



The **E15** Initiative

STRENGTHENING THE GLOBAL TRADE AND INVESTMENT SYSTEM  
FOR SUSTAINABLE DEVELOPMENT



**The WTO Appellate Body at 30: Exploring the Limits  
of WTO Dispute Settlement in the Next Decade**

May 2016

Alan Wolff

E15 Conversations on the  
Global Trade and Investment Architecture

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**Think Piece**

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# ABSTRACT

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This paper explores how far the WTO dispute settlement can take the organization as it faces the third decade since its establishment in 1995. As the capacity of the WTO to resolve trade problems is increasingly reliant on dispute settlement, since the negotiating function of the WTO continues to experience a member-induced coma, the author seeks to determine to what extent the void can successfully be filled by the current Dispute Settlement Understanding (DSU) and whether there might be room for innovation. The paper conducts a thought experiment to delve into what types of matters the WTO dispute settlement might deal with over the next ten years, in a rapidly evolving global trade environment, and evaluates how well equipped the Appellate Body (AB) is to address them alongside regional and plurilateral trade agreements.

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# CONTENTS

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<b>Introduction</b>	<b>1</b>
<b>Cases that fit clearly within the text of the WTO agreements</b>	<b>2</b>
Where the rules clearly apply	2
Where WTO jurisdiction on its face exists, but WTO member interest in bringing a claim appears to be absent	4
<b>Cases involving novel circumstances to which the current rules might logically be applied or extended</b>	<b>6</b>
<b>Beyond the current WTO rules</b>	<b>11</b>
<b>Disputes settled elsewhere</b>	<b>17</b>
<b>Conclusion</b>	<b>19</b>

# ABBREVIATIONS AND ACRONYMS

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AB	Appellate Body
AD	anti-dumping
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EU	European Union
FTAs	free trade agreements
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
MFN	most-favored-nation
PPMs	process and production methods
RTAs	regional trade agreements
SME	small- and medium-sized enterprise
SOE	state-owned enterprise
TBT	Technical Barriers to Trade
TiSA	Trade in Services Agreement
TPP	Trans-Pacific Partnership
TTIP	Transatlantic Trade and Investment Partnership
US	United States
WTO	World Trade Organization

# INTRODUCTION

A central question for the third decade of the WTO is: How effective can the WTO be for future controversies when the legislative part of the organization, the negotiating function of the WTO, is in a member-induced coma, and reliance at the WTO to resolve trade problems must be placed substantially on dispute settlement? Of course there are pressure relief valves – plurilateral agreements, either in the WTO or negotiated in proximity to it, and regional trade agreements. But these are not by any means answers for every trade controversy. As a result, the Appellate Body (AB) may in fact see more novel cases being brought before it.

The purpose of this paper is to perform a thought experiment – to try to take a look back from the future, from a time ten years from now, at the matters WTO dispute settlement might have had brought to it during this next decade. This is not intended as an endorsement of the AB launching itself in directions not foreseen by the negotiators. This paper is about hypothetical cases, and does not seek to offer advice as to what the Appellate Body should do. The problems cited are real. Many of them may not be brought into the WTO for dispute settlement. In the event that an issue is carried forward, in a number of cases, judicial restraint might well prevent the Appellate Body from providing answers. And that may actually be the best response.

Were there a white marble edifice on the shores of Lake Geneva housing just the WTO Appellate Body, over the front entrance one would probably find inscribed the motto *pacta sunt servanda* – “agreements must be kept”. When those agreements are international contracts that cannot as a practical matter be amended; to what extent can they evolve? By agreement of the WTO members, WTO dispute settlement “cannot add to or diminish the rights and obligations provided in the covered agreements.” What will happen as, increasingly, the WTO agreements age and subjects arise that were neither contemplated nor previously resolved by the signatories? The appropriate answer for any judiciary, especially an international one, is to defer to the legislative body to create new rules. Regrettably, recent history has demonstrated through the fate of the Doha Round Development Agenda that broad consensus among all the members is practically non-existent. The Trade Facilitation Agreement, worthy as it is, is limited in effect, and is still awaiting two-thirds of the signatories to ratify it. It marks the current bounds of possible agreement among the full WTO membership. With the legislative arm of the WTO not functioning, to what extent can the void be filled by dispute settlement?

This is particularly important because the world has changed dramatically since the WTO was created by the Uruguay Round over twenty years ago. Technological advances have

re-shaped global trade through revolutions in transportation, information flows, and communications. A digital economy exists both woven through, as well as independent from, trade in goods and services. Global value chains have changed the way that the global economy functions. Geopolitical and ecological concerns also shape trade flows. While these factors existed to a certain extent twenty years ago, they were certainly not as pronounced when the WTO was founded as they are now. Some were not acknowledged and perhaps a number of them could not even be foreseen. As a result they were not all dealt with in the Uruguay Round. The world economy was much more globalized in 1994 than it was in 1947 when the GATT was negotiated, but the world has moved on over the last two decades and, to a serious degree, the WTO has not.

While the role of dispute settlement through the Appellate Body is vitally important today, it will increasingly face jurisdictional limits. National laws may have their ambit stretched by judges (although this practice is the subject of domestic debate) but, at the level of the member states' own governments, there is the corrective in the form of other branches of government as well as a constitution that sets the framework for national governance. The WTO, absent negotiations, is notionally a fixed international contract. GATT Article XXIII, nullification and impairment, may provide a broader avenue for remedying shortcomings in the trading system's rules. But here too there are limits. The WTO's members will at some point not tolerate a situation in which the WTO becomes in essence a *kritarchy* – a rule by judges<sup>3</sup>. So the question is posed, where can WTO dispute settlement be effective for emerging issues? What are the limits beyond which it loses its legitimacy?

William Howard Taft, Chief Justice of the United States Supreme Court, wrote a century ago:

*According to the view and theory of one who does not understand the practical administration of justice, judges should interpret the exact intention of those who established the constitution, or who enacted the legislation, and should apply the common law exactly as it came to them. But frequently new conditions arise which those who were responsible for the written law could not*

1 | AB cases on zeroing have often been criticized because the Antidumping Agreement did not resolve the zeroing issue, but the AB interpreted other AD Agreement provisions to rule that zeroing is impermissible.

2 | WTO Dispute Settlement Understanding (DSU), Article 3.2.

3 | Of course there had to be a Greek term for this state of affairs. According to Wikipedia, *kritarchy* is a system of rule by judges, apparently existing in ancient Israel during the period of time described in the Book of Judges. “Because it is a compound of the Greek words *κριτής*, *krites* (“judge”) and *ἄρχω*, *arkhō* (“to rule”), its use has expanded to cover rule by judges in the modern sense as well, as in the case of Somalia,” ruled by judges with the tradition of *xeer*, as well as the Islamic Courts Union (which ruled part of Somalia for a time). To my knowledge, no WTO member, even those most dismayed by the outcome of the recent Nairobi WTO Ministerial, has suggested that *kritarchy* was the path forward for the WTO.

have had in view, and to which existing common-law principles have never before been applied, and it becomes necessary for the court to make new applications of both.

The power which the court thus exercises is said to be a legislative power...But it is not the exercise of legislative power as that phrase is used but the exercise of a sound judicial discretion in supplementing the provisions of the Constitution and laws and customs, which are necessarily incomplete or lacking in detail essential to their proper application, especially to new facts and situations constantly arising.<sup>4</sup>

To what extent does the Appellate Body have a mandate to expand the coverage of existing WTO agreements? With respect to new questions arising under the US Constitution, the scope for extension of the founding national document has been the subject of vigorous debate and split Supreme Court decisions. The WTO Appellate body pursuant to the Dispute Settlement Understanding has less scope for innovation than a national court. WTO members are likely to often differ on the appropriate limits of expansion of the scope of what is justiciable by the Appellate Body, depending whether they are invoking the DSU as a complainant or defending a case as a respondent.

#### How far can the DSU take the WTO?

There are four categories of hypothetical future dispute settlement cases to consider:

- I. Cases that fit clearly within the text of the WTO agreements.
  - A. Those that suit the regular diet of WTO dispute settlement
  - B. Those where members would rather not litigate
- II. Cases involving novel circumstances to which the current rules might logically be applied or extended.
- III. Cases that are clearly not within the current rules.
- IV. Cases not brought to the WTO for application of the DSU because the litigants prefer other fora.

## CASES THAT FIT CLEARLY WITHIN THE TEXT OF THE WTO AGREEMENTS

### WHERE THE RULES CLEARLY APPLY

*The bedrock cases:*

There will undoubtedly always be some instances where tariff bindings are breached, and where MFN or national treatment commitments are not honored. This is not the most likely growth area for disputes. Although there is no good way to gather statistics on the point, WTO members tend to live up to their clear commitments, or at least try to do so, and rarely intentionally cross the lines provided by black letter rules or, if they do, they may remedy the infraction before a panel is formed. An example is the differential rebate of an indirect tax, where a government discriminates in favor of domestic products as compared to imports in the application of a value added tax. Consider *DS309 China — Value-Added Tax on Integrated Circuits*, (Complainant: United States), 2004. The case did not proceed to a panel because the subject measure was withdrawn. In other instances, the Director General may have been involved through use of his "good offices". A notable example was the banana dispute. The very existence of the WTO's provisions imposing obligations (a body of law that encompasses seventeen different agreements including the Dispute Settlement Understanding), and of the WTO dispute settlement in enforcing them, is vitally important in terms of self-regulation by members of their conduct.

*Anti-dumping, countervailing duties, subsidies, and safeguard measures*

The fact that countries tend to obey the clearest of rules does not suggest a falling off of work load for the Appellate Body during the next decade. There are rules that require interpretation as to their application to specific factual circumstances, where member states can differ on whether a measure is consistent with WTO obligations, and these are justiciable under the WTO rules.

