

JIEL ARTICLES AND NOTES RELATED TO WTO DISPUTE SETTLEMENT

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The list below is a compilation of articles and notes related to WTO dispute settlement published in volumes 1 through 11 of the *Journal of International Economic Law*. The listed articles cover a broad variety of topics including the main features and design of the WTO dispute settlement system as well as analyses of specific rulings of panels and the Appellate Body. The articles are listed in chronological order. Where available, the abstracts of the articles have been included immediately after the title of the respective article. Readers will find an index to these articles in Volume 12(1) of the *Journal*, 'Subject Index to Volumes 1-11 (1998-2008)' under the heading 'WTO Dispute Settlement'. The full text of the articles can be found at <http://jiel.oxfordjournals.org/archive/>.

- 1) Ernst-Ulrich Petersmann, 'How to Promote the International Rule of Law? Contributions by the World Trade Organization Appellate Review System', 1 JIEL 25 (1998).
- 2) Thomas Cottier and Krista Nadakavukaren Schefer, 'The Relationship between World Trade Organization Law, National and Regional Law', 1 JIEL 83 (1998).
- 3) Peter Van den Bossche, 'World Trade Organization Dispute Settlement in 1997 (Part I)', 1 JIEL 161 (1998).
- 4) Ernst-Ulrich Petersmann, 'From the Hobbesian International Law of Coexistence to Modern Integration Law: the WTO Dispute Settlement System', 1 JIEL 175 (1998).
- 5) Debra P. Steger and Susan M. Hainsworth, 'World Trade Organization Dispute Settlement: the First Three Years', 1 JIEL 199 (1998).
- 6) Joost Pauwelyn, 'Evidence, Proof and Persuasion in WTO Dispute Settlement: Who Bears the Burden?', 1 JIEL 227 (1998).
- 7) Jacques H. J. Bourgeois, 'WTO Dispute Settlement in the Field of Anti-Dumping Law', 1 JIEL 259 (1998).
- 8) Andrew W. Shoyer, 'The First Three Years of WTO Dispute Settlement: Observations and Suggestions', 1 JIEL 277 (1998).

9) Maurits Lugard, 'Scope of Appellate Review: Objective Assessment of the Facts and Issues of Law', 1 JIEL 323 (1998).

10) John H. Jackson, 'Dispute Settlement and the WTO: Emerging Problems', 1 JIEL 329 (1998).

This article briefly examines the developing jurisprudence of the new WTO dispute settlement system as expressed in the Appellate reports of the first three and one-third years. It suggests some tentative generalizations about the Appellate Body approach, including a possible greater spirit of deference to national government regulatory decisions, to allow greater margins of leeway for those decisions than sometimes indicated in first-level panel reports or in later-year GATT panel reports. The author also notes some constitutional dangers of a tendency for the WTO diplomacy to rely too heavily on the dispute system to correct the many ambiguities and gaps in the new trading system Uruguay Round texts.

11) Donna Roberts, 'Preliminary Assessment of the Effects of the WTO Agreement on Sanitary and Phytosanitary Trade Regulations', 1 JIEL 377 (1998).

Sanitary and phytosanitary (SPS) measures that regulate movement of products across international borders are necessary to protect public health or the environment, but may also be used to protect domestic producers from international competition. The recent WTO Agreement on the Application of SPS Measures aims to create a set of multilateral trade rules which allows the legitimate use of trade regulations for health and environmental protection, while disallowing their use for mercantilist regulatory protectionism. This paper examines WTO jurisprudence, negotiated settlements of formal complaints, and unilateral implementation of Agreement's provisions since its entry into force to evaluate whether and how the Agreement has served the interests of the world trading system.

12) Petros C. Mavroidis and Werner Zdouc, 'Legal Means to Protect Private Parties' Interests in the WTO: the Case of the EC New Trade Barriers Regulation', 1 JIEL 407 (1998).

The WTO contract is essentially a government contract with important repercussions on private parties' interests. WTO Members enjoy wide discretion when it comes to regulating the way in which private interests will be represented; the WTO contract itself imposing only an obligation to perform the WTO contract in good faith. In principle, three solutions seem legally possible: WTO Members recognize direct effect to the WTO rules and consequently allow private parties to invoke WTO rules before national courts; WTO Members do not recognize any direct effect on the WTO rules and continue to be the sole judges of whether private parties' interests should be represented before the WTO adjudicating bodies; recently, in the WTO Government Procurement Agreement, the so-called 'challenge procedures' were agreed whereby WTO Members would allow private parties to check whether government behaviour in the field of

government procurement is in conformity with the relevant WTO rules. This paper argues that since the first option is still 'wishful thinking' and the third option is limited, for the time being, strictly to government behaviour, private parties' interests will continue to be represented for some time by governments. Hence, the need to study such instruments and their evolution. We propose a comparative study of the two most elaborate instruments in this respect (the EC and the US instruments) and draw the conclusion that over time they have become more responsive to private parties' concerns but that they can by no means be construed as perfect substitute of the other two options.

13) Jeffrey L. Dunoff, 'The Misguided Debate over NGO Participation at the WTO', 1 JIEL 433 (1998).

Whether private parties and NGOs should participate in the WTO system has recently become one of the most contentious issues in trade law and policy. However, this debate proceeds from the implicit - but mistaken - assumption that these entities currently do not participate in the system. While, as a formal matter, WTO 'legislative' and dispute resolution systems are open only to state actors, in fact private parties already participate extensively in WTO processes. Through discussion of several WTO disputes, including the Kodak-Fuji dispute, this paper demonstrates how the current debate substantially understates the considerable roles that NGOs already play in disputes submitted to the WTO. The claims here are largely positive and descriptive, rather than normative. By identifying and clarifying the roles that private parties currently play, I hope to close the increasing gulf between academic debate and WTO practice, and move the debate over NGO participation to a more fruitful series of inquiries. To this end, I argue that the controversy over NGO participation at the WTO can be understood as a particular instantiation of a larger debate over the roles of non-state actors in the international legal system.

14) Thomas L. Brewer and Stephen Young, 'Investment Issues at the WTO: the Architecture of Rules and the Settlement of Disputes', 1 JIEL 457 (1998).

This paper analyses the treatment of investment issues at the World Trade Organization (WTO), with an emphasis on foreign direct investment (FDI). The investment-related provisions of four agreements are evaluated: the agreement on Trade Related Investment Measures (TRIMs), the General Agreement on Trade in Services (GATS), the agreement on Trade Related Intellectual Property Rights (TRIPs), and the agreement on Subsidies and Countervailing Measures (SCMs). In fact only the GATS has significantly expanded coverage of FDI issues directly, though with many sectoral exceptions in the schedules of national commitments. An analysis of 115 dispute cases that entered the WTO dispute settlement process during 1995-97, plus 325 cases at the GATT during 1948-94, indicates that although investment issues are receiving more attention in the WTO than in the GATT, there have thus far been relatively few investment issues explicitly raised in WTO disputes. A consideration of the prospects for the evolution of investment issues at the WTO during the next several years suggests that they will receive increasing attention, especially within the context of reviews of the TRIMs agreement and the GATS.

15) Peter Van den Bossche, ‘WTO Dispute Settlement in 1997 (Part II)’, 1 JIEL 479 (1998).

16) Jerome H. Reichman, ‘Securing Compliance with the TRIPS Agreement After US v India’, 1 JIEL 585 (1998).

The different developmental circumstances of the industrialized and developing countries call for different approaches to intellectual property rights protection. While increasingly high levels of protection may (or may not) be appropriate to the industrialized economies, developing country economies are more likely to benefit from strategies and rules which encourage building upon existing stocks of knowledge. TRIPS Agreement standards provide sufficient 'wiggle room' to allow developing countries to pursue pro-competitive strategies, while still acting consistently with the TRIPS Agreement requirements of national and most favoured nation treatment. The decision of the WTO Appellate Body in the India-Mailbox case was a critical step in affirming the WTO-consistency of pursuing national and regional policies which take advantage of the absence of strict harmonization of IPRs standards at the worldwide level. The India-Mailbox decision suggests that the WTO will accord substantial deference to national and regional rules which manifest good faith compliance with the basic standards of the TRIPS Agreement. Developing countries that adopt pro-competitive IPRs-related strategies may move faster along the technology curve than countries that follow more protectionist strategies.

17) G. Axel Desmedt, ‘Hormones: “Objective Assessment” and (or as) Standard of Review’, 1 JIEL 695 (1998).

In the Appellate Body report on EC measures affecting meat and meat products, commonly referred to as the *Hormones* case, some of the findings of the Appellate Body related to the appropriate standard of review that panels must observe when evaluating the legality of a WTO member state measure that is in dispute. As this was the first Appellate Body ruling on the issue of standard of review, it could be an important indicator of the approach panels may take in the future to this issue.

18) Marco C. E. J. Bronckers and John H. Jackson, ‘Outside Counsel in WTO Dispute Processes’, 2 JIEL 155 (1999).

19) Peter D. Ehrenhaft, “‘Right to Counsel’ in WTO Dispute Settlement Proceedings: a 1998 Resolution of the American Bar Association’, 2 JIEL 159 (1999).

20) Ernst-Ulrich Petersmann, 'Dispute Settlement in International Economic Law: Lessons for Strengthening International Dispute Settlement in Non-Economic Areas', 2 JIEL 189 (1999).

This article begins with a discussion of negotiation theories and the need for a comprehensive theory of effective international adjudication and then examines why compulsory international adjudication is more widely accepted in international economic law and in related regional integration law than in non-economic areas of international law. The article compares the relevant dispute settlement mechanisms and offers economic, political and legal reasons why legal remedies and international adjudication tend to be more effective in international economic law than in other areas of international law. Lessons are drawn from the 'international economic law revolution', and concrete proposals are made for strengthening international dispute settlement mechanisms in non-economic areas, notably in UN law. The International Court of Justice (ICJ) and other UN dispute settlement mechanisms (notably in UN human rights covenants) risk coming under increasing criticism unless they protect human rights and rule of law more effectively. The power-oriented UN legal system requires far-reaching constitutional reforms.

21) Werner Zdouc, 'WTO Dispute Settlement Practice Relating to the GATS', 2 JIEL 295 (1999).

This paper discusses how the GATS adapts the different stages of the WTO dispute settlement procedures as foreseen by the Dispute Settlement Understanding (DSU) to trade in services. It deals with (1) bilateral and multilateral consultations, (2) causes of action in the adjudicative stage, (3) implementation and enforcement under surveillance by the DSB, and (4) special procedures for particular service sectors. It also explains the nine violation cases that were initiated between 1995 and 1998. Taking the *EC - Bananas* case as an example, the paper then discusses those legal issues and problems that are also likely to arise in future cases under the GATS. A discussion of the national treatment clause follows, addressing in particular the reach of *de jure* and *de facto* discrimination under the GATS, as well as the irrelevance of the 'aims and effects' of national regulation, and evidentiary problems arising in GATS dispute settlement practice. The final section deals with the reach of *de jure* and *de facto* discrimination under the GATS MFN treatment clause.

22) Matthijs Geuze and Hannu Wager, 'WTO Dispute Settlement Practice Relating to the TRIPS Agreement', 2 JIEL 347 (1999).

