We Need a Global Food Safety Agency: Reflections on the Hidden Jurisprudence of the WTO

Francis Snyder*

ABSTRACT

Globalization has irrevocably altered the world of food safety. This article focuses on WTO cases about food safety regulation, which arise under WTO agreements other than or in addition to the SPS or the TBT Agreements and which are not directly concerned with relations between the WTO and international standardization bodies. It asks: What do these cases—which are not mainly about relations between WTO and international food standards—teach us about the role of the WTO in food safety regulation?

The WTO dispute settlement system deals with food safety more frequently than is sometimes thought. Virtually all such cases were settled, withdrawn or reached stalemate during consultation; in only a very few cases was a panel established. Complainants always won, and the winner was usually of equal or higher income category than the respondent, except when the case went to a panel.

These cases are the “hidden jurisprudence” of the WTO with regard to food safety. They are mostly resolved, or at least concluded, by bilateral

* C.V. Starr Professor of Law, EU Jean Monnet Professor of European Union Law ad personam and Co-Director, Center for Research on Transnational Law, Peking University School of Transnational Law (PKUSTL), Shenzhen Graduate School, China; Visiting Professor, London School of Economics. The research benefited from support by Peking University School of Transnational Law. I am grateful to Liu Shuang for research assistance and Kim Yi-Seul for helpful comments. I also wish to acknowledge the continuing stimulus of discussions in the PKUSTL Food Safety Law Research Project. Earlier versions of different parts of this paper were presented in the Jean Monnet Seminar Series, Faculty of Law and Institute for Advanced Legal Studies, University of Macau; the Visiting Speaker Seminar Series, University of Macau, sponsored by the European Union Academic Programme in Macau, the University of Macau and the Institute of European Studies of Macau (IEEM); the European Union Studies Association Asia Pacific Conference, University of Macau, sponsored by the European Union Lifelong Learning Programme and the Asia Pacific Association of European Studies; and the 2013 Law & Society Association Annual Meeting, Boston, Massachusetts, USA. An early draft of the first part of this article was published in Inge Govaere and Dominik Hanf (eds), Liber Amicorum for Rector Paul Demaret (Peter Lang Publishers, Brussels, 2013). I am grateful for permission to use this material here. All correspondence should be addressed to the author at fgsnyder@gmail.com.
negotiations, sometimes between very unequal parties, rather than by decisions taken by a third party on the basis of multilaterally agreed rules. They also represent the basic philosophy or orientation of the WTO regarding food safety. Food safety is treated as simply another trade issue, rather than as a distinct subject matter with economic, political, social and cultural implications far beyond trade, as it should be. Powerful complainants use the WTO dispute settlement mechanism to export and if possible impose their national standards and practices.

Complainants, such as China, are well advised for the time being to use a strategy of “aggressive legalism” or of “assertive legalism.” China should participate more actively throughout the WTO dispute settlement procedures, especially at the consultation phase.

Neither “aggressive legalism” nor “assertive legalism,” however, can in any way guarantee food safety. The globalization of local food safety standards through a dispute settlement mechanism designed to settle trade disputes is not an appropriate way to determine which standards should regulate food safety in an increasingly integrated, yet inescapably diverse global food economy. The hidden jurisprudence of the WTO is not a good way to regulate food safety today. We need a global food safety agency.
I Introduction

Globalization has irrevocably altered the world of food safety. Consumers, economists, legal scholars and pundits alike agree that, in today’s world, we are witnessing the creation of a more or less integrated global food economy. This process of economic integration has been accompanied, conditioned and sometimes even shaped by the diffusion of food safety standards emanating from international institutions and/or leading food trading countries.\(^1\) As a result of these interconnected economic and legal processes, food safety standards today are worldwide concerns. We all ask: Is my food safe to eat? How do I know? What does “safe” mean? What are food safety standards? How are they made? How are they enforced, if at all? Which local standards are globalized? Can and should all countries in the world follow the same standards? If not, what about trade?

