Dispute Settlement in the World Trade Organization

Fall 2005  •  Seminar 745.01

Prof. Joost Pauwelyn  (Office 4027)

Syllabus

**Prerequisites:** Students must have taken the introductory course on International Trade Law or otherwise demonstrate a sufficient background in the field. The latter can only join the seminar upon approval by the instructor.

**Credits:** 2/3. The third credit can be obtained by students who officially submit a 25 page brief to the 2006 Sidley-IIEL WTO Moot Court Competition.

**Evaluation:** Each student must submit a reaction paper (between 2-4 pages long) to at least 5 different seminar sessions. Papers should be sent to WTO@lists.law.duke.edu before the seminar. This set of 5 papers will determine 60% of your grade; the remaining 40% is based on moot court performance and class attendance & participation.

**Sources:** Students should familiarize themselves with the following two websites:

[www.wto.org](http://www.wto.org) (official website of the World Trade Organization; click on “disputes” for the dispute settlement gateway)

Note, in particular, the WTO Appellate Body’s Repertory of Report and Awards at [http://www.wto.org/english/tratop_e/dispu_e/reptory_e/reptory_e.htm](http://www.wto.org/english/tratop_e/dispu_e/reptory_e/reptory_e.htm)

[www.worldtradelaw.net](http://www.worldtradelaw.net) (subscription website with summaries of all WTO rulings, links to government web-pages and much more)


**Journals:** For further background material, the following three journals are key:

World Trade Review: [http://www.journals.cambridge.org/journal_WorldTradeReview](http://www.journals.cambridge.org/journal_WorldTradeReview)
<table>
<thead>
<tr>
<th>Date</th>
<th>Topic</th>
<th>Readings &amp; Questions</th>
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</thead>
</table>
| Aug. 24| I. Introduction, Historic Development and Overview of WTO Dispute Settlement | 1. Book, p. 1-16 and 43-75 (if need be, the latter can be skimmed)  

Background:  

Questions:  
1. What are the major historical developments in dispute settlement from GATT to WTO?  
2. What are the conventional explanations for these developments (in particular, the loss of the veto right in panel establishment) and what other reasons do you deduce from my *Transformation of World Trade* article?  
3. What is the *method* of WTO dispute settlement (e.g., negotiation or adjudication?)  
4. What is the *aim* of WTO dispute settlement (e.g., rule compliance or settlement?)  
5. What is meant with the so-called “imbalance” between the political and the judicial branches of the WTO? Do you agree that there is such “imbalance”? Is it a “constitutional paradox”? Is it a problem, and if so, how would you resolve it?  

When preparing your answers to Questions 3-5, consider the *Airbus-Boeing Aircraft Subsidies* case (point 3 of your readings).
II. Legal Basis, Types and Object of WTO Complaints.

1. Book, p. 28-42 and 101
5. ILC Articles on State Responsibility, at [http://www.un.org/law/ilc/texts/State_responsibility/responsibilityfra.htm](http://www.un.org/law/ilc/texts/State_responsibility/responsibilityfra.htm), compare ILC Art. 2 to GATT Art. XXIII; and ILC Arts. 4, 5, 8 and 11 to Understanding on GATT Art. XXIV:12. Read also ILC Arts. 12, 48 and 55.

Additional:
* Santiago M. Villalpando, *Attribution of Conduct to the State: How the Rules of State Responsibility may be Applied Within the WTO Dispute Settlement System*, JIEL, July 2002

Questions:
1. What violations can one complain about in WTO dispute settlement?
2. To have a cause of action, is breach of a WTO rule always required? If not, what are the alternatives to bring a successful WTO complaint (consider the Film case)?
3. What type of governmental conduct is subject to WTO dispute settlement? What governmental conduct is not? How is the DSU different from the ILC Articles in this respect?
4. Can conduct by private operators be the subject of a WTO complaint? Compare to the ILC Articles.
5. Who has standing to bring a WTO complaint? Compare to the ILC Articles.
6. How can private parties obtain redress for WTO violations? What is Section 301?
### III. Sources of Law and Treaty Interpretation

1. Book, p. 3-6
7. For those who are unfamiliar with the case mentioned directly above (item #6): Joost Pauwelyn, *ASIL Insight: WTO Softens Earlier Condemnation of U.S. Ban on Internet Gambling, but Confirms Broad Reach into Sensitive Domestic Regulation*, April 12, 2005.