This paper provides some statistical information on the 16 TRIPS disputes initiated to date and discusses the Panel and Appellate Body Reports issued and adopted to date. Some of the procedural issues that have arisen are addressed, but the main focus is on the interpretation of the TRIPS provisions in question and the interpretative issues that the Panels and the Appellate Body were faced with, and how the Panels and the Appellate Body approached the questions raised.

Information is also provided about a pending panel procedure, the mutually agreed solutions reached to date and the pending consultations. Finally, dispute prevention under the TRIPS Agreement and the role of the review of implementing legislation in the Council for TRIPS in this connection is addressed.

23) Hyun Chong Kim, 'The WTO Dispute Settlement Process: a Primer', 2 JIEL 457 (1999).

24) Arthur E. Appleton, 'Shrimp/Turtle: Untangling the Nets', 2 JIEL 477 (1999).

The Appellate Body's decision in the *Shrimp/Turtle* case has important political, systemic and procedural implications for the WTO and its dispute settlement system. From a political perspective this decision satisfies a public relations objective - reducing the distrust of the WTO which exists in the environmental community. This task is accomplished without seriously compromising the trade rights guaranteed under the WTO Agreement. From the systemic and procedural perspective, this decision clarifies certain points concerning the legal requirements of a notice of appeal and the right of non-members to make submissions to panels. However, the decision also raises questions concerning the scope of the Appellate Body's review powers, the manner in which GATT Article XX(g) and chapeau should be interpreted, the authority of the Appellate Body to consider non-member submissions, and possible inadequacies in the Dispute Settlement Understanding.

25) Natalie McNelis, 'Success for Private Complainants under the EU's Trade Barriers Regulation', 2 JIEL 519 (1999).

26) Bernhard Jansen and Maurits Lugard, 'Some Considerations on Trade Barriers Erected for Non-Economic Reasons and WTO Obligations', 2 JIEL 530 (1999).

The issue discussed in this note concerns the jurisdictional limitation of Article XX GATT 1994. The authors develop four distinct categories of trade barriers erected to protect non-economic interests, so as to assess their acceptability under WTO rules. The first category concerns barriers put in place because of reasons of public health or the environment *within* the country taking the measure, i.e. based on the territoriality principle. The second category concerns barriers implemented with the sole objective of 'convincing' or coercing a foreign government to change its policy in a given sector, i.e. 'extraterritorial' measures. The third category concerns barriers raised because of environmental concerns outside the country taking the measure, but where a link with the country's territory can be established (for example, when a country implements an import ban so as to save a highly migratory species). Finally, the authors discuss whether a fourth category could be envisaged - and justified under Article XX GAT 1994 - where there is no obvious territorial link with the country imposing the trade barrier, but where the measure would be considered necessary to address an environmental concern elsewhere: could such environmental concern justify the application of a 'universal jurisdiction'?

27) Marco C. E. J. Bronckers, 'Better Rules for a New Millennium: a Warning Against Undemocratic Developments in the WTO', 2 JIEL 547 (1999).

The theme of this article is that the quality of WTO rule-making needs to improve, particularly as the WTO expands into new areas in the upcoming Millennium Round. The quality of existing WTO rules is deficient. This is illustrated with examples taken from the WTO agreements on intellectual property and telecommunications services. Furthermore the article shows that, in view of institutional constraints, it is particularly difficult within the WTO to clarify or replace inadequate rules. Now that the WTO's dispute settlement machinery is so effective, rule-makers may be tempted to leave the resolution of difficult problems to litigation. This, however, leads too easily to undemocratic surprises and, therefore, a weakening of the organization. The article concludes with recommendations for the negotiators of the new Round to ensure the adoption of better rules.

28) Reinhard Quick and Andreas Blüthner, 'Has the Appellate Body Erred? An Appraisal and Criticism of the Ruling of the WTO *Hormones* Case', 2 JIEL 603 (1999).

In the *Hormones* case the Appellate Body has sharply criticized the legal analysis of the lower panels, upholding seven findings, reversing six and modifying four. This article looks critically at the Appellate Body's interpretation of certain issues and concludes that its ruling contains a number of legal weaknesses. Not only does the Appellate Body creatively interpret the law without giving a clear reasoning for such interpretation (burden of proof), but also leaves certain issues undecided (the relationship between general and specific obligations of the SPS Agreement as well as the relationship between the GATT 1994 and the SPS Agreement). With its broad interpretation of risk assessment and its insistence on the notion of judicial economy, the Appellate Body fails to serve its fundamental role in assisting the DSB to achieve a satisfactory settlement of the matter.

29) Joost Pauwelyn, 'The WTO Agreement on Sanitary and Phytosanitary (SPS) Measures as Applied in the First Three SPS Disputes: *EC - Hormones*, *Australia - Salmon* and *Japan - Varietals*', 2 JIEL 641 (1999).

One of the new WTO agreements that panels and the Appellate Body had to deal with in a number of recent disputes is the Agreement on Sanitary and Phytosanitary (SPS) Measures. This article focuses on the legal principles of the SPS Agreement as interpreted and established by Appellate Body and panel jurisprudence in the two most prominent cases under the SPS Agreement, the *EC - Hormones* case and the *Australia - Salmon* case, as well as the recently concluded *Japan - Varietals* case. Substantive rights and obligations such as scope of application, scientific evidence, risk assessment and the factors to be looked at in assessing risk, provisional measures, the acceptable level of risk for WTO Members, non-discrimination under Articles 2.3 and 5.5 SPS, and measures in the presence of international standards are examined. The above-mentioned cases also involved a number of procedural issues with particular relevance to disputes on SPS measures, such as the panel's terms of reference, the burden of proving whether

a risk exists, the extent of a panel's investigation and the role of scientific experts. The status of implementation of reports is also briefly addressed.

30) Kim Van der Borgh, 'The Advisory Center on WTO Law: Advancing Fairness and Equality', 2 JIEL 723 (1999).

31) William J. Davey, 'The WTO Dispute Settlement System', 3 JIEL 15 (2000).

William J. Davey served as the Director of the Legal Affairs Division of the World Trade Organization between 1995 and 1999. In this note he reviews the first four years of WTO dispute settlement and gives some of his preliminary judgements about the new WTO dispute procedures.

32) Donald M. McRae, 'The WTO in International Law: Tradition Continued or New Frontier?', 3 JIEL 27 (2000).

The question of the relationship between international law and international trade law has taken on a greater significance with the development of the legal regime of the WTO. Although in a formal legal sense the WTO differs little from other international organizations, its legal regime is built on assumptions that are often at variance with those underlying the traditional sovereign state model. Moreover, the WTO dispute settlement mechanism is playing an active role in the development of the substantive and procedural content of international law. The contributions of this process include clarification of the rules relating to treaty interpretation, and the development of rights of access for non-state entities. These developments have implications for some of the assumptions on which international law traditionally has been based.

33) Mauricio Salas and John H. Jackson, 'Procedural Overview of the WTO EC – Banana Dispute', 3 JIEL 145 (2000).

This note provides a road-map to the many decisions triggered by the EU banana regulation at three levels: GATT/WTO procedures, the European Court of Justice, and German Courts.

34) Young Duk Park and Barbara Eggers, 'WTO Dispute Settlement 1995-99: a Statistical Analysis', 3 JIEL 193 (2000).

35) Julio Lacarte-Muró and Petina Gappah, 'Developing Countries and the WTO Legal and Dispute Settlement System: a View from the Bench', 3 JIEL 395 (2000).

This article intends to briefly outline the role of developing countries in WTO dispute settlement as seen from the bench, that is, from the Appellate Body. More specifically, it looks at the participation of developing country Members in appellate proceedings, their contribution to the development of substantive and procedural WTO legal issues, and the provisions serving their special interests.

36) Arvind Subramanian and Jayashree Watal, 'Can TRIPS Serve as an Enforcement Device for Developing Countries in the WTO?', 3 JIEL 403 (2000).

Developing countries assert that the limited size of their markets renders conventional trade retaliatory actions by them ineffective. The complaint is that they have no effective mechanism for forcing developed countries into compliance with WTO obligations that have market access consequences for developing countries. This paper proposes a design for the use of TRIPS as a retaliatory weapon in WTO trade disputes that would overcome some of these difficulties. The proposal has many advantages: it is feasible, effective, legal, and has certain attractive attributes that are absent in conventional trade retaliation. The very presence of the threat of such retaliatory action in domestic intellectual property legislation could lead to improved compliance by developed countries.

37) Elisabetta Montaguti and Maurits Lugard, 'The GATT 1994 and Other Annex 1A Agreements: Four Different Relationships?', 3 JIEL 473 (2000).

Interpretative criteria and other legal tools employed in treaty interpretation are not always sufficient to resolve questions regarding the relationship between the different WTO Agreements that form a 'single package' and which entered into force on the same day. This is particularly true with respect to the various agreements relating to trade in goods. The authors analyze four possible relationships between provisions of the GATT 1994 and provisions of the other Annex 1A Agreements that have so far been identified and developed by panels and the Appellate Body: *conflict*, *express derogation*, *overlap* and *complementarity*.

38) Sylvia A. Rhodes, 'The Article 21.5/22 Problem: Clarification Through Bilateral Agreements?', 3 JIEL 553 (2000).

To date, issues of non-compliance and retaliation have arisen in only a handful of WTO dispute settlement cases. In these cases, the parties have confronted procedural issues stemming from the lack of clarity of Articles 21.5 and 22 of the Dispute Settlement Understanding. A draft DSU text has been proposed, but not adopted. Until these provisions are clarified, WTO Members continue

to operate under the existing vague rules. Faced with implementation problems, the parties to disputes have resorted to bilateral agreements governing the procedures of their dispute. This note surveys these bilateral agreements, with a view to identifying the different solutions developed to resolve the interpretation of Article 21.5 and its relationship to Article 22. It focuses on three aspects of these agreements, namely, sequencing, appeal, and procedural objections.

39) Rambod Behboodi, “Should” means “Shall”: a Critical Analysis of the Obligation to Submit Information under Article 13.1 of the DSU in the Canada – Aircraft Case’, 3 JIEL 563 (2000).

In the case *Canada - Measures Affecting the Export of Civilian Aircraft*, the Appellate Body found that disputing parties had a legal obligation to submit information and documents requested of them by panels. The Appellate Body based this finding on the third sentence of Article 13.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). The Appellate Body further found that panels have a right to draw adverse inferences when requests for the production of documents and information are not heeded. This finding was based on the procedure set out in Annex V of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), even though Annex V is expressly restricted to proceedings under Article 7 of the SCM Agreement. This article describes and analyses the findings of the Appellate Body. It argues that they are consistent with neither the text of the DSU nor the intentions of the drafters. Moreover, the Appellate Body's analysis of the 'duty' of disputing parties to submit information and documents to arbitral tribunals, and the right of such tribunals to draw adverse inferences, is far broader than those provided in public international law. The article concludes with some institutional and systemic concerns triggered by the new case law.

40) Arthur E. Appleton, ‘Amicus Curiae Submissions in the Carbon Steel Case: Another Rabbit from the Appellate Body’s Hat?’, 3 JIEL 691 (2000).

