through the formal dispute settlement process or through bilateral representations. Once formal dispute settlement has been decided upon, DFAT works closely with industry in marshalling factual evidence and preparing dispute submissions. In the *Korea – Beef* dispute,[109] industry provided detailed market analysis on all aspects of trade in the complex Korean imported beef market. This factual analysis underpinned DFAT's submissions on the Korean regulatory environment and the applicable WTO rules. Industry representatives travelled to Geneva for meetings with the panel, where they provided an important advisory role.

The government-industry partnership approach has proved to be successful and cost-effective in pursuing Australia's trade interests in dispute settlement

108. Supra n 104.
109. Supra n 3.

processes. By using the government's trade and international law expertise and industry's detailed knowledge of specific markets, it is often possible to resolve disputes without formal arbitration.

PART IV: CONCLUSION

The purpose of this paper has been to provide an overview of the WTO dispute settlement system from a practitioner's perspective. The paper's emphasis has been on the practical considerations involved in initiating and resolving a dispute between Members. The paper has also provided a summary of Australia's experience in the WTO dispute settlement system and an introduction to how it manages WTO disputes. It may be useful, however, to touch briefly on some broader, systemic issues by way of conclusion.

First, it would be fair to say that, with the exception of two high-profile cases, the WTO dispute settlement system has been effective in resolving disputes. An indicator of the legitimacy the system enjoys is its frequent and expanding use. The number of cases decided in the last five years stands at over 210, far surpassing the small number of cases decided under GATT in the previous 50 years. Moreover, the WTO system of compulsory and binding jurisdiction has resulted in positive outcomes (improved market access) in most disputes. A recent report by the US General Accounting Office has declared that of the 25 completed cases in which the United States has been a complainant, 14 had (at the date of the report) resulted in direct commercial benefits through greater market access or stronger protection of intellectual property rights.[110]

Secondly, the rules-based system of dispute settlement provides certainty and predictability for WTO Members. The system clarifies the provisions of specific WTO Agreements and provides a climate of greater legal certainty in which international trade can take place. The system has also worked in the interests of developing countries, which have used it actively. As stated by the WTO's Director-General: 'Although no one can claim that the WTO's dispute settlement system compensates for unequal economic power distribution in the world, it must be emphasised that this system gives small countries a fair chance they otherwise would not have to defend their rights'.[111] Lack of resources – both in conducting a dispute and enforcing remedies – nevertheless remains a problem for developing countries. For example, retaliation by a small country like Ecuador in *European*

110. US General Accounting Office (HR) *US Experience to Date in the Dispute Settlement System: Briefing Report to the Committee on Ways and Means* (Washington DC, Jun 2000) 18-19.

111. Press Release supra n 23.

Communities – Regime for the Importation, Sale and Distribution of Bananas[112] might have limited impact in forcing the European Community to modify its banana import regime.

Thirdly, there are limitations on the system's ability to resolve a dispute and secure implementation, particularly where it is politically difficult or legally impossible for a Member to comply. Both the *European Communities – Measures Concerning Meat and Meat Products (Hormones)*[113] and *European Communities – Regime for the Importation, Sale and Distribution of Bananas*[114] disputes remain unresolved, with suspension applied by the United States costing over US$300 million per year. In these instances there is a concern that the dispute settlement system is leading to trade-restricting rather than trade-creating outcomes.

Finally, some comment may be made on what many predict will be the increasingly litigious nature of the WTO. The greater willingness of Members to resort to formal dispute settlement procedures could be attributable to a number of factors. First, delays in launching a new Round of trade negotiations may encourage Members to pursue market access concerns through binding dispute settlement rather than through negotiations. Secondly, there is now a sufficient volume of case-law on the Uruguay Round Agreements for Members to identify potential breaches of those Agreements and predict dispute settlement outcomes with much greater certainty than before. Thirdly, the increased capacity of developing countries to initiate and prosecute claims under the DSU should not be underestimated. Whether the increasingly litigious nature of the WTO will result in a fundamental shift from dispute resolution by negotiation to dispute resolution by arbitration remains to be seen.

112. Supra n 33.
113. Supra n 65.
114. Supra n 33.