One obvious category is the imposition of temporary import measures in the form of countervailing duties, anti-dumping measures, and safeguard actions. Arguments will persist over

4

William Howard Taft, *Popular Government*, Yale University Press, Oxford University Press, 1913, at pp. 222-223.

whether a given subsidy is specific, whether it is in reality either a prohibited import substitution or export subsidy, and whether serious prejudice or material injury was in fact caused. Likewise there will always be controversies about whether an anti-dumping or safeguard measure was properly applied. These are cases where WTO members have differences of opinion as to whether a measure is consistent with an obligation but an applicable discipline clearly does exist. These kinds of cases are likely to continue to provide a substantial part of the workload for the WTO's dispute settlement system going forward. Of the 504 DSU cases brought since its inception, a quick count indicates that 101 of these cases involved anti-dumping measures; 35 concerned the application of countervailing duties (in some instances in the same case where an anti-dumping measure was being complained of); and 43 disputes were about safeguard measures.<sup>5</sup>

This count – over a third of the caseload of the DSU – is not surprising. These measures fall within exceptions either to the binding of tariffs or the prohibition of quantitative restrictions on imports. There is a systemic interest, and perhaps an institutional bias, in having world trade as free as possible, and while these measures are explicitly permitted as a general proposition, the instances in which they will be tolerated have limits. There is also a built-in interest in appealing from a loss or partial loss at the panel level, both because of the belief by the country imposing the measure that it was justified under the WTO and because putting off compliance for as long as possible is advantageous in a system that provides relief prospectively. As a result, the Appellate Body will consider many of this class of cases.

Can the ambit of these rules be stretched? Arguably this has happened. It can occur where novel circumstances are presented and an existing discipline is extended to a measure about which the text of the WTO is silent. Whether this extension is justified is the subject of debate. It follows the old adage that where one stands depends upon where one sits. An example is the finding that the U.S. Byrd Amendment (paying the proceeds from countervailing and anti-dumping duties to injured domestic companies) was a prohibited additional countervailing or anti-dumping measure (*DS217 United States – Continued Dumping and Subsidy Offset Act of 2000*, 2004).

#### *Some of the more difficult areas*

In areas of the WTO where the rules are less precise, the Appellate Body has been giving some guidance and this convention is likely to expand. Examples include:

- *Adoption of national standards rather than international standards.* National standards have emerged as a major burden to international trade, especially as tariff levels have come down. The decision that such standards are inconsistent with WTO obligations is easiest when there appears to be an insufficient basis for adoption of a standard that discriminates against an imported good that is already being supplied, and the discrimination is clear-cut (*DS 2. United States – Standards for Reformulated*

*and Conventional Gasoline*. 1996). The TBT Agreement itself and GATT Article III are not as readily applied to situations where national standards agencies simply go their own way, or have a stated objective that does not *prima facie* appear to have been adopted for the protection of a domestic industry. Where companies can, they adapt their product to the local standard, but trade may often be reduced.

- *The application of standards to new products.* WTO dispute settlement has had to deal with the emergence of new, advanced technology products, such as those created through biotechnology. For example, a panel ruled against the EU for arbitrary delay in assessing whether imported biotech products (GMOs) met EU standards (*DS291, DS292, DS293 European Communities – Measures Affecting the Approval and Marketing of Biotech Products*. 2003–2006), but this case was not appealed. The Appellate Body and panels have also been able to address other biotech issues in a series of cases involving beef treated with hormones (*DS26 European Communities – Measures Concerning Meat and Meat Products (Hormones)*). See also *DS 39, 48, 320 and 321*).
- *Export restrictions based on GATT Article XX exceptions.* China's restrictions on the export of rare earths essential for the manufacture of electronics was an eye-catching invocation by several WTO members of WTO dispute settlement. The panel found, and the Appellate Body upheld, that China's accession commitments were binding and, even putting those aside, that the exceptions to GATT Article XX were not available as the design of the measures was not such as to conserve the rare earths on a nondiscriminatory basis (exports vs. domestic consumption), nor was the argument accepted that the dangers to human and animal health from pollution justified the restrictions (*DS431 China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, 2014). Left unanswered, and perhaps a subject for future cases, is the variety of limitations imposed by various countries on exports of oil and natural gas. Will the WTO members imposing the restrictions tolerate the WTO's intervention if a case is brought against measures restricting exports of fossil fuels or energy? Were such a case filed, a plausible defense might be the Article XX exception for the conservation of exhaustible resources, but then the question would also arise whether there was discrimination between domestic and foreign demand. Articles XI (prohibition of export quotas), XIII

5 Of the cases brought, only about 60% proceed beyond the formal consultation stage to actual litigation before a panel. And only about 70% of panel reports are appealed. Source: former Legal Services Division member.

6 One wonders, if the workload of the current WTO dispute settlement gets too burdensome, whether this class of cases should not be first considered by a trial level judge rather than a panel, especially if largely fact-intensive rather than raising novel questions of interpretation.

(nondiscriminatory allocation of export quotas) and XX (j) (exception for short supply) seek to address export control issues not involving national security.<sup>7</sup>

## WHERE WTO JURISDICTION ON ITS FACE EXISTS, BUT WTO MEMBER INTEREST IN BRINGING A CLAIM APPEARS TO BE ABSENT

This is a category of measures which, as either a practical or legal matter, WTO members have declined to pursue under WTO dispute settlement but which nevertheless distort trade. Were one setting up an international system of governance of world trade that was as effective as possible with respect to preventing national acts that distort trade, each of the following would be actively addressed, but they have in fact not been under the current WTO system. Part of the answer for the present state of affairs lies in the separation of functions within national governments. Ministers with portfolios addressing financial and monetary affairs, investment policy, competition policy, national security, among other matters largely outside the purview of trade departments, do not look to the WTO for solutions to matters arising within their competence, and generally do not allow trade ministers to do so.

Why list these categories of WTO DSU inactivity? Because WTO dispute settlement may move from being inert to being the center of a controversy overnight with a single member's decision to file a claim. Bringing a complaint of this nature could potentially expand the reach of the existing WTO agreements dramatically, despite the WTO's negotiating function being missing-in-action.

### Currency manipulation

The WTO/GATT Article XV is clear on its face:

4. *Contracting parties<sup>8</sup> shall not, by exchange action, frustrate the intent of the provisions of this Agreement, . . .*

Currency manipulation has been a hot topic for a number of members of the US Congress in the last few years, and is mentioned by a leading US Presidential candidate as a reason to oppose the Trans-Pacific Partnership (TPP) because its consultative mechanism is insufficiently strong. The above-quoted clause has been in the GATT since its inception in 1947. During these years, there have been more than a few instances of currency manipulation, as many economists would define it, practiced by a number of countries. But this provision remains dormant, untried. Why? There are various explanations: (1) The most compelling reason is that the WTO's members do not agree on a common definition of when currency manipulation exists; (2) members have defensive interests and may not want to see the question adjudicated in the WTO; (3) the WTO Secretariat is not viewed as having the expertise to address the issue; and (4) although the foregoing are more

sophisticated reasons for this area of WTO inactivity, cutting to the chase, finance ministers are not going to allow trade ministers onto this turf.

### National security

Economic sanctions, including embargoes, have been in place throughout the history of the GATT and of the WTO. As this is an alternative to military action, the use of sanctions is more likely to expand than contract in the future. "National security" is a phrase tossed about as a very large exception to the rules, to justify whatever measures a country self-defines as being in its national interest. GATT Article XXI states in relevant part:

#### Article XXI: Security Exceptions

*Nothing in this Agreement shall be construed*

...

- (b) *to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests*
  - (i) *relating to fissionable materials or the materials from which they are derived;*
  - (ii) *relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;*
  - (iii) *taken in time of war or other emergency in international relations; or*
- (c) *to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.*

7 India invoked Article XX(j) without success in *DS456 India — Certain Measures Relating to Solar Cells and Solar Module*. Panel report circulated February 24, 2016: *India argued that the DCR measures are justified under the general exception in Article XX(j) of the GATT 1994, on the grounds that its lack of domestic manufacturing capacity in solar cells and modules, and/or the risk of a disruption in imports, makes these "products in general or local short supply" within the meaning of that provision. The Panel found that the terms "products in general or local short supply" refer to a situation in which the quantity of available supply of a product, from all sources, does not meet demand in a relevant geographical area or market. The Panel also found that the terms "products in general or local short supply" do not cover products at risk of becoming in short supply, and found that in any event India had not demonstrated the existence of any imminent risk of a short supply. The Panel therefore found that India failed to demonstrate that the challenged measures are justified under Article XX(j).*

8 A "contracting party" is to be read as a "WTO Member" from the formation of the WTO under the *Marrakesh Agreement Establishing the World Trade Organization*.

It is far from clear whether many existing and past trade sanctions fit neatly into these categories. Governments have understandably been reluctant to litigate in the WTO to obtain a more precise definition of when invocation of national security is justified, apparently preferring preservation of their freedom of action. One example is European Communities' complaint against the Helms-Burton Act of the United States which, the EC claimed, constrained its trade and the freedom of movement of its citizens. However, in its complaint, the EC did not allege that actions aimed by the United States against Cuba were inconsistent with US WTO obligations, but only made note of the collateral damage to the EC. It did not allege a misuse of the defense accorded by GATT Art. XXI. The US and the EC settled the matter and the panel was dismissed (*DS38 United States — The Cuban Liberty and Democratic Solidarity Act. 1996/97*).

