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APPELLATE BODY INTERPRETATION OF THE WTO AGREEMENT: A CRITIQUE IN LIGHT OF *JAPAN—TAXES ON ALCOHOLIC BEVERAGES*

Ramón R. Gupta

Abstract: In *Japan—Taxes on Alcoholic Beverages*, the Appellate Body of the WTO upheld the conclusions of a Panel report finding Japan's Liquor Tax Law in violation of Article III of the GATT 1994. Considering that Japan has agreed to comply with the ruling, the Appellate Body seems to have successfully dealt with the issue. Yet analysis of the case brings to question the Appellate Body's interpretations of law. Though the dispute settlement procedures of the WTO resulted from recognition of a need for predictability and security in international trade law, the Appellate Body's interpretations fail to provide such law. As this inadequacy is likely to continue, the Body's interpretative powers should be restricted. In compliance with a strict construction of Article IX:2 of the WTO Agreement, interpretations should be made by the more political and representative entities of the Ministerial Conference and the General Council.

I. INTRODUCTION

On September 25, 1996, the Appellate Body of the World Trade Organization ("WTO")[1] reported its decision in the *Japan—Taxes on Alcoholic Beverages* ("*Japan Tax*") case.[2] The decision upheld a WTO Panel report which had found Japan's Liquor Tax Law[3] in violation of the Internal Taxation and Regulation provisions of Article III of the GATT 1994.[4] In accordance with WTO procedures,[5] the decision was adopted by the Dispute Settlement Body of the WTO in November, 1996.[6] By late

[1] The World Trade Organization was established on April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 33 I.L.M. 1140 (1994) [hereinafter WTO Agreement], and came into effect on January 1, 1995. *E.g.* Friedl Weiss, *WTO Dispute Settlement and the Economic Order of WTO Member States*, *in* CHALLENGES TO THE NEW WORLD TRADE ORGANIZATION 77, 77 (Pitou Van Dijck & Gerrit Faber eds., 1996).

[2] *See* Japan—Taxes on Alcoholic Beverages (Japan v. U.S., Can., Eur. Communities), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996) (WTO Appellate Body) *available in* 1996 WL 738800 [hereinafter Japan Tax Appellate], *aff'g* WT/DS8/R, WT/DS10/R, WT/DS11/R (July 11, 1996) *available in* 1996 WL 406720 (WTO Dispute Settlement Panel) [hereinafter Japan Tax Panel].

[3] Shuzeiho, (Liquor Tax Law), Law No. 6 of 1953 as amended.

[4] *See* Japan Tax Appellate, *supra* note 2, § I.

[5] WTO Agreement art. 3:3.

[6] *WTO Proposes Japan Close Liquor Tax Gap by Next Feb. 1*, JAPAN WKLY. MONITOR, Feb. 17, 1997, *available in* 1997 WL 8244833.

December of that year, Japan had agreed to remedy the situation by bringing the Liquor Tax Law into compliance with the WTO decision.[7]

This chain of events marked the second completed case of the WTO dispute settlement procedure.[8] As with the first case, a complaint against the United States,[9] not only was a major international economic power found in violation of the WTO Agreement, but in addition that nation declared its intention to comply with the Organization's decision.[10]

Such results were more difficult under the dispute resolution procedures of the GATT 1947.[11] Under those procedures, dispute resolution emphasized diplomacy, flexibility, and equity.[12] In contrast, the new WTO procedure, titled the Dispute Settlement Understanding ("DSU"),[13] emphasizes legal dispute resolution.[14] Now, under the DSU, after attempts at consultations fail, parties are essentially guaranteed a panel hearing[15] and an opportunity for appeal.[16]

Considering the outcome of the cases and the heavy usage of the organization,[17] it seems, as WTO Director-General Renato Ruggiero

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[7] *See Japan Set to Comply with WTO Ruling, Will Revise Domestic Liquor Taxes*, J. COM., Dec. 18, 1996, at A4 [hereinafter *Japan to Comply*].

[8] *See Overview of the State-of-Play of WTO Disputes* (last modified Apr. 1, 1997) <http://www.wto.org/wto/dispute/bulletin.htm> [hereinafter *Overview of Disputes*]. The first case was United States—Standards for Reformulated and Conventional Gasoline (U.S. v. Braz., Venez.), 35 I.L.M. 603 (1996) (WTO Appellate Body) [hereinafter U.S. Gasoline Appellate], *aff'g* 35 I.L.M. 274 (1996) (WTO Dispute Settlement Panel) [hereinafter U.S. Gasoline Panel]. Since *Japan Tax*, two more cases have been completed: United States—Restrictions on Imports of Cotton and Man-made Fibre Underwear (Costa Rica v. U.S.), WT/DS24/AB/R (Feb. 10, 1997) (WTO Appellate Body) [hereinafter U.S. Cotton Underwear], and Brazil—Measures Affecting Desiccated Coconut (Phil. v. Brazil), WT/DS22/AB/R (Feb. 21, 1997) (WTO Appellate Body) [hereinafter Brazil Coconut].

[9] *See, e.g.*, U.S. Gasoline Appellate, *supra* note 8.

[10] *U.S. Agrees to Abide by Gas Import Ruling*, L.A. TIMES, June 20, 1996, at D4.

[11] Under GATT 1947 a losing party could block adoption of a panel report by not consenting to the report. *See* Michael K. Young, *Dispute Resolution in the Uruguay Round: Lawyers Triumph over Diplomats*, 29 INT'L LAW. 389, 402 (1995). Even where a report was adopted, nations felt no obligation to comply with the decision. *See, e.g.*, Jared R. Silverman, *Multilateral Resolution Over Unilateral Retaliations Adjudicating the Use of Section 301 Before the WTO*, 17 U. PA. J. INT'L ECON. L. 233, 258 (1996).

[12] Young, *supra* note 11, at 389-91.

[13] Understanding on Rules and Procedures Governing the Settlement of Disputes, Dec. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 33 I.L.M. 112 (1994) [hereinafter DSU].

[14] *See generally Id.*

[15] *Id.* para. 4:7.

[16] *See Id.* para. 16:4.

[17] Since its entry into force a little over two years ago, seventy-four cases have been filed with the WTO. *Overview of Disputes*, *supra* note 8. In comparison, only 196 cases were handled by GATT 1947 over nearly half a century. Francis Williams, *News: World Trade: Antagonists Queue for WTO Judgment:*

recognized, "the system is working very well."[18] Yet despite its apparent success, analysis of *Japan Tax* brings into question the Appellate Body's interpretations of law. Though these interpretations brought an end to the dispute,[19] they are inadequate in light of the purposes of the WTO. As this comment will discuss, interpretations of the WTO Agreement must further the predictability and clarity of international trade law.[20]

In the *Japan Tax* case, the main issue is whether Japan's Liquor Tax law discriminates against "like domestic" or "directly competitive or substitutable" products.[21] While defining these terms provides an opportunity to clarify international trade law, the Appellate Body shies away from the challenge. Clear definitions of the terms are not provided, and as a result, future application of the WTO Agreement is left unpredictable.

This situation of poor interpretation of law is likely to continue. Because the Appellate Body already creates controversy each time it decides against a Member nation's laws, it is unlikely that the Appellate Body will strive to create more controversy through clear interpretations. Telling a sovereign nation that they must change their laws challenges the continuing membership of that nation in the WTO. Establishing clear definitions of "directly competitive or substitutable products" could challenge every membership to the WTO.

In hopes of preventing further inadequate interpretations of law, this comment calls for the development of a procedure to bring interpretation issues to the Ministerial Conference and General Council of the WTO. As these entities consist of a representative of each Member of the WTO, and essentially act as legislative bodies, it is likely their interpretations will provide more predictability to international trade law.

Such a procedure is in accordance with Article IX:2 of the WTO Agreement. Article IX:2 provides that the Ministerial Conference and the General Council have exclusive authority to adopt interpretations of the Agreement.[22] A strict construction of this provision dictates that final

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Frances [sic] *Williams on a Vote of Confidence in the Trade Body's Capacity to Settle Disputes*, FIN. TIMES, Aug. 8, 1996, at 6, *available in* 1996 WL 10606203.

[18] *See* Anne Swardson, *Trial for the Trade Police; The WTO Has a Lot to Lose When It Hears a Complaint About the U.S.*, WASH. POST, Oct. 16, 1996, at C11.

[19] *Japan to Comply*, supra note 7.

[20] *See* DSU para. 3.2.

[21] *See generally* Japan Tax Appellate, *supra* note 2.

[22] *See* WTO Agreement art. IX:2.

determinations as to questions of law should be made by these entities rather than the Appellate Body.[23]

II. BACKGROUND

A. *History of International Trade Dispute Resolution Procedures*

To understand the WTO and its purposes, a brief introduction to its predecessor, the General Agreement on Tariffs and Trade 1947 ("GATT 1947"),[24] is necessary. The GATT 1947 was drafted in the mid-1940s[25] as a multilateral treaty with the purpose of imposing on nations the obligation to refrain from using various trade impeding measures.[26] Although for years the GATT has been generally recognized as the principal international organization and rule system governing most of the world's trade, the 1947 Agreement was not originally intended to create an international organization.[27] Rather, the GATT was designed to operate under the "umbrella" of a comprehensive legal entity, the International Trade Organization ("ITO").[28]

Because the ITO never came into effect,[29] nations were left to work with the dispute settlement procedures of the GATT 1947.[30] These

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[23] *See* ASIF H. QURESHI, THE WORLD TRADE ORGANIZATION IMPLEMENTING INTERNATIONAL TRADE NORMS 99-100 (1996).

[24] General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 187 [hereinafter GATT 1947].

[25] *See, e.g.*, PÄR HALLSTRÖM, THE GATT PANELS AND THE FORMATION OF INTERNATIONAL TRADE LAW 23-24 (1994).

[26] JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF ECONOMIC RELATIONS 33 (1989) [hereinafter JACKSON, THE WORLD TRADING SYSTEM].

[27] *See* JOHN H. JACKSON, RESTRUCTURING THE GATT SYSTEM 1 (1990) [hereinafter JACKSON, RESTRUCTURING].

