LEATHER CAR SEATS, SALMON AND APPLES: AUSTRALIA AND THE WORLD TRADE ORGANISATION DISPUTE SETTLEMENT PROCESS

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EXPORT SUBSIDIES COMPLAINT

In 1995, the Howe Leather Company of Melbourne exported AUD20 million of car seat leather to the United States. The company had received some AUD18 million of assistance from 1992-1996 under Australian government programs set up in 1991, namely the Import Credit Scheme and the Export Facilitation Scheme. The Schemes assist Australian companies in the motor vehicle, textile clothing and footwear sectors. Under the Import Credit Scheme, Australian exporters of eligible products could pay lower import duties on specified imports,[1] the credit being calculated according to the percentage of Australian domestic content of the final export product. Howe Leather's AUD25 million export deal was the first installment of a five year AUD125 million contract to supply leather for car seats to General Motors in Detroit.

In 1996, two competitors in the United States complained to the US Trade Representative that the above Australian Schemes were an illegal export subsidy under GATT/WTO law. Specifically, US competitors petitioned the US Trade Representative seeking the application of section 301 of the 1975 Trade Act (US). The US Trade Representative accepted the complaint and began the procedure under that legislation which could have led to trade sanctions against Australian exports to the United States.

Simultaneously, in mid-October 1996, the United States government invoked the WTO dispute settlement procedures, formally requesting consultations with the Australian government under Article XXII of the 1994 General Agreement of Tariffs and Trade ("GATT 1994").[2] The

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1 In this case, leather products.

2 Note that GATT 1994 comprises the provisions of GATT 1947, as amended or modified by legal instruments in force by the date of entry into force of the WTO Agreement, on 1 January 1995, and a number of other Protocols, Decisions and Understandings. These relate to tariff concessions, terms of accession of countries to GATT, decisions on waivers and other decisions of GATT contracting parties, and

United States wanted the entire export facilitation program repealed. The Schemes had not been notified to the WTO as required by Article XVI:1 of GATT 1994, an obligation made more specific by detailed provisions of Article 25 of the Uruguay Round Agreement on Subsidies and Countervailing Measures ("Agreement on Subsidies").

According to substantive law, it was clear that the Australian Schemes amounted to a prohibited export subsidy, being a subsidy granted by the government to industries in specific sectors. This prohibition dated from the 1979 Tokyo Round Subsidies Code, the applicable law when the Schemes were established in 1991.[3] This Code obliged its contracting parties, including Australia in 1981, not to grant export subsidies on products other than certain primary products. Treated leather was not classed as a primary product. The Code had an illustrative list of prohibited export subsidies, including:

> the provision by governments of direct subsidies to a firm or an industry contingent upon export performance...and the remission or drawback of import charges in excess of those levied on imported goods that are physically incorporated...in the exported product.

When the WTO Agreement entered into force on 1 January 1995, the Australian Schemes became subject to the new Agreement on Subsidies, which is Annex 1A to the WTO Agreement. Unlike the Tokyo Round Codes, the WTO Agreement is binding on all WTO members. Most types of export subsidies[4] are prohibited, including those contingent in law or fact upon export performance, and those contingent on use of domestic over imported goods. For prohibition, it suffices that the contingency is one

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GATT, decisions on waivers and other decisions of GATT contracting parties, and understandings on the interpretation of various articles of GATT.
Under article XXII each party to GATT shall accord consideration to and afford adequate opportunity for consultation regarding representations made by the other party "with respect to any matter affecting the operation of this Agreement". Articles XXII and XXIII are the foundation for GATT/WTO dispute settlement process, but as will be seen, there is now an elaborate superstructure upon them.

3 The Agreement on Interpretation and Application of GATT 1994 Articles VI, XVI and XXIII. This code was superseded by the Uruguay Round Agreement on Subsidies and Countervailing Measures.

4 Other than agricultural subsidies which are subject to the separate Uruguay Round Agreement on Agriculture.

of several qualifying conditions for receipt of the subsidy.[5]

What we have in this situation is a textbook instance of action against a foreign export subsidy, clearly illegal under GATT/WTO law, being taken in the two ways that are open to aggrieved parties. Here, the two complainant competitors were private firms in a jurisdiction (namely, the United States) with access to a remedy under domestic law. They petitioned the United States government, the US Trade Representative, under domestic legislation, seeking a remedy in the form of imposition by the United States of countervailing duty to offset the subsidy received by Howe Leather. They sought protection against what they saw, rightly or wrongly, as unfair foreign competition. The United States government pursued their complaint against Australia, as WTO members under the WTO Dispute Settlement Understanding ("DSU").[6]

In the event, the dispute was settled by negotiation in the margins of the Manila APEC summit, following formal consultations between the two governments. Under the settlement,[7] Howe Leather had to repay the Australian government the AUD18 million received over the previous four years. In addition, Australia agreed to exclude automotive leather exporters from the Schemes, which were to be phased out altogether by the year 2000. Howe Leather received compensation in the 1997 Federal Budget for being cut out of the Schemes. The United States withdrew its WTO action and undertook not to bring further challenge to Australia's export assistance schemes before 2000. Further, the US Trade Representative terminated the process under the 1975 Trade Act (US) section 301.