An earlier case involving Article XXI under the GATT was initiated by Nicaragua against the United States, and left the question of when the exception can be invoked unresolved:

*The question of whether and to what extent the CONTRACTING PARTIES can review the national security reasons for measures taken under Article XXI was discussed again in the GATT Council in May and July 1985 in relation to the US trade embargo against Nicaragua which had taken effect on 7 May 1985. While a panel was established to examine the US measures, its terms of reference stated that "the Panel cannot examine or judge the validity or motivation for the invocation of Article XXI (b)(iii) by the United States". In the Panel Report on "United States - Trade Measures affecting Nicaragua", which has not been adopted,*

...

*"The Panel did not consider the question of whether the terms of Article XXI precluded it from examining the validity of the United States' invocation of that Article as this examination was precluded by its mandate. It recalled that its terms of reference put strict limits on its activities because they stipulated that the Panel could not examine or judge the validity of or the motivation for the invocation of Article XXI:(b)(iii) by the United States ... The Panel concluded that, as it was not authorized to examine the justification for the United States' invocation of a general exception to the obligations under the General Agreement, it could find the United States neither to be complying with its obligations under the General Agreement nor to be failing to carry out its obligations under that Agreement".<sup>9</sup>*

In connection with the Falklands War, the GATT noted that it would be inappropriate to consider procedures for use in Article XXI until such time as an interpretation was negotiated.<sup>10</sup> The EC alleged that certain import restrictions of India were not justified by Article XXI.<sup>11</sup> More recently Russia has threatened WTO litigation under WTO/GATT Article XXI with respect to the sanctions imposed in connection with its actions in Crimea and Ukraine.<sup>12</sup>

## Regional trade agreements

The WTO website notes that, "As of 1 February 2016, some 625 notifications of RTAs (counting goods, services, and accessions separately) had been received by the GATT/WTO. Of these, 419 were in force". The exception for the discrimination inherent in a regional free trade agreement is contained in WTO/GATT Art. XXIV, which on its face is pretty clear:

5. Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation . . . of a free-trade area . . . . Provided that:

(b) . . . the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free-trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement as the case may be; and

...

8. For the purposes of this Agreement:

(b) A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce . . . are eliminated on substantially all the trade between the constituent territories in products originating in such territories. (Emphasis supplied).

Since the WTO was founded, only one case appears to have involved a challenge to an act as being inconsistent with the above quoted provisions, and this was in a very limited complaint brought by India against Turkey with respect to the imposition of a textile quota (*DS 34 Turkey — Restrictions on Imports of Textile and Clothing Products. 1996*). Given that RTAs are so widespread and cover an increasing amount of world trade, and that it would strain credulity to believe that all meet the criteria listed above (especially the requirement that "all duties . . . are eliminated on substantially all trade between the constituted territories"), the absence of resort to the DSU must lie in self-restraint on the part of potential complainants. They do not challenge others' FTAs presumably based on an

9 | L/6053, dated 13 October 1986 (unadopted).

10 | L/5426, 29S/23.

11 | EC Request for consultations with India regarding, inter alia: Fowls of the species *Gallus Domesticus*, weighing not more than 185g other than grandparent stock, animal guts for natural casings. WT/DS279/1. DS279 India — Import Restrictions Maintained Under the Export and Import Policy 2002-2007. 2002. Case not pursued.

12 | [http://rbth.com/business/2015/06/01/russia\\_fails\\_to\\_win\\_wto\\_backing\\_in\\_fight\\_to\\_contest\\_western\\_sanction\\_46525.html](http://rbth.com/business/2015/06/01/russia_fails_to_win_wto_backing_in_fight_to_contest_western_sanction_46525.html)

implicit understanding that, in return, others will not challenge theirs. Perhaps they also do not wish to give an incentive for parties to an RTA to perfect the discrimination inherent in their agreement by coming into full compliance with GATT/WTO Article XXIV.

Now the primary path to liberalization lies in the agreements that do not require adherence by all WTO members – plurilaterals and RTAs. Those who can remember an MFN world with a single over-arching trade agreement can hope that RTAs lead back to Geneva someday.

#### *Certain restrictions on exports*

WTO dispute settlement dealt with China's export restrictions on rare earths, as noted above, but the US has not challenged the WTO-consistency of Canada's log export restrictions, nor has Canada in its turn challenged US state-level export restrictions on logs. And, of course, neither Canada nor the United States complained in the WTO about export restrictions imposed by Canada on softwood lumber, under the bilateral agreement that they entered into, to require those restrictions under certain circumstances.

As opposed to national governments, the WTO (Secretariat) does not self-initiate actions, nor has there been any encouragement from its members that it do so. Thus, for example, the WTO (Secretariat) has never challenged export restraints that are subject to a bilateral agreement (e.g., the US-Canada Softwood Lumber Agreement, 2006). A challenge would necessarily have to come from a third party that believes itself aggrieved. See *Japan - Trade In Semi-Conductors*, (Complainant: European Communities), 1998.

## CASES INVOLVING NOVEL CIRCUMSTANCES TO WHICH THE CURRENT RULES MIGHT LOGICALLY BE APPLIED OR EXTENDED

#### *Transparency*

The signatories of current RTAs, especially the TPP, pride themselves on creating extensive obligations for transparency – web access to regulations, ability to comment, access to decisions, etc. Spelling out what transparency means – how

in effect the WTO/GATT Article X obligation should be implemented – should not have been necessary. But it has been necessary. WTO/GATT Article X provides in relevant part:

#### *Article X: Publication and Administration of Trade Regulations*

1. *Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to . . . requirements, restrictions or prohibitions on imports or exports . . . or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them.*

In practice, transparency has been regarded as a subsidiary claim that need not be considered by a panel because a measure was found otherwise to be inconsistent with a member's obligations. It has also been applied in a Catch-22 manner – holding that because the claimant did not have sufficient access to published decisions; it could not make the case that the decisions were of general application which would require them to be published (*DS44 Japan — Measures Affecting Consumer Photographic Film and Paper*, 1998. See also *DS315 European Communities — Selected Customs Matters* (Complainant: United States), 2004-2006).

Going forward, Article X provides room for the Appellate Body in effect, requiring far greater transparency of government activities that affect trade. For example, if it becomes the norm to provide a single portal to import regulations to facilitate the participation of small and medium enterprises in internal trade, will a WTO member that does not provide the portal be in violation of its Article X obligations?

#### *Freedom of transit*

There are some 48 landlocked countries. Exports of goods from these countries must pass across two borders to get to the rest of the world that lies beyond immediate neighbors. The drafters of the GATT three-quarters of a century ago sought to provide a comprehensive set of obligations with respect to freedom of transport.<sup>14</sup> Article V states:

2. *There shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties. No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport.*

<sup>13</sup> US-Canada Softwood Lumber Agreement, 2006. <http://www.treaty-accord.gc.ca/text-texte.aspx?id=105072&lang=eng>.

<sup>14</sup> For the provenance of elements of this GATT Article, see the WTO/GATT Analytical Index, referring in part to the Barcelona Convention of 1921. [https://www.wto.org/english/res\\_e/booksp\\_e/gatt\\_ai\\_e/art5\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art5_e.pdf)

- 3 ... such traffic coming from or going to the territory of other contracting parties shall not be subject to any unnecessary delays or restrictions ...
7. Each contracting party shall accord to products which have been in transit through the territory of any other contracting party treatment no less favourable than that which would have been accorded to such products had they been transported from their place of origin to their destination without going through the territory of such other contracting party.

However, there is an extensive literature on whether Article V is adequate.<sup>15</sup> Landlocked countries have been the subject of concern in a substantial number of scholarly articles written about freedom of transit (e.g., Nepal with respect to transit through India)<sup>16</sup>. Does the provision apply to energy flowing across a country in the form of an oil or gas pipeline or transmission lines for electricity? What infrastructure is owed, if any, to facilitate the transit? Are roads to be wholly open?<sup>17</sup> Is it mainly where there is denial of national treatment that WTO dispute settlement can be effective?

While GATT Article V has not been a hotbed of WTO litigation, it could become so. Article V recognizes the right of the country through which transit is taking place to exercise customs jurisdiction, provided there is not unnecessary delay in the customs clearance process:

3. Any contracting party may require that traffic in transit through its territory be entered at the proper custom house, but, except in cases of failure to comply with applicable customs laws and regulations, such traffic coming from or going to the territory of other contracting parties shall not be subject to any unnecessary delays or restrictions ...

Countries claim customs jurisdiction over their territorial waters.<sup>18</sup> That claim of necessity depends on what parts of the sea are considered to be territorial waters. China's building of "improvements" on various reefs in the South China Sea and US passage of naval vessels through the disputed parts of that sea could also spill over into a WTO dispute. This would occur if any of the contiguous nations with overlapping claims sought to exercise customs jurisdiction over what it considers its territorial waters. Carl von Clausewitz famously wrote that "war is an extension of politics by other means".<sup>19</sup> While a WTO case is not necessarily a pleasure for the litigants, it beats exchanging missile strikes. Is this use of the WTO far-fetched? Well, it may well be remote, but it is not out of the question. It could be used, particularly by states facing asymmetrical power in the region.

The right of transit is covered in a number of agreements in other areas of the world. The Panama Canal Treaty of 1977 provides in Article II:

*The Republic of Panama declares the neutrality of the Canal in order that both in time of peace and in time of war it shall remain secure and open to peaceful transit by the vessels of*

*all nations on terms of entire equality, so that there will be no discrimination against any nation, or its citizens or subjects, concerning the conditions or charges of transit, or for any other reason, ...*<sup>20</sup>

It may be that at some point a specific agreement outside the WTO is reached with respect to freedom of transit through the South China Sea signed by all of the nations that are contiguous to that body of water. But until that happens, WTO dispute settlement remains a possible avenue to consider a complaint against customs jurisdiction asserted by one of the countries with an overlapping territorial waters claim.