[28] HAVANA CHARTER FOR AN INTERNATIONAL TRADE ORGANIZATION, U.N. Doc. E/Conf. 2/78 91948), reprinted in U.N. Doc. ICITO/1/4 (1948). *See also* JACKSON, THE WORLD TRADING SYSTEM, *supra* note 26, at 33. The charter of the ITO "envisaged procedures extending from consultation and arbitration to recourse to the International Court of Justice for advisory opinions on legal questions arising within the scope of the activities of the Organization' (Article 96, paragraph 1)." OLIVER LONG, LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL TRADE SYSTEM 1 (1985).

[29] Though a charter establishing the ITO was completed pursuant to the United Nations Conference on Trade and Employment held in Havana, Cuba from November 21, 1947, to March 24, 1948, the charter did not attain necessary recognition. LONG, *supra* note 28, at 1. Waning support in the U.S. Congress resulted in the Charter never coming to the floor of Congress. Eleanor M. Fox, *Competition Law and the Agenda for the WTO: Forging the Links of Competition and Trade*, 4 PAC. RIM L. & POL'Y J. 1, 3 (1995). While technically the ITO could have been put in place without the United States, no nation desired to enter an ITO which did not include the post-World War II's strongest economic power. JACKSON, THE WORLD TRADING SYSTEM, *supra* note 26, at 34.

procedures emphasized diplomacy, flexibility, and an equitable approach to dispute resolution.[31] As many nations preferred this political approach to resolving disputes, few modifications were made to enhance the rule of law in the process.[32] It was not until the Uruguay Round of negotiations, launched in 1986 in Punta del Este, Uruguay, that steps were made towards a more rule-oriented system of dispute resolution.[33]

B. *The Shift from Diplomatic to Legalistic*

In developing a mechanism for international dispute settlement, the issue of debate has been whether the mechanism should be diplomatic [34] or legalistic in its approach.[35] Since the GATT's application in 1948 until the establishment of the WTO, the diplomatic view has controlled.[36] The dispute resolution process has primarily aimed to avoid conflict and reach mutually satisfactory conclusions. [37]

This diplomatic approach is visible in the dispute resolution provisions of articles XXII[38] and XXIII of the GATT.[39] "Article XXII

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[30] Judith H. Bello & Alan F. Holmer, *Dispute Resolution in the New World Trade Organization: Concerns and Net Benefits*, 28 INT'L LAW. 1095, 1096 (1995) (U.S. Trade Law and Policy Series No. 24, 1995). The GATT had been put into force prior to the United States Congress' consideration of the ITO thanks to the adoption of the Protocol of Provisional Application. JACKSON, THE WORLD TRADING SYSTEM, *supra* note 26, at 35 (citing 55 U.N.T.S. 308 (1947)). Pursuant to the Protocol, U.S. negotiators had until mid-1948 to accept an agreement without further submission to Congress. Thus, there was strong motivation to bring the GATT, the writing of which was completed in October 1947, into force before a charter establishing ITO could be completed. *Id.* at 34-35.

[31] Young, *supra* note 11, at 389-91. There are 19 clauses in GATT 1947 which deal with the resolution of disputes. *See* JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 164 (1969) [hereinafter JACKSON, WORLD TRADE AND THE LAW OF GATT].

[32] *See* Bello & Holmer, *supra* note 30, at 1098.

[33] To begin the development of a more legalistic dispute resolution process, the Contracting Parties adopted the "Improvements of 1989." *See* Miquel Montañà i Mora, *A GATT with Teeth: Law Wins Over Politics in the Resolution of International Trade Disputes*, 31 COLUM. J. TRANSNAT'L L. 103, 136-41 (1993).

[34] Nations advocating for a diplomatic approach highlighted the ambiguity of GATT rules, the political sensitivity of trade disputes, and the complex tradeoffs of competing interests that go into the formulation of any trade rule. Young, *supra* note 11, at 390. *See also* Montañà i Mora, *supra* note 33, at 128-36.

[35] Advocates for the legalistic approach "argue that the necessity for certainty and predictability in the management of international business transactions calls for a more rule-oriented system." Montañà i Mora, *supra* note 33, at 129.

[36] *See, e.g.*, Silverman, *supra* note 11, at 255, 259-63. The diplomatic model is also known as the pragmatic model. *Id.* at 256-57.

[37] The GATT 1947 produced a dispute resolution process primarily "aimed at lowering tensions, defusing conflicts and promoting compromise." Andreas F. Lowenfeld, *Remedies Along with Rights: Institutional Reform in the New GATT*, 88 AM. J. INT'L L. 477, 479 (1994).

[38] GATT 1947 art. XXII.

contains a very broad two-tier consultation clause providing for bilateral consultations in the first instance and multilateral consultations if the former fails."[40] Article XXIII provides the unhappy complainant with the right to take the matter to the contracting parties who could be required to promptly investigate and make appropriate recommendations or give a ruling.[41] Under serious circumstances, this ruling might "include the suspension of concessions or other GATT obligations by the aggrieved party against the offending party."[42]

While this process appears sensible, and for a time seemed effective, significant procedural deficiencies materialized.[43] The composition of adjudicative panels became a point of disagreement.[44] Parties found ways to delay decisions;[45] even if decisions were made, it became difficult to secure adoption of the panel reports.[46] In fact, panel reports frequently remained unadopted for years because one or more nations disagreed with the panel's rulings or recommendations.[47] Where reports were adopted, nations felt no obligation to comply with the decisions.[48]

In the 1980s, frustrated with the GATT dispute resolution system, a growing trade deficit, and closed foreign markets, the United States turned to unilateral action through the use of section 301 of the Trade Act of 1974.[49] Section 301 ultimately, after a number of steps are taken,[50] gives the President authority to retaliate against foreign protectionist practices by various unilateral measures, including trade sanctions.[51] While the section 301 process provides for filing GATT complaints, there is no requirement

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[39] *Id.* art. XXIII. These GATT dispute resolution provision "fell pretty much on the non-legalistic side of the line." Young, *supra* note 11, at 391.

[40] Montañà i Mora, *supra* note 33, at 117.

[41] Young, *supra* note 11, at 392.

[42] *Id.*

[43] *See* Silverman, *supra* note 11, at 258-59.

[44] *Id.* at 258.

[45] *Id.*

[46] Young, *supra* note 11, at 402.

[47] *Id.*

[48] Silverman, *supra* note 11, at 258.

[49] 88 Stat. 1978, 2041 (codified as amended at 19 U.S.C. § 2411(a) (1996)); *See* G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of The World Trade Organization*, 44 DUKE L.J. 829, 843-45 (1995).

[50] *See* 19 U.S.C. § 2411(a) (1996).

[51] The U.S. Trade Representative determines if a sanction is appropriate and what the sanction should be, but the President has the final say as to whether to impose the sanction. § 2411(a)(1).

that the U.S. wait for the GATT proceedings to be resolved before taking unilateral actions.[52]

To say the least, many U.S. trade partners were not pleased with the United State's unilateral actions.[53] A general desire developed to replace these unilateral threats with a stable dispute resolution system.[54] In addition, the major GATT players began to realize that a more legalistic system could be used to advance their own trade interests as well as curb the use of section 301.[55] Also, developing nations thought a stronger dispute settlement system would give them additional leverage in negotiating with wealthier states over protectionist laws that limit their ability to export to these states.[56]

As a result of this change in outlook, and with the support of the United States,[57] the groundwork was set for the then-underway Uruguay Round to create a rule-oriented dispute settlement procedure.[58] In the end, the desire for a system which would be more transparent, consistent, and predictable[59] led to the metamorphosis of the GATT into the World Trade Organization.[60]

III. THE WORLD TRADE ORGANIZATION

A. *Organizational Structure and Purposes*

The 1994 Marrakesh Agreement ("the WTO Agreement" or "the Agreement"), [61] culminating the Uruguay Round,[62] established the World

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[52] Shell, *supra* note 49, at 844. For a brief, but comprehensive, discussion of section 301, refer to Silverman, *supra* note 11, at 240-52.

[53] Shell, *supra* note 49, at 845 (citing Wolfgang W. Leirer, *Retaliatory Action in United States and European Union Trade Law: A Comparison of Section 301 of the Trade Act of 1974 and Council Regulation 2641/84*, 20 N.C. J. INT'L & COM. REG. 41, 44-45 (1994)).

[54] *Id. See also* Bello & Holmer, *supra* note 30, at 1101-02.

[55] Shell, *supra* note 49 at 847.

[56] David M. Trubek, *Protectionism and Development: Time for a New Dialogue?*, 25 N.Y. U. J. INT'L L & POL. 345, 364-65 (1993).

[57] The United States has historically favored a more legalistic approach. *See* Montañà i Mora, *supra* note 33, at 129-31; Philip A. Akakwam, *The Standard of Review in the 1994 Antidumping Code: Circumscribing the Role of GATT Panels in Reviewing National Antidumping Determinations*, 5 MINN. J. GLOBAL TRADE 277, 285 (1996).

[58] Shell, *supra* note 49, at 846-48.

[59] Akakwam, *supra* note 57, at 285.

[60] QURESHI, *supra* note 23, at 3.

[61] WTO Agreement. The WTO Agreement was signed in Marrakesh (also spelled as Marrakech) Morocco on April 15, 1994. *See* Philip Raworth, *Introduction, in* THE LAW OF THE WTO 1995, at 15 (1995) (Practioner's Deskbook Series).

Trade Organization to ensure the reduction of tariffs and other barriers to trade, and to eliminate the discriminatory treatment in international relations.[63] Unlike the GATT 1947, the WTO is not a treaty signed by Contracting parties, but rather an organization[64] with the 130 signatory nations[65] defined as Members.[66]

Pursuant to attaining its goals of reducing barriers to trade and discriminatory treatment, the WTO functions in four ways. First, it provides a substantive code of conduct.[67] This code of conduct incorporates the GATT 1947—the WTO refers to the articles of the GATT 1947 as articles of the GATT 1994—and the additional agreements of the Uruguay Round of negotiations.[68]

Second, it provides the institutional framework for the administration of the various agreements.[69] This framework is structured with the highest organ as the "Ministerial Conference." This body, which is to meet at least once every two years,[70] is made up of representatives of all the Members,[71] generally Ministers of Trade,[72] and has supreme authority over all matters.[73] Below the Ministerial Conference is the General Council.[74] This body is also made up of representatives of all Members,[75] generally trade delegates based in Geneva, Switzerland, at the WTO headquarters.[76] The General

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[62] *See* Tracy M. Abels, Comment, *The World Trade Organization's First Test: The United States-Japan Auto Dispute*, 44 UCLA L. REV. 467, 468 (1996).