When we as lawyers try to discern the outlines of this transformation, we usually turn to WTO law. There are many WTO cases about agricultural or food products,\(^2\) but most of them are concerned only indirectly or remotely, if at all, with food safety.\(^3\) Most WTO cases involving agricultural or food products refer not to food safety, still less to food safety standards, but rather to matters such as import or export licensing, anti-dumping duties, safeguards,\(^4\) agricultural subsidies or intellectual property rights, which bear little relation to food safety, at least if we regard only the relevant legal documents and do not take account, for example, of what we might learn from a more detailed contextual

\(^1\) See generally PAUL ROBERTS, THE END OF FOOD: THE COMING CRISIS IN THE WORLD FOOD INDUSTRY (2008); LA SECURITE ALIMENTAIRE (Ahmed Mahiou & Francis Snyder eds., 2006); ALBERT ALEMANNO, TRADE IN FOOD: REGULATORY AND JUDICIAL APPROACHES IN THE EC AND THE WTO (2007); Francis Snyder, Global Legal Pluralism and Regulation of Food Safety (2012) (Course at the Xiamen Academy of International Law, Xiamen, China, July 2-6, 2012; revised version to be published in the COLLECTED COURSES OF THE XIAMEN ACADEMY OF INTERNATIONAL LAW) [hereinafter Snyder, Xiamen Academy].


analysis of the implications of the specific case for the economic sectors involved over a longer time period.\(^5\)

Consequently, in order to understand the impact of the WTO on food safety we tend to focus on the main agreements of the WTO that deal directly with food safety standards, namely the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) and the Agreement on Technical Barriers to Trade (TBT Agreement).\(^6\) Cases involving these agreements are frequently concerned with food safety in the sense of food safety standards, in particular because they involve relations between the WTO and international standardization bodies and their norms regarding food safety.\(^7\) However, not all cases involving the SPS Agreement or in particular the TBT Agreement deal with food safety standards. It would therefore be a mistake to imagine that these two agreements and relevant case law exhaust the field of WTO food safety law.

This means that, even leaving aside the Trade Policy Review Mechanism (TPRM), the work of WTO councils and committees and the contribution of technical assistance, some of which I explore elsewhere,\(^8\) the SPS Agreement and the TBT Agreement are not the only WTO agreements which give rise to cases about food safety, including food safety standards. Yet the cases about food safety which arise under other WTO agreements other than or in addition to the SPS Agreement or the TBT Agreement and which deal with issues other than international standards have rarely, if ever, been grouped together and analyzed in any systematic way from the standpoint of food law. This perspective on food safety regulation is distinct, for example, from studying individual cases in order to understand their contribution to the elaboration of general WTO legal rules and legal concepts, such as “discrimination” or “necessity.” As a result, despite their legal, political, economic and symbolic

\(^5\) For a complex and controversial example, see World Trade Organization, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds103_e.htm (last visited Sept. 11, 2012); World Trade Organization, *Canada – Measures Affecting Dairy Exports*, WT/DS113, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds113_e.htm (last visited Sept. 11, 2012). The United States on Oct. 8, 1997 in the first case and New Zealand on Dec. 29, 1997 in the second case requested consultations concerning a Canadian dairy export scheme. They argued that the scheme was incompatible with the GATT and the Agreement on Agriculture, and the US also challenged the scheme on the basis of the Import Licensing Agreement and the SCM Agreement. In both cases, following unsuccessful consultations, the case went through a panel, the AB and two Article 21.5 panels, both of which were appealed, before the parties notified the WTO on May 9, 2003 (in both cases) of their mutually satisfactory solution.

\(^6\) *E.g.*, Snyder, Xiamen Academy, § III Cross-References.

\(^7\) See generally Snyder, Xiamen Academy.

\(^8\) *Id.*
significance, these cases remain the “invisible case law” or the “hidden jurisprudence” of the WTO from the standpoint of food safety regulation.

Here I focus on the WTO cases about food safety regulation which arise under WTO agreements other than or in addition to the SPS or the TBT Agreements and which are not directly concerned with relations between the WTO and international standardization bodies. My basic question is: What do these cases—which are not mainly about relations between WTO and international food standards—teach us about the role of the WTO in food safety regulation, in particular in promoting other food safety standards, especially national food safety standards, and about specific conceptions of food safety?

As a law professor in China, I am very interested in what these cases can teach us about relations between the WTO and China regarding food safety. Since acceding to the WTO on December 11, 2001, China has so far been a complainant in 11 cases, a respondent in 30 cases, and a third party in 97 cases. However, China was not a complainant or a respondent in any of the cases discussed here. Nevertheless, China was a third party in six cases, in particular because Chinese government policy has been to participate as a third party in as many cases as possible in order to learn quickly how the WTO dispute settlement system worked and to express its viewpoint on specific issues. China’s third party status in these cases is noted in the text. Any lessons that the cases may contain for China, as well as other WTO Members, are summarized in the conclusion.