### Unilateralism

The use of domestic retaliatory authority by the US President absent authorization by the WTO seemed to be a thing of the past. But a leading contender at present for the nomination of one of the two major American political parties has suggested that he would impose tariffs on goods from China and Mexico to redress imbalances in trade and opportunities for access to those markets. The mere existence of statutory retaliatory authority has been held by the Appellate Body to fall short of being a measure that is inconsistent with WTO obligations (*DS152 — United States — Sections 301–310 of the Trade Act 1974* (Complainant: European Union 1999)). Assurances from the US that it would not use Section 301 inconsistently with its WTO obligations facilitated this result. Were a country to take the path condemned by the WTO in the cited Section 301-310 case, the retaliatory action could be a long time in coming, but the day of reckoning would come. The retaliatory measures in the COOL case<sup>21</sup> implicitly stand for this proposition.

Unilateral trade measures, without first pursuing a WTO dispute settlement case and being authorized to retaliate by the Dispute Settlement Body, would be contrary to WTO obligations. This sort of deviation from the WTO rules would be egregious and fall into category I.A. above — cases for

- 15 Selective Bibliography of Literature on GATT Article V, WTO Council for Trade in Goods, *G/C/W/463*, 26 May 2003.
- 16 Almeen, Ali (1989), "Land-locked States and International law, with special reference to the role of Nepal", South Asian Publishers Pvt. Ltd.
- 17 German limitations on hours of use by Austrian trucks.
- 18 *Contiguous Zone. The contiguous zone of the United States is a zone contiguous to the territorial sea. In this zone, the US may exercise the control necessary to prevent and punish infringement of its customs, fiscal, immigration, cultural heritage, or sanitary laws and regulations within its territory or territorial sea. The US contiguous zone is measured 24 nautical miles from the baseline. U.S. Maritime Limits and Boundaries, to be found at: <http://www.nauticalcharts.noaa.gov/csdl/mbound.htm>.*
- 19 "Der Krieg ist eine bloße Fortsetzung der Politik mit anderen Mitteln."
- 20 Accessed at <http://2001-2009.state.gov/p/wha/rlnks/11936.htm>.
- 21 *DS384. United States – Certain Country of Origin Labeling (Cool) Requirements* (Complainant: Canada) 2008-15.

which WTO jurisdiction is unquestioned. There is, however, a more subtle form of unilateralism.

One cannot exclude the possibility of occasions in the coming decade when unilateral measures are imposed without WTO approval where the facts are harder to prove. While the US could again stand out as a practitioner of unilateralism, this is largely because when it acts it does so in an entirely transparent manner. Others may engage in unilateral acts that are far less transparent (e.g., denying permits for investment, plant expansion, etc., where the motivation, while not obscure, is not provable). Sometimes this form of unilateralism may be seen by the country taking the measure as retaliation for another's trade measures which harmed its trade.

#### *Toleration of anti-competitive practices, abuses of competition policy*

All the obligations for market access can be of little or no effect if either a government turns a blind eye to market closure that is the result of private activity that, while illegal under its national laws, it takes no action to remedy. Likewise, a government can use the administration of competition policy to regulate market access, either cross border or through investment. Both of these categories of full or partial market closure are well known.

The history of the forerunner of the WTO and GATT before it, the Havana Charter for the failed International Trade Organization (ITO), demonstrates that multilateral trade agreements were not to be allowed to intrude into the field of competition policy. That was true 70 years ago and it continues to be the case up to the present<sup>22</sup>. However, countries can use competition policy as a substitute for anti-dumping or safeguard actions. The WTO provisions are silent on what can be done in response.

One would have to look to the sections of the WTO/GATT that promise nondiscrimination (WTO/GATT Article I) and national treatment (WTO/GATT Article III), but also to WTO/GATT Article XXIII, which provides that

#### *Article XXIII: Nullification or Impairment*

1. *If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of*

(a) *the failure of another contracting party to carry out its obligations under this Agreement, or*

(b) *the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or*

(c) *the existence of any other situation,*

*the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.*

2. *If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1 (c) of this Article, the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. . .*

*If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary to the Contracting Parties of its intention to withdraw from this Agreement and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him.*

I have included toleration of anti-competitive practices, abuse of anti-trust remedies, and government encouragement of boycotts under the category of measures to which the existing WTO commitments might be extended by a WTO adjudicatory body. This is not free from controversy. It is not an area that WTO dispute settlement ventures into at present. See *DS44 Japan — Measures Affecting Consumer Photographic Film and Paper*, 1998. Matters of competition policy might be properly placed in the third category addressed in this paper — where there are no WTO rules to apply.

#### *Geographical indications (GIs)*

"Geographical indications" is a rather harmless-sounding term, perhaps sort of a labeling device to help the consumer? Often, yes. Nevertheless there are labels that the WTO Appellate Body has found to be inconsistent with a member's international obligations, for example, US country of origin labeling of meat (COOL). This measure was found to be an unjustifiable trade barrier, and billions of dollars worth

22 In July 2004 the General Council of the WTO decided that the interaction between trade and competition policy (in addition to investment, and transparency in government procurement) would no longer form part of the Work Programme set out in the Doha Ministerial Declaration and therefore that no work towards negotiations on any of these issues will take place within the WTO during the Doha Round. From the WTO's website, under Trade and Competition Policy.

of trade retaliation was authorized to get the offending member, the United States, to repeal the measure (*DS384. United States – Certain Country of Origin Labeling (Cool) Requirements* (Complainant: Canada) 2008-15).“The Appellate Body concluded that the least costly way for businesses to comply with the COOL measure was to rely exclusively on domestic livestock, creating an incentive for US producers to do so, causing a detrimental impact on the competitive opportunities of imported livestock. The Appellate Body found further that the recordkeeping and verification requirements imposed a disproportionate burden on upstream producers and processors compared to origin information conveyed to consumers. This regulatory distinction drawn by the COOL measure was therefore *not* legitimate within the meaning of [Technical Barriers to Trade (TBT) Agreement] Art. 2.1.”

What would the outcome be of a WTO dispute settlement proceeding against a provision in the Canada-EU Comprehensive Economic Partnership (CETA) that will not allow the importation of cheese labeled as “feta” from third countries not party to CETA, other than from those persons who sold the product as such in Canada prior to CETA going into effect? The EU goes about the world sowing GI provisions in its RTAs<sup>23</sup>, which the US agricultural community regards as the sowing of dragon’s teeth<sup>24</sup> threatening America’s agricultural export opportunities.

The Trans-Pacific Partnership (TPP) Agreement signatories’ response is to provide:

*Article 18.19: Collective and Certification Marks*

*Each Party shall provide that trademarks include collective marks and certification marks. A Party is not obligated to treat certification marks as a separate category in its law, provided that those marks are protected. Each Party shall also provide that signs that may serve as geographical indications are capable of protection under its trademark system.*

It also provides notice and challenges provisions. These separate regimes may well collide in WTO dispute settlement at some point.

*The digital economy*

The foundation of the globalization of trade is the free flow of data across borders.<sup>25</sup> This is one of the central tenets of the Trans-Pacific Partnership (TPP) Agreement:

*2. Each Party shall allow the cross-border transfer of information by electronic means, including personal information, when this activity is for the conduct of the business of a covered person.*<sup>26</sup>

It can readily be envisaged that the current WTO dispute settlement process will, through the national treatment obligation in WTO/GATT Article III, condemn the curtailing of cross-border data flow for Amazon, E-Bay, or any other online retailer where there discrimination. If it is equally restrictive for domestic businesses, that is more problematic.

Perhaps the non-violation provisions of WTO/GATT Article XXIII could be applied. The importance of cross-border data flow is very broad. There is hardly any international business of any kind that could operate today without the ability to transfer information across borders. Do the current WTO rules reach beyond the movement of goods and services across borders to measures that impair an essential support for those transactions in the form of electronic data transfer where there is no apparent discrimination between domestic and foreign businesses?

The same question arises with respect to forced localization of data storage. Holding data in digital form about customers, inventory, distribution, and all other aspects of operating a business engaged in international trade is essential to both trade in goods and trade in services. It is impractical to store data in every country in which a firm conducts its business. Is there a current substantive provision of the WTO that covers forced localization of data storage? A good argument can be made that the requirement to do so violates national treatment per WTO/GATT Article III:

1. *The contracting parties recognize that . . . laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, . . . should not be applied to imported or domestic products so as to afford protection to domestic production.*  
...
4. *The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. . . .*<sup>27</sup>

23 | See e.g.: EU-Korea, EU-Singapore and, just concluded, EU-Vietnam FTAs.

24 | *In Greek myth, dragons’ teeth feature prominently in the legends of the Phoenician prince Cadmus and in Jason’s quest for the Golden Fleece. In each case, the dragons are real and breathe fire. Their teeth, once planted, would grow into fully armed warriors. Cadmus, the bringer of literacy and civilization, killed the sacred dragon that guarded the spring of Ares. The goddess Athena told him to sow the teeth, from which sprang a group of ferocious warriors called the spartoi. He threw a precious jewel into the midst of the warriors, who turned on each other in an attempt to seize the stone for themselves. The five survivors joined with Cadmus to found the city of Thebes. The classical legends of Cadmus and Jason have given rise to the phrase “to sow dragon’s teeth.” This is used as a metaphor to refer to doing something that has the effect of fomenting disputes.* [https://en.wikipedia.org/wiki/Dragon%27s\\_teeth\\_\(mythology\)](https://en.wikipedia.org/wiki/Dragon%27s_teeth_(mythology)).

