Centre for International
Governance Innovation

Canada in International Law at 150 and Beyond | Paper No. 11 — February 2018

Canada: A Key Player in WTO Dispute Settlement

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About the Series

Marking 150 years since Confederation provides an opportunity for Canadian international law practitioners and scholars to reflect on Canada's past, present and future in international law and governance. "Canada in International Law at 150 and Beyond/Canada et droit international : 150 ans d'histoire et perspectives d'avenir" is a series of essays, written in the official language chosen by the authors, that provides a critical perspective on Canada's past and present in international law, surveys the challenges that lie before us and offers renewed focus for Canada's pursuit of global justice and the rule of law.

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"Canada in International Law at 150 and Beyond/Canada et droit international : 150 ans d'histoire et perspectives d'avenir" demonstrates the pivotal role that Canada has played in the development of international law and signals the essential contributions it is poised to make in the future. The project leaders are Oonagh Fitzgerald, director of the International Law Research Program at the Centre for International Governance Innovation (CIGI); Valerie Hughes, CIGI senior fellow, adjunct assistant professor of law at Queen's University and former director at the World Trade Organization; and Mark Jewett, CIGI senior fellow, counsel to the law firm Bennett Jones, and former general counsel and corporate secretary of the Bank of Canada. The series will be published as a book entitled *Reflections on Canada's Past, Present and Future in International Law/Réflexions sur le passé, le présent et l'avenir du Canada en matière de droit international* in spring 2018.

About the International Law Research Program

The International Law Research Program (ILRP) at CIGI is an integrated multidisciplinary research program that provides leading academics, government and private sector legal experts, as well as students from Canada and abroad, with the opportunity to contribute to advancements in international law.

The ILRP strives to be the world's leading international law research program, with recognized impact on how international law is brought to bear on significant global issues. The program's mission is to connect knowledge, policy and practice to build the international law framework — the globalized rule of law — to support international governance of the future. Its founding belief is that better international governance, including a strengthened international law framework, can improve the lives of people everywhere, increase prosperity, ensure global sustainability, address inequality, safeguard human rights and promote a more secure world.

The ILRP focuses on the areas of international law that are most important to global innovation, prosperity and sustainability: international economic law, international intellectual property law and international environmental law. In its research, the ILRP is attentive to the emerging interactions among international and transnational law, Indigenous law and constitutional law.

About the Author

Valerie Hughes is a CIGI senior fellow and an adjunct assistant professor of law at Queen's University in Kingston, Ontario. An expert in international trade law and international dispute settlement, she served as director of the Legal Affairs Division of the World Trade Organization (WTO) from 2010 to 2016 and as director of the WTO Appellate Body Secretariat from 2001 to 2005. Valerie also spent 22 years with the Government of Canada, during which time she held various positions, including assistant deputy minister at the Department of Finance, general counsel of the Trade Law Division at Foreign Affairs and International Trade, and senior counsel in the International Law Division of the Department of Justice. She has served as counsel for Canada and litigated before international courts and tribunals on trade law, investment law, and law of the sea matters.

Valerie has published several articles and chapters on WTO law and dispute settlement, as well as on maritime boundary disputes. Valerie was recently awarded the John E. Read Medal by the Canadian Council on International Law for her "distinguished contribution to international law and organisations."

Acronyms and Abbreviations

CVD	countervailing duty
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EC	European Communities
GATT	General Agreement on Tariffs and Trade
NGOs	non-governmental organizations
PV	photovoltaic
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SPS	sanitary and phytosanitary measures
USDOC	US Department of Commerce
WTO	World Trade Organization

Introduction

On April 15, 1994, ministers representing 124 governments and the European Communities (EC) saluted the "historic achievement" represented by the conclusion of the Uruguay Round of Multilateral Trade Negotiations, which they believed would "strengthen the world economy and lead to more trade, investment, employment and income growth throughout the world."[1] The ministers adopted a declaration in which they welcomed "the stronger and clearer legal framework they ha[d] adopted for the conduct of international trade, including a *more effective and reliable* dispute settlement mechanism."[2]

From the outset, the World Trade Organization (WTO) dispute-settlement system has enjoyed wide praise from WTO members, trade law practitioners and legal scholars, and, despite some criticisms voiced from time to time, it is readily regarded as effective and reliable and a significant improvement over dispute-settlement procedures employed under the General Agreement on Tariffs and Trade (GATT).[3] This is reflected in the frequent use of the system since its establishment by both developed and developing country WTO members, with more than 530 disputes filed thus far. Some 300 disputes were pursued during 47 years of the WTO's predecessor, the GATT, while the International Court of Justice, the principal judicial organ of the United Nations, has received only 168 cases in its 70-year history.

The diversity, economic importance and subject-matter significance of the disputes submitted for resolution attest to the confidence members have that the system will resolve their trade irritants fairly and impartially. The results of those disputes found in the many panel and Appellate Body reports adopted by the WTO membership have contributed importantly to the development of international trade law in the last 20 years.

1 WTO, "Marrakesh Declaration of 15 April 1994", online: <www.wto.org/english/docs_e/legal_e/marrakesh_decl_e.htm>.

2 *Ibid* [emphasis added].

3 *General Agreement on Tariffs and Trade*, 15 April 1994, 1867 UNTS 187, 33 ILM 1153 (entered into force 1 January 1995) [GATT 1994]. See e.g. John Howard Jackson, "The Evolution of the World Trading System – The Legal and institutional Context" in Daniel Bethlehem et al, eds, *The Oxford Handbook of International Trade Law* (Oxford, UK: Oxford University Press, 2009) at 49–50.

As a major player in the WTO dispute-settlement system, both in helping craft its terms and in bringing and defending important trade challenges, Canada can take some credit for the success the WTO dispute-settlement mechanism has enjoyed since its establishment in 1995.

Canada's Participation and Contribution

Canada was one of the original 23 participants of the GATT, the predecessor to the WTO. Canada's influence in the GATT was considerable, in part because it was a member of what was known as "the Quad," the highly influential group of four that "once dominated the GATT."[4] Canada has been an active and influential member of the WTO as well, although it perhaps enjoys less overall influence in the WTO today than it did as a member of the Quad in the GATT days. With respect specifically to WTO dispute settlement, however, Canada has enjoyed a leading role on several fronts.

A Frequent Participant in WTO Dispute-Settlement Activity

From the outset, Canada has been one of the most active members in the WTO dispute-settlement system, not only in terms of participation in disputes and contributing to the development of international trade law, but also through its active contribution to the negotiations and debates over potential improvements to the rules.

Looking first to raw numbers,[5] Canada stands third of 164 WTO members in terms of frequency of disputes brought to the WTO for resolution and sixth in the number of disputes defended. This is remarkable, considering that Canada ranks tenth in the world in terms of size of economy.[6] Thus far, Canada has brought 37 cases; only the United States and the European Union have more offensive cases on the WTO docket.[7] Canada has been named as a respondent in 21 challenges so far; the United States and the European Union have defended more often (132 and 84 challenges, respectively), as have China (39), India (24) and Argentina (22). Canada has also been very active as a third party, a role afforded WTO members who have a specific trade or systemic interest in a dispute between two other WTO members. Canada has participated in 122 disputes in this capacity.[8]

Of course, these numbers reveal only part of Canada's WTO dispute-settlement story. It is also important to examine, as is done in the next section of this paper, Canada's dispute-settlement activity — both offensive and defensive — from a substantive perspective.

Contributions to International Trade Law

It is not possible to review in this brief paper all of the numerous Canadian WTO disputes that have contributed in some way to the clarification of WTO law, be it from a procedural or substantive point of view. However, this section highlights a few examples of developments in international trade law that can be said to trace their origins to Canadian dispute-settlement activity.[9]

EC–Asbestos: The Concept of "Like Product" and *Amicus Curiae* Briefs

One of Canada's early cases — *EC—Measures Affecting Asbestos and Products Containing Asbestos* (*EC—Asbestos*)[10] — where Canada challenged the EC's ban on asbestos-containing products, contributed

4 Craig VanGrasstek, *The History and Future of the World Trade Organization* (Geneva, Switzerland: World Trade Organization Publications, 2013) at 83. The other three members of the Quad were the United States, Japan and the EC.