The article argues, first, the WTO dispute settlement system deals with food safety and food safety standards much more frequently than is sometimes thought. While the SPS Agreement and the TBT Agreement are the most important WTO agreements in the field of food safety, they are not by any means the only relevant WTO agreements. Second, it argues that these cases constitute the “hidden jurisprudence” of the WTO in two different senses; each sense reflects a different meaning of the term “jurisprudence” as currently used in English-language legal scholarship. On one hand, these cases constitute building blocks in the construction of WTO food safety law. Here, “jurisprudence” refers to “case law.” Borrowed from the original French term jurisprudence, this meaning of “jurisprudence” is now widely accepted in the English language. On the other hand, the cases help us to elucidate the philosophy or, to put it more modestly, the approach and orientation of the WTO with regard to food

safety. This sense relies on the English-language term “jurisprudence” to mean “legal philosophy,” a connotation which previously was the standard meaning of the term and which is still widely used today.

II The Cases

Which cases should be considered? WTO law does not provide a definition or even a specific conception of food safety. In this article, for the sake of convenience, I adopt the following definition: Food safety law consists of the norms, institutions and legal processes “intended to ensure, or having the effect of ensuring, that food is safe to eat,” in the sense that it is neither injurious to health nor unfit for human consumption. This definition is based on reasoning a contrario from the definition of “unsafe food” provided in the 2009 European Union (EU) Food Law.\(^10\) Even though not perfect, it is for present purposes both sufficiently precise and sufficiently inclusive to serve as a criterion for selecting the cases to be examined.\(^11\)

WTO cases on food safety can be classified in various ways. First, they may be classified according to the WTO agreement(s) involved in the case. Specialists in WTO law usually employ this criterion. This is not surprising, because most lawyers are usually trained to take the law as an authoritative starting point, and the purpose of their research often focuses on issues of positive law or legal doctrine.\(^12\) However, if our objective is to understand the impact of the WTO on food safety regulation, such a legal criterion is less useful than a socioeconomic criterion, because it assumes, counterfactually, that law rather than socioeconomic activity is the structuring principle on which our inquiry is based.

A second method of classification is to classify cases according to the type of measure which gives rise to the case. We might distinguish two groups of cases: those which concern “border measures,” and those which concern “behind the border measures.” The first group comprises cases concerning measures regarding imports and exports, in other words,


\(^{11}\) Following this criterion, the paper concerns WTO food safety cases registered at the WTO before Sept. 9, 2012. At the time of writing, numerous recently filed cases are still in progress. A complete list of WTO cases is http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited Sept. 12, 2012 and updated to Feb. 2013 with the WTO website www.wto.org).

\(^{12}\) This second approach is the basis for the discussion of relations between the WTO DSM and international standards bodies in Snyder, Xiamen Academy, § III Cross-References.
which affect products by virtue of the fact that they cross a border.\textsuperscript{13} The second group embraces cases concerning internal legislation, administrative regulations or other measures, which affect products after they have arrived in the territory of an importing WTO Member. A more specific variant of this method is to distinguish between (a) cases concerning food safety measures imposed on imports, (b) cases concerning food safety measures imposed on exports, and (c) cases concerning the treatment of imported food on a domestic market. For instance, measures affecting exports have recently become an increasing target in WTO cases, for example regarding raw materials,\textsuperscript{14} and with a growing shortage of food and water in the world it may be foreseen that WTO cases concerning measures regarding exports of food will increase in number. However, a review of the case law, presented below, reveals that the distribution of cases among these categories is notably uneven. A longer article might examine the reasons for this distribution, but such an objective is outside the scope of the present discussion. More importantly, this classification is based very much on legal categories and takes little account of socio-economic circumstances. Taking law as a starting point hinders our understanding of the impact of specific cases on food safety regulation.