OTHER RECENT OR CURRENT COMPLAINTS INVOLVING AUSTRALIA

Before moving to an account and evaluation of the WTO dispute settlement procedures as they might have operated in the Howe Leather case, and as

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5 Agreement on Subsidies Article 3.1.

6 The full title is the Understanding on Rules and Procedures Governing the Settlement of Disputes. It is Annex 2 to the WTO Agreement 1994 and applies to all disputes under the 1994 Multilateral Trade Agreements ("MTA's") in Annex 1 to the Agreement, including GATT and the Subsidies Agreement. Some Mat's have their own special dispute settlement rules and, to the extent of any difference or inconsistency between these and the DSU provisions, the special rules prevail: DSU Article 1.2.

7 This was widely reported in the press on 26 November 1996.

they have operated in other cases brought since the WTO came into force, it may be helpful to have in mind some of the other complaints involving Australia in recent times, some of which are still extant disputes.

In December 1996, Australia issued regulations for salmon imports. Cooked and hot smoked salmon were allowed in, but the ban on the import of fresh salmon continued. The Australian authorities claimed that wild salmon from some countries, particularly Canada but also New Zealand, carried diseases which were not present in Australian wild salmon. Canada asked for the matter to be determined by the WTO disputes panel, and it is expected the process will be completed within the next twelve months.

WTO members do not act unlawfully if they adopt or enforce measures "necessary to protect human, animal or plant life or health", provided the measures are not applied in a manner which could constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or would amount to a disguised restriction on international trade.[8] Issues here turn on the necessity of the ban on imports of fresh salmon, a matter of scientific evidence of the risk of disease coming into Australia. If necessity is shown, the question of arbitrary or unjustifiable discrimination or disguised restriction on trade will have to be addressed. Some of these issues arose in the WTO Appellate Body decision which will be examined below. Interestingly, New Zealand is apparently arguing that their salmon is disease free and that if Australia allowed it to be imported, this would demonstrate to the WTO that the ban on Canadian salmon was imposed for genuine disease risk reasons and not as a protectionist device.[9]

New Zealand may challenge Australia over its ban on the import of apples from that country if the Australian government decides to continue the ban. The Australian Quarantine Inspection Service recommenced continuation of the ban in its draft report made to the government in mid April 1997. The issue here is the risk of importing fire blight disease, and the relevant GATT provisions are the same as in the fresh salmon case. Mysterious discoveries of plants with fire blight symptoms in the Botanical Gardens in Adelaide and Melbourne could feature in future panel proceedings, lending these an unusual flavour of alleged conspiracy and spoiling tactics.

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8 GATT 1994 Article XX(b). See generally sections 4.5 and 4.6 below.

9 For example, see Ripe, "Salmon's jumping, but not across the Tasman" The Australian, 21 February 1997 at 16.

A final example was reported in the press in July 1997. Australia is to join a number of other countries, including the United States and New Zealand, in requesting WTO consultations with India over India's quantitative restrictions on imports, of which there are apparently more than 2,700. Australia considers that its exporters are denied fair access to the Indian market for a range of agricultural goods, processed foods, precious stones, car parts, textiles and electrical and mechanical goods. Some 50 years ago the restrictions were approved under GATT Article XII as necessary to safeguard India's balance of payments. Now, WTO members are required by Article XII(2) to eliminate such restrictions when conditions no longer justify their maintenance and quantitative restrictions must be replaced by tariffs that are subject to reduction as "bound" tariffs under WTO agreements. India is apparently insisting on a seven year phase out period for its restrictions but Australia wants the process to be speeded up.[10]

THE WTO DISPUTE RESOLUTION PROCEDURE

Procedure under the Agreement on Subsidies

The United States complaint against Australia over the export subsidy scheme would have gone to a panel established under Article 4 of the Agreement on Subsidies. This article comprises a special, speedier resolution process for disputes over alleged prohibited export subsidies. In general, the time periods applicable under this article are only half of those allowed under the DSU. Two further differences in the Article 4 procedure from the general DSU procedure are the omission of the provision for an interim draft report from the panel, which the DSU requires panels to issue to the parties for comment within a specified time period,[11] and the facility in Article 4 for a panel to request the assistance of a Permanent Group of Experts established by Article 24 of the Agreement on Subsidies. This group may be called upon to determine whether the challenged measure is a prohibited subsidy. The defendant member is then given opportunity to show that the measure is not prohibited. If the Expert Group concludes that the measure is a prohibited subsidy, this conclusion "shall be accepted by the panel without modification".[12] The Group is composed of five

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10 McKenzie and anor, "India under fire on import restrictions" The Australian, 17 July 1997 at 4.

11 DSU Article 15.

12 Agreement on Subsidies Article 4.5.

independent persons "highly qualified in the fields of subsidies and trade relations" elected by the Committee on Subsidies and Countervailing Measures, comprising representatives from each WTO member.[13] It is now appropriate to move from the special procedure under the Agreement on Subsidies to consider the general WTO disputes procedure.

New Features of the WTO Process

The three principal new features of the dispute resolution process which were adopted by GATT Parties in the Uruguay Round are present in both the special Subsidies Agreement procedure and the DSU procedure. These features are:

1. The compulsory formation of a panel to hear a dispute (the so-called "right to a panel") if this is requested by a member following the failure of the obligatory inter-governmental consultations to arrive at a mutually agreed solution within the specified time limit;[14]
2. the quasi-automatic adoption of the panel's report, unless one of the parties notifies the DSB of its decision to appeal; and
3. the appeal procedure itself.