5 Dispute statistics cited in this paper are current as of November 30, 2017. Dispute data relied upon in this paper are found on the WTO website under Trade topics/dispute settlement. See WTO, "Dispute Settlement", online: <www.wto.org/english/tratop_e/dispu_e/dispu_e.htm>.

6 See World Bank, "World Development Indicators", online: <https://data.worldbank.org/data-catalog/world-development-indicators>.

7 The United States has brought 115 complaints for resolution, while the European Union has brought 97.

8 Japan holds the record for third-party participation, having been third party in 174 disputes; other frequent third parties are the European Union (169), China (142), the United States (142) and India (129).

9 The issues and decisions in WTO disputes are often complex legally as well as factually, and the submissions and reports often extend to several hundred pages. Hence, the descriptions below cannot cover the disputes in any detail and seek to provide only a general appreciation of the disputes.

10 *European Communities–Measures Affecting Asbestos and Products Containing Asbestos*, WTO Doc WT/DS135 [*EC–Asbestos*].

importantly to our understanding of what is meant by "like products" in WTO dispute settlement.

Non-discrimination is a key concept in WTO law, both with respect to trade in goods and trade in services. Article III:4 of GATT 1994 contains one expression of the non-discrimination requirement with respect to goods, stating that imported products shall be accorded treatment no less favourable than that accorded to like products of national origin with respect to their internal sale, offering for sale, purchase, transportation, distribution or use.[11] In *EC—Asbestos*, Canada sought to prove that the EC measures on asbestos discriminated between the banned products and other materials, which Canada maintained were like products.

The Appellate Body clarified that the determination of "likeness" under article III:4 is "fundamentally, a determination about the nature and extent of a competitive relationship between and among products."[12] The Appellate Body then provided guidance as to "how a treaty interpreter should proceed"[13] in determining whether products are like for purposes of article III:4, observing that the determination must be made on a case-by-case basis and indicating that the analysis entails a consideration of four criteria: the physical properties of the products; the extent to which the products are capable of serving the same or similar end-uses; the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand; and the international classification of the products for tariff purposes.[14] The Appellate Body explained that these criteria, which had been relied upon in GATT cases and, subsequently, in WTO rulings[15] were "tools to assist in the task of sorting and examining the relevant evidence," but were "not a closed list."[16]

Of particular note in the context of the likeness analysis in *EC—Asbestos* is the Appellate Body's consideration of the health risk of the products in question (asbestos products and other materials). The panel in *EC—Asbestos* had declined to consider the health risk of the products in question in conducting its likeness analysis, believing that this "would largely nullify"[17] the effect of the exception in article XX(b) of GATT 1994, which operates to excuse a GATT violation if the measure is necessary to protect human health. The Appellate Body criticized the panel's approach and explained its view as follows: "This carcinogenicity, or toxicity, constitutes, as we see it, a defining aspect of the physical properties of chrysotile asbestos fibres. The evidence indicates that PCG [polyvinyl alcohol, cellulose and glass] fibres, in contrast, do not share these properties, at least to the same extent. We do not see how this highly significant physical difference *cannot* be a consideration in examining the physical properties of a product as part of a determination of 'likeness' under Article III:4 of the GATT 1994."[18]

Regarding the panel's concern about the effect on article XX(b), the Appellate Body observed that article III:4 and article XX(b) "are distinct and independent provisions" and "the fact that an interpretation of Article III:4, under those rules, implies a less frequent recourse to Article XX(b) does not deprive the exception in Article XX(b) of *effet utile*."[19]

Ultimately, the Appellate Body reversed the panel's findings that the products in question were like products. The Appellate Body did not conclude that the products were not like; it ruled, however, that Canada had not proved that the products were like and, therefore, that Canada had failed to establish that the EC asbestos ban constituted a violation of article III:4 of GATT 1994.[20]

EC—Asbestos presented another first in WTO dispute settlement in that the Appellate Body report in that case included a concurring statement, reflecting a separate (although not dissenting) view of one of the members of the three-member Appellate Body division deciding the appeal. Appellate reports

11 *GATT 1994*, *supra* note 3, art III:4.

12 Appellate Body Report, *EC–Asbestos*, WTO Doc WT/DS135/AB/R (2001) at para 99 [Appellate Body Report, *EC–Asbestos*].

13 *Ibid* at para 101.

14 *Ibid* at para 102.

15 See e.g. GATT, *Report by the Working Party on Border Tax Adjustments*, GATT Doc L/3464, BISD 18S/97 (1970); GATT, *EEC–Measures on Animal Feed Proteins*, GATT Doc L/4599, BISD 25S/49 (1977); Panel Report, *US–Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/R (1996) at para 6.8; Appellate Body Report, *Japan–Taxes on Alcoholic Beverages*, WTO Doc WT/DS20/AB/R (1996) at 20.

16 Appellate Body Report, *EC–Asbestos*, *supra* note 12 at para 102.

17 Panel Report, *EC–Asbestos*, WTO Doc WT/DS135/R (2000) at para 8.130 [Panel Report, *EC–Asbestos*].

18 Appellate Body Report, *EC–Asbestos*, *supra* note 12 at para 114 [footnote omitted, emphasis in original].

19 *Ibid* at para 115.

20 *Ibid* at para 148.

are authored by the three division members, and all 36 Appellate Body reports issued prior to the *EC—Asbestos* report reflected unanimous rulings. This very first concurring opinion was on the issue of like products. Specifically, the concurring Appellate Body member was of the view that, "considering the nature and quantum of the scientific evidence showing that the physical properties and qualities of chrysotile asbestos fibres include or result in carcinogenicity...there [was] ample basis for a definitive characterization that the products in question were *not* 'like.'"[21] In other words, for that member, the Appellate Body could have found that the products were not like, given the significantly different health risks presented, although the member cautioned that his view was limited to the circumstances of the dispute in question and clarified that "not... *any* kind or degree of health risk, associated with a particular product, would *a priori* negate a finding of the 'likeness' of that product with another product, under Article III:4 of the GATT 1994."[22]

The concurring member also questioned the "necessity or appropriateness" of adopting a "'fundamentally' economic interpretation" of like products under article III:4[23] (referring to the Appellate Body's statement, mentioned above, that the determination of likeness under article III:4 is "fundamentally, a determination about the nature and extent of a competitive relationship between and among products"[24]). The member reserved opinion on this aspect, stating that "in future concrete contexts, the line between a 'fundamentally' and 'exclusively' economic view of 'like products' under Article III:4 may well prove very difficult, as a practical matter, to identify," and so it seemed to him "the better part of valour to reserve one's opinion on such an important, indeed, philosophical matter, which may have unforeseeable implications, and to leave that matter for another appeal and another day, or perhaps other appeals and other days."[25] Concurring statements and even dissenting opinions have appeared in subsequent Appellate Body reports, but they remain extremely rare.