This article adopts a third method of classifying cases. It distinguishes between cases according to the point in the value chain or food chain at which a challenged measure intervenes.\textsuperscript{15} In other words, what aspect of food safety does the measure affect? In adopting this method of classification, the article aspires to follow a classification method, which is likely to be adopted by government officials, business people and interested citizens, as well as food safety lawyers. Their point of departure is their own law and their own legal system, the characteristics and industrial structure of their own domestic and export markets, and the impact of foreign trade and international competition on both of these.


These concerns (imports, exports, domestic competition) therefore focus more on social and economic relations, in particular on food safety, than on legal criteria. Such a method of classification sets WTO cases more squarely in their domestic economic, political, social and cultural contexts. As a result, it should provide a basis for a more detailed picture of the effects of the WTO dispute settlement mechanism on food safety and on food safety standards.

Using this approach, the remainder of this part of the article first analyses five groups of cases, focusing respectively on (a) pre-importation production and treatment methods, (b) import bans – procedures, (c) import bans – health and quality standards, (d) testing and inspection and (e) shelf-life. It then considers which WTO Members were involved and how, the ways in which their disputes were resolved, who won the cases, and the implications for the globalization of food safety rules and practices. The conclusion draws out the main lessons from this detailed analysis. It identifies some serious shortcomings in the current resolution of disputes about food safety and then proposes the creation of a global food safety agency.

A  Group 1: Pre-Importation Production and Treatment Methods

A first category of cases concerns rules about production and treatment methods used in the exporting country, that is, prior to exportation of the product, and therefore prior to importation of the product on the importing country’s market. Table 1 shows the cases in this category.

Table 1. Cases on Pre-Importation Production and Treatment Methods

<table>
<thead>
<tr>
<th>Case No., Filing Date</th>
<th>Case Name</th>
<th>Complainant</th>
<th>Product</th>
<th>Procedural Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>DS20, 8.11.1995</td>
<td>Korea – Bottled Water</td>
<td>Canada</td>
<td>Bottled water</td>
<td>Mutually agreed solution</td>
</tr>
<tr>
<td>DS72, 24.3.1997</td>
<td>EC – Butter</td>
<td>New Zealand</td>
<td>Butter</td>
<td>Mutually agreed solution</td>
</tr>
<tr>
<td>DS287, 3.4.2003</td>
<td>Australia – Quarantine Regime</td>
<td>EC</td>
<td>Meat</td>
<td>Mutually agreed solution</td>
</tr>
</tbody>
</table>
| DS389, 16.1.2009      | EC – Poultry            | US          | Poultry          | Panel established but not yet com-

© 2013 Peking University School of Transnational Law
Such rules may determine in effect whether a product can be imported and/or sold. Usually, they constitute, at least arguably, not only barriers to market entry but also measures seeking to guarantee food quality and food safety, with complainant and respondent characterizing the measures in opposite ways.

Water, the “noblest of the elements” according to Pindar,\(^\text{16}\) is also an economic sector characterized in recent decades by intense competition. This is especially true of bottled water. During the past two decades, international consumption of bottled water increased dramatically. It is perhaps not surprising therefore that the bottled water industry, comprising bottlers, distributors and suppliers, witnessed rapid consolidation.\(^\text{17}\) At the time, however, there were no internationally accepted standards on bottled water.

**Korea – Bottled Water** concerned the production and treatment of bottled water by ozonation, a commonly used but nevertheless controversial method of treatment.\(^\text{18}\) Canada, which used ozonation as a method of treating bottled water, complained about Korean measures prohibiting disinfection of bottled water by ozonation. Korean law allowed only physical water treatments (precipitation, filtration, aeration and ultraviolet disinfection). It considered ozonation to be a prohibited chemical treatment.\(^\text{19}\) At the time, and at least for the following decade, Korea was a rapidly growing market for bottled water.\(^\text{20}\)

---


\(^{19}\) World Trade Organization, Korea – Measures Concerning Bottled Water, Request for Consultations by Canada, WT/DS20/1G/L/33, G/SPS/W/35G/TBT/D/4, G/MA/3, G/AG/w/14 (Nov. 22, 1995), http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds20_e.htm.