Automatic adoption of panel reports, unless there is a *negative consensus* in the DSB not to adopt a report, was politically acceptable to leading trading nations only together with an appellate procedure. Under the "old" GATT dispute settlement provisions the unsuccessful party could veto the adoption of a panel report which needed a *positive consensus* decision by the GATT Council. Blocking of the adoption of reports in major disputes occurred more frequently since 1983.[15] Evaluation of the function and operation of the new appellate procedure, insofar as this may be attempted at this early stage in its history, will be discussed below.

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13 Ibid Article 24.

14 The time limit is 30 days under the Subsidies Agreement Article 4 and 60 days under DSU Article 4.7. The Dispute Settlement Body ("DSB") which represents all WTO members, must establish a panel unless it decides by consensus not to do so. All decisions of DSB are to be taken by consensus under DSU Article 2.4. Consensus is reached if no member present formally objects to the proposed decision.

15 For example, see Petersmann, "The dispute settlement system of the WTO and the evolution of the GATT dispute settlement system since 1948" (1994) 31 Common Market Law Review 1157, 1192-1193.

Consultation

As seen above, a WTO member challenging some trade measure or action of another member must first try to resolve the matter by consultation. The Agreement on Subsidies provides that upon request for consultation concerning an alleged prohibited subsidy, the member believed to be granting or maintaining the subsidy is obliged to enter into consultations "as quickly as possible".[16] The purpose of consultations is to clarify the facts and reach a mutually agreed solution, if possible. This is what occurred in the Howe Leather episode.

Similar provisions apply to complaints about the so-called *actionable* subsidies under Article 7 of the Agreement. These subsidies are not prohibited *per se* but are "actionable" if they cause adverse effects to another member or members in the form of injury to that member's domestic industry. Both "injury" and "domestic industry" are defined at length. A subsidy is actionable also if it causes nullification or impairment of benefits under GATT, especially the benefits of bound tariffs. These important areas of substantive international trade law are outside the scope of this article.

The general DSU itself embodies clauses of great significance relating to the consultation part of the process. Article 3.7 enjoins a member before bringing a case formally under the consultation and dispute settlement provisions to "exercise its judgment as to whether action under these procedures are fruitful". It continues to provide that the aim of the mechanism is to secure a positive solution to the dispute, declaring that a solution mutually acceptable to the parties "and consistent with the covered agreements"[17] is to be preferred. Consistency with WTO law is achieved by the obligation on members to notify any mutually agreed solution to the DSB "where any Member may raise any point relating thereto".[18]

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16 Article 4.3.

17 These are the WTO Agreement, the several Multilateral Agreements on Trade in Goods such as the Subsidies Agreement, the General Agreement on Trade in Services ("the GATS"), the Agreement on Trade-Related Aspects of Intellectual Property Rights, the DSU itself, and four Plurilateral Trade Agreements to which only some WTO members are party.

18 Article 3.6.

Article 4 of DSU is devoted entirely to consultations, specifying time limits for entering into them "in good faith", and allowing the complainant member to request a panel if no response is forthcoming within ten days of receipt of request for consultations, or if the member concerned does not enter into them within 30 days of such request. Requests must be notified to the DSB and give reasons for the request, including identification of the measures concerned and an indication of the legal basis for the complaint. Consultations are confidential, as would be expected, and are without prejudice to the right of members in any further proceeding. If no settlement results after 60 days of receipt of the request,[19] the complainant may request the establishment of a panel. Shorter periods are prescribed for urgent cases, including those concerning perishable goods.

Panel Proceedings

Panels of three independent members, or five if the parties agree, are established by the DSB. The panels must abide by the provisions of their DSU on their composition. Panels must be composed of "well qualified governmental or non-governmental individuals". These may include representatives of WTO members, persons who have served in the GATT or WTO Secretariat, persons experienced in international trade law or policy, and former senior trade policy officials of WTO members.[20] The Secretariat maintains a list of such persons, but the DSB is not confined to names on this list. Members may periodically suggest names of suitable individuals for listing.

Article 8.6 provides that parties to the dispute shall not oppose nominations for the panel proposed by the Secretariat "except for compelling reasons". There is provision for the Director-General of WTO to appoint panelists in consultation with the Chairman of DSB if there is no agreement on panelists within 20 days of the decision to establish a panel. Panelists serve in their individual capacities, not as government representatives. WTO members have to undertake not to give them instructions or seek to influence them.

A panel's task is to examine in the light of the relevant provisions of WTO agreements cited by the parties the matter referred to the DSB by the

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19 This is 30 days under the Subsidies Agreement.

20 Article 8.1.

complainant, and to make such findings as will assist the DSB in making its recommendations or in giving the rulings provided for in the relevant agreement or agreements.[21] The function of panels, according to Article 11 of the DSU, is to assist the DSB in discharging its responsibilities under the DSU and the various "covered agreements".[22] A panel is instructed to "make an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements".[23] It is to make such findings as will assist the DSB. Significantly, it is expressly laid down in Article 11 that:

> Panels shall consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

This injunction formally enshrines established GATT practice. Panel proceedings are not judicial and there has always been an emphasis on the desirability of negotiated resolution of disputes in the GATT.