EC—Asbestos also gave rise to numerous strong interventions during a meeting of the WTO General Council — the most powerful body in the WTO, next to the Ministerial Conference[26] — regarding the procedure adopted by the Appellate Body in that case for receiving and taking into consideration *amicus curiae* submissions it anticipated from non-governmental organizations (NGOs), other interest groups and individuals.[27] This was the first time the Appellate Body had adopted such procedures in an appeal. The Appellate Body had ruled in cases that preceded *EC—Asbestos* that only WTO members have a *right* to be heard by panels and the Appellate Body, but that panels and the Appellate Body have the authority to receive and consider *amicus* briefs, if they find it useful to do so.[28] Many WTO members disagree with that position, believing that it is contrary to the Dispute Settlement Understanding (DSU).[29]

The Appellate Body was strongly criticized by several WTO members during the General Council meeting for establishing the *amicus* procedure in the *EC—Asbestos* case; the members insisted that WTO members, not the Appellate Body, should decide how to deal with the issue of *amicus* participation.[30] Canada stated during the General Council meeting that it supported greater transparency in WTO dispute settlement, but considered that the *amicus* issue was not a transparency issue. For Canada, this was, rather, a "fundamental issue" of whether participation in WTO dispute-settlement

21 *Ibid* at para 152 [emphasis in original].

22 *Ibid* at paras 152–53 [emphasis in original].

23 *Ibid* at para 154.

24 *Ibid* at para 152.

25 *Ibid* at para 154.

26 The General Council is composed of all WTO members and usually meets several times per year. The Ministerial Conference attended by members' trade ministers meets once every two years. The General Council carries out the functions of the Ministerial Conference when the latter is not in session. See *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 UNTS 154, 33 ILM 1144 (1994), art IV:2.

27 The minutes of the meeting, which was held on November 22, 2000, are found at WTO, "Minutes of Meeting", WTO Doc WT/GC/M/60 (2001) ["Minutes of Meeting", 2001]. Minutes of General Council meetings are accessible via the WTO website on the General Council page. The procedures required those wishing to file *amicus* briefs to apply for leave, disclose the nature of the applicant's interest in the appeal and provide a statement on the contribution that the brief would make to the resolution of the appeal.

28 See e.g. Appellate Body Report, *US–Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WTO Doc WT/DS138/AB/R (2000) at para 39.

29 *Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 UNTS 154, 33 ILM 1144 (1994), Annex II [*DSU*]. See e.g. the interventions of Argentina, Chile and Cuba at the General Council meeting held on November 22, 2000: "Minutes of Meeting", 2001, *supra* note 27 at paras 93, 97–99.

30 "Minutes of Meeting", 2001, *supra* note 27 at para 114. Members were not named specifically in the minutes.

proceedings should be limited to WTO members, and such an issue was for WTO members to decide.[31]

Although it received 30 applications, the Appellate Body denied leave to file a brief to all potential *amici* in the *EC—Asbestos* case, some for failing to file on time, some for failing to file in accordance with the procedures and some for reasons that were not specified.[32] The Appellate Body has not set down procedures for filing *amicus* briefs in subsequent appeals.

An agreed approach for dealing with *amicus* participation eludes WTO members to this day. Some WTO members are firmly against admitting such briefs in WTO disputes, arguing that the rules do not permit their filing and that the WTO dispute-settlement mechanism is a means for WTO-member governments to resolve disputes, not a vehicle for NGOs and interest groups financed in large, developed countries to interfere in the system. Other members are not opposed to permitting *amicus curiae* briefs and favour increased transparency in WTO dispute settlement. Despite the vacuum in procedure, such briefs are often filed in WTO disputes today, both before panels and the Appellate Body.

Canada–Autos: According Advantages Unconditionally under GATT Article I:1

Another of Canada's early cases, *Canada—Certain Measures Affecting the Automotive Industry* (*Canada—Autos*), provides insight into the meaning of the word "unconditionally," as it is used in the most-favoured nation obligation set forth in article I:1 of GATT 1994, referred to as the "cornerstone" of GATT.[33] According to that provision, any advantage with respect to a customs duty or other import or export charge that is granted by a WTO member to a particular product from one country must be "accorded immediately and unconditionally"[34] to like products from all other countries.

In this dispute, the European Union and Japan challenged Canadian measures providing duty exemptions for automobiles and automobile parts. The exemptions were based on manufacturers maintaining production-to-sales ratios and a certain level of Canadian value-added in vehicles. Both the European Union and Japan successfully argued that Canada's measures were discriminatory and therefore inconsistent with article I:1 of GATT 1994 because the measures operated such that products from some countries received the import-duty exemption, while like products from other countries did not.

The ruling with respect to Japan's second challenge under article I:1 addressed the meaning of the word "unconditionally" as used in that provision. Japan argued that, by making the import duty exemptions conditional upon criteria related to the importer, but unrelated to the imported product, itself, Canada failed to accord the import-duty exemption immediately and unconditionally to like products from all WTO members. The panel disagreed with Japan, explaining that in the context of article I:1 of GATT, unconditionally does not refer to whether or not the advantage itself is subject to conditions. Rather, the panel explained that unconditionally refers to whether, once granted to the products of one country, the advantage is granted unconditionally to the like products in all other countries. In other words, once the advantage has been granted to products of one country, it must be granted to like products of all other countries without conditioning that grant on the situation in those countries.[35] Although several of the panel's findings were appealed, this one was not.

Canada–Aircraft: Subsidies Contingent on Export Performance, Duty to Provide Information Requested by a Panel and Drawing Adverse Inferences

In *Canada—Measures Affecting the Export of Civilian Aircraft* (*Canada—Aircraft*), Brazil challenged various measures, including financing, loan guarantees and other funding provided to the civil aircraft industry by the Export Development Corporation[36] and the Canadian government. Brazil alleged that these measures constituted subsidies contingent in fact upon export performance and were, therefore, prohibited under article 3.1(a) of the Agreement

31 *Ibid* at paras 71–73.

32 Appellate Body Report, *EC–Asbestos*, *supra* note 12 at paras 51–56.

33 Appellate Body Report, *Canada–Autos*, WTO Doc WT/DS139/AB/R, WTO Doc WT/DS142/AB/R (2000) at para 69.

34 *GATT 1994*, *supra* note 3, art I:1.

35 Panel Report, *Canada–Autos*, WTO Doc WT/DS139/R, WTO Doc WT/DS142/R (2000) at para 10.23.

36 The Export Development Corporation is a Crown corporation owned by the government of Canada.

on Subsidies and Countervailing Measures[37] (SCM Agreement). One of the questions at issue in the dispute was the meaning of "subsidies contingent in fact upon export performance" as used in article 3.1(a) of the SCM Agreement.

Canada argued that a subsidy is contingent in fact upon export performance when the subsidy "would not have been granted but for past or future exportation" and "when the facts and circumstances are such that the recipient will reasonably know that there is a requirement to export."[38] For Canada, "absent some understanding *by the company* that it is required to export as a condition of receipt of the subsidy,"[39] the subsidy would not be contingent upon export performance. Canada also maintained before the Appellate Body that the panel had erred in putting too much emphasis on the "export propensity" of the Canadian regional aircraft industry.[40]

The Appellate Body did not agree with Canada that the recipient's knowledge was a relevant consideration, explaining that the WTO obligation is on the granting authority and not on the recipient; hence, the inquiry would be into whether any condition was imposed by the granting authority.[41] The Appellate Body observed that proving de facto contingency is "much more difficult" than proving de jure contingency[42] and explained that the "relationship of contingency" must be "*inferred* from the total configuration of the facts constituting and surrounding the granting of the subsidy."[43] The Appellate Body also pointed to footnote 4 to the SCM Agreement, which stipulates that contingency in fact "is met when the facts demonstrate that the granting of a subsidy…is in fact tied to actual or anticipated exportation."[44] For the Appellate Body, proving that a subsidy is "granted in the knowledge, or with the anticipation, that exports will result" is not sufficient on its own to establish that the granting of the subsidy is "tied to" the anticipation of export.[45] In this context, the Appellate Body cautioned against examining export contingency using a "but for" analysis because the term "but for" is not found in article 3.1(a).[46]

The Appellate Body also disagreed with Canada that the panel put too much emphasis on the export orientation of the Canadian regional aircraft industry. The Appellate Body pointed again to footnote 4, which states that the "mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy."[47] The Appellate Body explained that footnote 4 permits taking into account an industry's export orientation, along with other factors in determining the export contingency of a subsidy.[48]

The *Canada—Aircraft* case also raised what was described by the Appellate Body as "a number of questions with fundamental and far-reaching implications for the entire WTO dispute settlement system."[49] The questions concerned "the authority of a panel to request a party to a dispute to submit information about that dispute," the "duty of a party to submit information requested by a panel" and "the authority of a panel to draw adverse inferences from the refusal by a party to provide requested information."[50]

The issues arose because Canada refused to provide certain information initially requested by Brazil in the early stages of the dispute and then by the panel, claiming that it was not required to provide the information because Brazil had not made out a prima facie case with respect to the issue in question. Canada also maintained that even if Brazil had made out a prima facie case, the sensitive business-confidential information requested would not have been adequately protected under the procedures adopted by the panel to protect information.