Canada requested formal consultations with Korea under Article 4.3 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), probably after the failure of early informal discussions.\(^{21}\) WTO Members are required to provide an opportunity for consultation if another Member requests consultations concerning measures that affect obligations under the WTO agreements.\(^{22}\) “Members duty to consult is absolute.” Requests for consultations must be notified to the WTO Dispute Settlement Body (DSB) and relevant Councils and Committees.\(^{23}\) During consultations, “before resorting to any further action under [the DSU],” namely requesting a panel, “Members should attempt to obtain satisfactory adjustment of the matter.”\(^{24}\) Consultations are required before a panel can be requested.\(^{25}\) Consultations are “confidential, and without prejudice to the rights of any Member in any further proceedings.”\(^{26}\) The Appellate Body has described the purpose of consultations as follows:

Through consultations, parties exchange information, assess the strengths and weaknesses of their respective cases, narrow the scope of the differences between them and, in many cases, reach a mutually agreed settlement in accordance with the explicit preference expressed in Article 3.7 of the DSU. Moreover, even when no such agreed settlement is reached, consultations provide the parties an opportunity to define and limit the scope of the dispute between them. Clearly, consultations afford many benefits to complaining and responding


\(^{23}\) DSU art. 4.4.

\(^{24}\) DSU art. 4.5.

\(^{25}\) DSU art. 4.7 & 6.2.

\(^{26}\) DSU art. 4.6.
parties as well as to third parties and to the dispute settlement system as a whole.\(^{27}\)

As Pauwelyn notes, formal DSU consultations are “as much a final attempt to settle a dispute as a prelude to the litigation stage” and also “a safety value to let off domestic pressure to take a dispute seriously.”\(^{28}\)

Canada argued that the Korean measures were inconsistent with Articles III and XI GATT, Articles 2 and 5 SPS, and Article 2 TBT. In April 1996 the parties reached a mutually agreed solution. They agreed that Korea would amend its measures to allow the importation, sale and distribution of ozone-treated water by 1 January 1997 if possible, and in any event no later than 1 April 1997. Article 3.6 DSU requires Members to notify mutually agreed solutions to the DSB and relevant Councils and Committees.\(^{29}\) As a matter of law, such solutions must be consistent with the WTO agreements and not nullify or impair Member’s benefits under the WTO agreements or impede achievement of the objectives of the WTO agreements.\(^{30}\)

During the case, neither party referred to any international standards. The World Health Organization had advocated the use of its Guidelines for Drinking Water Quality, adopted in the mid-1990s, as the basis for drafting international standards for bottled water. By the late 1990s, such standards were being drafted by the Codex Alimentarius Commission. However, at the time of Korea – Bottled Water there was no such international standard and no universally accepted certification scheme.\(^{31}\) Adopted only in 2001, the Codex standard permits the treatment of waters intended for bottling by chemical processes, including ozonation, singly or in combination with other processes.\(^{32}\)


\(^{29}\) DSU art. 3.6.

\(^{30}\) DSU art. 3.5.


© 2013 Peking University School of Transnational Law
We may hypothesize that Canadian bottled water companies and their trade associations played a significant role not only in the making of the Codex standard but also in pressing the Canadian Government to bring the complaint against Korea. Three trade associations are likely to have been especially important. One such association is the International Bottled Water Association (IBWA), which was formed in the United States in 1958 and which included US and some non-US companies, mainly small, locally-owned bottlers, distributors and suppliers, as members. Second is the Canadian Bottled Water Association, founded in 1992 and encompassing bottlers, distributors and suppliers in Canada, with some associate members; as of 2013, CBWA members produced 85% of all bottled water sold in Canada. The CBWA is the Canadian chapter of a third association, the International Council of Bottled Water Associations (ICBWA). The ICBWA was incorporated in Toronto, Canada, on 9 February 2001. Today it comprises six regional associations as members: IBWA, CBWA, Middle East Bottled Water Association (ABWA), Australasian Bottled Water Institute (ABWI), European Federation of Bottled Waters (EFBW), including the European Bottled Watercooler Association (EBWA) (Europe), Latin American Bottled Water Association (LABWA) and Asian Bottled Water Association (ABWA), altogether representing a total of 1,567 companies in 141 countries, including Korea.

The outcome of Korea – Bottled Water was consistent with Article 3.7 DSU, which provides that “The aim of the dispute settlement mechanism is to secure a positive solution to the dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred.” However, it would appear that

---

33 It is unlikely that WTO Members would bring cases to the WTO dispute settlement system unless important economic interests were at stake. See JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION 399–417 (2000); CORPORATE POWER IN GLOBAL AGRIFOOD GOVERNANCE (Jennifer Clapp & Doris Fuchs eds., 2009). On relationships between economic interests and government in WTO litigation, see generally GREGORY C. SHAFFER, DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION (2003). For Chinese examples, see Yan Luo, Engaging the Private Sector: EU-China Trade Disputes under the Shadow of WTO Law, 13(6) EUR. L.J. 800 (2007).