25 | TPP Chapter 14. Electronic Commerce. <https://ustr.gov/sites/default/files/TPP-Final-Text-Electronic-Commerce.pdf>.

26 | Ibid. TPP Chapter 14.11.2.

27 | WTO/GATT Art. III.

and WTO/GATS Article XVII:

*Article XVII: National Treatment*

1. *In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.*

If forced localization of data storage is covered by the current WTO rules or dispute settlement, as is likely to be the case,<sup>28</sup> how are the necessary exceptions (such as for privacy) to be inferred and their applicability judged?

Barriers to the provision of services over the Internet that are integral to electronic commerce, such as the use of search engines and electronic payment services, will likely become a substantial part of WTO dispute settlement going forward. These essential features of today's digital economy must be held to be covered by any signatory's obligations under the General Agreement on Trade in Services (GATS) national treatment obligations, unless an explicit exception was listed in the annexed GATS schedule.<sup>29</sup> A Venn diagram of the needs of the digital economy<sup>30</sup> and the coverage of the WTO agreements would show substantial overlap but there would be areas where questions will arise. For example, do current rules apply or are others required to resolve disputes in the not-distant future when a substantial portion of international trade takes place in new forms, through technological breakthroughs such as 3-D printing? As it is, the TPP, signed just six months ago, may not cover all aspects of the digital economy, however it does its best to do so, other than as limited by individual signatories' nonconforming measures, and the Transatlantic Trade and Investment Partnership (TTIP) provisions have yet to emerge. To expect WTO agreements from twenty years ago to cover fully matters that are not even subject to binding commitments under fresh multi-country agreements is asking for judicial legislation that that even Chief Justice Taft might not have thought supportable.

*Harmful manufacturing methods (process and production methods – PPMs)*

The Appellate Body let stand an American ban on shrimp imports that endangered sea turtles, as long as the United States worked to avoid discriminating among countries exporting the shrimp to the United States.<sup>32</sup> In the tuna-dolphin decision, "the Appellate Body found that the measure at issue is not even-handed in the manner in which it addresses the risks to dolphins arising from different fishing techniques in different areas of the ocean".<sup>32</sup> In the EC Asbestos case, the EC was held to be within its WTO obligations when it restricted imports of products made with asbestos.<sup>33</sup>

It therefore appears that WTO dispute settlement under existing rules protect the survival of individuals of our own

species, namely, humans, as well as turtles and dolphins – under certain circumstances, that is, the harm that is to be avoided is in the importing country. Can this application of WTO/GATT Article XX exceptions allow import restrictions (accompanied by comparable domestic restrictions) to be placed on products that are produced with processes that are harmful to workers in foreign plants, either because of the use of dangerous chemicals or under conditions that cause injury? Can America's EPA and OSHA regulations be applied at the border consistently with WTO obligations?

Once nondiscrimination and national treatment obligations are satisfied, are restrictions to be permitted under the exceptions contained in WTO/GATT Article XX for imposing these types of domestic regulations on imports?

28 *DS285 United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (Complainants: Antigua and Barbuda), (2003-13), finding a US measure against foreign-based Internet gambling to be contrary to the chapeau of GATS Article XIV which provides in relevant part that a measure shall not be "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services . . ."

29 See Central Product Classification (CPC 843. *n. on-line information and/or data processing (incl. transaction processing)*). It is beyond the scope of this paper to determine which Internet services would be covered by the WTO rules as they stand today.

30 *A Policy Checklist for the Global Digital Economy*, National Foreign Trade Council (NFTC), <http://www.nftc.org/default/Innovation/2015-NFTC-digital-economy-checklist.pdf>.

31 *DS58. United States — Import Prohibition of Certain Shrimp and Shrimp Products* (Complainants: India; Malaysia; Pakistan; Thailand) 1996.

32 *DS381 United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*

33 *DS135 European Communities — Measures Affecting Asbestos and Products Containing Asbestos* (Complainant: Canada), 1998-2001. The Panel and the Appellate Body in this case both rejected Canada's challenge to France import ban on asbestos and asbestos-containing products, reinforcing the view that the WTO Agreements support members' ability to protect human health and safety at the level of protection they deem appropriate.

# BEYOND THE CURRENT WTO RULES

A good place to start an inquiry into which subjects are probably or definitely not covered by the WTO rules is to examine areas that WTO members identify as deficient in the current WTO rules. Perhaps the easiest way to identify these areas is by examining where WTO members are negotiating new rules in other fora. Countries engaging in regional trade agreements or in plurilateral agreements highlight in their public statements obligations in their agreements that they describe as being new, undertaken for the first time. Sometimes this might mean, in reality, just bringing greater clarity to a subject that is notionally covered by existing WTO disciplines – an example would be adoption of a national standard for devices or software that includes encryption. However, in other instances, it will be crystal clear that a new subject is being addressed – in TiSA or in the TPP, such as imposing disciplines on the subsidization of the cross-border provision of services.

A central challenge to the effectiveness of the WTO in applying its existing rules, and indeed to the legitimacy of the WTO itself, exists when the rules no longer reflect current realities of world trade. An illustrative list follows:

## *Domestic subsidies to goods*

WTO/GATT Article III.8. creates an exception from the requirement for national treatment. It states:

*(b) The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products.*

Where the goods in question are not substantially for export, and not part of an import substitution scheme, the subsidies may nevertheless affect trade. At that point, serious prejudice might be shown if the adverse effects on trade are serious enough. But in a very large number of instances, governments decide to underwrite the creation or expansion of an industry not hitherto a factor in either domestic or international commerce. Does Article III.8 indicate a permissiveness on the part of the WTO rules such that the establishment of an industry that later becomes globally competitive operates within a WTO-shelter until markets are disrupted?<sup>34</sup>

## *Subsidies to services*

The General Agreement on Trade in Services (GATS) envisioned the negotiation of disciplines on subsidies:

### *Article XV: Subsidies*

- 1. Members recognize that, under certain circumstances, subsidies may have distortive effects on trade in services. Members shall enter into negotiations with a view to developing the necessary multilateral disciplines to avoid such trade-distortive effects. The negotiations shall also address the appropriateness of countervailing procedures. Such negotiations shall recognize the role of subsidies in relation to the development programmes of developing countries and take into account the needs of Members, particularly developing country Members, for flexibility in this area. For the purpose of such negotiations, Members shall exchange information concerning all subsidies related to trade in services that they provide to their domestic service suppliers.*
- 2. Any Member which considers that it is adversely affected by a subsidy of another Member may request consultations with that Member on such matters. Such requests shall be accorded sympathetic consideration.*

While the GATS does contain a national treatment obligation, which would make it necessary to subsidize foreign service providers along with domestic, most countries' schedules contain a horizontal limitation on its obligations to allow it to subsidize domestic service providers, services supplied in-country, either generally or for specific sectors.<sup>35</sup> The net effect is that the GATS generally contains no effective disciplines on subsidies granted to suppliers of services, beyond the obligation to consult. End of story – until the Trade in Services Agreement (TiSA) or a Regional Trade Agreement (RTA) fills the gap.

## *State-owned enterprises*

While the WTO/GATT XVII addresses state trading, it does not explicitly provide for the regulation of state-owned enterprises in their competition with private companies. The closest the WTO comes in this respect is the Working Party Report for China's Accession to the WTO, which provides in relevant part:

- 46. The representative of China further confirmed that China would ensure that all state-owned and state-invested enterprises would make purchases and sales based solely on commercial considerations, e.g. price, quality, marketability*

<sup>34</sup> Some subsidies still pertain – such as that contained in section 25.2 of the Subsidies and Countervailing Measures Agreement: *Members shall notify any subsidy as defined in paragraph 1 of Article 1, which is specific within the meaning of Article 2, granted or maintained within their territories.*

<sup>35</sup> US Schedule of GATS Commitments. Horizontal exclusion of subsidies. <https://www.citizen.org/documents/GATS98.pdf> at p. 10.

and availability, and that the enterprises of other WTO Members would have an adequate opportunity to compete for sales to and purchases from these enterprises on non-discriminatory terms and conditions. In addition, the Government of China would not influence, directly or indirectly, commercial decisions on the part of state-owned or state-invested enterprises, including on the quantity, value or country of origin of any goods purchased or sold, except in a manner consistent with the WTO Agreement. The Working Party took note of these commitments.<sup>36</sup>

WTO dispute settlement has found the commitments contained in the Working Party Report to be binding obligations of the government of China.<sup>37</sup>

The Trans-Pacific Partnership contains a chapter on the obligations of TPP Parties with respect to their state-owned enterprises ("SOEs").<sup>38</sup> The TPP provisions impose additional obligations beyond those found in the China working party report, as well as a number of exceptions and a narrower scope of entities covered<sup>39</sup>.

The key provisions, in addition to SOEs being required to buy and sell on the basis of commercial considerations, are the following:

- SOEs are not to discriminate in their purchases and sales in their dealings with entities of another party, and are to accord national treatment to the entities of other parties;
- Government regulators are not to exercise their discretion to favor SOEs over their competitors; they are to be impartial;
- Subsidies that cause harm are actionable, not only for goods in all circumstances but where there is cross-border provision of services (including competition in third country markets) and in the market of the complaining party whether through trade or investment;
- SOEs are to be transparent with respect to their ownership, directors, and officers.
- In dispute settlement, a pattern or practice of a regulatory body can be proof of a violation of the Party's obligations.

As SOEs are a large and growing factor in world trade, the absence of WTO coverage of SOE activities, outside of China's commitments made in the Working Party report cited above, leaves a wide swath of world trade unconstrained by WTO obligations. Removing tariffs and other border measures may have very little effect when substantial portions of some members' economies are controlled by state-owned enterprises.