**Additional:**
- Palme, David and Mavroidis, Petros, *The WTO Legal System: Sources of Law* *AJIL* (1998) 398-413

**Questions:**

1. What are the sources of law that WTO panels can apply?
2. Can WTO panels refer to and/or apply rules of public international law outside WTO covered agreements?
3. Is there a hierarchy in the elements for treaty interpretation referred to in Arts. 31-32 of the Vienna Convention?
5. What requirements must a rule of international law meet before it can be referred to pursuant to Art. 31.3(c) of the Vienna Convention? Does it suffice for the disputing parties to be bound by it?
<table>
<thead>
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<th>Sept. 14</th>
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| **IV.**  
**Overlaps with Other International Courts and Tribunals. Conflicts and Choice of Law** |

2. Case law Excerpts on Article 23 DSU  
3. NAFTA provisions on overlaps & cultural industries  
4. WTO dispute on *Canada - Periodicals* (complaint by US), case summary at [http://www.worldtradelaw.net/dsc/ab/canada-periodicals(dsc)(ab).pdf](http://www.worldtradelaw.net/dsc/ab/canada-periodicals(dsc)(ab).pdf); no need to read it all, just ask yourself why this case was brought to the WTO and not to NAFTA; could Canada have insisted on resolving the case at NAFTA?  
7. *EC/Chile – Swordfish* case, before WTO, DS193 and ITLOS, at [http://www.itlos.org/start2_en.html](http://www.itlos.org/start2_en.html), go to "Proceedings", then "docket" then Case No. 7  

**Additional:**  

**Questions:**  
1. What is the jurisdiction of WTO panels? How can it overlap with that of NAFTA, ITLOS or the ICJ? Consider, in particular, *Canada - Periodicals*; the *EC-Chile Swordfish* case and the *Nicaragua/Honduras* border dispute.  
2. What happens in the event of overlap of jurisdiction? Who decides where a case goes (forum shopping)? What about re-submitting a case, after losing it in one tribunal, to another tribunal?  
3. What law can each of these tribunals apply? What happens in the event of conflict of norms?  
4. What happens in the event the applicable law before two tribunals were to differ; what if it is the same but the tribunals each have a different view leading to conflicting judgments?
<table>
<thead>
<tr>
<th>Sept. 21</th>
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<tbody>
<tr>
<td>V. The Main Players in WTO Dispute Settlement:</td>
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<tr>
<td>WTO Members, Panelists, the Appellate Body, the Secretariat, Private Lawyers, Scientific Experts, NGOs</td>
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<tr>
<td>1. Book, p. 9, 17-27, 63-74, 97-100, 170-178</td>
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<td>2. Appellate Body excerpts on private lawyers</td>
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<td>3. Claus-Dieter Ehlermann, <em>Six Years on the Bench of the “World Trade Court”, Some Personal Experiences as Member of the Appellate Body of the WTO</em>, Journal of World Trade, 2002, 605, 639, read only: 2–4 (composition) and 5–7 (divisions)</td>
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<td>5. Appellate Body rulings on <em>Amicus Curiae</em> briefs</td>
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<td>Additional:</td>
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<tr>
<td>* The Rules of Conduct for WTO Dispute Settlement, Book, p. 170-178</td>
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<td>* James Bacchus, <em>Table Talk: Around the Table of the Appellate Body of the WTO</em>, 35 Vand. J. Transnat’l L. 1021-1039</td>
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<td>Questions:</td>
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<tr>
<td>1. What are the pros and cons of letting private lawyers represent states in WTO disputes? Where do you stand?</td>
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<td>2. What are the pros and cons of permitting <em>amicus curiae</em> briefs? Where do you stand?</td>
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<td>3. What is the difference between third parties and <em>amici</em>?</td>
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<td>4. Do you trust panel and Appellate Body members? What kind of people should they be? How are they held accountable?</td>
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<td>5. Should panels become permanent bodies? Should Appellate Body members be appointed for life?</td>
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<td>6. What is the role of the WTO Secretariat? Does it have too much influence?</td>
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<td>7. What is the place of scientific experts in WTO dispute settlement? What can they, and are they permitted to, contribute? Are panels bound by their views?</td>
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In preparing your answers to questions 5-7 consider, in particular Weiler’s theory of internal v. external legitimacy
**VI.**