[63] WTO Agreement preamble.

[64] *See id.* art. I.

[65] *WTO Membership* (visited Apr. 16, 1997) <http://www.wto.org/wto/memtab2_wpf.html>. An additional twenty-nine nations have requested to join the WTO including the Russian Federation, the People's Republic of China, Cambodia, Tonga, and Vietnam. *Id.*

[66] *Compare* GATT 1947 *with* WTO Agreement.

[67] QURESHI, *supra* note 23, at 5.

[68] WTO Agreement arts. II:2-3. The WTO Agreement has four Annexes, as referred to in arts. II:2-3. Annex 1A contains the multilateral agreements on trade in goods, which includes the so-called GATT 1994. General Agreement on Tariffs and Trade, April 15, 1994, Marrakesh Agreement Establishing the WTO, Annex 1A, 33 I.L.M. 1154 (1994) [hereinafter GATT 1994]. It is important to note that GATT 1994 has five components, one of which is the original text of GATT 1947. *See* Raworth, *supra* note 61, at 15-17. Annexes 1B, 1C, 2 and 3 are the other multilateral agreements. Annex 4 includes the Plurilateral Agreements. *See id.*

[69] WTO Agreement art. II:1.

[70] *Id.* art. IV:1.

[71] "[I]n the WTO, unlike the IMF or the World Bank, there is no weighted voting." QURESHI, *supra* note 23, at 6. *See* WTO Agreement art. IX:1.

[72] QURESHI, *supra* note 23, at 6.

[73] WTO Agreement art. IV:1.

[74] *Id.* art. IV:2.

[75] *Id.*

[76] QURESHI, *supra* note 23, at 6.

Council meets between the meetings of the Ministerial Conference, has all the powers of the Ministerial Conference while it is not in session, and essentially acts as the engine of the WTO.[77] Other councils with specific spheres of responsibility, Committees on different issues,[78] and a Secretariat headed by a Director General, also make up the structure of the WTO.[79]

Third, the WTO functions as a medium for the conduct of international trade relations among member states.[80] Fourth, and of particular interest in this paper, the WTO ensures implementation of these agreements by providing a forum for dispute settlement of international trade matters.[81] In essence, this fourth function creates with the WTO what the Havana Charter had attempted to create with the ITO: an institution to adjudicate international trade disputes.

B. *The Dispute Settlement Understanding*

1. *Overview of the DSU*

The newly-created dispute settlement procedure, titled Understanding on Rules and Procedures Governing the Settlement of Disputes ("Dispute Settlement Understanding" or "DSU"),[82] marks a profound change from the GATT 1947 procedures.[83] In a shift from the diplomatic approach of the GATT, the WTO realizes the international trend toward legal dispute settlement.[84] Instead of pursuing goals of compromise and negotiated settlement, the DSU strives to provide security and predictability to the multilateral trading system.[85]

In contrast to previous GATT procedures, the Dispute Settlement Understanding provides a single dispute resolution mechanism for most

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77 WTO Agreement art. IV:2; *See also* QURESHI, *supra* note 23, at 6.

78 WTO Agreement arts. IV:5-7.

79 *Id.* art. VI.

80 *Id.* art. III:2.

81 *Id.* art. III:3.

82 Understanding on Rules and Procedures Governing the Settlement of Disputes, Dec. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 33 I.L.M. 112 (1994) [hereinafter DSU].

83 Curtis Reitz, *Enforcement of the General Agreement on Tariffs and Trade*, 17 U. PA. J. INT'L ECON. L. 555, 580 (1996).

84 *See, e.g.*, Young, *supra* note 11, at 399, 405-06.

85 *See* DSU para. 3.2.

trade disputes[86] between nations.[87] This mechanism is administered by the Ministerial Conference, or if it is not in session then the General Council, acting as the Dispute Settlement Body ("DSB").[88] Thus, the composition of this body mirrors the WTO Membership.[89]

Pursuant to the DSU, conflicts may be resolved through "consultation procedures, good offices, conciliation and mediation, arbitration, adjudication by a panel, and an appeal structure."[90] The use of these techniques emphasizes a balance between ensuring consensual resolution between members and the prominence of the rule of law.[91]

For this comment, the panel and appellate procedures are of most interest because these adjudicative procedures[92] particularly distinguish WTO dispute resolution from that of the GATT 1947.[93] To initiate these procedures, a complaining party must first comply with the strict consultation requirements of the DSU.[94] If consultations fail, the allegedly aggrieved party may request that the DSB establish a panel to adjudicate the matter.[95]

2. *Panel Review*

Once an appropriate request for a panel has been made, the establishment of a three person[96] panel is essentially certain[97] and

[86] *Compare* JACKSON, WORLD TRADE AND THE LAW OF GATT, *supra* note 31, at 164-66 (discussing the nineteen different dispute resolution mechanisms) *with* DSU para. 1.1. Though not pertinent to this comment, the mechanism of the DSU is not all encompassing. *See* QURESHI, *supra* note 23, at 98. Special dispute settlement provisions contained in specific GATT agreements still must be followed. *See id.*

[87] Private parties cannot bring complaints to the WTO, but must request their respective governments to instigate complaints. QURESHI, *supra* note 23, at 98-99.

[88] WTO Agreement art. IV:3; DSU para. 2.1.

[89] Reitz, *supra* note 83, at 584-85.

[90] QURESHI, *supra* note 23, at 100; *see* DSU.

[91] QURESHI, *supra* note 23, at 100.

[92] The dispute settlement procedure is now divided into extrajudicial and judicial, or adjudicatory, stages. *See* Claudio Cocuzza & Andrea Forabosco, *Are States Relinquishing Their Sovereign Rights? The GATT Dispute Settlement Process in a Globalized Economy*, 4 TUL. J. INT'L & COMP. L. 161, 172-86 (1996). Consultations, good offices, and mediations encompass the extrajudicial. Panel and appeal processes characterize the judicial. *See id.*

[93] *See* Young *supra* note 11, at 405-06.

[94] DSU paras. 4.1-4.11.

[95] *Id.* paras. 6.1-6.2.

[96] *Id.* para. 8.5. The Secretariat proposes nominations for the panel. "[P]arties to the dispute shall not oppose nominations except for compelling reasons." *Id.* para. 8.6.

[97] *See id.* para. 6.1. In theory the DSB can decline a country's request for a panel if all DSB members agree by consensus not to establish a panel. As the requesting party is unlikely to join such a consensus, the DSB essentially must always establish a panel. Young, *supra* note 11, at 402.

automatic.[98] Panelists are to serve as individuals and not as representatives of their nations.[99] They are to be governmental or non-governmental individuals who have served in a representative capacity in the WTO system or its Secretariat, have taught or published on international trade law, or have served as a senior trade policy official of a Member.[100]

Panels are to meet in closed session, to keep confidential all materials received and meetings held,[101] to provide an interim report to the parties for consideration,[102] and to provide a final report generally within six months of the panel's establishment.[103] Once a final report is issued by a panel, it is adopted by the DSB unless either there is a negative consensus—it is decided by a consensus of the DSB not to adopt the report—or one of the parties formally notifies the DSB of an intention to appeal.[104] The right of appeal from a panel report exists only on a point of law covered in the panel report and on legal interpretation developed by the panel.[105] All appeals are made to the Appellate Body.[106]

3. *Appellate Review*

The Appellate Body is made up of a standing group of seven individuals who are "of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally."[107] They are appointed by the DSB for four year terms and may be reinstated once.[108]

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[98] *See* Young, *supra* note 11, at 402. The DSU requires: that a list of possible panel members be kept on file, that a panel be formed within a short number of days, and that the terms of reference be determined within twenty days. *See* DSU paras. 8.1-8.11.

[99] DSU para. 8.9. Citizens of Member nations whose governments are in dispute are not to serve on a panel concerned with that dispute unless the parties agree. *Id.* para. 8.3.

[100] *Id.* para. 8.1.

[101] *Id.* paras. 14.1-14.3; *see also id.* app. 3, cl. 2.

[102] *Id.* paras. 15.1-15.3.

[103] *Id.* para. 12.8.

[104] *Id.* para. 16.4.

[105] *Id.* para. 17.6.

[106] *Id.* para. 17.1.

[107] *Id.* para. 17.3. The individuals should not be affiliated with any government. As a group they should reflect the membership of the WTO. *Id.* The present Appellate Body Members are: James Bacchus, former U.S. Congressman and former Special Assistant to the United States Trade Representative; Christopher Beeby, trade diplomat and former Ambassador from New Zealand; Laus-Dieter Ehlermann, German trade lawyer and professor of international economic law; Florentino Feliciano, Filipino Supreme Court Justice and former trade lawyer; Mitsuo Matsushita, Japanese professor of international economic law with ties to the Japanese Ministry of Finance and Ministry of International Trade and Industry; Julio Lacarte Muro, Uruguayan trade diplomat and participant in all eight GATT

Cases appealed to the Appellate Body are heard by three members of the Body.[109] Those individuals may uphold, modify, or reverse the legal findings and conclusions of law made by a panel.[110] As with the panels, proceedings are confidential and opinions must be given anonymously.[111] Proceedings should generally take no longer than 60 days.[112] In accord with panel report adoption, an Appellate Body report shall be adopted unless there is a "negative consensus."[113]

4. Use of the DSU

At the time of this writing, four cases have been completed under the Dispute Settlement Understanding, and sixteen have been settled or have become inactive.[114] The four completed cases, *United States—Standards for Reformulated and Conventional Gasoline,*[115] *Japan—Taxes on Alcoholic Beverages,*[116] *United States—Restrictions on Imports of Cotton and Man-made Fibre Underwear,*[117] and *Brazil—Measures Affecting Desiccated Coconut,*[118] were decided by the Appellate Body and adopted by the DSB.[119] Since the adoption of the decisions, the nations involved have complied with, or agreed to comply with, the decisions.[120]

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negotiation rounds; and Said el-Naggar, Egyptian professor of economics. *See* Daily Report for Executives, *Biographical Notes on Members of the World Trade Organization Appeals Body Released Nov. 29 in Geneva by the WTO,* Nov. 30, 1995 (BNA) No. 230, at M-1 (1995).