#### Access to water

Rare earths turned out to be essential to the production of electronics, and information technology in turn requires these components in order to function. In that case, China's export restrictions were considered to be unjustified under the exceptions to the WTO/GATT rules. Water is essential

for human life. Will restrictions on water flowing from one country into another be considered the export of a good (even if no price had previously been charged for it)? Will water export restrictions be judged under the exceptions to the WTO prohibition on limits on exports? The WTO GATT provides in relevant part:

#### Article XX: General Exceptions

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

*(b) necessary to protect human, animal or plant life or health;*

...

*(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;*

Economic development, population growth, as well as climate change (whether due to *el niño*, *la niña*, or longer term climate change) are likely to make access to water that crosses borders a key issue of the next decade:

*During the next 10 years, many countries important to the United States will experience water problems — shortages, poor water quality, or floods — that will risk instability and state failure, increase regional tensions, and distract them from working with the United States on important US policy objectives. Between now and 2040, fresh water availability will not keep up with demand absent more effective management of water resources. Water problems will hinder the ability of key countries to produce food and generate energy, posing a risk to global food markets and hobbling economic growth. As a result of demographic and economic development pressures, North Africa, the Middle*

36 Report of the Working Party on the Accession of China, WT/ACC/CHN/49, 1 October 2001. Para. 47. makes clear that SOE purchasing is not to be considered generally as government procurement, and so WTO obligations apply to these purchases whether or not China joined the Government Procurement Agreement.

37 DS379 United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China (Complainant: China), 2008-12.

38 TPP, Chapter 17. State-owned enterprises. <https://ustr.gov/sites/default/files/TPP-Final-Text-State-Owned-Enterprises-and-Designated-Monopolies.pdf>

39 The TPP text contains a number of limitations on coverage. Among the most important are: government ownership must be more than 50%; the SOE's revenues must exceed a threshold (200m SDR equivalent); and subcentral government owned entities are not covered.

East, and South Asia will face major challenges coping with water problems.<sup>40</sup>

Does protection of human, animal, or plant life or health stop at the border? What if the conservation effort falls most heavily on export markets? The second of these questions was presumably answered by *Rare Earths*.

What if there is no movement of water above ground and perhaps not provable below – just by tapping into an aquifer that is shared by more than one WTO member. The United Nations encourages its members to enter into agreements for sharing of water resources. With respect to aquifers, the model provisions contain the following:

*Aquifer States shall utilize transboundary aquifers or aquifer systems according to the principle of equitable and reasonable utilization, as follows:*

(a) *They shall utilize transboundary aquifers or aquifer systems in a manner that is consistent with the equitable and reasonable accrual of benefits therefrom to the aquifer States concerned; . . .*<sup>41</sup>

Can the Appellate Body take the members of the WTO into a subject area that its members have failed to address in any rule-making forum, least of all in the WTO? What if the subject matter is the most important cross-border issue regarding a commodity upon which human life depends? If it is considered trade, or becomes so (e.g., by trading water rights for cash or for other commodities), can the WTO Appellate Body ignore it?<sup>42, 43</sup>

#### Access to virtual water

Virtual water is defined as follows:

*The water used in the production process of an agricultural or industrial product is called the 'virtual water' contained in the product. For producing 1 kg of grain we need for instance 1000 kg water per kilogram of product. For producing 1 kg of cheese we need for instance 5000- 5500 kg of water and for 1 kg of beef we need in average 16000 kg of water . . .*

. . .

*Trade of real water between water-rich and water-poor regions is generally impossible due to the large distances and associated costs, but trade in water-intensive products (virtual water trade) is realistic. For water-scarce countries it could therefore be attractive to achieve water security by importing water-intensive products instead of producing all water-demanding products domestically. Reversibly, water-rich countries could profit from their abundance of water resources by producing water-intensive products for export.<sup>44</sup>*

Climate change could well lead countries to ration water. Whether relatively water-rich or water-poor, export restrictions on products that are water-use intensive during production may become based upon the virtual water content of crops. In fact, it is hard to imagine that there will not be restrictions for this purpose.<sup>45</sup> If they are coupled with domestic restrictions of like effect, it may be hard to challenge this form of restriction on exports successfully. The subject is not dissimilar from the calls for agricultural safeguards in general. The debate there is about import restrictions rather than sharing food from regions experiencing bumper harvests with those regions experiencing crop shortfalls. The issue may extend beyond agriculture, although it might hit in that sector first. A number of manufactured goods are also water-intensive in their production.

40 Global Water Security Intelligence Community Assessment, Office of the Director of National Intelligence, ICA 2012-08, 2 February 2012.

41 Resolution adopted by the General Assembly on 11 December 2008 [on the report of the Sixth Committee (A/63/439)] 63/124. *The law of transboundary aquifers*. <http://www.un.org/es/comun/docs/?symbol=A/RES/63/124&lang=E>.

42 NAFTA begins to address water export issues. *Water in its "natural state" would not be subjected to the terms of the trade agreement. trade law provides exceptions for environmental protection. Governments can set limits on water extraction, . . . as long as they apply equally to domestic and international companies. Canada did as much in 1999 when Parliament instituted a moratorium on bulk water exports after Sun Belt Water, an American company, attempted to ship water from British Columbia to California in the 1990s. Then in 2004, a group of farmers in Texas brought suit against Mexico for allegedly withholding water from reservoirs in the Rio Grande Basin that was supposed to flow to Texas. The tribunal ruled on a technicality and did not address the merits of the case, . . .* <http://www.circleofblue.org/2015/world/concerns-over-bottled-water-and-nafta-swirl-during-british-columbia-drought/>.

43 In 1993, the governments of Canada, Mexico, and the United States issued a joint statement on this matter, noting that "[u]nless water, in any form has entered into commerce and become a good or product, it is not covered by the provisions of any trade agreement including the NAFTA.... Water in its natural state in lakes, rivers, reservoirs, aquifers, water basins and the like is not a good or product, is not traded, and therefore is not and never has been subject to the terms of any trade agreement." In sum, the joint statement confirmed that Canadian water resources in "a natural state" are not subject to NAFTA trade rules. However, this does not prevent Canadian water from being taken from its natural state, being put into containers, and made into a "good" fully subject to NAFTA rules. In fact, in the case of bottled water, this is exactly what happened. Thus, water exports were not insulated from the considerable institutional changes resulting from the introduction of free trade. *Harmonization through Emulation: Canadian Federalism and Water Export Policy*. Heinmiller, B. Timothy, Institute of Public Administration of Canada, Volume 46; Issue 4, December 22, 2003.

44 *Virtual Water Trade: Proceedings of the International Expert Meeting on Virtual Water Trade*, edited by A.Y. Hoekstra, February 2003.

45 See *Saudi land purchases fuel debate over US water rights*, *Washington Post*, March 28, 2016, which refers to Saudi interests buying land in drought-suffering regions of the United States to grow Alfalfa, presumably for export to Saudi Arabia. [https://www.washingtonpost.com/national/energy-environment/saudi-land-purchases-fuel-debate-over-us-water-rights/2016/03/28/252ebc0c-f4ad-11e5-958d-d038dac6e718\\_story.html](https://www.washingtonpost.com/national/energy-environment/saudi-land-purchases-fuel-debate-over-us-water-rights/2016/03/28/252ebc0c-f4ad-11e5-958d-d038dac6e718_story.html).

The appropriate answer as to whether it is appropriate to limit exports of virtual water crops and products is probably best assigned to negotiators to find an equitable, or at least tolerable, sharing of the burden. It will be hard for the Appellate Body to do more than address broad questions of differential treatment of production for the domestic market and for export. The effects may still be very uneven however, even if not on their face different. Crops exported for feed can be substituted with grazing, to some extent, for example. Differences in national measures may cause problems too. The US Constitution forbids the imposition of export taxes.<sup>46</sup> The United States would have to use export quotas. What if US export restrictions were held to fit within an exclusion to the export quota prohibition of the WTO/GATT, and thus facially consistent with US obligations under the WTO, but were allocated to reflect trade on an historical basis? This might not fit the needs of the global trading system at a given point in time, nor be responsive to the needs of newly water-short countries. To what extent can dispute settlement substitute for negotiation in an area that, while not unknown when the Uruguay Round ended, was not addressed directly?

*Imputing an obligation to supply: trade in electricity, natural resources*

The resources for electric power generation and the demand for electric power are not evenly distributed. For Germany (which, it is said, has only as much exposure to the sun as Alaska), a primary source of solar power in the future may be from the Maghreb countries once transmission over great distances is technologically feasible. For the northern tier of the United States, hydropower from Canada would help meet clean air standards.

Is electricity a "good" covered by the WTO/GATT?<sup>47</sup> If it is, what is the obligation to continue to generate it for export? How far does the ruling in *Rare Earths* apply? Is there a difference between cutting off exports in a discriminatory manner and not producing the "product" for export in the first place? What is the obligation to share resources? Oil, gas, water, minerals, food? Assuming that China is in full compliance with its WTO obligations but sharing its rare minerals, what if world demand increases, but China was worried about additional pollution being created? If Denmark came up with a process that would solve the pollution problem, is China obligated to adopt it, and ratchet up production? The current WTO rules go to nondiscrimination (as between supply of the domestic market and exporting) not to meeting external needs. Take as a hypothetical example a producing country instead that has no domestic need for certain minerals (could be rare earths). Assume it has a ban on production on, or simply chooses not to produce, something the world definitely needs. There can hardly be a WTO rule or ruling that there is an obligation to mine it or produce it.