The Appellate Body ruled (using strong language) that a panel has the authority to request a disputing party to submit information and that a disputing party is obliged to provide it. The Appellate Body

37 WTO, *Agreement on Subsidies and Countervailing Measures*, art 3.1(a) [*SCM Agreement*], online: <www.wto.org/english/docs_e/legal_e/24-scm.pdf>.

38 Appellate Body Report, *Canada–Aircraft*, WTO Doc WT/DS70/AB/R (1999) at para 18 [Appellate Body Report, *Canada–Aircraft*].

39 *Ibid* at para 22 [emphasis in original].

40 *Ibid* at paras 16–17, 20, 23.

41 *Ibid* at para 170.

42 *Ibid* at paras 166–167.

43 *Ibid* at para 167 [emphasis in original].

44 *SCM Agreement*, *supra* note 37, n 4.

45 Appellate Body Report, *Canada–Aircraft*, *supra* note 38 at para 172.

46 *Ibid* at para 102.

47 *SCM Agreement*, *supra* note 37, n 4.

48 Appellate Body Report, *Canada–Aircraft*, *supra* note 38 at para 173.

49 *Ibid* at para 182.

50 *Ibid*.

relied on article 13.1 of the DSU, which states that panels "shall have the right to seek information and technical advice from any individual or body which it deems appropriate" and also provides that WTO "members should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate."[51] The Appellate Body recalled earlier rulings where it referred to the "comprehensive nature" of this authority to seek information, the "ample and extensive authority to undertake and to control the process by which it informs itself" of the relevant facts of the dispute and the "breadth" of the authority that is "indispensably necessary to enable a panel to discharge its duty."[52]

The Appellate Body explained that a panel's authority to seek information is not conditional upon the other party making out a prima facie case; it found no "textual or logical" basis for Canada's argument in this respect.[53] The Appellate Body pointed out that information might be required before or after a prima facie case is made out, and, in any event, it is not for the requested party to decide whether or not a prima facie case has been made out because that is the purview of the panel.[54] The Appellate Body also asserted that the word "should," as used in article 13.1 ("members should respond promptly and fully to any request by a panel"[55]), does not imply an exhortation, but rather expresses a duty. To hold otherwise, said the Appellate Body, would "render meaningless" the panel's legal right to seek information under article 13.1, could "thwart the panel's fact-finding powers" and could preclude a panel from carrying out its duties.[56]

Canada also failed to persuade the Appellate Body that the sensitive business-confidential information would not be adequately protected under the procedures adopted by the panel to safeguard that information. The Appellate Body noted that Canada had requested the panel to adopt procedures to protect certain information and that the panel had accommodated Canada's request (albeit with one adjustment requested by Brazil). Under the circumstances, the Appellate Body considered that Canada was not "entitled"[57] to reject the procedures adopted at its request and then decline to provide the requested information on the ground that it would not be adequately protected. The Appellate Body also observed that Canada had asked for the procedures to be used again during the appellate phase and said that if Canada "truly considered" the procedures to be inadequate to protect the information requested by the panel, then its request that the Appellate Body adopt those same procedures on appeal was "a curious one."[58]

As to the drawing of inferences adverse to Canada and supportive of Brazil from Canada's refusal to provide information requested by the panel, the Appellate Body made clear that the panel had "the legal authority and the discretion"[59] to draw inferences from Canada's refusal. However, the Appellate Body declined to find that the panel had erred in concluding that Brazil had not done enough to compel the panel to make the inferences it requested because, it explained, the record did not provide a sufficient basis to do so.[60]

The *Softwood Lumber* Cases: Provision of "Goods," Calculation of "Benefit" and Pass Through of Indirect Subsidies

Canada has brought several cases against the United States regarding duties imposed on softwood lumber. The decisions have required panels and the Appellate Body to consider the meaning of numerous WTO provisions. Two of the disputes, known as *US—Softwood Lumber III*[61] and *US—Softwood Lumber IV*,[62] gave rise to significant findings regarding key provisions of the SCM Agreement, including: the meaning of "provides goods"[63] in determining whether there has been a financial contribution by a government; the calculation of a benefit to the recipient of a subsidy and the adequacy of remuneration in relation to prevailing market conditions; and whether subsidies conferred on inputs (timber or logs) can

51 *DSU*, *supra* note 29, art 13.1.

52 Appellate Body Report, *Canada–Aircraft*, *supra* note 38 at para 184.

53 *Ibid* at para 185.

54 *Ibid* at para 192.

55 *DSU*, *supra* note 29, art 13.1.

56 Appellate Body Report, *Canada–Aircraft*, *supra* note 38 at paras 188–189.

57 *Ibid* at para 195.

58 *Ibid* at para 196.

59 *Ibid* at para 203.

60 *Ibid* at para 205.

61 *US–Preliminary Determinations with Respect to Certain Softwood Lumber from Canada*, WTO Doc WT/DS236.

62 *US–Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada*, WTO Doc WT/DS257.

63 *SCM Agreement*, *supra* note 37, art 1.1(a)(1)(iii).

be presumed to "pass through" to downstream products (softwood lumber and remanufactured lumber) in sales between unrelated enterprises.

The SCM Agreement stipulates that a subsidy shall be deemed to exist if there is a financial contribution by a government and a benefit is thereby conferred.[64] A financial contribution can take many forms, including where a government "provides goods."[65] In *US—Softwood Lumber III* and *US—Softwood Lumber IV*, the issue was whether Canadian provincial governments provided goods when entering into stumpage contracts with harvesters, entitling them to cut standing timber on provincial Crown land. Canada argued that granting the intangible right to harvest trees did not constitute the provision of goods. For Canada, a "good" in the context of the SCM Agreement was to be understood to mean a product with a tariff line and could not be understood to mean something that cannot be traded across borders.

The panel and the Appellate Body disagreed with Canada. The Appellate Body explained that granting the right to fell trees results, inevitably, in rights over felled trees (or logs), which are tangible property. Thus, the granting of stumpage contracts constitutes the provision of goods by the government, and, hence, there is a financial contribution by a government.[66]

As it had been determined that a financial contribution by a government existed, it was necessary to determine whether a benefit had been conferred as a result of this financial contribution. The SCM Agreement provides guidelines in article 14(d) for the calculation of a benefit in the context of the provision of goods: a benefit is conferred only when the provision of goods is made for less than adequate remuneration.[67] The agreement provides further that "adequacy of remuneration shall be determined in relation to prevailing market conditions" for the good in question "in the country of provision"[68] — in this case, Canada.

Canada challenged the US Department of Commerce's (USDOC's) determination of benefit because the USDOC had not used Canadian market prices to assess the adequacy of remuneration for the stumpage contracts, but had used, instead, market prices of private stumpage in US northern border states. The USDOC argued that it did not have to use Canadian prices to make the assessment because the Canadian market had been distorted by the government's intervention in the stumpage market.