The DSU contains detailed provisions on panel procedures, including the interim review stage to which reference has been made above. This stage comes following consideration of rebuttal submissions and oral argument. The panel must then issue the descriptive (factual and argument) section of its draft report to the parties, who may submit written comments within a time period set by the panel. When this period expires, the panel has to issue an interim report to the parties "including both the descriptive sections and the panel's findings and conclusions." A party may request the panel to review "precise aspects" of the interim report prior to circulation of the final report to all WTO members. If no comments are received from any party within the comment period, the interim report becomes the final one. Any arguments made at interim review stage are to be discussed in the final report.[24]

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21 See Article 7 on Terms of Reference. These standard terms may be altered by agreement of the disputants, but if this is done, any member may raise any point relating to the terms of reference in the DSB. All members have an interest in the interpretation of WTO rules by panels, and this interest can be affected by the formulation of non-standard terms of reference.

22 See note 17 above.

23 DSU Article 11.

24 Article 15.

Adoption of Panel Reports

As indicated earlier, adoption is not quasi-automatic in that, unless a party notifies its decision to appeal, the report must be adopted by the DSB within 60 days of its circulation to members, except if the DSB decides by consensus not to adopt it. Any member may express views on a panel report, and the views of the parties to the dispute "shall be fully recorded".[25]

Status of Panel Reports: GATT/WTO Case Law

Here, we must distinguish between unadopted and adopted panel reports. As to the former, a recent decision of the WTO Appellate Body in the case of *Japan: Taxes on Alcoholic Beverage*[26] on 25 September 1996 confirmed the position as it had been understood previously under the GATT system, ruling that there had been no change following the inauguration of the WTO regime. The Appellate Body agreed with the Panel's conclusion in this case that unadopted panel reports:

> have no legal status in the GATT or WTO system since they have not been endorsed through decisions by the CONTRACTING PARTIES to GATT or WTO members.[27]

The Appellate Body also agreed that:

> a panel could nevertheless find useful guidance in the reasoning of an adopted panel report that it considered to be relevant.[28]

As to adopted panel reports, however, the Appellate Body concluded that the Panel had erred in law in stating that:

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25 Articles 16.4 and 16.2.

26 Organisation of American States – Trade Unit, SICE (Foreign Trade information System), WTO Dispute Settlements, Adopted Panel Reports and Appellate Body Reports (1996-1997). Also see note 27.

27 Panel Report of 11 July 1996, WT/DSB/R, WT/DS10/R, WT/DS11/R, para 6.10. Complaint by European Communities, Canada and the United States against Japan relating to Japanese Liquor Tax Law of 1953 as amended, WTO Appellate Body, Japan: Taxes on Alcoholic Beverages 13.

28 Ibid.

> panel reports adopted by the GATT CONTRACTING PARTIES and the WTO Dispute Settlement Body constitute subsequent practice in a specific case by virtue of the decision to adopt them.[29]

"Subsequent practice" in the application of a treaty which establishes the parties' agreement regarding its interpretation is to be considered when interpreting the treaty's terms.[30] The Appellate Body correctly pointed out that although GATT 1947 panel reports were adopted by decisions of the Contracting Parties, such a decision did not constitute their agreement on the Panel's legal reasoning:

> The generally accepted view under GATT 1947 was that the conclusions and recommendations in an adopted panel report bound the parties to the dispute in that particular case, but subsequent panels did not feel legally bound by the details and reasoning of a previous panel report.[31]

The Appellate Body was satisfied that neither GATT Contracting Parties nor WTO members intended that their decisions to adopt panel reports would constitute a definite interpretation of GATT/WTO provisions. Their conclusion on WTO intention found strong support in WTO Agreement Article IX.2. Since this provision gives the WTO Ministerial Conference and General Council the exclusive authority to adopt interpretations of the Agreement and MTAs, it has been observed that it provides the basis for the conclusion "that such authority does not exist by implication or by the inadvertence elsewhere".[32]

The Appellate Body also pointed to Article 3.9 of the DSU which states:

> The provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement.

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29 See Panel Report para 6.10.

30 Vienna Convention on the Law of Treaties Article 31(3)(b); Sinclair IM, The Vienna Convention on the Law of Treaties (1984, 2nd edition, Manchester University Press, Manchester) 137.

31 See above discussion on the Appellate Body decision.

32 Ibid.

However, adopted panel reports are acknowledged to form part of the accumulated experience of the GATT by which the WTO is required to be guided. Article XVI.1 of the WTO Agreement stipulates that except as otherwise provided under the Agreement or the MTAs:

> the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947.

Decisions to adopt panel reports fell within this material. The Appellate Body declared that adopted panel reports are an important part of the GATT *acquis*. They are often referred to by later panels. In addition, the Appellate Body stated that:

> [t]hey create legitimate expectations among WTO Members, and therefore, should be taken into account where they are relevant to any dispute.[33]

But the reports are binding only with respect to resolving the particular dispute as between the parties. Here, the Appellate Body referred to the Statute of the International Court of Justice. Article 59 of the Statute provides:

> The decision of the Court has no binding force except between the parties and in respect of that particular case.