[108] *Id.* para. 17.2.

[109] *Id.* para. 17.1. The three members are to be selected on the basis of rotation, "taking into account the principles of random selection, unpredictability and opportunity for all Members to serve regardless of their national origin." Working Procedures for Appellate Review, Feb. 15, 1996, rule 6(2), 35 I.L.M. 495, 505 (1996).

[110] DSU para. 17.13.

[111] *Id.* paras. 17.10-17.11. Dissenting opinions are not specifically forbidden, but their expression would likely run afoul of the requirement of anonymity. *See* Reitz, *supra* note 83, at 584 n.137.

[112] DSU para. 17.5. At most the proceeding may take 90 days. *Id.*

[113] *See id.*, paras. 16.4, 17.14.

[114] *See Overview of Disputes, supra* note 8.

[115] U.S. Gasoline Appellate *supra* note 8.

[116] Japan Tax Appellate, *supra* note 2.

[117] U.S. Cotton Underwear, *supra* note 8.

[118] Brazil Coconut, *supra* note 8.

[119] *See Overview of Disputes, supra* note 8.

[120] *See U.S. to Comply with WTO Ruling on Gasoline Imports,* WALL ST. J., June 20, 1996, at A20; *Japan to Comply, supra* note 7. *See generally U.S. Disappointed About WTO Ruling on Cost Rica Underwear,* Dow Jones Int'l News Service, Feb. 10, 1997, *available in* WESTLAW, USNEWS database. *See* Cecilia E. Yap, *Gov't Urged to Pursue Coco Case in Brazil,* BUSINESSWORLD (MANILA), Apr. 3, 1997, *available in* 1997 WL 10161604.

There are also thirteen active cases under Panel review, and seventy-four cases presently in consultation pursuant to paragraph 4 of the DSU.[121]

IV. EXPECTATIONS OF THE APPELLATE BODY

A. *The Present Expectation*

The WTO's dispute settlement procedure has been expected to function much as a traditional judicial system, with the Appellate Body having the final say as to issues of law.[122] This is a sensible understanding in light of paragraph 17.6 of the DSU which states, "an appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel."[123] The Appellate Body is to hear issues of law and legal interpretation; with no higher judicial body, logically, this body should have the final say.

Not surprisingly, the Appellate Body itself has accepted this understanding of its position as interpreter of law.[124] This is particularly apparent in the *Japan Tax*[125] decision where the Appellate Body interpreted vague terminology in Article III of the GATT 1994,[126] and also dealt with an issue of determining facts.[127]

B. *The Issue of Article IX:2*

1. *An Alternative Perspective on the Appellate Body*

Yet despite the expectations, the logic, and the reality of Appellate Body actions, it is not entirely clear that this understanding is defensible in light of other WTO Agreement provisions. While paragraph 17.6 of the

[121] *See Overview of Disputes*, *supra* note 8.

[122] "The initial appointees to the WTO Appellate Body have an especially heavy responsibility to give that important body and its decisions stature and credibility; their judgments will become the paramount precedents of the new system." Reitz, *supra* note 83, at 584; *see also* Shell, *supra* note 49, at 897.

[123] DSU art. 17.6.

[124] "[T]he DSU directs the Appellate Body to clarify the provisions of GATT 1994 and the other 'covered agreements' of the *WTO Agreement* . . . ." Japan Tax Appellate, *supra* note 2, §D. *See also* U.S. Gasoline Appellate, *supra* note 8, at 17.

[125] Japan Tax Appellate, *supra* note 2.

[126] *Id.* § H(1)(a).

[127] *Id.* § H(2)(a).

DSU seems to support the perspective taken by the Body,[128] Article IX:2 of the Agreement brings it into question.[129] Article IX:2 states, "[t]he Ministerial Conference [("MC")] and the General Council [("GC")] shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements . . . . The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members."[130] In accordance with this provision, paragraph 3.9 of the Dispute Settlement Understanding states, "[t]he provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement."[131]

Strictly construing these provisions keeps from the Dispute Settlement Body, and thus the panels and Appellate Body, the full interpretative function generally allowed to common law judicial bodies.[132] In other words, as discussed by Professor Asif H. Qureshi in his book, *The World Trade Organization: Implementing International Trade Norms*, these provisions de-couple the interpretative function from the judicial forum.[133]

This is not to say that these provisions entirely deny the DSB, and thus the Appellate Body, the right to interpret law. Rather, Professor Qureshi holds, perhaps in light of paragraph 17.6 of the DSU,[134] that these provisions only deny the DSB the final decision as to any question of interpretation.[135] Pursuant to Article IX:2, issues of interpretation should be resolved by the MC or GC.[136]

This division between the DSB and the GC may seem inconsequential considering that the GC acts as the DSB.[137] Yet the distinction to be made is not in who is making decisions, but how. Though the GC will act as the DSB, while wearing its "General Council" hat, decisions must be made by a three-fourths majority.[138] This is a tougher

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[128] *See* DSU para. 17.6. *See also id.* para. 3.2.
[129] *See* WTO Agreement art. IX:2. *See* also DSU para. 3.9.
[130] WTO Agreement art. IX:2.
[131] DSU para. 3.9.
[132] *See* MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW 2 (1988).
[133] QURESHI, *supra* note 23, at 99.
[134] DSU para. 17.6.
[135] *Id.*
[136] WTO Agreement art. IX:2.
[137] *Id.* art. IV:3.
[138] *Id.* art. IX:2.

standard than that of the DSB, which, as discussed, makes decisions to adopt a report by negative consensus.[139]

Considering this negative consensus rule,[140] six individuals—three individuals on the Panel and three on the Appellate Body[141]—make interpretation decisions which affect parties in a particular case. Furthermore, these interpretations, while not creating legal precedents,[142] do create legitimate expectations among WTO Members.[143] "[L]egal interpretations developed by GATT panels have been subsequently incorporated when considering reform of substantive norms . . . . [T]he decisions of the Appellate Body are likely to be highly considered in the future."[144]

This result is in direct conflict with Article IX:2's requirement that the MC or GC make final decisions as to interpretation.[145] De-coupling of the interpretative function would defeat this six-person interpretation in support of Article IX:2. Instead of the common law system, where courts interpret the law and then legislative bodies, frustrated with the court's interpretation, clarify the statutory code,[146] de-coupling the interpretative function would cut out the possibility of frustration. The judicial body would be restricted from making final interpretations; thus, those issues would go to the MC and the GC, more political and representative bodies.[147]

Despite this sensible understanding of Article IX:2, no cases have involved questions of interpretation going before the General Council or Ministerial Conference. In fact, as Professor Qureshi discusses, there are no

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139 DSU paras. 16.4, 17.14. The DSB shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision. *Id.* para. 2.4 n.1.

140 *Id.* paras. 16.4, 17.14.

141 *Id.* paras. 8.5, 17.1.

142 There is no principle of *stare decisis* in international law. *See* John H. Jackson, *Strengthening the International Legal Framework of the GATT-MTN System: Reform Proposals for the New GATT Round, in* 5 THE NEW GATT ROUND OF MULTILATERAL TRADE NEGOTIATIONS: LEGAL AND ECONOMIC PROBLEMS 3, 13 (Ernst-Ulrich Petersmann & Meinhard Hilf eds., 1988) [hereinafter Jackson, *Reform Proposals*].

143 *See* Japan Tax Appellate, *supra* note 2, § E.

144 Montañà i Mora, *supra* note 33, at 162-63.

145 WTO Agreement art. IX:2.

146 *See* HENRY R. GLICK, COURTS, POLITICS, AND JUSTICE 342 (2nd ed. 1988).

147 *See* QURESHI, *supra* note 23, at 99-100. *See also* WTO Agreement art. IV. Neither Professor Qureshi's book nor this comment argue that these interpretations should undermine the amendment provisions of Article X. Rather de-coupling should ensure decisions as to interpretation are made by the general membership. *See* QURESHI, *supra* note 23, at 8, 100.

provisions describing how this would be done, nor time limits mandating how long the General Council might take to make a decision.[148]

2. *The Appellate Body's Understanding of Article IX:2*

In the absence of a system of implementation, it is not surprising that the Appellate Body has interpreted Article IX:2 differently than Professor Qureshi.[149] In *Japan Tax*, along with interpreting Article III of the GATT 1994,[150] the Appellate Body discussed Article IX:2 of the Agreement and paragraph 3.9 of the DSU.[151]

The Body considered these provisions as pertaining to the status of adopted panel reports.[152] Disagreeing with the Panel decision to give the reports status as "subsequent practice,"[153] and thus significant precedential weight,[154] the Appellate Body held that the reports are binding only "with respect to resolving the particular dispute between the parties to that dispute."[155]

On its face, this analysis of Article IX:2 of the Agreement and paragraph 3.9 of the DSU seems to significantly restrict the panels and the Appellate Body from developing binding interpretations of the agreements through the power of precedent. Yet despite the Appellate Body's discouragement of reliance on previous decisions, the Body's report, at the same time, actually advocates for their importance.[156] As stated, "adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and therefore, should be taken into account where they are relevant to any dispute."[157] In addition, the Body cited to the practices of the International Court of Justice, stating that though decisions

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[148] QURESHI, *supra* note 23, at 99.

[149] Japan Tax Appellate, *supra* note 2, § E.

[150] *Id.* §§ F-H.

[151] *Id.* § E.

[152] *Id.* § E.

[153] *Id.* (citing Japan Tax Panel, *supra* note 2, para. 6.10).