The Appellate Body rejected the US position that "prevailing market," as used in article 14(d), necessarily implies a market that is undistorted by government intervention. However, the Appellate Body did not agree with Canada (or the panel) that article 14(d) prohibited using private prices outside the country of provision when determining the adequacy of remuneration. According to the Appellate Body, the use of the phrase "*in relation to* prevailing market conditions…in the country of provision" in article 14(d) — as opposed to "*in comparison with* prevailing market conditions… in the country of provision" — meant that "the drafters did not intend to exclude any possibility of using as a benchmark something other than private prices in the market of the country of provision."[69] The language of article 14(d) only requires that the chosen benchmark "relates or refers to, or is connected with, the conditions prevailing in the market of the country of provision."[70] The Appellate Body explained that the panel's restrictive interpretation of article 14(d), whereby the private market prices in the country of provision had to be used in the benefit analysis whenever they existed, "frustrates"[71] the SCM Agreement. This is because, in a situation where a government has a predominant role in providing goods, private suppliers will align their prices with those of the government.[72] Thus, using such private prices in the country of provision for the benefit analysis will lead to a result that is artificially low, or even zero. This, in turn, will

64 *Ibid*, art 1.1.

65 *Ibid*, art 1.1(a)(1)(iii).

66 Appellate Body Report, *US–Softwood Lumber IV*, WTO Doc WT/DS257/AB/R (2004) at para 75 [*US–Softwood Lumber IV*].

67 *SCM Agreement*, *supra* note 37, art 14(d).

68 *Ibid*.

69 Appellate Body Report, *US–Softwood Lumber IV*, *supra* note 66 at para 89. Interestingly, the panel in *US–Softwood Lumber III* had come to a different conclusion, stating that "the text of Article 14 SCM Agreement leaves no choice to the investigating authority but to use as a benchmark the market, for the good (or service) in question, *as it exists* in the country of provision." Panel Report, *US–Softwood Lumber III*, WTO Doc WT/DS236/R (2003) at para 7.53 [emphasis in original]. That panel report was not appealed.

70 Appellate Body Report, *US–Softwood Lumber IV*, *supra* note 66 at paras 89, 103.

71 *Ibid* at para 95.

72 *Ibid* at paras 90, 115.

lead to a countervailing duty (CVD), if any, that is insufficient to offset the effect of the subsidy.[73]

Ultimately, however, the Appellate Body was unable to determine whether the USDOC was justified in using US market prices for stumpage as a benchmark in the benefit analysis. This was because there were insufficient factual findings or undisputed facts in the panel record regarding the effect on prices of the provincial governments' participation in the market for standing timber. Also unavailable were factual findings by the panel as to whether US prices of private stumpage used by the USDOC were adequately adjusted to reflect market conditions in Canada, so as to be "related to or connected with" prevailing market conditions in Canada as required under article 14(d).[74]As a result, the Appellate Body could not make a finding as to the WTO consistency, or otherwise, of the benefit calculation carried out by the USDOC, or as to the WTO consistency of the CVDs imposed in the light of that calculation.

The third issue of note in these cases relates to what is referred to as "pass through." In both *US—Softwood Lumber III* and *US—Softwood Lumber IV*, Canada argued that the USDOC had impermissibly assumed that the (alleged) financial contribution to the timber harvesters through the provision of stumpage contracts conferred a benefit on downstream producers of softwood lumber and remanufactured lumber. More specifically, Canada argued that the (alleged) subsidy conferred on the harvesters who produced *logs* could not be presumed to pass through to downstream softwood *lumber* producers and lumber remanufacturers where the sales were between unrelated enterprises. According to Canada, because the United States had not conducted a pass-through analysis, it had impermissibly countervailed "presumed" subsidies instead of determined subsidies.

The SCM Agreement and GATT 1994 permit the imposition of a CVD to offset any subsidy "bestowed directly or indirectly" upon the manufacture, production or export of any merchandise.[75] At the same time, they prohibit levying CVDs in excess of the amount of the subsidy determined to have been bestowed on the product under investigation.[76]

The Appellate Body concluded that the use of the word "indirectly" in the WTO provisions governing the imposition of CVDs for the purpose of offsetting subsidies implies that financial contributions to the production of *inputs* used in processed products subject to a CVD investigation "are not, in principle, excluded" from the amount of subsidies that may be offset through the imposition of a CVD on the *processed* product.[77] Thus, it is not excluded in principle that the subsidy bestowed on the harvester of logs (the input) could be included in the amount of subsidy to be offset when imposing a CVD on softwood lumber (the downstream product under investigation). However, because the CVDs imposed on the product under investigation may not exceed the subsidies bestowed upon that product, it is necessary to analyze whether the subsidy bestowed on the harvester of logs (the input) actually flowed through, downstream, to the producer of the softwood lumber. The Appellate Body ruled that if there was no pass through, at least, in part, the subsidy to the harvester of logs could not be included in the amount of the subsidy to be countervailed through the imposition of CVDs on softwood lumber.[78]

The Appellate Body explained that when the input producers (harvesters of logs) and the producers of the processed products (producers of softwood lumber) operate at arm's length, pass through of the subsidy bestowed on the input producer to the downstream producer cannot be presumed; it must be established by the investigating authority. Otherwise, it cannot be demonstrated that the essential elements of a subsidy (financial contribution and benefit to a recipient) are present in the processed product and, thus, that there is a right to impose a CVD on that product.[79]

Canada—Renewable Energy/Canada—Feed-in Tariff Program: The Relevant Market and Calculation of Benefit in the Energy Sector

The question of calculation of benefit to the recipient of an alleged subsidy and the analysis of the adequacy of remuneration in the context of a market affected by government intervention were also raised in the cases brought by the European Union and Japan, challenging the province of

73 *Ibid* at para 95.

74 *Ibid* at paras 113–118.

75 *GATT 1994*, *supra* note 3, art VI:3; *SCM Agreement*, *supra* note 37, art 10.

76 *Ibid*.

77 Appellate Body Report, *US—Softwood Lumber IV*, *supra* note 66 at para 140.

78 *Ibid* at para 147.

79 *Ibid* at paras 140, 142–143, 147.

Ontario's measures related to the supply of electricity generated from renewable sources. This time, however, there was a different twist because the disputes involved the green-energy sector. Under the circumstances, the inquiry into whether a benefit had been conferred raised novel questions.

Canada argued before the panels[80] that the relevant market for the purpose of conducting the benefit analysis and the adequacy of remuneration should be the market for electricity produced from wind power or solar photovoltaic (PV) technology. The panels disagreed, finding that consumer demand did not distinguish electricity on the basis of generation technologies, and, therefore, the relevant market was that for electricity generated from all sources of energy.[81] On appeal, the Appellate Body sided with Canada on this issue. The Appellate Body said the panel should have looked at supply-side, as well as demand-side, factors in defining the relevant market. It noted the significant differences in capital and operating costs between conventional and renewable electricity technologies and concluded that, in such circumstances, "markets for wind- and solar PV-generated electricity can only come into existence as a matter of government regulation."[82] The Appellate Body observed that it "is often the government's choice of supply-mix of electricity generation technologies that creates markets for wind- and solar PV-generated electricity"[83] and recognized that the Ontario government's definition of the energy-supply mix for electricity shaped the market in which electricity generators were operating. Under these circumstances, the benefit comparison was properly conducted within the market for wind- and solar PV-generated electricity, rather than the electricity market as a whole.[84]