The Appellate Body pointed out that this provision had not inhibited the development of the International Court of Justice by a body of case law "in which considerable reliance on the value of previous decisions is readily discernible".[34]

The New Appellate Procedure

Perhaps the most radical innovation produced by the Uruguay Round in the dispute settlement area is the creation of a right of appeal from panel reports on issues of law only. As noted above, the introduction of an appellate level was insisted upon by several leading trading countries as a

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[33] Ibid.
[34] See note 15.

political "consideration" for agreement on the quasi-automatic adoption of panel reports. In the words of Petersmann, a former GATT legal adviser now in private practice and recognised as one of the foremost experts on the GATT/WTO dispute settlement system:

> The strictly legal function and expertise of the Appellate Body were seen as a safeguard against legally unconvincing dispute settlement findings and as a more rule-oriented substitute for the current [ie pre-WTO] consensus-practice and 'political filtering' of panel reports in GATT Council.[35]

He considered that appellate review should help to prevent losing parties from claiming, as grounds of non-compliance with a DSB ruling based on a panel report, that the ruling was unfair, erroneous or incomplete.

The Appellate Body is established by the DSB under Article 17 of the DSU. It is composed of seven persons "of recognised authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally".[36] They are appointed for four year terms and may be reappointed once only. Three members of the Appellate Body serve on any one case. They must be independent of any government, and should be broadly representative of WTO membership. The initial seven members come from Uruguay, United States, New Zealand, Germany, Egypt, Philippines and Japan. At least three have legal backgrounds with specialisation in international trade and economic law; some have diplomatic or political experience; and some are academics.

William Davey, the current Director of the WTO's Legal Affairs Division, has reported that the division of three to hear a given appeal is chosen by a random procedure which gives an opportunity for all members to serve without regard to national origin. The division may exchange views with other Appellate Body members before finalising its report. Davey's final comment in a talk given in April 1996 was the following:

> [T]he hope is that the Appellate Body will supply as much, if not more, legitimacy to dispute settlement results in the WTO as did the adoption

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35 See note 15 at 1216.
36 Article 17.3.

of panel reports by consensus of the Contracting Parties in GATT.[37]

Powers of the Appellate Body

Appeal is as of right; no leave is required. A party has 60 days in which to notify a decision to appeal a panel report. Generally, the appeal proceedings should not exceed 60 days from the date of such notification to the date of the Appellate Body's report. In no case shall this period exceed 90 days.[38]

As stated, there is right of appeal on issues of law only, and limited to such issues as are covered in the panel report "and legal interpretations developed by the panel".[39] The Appellate Body may uphold, modify or reverse the panel's legal findings and conclusions.[40] The DSU is silent on whether the Appellate Body can allow an appeal on the ground of material breach of procedural rules.

The experience of many national jurisdictions teaches that the borderline between issues of law and issues of fact can sometimes be hard to discern. In the context of GATT/WTO law, one commentator has pinpointed areas in which there may be scope for argument on what is law as distinct from fact. For example, is a finding that a national measure provides a benefit to a particular industry a finding of fact or of law? Or, suppose that a panel clearly signals that a certain finding is factual, but the losing part asserts that the finding is unsupported by evidence in the record. Does this assertion raise an issue of law?[41] No doubt these and similar arguments will be ventilated in future appeals.

Nature of the Appeal Process and Standards of Review

An appeal on a point of law is not identical to juridical review of administrative action. A common lawyer might accept the following summary judgment as highlighting the difference between the two:

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37 Davey, [1996] Proceedings, American Society of International Law 416.
38 DSU Article 17.5.
39 Article 17.6.
40 Article 17.13.
41 Lowenfeld, Editorial Comment on the DSU, (1994) 88 American Journal of International Law 484. Professor Andreas Lowenfeld is a United States lawyer with immense experience and expertise in international trade law.

> an appeal is any proceeding taken to rectify an erroneous decision of a court by bringing it before a higher court;the remedy of judicial review is concerned not with the decision of which review is sought but with the decision-making process.[42]

Professor Andreas Lowenfeld inquired whether the Appellate Body might recognise some principle of deference to panel decisions, analogous to judicial review in national legal systems. He and others have observed that GATT/WTO rules are imperfect in judicial review terms, reflecting compromises and bargains that often make it hard to detect underlying principle.[43]

From the small number of Appellate Body decisions now available, one can at least say that the Appellate Body does not regard itself as limited to a judicial review function in the sense of the common law approach summarised above. The Appellate Body is concerned with the panel's decision as such, so far as issues of legal interpretation and reasoning are relaxed. No doubt if occasion arises the Appellate Body will also concern itself with fundamental procedural principles and safeguards for the rights of disputing Members.

As to standards of review, it has been suggested that time and experience with particular cases will probably clarify the appropriate standards - the term is in the plural because standards may have to vary with difference subject matters. Some guidance is given by the *General Provisions* of the DSU in Article 3. In particular, Article 3.2 declares that the dispute settlement system is a central element in providing security and predictability to the multilateral trading system. This provision continues:

> The Members recognise that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

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42 See definitions in Osborne's Concise Law Dictionary (1983, 7th edition, Sweet & Maxwell, London).

43 See note 38 at 488.

> in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.

Article 3.5 underlines the fundamental requirement that all institutions in the system abide by the agreements in all solutions to matters raised under the consultation and dispute settlement provisions. Such solutions must not nullify or impair benefits accruing to Members, nor impede the attainment of any objective of those agreements. Hence, both panels and the Appellate Body are constrained to produce reports and decisions which uphold national measures that are consistent with Members' WTO obligations, and condemn measures that contravene those obligations.