In the *Carbon Steel* decision, the Appellate Body finally explains its legal authority to accept *amicus curiae* submissions. From a legal perspective this explanation is neither entirely satisfactory nor convincing, raising questions concerning the manner in which the Appellate Body exercises the authority vested in it by the Members. Despite possible misgivings among the Members, because of the automaticity principle, *amicus curiae* submissions are here to stay. There is therefore a need to establish rules and a timetable governing the Appellate Body's treatment of such submissions.

41) William J. Davey, ‘Has the WTO Dispute Settlement System Exceeded its Authority? A Consideration of Deference Shown by the System to Member Government Decisions and its Use of Issue-Avoidance Techniques’, 4 JIEL 79 (2001).

A systematic study of 38 adopted decisions of the Appellate Body and Panels since the inception of the WTO Dispute Settlement System leads to the conclusion that the WTO Dispute Settlement

System remains generally within the boundaries of its authority. With a few limited exceptions, the system has shown sufficient deference to legitimate policy decisions made by WTO Member Governments. Further, US and international law rules on techniques used to dispose of cases (or issues within cases) where a decision seems unnecessary or inappropriate could be used more frequently with regard to the timing of consideration of issues (mootness and ripeness) as well as the exercise of judicial economy.

42) Meinhard Hilf, 'Power, Rules and Principles – Which Orientation for WTO/GATT Law?', 4 JIEL 111 (2001).

Are principles just 'phony concepts' or the very heart of every legal system? The purpose of this article is to inquire to what extent one might describe the WTO system as having triple-jumped from a power-oriented system to a rule-based system and finally to a principle-oriented system. This comparison should not be taken literally. Of course, there have not been 'jumps'. In reality there has been a continuing process in which power, rules, and principles evolved gradually. What are these principles, which also were referred to in the Preamble of the Agreement Establishing the World Trade Organization as basic principles underlying the multilateral trading system? This article searches Appellate Body reports in an effort to identify the use of principles. It first looks at eight 'internal' principles, e.g. trade liberalization, non-discrimination, sovereignty, and sustainable development, derived from WTO Agreements and focuses then on 'external' principles derived from public international law. Finally, the article discusses the proper role and ranking of principles in the WTO legal system and suggests that these should be balanced by using the principle of proportionality as applied by the International Court of Justice or extensively by the European Court of Justice.

43) Allan Rosas, 'Implementation and Enforcement of WTO Dispute Settlement Findings: an EU Perspective', 4 JIEL 131 (2001).

The EU has no reason to be disappointed with the dispute settlement system created by the Uruguay Round, with regards to both the system itself and the actual outcome of disputes settled. But all WTO Members have a common interest in improving the system, including the question of implementation and enforcement. The article discusses various alternatives for enhancing implementation and enforcement, including the possibility to strengthen the rights of private parties and to shorten and re-design the deadlines for implementation and compliance panel procedures. The article concludes that while in the present global trade system, the intergovernmental character of the WTO must be preserved, there is room for some shortening of deadlines, for making the panel system more permanent and professional, and for increasing the resources for the Appellate Body. Finally, the article mentions the possibility of creating a system of compulsory compensation, as an alternative to the present system of suspension of concessions.

44) Jacques H. J. Bourgeois, ‘Some Reflections on the WTO Dispute Settlement System from a Practitioner’s Perspective’, 4 JIEL 145 (2001).

This brief article advocates the establishing of a standing or standing WTO Dispute Settlement panels. It also draws the attention to some deficiencies of a procedural nature, i.e. on standing, preliminary rulings, scope of disputes, judicial economy and appeals, and review of factual findings on appeal. It suggests improvements and raises the question whether interim relief should be provided.

45) Gabrielle Marceau and Matthew Stilwell, ‘Practical Suggestions for Amicus Curiae Briefs before the WTO Adjudicating Bodies’, 4 JIEL 155 (2001).

The evolution of the multilateral trading system, and the creation of the World Trade Organization, has heightened calls by non-governmental organizations to participate in decisions about trade policy, including in WTO dispute settlement as *amicus curiae*, or 'friends of the court'. *Amicus* briefs have now been received by a number of WTO panels and the Appellate Body, raising an outcry from many WTO Members, and calls by others for the creation of criteria to guide their use. This note explores the practical implications of *amicus* briefs, and suggests criteria for their use in light of current WTO practice, the goals of the WTO and its dispute settlement mechanism, and the practice of other international courts and tribunals. It commences by examining the main WTO disputes in which *amicus* briefs have been received, and the varying responses of WTO adjudicating bodies. It then examines the approach of other international fora - including the International Tribunal for the Law of the Sea - to involvement of non-parties. Drawing on these experiences, it suggests that WTO panels and the Appellate body should weigh both substantive criteria (relating, for example, to the character of the *amici*, the nature of its submission, and the characteristics of the case) and procedural criteria (relating to issues such as timing and format) when determining whether, and if so, how to use *amicus* briefs. The note also identifies the mechanisms that may be used to establish criteria to ensure *amicus* briefs promote predictability and procedural fairness in WTO dispute settlement.

46) Natalie McNelis, ‘The Role of the Judge in the EU and WTO: Lessons from the BSE and Hormones Cases’, 4 JIEL 189 (2001).

47) Young Duk Park and Georg C. Umbrecht, ‘WTO Dispute Settlement 1995-2000: a Statistical Analysis’, 4 JIEL 213 (2001).

48) Axel Desmedt, ‘Proportionality in WTO Law’, 4 JIEL 441 (2001).

49) Marco M. Slotboom, ‘Do Different Treaty Purposes Matter for Treaty Interpretation? The Elimination of Discriminatory Internal Taxes in EC and WTO Law’, 4 JIEL 557 (2001).

The comparison made in this contribution between Article III:2 GATT and Article 90 EC indicates that different treaty purposes need not matter that much, if the text and purpose of individual provisions are similar. Indeed, the different objectives and purposes of the GATT and the EC have not led to noticeably different interpretations of the similarly worded obligations on WTO Members and EC Member States concerning the elimination of discriminatory internal taxes in Article III:2 GATT and Article 90 EC. This finding is in line with Article 31 (1) of the Vienna Convention on the law of treaties, which puts emphasis on the relevance of the wording of treaty provisions. The European Court of Justice (ECJ), however, pays more attention to the object and purpose of the EC Treaty when interpreting a provision of that treaty. Would one have followed the line of reasoning of the ECJ, one might therefore have expected another conclusion.

50) John H. Jackson and Patricio Grane, ‘The Saga Continues: an Update on the Banana Dispute and its Procedural Offspring’, 4 JIEL 581 (2001).

The regulation adopted by the European Commission on 2 May 2001 may herald the end of the long-standing banana dispute. In its wake, the saga has left a long trail of panels, arbitration, and procedural battles. This article completes the ‘roadmap’ of the banana dispute and its progeny, by reporting on the following distinct matters: (i) US – Section 301–310 of the Trade Act of 1974; (ii) US – Import Measures on Certain Products from the EC; (iii) Ecuador – Recourse to Article 22.2 and 22.7 of the DSU (authorization to suspend concessions); (iv) Section 306 of the Trade Act of 1974, as amended by Section 407 of the Trade and Development Act of 2000 (carousel provision). It also provides a table that lists all the disputes that have been initiated since 1993 and that are related to the banana dispute.

51) Patricio Grané, ‘Remedies under WTO Law’, 4 JIEL 755 (2001).

This article discusses the nature of the remedies that are available to Members of the WTO under the dispute settlement mechanism introduced by the Dispute Settlement Understanding. It will argue that the rules and procedures governing the settlement of disputes under the WTO have not greatly expanded or modified the jurisdictional powers of panels when it comes to recommendations of remedial action, *vis-à-vis* the powers once exercised by panels under the GATT system. It will also show that the performance of the primary rule through the ‘withdrawal of the measures concerned where these are found to be inconsistent’, is a prospective remedy and the primary form of reparation under the WTO dispute settlement system. It lists those instances in GATT and WTO case law where panels have braved recommendations that go beyond a mere bringing into conformity or withdrawal of the measure. To conclude, the article looks at what the future may hold and considers how much further WTO law could or should go in the field of remedial action, drawing to the extent possible from the notions of state responsibility in general international law.

52) Georg C. Umbricht, ‘An “Amicus Curiae Brief” on Amicus Curia Briefs at the WTO’, 4 JIEL 773 (2001).

This article first analyses the nature of the institution of amicus curiae. Next, the article outlines different options for tackling the amicus question by the WTO dispute settlement bodies and highlights the complexities thereby entailed, drawing a distinction between policy arguments and legal arguments. If it is not through a package deal at a ministerial conference, it is less likely that actions by the political bodies of the WTO will succeed. Finally, the author concludes that amicus curiae briefs, for systemic reasons, should in the future only be allowed at the panel level, and not at the appellate level. The article further suggests that, ideally, the initial submissions of the parties should be made public *ab initio* in order to allow the best possible exchange with non-governmental experts and views.

53) Michael Lennard, ‘Navigating by the Stars: Interpreting the WTO Agreements’, 5 JIEL 17 (2002).

54) Young Duk Park and Marion Panizzon, ‘WTO Dispute Settlement 1995-2001: a Statistical Analysis’, 5 JIEL 221 (2002).

55) Yuji Iwasawa, ‘WTO Dispute Settlement as Judicial Supervision’, 5 JIEL 287 (2002).

This article distinguishes ‘judicial supervision’ and ‘dispute settlement’. Judicial supervision is a mechanism to control and secure compliance of international obligations undertaken by States by judicial means. Its notable feature is that States which have not been injured directly may initiate judicial proceedings for the purpose of putting an end to violations of international obligations by another State. This article compares the dispute settlement procedures in the WTO with those in the ICJ, and demonstrates that the WTO procedures have the character of judicial supervision. It also focuses on the position assigned to third States by the WTO and the ICJ, and shows that the WTO allows participation of third States in its adjudicatory process much more liberally than the ICJ. A WTO member can bring a complaint to the WTO, even if it has suffered no injury in a concrete and material sense. Multiple disputes involving more than two States are a regular feature in the WTO. Third party intervention is virtually automatically allowed. It could be suggested that the WTO allows participation of third States in its adjudicatory process liberally because compulsory jurisdiction has been achieved and because the WTO adjudicatory procedures have the character of judicial supervision. The WTO and ICJ procedures are both judicial, but they differ considerably in character.

56) Chi Carmody, ‘Remedies and Conformity under the WTO Agreement’, 5 JIEL 307 (2002).

57) Jason E. Kearns and Steve Charnovitz, ‘Adjudicating Compliance in the WTO: a Review of DSU Article 21.5’, 5 JIEL 331 (2002).

This article provides an analytical overview of one of the most important provisions in the WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes. That is Article 21.5 which provides for a review of whether governmental measures taken to comply do in fact achieve compliance with WTO rules. Part I discusses the purposes that Article 21.5 serves and how they relate to the larger objectives of dispute settlement. Part II presents a table summarizing the Article 21.5 caselaw through February 2002, and then draws a few conclusions from that practice as to how well Article 21.5 is working. Part III discusses some procedural issues that have arisen in the new case law. Among the questions examined are which governments have standing to invoke Article 21.5 and what limits exist on raising new claims. The article concludes that Article 21.5 compliance panels and the Appellate Body are developing an innovative body of law that will serve a growing role in the cooperative management of the multilateral trading system.