[154] *See* Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(3)(b), 8 I.L.M. 679. [hereinafter Vienna Convention]. The Vienna Convention constitutes generally accepted rules of international agreement interpretation. *See id.*

[155] Japan Tax Appellate, *supra* note 2, § E. Though the Appellate Body discusses adopted panel reports, its conclusions can be extended to adopted appellate reports as the process of adoption of a panel report is the same as an appellate body report. *Compare* DSU paras. 16.1-16.4 *with* para. 17.14.

[156] Japan Tax Appellate, *supra* note 2, § E.

[157] *Id.*

of that court are only binding on the parties to the case, "this has not inhibited the development by that Court . . . of a body of case law in which considerable reliance on the value of previous decisions is discernible."[158]

The Body's advocacy for adopted reports ignores Article IX:2's full strength.[159] Article IX:2 mandates that the Ministerial Conference and the General Council shall have *exclusive* authority to adopt interpretations of the trade agreements.[160] There is no reason interpretations by any other entity should carry any significant weight. Allowing these decisions to create legitimate expectations for Members,[161] and gesturing that these decisions might develop into reliable case law,[162] is going further than a clear reading of the provisions would allow.[163]

In addition, the Body's holding that panel or Appellate Body interpretations "are not binding, except with respect to resolving the particular dispute between the parties,"[164] disregards Members' rights provided by paragraph 3.9. "The provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions . . . ."[165] There is no indication from the DSU that interpretations as to particular parties should be made differently than general interpretations. In fact, as paragraph 3.9 of the DSU falls under the general provisions of the DSU,[166] it is logical that its application is appropriate even in a case between two parties.[167]

V. INTERPRETATION OF THE WTO AGREEMENT

A. Guidelines for Interpretation: The Vienna Convention

In *Japan Tax*, the Appellate Body refers to paragraph 3.2 of the DSU[168] stating, "[it] directs the Appellate Body to clarify the provisions of GATT 1994 and the other 'covered agreements' of the WTO Agreement 'in

[158] *Id.* § E n.30.
[159] *See* WTO Agreement art. IX:2.
[160] *Id.* art. IX:2. *See also* DSU para. 3.9.
[161] Japan Tax Appellate, *supra* note 2, at 15.
[162] *Id.* § E, n.30.
[163] *See* WTO Agreement art. IX:2; DSU para. 3.9.
[164] Japan Tax Appellate, *supra* note 2, § E.
[165] DSU para. 3.9.
[166] *See* DSU para. 3.1-3.12.
[167] In fact the *Vienna Convention* stresses that terms of a treaty should be interpreted in their context. Here the context is all of Article 3. *See* Vienna Convention art. 31, para. 1.
[168] DSU para 3.2.

accordance with customary rules of interpretation of public international law.'"[169] In light of these customary rules of interpretation, the Body looks to Articles 31 and 32 of the Vienna Convention.[170] Article 31 of the Vienna Convention, entitled the "general rule of interpretation," has attained the status of a rule of customary or general international law. It provides the following maxims of interpretation:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning of the terms in light of their context and its object and purpose.
> 2. For purposes of interpretation, the context shall include the preamble and annexes of the agreement.
> 3. Together with the context, interpretation shall also take into account: a. any subsequent agreement between the parties regarding the interpretation of the treaty or application of its provisions; b. any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding interpretation; c. any relevant rules of international law applicable between the parties.
> 4. If it is established that the parties intended a special meaning for a term, that meaning shall be given.[171]

Article 32, entitled "supplementary means of interpretation" is considered by the Body as highly pertinent to the present appeal.[172] This Article provides that supplementary means of interpretation, such as the preparatory work of the treaty and circumstances of its conclusion, may be used to confirm the meaning of a provision resulting from the application of Article 31.[173] These means of interpretation may also be used, where in spite of Article 31, the meaning is ambiguous, obscure, or leads to an unreasonable or absurd result.[174]

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169 Japan Tax Appellate, *supra* note 2, § D (emphasis in original).
170 *Id.* § D. *See* Vienna Convention art. 31-32.
171 Vienna Convention art. 31.
172 Japan Tax Appellate, *supra* note 2, § D.
173 Vienna Convention art. 32.
174 *Id.*

B. *The Importance of Furthering Predictability and Clarity*

In light of the demands of the Vienna Convention to look to the context of a provision and the circumstances of a treaty's conclusion,[175] it is clear that adequate interpretations of the WTO Agreement must include creating more predictable rules. As discussed, the WTO originated in response to frustration with the inadequate, highly diplomatic dispute resolution system of the GATT 1947.[176] The Contracting parties had come to recognize, as stated by Professor John H. Jackson, that the ambiguity of many of the GATT 1947 rules had polluted the general rule system, and brought "GATT [1947] rules generally and its dispute settlement procedures in particular into disrepute."[177] Much of the world desired a more legal-oriented system which would be transparent, consistent, and predictable.[178]

This desire is stated in paragraph 3.2 of the DSU:

> The dispute settlement system of the WTO is a central element in providing *security* and *predictability* to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to *clarify* the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.[179]

In accordance with paragraph 3.2, legal scholars have considered clarity and the furtherance of predictability as necessary for the proper functioning of the WTO Agreement.[180] As one scholar stated, "the

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[175] *Id.* arts. 31-32.

[176] *See* Silverman, *supra* note 11, at 258-59. "Hitherto, adaptability not legal consistency, predictability, and certainty were the goals to be achieved." Weiss, *supra* note 1, at 83.

[177] Jackson, *Reform Proposals, supra* note 142, at 16. *See also* PIETER VERLOREN VAN THEMAAT, *Strengthening the International Legal Framework of the GATT MTN System: A Comment, in* 5 THE NEW GATT ROUND OF MULTILATERAL TRADE NEGOTIATIONS: LEGAL AND ECONOMIC PROBLEMS 25, 27 (Ernst-Ulrich Petersmann & Meinhard Hilf eds., 1988).

[178] Akakwam, *supra* note 57, at 285.

[179] DSU para. 3.2 (emphasis added).

[180] *See, e.g.*, Shell, *supra* note 49, at 897. This is in accordance with the view that the success of international law depends upon the predictability of that law. *See* Jonathan I. Charney, Book Note, 89 AM. J. INT'L L. 458, 459-60 (1995) (citing HANS KELSEN, GENERAL THEORY OF LAW AND THE STATE 120 (Anders Wedberg trans., 1945); KRYSTYNA MAREK, IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW 554 (1968)) (reviewing CHRISTOPHER R. ROSSI, EQUITY AND INTERNATIONAL LAW: A LEGAL REALIST APPROACH TO INTERNATIONAL DECISION MAKING (1993)). "Law is valuable only if it

Appellate Body should expound on the meaning of the agreements within its jurisdiction and create a corpus of decisions that will assure consistency in GATT law . . . ."[181]

Thus if interpretations of the Agreement provide these elements, the present system is not in need of change. The fact that the WTO Agreement may actually disallow the Appellate Body from making interpretations[182] could be ignored. The maxim "don't fix it if it isn't broken" would apply, and the Appellate Body's understanding of Article IX:2 would be appropriate.[183]

Yet *Japan Tax* evidences that the Appellate Body has inadequately performed the interpretative function. Instead of providing predictability and clarity, the Body has made broad and vague interpretations of the WTO Agreement.

VI. INADEQUATE INTERPRETATIONS: *Japan—Tax on Alcoholic Beverages*

A. Overview of the Case

The *Japan—Taxes on Alcoholic Beverages* case[184] involves a dispute between Japan, on the one hand, and the European Community ("the Community"), Canada, and the United States, on the other.[185] The dispute came as a reaction to the Japanese Liquor Tax Law ("Liquor Tax Law"),[186] which taxes liquors intended for consumption in Japan based on the beverages categorization within one of ten categories and additional sub-categories.[187] In the summer of 1995, the Community, Canada, and the United States began consultations with Japan.[188] These parties alleged that the Liquor Tax Law's differentiation between shōchū—a native spirit

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guides the behavior of its subjects in the real world—a task that is particularly delicate in public international law. If the law is so flexible that any result is possible, it fails to fulfill that essential function." *Id.*

[181] Reitz, *supra* note 83, at 584.

[182] *See* WTO Agreement art. IX:2.

[183] Japan Tax Appellate, *supra* note 2, §E.

[184] Japan Tax Appellate, *supra* note 2; Japan Tax Panel, *supra* note 2.

[185] Japan Tax Panel, *supra* note 2, paras. 1.1-1.11.

[186] Shuzeiho, (Liquor Tax Law), Law No. 6 of 1953 as amended.

[187] Japan Tax Panel, *supra* note 2, paras. 2.1-2.4. The categories and sub-categories are: sake, sake compound, shōchū (group A, group B), mirin, beer, wine (wine, sweet wine), whisky/brandy, spirits, liqueurs, miscellaneous (various sub-categories). *Id.* para. 2.2.

[188] Japan Tax Panel, *supra* note 2, paras. 1.1-1.4. Consultations were brought pursuant to paragraph 4 of the DSU. DSU paras. 4.1-4.11.

distilled from potatoes, buckwheat or other grains—[189] and vodka, rum, gin, other "white spirits," whiskey/brandy, other "brown spirits," and liqueurs is inconsistent with Japan's obligations under the Internal Taxation and Regulation provisions, Article III of the GATT 1994.[190]

The relevant parts of the Article read as follows:

> Article III
>
> 1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation or use of products. . . should not be applied to imported or domestic products so as to afford protection to domestic production.[191]
>
> 2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to *like domestic products*. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.[192]

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[189] Jon Choy, *Tokyo to Appeal WTO Decision on Liquor Taxes*, JAPAN ECON. INST. REP., Aug. 23, 1996, *available in* 1996 WL 8316098. *See also* 7 KODANSHA ENCYCLOPEDIA OF JAPAN 1 (1983).

[190] GATT 1994. In 1986, the European Communities brought a similar complaint against Japan. *See GATT Dispute Settlement Panel Report: Japan—Custom Duties, Taxes and Labeling Practices on Imported Wines & Alcoholic Beverages*, Nov. 10, 1987, GATT B.I.S.D. (34th Supp.) at 83 (1987) [hereinafter Japan Tax 1987]. In that complaint, a GATT Panel Report found that some aspects of Japan's Liquor Tax law were inconsistent with Article III of GATT 1947. *Id.*, at 112-27, paras. 5.1-5.17. The Recommendations were adopted by the GATT Council, and Japan made some changes to the law in 1989. *See* Japan Tax Panel, *supra* note 2, para. 2.8. Despite the changes, the Community began consultations in 1995 with the belief that the recommendations of the Panel Report had not been fully implemented. *See id*, para. 4.5.