The agreements in which these rights and obligations are embodied, being international agreements, are to be construed and "clarified" by application of customary international law rules of interpretation. So, any principle of deference to panel reports, or "sensitivity" to the legal appropriateness of national measures and actions should operate only subject to the overriding norm of compliance with the latter and, it is submitted, the spirit in the sense of objective and purpose of WTO agreements, where such can be discerned.

THE APPELLATE BODY'S FIRST RULING

Some examples of Appellate Body rulings have now been made available. The first such ruling does not relate to export subsidies. However, given the area of law with which this article began, it could be profitable to examine this 1996 decision. It may be possible to see some indicators of the way in which the Appellate Body might approach their sensitive task in future cases.

United States Standards for Gasoline: the Panel Report

Before looking at the Appellate Body's decision, the main issue in the dispute and their disposition by the Panel will be reviewed.

Venezuela and Brazil complained that the United States "Gasoline Rule" or "Gas Rule" of 1994 laying down quality standards for domestic refiners and imports of reformulated and conventional gasoline (gas) discriminated against imported gas in violation of Article III.4 of the GATT. This

and imports of reformulated and conventional gasoline (gas) discriminated against imported gas in violation of Article III.4 of the GATT. This provision requires national treatment for imports of "like products" to products of national origin. The Gas Rule was issued pursuant to the 1990 Clean Air Act with the objective of reducing air and ozone pollution by vehicle emission in certain metropolitan areas of the country.

The Rule imposed baseline establishment rules needed to enforce quality standards, namely certain compositional and performance specifications. A domestic refiner in the United States had to establish an individual baseline representing the quality of gas produced by it in 1990. The refiner could select from three possible methods to establish this baseline. Importers of foreign gas had also to establish a baseline but could use only one method to do so. If necessary data for this was not available, importers were subject to a statutory baseline. Foreign refiners of gas were not permitted to use individual baselines but had to use the statutory baseline set by the United States Environmental Protection Agency.

The statutory baseline was more stringent than individual baselines so that imported gas exceeding the statutory parameters could not be directly sold on the United States' market. But gas with identical qualities produced in a United States refinery could be freely sold on that market if it conformed with that refiner's individual baseline. Foreign refiners therefore had to spend money to make changes to their refineries so as to produce gas at a lower price to a United States importer who could mix it with other gasolines to meet the statutory baseline requirements over a period. Venezuela and Brazil argued that both options adversely affected conditions of competition for imported gas, protecting United States domestic production in a way contrary to Article III.4. The Panel accepted his argument.[44]

The United States sought to justify any discrimination against imported gas by invoking Article XX(g) of the GATT. Article XX contains *General Exceptions* to the international trade rules found in other articles. The United States Gas Rule was part of legislation aimed at environmental protection and improvement. Specifically, item (g) in the list of permissible measures comprises measures which relate to:

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[44] United States - Standards for Reformulated and Conventional Gasoline, WT/DS2/R, 29 January 1996.

> the conservation of exhaustible natural resources if such measure are made effective in conjunction with restrictions on domestic production or consumption.

Here, clean air was the exhaustible natural resource.

Article XX opens with a general clause or *chapeau*, applying to every type of measure listed:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any party of measures.

Having found the Gas Rule to contravene Article III.4, the Panel moved to consider the application of Article XX(g). Without going into the details of its reasoning, since the focus of the present discussion is the Appellate Body's decision, the Panel held that the baseline rules were not a measure "relating to" the conservation of natural resources. It followed, according to the Panel, that it was unnecessary to determine other aspects of the interpretation and application of Article XX, specifically the *chapeau* clause, or other substance of Article XX(g).

The United States Appeal

The United States did not contest the finding that its measure violated Article III.4, but appealed that the Panel had erred in law (a) in holding that the measure was not justified under Article XX(g); and (b) in its interpretation of Article XX as a whole. The approach of the Appellate Body to Article XX in this first ruling is of considerable interest to all WTO Members, and particularly those like Australia which trade in primary products and have numerous measures on the statute books to protect plant and animal life. The dispute between Canada and Australia over the latter's ban on the entry of fresh salmon involves Article XX(b), the provision which would also apply if New Zealand brings its dispute over the apple import ban to the WTO.[45]

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[45] Refer notes 6-7 and discussion above. Article XX(b) allows for measures "necessary

The Appellate Body Report of 22 April 1996

The Appellate Body decided first that the Panel erred in holding that the baseline rules fell outsider Article XX(g). It found that the rules were a measure "relating to conservation". Secondly, it found that the Panel erred in failing to decide whether the rules fell within the ambit of the *chapeau* of Article XX. Thirdly, it held that the baseline rules failed to meet the *chapeau* requirements in that they amounted to "unjustifiable discrimination" and a "disputed restriction on international trade". Hence, the rules were not justifiable. It recommended that the DSB, the final decision maker in WTO disputes, request the United States to bring its baseline rules into conformity with its GATT obligations. The United States had complied with this request.[46]

The Appellate Body's Juridical Approach

It is not proposed to rehearse here the Appellate Body's reasoning step by step.[47] The object of the present account is to highlight its methodology and general juridical approach to the legal issues. While there is no system of *stare decisis* in the WTO it is more likely than not, for several reasons, that the Appellate Body will follow similar juridical methods in its future interpretation of the GATT/WTO provisions, and its review of the consistency of GATT/WTO national measures.