58) Santiago M. Villalpando, ‘Attribution of Conduct to the State: How the Rules of State Responsibility May Be Applied within the WTO Dispute Settlement System’, 5 JIEL 393 (2002).

The present article identifies the tests that make it possible to determine whether a breach of obligations under the WTO agreements is a conduct of the Member and therefore entails its responsibility under international law. It examines the relevant provisions of the WTO agreements and the case law of the dispute settlement bodies in light of the principles of the law of State responsibility codified by the UN International Law Commission. Special consideration is given to the issues related to the conduct of organs of the State, territorial units, para-statal entities (including State trading enterprises) and individuals or private corporations.

59) Sharif Bhuiyan, ‘Mandatory and Discretionary Legislation: the Continued Relevance of the Distinction under the WTO’, 5 JIEL 571 (2002).

There is a considerable body of GATT/WTO dispute settlement practice which stands for the principle that legislation mandating a violation of WTO obligations can be WTO-incompatible, whereas legislation that merely gives the executive a discretion to violate those obligations cannot, by itself, be WTO-incompatible. However, in *US – Section 301* the Panel in effect held that under certain circumstances discretionary legislation can violate WTO obligations. As a result, considering the significance of the distinction between mandatory and discretionary legislation in the WTO context may be a useful exercise. This paper examines the GATT/WTO case law on mandatory/discretionary legislation and explains why discretionary legislation may sometimes be WTO-inconsistent. It then discusses the implications of subjecting at least some discretionary laws to WTO discipline. However, requiring WTO-consistency of all discretionary laws may not be realistic. Accordingly, the paper also explores ways in which panels may, where appropriate, defer to discretionary legislation of Members. It concludes by noting that the

distinction will continue to be relevant under the WTO given that legislation mandating a WTO-inconsistency will undoubtedly be regarded as WTO-incompatible. However, the WTO-compatibility of discretionary legislation will have to be addressed by the panels on a case-by-case basis.

60) Qingjiang Kong, 'Can the WTO Dispute Settlement Mechanism Resolve Trade Disputes Between China and Taiwan?', 5 JIEL 747 (2002).

Following China's accession to the WTO, Taiwan joined the trading body smoothly. This was believed to present a bright prospect for the trade relations between China and Taiwan, because, *inter alia*, the WTO Dispute Settlement Mechanism is supposed to facilitate and resolve trade disputes among members. However, the reality does not permit to unfold such a rosy picture. As illustrated by what both Beijing and Taipei have done since their accession, they seem unprepared to treat each other in a way as required by the WTO Agreement, which suggests prospective disputes across the Taiwan Straits. Moreover, the WTO Dispute Settlement Mechanism might be helpless or, at least, not as effective as it should be when it comes to the cross-straits trade disputes. As Beijing and Taipei appear to be constantly obsessed with political concerns that override trade considerations, both parties are likely to politicize the use of the Dispute Settlement Mechanism at the cost of effectiveness as well as the credibility of the procedures. The international trade community should advisably help both Beijing and Taipei foster a common approach to the WTO Dispute Settlement Mechanism.

61) John Greenwald, 'WTO Dispute Settlement: an Exercise in Trade Law Legislation?', 6 JIEL 113 (2003).

62) James P. Durling, 'Deference, but Only When Due: WTO Review of Anti-Dumping Measures', 6 JIEL 125 (2003).

63) Richard O. Cunningham and Troy H. Cribb, 'Dispute Settlement Through the Lens of 'Free Flow of Trade': a Review of WTO Dispute Settlement of US Anti-Dumping and Countervailing Duty Measures', 6 JIEL 155 (2003).

64) William J. Davey, 'The Case for a WTO Permanent Panel Body', 6 JIEL 177 (2003).

65) Thomas Cottier, 'The WTO Permanent Panel Body: a Bridge too Far?', 6 JIEL 187 (2003).

66) Andrew W. Shoyer, ‘Panel Selection in WTO Dispute Settlement Proceedings’, 6 JIEL 203 (2003).

If perception is reality, it is never more so than in the process in which WTO Members and the WTO Secretariat engage when selecting panelists to serve in dispute settlement proceedings. In the excellent paper that appears elsewhere in this volume, Professor Davey makes the case for a WTO permanent panel body. But, as the nursemaid Buttercup observes (rather defensively, as the plot of *Pinafore* develops), appearances can be deceiving. And notwithstanding the flaws fairly noted by Professor Davey, the flexibility of the current *ad hoc* selection system serves to address one of the key objectives of a party to a WTO panel proceeding – to compose a panel that appears likely to rule in its favor – better than would a permanent panel body. Although they may reform certain elements of the WTO dispute settlement mechanism as part of the Doha Development Agenda, Members should not be expected to discard this flexibility (what Professor Davey refers to as ‘party control’) easily. Panel composition under current procedures is a high-stakes game that, when played well, can benefit both sides of the dispute and the overall WTO system. What follows is a brief examination of the current practice, and a discussion of the case for preserving the flexibility of the current *ad hoc* system.

67) Jacques H. J. Bourgeois, ‘Comment on a WTO Permanent Panel Body’, 6 JIEL 211 (2003).

The task of commenting usefully on Professor Davey's ‘The Case for a WTO Permanent Panel Body’ is not an easy one. He speaks with the authority of one that, in his former capacity of Director of the WTO Legal Affairs Division, has in fact had a major role in selecting panelists as a result of the frequent failure of parties to agree on a slate of panelists, and has followed closely on the ground the functioning of panels under the new WTO dispute settlement system. Moreover, a commentator is expected to disagree so as to provoke a debate. This commentator happens to share Professor Davey's overall assessment that the permanent panel body proposal does have sufficient benefits to make it worth going forward. So, these comments are ‘concurring’ rather than ‘dissenting’. I will deal first with the potential advantages and then with the potential disadvantages, ending with a brief concluding remark.

68) Michael Cartland, ‘Comment on a WTO Permanent Panel Body’, 6 JIEL 214 (2003).

69) Seung Wha Chang, ‘Comment on a WTO Permanent Panel Body’, 6 JIEL 219 (2003).

Recently, the European Communities (“EC”) proposed to establish a permanent panel, as set forth in TN/DS/W/1 and TN/DS/W/7. In 2000, Professor William Davey, former Director of the WTO Legal Affairs Division, already suggested a reform of the current *ad hoc* panelist system to

a “Permanent Panel Body”.¹ Both the EC and Professor Davey point out several problems of the current system and cautiously suggest that establishing a permanent panel can provide a reasonable solution to such problems. Assuming that in reality neither system can be a perfect model for the WTO dispute settlement, it is necessary to evaluate which one can better serve the goal of the WTO dispute settlement mechanism. I basically would support the move toward a permanent panel. Given Professor Davey’s thorough analysis of advantages and disadvantages of this reform, this short comment touches upon only some aspects, which were not addressed or were under-addressed in his article or the recent EC proposal. This comment is organized as follows: first, from the perspective of a lawyer serving as a WTO panelist/arbitrator on several occasions, this comment will highlight some inherent problems underlying the ad hoc panelist system. Then, while supporting a proposal to establish a permanent panel, this comment will propose a different approach as to how the WTO can select permanent panelists. Lastly, this comment critically evaluates some alternative proposals for reforming the panel system.

70) Luzius Wasescha, ‘Comment on a WTO Permanent Panel Body’, 6 JIEL 224 (2003).

The WTO *today* covers trade in goods, agriculture, textiles and services; subsidies; dumping; intellectual property and public procurement; and it has 144 members. *Tomorrow* it will likely cover additional issues such as investment, competition, trade facilitation and perhaps others, and will have around 165 members (including Russia, Saudi Arabia, Uzbekistan and Vietnam). This will lead to an increased number of disputes, more complex issues and an increase of dispute cases among more different trading partners. *Today*, coherence between the WTO and other international organizations involves coordination with the World Intellectual Property Organization, the United Nations Conference on Trade and Development, the International Monetary Fund, the World Bank and the United Nations Environmental Program. *Tomorrow*, there will be more international agreements in non-trade areas having an impact on trade. This will lead to an increased potential for conflicts of a new type. Given the foregoing developments and the fact that the Uruguay Round created a strong, semi-professional Appellate Body, which has led to an imbalance between panels and AB, there are strong reasons for considering reforms to the panel system. In the remainder of this comment, I consider the validity of the criticisms made of the current panel system and possible alternative reforms.

71) Julio Lacarte, ‘Comment on a WTO Permanent Panel Body’, 6 JIEL 227 (2003).

72) Frieder Roessler, ‘Comment on a WTO Permanent Panel Body: the Cobra Effects of the WTO Panel Selection Procedures’, 6 JIEL 230 (2003).

¹ William J. Davey, ‘A Permanent Panel Body for WTO Dispute Settlement: Desirable or Practical?’ in Daniel L.M. Kennedy & James D. Southwick (eds.), *The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec* (Cambridge: Cambridge University Press 2002) 496-527.

73) Ernst-Ulrich Petersmann, ‘WTO Negotiators Meet Academics: the Negotiations on Improvements of the WTO Dispute Settlement System’, 6 JIEL 237 (2003).

On 13–14 September 2002, the European University Institute in Florence sponsored – thanks to the financial support from British Petroleum (BP) – an international workshop on the current negotiations in the World Trade Organization (WTO) on improvements and clarifications of the WTO's Dispute Settlement Understanding (DSU). The negotiating proposals submitted so far to the DSB in Special Session can be grouped into eight different categories. This short conference report, written by the workshop organizer, begins with a brief introduction to the importance of the law of international organizations for improving the political and legal methods for the international prevention and settlement of disputes. Subsequently, the report summarizes the arguments made during the discussions on the various negotiating proposals, yet without summarizing the eight published conference reports and without disclosing the identity of WTO negotiators in order to respect the fact that their statements were made on a personal basis.

74) Kara Leitner and Simon Lester, ‘WTO Dispute Settlement 1995-2002: a Statistical Analysis’, 6 JIEL 251 (2003).

75) Richard H. Steinberg and Timothy E. Josling, ‘When the Peace Ends: the Vulnerability of EC and US Agricultural Subsidies to WTO Legal Challenge’, 6 JIEL 369 (2003).

Article 13 of the WTO Agreement on Agriculture, known as the ‘Peace Clause’, precludes most WTO dispute settlement challenges against a country that is complying with the Agreement's liberalization commitments – until 1 January 2004, when the Peace Clause will expire. This article evaluates the strength of the main legal theories likely to be used in challenges to EC and US agricultural subsidies after expiry of the Peace Clause, and then employs economic techniques (regression analysis and equilibrium modeling) to meaningfully apply the soundest legal theories to economic data about agriculture trade. We conclude that when the Peace Clause expires, many commodity-specific EC and US agricultural subsidies will be vulnerable to legal challenge under Articles 6.3(a)–(c) and 6.4 of the WTO Agreement on Subsidies and Countervailing Measures. The remedy would require that such subsidies be withdrawn or that appropriate steps be taken to remove their adverse effects. Non-subsidizing developing countries can be expected to bargain in the shadow of this legal vulnerability, demanding that the Community and the United States commit to further subsidy reductions and a shift toward tariffs-and-decoupled-payments systems, in exchange for extension of the Peace Clause.