Article III of GATT 1947 has been incorporated into GATT 1994. *See* Raworth, *supra* note 61, at 16 for a discussion of the components of GATT 1994. Thus, Article III at issue in the *Japan Tax* case being discussed in this paper is the same as that dealt with in the 1987 Panel Report. *Id.*

[191] GATT 1994 art. III:1.

[192] *Id.* art. III:2 (emphasis added).

Ad Article III

Paragraph 2

> A tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a *directly competitive or substitutable product* which was not similarly taxed.[193]

Essentially, the Parties claimed that as shōchū and the other alcoholic beverages are "like products"[194] and/or "directly competitive and substitutable,"[195] they must be taxed similarly in accordance with the GATT 1994.[196]

Under the Liquor Tax Law, shōchū was taxed at a lower tax rate than the other spirits.[197] In fact, the tax rate on one-percent alcohol content per liter of whisky was found to be about six times higher than on shōchū.[198] European Union figures show that foreign spirits hold only eight percent of the Japanese market, compared with an average share of between 30 and 50 percent in most other industrialized countries.[199] The parties believed that this lack of Japanese market penetration was a direct result of the Liquor Tax Law.[200]

As consultations between the four parties led to no mutually acceptable resolution, [201]in late September of 1995, the DSB established a

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[193] *Id.* ad art. III:2 (emphasis added).

[194] *Id.* art. III:2, first sentence.

[195] *Id.* art. III:2, second sentence, *amended by* ad art. III:2.

[196] *See* Japan Tax Panel, *supra* note 2, para. 3.1-3.4.

[197] *Id.* para. 3.1.

[198] *Japan/Local Liquor Demand—2: Partners Seek Faster Action,* DOW JONES INT'L NEWS SERV., Dec. 16, 1996, *available in* Westlaw, ALLNEWSPLUS database. According to the Japan Economic Institute of America, under the Liquor Tax Law, taxes on shōchū are 6.8 to 10.4 times higher than those of vodka, whisky, and other liquors. Choy, *supra* note 189.

[199] *E.U./Japan's Liquor Tax—2: Foreign Liquor 8% of Japan Mkt.*, DOW JONES ASIAN EQ. REP., Oct. 3, 1996, available in Westlaw, ALLNEWSPLUS database. According to EU figures, imports comprise 80% of the market in Belgium, 73% in Australia, 35% percent in the United States, and 25% in Great Britain. Choy, *supra* note 189.

[200] *See, e.g.*, Choy, *supra* note 189.

[201] *See* Japan Tax Panel, *supra* note 2, para. 1.4.

panel to hear the dispute.[202] The Panel issued a final report on July 11, 1996.[203]

The Panel concluded that:

> (i) Shōchū and vodka are like products and Japan, by taxing the latter in excess of the former, is in violation of its obligation under Article III:2, first sentence of the . . . [GATT 1994].[204]
>
> (ii) Shōchū, whisky, brandy, rum, gin, genever, and liqueurs are "directly competitive or substitutable products" and Japan, by not taxing them similarly is in violation of its obligation under Article III:2, second sentence of the . . . [GATT 1994].[205]

Based on its findings, the Panel recommended that the DSB request that Japan bring the Liquor Tax Law into conformity with its obligations under the GATT 1994.[206]

On August 8, 1996, Japan notified the DSB of its decision to appeal certain issues of law and legal interpretations developed by the Panel.[207] On August 23, 1996, the United States filed an appellant's submission.[208] All of the parties filed Appellees' submissions soon after.[209] An oral hearing was held on September 9, 1996.[210] The Appellate Body made its decision September 25, 1996.[211]

The Body found that the Panel had made errors in two areas.[212] First it had wrongly determined the status of previous panel reports.[213] Second, it improperly applied the Internal Taxation and Regulation provisions, Article

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202 *See id.* paras. 1.5-1.7.
203 *See* Japan Tax Appellate, *supra* note 2, §A.
204 Japan Tax Panel, *supra* note 2, para. 7.1(i).
205 Japan Tax Panel, *supra* note 2, para. 7.1(ii).
206 Japan Tax Panel, *supra* note 2, para. 7.2.
207 Japan Tax Appellate, *supra* note 2, §A.
208 *Id.* The United States appealed as to particular interpretations of law made by the Panel. *Id.*
209 *Id.*
210 *Id.*
211 *Id.* §I.
212 *See generally id.* While the Appellate Report conclusion refers to four errors, *id.*, §I(a)-(d), they can be grouped into two categories: (1) errors relating to the status of adopted panel reports, and (2) errors relating to interpretation of Article III of GATT 1994. *Id.*
213 *See id.* §E.

III of the GATT 1994.[214] Yet despite the errors, the Appellate Body came to the same conclusion as the Panel:[215] shōchū and the other alcoholic beverages are "like products" or "directly competitive or substitutable";[216] Japan, by taxing these imported products in excess of shōchū, is in violation of its obligations under the Internal Taxation and Regulation provisions, Article III of the GATT 1994.[217] In accordance with the DSU, the Body recommended that the DSB request that Japan bring the Liquor Tax Law into conformance with its obligations under the GATT 1994.[218]

B. *Inadequate Interpretations of Law*

Despite the decision's acceptance by the DSB on October 4, 1996,[219] the Appellate Body does not sufficiently fulfill the duty of interpreting law. Though the rules of interpretation set out in the Vienna Convention,[220] the history of the WTO, and paragraph 3.2 of the DSU[221] make clear the importance of developing a predictable international trade law, this is not furthered by the Appellate Body's interpretations.

It is important to note that defining what is an interpretation of law is not self-evident nor clear from the Agreement.[222] As a result, some issues in the *Japan Tax* case, which might arguably be categorized as interpretation of law, are not dealt with in this paper. In hopes of taking a conservative position as to what is interpretation, this comment only considers those issues involving unclear terminology and undeveloped tests.

The *Japan Tax* case raises two main interpretative issues: (1) what are "like products," and (2) what are "directly competitive or substitutable products."[223] As to both these issues, there are no established definitions, nor have the parties to the Agreement intended special meanings for the terms.[224]

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[214] *See id.* §F.
[215] *Id.* §I.
[216] *Id.*
[217] *Id.*
[218] *Id.*
[219] *Overview of Disputes*, *supra* note 8.
[220] *See* Vienna Convention arts. 31-32.
[221] DSU para. 3.2.
[222] *See* QURESHI, *supra* note 23, at 99.
[223] *See generally* Japan Tax Appellate, *supra* note 2.
[224] Vienna Convention art. 31, para. 4.

1. Like Domestic Products

In interpreting what constitute "like domestic products," the Appellate Body held that the term should be interpreted narrowly.[225] The Body stated,

> [b]ecause the second sentence of Article III:2 provides for a separate and distinctive consideration of the protective aspect of a measure in examining its application to a broader category of products that are not 'like products'[226] . . . the first sentence of Article III:2[, where the term 'like domestic products' is used,] must be construed narrowly so as not to condemn measures that its strict terms are not meant to condemn.[227]

In determining how narrowly the phrase should be interpreted, the Body agreed with the inveterate practice[228] that it should be determined on a case-by-case basis.[229]

The Body stressed that this analysis is not to be arbitrary.[230] Rather, panels should make decisions using their best judgment considering such criteria as the product's end-uses in a given market, consumers' tastes and habits, and the product's properties, nature and quality.[231] While tariff bindings may be helpful in determining what are "like products,"[232] as some tariff bindings include a wide range of products,[233] the Body held this was

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[225] Japan Tax Appellate, *supra* note 2, §H(1)(a).

[226] The statement refers to the broader category of "directly competitive or substitutable products". *See* GATT 1994 art. III:2, second sentence, *amended by* ad. art. III:2.

[227] Japan Tax Appellate, *supra* note 2, §H(1)(a).

[228] Since the Report of the Working Party on *Border Tax Adjustments*, adopted in 1970, almost all adopted panel reports have followed a case by case approach. *Id.* (citing *e.g.* EEC—Measures on Animal Feed Proteins, Mar. 14, 1978, GATT B.I.S.D. (25th Supp.) at 49 (1978), Spain—Tariff Treatment of Unroasted Coffee, June, 11, 1981, GATT B.I.S.D. (28th Supp.) at 102 (1981), U.S. Gasoline Appellate.).

[229] Japan Tax Appellate, *supra* note 2, §H(1)(a).

[230] *Id.*

[231] *Id.* (quoting Border Tax Adjustments, Dec., 2, 1970, GATT B.I.S.D. (18th Supp.) at 97, para. 18 (1970)).

[232] *Id.*

[233] Many lesser developed nations, as well as other developing countries, have bindings in their schedules which include broad ranges of products. *Id.* It is true that numerous tariff bindings are in fact extremely precise with regard to product description and which, therefore, can provide significant guidance as to the identification of "like products." *Id.*

"not a reliable criterion for determining or confirming a product's likeness."[234]

In the end, despite some minor changes to the Panel's legal reasoning, the Body affirmed the Panel's decision that vodka is a "like product" with respect to shōchū.[235] The Panel had made this decision as vodka and shōchū share most physical characteristics,[236] they both have the same tariff applied to them in the Japanese tariff schedule, and Japan had provided no convincing evidence that they were not like.[237]

The Body's decision is not illogical or innately poor. The Body looked to the whole provision of Article III of the GATT 1994[238] to determine that "like domestic products" should be interpreted narrowly.[239] While previous practice does not carry any precedential value,[240] it is sensibly turned to as it "creates legitimate expectations."[241]

By providing a list of items to be considered,[242] the Appellate Body gestures in the direction of developing predictable and clear trade law. Yet the emphasis on case-by-case analysis leaves the term excessively vague. Providing predictability to WTO law could be better achieved with set guidelines or particular tariff bindings.[243] Though these actions could be highly controversial,[244] the Agreement does not provide that predictability should be hindered because a specific decision would bring controversy.[245]

2. *"Directly Competitive or Substitutable"*

As with its definition of "like domestic product," the Body decided that the category of "directly competitive or substitutable products" should

[234] *Id.*

[235] *Id.*

[236] The Panel agreed with a 1987 Panel Report which found that the products were "like" as they are both white/clean spirits, made of similar raw materials, and the end-uses are virtually identical. *See* Japan Tax Panel, *supra* note 2, para. 6.23.