Among the reasons for believing that the Appellate Body is likely to follow the general approach taken in this and other early decisions are that:

1. the dispute settlement system is the central element in providing *security* and *predictability* to the international trading system;[48]

2. both panels and the Appellate Body are instructed to interpret GATT provisions in accordance with the customary rules of interpretation of public international law;[49]

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to protect human, animal or plant life or health".

46 Shenk, Case Note (1996) 90 American Journal of International Law 669, 674.

47 The Appellate Body Report was adopted by the DSB on 20 May 1996: see WTO Doc WT/DS2/9 reproduced in (1996) 35 International Legal Materials 603.

48 DSU Article 3.2.

49 Ibid.

3. the panels and Appellate Body must respect the rights and obligations of Members under WTO/GATT law. They can neither add to nor diminish those rights and obligations;[50] and

4. there is a natural tendency in any juridical or similar body to look to previous similar cases and to the reasoning on the interpretation of the same provision in earlier cases.

Measures "relating to" Article XX(g)

On whether the Appellate Body rules were measures "relating to conservation", the Panel was held to have applied the wrong test. It had inquired whether the measures were "necessary" for the conservation objective. This test is appropriate to Article XX(b), on the protection of human, animal or plant life, but not to Article XX(g). The Appellate Body invoked Article 31 of the 1969 Vienna Convention on the Law of Treaties as embodying the general rule for the interpretation of treaties, holding that Article 31 had attained the status of customary international law.

Article 31 requires a treaty to be interpreted in good faith in accordance with the ordinary meaning of its terms in their context and in light of the treaty's object and purpose. The Panel had failed to apply this rule in that it had not taken account of the language of Article XX in its several paragraphs, the list of permitted exceptions. Article XX uses different terms for various categories of exception. For example, in paragraphs (a), (b) and (d) the term is "necessary". In paragraph (g) it is "essential". In paragraph (c), (e) and (g) it is simply "relating to". In paragraph (f) it is "for the protection of", and so on.

The Appellate Body reasoned that WTO members did not intend to require for each category the same kind of degree of connection between the national measure and the interest or policy which the measure sought to protect or achieve.

The Appellate Body's ruling that Article 31 of the 1969 Vienna Convention on the Law of Treaties has become customary international law and is therefore the rule to be applied by WTO panels and the Appellate Body itself is uncontroversial but nonetheless important. Some

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[50] Ibid.

pre-WTO/GATT panels had relied on Article 31, but it has now received the *imprimatur* of the new Appellate Body. What was not done by these earlier panels but was here spelled out with care by the Appellate Body was the reference to supporting authority from general international law for the proposition that Article 31 now represents the customary rule. The Appellate Body cited a judgment of the International Court, judgments of the European Court of Human Rights and Inter-American Court of Human Rights, and the writings of practising and academic international lawyers.[51] Significantly, the Appellate Body observed that the direction in the DSU to supply the "customary rules of public international law":

> reflects a measure of recognition that the *General Agreement* [ie GATT 1994] is not to be read in clinical isolation from public international law.[52]

The interpretation that there are different connections required between national measures and the interests or policy aimed at is a straightforward application of the "ordinary meaning" of the terms used in the treaty provisions.

Context of Article XX(g) and the object and purpose of GATT

The Appellate Body then considered the content of Article XX(g) and its terms in light of the objects and purposes of the GATT. The context comprised the rest of the GATT and, in particular, three provisions: Article I, the general MFN clause; Article II, national treatment in areas of international taxation and regulation; and Article IX, general elimination of qualitative restrictions. Conversely, the context of these articles includes Article XX. Therefore, "relating to conservation..." might not be read so expansively as seriously to subvert the purpose and object of Article III.4. But this provision must not be given so broad a reach as effectively to emasculate Article XX(g) and the policies and interests which it recognises. It was a matter of relating the affirmative commitments of, *inter alia*, Articles I, III and XI, and the policies and interests recognised in the *General Exceptions* in Article XX.

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51 See Appellate Body Report, III.B at 17, reproduced in (1996) 35 International Legal Materials 621.

52 Ibid.

The Appellate Body's approach to this task of reconciliation or balancing will surely be seen as a clear guiding signal for future panels and for the Appellate Body itself; not only for disputes involving these particular provisions but more generally in WTO law. The Appellate Body said that the relationship between the two types of provision:

> can be given meaning within the framework of the *General Agreement* and its object and purpose by a treaty interpreter only on a case-to-case basis, by careful scrutiny of the factual and legal context in a given dispute, without disregarding the words actually used by the WTO Members themselves to express their intent and purpose.[53]

Applying this approach, the Appellate Body held that the United States baseline rules were "primarily aimed at" the conservation of clean air. This was the test for a measure to fall within Article XX(g) which the Panel in this case and in an earlier GATT Panel[54] had formulated and which all parties in the instant case[55] accepted as proper.

The United States rules were designed to allow monitoring of compliance by refiners, importers and blenders with the new quality standards. With no baseline rules, scrutiny would be impossible and the Gasoline Rule's objective of stabilising air pollution at 1990 levels would be frustrated. The rules were not merely incidentally aimed at conservation of clean air, but were primarily aimed at this objective.