76) Gavin Goh and Andreas R. Ziegler, ‘Retrospective Remedies in the WTO after *Automotive Leather*’, 6 JIEL 545 (2003).

Prior to the *Australia – Automotive Leather* implementation report, it was widely understood by WTO Members that the WTO did not provide for retrospective remedies. The multilateral trading

system was about a balance of rights and obligations with WTO remedies to preserve future trading opportunities rather than redress past injury. The *Automotive Leather* implementation panel's findings that 'withdraw the subsidy' under Article 4.7 of the Agreement on Subsidies and Countervailing Measures (the SCM Agreement) required retrospective repayment of past subsidies appeared to challenge this long-standing understanding. This paper examines the *Automotive Leather* findings on remedy and argues that retrospective remedies have no basis either in past GATT practice nor under the WTO Agreements. The findings raised fundamental constitutional and democratic governance concerns given the legal constraints on the ability of Member governments to recall subsidies already provided lawfully and in good faith to private companies. They also highlight the need for caution in transposing currently accepted rules of the law of the European Community into the WTO legal order. Given the fundamental legal and policy concerns, the *Automotive Leather* findings on retrospective remedy have not been followed by panels and parties in subsequent WTO disputes. Canada's comments at the February 2000 meeting of the Dispute Settlement Body – that the findings will be treated by WTO Members 'as a one-time aberration of no precedential value' – have therefore proved prophetic.

77) Dukgeun Ahn, 'Korea in the GATT/WTO Dispute Settlement System: Legal Battle for Economic Development', 6 JIEL 597 (2003).

Korea's economic development saga, which amazed economists and policymakers, has been filled with numerous trade disputes with its major trading partners. Despite the prevalence of such bilateral trade disputes, Korea had shown unequivocal resistance to resorting to the multilateral dispute settlement forum under the GATT system. Since the inception of the WTO, however, Korea has dramatically changed its attitude toward trade dispute settlement. The Korean experience of trade dispute settlement, therefore, seems a salient example of how the newly augmented system under the WTO is perceived and how it has been effectively utilized by average WTO Member countries in order to address international trade problems.

78) Matthias Oesch, 'Standards of Review in WTO Dispute Resolution', 6 JIEL 635 (2003).

This article explores the issue of standard of review in WTO dispute resolution. Standards of review have over the last years gained unprecedented political and systemic significance in panel and Appellate Body proceedings. They express a deliberate allocation of *vertical* power between WTO adjudicating bodies and national authorities to decide upon factual and legal issues. Therefore, this article contributes to the debate on the balance of powers between the judiciary of the WTO and its members. At the outset, it defines the issue of standard of review (Section I) and examines the commonly invoked rationales for deference towards members' perceptions of their obligations under the WTO (Section II). Then, it expounds the *Uruguay Round* negotiations (Section III) and turns to the current state of law and practice (Section IV). The analysis of the case law to date reveals that panels and the Appellate Body have in general applied intrusive standards of review. Such a conclusion holds true in particular for the interpretation of WTO law, but it also stands to reason with regard to factual findings. It is submitted that the policy of intrusiveness is correct from a *legal* perspective but contrasts with the various rationales speaking in favour of a more deferential attitude.

79) Claus-Dieter Ehlermann, 'Reflections on the Appellate Body of the WTO', 6 JIEL 695 (2003).

80) Daniel Brinza, 'International Trade Dispute Settlement System', 6 JIEL 719 (2003).

81) Donald McRae, 'What is the Future of WTO Dispute Settlement?', 7 JIEL 3 (2004).

82) Yoshiko Naiki, 'The Mandatory/Discretionary Doctrine in WTO Law: the US – Section 301 Case and its Aftermath', 7 JIEL 23 (2004).

This article focuses on the policy concerns or justifications underlying the so-called 'mandatory/discretionary' doctrine in GATT/WTO law, and reviews the application of this doctrine to specific cases. Under the mandatory/discretionary doctrine, enactment of a 'mandatory' law (a law requiring a government to do or not to do a particular act) can constitute a violation of the WTO obligations, but a 'discretionary' law (a law giving a government discretion to do or not to do a particular act) does not constitute a violation until a government actually commits a prohibited act. However, in 1999, the famous *Section 301* Panel appeared to rule that even a discretionary law can constitute a violation, suggesting a change in the mandatory/discretionary doctrine. Such a change could have a great impact on the WTO-legality of national trade laws, making it possible to find a number of WTO violations in national trade laws that provide governments some discretion to violate their WTO obligations. This article examines the *Section 301* decision critically, and traces the aftermath of this celebrated decision. The article starts by describing the general operation of the mandatory/discretionary doctrine under GATT. It first examines the rationale underlying the doctrine, established by the *Superfund* decision in 1988. But the article argues that the rationale implied in that case was insufficient, and offers a different rationale to explain why GATT came to accept the doctrine. It then examines the *Section 301* case in light of the Uruguay Round negotiating history, and argues that the reasons cited by the Panel for changing the mandatory/discretionary doctrine were not convincing. It suggests that specific aspects of the *Section 301* case motivated the Panel to change the mandatory/discretionary line. The article also discusses the status of the mandatory/discretionary doctrine after the *Section 301* decision. The doctrine was promptly challenged again in the *US -- 1916 Act* case. Moreover, recent complaints have targeted administrative practices, raising a further challenge to the doctrine. It remains to be seen whether the mandatory/discretionary doctrine follows the same approach established under GATT.

83) Jiaxiang Hu, 'The Role of International Law in the Development of WTO Law', 7 JIEL 143 (2004).

As a new branch of international law, WTO law consists of the rules which particularly regulate the transactions concerning trade in goods, trade in services, investment and trade-related intellectual property rights among WTO Members. To be more specific, WTO law is referred to as the 'single package' results of the Uruguay Round of multilateral trade negotiations (1986--

1994). Basically, WTO law is no different from other branches of international law. The general principles, customary rules and the way of interpretation of international law all apply to the operation of WTO law. Notwithstanding this, WTO law still has its unique characteristics which are sufficient enough to distinguish it from other branches of international law. These differences can normally be perceived from their institutional statuses and dispute settlement mechanisms. The influence between international law and WTO law is mutual. While general international law determines the basic structure of WTO law, the creation of WTO law has also changed the landscape of international law.

84) Kara Leitner and Simon Lester, 'WTO Dispute Settlement 1995-2003: a Statistical Analysis', 7 JIEL 169 (2004).

85) Wilfred J. Ethier, 'Intellectual Property Rights and Dispute Settlement in the World Trade Organization', 7 JIEL 449 (2004).

With the advent of the TRIPS Agreement, international disputes about governmental regulation of intellectual property rights (IPRs) are now subject to adjudication within the WTO dispute resolution mechanism. The standard model used by economists to explain dispute settlement procedures is misleading, for the process is not about preventing countries from exercising market power. Rather, the system is designed to resolve political market failures arising within countries that would be harmful to market access for foreign firms. These issues arise particularly in the context of IPRs, which may be used as cross-market bargaining chips. This possibility is illustrated by the petition of Ecuador to suspend concessions in this area for European firms in the context of the EU – *Banana* case. The scope of such an approach remains unclear and there are many fundamental questions deserving close analysis. In this paper I make several basic points relating to the economics of IPRs and the World Trade Organization's (WTO) dispute settlement process. These comments underscore the fact that the injection of IPRs into the global trading system raises a new dimension for settling disputes.

86) Gregory Shaffer, 'Recognizing Public Goods in WTO Dispute Settlement: Who Participates? Who Decides? The Case of TRIPS and Pharmaceutical Patent Protection', 7 JIEL 459 (2004).

The question of how to produce 'global public goods' in a world of sovereign states with divergent norms and preferences, reflecting differences in economic development levels, is increasingly on the international policy agenda. This question raises issues not only for political decision-making but also for judicial interpretation of existing international agreements. This article analyzes this fundamental question in the context of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of the World Trade Organization (WTO), with particular emphasis on patent protection for pharmaceutical products. The TRIPS Agreement's provisions raise concerns over at least three public (or quasi-public) goods in this area: the generation of new knowledge, the provision of public health, and the maintenance of rules fostering open trade and competition. WTO judicial panels charged with resolving disputes

regarding patents on medicines must determine whether to defer to national sovereignty, multilateral negotiations, or their own interpretations in balancing among these objectives. Thus, questions of 'who participates' and 'who decides' will be critical in this determination. The article notes structural weaknesses in the ability of developing countries to participate meaningfully in the WTO judicial process and offers suggestions for making their participation more meaningful so as to protect their interests.

87) Claus-Dieter Ehlermann and Nicolas Lockhart, 'Standard of Review in WTO Law', 7 JIEL 491 (2004).

There is no escaping standard of review in WTO dispute settlement. While the contested national measure and the claims made change from case to case, standard of review is a constant feature. In every case, panels and the Appellate Body must decide how intensively a measure should be reviewed and how much deference should be granted to national decision makers. Standard of review, therefore, plays a central role in defining the powers of national authorities in the trade field. In recent years, perhaps the most frequent criticism made of panels and the Appellate Body is that they have been overly intrusive in their review of national measures. This article explores the role and operation of standard of review in WTO law. It begins with the basic requirement that panels must make an 'objective assessment of the matter' and argues that this requirement does not specify the precise nature or intensity of review that panels undertake. The article goes on to consider how panels and the Appellate Body have approached the review of legal and factual determinations, as well as of different types of national measure. In particular, the article examines the review of trade remedy measures, SPS and TBT measures, and measures covered by the GATT 1994. The case-law indicates that the character of review changes with the nature of the determination at issue and also with the obligations in the covered agreement in consideration. The article suggests that the differing approaches to review reflect differences in the covered agreements themselves regarding the respective roles of panels and national authorities.

88) Alan O. Sykes, 'The Persistent Puzzles of Safeguards: Lessons from the Steel Dispute', 7 JIEL 523 (2004).

The recent WTO dispute between the United States and eight complainant nations over protective measures for the steel industry brought widespread attention to a little known area of WTO law – the rules governing 'safeguard measures', the temporary protection of troubled industries against import surges. The use of safeguard measures is normatively controversial, although their welfare implications are much less clear than their critics sometimes suggest. This paper makes the point that WTO rules, as interpreted by recent Appellate Body decisions and applied by the dispute panel in the steel case, pose nearly insurmountable hurdles to the legal use of safeguard measures by WTO members. Among other things, the current interpretation of the 'nonattribution' requirement for the use of safeguard measures in the WTO Safeguards Agreement obliges members to make a demonstration that is logically impossible as an economic matter. Those who believe that safeguard measures are merely wasteful protectionism may welcome such impediments to their use, but it is not obvious that the trading system will benefit

in the long run, and there can be little doubt that one key objective of the Uruguay Round negotiators – to revive the use of disciplined, temporary safeguard actions – is being frustrated.

89) William J. Davey, ‘The WTO Dispute Settlement System: the First Ten Years’, 8 JIEL 17 (2005).