*Export of harmful substances*

While delving into future environmental issues, it is worth considering not just the diversion of water to downstream users in a different member country, but also the fouling of what is supplied. The WTO rules are about limiting restrictions on exports or subsidizing them, not about an obligation to limit the export of harmful materials. An analogy might be the export of counterfeit goods that are harmful (e.g., counterfeit semiconductors that fail when installed in critical downstream products such as a heart transplant with ventricular assist device).<sup>48</sup> If cross-border pollution of water necessary for human consumption, production, and export of harmful goods or services takes place, it is hard to see a remedy in the WTO through dispute settlement. This is true of knowingly exporting milk that contains melamine, and wine or water that includes benzene.

What if the WTO takes steps to limit only domestic consumption of products deemed harmful, but not exports (e.g., flavored cigarettes or alcoholic beverages that might appeal to young adults, etc.)? Or take the reverse situation: could a WTO member, consistent with its WTO obligations, place export restrictions on marijuana, possession of which is legal at home, when asked to do so by its neighboring country where the product is banned? Can it be deemed obligated to do so?

There was a GATT Working Group on the Export of Domestically Prohibited Goods and Other Hazardous Substances formed in 1989. It did not reach a conclusion that could be adopted as part of the GATT rules, nor did the subject make it onto the Uruguay Round agenda. The WTO articles are silent with respect to any justification of export restrictions that might have been applied to assist a fellow WTO member<sup>49, 50</sup> — unless Article XX's exception for measures to protect human health is invoked. The novelty

46 | Art. I Sec. 9. Cl. 5.

47 | In this regard, both a panel and the Appellate Body reviewed the discriminatory purchasing of electricity by Canadian government agencies depending on the degree of local content of the renewable energy generating equipment. See *DS426 Canada — Measures Relating to the Feed-in Tariff Program*. 2011-14.

48 | See Art. 23.1. of the Anti-Counterfeiting Trade Agreement (ACTA): *Each Party shall treat wilful importation or exportation of counterfeit trademark goods or pirated copyright goods on a commercial scale as unlawful activities subject to criminal penalties under this Article.* ACTA is not in force.

49 | My assumption is that the "exportation" of polluted air that impairs habitation and production of crops or goods is also outside the ambit of the WTO. Air is not traded. Water can be (but does it have to be bottled first?).

50 | Assisting another country with a problem is found in the third country anti-dumping provisions of WTO/GATT Article VI.6 (b). The WTO can waive the need to find injury to one's own industry if one is using anti-dumping or countervailing duties to assist another WTO member. I know of no instance in which a request to protect an industry other than one's own has been made or, if made, honored.

would be the fact that it was not the population of the exporting country for which Article XX would be invoked, but that of the market for which the goods would have been destined.

#### *Differences in national systems of taxation*

The WTO has clarity with respect to the rebate of direct taxes (e.g., taxes on persons, including corporations, such as on income taxes) being a subsidy, and the exemption of indirect taxes (e.g., value added taxes on goods) on goods for export not being a subsidy. A WTO/GATT panel clearly stated this distinction in a case brought by the European Communities against the Domestic International Sales Corporation (DISC):

*the illustrative list of measures which governments prepared to accept the Declaration giving effect to Article XVI:4 - including the United States Government - considered in general to be subsidies within the meaning of Article XVI:4 (BISD, 9 Supp., p. 186) and in particular to items (c) and (d) of that list, . . . referred respectively to "the remission, calculated in relation to exports, of direct taxes ... on industrial or commercial enterprises", and "the exemption, in respect of exported goods, of charges or taxes, other than charges in connection with importation or indirect taxes levied at one or several stages on the same goods if sold for internal consumption".<sup>51</sup>*

There is no economic justification for this rule. In 1960 when this issue was being debated, the United States seems to have accepted the notion that exports should be relieved of sales taxes (such as US states impose) and VAT taxes prevalent in many foreign countries. It is an analysis that is superficially appealing. But the actual effect depends on how much of the indirect tax the seller must absorb as opposed to passing it on as a cost to a purchaser. This is determined by market forces. If a commodity like salt is a necessity, taxing it will raise its price. It is price inelastic. Likewise, a direct tax on a corporation has to come out of revenues and is built into the price a purchaser of the company's product buys, if the market allows it to do so.

Congress includes in each grant of "trade promotion authority" an objective that the US negotiators correct this differential in the treatment of the taxes the US budget relies upon as compared with the tax systems of other countries that have a mix of direct taxes (on persons) and indirect taxes (on goods). This has been seen as a non-negotiable American wish for generations of trade negotiators.

Beyond national treatment and the subsidies rules, the WTO is silent on other aspects of taxation, for example countries adopting different tax rates, one from the other, as long as goods are not discriminated against. But in fact, differentials in levels of taxation have a dramatic effect on the location of production and, therefore, on trade flows. The EU Commission has recently decided to pursue, under its State Aids Code Member State differentials, indirect taxation. In

the OECD, a discussion is underway as to how to deal with what the OECD labels as Base Erosion and Profit Shifting (BEPS).<sup>52</sup> Unless the WTO dispute settlement process considers such differentials to be, in effect, subsidies, these issues will remain outside the purview of the WTO rules. The possibility should not be excluded that this WTO reticence could change in the context of dispute settlement.

#### *Investment*

Where investment is located is often due to government measures designed to attract it. In turn, investment is largely determinative of trade flows, perhaps to the same degree as trade measures. The WTO edges into this terrain. WTO/GATT Article III does not allow discrimination against foreign goods with respect to a number of activities involving goods that are very often carried out through branches or subsidiaries of the exporting company headquartered in another country:

1. *The contracting parties recognize that . . . laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products . . . should not be applied to imported or domestic products so as to afford protection to domestic production.*
4. *The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use . . .*

And the WTO's Trade Related Investment Measures (TRIMS) Agreement provides:

51 United States Tax Legislation (DISC), *Report of the Panel presented to the Council of Representatives on 12 November 1976 (L/4422 - 235/98)*. The US defense of the DISC did not rely on a challenge to the different treatment direct and indirect tax rebates received, as this had a GATT justification, but instead pursued the following line of argument:

39. *The representative of the United States argued that the DISC legislation removed an existing distortion rather than creating a new distortion in international trade.*

40. *He recalled that a number of countries including several countries belonging to the European Communities including France, Belgium and the Netherlands did not tax currently the export sales income of foreign branches or foreign sales subsidiaries. In addition, many countries also wholly or partially exempted from taxation export earnings repatriated by a foreign sales subsidiary to its parent while the United States taxed that income. By organizing a foreign branch or subsidiary in a low-tax country, the domestic manufacturing firm could enjoy the low-tax rate on that portion of the total income which was allocated to the foreign branch or subsidiary as export sales income, and, since inter-company pricing rules were leniently applied in many countries, a substantial portion of the combined income could be shifted to the sales subsidiary in the low-tax jurisdiction.*

52 <http://www.oecd.org/tax/background-brief-inclusive-framework-for-beeps-implementation.pdf>

*Annex: Illustrative List*

1. *TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which require:*

*(a) the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production;*

The Illustrative List is, by its terms, illustrative. How much of a stretch is it to consider that a requirement placed on an investment – e.g., forced technology transfer – is really equivalent to a restriction on the sale of imports? A violation of WTO/GATT Article III and TRIMs Article 2 (national treatment) occurs if the restrictions were placed on imported goods but not on domestic goods. But forced technology transfer is often designed to create domestic production that substitutes for import. Should a violation of the WTO be found?

The General Agreement on Trade in Services (GATS) takes the WTO further into the protection of investment, because protecting services against restrictions often means protecting the provider as well:

2. *For the purposes of this Agreement, trade in services is defined as the supply of a service:*

...

*c) by a service supplier of one Member, through commercial presence in the territory of any other Member;*

*(d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.*

*Article II: Most-Favoured-Nation Treatment*

1. *With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.*

...

There are a plethora of types of investment restrictions that can alter trade flows, whether in goods or services. The TRIMs and GATS lead the way to considering a wide range of investment restrictions to be covered by the obligations of the WTO.

How much of bilateral investment treaties, under the above analysis, can be considered to be within the compass of the WTO's obligations so long as trade is involved? Obligations that might be considered in this specific trade context might include, for the investor engaged in international trade:

- treatment no less favorable than that the Member accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory;
- treatment in accordance with customary international law, including fair and equitable treatment and full protection and security;
- the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world;
- the obligation to provide the level of police protection required under customary international law;
- non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife; and
- limits on expropriation and a requirement that any compensation shall be prompt, adequate, and effective.

As the GATS indicates with respect to obligations to protect a services provider (because this is inextricably linked with the supply of the service), in considering whether national treatment or other restrictions are applied to an imported good, it is reasonable to also consider whether the same WTO-prohibited result is achieved indirectly by imposing measures on the investor.

*Positive obligations to support trade*

The WTO Agreements are first and foremost about refraining from placing obstacles to international trade. For years, American soda ash could not be shipped in bulk to Japan because the only suitable port facility handled only products destined for domestic producers.<sup>53</sup> An LNG super tanker cannot offload its cargo without the appropriate port facilities. Neither can a super container ship. Oil needs pipelines for efficient transport. Electricity needs a connection to the grid. Roads are needed for the sea to inland destinations. Airports need to accommodate cargo. Internet and telecommunications networks need to be available. The WTO imposes no obligation to create infrastructure, and only stipulates not to discriminate in the use of it through government measures. But absence of infrastructure can easily be a more formidable barrier to trade in goods, services, and digital commerce than tariffs or quotas.

53 Trade Subcommittee of the Senate Finance Committee *Hearing on the Japan - Structural Impediments Initiative*, 1989, at p. 26ff. <http://www.finance.senate.gov/imo/media/doc/hrg101-594.pdf>.