**Selected Procedural Questions:**

**Burden of Proof, Level of Proof and Standard of Review**

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<thead>
<tr>
<th>Questions</th>
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<td>Burden?, 1 JIEL 1998 227, read 227-9, 233-5, 237-42 and 252-8</td>
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<tr>
<td>4. What refinements and/or reversals of earlier practice (as reflected in</td>
<td>4. Additional case law excerpts on burden of proof</td>
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<td>5. What standard of review must panels respect when reviewing the WTO</td>
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<td>6. What standard of review must the Appellate Body respect when reviewing</td>
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<td>7. What standard of review must the Appellate Body respect when reviewing</td>
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**Additional:**

* S. Croley and J. Jackson, *WTO Dispute Procedures, Standard of Review and Deference to National Governments* 90 AJIL 1996, 193-213
### Oct. 5

#### VII.

### Remedies in WTO Dispute Settlement


**Additional:**

* Steve Charnovitz and Jason Kearns, *Adjudicating compliance in the WTO*, JIEL (2002), 331

**Questions:**

1. What are the different steps, in each stage of the procedure after the DSB adoption of a dispute settlement report, that complainants can rely on to achieve compliance as against recalcitrant defendants?
2. How do the remedies in the DSU compare to those offered in general international law? Which set of remedies offers more to the complainant? Which is more effective to induce compliance?
3. Is the WTO a property or a liability rule regime? What about general international law?
4. DSU Art. 22 refers to compensation. What form does it take? How do you explain that this remedy is only rarely resorted to?
5. Are you in favor of a new remedy of retroactive monetary compensation in the WTO?
6. How is WTO retaliation kept in bounds? What form does retaliation eventually take?
7. Is WTO retaliation aimed at re-balancing the trade scales or at inducing compliance? If the latter, is the current level/method of retaliation sufficient to induce compliance? Why was it not set at a higher level?
8. What are the pros and cons of equivalent suspension of concessions as a (and the only) remedy of last resort?
### Oct. 19

**VIII. The Calculation and Selection of “Trade Sanctions”**

5. EC Notice Requesting Comments on Retaliation List in FSC (September 2002)
7. US-EC dispute on EC enlargement consequences for US rice exports: comments on US proposal to retaliate
8. US retaliation list in Hormone dispute

**Optional:**


**Questions:**

1. How is the level of suspension of concessions calculated? When does the clock start ticking?
2. Is the amount based on the value of the violation by the wrongdoer, economic harm to the victim or rather trade effects suffered by the victim? What *should* it be in your view?
3. In what sense are export subsidy cases treated differently when it comes to remedies? Why? *Should* there be such a difference?
4. What considerations must countries that impose trade sanctions take into account? How are product lists chosen? How can product selection make retaliation more effective. Consider the US practice in *Hormones* and *Rice*; the EC practice in *FSC*. 
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<tr>
<th>Date</th>
<th>Event</th>
<th>Speaker</th>
<th>Details</th>
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<tbody>
<tr>
<td>Oct. 26</td>
<td>NO SEMINAR</td>
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<td>Nov. 2</td>
<td>Moot Court</td>
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| Nov. 9   | Moot Court    | Prof. Eric Reinhardt             | Guest Speaker: Prof. Eric Reinhardt (Department of Political Science, Emory University) “Developing countries in WTO Dispute Settlement and Reform of the DSU” Paper will be circulated. See also:  
| Nov. 16  | Moot Court    |                                  |                                                        |
| Nov. 23  | Moot Court    |                                  |                                                        |