This paper reviews the operation of the WTO’s dispute settlement system during its first ten years – from 1995 to 2004. After a brief overview of the system, the experience of several major users of the system – the United States, the European Communities, Canada, Japan, Brazil and India – is examined and an evaluation is made in terms of how they have fared in advancing their major trade policy concerns on a subject matter and a country-by-country basis. Particular attention is paid to certain bilateral relationships, such as that of the United States and the EC. The paper then evaluates the system’s success in settling disputes, in terms of whether disputes have been settled promptly, either through mutually agreed solutions or through implementation of panel/Appellate Body reports. The paper concludes that since its inception in 1995, the system has worked reasonably well in providing a reasonably effective mechanism through which WTO Members are able to resolve disputes, both at the consultation stage and following completion of formal dispute settlement proceedings. The system has not, however, achieved its goal of promptness in many cases.

90) Marco Bronckers and Naboth Van den Broek, ‘Financial Compensation in the WTO: Improving the Remedies of WTO Dispute Settlement’, 8 JIEL 101 (2005).

The current system of remedies in the WTO provides Members with a choice between trade compensation or retaliation. There is a problem in that trade compensation is only possible with the consent of the non-complying country and thus often remains theoretical, while retaliation has the disadvantage of requiring the complaining Member to ‘shoot itself in the foot’ by restricting imports and thus hurting its own industrial users, importers and consumers. Such retaliatory restrictions also hurt innocent bystanders abroad: private parties who are not involved in a dispute lose their export markets. As importantly, the current system does not provide for effective reparation of damages suffered by the WTO Member and private parties concerned. These problems are even more urgent for developing countries. Many of them cannot effectively retaliate: their economies are too small to make an impression on the infringing country, and the negative effects of such countermeasures would be felt disproportionately by their own economies and businesses. Introducing financial compensation could be a solution. Financial compensation does not restrict trade, helps to compensate injured Members and industries, avoids hurting innocent bystanders, and can contribute to more effective compliance. In addition to analysing the problems with current remedies and the pros and cons of financial compensation, this article outlines what financial compensation in the WTO could look like.

91) Bernard O'Connor and Margareta Djordjevic, 'Practical Aspects of Monetary Compensation: The US – Copyright Case', 8 JIEL 127 (2005).

The mutually satisfactory temporary arrangement reached between the EC and the US in the WTO *US – Copyright* dispute raises a number of legal issues in international, WTO and EC law as well as systemic considerations for the WTO dispute settlement system. It is the first time that monetary compensation has been granted within the terms of Article 22 of the DSU. The agreement is that the US makes a payment of moneys directly to a specific private body in the EC as a temporary arrangement during a period of implementation. The availability and mechanics of monetary compensation as a WTO remedy is currently being debated (see, among many others, 'Financial Compensation in the WTO: Improving the Remedies of WTO Dispute Settlement' in this journal). This brief note examines whether the granting of monetary compensation in this case is consistent with the WTO agreements and, in particular, the most-favoured-nation principle. It also considers whether any inconsistency with the WTO agreements can be justified under WTO rules or general international law. Furthermore, the note outlines the international law and EC law implications of the Community's authorization of a payment to a private party. The conclusion reached is that, while the idea of monetary compensation for private parties may have much support, considerable thought will have to be given to its practical and legal implementation both in WTO and EC law.

92) Kara Leitner and Simon Lester, 'WTO Dispute Settlement 1995-2004: a Statistical Analysis', 8 JIEL 231 (2005).

93) William J. Davey, 'The Sutherland Report on Dispute Settlement: a Comment', 8 JIEL 321 (2005).

94) Mitsuo Matsushita, 'The Sutherland Report and its Discussion of Dispute Settlement Reforms', 8 JIEL 623 (2005).

95) Helge Elisabeth Zeitler, "'Good Faith" in the WTO Jurisprudence: Necessary Balancing Element or an Open Door to Judicial Activism?', 8 JIEL 721 (2005).

The purpose of the article is two-fold: first, it seeks to clarify and structure those contexts in which the principle of good faith has entered the WTO jurisprudence; and second, it presents an analysis of the potential effects and risks accompanying this entrance, such as the allegation of judicial activism on the part of the panels or the Appellate Body and the viability of a distinction between violation and non-violation cases. It attempts to define the framework within which a suitable concept for the application of good faith must be found and explores the conclusion that thus far the Appellate Body has applied good faith with the necessary caution. However, it cautions the necessity of avoiding an overbroad use of the concept and mandates the requirement for the judicial bodies to articulate more clearly the content attributed to the concept in a

particular case and the legal consequences thereof than it has done thus far. Finally this article urges the judicial bodies to avoid the idea of an abstract obligation of good faith that adds something to the obligation under the WTO Agreements. This would accord with the traditional international law understanding of what the application of the good faith principle implies.

96) Isabelle Van Damme, 'Fifth Annual WTO Conference: an Overview', 8 JIEL 769 (2005).

97) Chad P. Bown and Bernard M. Hoekman, 'WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector', 8 JIEL 861 (2005).

The poorest WTO member countries almost universally fail to engage as either complainants or interested third parties in formal dispute settlement activity related to their market access interests. This paper focuses on costs of the WTO's extended litigation process as an explanation for the potential but 'missing' developing country engagement. We provide a positive examination of the current system, and we catalogue and analyze a set of proposals encouraging the private sector to provide DSU-specific legal assistance to poor countries. We investigate the role of legal service centres, non-governmental organizations, development organizations, international trade litigators, economists, consumer organizations, and law schools to provide poor countries with the services needed at critical stages of the WTO's extended litigation process. In the absence of systemic rules reform, the public-private partnership model imposes a substantial cooperation burden on such groups as they organize export interests, estimate the size of improved market access payoffs, prioritize across potential cases, engage domestic governments, prepare legal briefs, assist in evidentiary discovery, and pursue the public relations effort required to induce foreign political compliance.

98) Jacqueline D. Krikorian, 'Planes, Trains and Automobiles: the Impact of the WTO "Court" on Canada in its First Ten Years', 8 JIEL 921 (2005).

Observers interested in the nature and scope of judicial policy-making traditionally focused on the extent to which domestic courts shaped national policy arrangements. With the emergence of more robust international tribunals, however, many are raising questions about the degree to which foreign judges are influencing domestic legal regimes. This project addresses one corner of this debate by analysing the impact of the WTO 'court' on Canada. The legal challenges have provoked considerable controversy as the country has lost, either in whole or in part, each case brought against it. Moreover, there has been widespread public concern about these disputes as many have involved significant social issues. Yet despite the country's successive defeats before the WTO 'court', the policy impact of the trade tribunal has been relatively modest. Contrary to suggestions, the WTO dispute settlement mechanism has not superimposed some form of neo-liberal order on the Canadian state via its judicial decision-making process.

99) William J. Davey, 'The WTO: Looking Forwards', 9 JIEL 3 (2006).

100) Holger Spamann, ‘The Myth of “Rebalancing” Retaliation in WTO Dispute Settlement Practice’, 9 JIEL 31 (2006).

It is generally assumed that trade retaliation under the WTO performs some kind of ‘rebalancing’ by allowing the injured Member to suspend ‘concessions and obligations’ *vis-à-vis* the violating Member of a level equivalent to the level of ‘nullification and impairment’ suffered by the injured Member. This article argues that this perception is misguided. The article first questions if a sensible comparator exists with which equivalence for purposes of ‘rebalancing’ could be evaluated. It then argues that WTO arbitration decisions do not even succeed in their limited goal of providing for retaliation that will affect trade in the same amount as the WTO-inconsistent measure at issue. One reason is the use of an asymmetric and underspecified trade effects comparator. The other reason is very significant miscalculation of the trade effects of the violation, as shown by detailed legal-economic analysis of all relevant arbitration decisions. The decisions concerning countermeasures against prohibited export subsidies do not make any attempt at ‘rebalancing’ in the first place. The article considers political explanations of arbitration decisions. It concludes with some suggestions for improvement.

101) Federico Ortino, ‘Treaty Interpretation and the WTO Appellate Body Report in *US – Gambling: a Critique*’, 9 JIEL 117 (2006).

Treaty interpretation in WTO law continues to represent a topic of highly theoretical and practical importance. The Panel’s and the Appellate Body’s reports in the recent *US – Gambling* dispute have critically turned on ascertaining the meaning of the United States’ GATS Schedule and Article XVI GATS on the basis of the public international law rules of treaty interpretation as codified in the Vienna Convention on the Law of Treaties. The paper’s principal aim is to review the interpretative approach followed in particular by the Appellate Body in reaching its decision in *US – Gambling*. Its main argument is that, although the Appellate Body appears to be trying to emancipate itself from a rigorous textual approach, it has not yet embraced a holistic approach to treaty interpretation, one in which the treaty interpreter looks thoroughly at all the relevant elements of the general rule on treaty interpretation pursuant to Article 31(1) of the Vienna Convention.

102) Karen Halverson Cross, ‘King Cotton, Developing Countries and the “Peace Clause”’: the WTO’s *US Cotton Subsidies Decision*’, 9 JIEL 149 (2006).

Although the World Trade Organization (WTO) is a powerful vehicle for promoting economic development, the Uruguay Round has been perceived by developing country WTO members as an unequal bargain. Especially with respect to agriculture, the Uruguay Round yielded only limited concessions. In September 2003, Doha Round efforts stalled at Cancún when developing countries coalesced to oppose a proposal that insufficiently liberalized trade in agriculture. In March 2005, the Dispute Settlement Body adopted a panel decision upholding Brazil’s legal challenge of US subsidies to cotton producers. The *US Cotton Subsidies* decision represents a dramatic victory for Brazil and other developing country WTO members. The timing of the

decision, coinciding with ongoing Doha Round agriculture negotiations, ensures that it will influence any outcome of the Round. This article examines the *US Cotton Subsidies* decision, describes the subsidy programs at issue in the dispute, reviews applicable WTO rules, and outlines the major findings of the panel and Appellate Body. The article concludes that Brazil's victory in *US Cotton Subsidies* may represent a broader shift within the WTO away from a system dominated by the US and EC toward a system that increasingly is influenced by emerging market economies.

103) Joost Pauwelyn, 'Adding Sweeteners to Softwood Lumber: the WTO-NAFTA "Spaghetti Bowl" is Cooking', 9 JIEL 197 (2006).

104) Ross Becroft, 'The Standard of Review Strikes Back: the US – Korea DRAMS Appeal', 9 JIEL 207 (2006).

This article contains a brief analysis of how the WTO Appellate Body identified and applied a standard of review in the recent US–Korea DRAMS Appeal and its implications for this aspect of WTO jurisprudence in the future. Section I discusses the formulation of the objective assessment test and its development through subsequent cases. Section II sets out the background to the US–Korea DRAMS decision and summarizes the reasoning of the Appellate Body in determining that the panel had not complied with its obligations under Article 11 of the Dispute Settlement Understanding. Section III discusses the implications of this decision for panels and parties. It is suggested that this decision evidences the significant development of the standard of review under the WTO dispute-settlement system. However, it is suggested that the standard is becoming more complex in nature, and it may be increasingly difficult for panels to comply with Article 11 without a clear restatement of applicable principles by the Appellate Body.

105) Kara Leitner and Simon Lester, 'WTO Dispute Settlement from 1995 to 2005 – a Statistical Analysis', 9 JIEL 219 (2006).

106) Eleanor M. Fox, 'The WTO's First Antitrust Case – Mexican Telecom: a Sleeping Victory for Trade and Competition', 9 JIEL 271 (2006).