Having determined the relevant market for the benefit analysis, the Appellate Body turned to the question of the appropriate benchmark for the benefit comparison, noting that the guidelines in article 14(d) of the SCM Agreement refer to the determination of the adequacy of remuneration in relation to prevailing market conditions. In addressing "prevailing market conditions," the Appellate Body recalled its determination in *US—Softwood Lumber IV* that an out-of-country benchmark could be used if the prices in the country of provision were distorted, provided that necessary adjustments were made to replicate the competitive conditions in the original market. The Appellate Body clarified in this renewable-energy case that a market-based approach to the benefit analysis does not necessarily exclude taking into account a market where government intervention affects prices. The Appellate Body explained that "a distinction should be drawn between, on the one hand, government interventions that create markets that would otherwise not exist and, on the other hand, other types of government interventions in support of certain players in markets that already exist."[85] According to the Appellate Body, "[w]here a government creates a market, it cannot be said that the government intervention distorts the market, as there would not be a market if the government had not created it."[86] Thus, although the Ontario government's defined supply mix for electricity generation affected market prices, the Appellate Body ruled that the benefit benchmarks for wind- and solar PV-generated electricity "should be found"[87] in the markets for wind- and solar PV-generated electricity that result from the supply-mix definition. In making this decision, the Appellate Body referred to the need for governments to ensure a constant and reliable supply of power, which they do by regulating the type of electricity that is supplied, and to government choices to reduce reliance on fossil fuels in favour of renewable energy sources in order to ensure the sustainability of the electricity market.[88]

The challenged feed-in tariff program and related contracts were ultimately found to be inconsistent with Canada's WTO obligations under article III:4 of GATT 1994 and article 2.1 of the Agreement on

80 Two panels were established — one to examine the European Union's complaint and the other to examine Japan's complaint. The panels were composed of the same three individuals. They issued two separate panel reports, but most of the content was identical.

81 Panel Reports, *Canada—Certain Measures Affecting the Renewable Energy Generation Sector* [*Canada—Renewable Energy*] / *Canada—Measures Relating to the Feed-In Tariff Program* [*Canada—Feed-in Tariff Program*], WTO Doc WT/DS412/R, WTO Doc WT/DS426/R (2012) at para 7.318.

82 Appellate Body Reports, *Canada—Renewable Energy / Canada—Feed-In Tariff Program*, WTO Doc WT/DS412/AB/R, WTO Doc WT/DS426/AB/R (2013) at para 5.175. The Appellate Body issued a single document constituting two separate Appellate Body reports for the two cases. Most of the single document covers both Japan's and the European Union's challenges in identical terms, but there are findings and conclusions at the end of the document for each claimant.

83 *Ibid*.

84 *Ibid* at paras 5.167–5.175, 5.178.

85 *Ibid* at para 5.188.

86 *Ibid*.

87 *Ibid* at para 5.190.

88 *Ibid* at paras 5.188–5.191.

Trade-Related Investment Measures[89] because of the domestic content requirements set forth in the measures. However, the impugned measures were not found to constitute a prohibited local content subsidy under the SCM Agreement because it was not possible for the Appellate Body to determine whether a benefit had been conferred on the basis of the factual findings in the panel record.

Canada–Continued Suspension of Obligations in the EC–Hormones Dispute: Public Observation of Hearings, Termination of Suspension of Concessions and Bringing Compliance Proceedings

Canada was a disputing party in the first-ever WTO dispute where public observation of hearings was permitted: both the panel and appellate hearings in *Canada—Continued Suspension of Obligations in the EC—Hormones Dispute* (*Canada—Continued Suspension*), as well as in the simultaneous case, *United States—Continued Suspension of Obligations in the EC—Hormones Dispute* (*United States—Continued Suspension*), were open for public observation by closed-circuit television in a room on the WTO premises. The open panel hearings took place in 2005 and 2006, and the open appellate hearing took place in 2008.

In *Canada—Continued Suspension*, as well as in *United States—Continued Suspension*, the disputing parties (the EC, Canada and the United States) jointly requested the panels and the Appellate Body to permit public observation of the hearings. Several third parties objected, some arguing that the DSU requires confidentiality of proceedings and that any decision to change this requirement must be made by the WTO membership as a whole.

Canada argued before the panel that the DSU permits panels to open panel hearings to public observation, observing that article 12.1 of the DSU allows panels to deviate from the procedures set forth in appendix 3 of the DSU, following consultation with the disputing parties.[90] Before the Appellate Body, Canada pointed to article 18.2 of the DSU, which states that written submissions shall be treated as confidential,[91] but noted that the provision does not preclude disputing parties from disclosing statements of their positions to the public.[92] Canada also argued that open hearings would contribute to "the legitimacy and the perception of legitimacy" of the WTO dispute-settlement system.[93] Similar arguments were made by the EC and the United States.

The panel and the Appellate Body agreed with Canada, the EC and the United States. The panel considered that it was "entitled,"[94] pursuant to article 12.1, to open its hearings to public observation, and thus it accepted the parties' request that it do so. The third-party session before the panel remained closed, however, in view of the lack of consensus on the part of the third parties to have an open third-party hearing.[95] The Appellate Body said that the requirement in article 17.10 of the DSU[96] that appellate proceedings be confidential was not absolute and that, when read in context, in particular article 18.2,[97] which provides for parties to forego confidential protection in respect of their positions, it was clear that the Appellate Body "has the power"[98] to authorize a joint request of the disputing parties to lift confidentiality. The appellate hearing was thus open to public observation through closed-circuit television. Given the concerns and objections of some of the third-party participants in the appeal, however, the third-party statements before the Appellate Body were not open to observation, if the third party in question requested confidentiality.[99]

89 *Agreement on Trade-Related Investment Measures*, 15 April 1994, 1868 UNTS 186.

90 Panel Report, *Canada–Continued Suspension*, WTO Doc WT/DS321/R (2008) at para 4.14 [Panel Report, *Canada–Continued Suspension*].

91 *DSU*, *supra* note 29, art 18.2.

92 Appellate Body Report, *Canada–Continued Suspension*, WTO Doc WT/DS321/AB/R (2008) at para 143 [Appellate Body Report, *Canada–Continued Suspension*].

93 Panel Report, *Canada–Continued Suspension*, *supra* note 90 at paras 4.17, 7.12; Appellate Body Report, *Canada–Continued Suspension*, *supra* note 92 at para 145.

94 Panel Report, *Canada–Continued Suspension*, *supra* note 90 at para 7.51.

95 *Ibid* at paras 1.6, 7.44–7.54.

96 *DSU*, *supra* note 29, art 17.10.

97 *Ibid*, art 18.2.

98 Appellate Body Report, *Canada–Continued Suspension*, *supra* note 92 at para 32; WTO, "Procedural Ruling of 10 July to Allow Public Observation of the Oral Hearing" (2008) 14 Dispute Settlement Reports 5729 at para 7 ["Procedural Ruling"].

99 Appellate Body Report, *Canada–Continued Suspension*, *supra* note 92 at para 32; "Procedural Ruling", *supra* note 98 at paras 4, 10–11.

Although most panel and appellate hearings are confidential to this day, several hearings were open for public observation following these pioneering cases.[100]

Canada—Continued Suspension and *United States—Continued Suspension* are also important for, among other things, the rulings with respect to whether a WTO member must terminate suspension of concessions when a party alleges that it has removed a measure that was found to be WTO inconsistent and with respect to which party should bring compliance proceedings when "there is disagreement as to the existence or consistency" with WTO obligations of measures taken to comply with WTO rulings. (Article 21.5 of the DSU provides for compliance proceedings in the event of such disagreement, but is silent as to which party must initiate them.[101])

Following the rulings of the panels and the Appellate Body in *EC—Measures Concerning Meat and Meat Products (Hormones)*,[102] Canada and the United States had been authorized by the Dispute Settlement Body (DSB) to suspend concessions against the EC, when the latter failed to remove its WTO-inconsistent ban on hormone-treated beef. Some years later, the EC removed the impugned measure and imposed a new one that it claimed was WTO consistent. It considered that Canada and the United States were thereby obliged to discontinue suspension of concessions. The Appellate Body agreed with the EC that, under DSU article 22.8, suspending members must cease the application of suspension of concessions, once compliance is achieved. But the Appellate Body did not agree with the EC that if the suspending members do not agree that compliance has been achieved with the imposition of the new measure, they are obliged as original complainants to bring compliance proceedings under DSU article 21.5 to resolve the disagreement. Nor did the Appellate Body agree that the responding party is prohibited from doing so. The Appellate Body ruled that it is open to a responding party to initiate compliance proceedings under article 21.5 to obtain confirmation that its new measure is WTO consistent.[103]

Australia–Salmon: Interim Review and False Judicial Economy

Canada's early sanitary and phytosanitary (SPS) measures dispute with Australia, regarding Australia's measures prohibiting Canadian salmon imports, assisted in clarifying the interim review procedure provided for in article 15 of the DSU. By virtue of that provision, panels are required to issue an interim report to the disputing parties, containing a descriptive part setting out the facts and the arguments of the parties, as well as the panel's findings and conclusions. Disputing parties are entitled to ask the panel "to review precise aspects of the interim report,"[104] prior to circulating the final report to WTO members.