There are less tangible forms of support for trade. One example consists of the efforts of the Regulatory Coherence chapter of TPP to foster the freer flow of trade among the parties. It will be difficult to extend the WTO's obligations to an area that is both new and largely hortatory. This may not be as difficult for some other new areas of support for trade. For example, at some point does the absence of ready access for small and medium sized enterprises, to a single portal for customs and regulatory clearances, become an obligation? "Yes" in the Trade Facilitation Agreement for customs matters, "no" for internal regulations.<sup>54</sup> See Trans-Pacific Partnership Agreement Article 24 Information Sharing:

1. *Each Party shall establish or maintain its own publicly accessible website containing information regarding this Agreement, including:*

(a) *the text of this Agreement, including all Annexes, tariff schedules and product specific rules of origin; . . .*

(c) *information designed for SMEs that contains:*

(ii) *any additional information that the Party considers useful for SMEs interested in benefitting from the opportunities provided by this Agreement.*

3. *Subject to each Party's laws and regulations, the information described in paragraph 2(b) may include:*

(b) *regulations and procedures concerning intellectual property rights;*

(c) *technical regulations, standards, and sanitary and phytosanitary measures relating to importation and exportation;*

(d) *foreign investment regulations;*

(e) *business registration procedures;*

(f) *employment regulations; and*

(g) *taxation information.*

Can a requirement for posting information of this kind be inferred from WTO/GATT Article X or under Article 12 of the *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade, 1994*, as a requirement for transparency when many of the types of information listed in the TPP are only suggestions?

The conclusion reached here with respect to support for trade: a few areas are likely to be potentially susceptible to application through interpretation of existing rules in the course of dispute settlement. Those will be the exceptions. The rule for WTO dispute settlement will likely be to avoid inferring obligations unless governments have already taken steps in the direction to provide support, physical or regulatory. But while the Appellate Body is unlikely to find an obligation on a country to build a pipeline for the transit of oil across its territory, it might find an obligation not to interfere in the transit of that oil.

## DISPUTES SETTLED ELSEWHERE

As noted earlier in this paper, the WTO website states that, "As of 1 February 2016, some 625 notifications of RTAs (counting goods, services, and accessions separately) had been received by the GATT/WTO. Of these, 419 were in force". According to a WTO Staff Working Paper<sup>55</sup>, after examining 226 RTAs notified to the WTO, "most, if not all, RTAs contain" dispute settlement provisions. It should be noted that under just one of these agreements, NAFTA, the NAFTA Secretariat, lists 119 disputes filed among the three NAFTA countries, excluding investment cases filed under chapter 11<sup>56</sup>. The mega-regional trade agreements, whether the EU (composed of currently 28 countries), the signed, but not ratified Trans-Pacific Partnership Agreement (TPP, with 12 original signatories and six others expressing strong current interest in joining), and the Transatlantic Trade and Investment Partnership (TTIP, composed of two parties and 29 countries at present) all include their own dispute settlement provisions.

As the TPP Agreement is the most recent agreement with the most trade coverage, it might be considered "state of the art" with respect to the interrelationship of an RTA with the WTO, at least in the view of the twelve signatories. The TPP provides, with respect to choice of forum, in Article 28:

1. *If a dispute regarding any matter arises under this Agreement and under another international trade agreement to which the disputing Parties are party, including the WTO Agreement, the complaining Party may select the forum in which to settle the dispute.*

On the substantive relationship between the RTA and the WTO's body of findings, the TPP provides, also in Article 28:

3. *. . . With respect to any provision of the WTO Agreement that has been incorporated into this Agreement, the panel shall also consider relevant interpretations in reports of panels and the WTO Appellate Body adopted by the WTO Dispute Settlement Body.*

54 | Actually, the provision for availability of customs information on the Internet is not specified in the TFA to be for small and medium enterprises (SMEs). See Article 2, TFA.

55 | Chase, Yanovich, Crawford, and Ugaz, *Staff Working Paper ERSD-2013-07, Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements – Innovative or Various on a Theme?*, WTO 10 June 2013.

56 | <https://www.nafta-sec-alena.org/Home/Dispute-Settlement/Decisions-and-Reports>.

As with the WTO's DSB, TPP panels are not to extend or subtract from the agreed substantive provisions of the agreement:

3. . . . *The findings, determinations and recommendations of the panel shall not add to or diminish the rights and obligations of the Parties under this Agreement.*

From the above, and from the experience that the US and Canada with their softwood lumber dispute, leading up to the nine year settlement of the issue in the 2006 US-Canada Softwood Lumber Agreement<sup>57</sup> – there were some 43 separate proceedings in US domestic courts, under NAFTA and at the WTO<sup>58</sup> – one can conclude that the existence of bilateral dispute settlement does not mean that, in every instance, there will be a complete by-passing of WTO dispute settlement.<sup>59</sup> In the case of NAFTA, the choice of forum is likely affected by the fact that NAFTA decisions have direct legal effect in anti-dumping and countervailing duty cases and WTO cases must be implemented by a separate Member country government action. However, the effect of this distinction (which might give a preference for invoking NAFTA rather than WTO dispute settlement) is narrowed by the fact that WTO panel decisions are binding, cannot be blocked, and can and do result in an authorization of retaliation if compliance with a panel decision is not forthcoming. The case brought against US country of origin labeling (COOL) is an example. The WTO, rather than NAFTA, may also be preferred because non-RTA parties may wish to join a complaint, and there is more pressure to withdraw a WTO-inconsistent measure if there is more than one complaining country.

Going forward, choice of forum will depend heavily on whether the RTA covers new areas of rights and obligations. The more specific the RTAs are with matters that might only be covered generally in the WTO (e.g., by extension of national treatment or the TBT agreement), the more likely a party to both the WTO and the RTA will choose to bring its complaint under the dispute settlement provisions of the RTA. For these new subject-matter areas, the degree to which WTO dispute settlement is invoked will depend in very large part on whether the WTO Appellate Body believes that it is appropriate to expand through interpretation the coverage of the rules – holding that the DSB by adopting its decisions will not in effect be “expanding the rights and obligations” of the WTO agreement. In US Supreme Court parlance, to what extent will Appellate Body interpretation be “originalist” as the late US Supreme Court Justice Scalia felt was the one true path for interpretation of the US Constitution? And, conversely, to what extent can the Appellate Body take the direction that US Supreme Court has often taken – to fit the WTO's provisions to current circumstances in a manner that could not have been foreseen by the drafters?

## CONCLUSION

The role of WTO dispute settlement during this next decade will be determined by three actors: While the Appellate Body (AB) is the ultimate WTO adjudicator, panels can and do have an important role to play in shaping WTO jurisprudence; and while the AB and the panels are the adjudicators, it is the WTO members who ultimately formulate the legal claims and defenses, advance the legal theories, and provide the argumentation upon which the adjudicators heavily rely.

This paper focuses primarily on one actor, the Appellate Body. It poses some areas for discussion without providing definitive answers. That is for the Appellate Body to do over the next ten years. There are costs to a WTO whose negotiating function has become inert. While WTO Members may, in the abstract, condemn judicial “gap-filling”, each may feel otherwise depending on the circumstances. As a consequence, the question will arise in a growing number of instances going forward: When is it appropriate for the WTO dispute settlement process to engage in innovation – potentially to color outside the lines? There are limits to the elasticity of the substantive rules. The WTO agreements are part of an international contract. In the context of mediation, the WTO secretariat might well invoke the spirit of the agreements. Depending on the issues, the WTO members will on the whole probably be of the view that there is no spirit contained WTO agreements that can carry them beyond the original intent of the signatories. That said, complainants will certainly place before the Appellate Body arguments that press against the envelope of reasonable application of the existing WTO agreements.

There is one certainty – the Appellate Body is increasingly likely to adjudicate matters where the limits are tested.

57 | The text of the 2006 SLA is available at <http://www.treaty-accord.gc.ca/text-texte.aspx?id=105072&lang=eng>.

58 | See *The Softwood Lumber War: Politics, Economics, and the Long U.S.-Canada Trade Dispute*, by Daowei Zhang, Resources for the Future, Washington, D.C. 2007, Table 8-7. at pp. 205-16, cited in A. Wolff, *Lessons of the 2006 Softwood Lumber Agreement*, the Wilson Center, March 2016. The latter is available at <http://www.politico.com/tipsheets/morning-trade/2016/04/are-you-ready-for-lumber-v-fed-decrease-in-exports-hurting-economic-growth-itc-looking-at-aluminum-213635>.

59 | The *WTO Staff Working Paper ERSD-2013-07* cited earlier in this section also notes that RTAs more often than not (65%) contain exclusions from quasi-judicial dispute settlement. See Section 5.1.1. : . . . *certain subject matter may be excluded in whole, but more frequently in part, from the RTA-DSM. We found that 46% of these RTA-DSMs exclude provisions under their competition chapters; 38% exclude trade-in-services related issues; 33% exclude sanitary and phytosanitary (SPS) measures; 20% exclude anti-dumping and countervailing measures; 19% exclude provisions relating to the environment; 18% exclude provisions under their technical barriers to trade (TBT) chapter; 12% exclude provisions related to labour; 12% exclude provisions requiring co-operation between members on certain issues; 9% exclude provisions concerning government procurement; 8% exclude investment-related provisions; 8% exclude intellectual property related provisions; and 7% exclude global safeguard measures.*



Implemented jointly by ICTSD and the World Economic Forum, the E15 Initiative was established to convene world-class experts and institutions to generate strategic analysis and recommendations for government, business, and civil society geared towards strengthening the global trade and investment system for sustainable development.



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