A World Trade Organization (WTO) dispute panel has decided the WTO's first antitrust case. It resolved the matter in favour of the United States' claim that Mexico had anticompetitively facilitated exploitative prices and a cartel that raised the price of terminating cross-border telephone calls in Mexico and thereby harmed trade and competition. The case is *Mexico – Measures Affecting Telecommunications Services* (April 2004) ('the *Mexican telecom* case'). This essay argues that if the WTO's antitrust clause was in fact triggered (which is a point of contention), Mexico's conduct violated its obligations. Furthermore, it argues that the GATS antitrust obligation in the telecommunications sector should be acknowledged as occupying an important place at the intersection of trade, competition and industrial policies. Antitrust law is the other side of the coin of liberal trade law. Antitrust law opens markets by prohibiting private

and other commercial restraints, while trade law opens markets by prohibiting public restraints. Before *Mexican telecom*, no legal discipline was regarded as copious or flexible enough to address combined public and private restraints. In particular, nations were allowed free rein to privilege national champions that harmed competition in and out of their country, imposing costs on outsiders as well as on their own people. A positive reading of the antitrust clause helps to fill the gap.

107) Yuka Fukunaga, 'Securing Compliance Through the WTO Dispute Settlement System: Implementation of DSB Recommendations', 9 JIEL 383 (2006).

The World Trade Organization (WTO) dispute settlement system has been making substantial contributions to improved compliance with the WTO Agreements. Of particular note are the elaborate multistage mechanisms installed in the system that facilitate and ensure the implementation of the DSB recommendations. However, these multistage mechanisms are not devoid of problems and shortcomings. Several improvements are proposed by Members and scholars but a number of disagreements exist, reflecting varied understanding of the nature of the dispute settlement system. Against this background, this article first analyses the nature of the dispute settlement system. It argues that the primary purpose of the dispute settlement system is not to secure compliance *in abstracto* but to settle a dispute and remedy injury, and its compliance function is exerted only in the course of dispute settlement. Thereafter, in the light of the nature of the dispute settlement system, this article presents a comprehensive analysis of the manner in which the multistage mechanisms currently function and how they should function.

108) Victor Mosoti, 'Africa in the First Decade of WTO Dispute Settlement', 9 JIEL 427 (2006).

African countries have largely been absent as players at the WTO dispute settlement system in its first decade. In recent literature, this has been attributed to a number of factors, among them, the low volume of trade with an export base often characterized by single unprocessed commodities, a complicated and expensive dispute settlement system, inadequate legal expertise and a less litigious approach to possible disputes particularly when major trading and donor partners are involved. By showing how and to what extent African countries have participated in GATT and WTO disputes, as well as in the DSU review negotiations and other related processes, the present article argues that this weak participation by large sections of the WTO membership is a danger to the long-term "predictability" function of the WTO, and could undermine the usefulness of the entire process eventually. It closes with various proposals on how the problem may be addressed.

109) Michelle T. Grando, 'Allocating the Burden of Proof in WTO Disputes: a Critical Analysis', 9 JIEL 615 (2006).

This article argues that the World Trade Organization (WTO) jurisprudence on the allocation of the burden of proof is in a confused state. Panels and the Appellate Body have failed to produce a consistent line of cases, which can be used as a predictable model to solve future cases. Furthermore, the jurisprudence has also created artificial differences between similar provisions, raising questions about the relevance of the criteria employed to distinguish provisions that must be proved by the defendant from those that must be proved by the complainant. The analysis undertaken in this article suggests that it may be time to reflect upon the basic question of why the burden of proof should be allocated to a given party. The article explores alternatives and suggests courses of action.

110) Isabelle Van Damme, 'Sixth Annual WTO Conference: an Overview', 9 JIEL 749 (2006).

111) Meredith Kolsky Lewis, 'The Lack of Dissent in WTO Dispute Settlement', 9 JIEL 895 (2006).

This article analyses in detail the fact that there has been almost no dissent in World Trade Organization (WTO) dispute settlement reports. Only a handful of articles have noted this phenomenon, even in passing. The article first examines the empirical data with respect to dissenting and concurring opinions at both the panel and Appellate Body levels. Fewer than 5% of panel reports and 2% of Appellate Body reports contain separate opinions of any kind. Second, it shows that the WTO is in fact actively discouraging dissents and discusses why this might be the case. The article argues that dissents are valuable in general and assesses whether more dissents would be a positive for the WTO. It then reviews the few dissents that have been published and demonstrates that 50% of the arguments raised in dissents at the panel level were adopted in whole or in part on appeal by the Appellate Body, thus illustrating dissents can and do make a difference. The article concludes that keeping the lid on dissents may ultimately erode the strength of the dispute settlement system and hinder the ability of the WTO Members to make appropriate changes to the Agreements.

112) Alan Yanovich and Tania Voon, 'Completing the Analysis in WTO Appeals: the Practice and its Limitations', 9 JIEL 933 (2006).

Since its creation in 1995, the Appellate Body of the World Trade Organization (WTO) has gradually constructed a consistent approach to completing panels' analysis where the circumstances permit. The need for this practice stems from the limitation of WTO appeals to issues of law and the absence of remand in WTO disputes. The Appellate Body can be seen to complete a panel's analysis in two different scenarios: to deal with a claim that the panel failed to

address; or to apply a different legal interpretation to the facts of the case, where the Appellate Body has reversed or modified the panel's legal interpretation. In deciding whether to complete a panel's analysis, the Appellate Body appears to consider three criteria: the existence of uncontested facts to resolve the matter, the connection between the legal issues to be addressed in completing the analysis and those considered by the panel, and the due process rights of the parties to the dispute. Where these criteria are not satisfied, the Appellate Body is unable to complete the analysis, and the dispute may go unresolved. This is an increasing problem, highlighting the need for WTO Members to agree on a suitable remand mechanism.

113) Kara Leitner and Simon Lester, 'WTO Dispute Settlement 1995-2006: a Statistical Analysis', 10 JIEL 165 (2007).

114) John Maton and Carolyn Maton, 'Independence under Fire: Extra-legal Pressures and Coalition Building in WTO Dispute Settlement', 10 JIEL 317 (2007).

This study uses detailed quantitative analyses of the complete history of rulings made by the Panels and the Appellate Body of the WTO Dispute Settlement Mechanism during its first ten years of operation, to assess the robustness of theories regarding the decision-making of these institutions. Regression analyses are used to test for correlation between the success of Complainants in dispute settlement and a variety of factors, representing the hypothesized capacity of states to influence Panels and the Appellate Body through dimensions of political and economic power, the impact of the relative practical capacities of states in dispute settlement proceedings, and the formation of coalitions of states in support of a particular Complainant or Respondent. The results of the regression analyses – that few significant correlations exist between the independent variables and the dispute outcomes – provide evidence that the judicial institutions of the Dispute Settlement Mechanism are independent from Member State influence. The one reliable correlation found in these analyses demonstrates that a Complainant state does have substantial advantage in Panel proceedings if it has previously participated in more disputes than the Respondent.

115) Rex J. Zedalis, 'When do the Activities of Private Parties Trigger WTO Rules?', 10 JIEL 335 (2007).

As scrutiny of government actions affecting international trade relations continues to increase, the relevance of private party actions having an impact on those relations may gain in importance. Since the 1960s, the GATT member states have been cognizant of the role that private parties can play in disrupting the natural competitive economic relationships extant between countries. A handful of GATT and WTO adjudicative determinations over the intervening four and a half decades have initiated the process of fleshing-out the conditions under which GATT/WTO legal disciplines apply to private party action as a consequence of ascribing such action to the government of a relevant member state. What follows reviews those adjudicative determinations and distills the themes and conditions for attribution articulated therein. It also reviews what could be offered GATT/WTO dispute settlement bodies were

consideration to be given to the international rules regarding state responsibility for acts of individuals. From an examination of article 8 of the 2001 International Law Commission's articles on state responsibility in particular, it is suggested a somewhat narrow understanding of attribution should obtain, and that such an understanding can be seen as in conformance with the basic thrust of international economic law, extant GATT/WTO case law, and sound policy.

116) Bruce Wilson, 'Compliance by WTO Members with Adverse WTO Dispute Settlement Rulings: The Record to Date', 10 JIEL 397 (2007).

The generally positive record of Members in complying with adverse rulings by panels, the Appellate Body or both has been an important factor in the success of the WTO dispute settlement system to date. In approximately 90 percent of the adopted reports, one or more violations of WTO obligations have been found by panels and/or the Appellate Body. In virtually all of these cases the WTO Member found to be in violation has indicated its intention to bring itself into compliance and the record indicates that in most cases has already done so. It is noticeable, if not unsurprising, that compliance has been more rapid where the WTO violations can be corrected through administrative action as opposed to legislative action. A closer review of the compliance record of the United States and the European Communities, which together have been the object of approximately half of all adverse WTO rulings, shows that these Members have generally succeeded in bringing themselves into compliance with such rulings, although both Members have experienced some residual compliance difficulties in a small number of cases. As a final note, the overall positive record of Members in complying with adverse WTO rulings is reflected in, and confirmed by, the low number of cases where Members have sought and received authorization to impose retaliatory measures.

117) Eric H. Leroux, 'Eleven Years of GATS Case Law: What Have We Learned?', 10 JIEL 749 (2007).

The General Agreement on Trade in Services (GATS) negotiators faced a significant challenge when having to craft a comprehensive set of disciplines governing multilateral trade in services, and the result is somewhat complex. Some obligations, in particular the most favoured-nation treatment (MFN) obligation, apply across the board. Others, like the market access and national treatment obligations, apply only in respect of service sectors of a Member's choosing. There is overlap between the market access and national treatment obligations, and the relationship between these two disciplines and those on domestic regulation is not clearly established. Additional obligations have been adhered to on a voluntary basis, in particular in the areas of telecommunications and financial services. In general, the interpretation and understanding of Members' Schedules of Specific Commitments proves to be a laborious exercise. This provides fertile ground for difficult and often sensitive interpretive issues to arise. Although Members have thus far not made extensive use of dispute settlement procedures to resolve them, existing World Trade Organization (WTO) decisions already show the reach of GATS disciplines and their potential impact on Members' policies and regulations. The *Gambling* case has, in particular, sparked a debate as to what should be the right balance between trade constraints and the autonomy of Members' service regulators. This article reviews the GATS case law with a

view to offering a critical assessment of the main systemic issues that have been addressed by WTO adjudicatory bodies. These issues are, respectively, the scope of application of the GATS, the interpretation of specific commitments in Members' Schedules, market access, non-discriminatory treatment, and general exceptions.

118) Andrew D. Mitchell, 'The Legal Basis for Using Principles in WTO Disputes', 10 JIEL 795 (2007).

This article argues that the use of principles in WTO dispute resolution is both necessary and desirable. However, Panels and the Appellate Body (WTO Tribunals) have often ignored principles or not clearly identified the legal basis for their use. This article establishes a framework for the use of principles (in particular principles of WTO law, principles of customary international law, and general principles of law) in WTO dispute settlement. Broadly, WTO Tribunals can use principles drawn from these categories to interpret WTO provisions, based on Article 3.2 of the DSU, and Articles 31 and 32 of the VCLT. This follows most directly from a teleological approach to interpretation, but principles also feature under subjective and textual approaches to interpretation. WTO Tribunals may also use certain principles in a non-interpretative manner. Indeed, this may be necessary, particularly to address procedural issues. Precisely how a principle may be used depends on its type, content and status.