[237] Japan Tax Panel, *supra* note 2, para. 6.23.

[238] *See* Vienna Convention art. 31, paras.1-2.

[239] Japan Tax Appellate, *supra* note 2, §H(1)(a).

[240] *Id.* §E.

[241] *Id.*

[242] Japan Tax Appellate, *supra* note 2, §H(1)(a).

[243] *But see id.*

[244] The Appellate Body seems overwhelmed with all the options of possible tariff bindings to apply and the fact that some do not relate to product similarity. *See id.*

[245] DSU para 3.2. "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system." *Id.*

also be determined on a case-by-case basis.[246] In making determinations, the Body recommended that such matters as physical characteristics, common end-uses, tariff classifications, and the "marketplace" all be considered.[247] Particular stress is given to considering the "marketplace" because "the GATT 1994 is a commercial agreement, and the WTO is concerned, after all, with markets."[248]

In order to determine the situation in the marketplace, the Appellate Body supported an examination of the elasticity of substitution in the market.[249] Yet, the Appellate Body also stressed that the elasticity is not meant to be the decisive criterion.[250] In fact, in response to an allegation by the United States that the Panel considered it as the decisive criterion,[251] the Appellate Body clarified that this is not what the Panel stated. "The Panel stated the following: '. . . the decisive criterion in order to determine whether two products are directly competitive or substitutable is whether they have common end-uses, *inter alia*, as shown by elasticity of substitution.'"[252] With this clarification of the Panel's statement, the Appellate Body upheld the Panel's reasoning,[253] and found that all the other products referred to by the complainants[254] were "directly competitive or substitutable." [255]

The case-by-case rule set out for determining when a product is "directly competitive or substitutable," while similar to the rule applied for determining "like products,"[256] is even more inappropriate here. For determining "like products," the Body's case-by-case rule achieves some predictability, as it stresses "narrowness"[257] and turns to the historical

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246 Japan Tax Appellate, *supra* note 2, §H(2)(a).
247 *Id.*
248 *Id.*
249 *Id.*
250 *Id.*
251 *Id.* §C(2)(e).
252 *Id.* §H(2)(a) (quoting Japan Tax Panel, *supra* note 2, para. 6.22).
253 *Id.*
254 For a list of the products at issue, *see id.* n.56.
255 Despite the fact that the Appellate Body had found that the Panel had failed to address the full range of alcoholic beverages included in the Panel's Terms of Reference, *id.*, the Body concluded all the products listed, except vodka which was determined a "like product," are "directly competitive or substitutable." *Id.* §I. This is an odd conclusion considering that the DSU states the Appellate Body is to determine questions of law. DSU para. 17.6. Here it seems the Appellate Body has decided an issue of fact and, furthermore, has done so with no reference to the facts. *See* Japan Tax Appellate, *supra* note 2, §I.
256 *See* Japan Tax Appellate, *supra* note 2, §H(1)(a).
257 *Id.*

development of what constitutes a "like product."[258] In contrast, a case-by-case rule applied to determine what products are "directly competitive or substitutable" leaves Member nations and Panels bewildered as to how broadly to apply the rule[259] and with no historical understanding of how to test the market at issue.

In fact, to make matters worse, while the Appellate Body stressed that "elasticity of substitution" should not be the decisive criterion in determining what is "directly competitive or substitutable,"[260] the Panel, despite a statement to the contrary,[261] did just that. The Panel made its decision based on four factors: (1) the finding of the 1987 Panel Report;[262] (2) a study submitted by the complainants done by ASI market research, an independent research institution ("the ASI study");[263] (3) a survey submitted by Japan;[264] and (4) evidence concerning the "1989 Japanese tax reform which showed that whisky and shōchū are essentially competing for the same market."[265] Three of these four factors, factors two through four, were explicitly held by the Panel to display significant elasticity of substitution![266]

In addition, even the one study not given credence by the Panel was a statistical analysis proving inelasticity of substitution.[267] This study done by Shakai-Chosa Kenkyujo (Institute for Social Study) of Japan[268] was based on household survey statistics from the past twenty years.[269] The study was

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[258] *See id.*

[259] The Body held that how much broader "directly competitive or substitutable" is from "like product" is a matter for the panel in each case depending on the facts of the case. *Id.* §H(2)(a). In *Japan Tax*, the present case, the Panel supported its conclusion that shōchū is "directly competitive or substitutable" with, among other studies, a survey showing that in the case of non-availability of shōchū, a mere 10 percent of consumers would switch to spirits or whisky. *See* Japan Tax Panel, *supra* note 2, paras. 6.31-6.32.

[260] Japan Tax Appellate, *supra* note 2, §H(2)(a).

[261] Japan Tax Panel, *supra* note 2, para. 6.22; *see also* Japan Tax Appellate, *supra* note 2, §H(2)(a).

[262] *See* Japan Tax Panel, *supra* note 2, at para. 6.32; *see also id.*, para. 6.29, Japan Tax 1987, *supra* note 190, para. 5.7.

[263] *See* Japan Tax Panel, *supra* note 2, at paras. 6.32; *see also id.* paras. 4.172-.174, 6.31.

[264] *See id.* para. 6.32; *see also id.* para. 6.31.

[265] *See id.* para. 6.32; *see also id.* paras. 4.82 - 4.93, 6.30.

[266] The ASI study, factor (2), "contained persuasive evidence that there is significant *elasticity of substitution* among the products in dispute." *Id.* para. 6.32 (emphasis added). "The survey submitted by Japan[, factor (3),] . . . shows *elasticity of substitution* among the products in dispute." *Id.* para. 6.32 (emphasis added). And finally, the fact that evidence shows that "foreign produced whisky and shōchū were competing for the same market [after the 1989 Japanese tax reform, factor (4),] is evidence that there was *elasticity of substitution* between them." *Id.* para. 6.30 (emphasis added).

[267] Japan Tax Panel, *supra* note 2, para. 6.31.

[268] *Id.* para. 4.85.

[269] *Id.*

allegedly done using the same statistical methods as the Bossard study, an analysis commissioned by the European Commission to determine competition between different categories of alcoholic drinks in the European markets.[270] Yet, the complaining parties discounted this study stating that the methodology used, unlike in the Bossard study, was flawed.[271] The Panel discredited the study because Japan did not rebut the criticism advanced against the studies.[272]

This dependence on studies of "elasticity of substitution," combined with the Appellate Body's statement that the Panel didn't so depend, creates confusion and not the predictability mandated by the DSU.[273]

Moreover, the Panel's extensive consideration of elasticity should have been taken as an omen by the Appellate Body. The Panel in *Japan Taxes* is not likely to be the last to use "elasticity of substitution" studies in application of Article III:2 sentence two.[274] In fact, because the Appellate Body discussed only one method for examining the market place, "elasticity of substitution,"[275] and because this method of examination is also used by national antitrust and trade law regimes to measure product competition,[276] it is likely such a method of examination will be prevalent.

Yet despite "elasticity of substitution's" future of use, no clear mandate as to how it should be determined is provided. The Appellate Body, by stating that the Panel did not exclusively depend on "elasticity of substitution," dodged a perfect opportunity to develop a methodology to deal with the issue. As a result, evidentiary-type questions are left open. For example:

> 1. Should studies, such as the ASI study, where data was taken from "contemporary reactions of a representative sample of shōchū drinkers to a series of thirty-six different combinations of price levels for shōchū and five brown spirits"[277] carry more

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270 *Id.*

271 *See id.* paras. 4.86-.89.

272 *Id.* para. 6.31.

273 DSU para. 3.2.

274 *See* GATT 1994 art. III:2 second sentence, *amended by* ad art. III:2.

275 Japan Tax Appellate, *supra* note 2, §H(2)(a).

276 *See* Japan Tax Panel, *supra* note 2, para. 6.31.

277 *Id.* para. 4.172. The brown spirits at issue were Scotch, Japanese whisky, cognac, Japanese brandy, and North American Whisky. *See id.* para. 4.172.

weight than historical studies such as that done by the Shakai-Chosa Kenkyujo (Institute for Social Study) of Japan?[278]
2. Or, are historical studies appropriate where, in contrast to the Japan study,[279] they consider a substantial amount of data[280] and use well-recognized techniques for correcting statistical problems?[281]
3. Where statistical analyses are performed, should Panels turn to outside experts to analyze the studies as provided for under paragraph 13 of the DSU?[282]

Though answers to these questions may be highly controversial, controversy should not trump the pursuit of predictability.

In sum, the Body's interpretation leaves Members with no clear test enabling them to determine if another party's allegations of discriminatory taxation are valid. In determining if products are "directly competitive or substitutable," each case will rest not on predictable guidelines, but rather the Panel's case-by-case determinations.

VII. FUTURE INADEQUATE INTERPRETATIONS: A CALL FOR CHANGE

A. *The Likelihood of Future Inadequate Interpretations*

The *Japan Tax* case represents the Appellate Body's first confrontation with interpretation issues.[283] Yet despite this, in light of the importance of predictability and clarity in developing a credible dispute

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[278] *Id.* para. 4.83.

[279] The European Union, the United States, and Canada all had qualms about Japan's study. The Panel held the study to be essentially meaningless because Japan "had not succeeded in rebutting the criticism advanced by the complainants . . ." *Id.* para. 6.31.

[280] *See, e.g., id.* para. 4.169.

[281] *See, e.g., id.* para. 4.86.

[282] DSU para. 13.2. This provision states, in pertinent part, "Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report ... form an expert review group."