In the *Australia—Measures Affecting Importation of Salmon* case (*Australia—Salmon*), Australia requested a "whole of report" review at the interim review stage,[105] claiming that a large part of the report was based on factual errors and inaccuracies and that the legal reasoning was not based on an objective assessment of the facts. Canada objected to Australia's request and argued that the panel could only consider comments addressing "precise aspects" of the interim report. The panel agreed with Canada and declined Australia's request, stating that it had reviewed the interim report "in light of the comments made by the parties which relate to 'precise aspects'" of that report.[106] The ruling was instructive at the time (1998), given that the WTO dispute-settlement mechanism was still fairly new. However, it may have little practical relevance in today's WTO dispute-settlement environment because today's disputing parties generally tend not to use the interim review procedure to seek a substantive reversal of the panel's findings, preferring instead to keep their legal powder dry for the appellate phase.

Australia—Salmon is also instructive for clarifying what is meant by "false judicial economy."

100 These include *US–Certain Country of Origin Labelling (COOL) Requirements*, WTO Doc WT/DS384 (brought by Canada) and WTO Doc WT/DS386 (brought by Mexico) [*US–Certain Country of Origin Labelling (COOL) Requirements*]; *Canada–Renewable Energy / Canada–Feed-In Tariff Program*, WTO Doc WT/DS412 (brought by Japan) and WTO Doc WT/DS426 (brought by the European Union); *EC–Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400 (brought by Canada) and WTO Doc WT/DS401 (brought by Norway).

101 *DSU*, *supra* note 29, art 21.5.

102 *EC–Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc WT/DS26 (brought by the United States) and WTO Doc WT/DS48 (brought by Canada).

103 Appellate Body Report, *Canada–Continued Suspension*, *supra* note 92 at paras 321, 347, 368.

104 *DSU*, *supra* note 29, art 15.2.

105 Panel Report, *Australia–Salmon*, WTO Doc WT/DS18/R (1998) at para 7.3.

106 *Ibid*.

Although WTO panels are not required to rule on each and every claim before them and may, as a matter of "judicial economy," rule on only some of them, panels must rule on all claims that must be addressed in order to resolve the particular dispute before them. In *Australia—Salmon*, Canada appealed the panel's decision to make findings under article 5.1 of the SPS Agreement[107] with regard to *all* categories of salmon at issue, but to limit its findings under articles 5.5 and 5.6 of the SPS Agreement to only one category of salmon at issue.[108] Canada complained that, as a consequence of its approach, the panel had not resolved the matters in dispute; Canada was of the view that it would have "better frame[d] the course of implementation"[109] had the panel also ruled on the articles 5.5 and 5.6 claims, regarding the other categories of salmon. The Appellate Body agreed with Canada, acknowledging that a measure brought into conformity with article 5.1 might still be inconsistent with either article 5.5 or article 5.6 or with both. The Appellate Body concluded that for the panel to make findings concerning article 5.1 with respect to the other categories of salmon without also making findings under articles 5.5 and 5.6 for those other categories would not lead to "sufficiently precise recommendations and rulings so as to allow for compliance by Australia with its obligations under the *SPS Agreement*, in order to ensure the effective resolution of this dispute with Canada."[110] Having determined that the panel provided only a partial resolution of the matter at issue, the Appellate Body ruled that the panel had engaged in false judicial economy and had thereby committed an error of law.[111]

As noted above, Canada ranks as one of the most active players in WTO dispute settlement, with 37 offensive and 21 defensive cases thus far. This review of Canadian disputes can highlight but a few of them. Several other Canadian disputes also provide useful insight into WTO law and practice, but they are too numerous to examine here.[112]

Updates and Improvements to WTO Dispute-Settlement Rules

Canada's frequent participation in WTO dispute settlement and the contribution to the development of the law made through Canadian disputes is complemented by Canada's significant involvement in developing and seeking to improve WTO dispute-settlement procedures. Canada played a leading role in crafting the WTO dispute-settlement rules during the Uruguay Round negotiations and has continued to play a key role in efforts to negotiate improvements to the dispute-settlement procedures over the years.

Canada's leadership in dispute-settlement negotiations can be traced back to the De la Paix Group, a group of some 20 developed and developing countries formed in 1987 that "helped to broker some of the most important deals in the Uruguay Round on issues such as dispute settlement and the Trade Policy Review Mechanism."[113] A former Canadian diplomat chaired the group's discussions on dispute settlement.[114]

Following establishment of the WTO, Canada continued to play an active role in the ongoing negotiations to improve and clarify the dispute-settlement rules.[115] Canada submitted several proposals, addressing all phases of the dispute-settlement process, including with respect to third-party rights, panel composition, transparency, a remand procedure and sequencing between articles 21 and 22 of the DSU. Numerous proposals

107 WTO, *Agreement on the Application of Sanitary and Phytosanitary Measures* [*SPS Agreement*], 1867 UNTS 493, online: <www.wto.org/english/tratop_e/sps_e/spsagr_e.htm>.

108 Article 5.1 requires WTO members to ensure that their SPS measures are based on an appropriate risk assessment. Article 5.5 concerns the avoidance of arbitrary or unjustifiable distinctions in the level of sanitary or phytosanitary protection that a WTO member considers to be appropriate in different circumstances. Article 5.6 requires WTO members to ensure that their SPS measures are not more trade restrictive than required to achieve the member's appropriate level of sanitary or phytosanitary protection.

109 Appellate Body Report, *Australia–Salmon*, WTO Doc WT/DS18/AB/R (1998) at para 222.

110 *Ibid* at para 224.

111 *Ibid* at para 226.

112 These include *US–Certain Country of Origin Labelling (COOL) Requirements*, *supra* note 100, *China–Measures Affecting Imports of Automobile Parts*, WTO Doc WT/DS342, *Canada–Measures Affecting Dairy Exports/Measures Affecting the Import of Milk and the Exportation of Dairy Products*, WTO Doc WT/DS113, WTO Doc WT/DS103 and *Canada–Certain Measures Concerning Periodicals*, WTO Doc WT/DS31.