On the whole, one has to agree that the Appellate Body did indeed carry out a careful scrutiny of the quite complex factual and legal context of the dispute.

The Introduction or "Chapeau" *to Article XX*

The text of the general introduction to Article XX, referred to as its *chapeau*,[56] was quoted above. The Appellate Body held that whenever a WTO Member invokes an Article XX exception to justify a restrictive or

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53 Ibid.

54 This was the case involving Canada and the measures which affected exports of unprocessed herring and salmon in 1987.

55 Including the European Communities and Norway which took part in the panel hearings.

56 Meaning "hat".

otherwise impermissible national measure a two-tiered analysis is required. First, does the measure fall within one or more of the listed exceptions in Article XX(a)-(j)? If so, is it provisionally justified, as was the case with the United States Gasoline Rule? Secondly, the measure must be appraised to see whether it satisfies the *chapeau*. As noted above, the Appellate Body held that the United States Rule did not meet this test.

The Appellate Body referred to the drafting history of Article XX to reveal its object and purpose, finding that prevention of abuse of the several exceptions was the intention behind the *chapeau*.[57] If the exceptions are not to be abused or misused:

> the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned.[58]

The burden of proof that a measure provisionally justified does not amount to abuse in its application rests on the party invoking the exception. No authority was cited or needed for that proposition. The Appellate Body said that this burden is "of necessity" heavier than the burden of showing that the measure falls within a listed exception. Why this should be so is not stated. Perhaps the reason lies in the open-textured language of the *chapeau* where, for example, the words "arbitrary discrimination" are used. Or it may simply be the difficulty of proving a negative.

The fact that a measure has found to be GATT-inconsistent, as here, in violation of Article III.4, is not determinative of the measure's legality under the *chapeau*. If the *chapeau* referred to the same standard by which a violation of a substantive GATT rule has been held to have occurred, the *chapeau* would lose all meaning, as would the listed exceptions. The issue under Article XX is whether a GATT-inconsistent measure is nevertheless justified. Again, the Appellate Body cited international jurisprudence in support of the proposition that interpretation must give meaning and effect to all the terms of the treaty.[59] The interpreter may not adopt a reading that would reduce whole clauses to redundancy.

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57 Appellate Body Report, IV at 22, reproduced in 35 International Legal Materials 626.
58 Ibid.
59 Ibid at 23 and 627 respectively.

The phrases in the *chapeau*, namely, "arbitrary discrimination" and "disguised restriction on international trade" may be read alongside one another. They impart meaning to one another. The kinds of consideration pertinent to deciding whether application of a measure amounts to "arbitrary or unjustifiable discrimination" may also be taken into account in determining the issue of "disguised restriction" on trade. The "fundamental theme", said the Appellate Body, is the purpose and object of the avoidance of abuse or illegitimate use of the exceptions.

The Appellate Body held that the United States had applied its baseline rules in a discriminatory manner that was foreseeable, and could have been avoided. The rules could have been applied in a way that would have avoided discrimination against imported gasoline. The United States did not properly explore such avenues. Hence its conduct exceeded what was necessary for the Panel to fund a violation of Article III.4. The baseline rules, in their application, constituted both "unjustifiable discrimination" and a "disguised restriction" on trade.

WTO Rules and Protection of the Environment

Aware of the political sensitivity of any interpretation of Article XX, the Appellate Body added a rider on the general question of national measures for protection of the environment and WTO rules. The ability of any WTO Member to take measures to protect the environment was *not* at issue. Article XX has provisions designed to allow the expression of important state interests, including protection of human health as well as conservation of exhaustible natural resources. The Appellate Body underlined the fact that Article XX was not amended by the Uruguay Round of Trade Negotiations, and pointed to the express acknowledgment, in the Preamble to the WTO Agreement and the 1994 Ministerial Decision on Trade and Environment of the importance of coordinating policies on trade and the environment.[60]

WTO members have considerable autonomy to determine their environmental policies and the legislation they enact to implement them. Their autonomy is circumscribed, so far as concern WTO, only by the need to respect the requirements of the GATT and the other covered agreements.

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[60] Trade Negotiations Committee, Marrakesh, 14 April 1994.

EVALUATION

The Appellate Body's decision is fully and carefully reasoned. It is clearly a judicial decision and in no sense a compromise settlement. The interpretation of GATT provisions was made in accordance with the prescribed public international law rules of treaty interpretation with an obvious sensitivity to the objects and structures of GATT/WTO. The Panel's reasoning, where defective, was firmly and courteously overruled.

The Appellate Body's approach to Article XX and in particular its introductory clause will be a source of principled guidance to future panels and to the Appellate Body itself. It should also be a helpful guide to national governments and legislative draftsmen grappling with the needs and wishes of their countries to protect legitimate interests while complying with their GATT obligations.

Australia as a medium-sized international trader can take heart from the existence of the new and more juridical dispute settlement procedures in the WTO. Whether Australia is complainant or defendant in future proceedings, the new provisions and procedures indicate that a more rule-based framework has been accepted by WTO members, comprising virtually all major and several minor players on the international trade stage. The closer one approaches to a genuine rule of law system (as distinct from a more informal or more diplomatic framework which leaves greater scope for evasion, gray areas, and failure to accept or comply with adverse panel rulings), the more advantageous the system becomes for a state such as Australia, and for companies and firms exporting from Australia to other WTO members.