119) Junji Nakagawa, 'No More Negotiated Deals?: Settlement of Trade and Investment Disputes in East Asia', 10 JIEL 837 (2007).

Many argue that East Asian countries have come to adopt 'aggressive legalism' in trade and investment policy, in the sense that they have come to settle their trade and investment disputes through the dispute settlement mechanism (DSM) of the WTO and the other third-party procedures. Scrutiny of the dispute cases of these countries shows, however, that East Asian legalism is not so aggressive, that it varies country by country, and that there still exists room for negotiated deals in settling trade and investment disputes among them. On the other hand, the recent move toward regional integration through free trade agreements (FTAs), economic partnership agreements (EPAs), and bilateral investment treaties (BITs) in East Asia may lead to the adoption of a more aggressive legalism in the region, in particular in settling investment disputes, disputes relating to intellectual property rights, and trade remedies.

120) Isabelle Van Damme, 'Seventh Annual WTO Conference: an Overview', 11 JIEL 155 (2008).

121) Kara Leitner and Simon Lester, 'WTO Dispute Settlement 1995-2007: a Statistical Analysis', 11 JIEL 179 (2008).

122) 'The WTO Appellate Body's Activities in 2007', 11 JIEL 193 (2008).

123) Henning Grosse Ruse-Khan, ‘A Pirate of the Caribbean? The Attractions of Suspending TRIPS Obligations’, 11 JIEL 313 (2008).

On 21 December 2007, arbitrators in the *US – Gambling* dispute awarded the Caribbean Island State Antigua and Barbuda the right to retaliate against the United States of America by suspending obligations under the WTO Agreement on Trade Related Aspects of Intellectual Property Rights with an annual value of US\$ 21 million. Given the asymmetries in market size and economic power, this scenario serves as the perfect case study for testing claims that suspending intellectual property protection is a legal and feasible option for developing countries and small economies in disputes with their larger trading partners. I argue that it can do a significantly better job than traditional retaliation in achieving the re-balancing purpose as well as the objective of inducing compliance. The relevant DSU rules further do not raise real hurdles for cross-retaliation. However, its main attraction lies in the potential to generate positive welfare effects: If implemented wisely, suspending TRIPS obligations can create temporary policy space for designing the domestic intellectual property regime in a way which facilitates technological development and domestic innovation through imitation and technological learning. In this case, the publicity ‘WTO authorized piracy’ is likely to generate might actually put a spotlight on normative flaws within the global intellectual property regime.

124) Richard Diamond, ‘Privatization and the Definition of Subsidy: A Critical Study of Appellate Body Textualism’, 11 JIEL 649 (2008).

Analysis of the Appellate Body's (AB) treatment of a particular legal question often provides insight into issues of more general importance. In this article, examination of the AB's treatment of a particular subsidy issue is used to explore the Agreement on Subsidies and Countervailing Measures' (SCM Agreement) definition of subsidy and to question the efficacy of the AB's reliance on textualism. The legal question analyzed arose when European governments challenged the US's imposition of countervailing duties (CVDs) on steel manufactured by ‘privatized’ steel companies. The US claimed the CVDs were proper since subsidies provided prior to privatization had ‘passed through’ to the privatized companies. The AB, relying heavily on the meaning of words rather than on consideration of ‘object and purpose’, found that the US had violated its obligations under the SCM Agreement. An analysis of the AB's logic and the authorities cited demonstrates that neither justifies the AB's conclusion. A heuristic model of the definition of subsidy is used to show that the question raised by privatization implicates issues of causation, overlooked by the AB, that are important in correctly interpreting the SCM Agreement. The problems arising from AB textualism are contrasted with the justifications given for that approach, suggesting that a change in approach may be warranted.

125) Peter Van den Bossche, ‘NGO Involvement in the WTO: A Comparative Perspective’, 11 JIEL 717 (2008).

This article examines the nature and the extent of the involvement of non-governmental organizations (NGOs) in the activities of the World Trade Organization (WTO). First, it looks at

the arguments for and against NGO involvement in WTO activities. Next, the article discusses the legal basis for the involvement of NGOs in WTO activities and the various forms of involvement provided for. It compares the position of NGOs in the WTO with their position in other international organizations, in particular, the United Nations. Subsequently, the article explores the practice of WTO engagement with NGOs. Finally, it examines and compares the rules and procedures of the WTO and the United Nations for the selection of the NGOs with which to engage. This article concludes that a more open and engaged dialogue with civil society will make the WTO a more transparent and responsive organization, enjoying greater support among the general public in developed as well as developing country Members. Justified concerns about the legitimacy, accountability, and politics of NGOs could be eliminated, or at least mitigated, by introducing a system of accreditation in the WTO. While NGO involvement in the WTO definitely has its limits, the involvement of NGOs in other international organizations, in particular, the United Nations, suggests that these limits have not been reached as yet.

126) Padideh Ala’I, ‘From the Periphery to the Center? The Evolving WTO Jurisprudence on Transparency and Good Governance’, 11 JIEL 779 (2008).

The rise of the regulatory state in the latter half of the 20th century is reflected in the text of the World Trade Organization (WTO) Agreements and specifically its transparency related obligations. The oldest transparency and good governance obligation of the WTO is Article X of General Agreement on Tariffs and Trade (GATT). Article X imposes broad publication and due process requirements on the administration of measures in the area of trade in goods. The language of Article X is duplicated or incorporated by reference throughout the WTO Agreements. During the GATT years (1947–94), Article X was a silent provision dismissed by GATT panels as ‘subsidiary’ to the other ‘substantive’ provisions of the GATT. Since the creation of the WTO, Article X has emerged from obscurity, and is now viewed as creating obligations of ‘fundamental importance,’ such as transparency and due process. In addition, there has been an exponential increase in the number of cases asserting Article X claims before WTO panels and the Appellate Body. The resulting treatment of such claims by the WTO dispute settlement bodies reflects both the emerging role of the WTO as a supranational administrative body and the continuing discomfort of panels and the Appellate Body with applying good governance obligations.

127) Ernst-Ulrich Petersmann, ‘Judging Judges: From “Principal-Agent Theory” to “Constitutional Justice” in Multilevel “Judicial Governance” of Economic Cooperation among Citizens’, 11 JIEL 827 (2008).

How should citizens evaluate the ever more important case law of international economic courts and their sometimes inadequate responses (e.g. by investor-state arbitration) to ‘the governance gaps created by globalization (which) provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation’?¹ Section I recalls that the customary law requirement (as codified in the Vienna Convention on the Law of Treaties) of settling ‘disputes concerning treaties, like other international disputes, ... in conformity with the

principles of justice and international law', including 'universal respect for, and observance of, human rights and fundamental freedoms for all' (Preamble VCLT), reflects the constitutional functions of courts to interpret and apply law in conformity with 'rule of law', justice and human rights as constitutional restraints on the 'rule of men' and their 'rule by law'. Section II explains why some of the governance problems of the World Trade Organization (WTO) are due to power-oriented conceptions of 'principal-agent' relationships as 'member-driven governance' without regard to the constitutional functions of WTO bodies to provide collective public goods with due respect for citizens as 'democratic principals'. Sections III and IV recall how the European Court of Justice (ECJ), the European Court of Human Rights (ECtHR) and the European Free Trade Area (EFTA) Court developed diverse 'constitutional methods' of interpreting treaties among European states as 'constitutional instruments' protecting fundamental freedoms and social rights of European producers, investors, traders and consumers. Sections V and VI argue that the worldwide context of international economic law (IEL) differs from multilevel European constitutionalism and requires WTO and North American Free Trade Agreement (NAFTA) dispute settlement bodies and investor-state arbitral tribunals to exercise more judicial deference and respect for the diversity of constitutional principles in WTO Members and their regulatory discretion. Section VII concludes that national, regional and worldwide economic courts should promote common conceptions of rule of law and 'constitutional justice', following the 'solange method' of multilevel cooperation among national and international courts in Europe, in order to protect transnational 'rule of law communities' for mutually beneficial economic cooperation among citizens across frontiers.

128) Henry Gao and C. L. Lim, 'Saving the WTO from the Risk of Irrelevance: The WTO Dispute Settlement Mechanism as a 'Common Good' for RTA Disputes', 11 JIEL 899 (2008).

Over the past few decades, Regional Trade Agreements (RTAs) have proliferated globally. Such proliferation of RTAs created a renewed sense of urgency for the WTO to take action in order to avoid the fate of being eclipsed into irrelevance. There are several options for coping with the challenge. Theoretically speaking, the best approach would be to heighten the level of ambition in global trade talks to reduce all trade barriers to zero so that the discriminatory effect created by RTAs could be reduced or even eliminated. In reality, such an approach would be impossible for well-known reasons. The next best option would be for the WTO to draft 'best practices' or model RTAs to minimize the effect of further fragmentation created by different breeds of RTAs. The problems with this approach are first the resource constraints of the WTO, second the bounded rationality of human beings, and third, whether a 'one size fits all' approach would work. Yet another option offered is to strengthen the WTO's monitoring system of RTAs, with the 2006 rules on transparency being the most recent example. Unfortunately, as the Committee on RTAs (CRTAs), the main enforcer of the monitoring rules in the WTO, has been plagued with ineffectiveness because of the consensus rule, heightened monitoring rules would not be of much help either. In this article, we will discuss a fourth option, i.e. to use the WTO dispute settlement mechanism as a venue for resolving RTA disputes. The rationale underlying this initiative is that, by using the WTO dispute settlement system for RTA disputes, the Members will be able to develop a body of 'common law' on RTAs, which would then either form the basis of multilateral rules on RTAs or harmonize RTAs. This way, we can try to minimize the harmful

effect of RTAs, and indeed turn RTAs from ‘stumbling blocks’ into ‘building blocks’ of the multilateral trading system.

129) Lothar Ehring, ‘Public Access to Dispute Settlement Hearings in the World Trade Organization’, 11 JIEL 1021 (2008).

In 2005, the first dispute settlement panels of the World Trade Organization (WTO) decided that the public could observe their oral hearings. Following three years of panel practice with open hearings where both parties requested public access, the Appellate Body in 2008 followed suit and held its first open hearings. Most people had believed this to be impossible without modification of the WTO Agreement, and WTO Members were far apart regarding the desirability and legality of open hearings. This controversy persists, but it has changed considerably, based on the entirely successful experience of open hearings to date, which has already prompted several WTO Members to change their position. The new practice is a historic and irreversible shift from sixty years of Practice under the General Agreement on Tariffs and Trade (GATT) and in the WTO. It is also remarkable given the importance of allowing public observation of judicial hearings, as it exists across the world both domestically and internationally. More than a quarter of WTO disputes currently have public hearings, and the future practice is likely to consolidate the trend. No political fallout has occurred so far, as it did on *amicus curiae* in 2000. This is also unlikely to happen in the future, which will tell whether WTO Members can find agreement on codifying rules on transparency. Already now, justice is not only done at the WTO, but it can also be seen to be done.