[283] The other cases decided have not required extensive interpretation of unclear terminology or undeveloped tests. *See generally,* U.S. Gasoline Appellate, *supra* note 8 (finding that U.S. regulations to control air pollution could not distinguish between domestic and foreign petroleum producers); U.S. Cotton Underwear, *id.* (finding that backdating of a transitional safeguard measure is not permitted by the provisions of the Agreement); Brazil Coconut, *id.* (discussing the integration of the different parts of the agreement).

settlement procedure,[284] the Body's failure merits attention. Moreover, considering the likelihood of future poor interpretations, this failure calls for action.

The above discussion of "like domestic products" and "directly competitive or substitutable products," clarifies that providing predictability is a controversial task. Inevitably, wherever interpretation is necessary, controversial issues will be confronted, and with over 130 Members of the WTO, it isn't difficult to imagine that each Member will have a different idea of how a particular term should be defined.[285]

In addition to the magnitude of controversy involved in defining terms, the WTO's legal status threatens to hinder future predictability. While domestic courts in many democratic nations are upheld as institutions of public order and the ultimate arbiters of the legality of government actions, this is not true for international tribunals.[286] With international tribunals, cooperation and compliance is the choice of sovereign nations.[287] "If the local politics *du jour* or changing economics require or merit it, any WTO member may exercise its sovereignty and take action inconsistent with the WTO Agreement [or decisions by the DSB]."[288] While the DSU allows for retaliation by the injured nations, in the past this has not proved effective.[289] "Imposing trade sanctions generally is shooting yourself in the foot: in a global economy, both consumers and industries that use the sanctioned imports are adversely affected."[290]

One nation's non-compliance with a ruling may not bring ruin to the WTO. Of course, the effect will depend on the nation. The United States' frustration with the procedures under the GATT 1947 led to the heavy use

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[284] *See* Jackson, *Reform Proposals*, *supra* note 142, at 16; *see* text *supra* part V.B.

[285] The four parties to the Japan Tax case all had different interpretations of the first sentence of Article III which deals with the "like product" issue. *See* Japan Tax Panel, supra note 2, paras. 4.20-4.61.

[286] Akakwam, *supra* note 57, at 295.

[287] Judith Hippler Bello, *The WTO Dispute Settlement Understanding: Less is More*, 90 AM. J. INT'L L. 416, 417 (1996).

[288] *Id.*

[289] Bello & Holmer, *supra* note 30, at 1103. In 1952 in response to a complaint by the Netherlands, the GATT contracting parties authorized the Netherlands to retaliate against the United States for failure to bring dairy import practices into conformity with its GATT obligations. *Id.* (discussing United States Import Restrictions on Dairy Products, Oct. 13, 1953, GATT B.I.S.D. (2nd Supp.) at 28 (1954).). This appears to have been the first and only time retaliation was authorized. *Id.* at 1103. Although the Netherlands was authorized to impose a limit of 60,000 tons on imported wheat flour from the United States, it declined to exercise this authority because fears that such action would result in higher prices for bread. *Id.*

[290] *Id.*

of unilateral trade measures,[291] and eventually forced a dramatic change to the dispute settlement procedure.[292] While the present system is more in line with United States' expectations of dispute settlement,[293] the United States could still withdraw from the WTO,[294] revert to unilateral measures,[295] or decide to not participate in a panel proceeding.[296] These actions could seriously hinder the organization and world trade.[297]

The Appellate Body's determinations of the propriety of a nation's law already create controversy.[298] It is unlikely the Body will strive to also deal with the highly political issues involved in defining terms or developing methods of determining facts. Faced with interpreting vague terms in ways which might threaten the stability of the WTO, the Appellate Body is likely to strive to maintain the organization.[299]

This desire to maintain is visible in the *Wheat Flour* dispute brought by the United States against the European Community in 1981.[300] In this case heard under the GATT 1947 procedures, a Panel was developed to define "more than an equitable share."[301] "Faced with a politically charged dispute over an ambiguous text . . . , the panel rejected the complaint and ruled that the legal term at issue was too imprecise to be applied to world wheat trade."[302] Had the Panel decided against the Community, "a severe political crisis would have precipitated threatening the stability of

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291 *See* Shell, *supra* note 49 at 843-45.

292 *Id.* at 846-48.

293 Montañá i Mora, *supra* note 33, at 129-31.

294 By statute the United States could withdraw in the year 2000. *See* 19 U.S.C. § 3535 (1996).

295 *See* Acting U.S. Trade Representative Charlene Barshefsky, Address Before the Subcommittee on Trade of the Committee on Ways and Means of the U.S. House of Representatives (Sep. 11, 1996), <http://www.ustr.gov/testimony/barshevsky_5.html>.

296 In reaction to the European Union's complaint against the Helms-Burton Act, senior U.S. officials said the United States would not participate in a panel proceeding. *U.S. Says WTO Panel Not Competent to Judge Cuba Dispute, Hopes to Settle*, 14 INT'L TRADE REP. (BNA) No. 9, at 351 (Feb. 26, 1997).

297 "[I]t would be a 'tremendous wrench' if the United States were to pull out." *WTO Faces Major Challenges in New Year, GATT Expert Says*, JAPAN WKLY. MONITOR, Dec. 12, 1994, *available in* 1994 WL 2097922 (quoting Professor John Jackson).

298 *See* Alan Tonelson & Lori Wallach, *We Told You So; The WTO's First Trade Decision Vindicates the Warnings of Critics*, WASH. POST, May 5, 1996, *available in* 1996 WL 3077900; *Administration Bows to WTO Ruling / Critics Attack Plans to Change Rules on Imported Gasoline*, HOUS. CHRON., June 20, 1996, *available in* 1996 WL 5605294; Michiyo Nakamoto, *WTO's Liquor Tax Ruling Unsteadies Japan*, FIN. TIMES, Oct. 8, 1996, *available in* 1996 WL 10618083.

299 *See* Shell, supra note 49, at 869.

300 *See id.* at 869-72.

301 *Id.*; *see also* ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW 147-51 (discussing facts of *Wheat Flour*).

302 Shell, *supra* note 49, at 871.

GATT...."[303] Deciding for the Community would have considerably weakened the GATT.[304]

Though the Appellate Body's present understanding of its position may keep it from rejecting complaints,[305] as the *Japan Tax* case demonstrates, and the above discussion supports, avoidance of political controversy is likely. This avoidance will hinder the development of predictable WTO law and may, as occurred in the 1980s, result in disuse of the procedure. In light of this predicament, the Members of the WTO should reconsider Article IX:2 of the WTO Agreement.

B. *Implementing the Alternative*

The understanding of Article IX:2 as de-coupling interpretation from the Appellate Body[306] and leaving this for the Ministerial Conference or General Council gives full weight to the words of the Article. Furthermore, it will allow highly controversial issues to be heard by a political body[307] that truly represents every Member of the WTO.[308] In contrast to the present situation where six individuals make interpretations of the Agreement,[309] de-coupling would allow all 130 Members to be actively involved in the decision making process.[310]

Though not every Member would be content with every interpretation,[311] this body is likely to provide a more predictable and consistent body of law than the apprehensive Appellate Body. The clear importance of furthering predictable international trade law is likely to influence interpretations of the Members. In addition, the fear that WTO decisions will be of poor quality,[312] should result in a positive reception to

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303 *Id.*

304 *Id.* at 871-72 (citing I. Garcia Bercero, *Trade Laws, GATT and the Management of Trade Disputes Between the US and the EEC*, 5 Y.B. EUR. L. 149, 168-70 (1985)).

305 *See* Japan Tax Appellate, *supra* note 2, §D.

306 QURESHI, *supra* note 23, at 99.

307 "[T]he General Council and the ministerial Conference are formally political bodies." *Id.* at 99.

308 *See* WTO Agreement art. IV.

309 *See* DSU paras. 8.5, 17.1.

310 *See* WTO Agreement art. IX:2.

311 The decision to adopt an interpretation takes a three-fourths majority of the Members. *Id.* art. IX:2. Thus, potentially one-fourth of the Members will be unhappy with a decision.

312 U.S. President Clinton, appearing with [Senator] Dole at a White House news conference, said that the agreement worked out between the administration and Dole, [allowing monitoring of WTO dispute settlement decisions,] . . . means that the WTO will be 'accountable and fair and will meet our expectations.'" *GATT: Sen. Dole Pledges Support for GATT Bill After Winning Deal on WTO, Other Issues*, 11 INT'L TRADE REP. (BNA) No. 47, at1830 (Nov. 30, 1994).

the opportunity to develop interpretations of the WTO Agreement. The more clarity developed by these interpretations, the less freedom given to the Dispute Settlement Body.

Implementing this de-coupling brings new problems. First, there is the issue of "what constitutes an 'interpretative' decision."[313] No provisions distinguish interpretation from application of law. Second, though Article IX:2 provides that the Council overseeing the agreement in question recommend action by the Ministerial Conference and General Council,[314] it is not clear when such a recommendation should come. Third, there is a danger that interpretation could result in "creeping legislation that could undermine . . . the amendment provisions."[315] Finally, there is no clear procedure to transfer interpretative issues from the DSB to the Ministerial Conference or General Council.

Dealing with these problems will be a challenge; however, the benefits of more predictable international trade law outweigh the costs. Unpredictable rulings led to the demise of dispute resolution under the GATT 1947;[316] without more appropriate interpretations, this could occur again. Therefore, WTO Members should begin development of an "Interpretation of Agreements Procedure."

VIII. CONCLUSION

In conclusion, analysis of *Japan—Taxes on Alcoholic Beverages* displays significant inadequacies in the Appellate Body's interpretations of law. Despite the fact that history and the dispute settlement procedures of the WTO stress the importance of predictability in international trade law, this is not provided by the Appellate Body's interpretations. As this inadequacy is likely to continue, the Appellate Body should be restricted from making interpretations. Instead, in compliance with Article IX:2 of the WTO Agreement, interpretations should be made by the Ministerial Conference and the General Council. Though developing a procedure to transfer issues of interpretation from the DSB to these more political and representative entities will be difficult, the benefits of predictable international trade law outweigh the costs.

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[313] QURESHI, *supra* note 23, at 7.

[314] WTO Agreement art. IX:2.

[315] *Id.* at 8. The amendment provisions provide different voting requirements than Article IX:2. *Compare* WTO Agreement art. X, *with id.* art. IX:2.

[316] *See, e.g.*, Akakwam, *supra* note 57, at 285.