113 VanGrasstek, *supra* note 4 at 93.

114 This was Elaine Feldman, at the time a member of the Canadian permanent mission to the GATT.

115 WTO members assumed at the outset that it might be necessary to make adjustments to the dispute-settlement rules once they had been in use for a while. Originally, members called on the WTO Ministerial Conference to "complete a full review" of the rules and procedures by 1999. (See *Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes*, WTO Doc LT/UR/D-1/6 (1994) at para 3, online: <www.wto.org/english/docs_e/legal_e/53-ddsu_e.htm>.) The deadline came and went without completion of the task, but members continued working.

for clarification and adjustment were also submitted by other WTO members, but none of them achieved consensus, with the result that no amendments have been made thus far to the DSU. This may be due, in part, to the fact that the system has been working relatively well and members may not feel any pressing need to change the rules. Nevertheless, there are elements that would benefit from an update, such as the sequencing of articles 21 and 22 of the DSU, dealing, respectively, with compliance proceedings and proceedings to determine the level of suspension of concessions for failure to comply with a ruling. Members apparently have not abandoned the goal of arriving at an agreed set of amendments, however, as they continue to discuss possible clarifications and improvements in the special committee established for this purpose.[116]

Alongside these efforts, Canada proposed in July 2016 that the membership seek to pursue improvements to dispute-settlement procedures through a parallel avenue. Canada opined that the WTO dispute-settlement system was "by far the most prolific and successful forum for international dispute settlement in history,"[117] but expressed concern about the "increase in both the volume and complexity"[118] of disputes that had placed a "heavy burden"[119] on the system, such that members were experiencing delays in resolving disputes. For Canada, this "threatened both the objective, and the reputation, of WTO dispute settlement for timely resolution."[120] In light of this situation, Canada introduced a new and innovative approach — a "Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes" — with a view to "foster[ing] a more-organic evolution of dispute settlement practices."[121]

Under the mechanism, Canada proposed that members develop and circulate documents setting forth practices and procedures used in specific disputes or proposed as models to be used in disputes in the future. Canada underscored that this "process of experimentation"[122] would not affect the rights and obligations of WTO members and did not replace efforts under way in the DSB to negotiate binding improvements to the DSU.

Canada circulated four practice documents in July 2016, which covered notifications, third-party participation, transparency, and streamlining the panel process.[123] Seventeen WTO members endorsed the mechanism and considered that it "would improve the operation of the dispute settlement system"[124]; other members spoke very positively of Canada's efforts and some undertook to consider endorsement of the mechanism in due course. One year later, in July 2017, Canada circulated four new practice documents, addressing panel composition, electronic filing in disputes, third-party participation, and transparency, which were endorsed by a number of members.[125] Several members thanked Canada for its work in seeking to improve practices and procedures in WTO dispute settlement, and Canada was lauded for its "ongoing, able leadership" in these efforts.[126]

It is too early to determine whether Canada's mechanism will have an impact on the operation of the dispute-settlement system and whether it will contribute positively to address the concerns Canada referred to in introducing its novel approach to making improvements to dispute-settlement procedures. It is clear, however, that Canada is once again stepping up as leader and innovator in the field of trade-dispute settlement.

116 See "Special Session of the Dispute Settlement Body, Report by the Chairperson, Ambassador Coly Seck, to the Trade Negotiations Committee", WTO Doc TN/DS/30 (2017).

117 WTO, "Minutes of Meeting", WTO Doc WT/DSB/M/383 (2016) at para 9.2. Former Canadian diplomat Robert McDougall, who served at the Canadian permanent mission to the WTO for five years and is now a CIGI senior fellow, is understood to have developed and advanced this approach, together with his colleagues at the mission.

118 *Ibid*.

119 *Ibid*.

120 *Ibid*.

121 *Ibid* at para 9.3.

122 *Ibid* at para 9.5.

123 *Ibid* at para 9.4.

124 WTO, "Minutes of Meeting", WTO Doc WT/DSB/M/399 (2017) at para 3.2.

125 *Ibid* at paras 3.2, 3.3–3.19.

126 *Ibid* at para 3.12.

Contribution of Individual Canadians

The contribution of Canadian individuals behind the disputes also deserves mention in a review of Canada's role in WTO dispute settlement.

More than 250 individuals have served as WTO panellists since 1995.[127] Twenty-two different Canadians have served as WTO panellists so far, which is more in total than from any other WTO member. These individuals — some of whom have served more than once — include several former and serving Canadian diplomats, academics, private practitioners, a former trade minister and former trade negotiators.[128] Canada also holds the record for the number of women who have served on panels: a total of five different Canadian women have served on panels, one of them three times.[129]

Two Canadians have served as chair of the DSB, which meets on a monthly basis to administer the WTO dispute-settlement system.[130] In addition, several Canadians have served, and many continue to serve, in the three dispute-settlement divisions in the WTO (Appellate Body Secretariat, Legal Affairs Division and Rules Division). Of course, as with panellists, these individuals do not represent Canada in those positions. Secretariat staff must perform their duties in a neutral manner, and they are bound by strict conflict of interest rules.

Finally, it is worth noting that Canada is generally represented before WTO panels and the WTO Appellate Body by Canadian government lawyers, rather than private-sector counsel, as is the case with several other WTO members. That is not to say that the government does not receive legal advice from time to time from the private sector, including behind the scenes. However, Canada was one of the first WTO members to have a dedicated government office responsible for representing Canada in WTO dispute settlement, and it has built a strong team of WTO legal experts over the years.

Conclusion

It is often said that Canada "punches above its weight" in the international arena. This is certainly true in the field of WTO dispute settlement.

Canada played a significant role in the development of the WTO's highly lauded and successful dispute-settlement system and continues to play a leading role in that area, offering novel approaches to strengthening and improving the system. Several WTO members have applauded Canada for its leadership in these recent reform efforts. Individual Canadians have also made their marks in the system in different capacities, as mentioned above.

Perhaps Canada's most valuable contribution has been its active involvement in dispute-settlement activity itself. Canada stands behind only the much larger economies of the United States and the European Union in bringing important challenges under the system that have helped clarify members' WTO obligations under the multilateral trade agreements. Canadian measures have also been the subject of WTO challenges from time to time, and some of these cases, too, have contributed importantly to the development of international trade law.

Canada's participation in WTO dispute settlement, be it in helping to develop rules and procedures, in supporting the system generally through individual service and otherwise, and in contributing to the development of international trade law through the cases, has helped create and sustain a WTO dispute-settlement system that has enjoyed wide praise and success. It will be important for Canada to continue playing an active role to ensure that, despite current challenges, the system continues to serve the WTO membership well.

127 Three panellists are chosen by the disputing parties on an ad hoc basis for each dispute or, if agreement on panel selection cannot be reached by the parties, the WTO director-general appoints the three panellists. Panellists can be government or non-government persons. They serve in their individual capacities and not as representatives of their governments. See *DSU*, *supra* note 29, art 8, regarding selection of panellists and their qualifications.

128 Gilles Gauthier, retired diplomat and former minister (Economic Affairs), Canadian embassy, Washington, DC, has served five times. Donald McRae (arbitrator and emeritus professor, University of Ottawa) and Pierre Pettigrew (former trade minister, former minister of foreign affairs) have each served four times.

129 Elaine Feldman, former deputy permanent representative of Canada to the WTO, has served three times. Heather Forton and Kirsten Hillman, both former Canadian delegates to the WTO, each served once, as did Debra Steger (University of Ottawa) and the author.

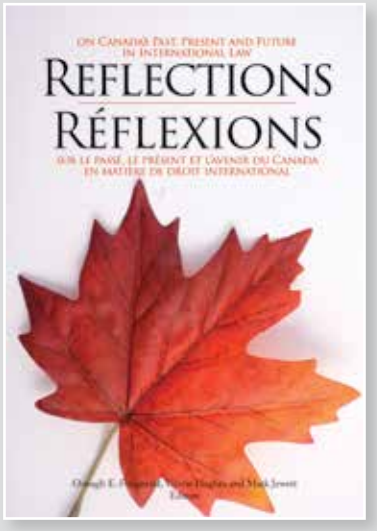
130 The chair of the DSB is selected from among the ambassadors in Geneva, accredited to the WTO. The part-time appointment is for one year. The two Canadians are Jonathan Fried and John Gero, both of whom served as Canadian ambassador and permanent representative to the WTO at the Canadian permanent mission to the WTO in Geneva.

ON CANADA'S PAST, PRESENT AND FUTURE IN INTERNATIONAL LAW

REFLECTIONS
RÉFLEXIONS

SUR LE PASSÉ, LE PRÉSENT ET L'AVENIR DU CANADA EN MATIÈRE DE DROIT INTERNATIONAL

Oonagh E. Fitzgerald, Valerie Hughes and Mark Jewett, Editors



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