38 DSU art. 3.7.
WTO law itself did not compel withdrawal of the measure. So far as we can judge from available documents, there was no determination as to whether the Korean measure was contrary to WTO law, since the case did not proceed to a panel.

Within the consultation phase of the WTO dispute settlement mechanism, Canada was able to export its food safety standards to Korea, or, put it pungently, to impose its bottled water treatment methods on Korea. Korea accepted the Canadian ozonation treatment method as a permitted method for treating bottled water to be imported into Korea. This mutually agreed solution was backed up by the possibility of further recourse to the WTO. At the stage of consultations, it is likely that the parties did “not necessarily know all the claims they w[ould] want to make or not make at this relatively early stage.” 39 Doubtless they also had conflicting views of the interpretation of WTO law. Yet factors outside the consultation process itself were likely to have been the most important factors in determining the outcome. 40 Such factors include the results of diplomacy outside of consultations, the political salience of the dispute, the involvement of important domestic interests such as companies and trade associations, and the threat of recourse to a panel. 41

Several other cases also concerned pre-importation production and treatment methods, though it is not possible to analyze them in the same detail here. Production methods were at issue in DS72 EC – Butter Products. When the United Kingdom acceded to the European Economic Community, its imports of dairy products from New Zealand were a sensitive issue within the EEC’s Common Agricultural Policy, 42 which had a structural surplus of dairy products. In early 1997 New Zealand challenged EC and United Kingdom decisions that certain New Zealand butter manufacturing processes were classified so as to exclude the product from New Zealand’s country-specific tariff quota under the EC’s WTO

41 Id. at 588. For example, between 1995–2000, when the Korea – Bottled Water case took place, the United States strategy was to see the consultation phase “merely as part of a broader strategy to ratchet up political pressure in order to resolve the problem with a panel decision, or outside the WTO context if necessary.”
schedule. New Zealand used the ANMIX butter-making process and the spreadable butter-making process, which the UK Customs and Excise Department did not recognize. It is likely that the main New Zealand producer was Fonterra, long established before 1973 and today one of the world’s largest producers of dairy products.43 It was not until more than two years later that the parties notified the WTO DSB that they had reached a mutually agreed solution.44 In this case the UK and the EC recognized the New Zealand production processes to the extent of allowing imports of New Zealand butter into the UK under specified conditions and subject to reduced tariff rates. Even today, special terms apply to imports into the United Kingdom of butter from New Zealand.45

In DS287, Australia – Quarantine Regime, the EC on 3 April 2003 requested consultations with Australia concerning its quarantine regime for imports. The Australian regime was based on legislation, administrative guidance, and the exercise of administrative discretion. The EC complaints included claims concerning the import of processed deboned pig meat from Denmark and poultry meat required to be subject to specific methods of preparation. The EC considered the Australian regime not to be based on a risk assessment, except on an unpredictable and even arbitrary basis. It considered the regime to be incompatible with Articles 2, 3, 4, 5, 8 and Annex C of the SPS Agreement. Canada, Chile, India and the Philippines joined the consultations.46 China, though a major poultry exporter, did not request to join the consultations.47 A panel was established on 14 October 2003. At this stage, under Article 4.11 DSU, China reserved its third party rights.48 However, on 9 March 2007 the parties notified the WTO that they had reached a mutually satisfactory solution. The solution included increased transparency of the Australian

---

46 Since 1958 third parties have been allowed to join consultations under Article XXII GATT: Christiane Schuchhardt, Consultations, in 1 THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS 1197, 1200 (Patrick F.J. Macrory, Arthur E. Appleton & Michael G. Plummer eds., 2005); DSU art. 4.11.
48 Id.
quarantine regime, the articulation by Australia of principles for dealing with EC market access applications and “continued expert discussions on scientific aspects associated with trade in pig meat and chicken meat.”

In early 2009 in DS389 EC - Poultry the United States challenged various EC measures which blocked US exporters of poultry meat and poultry meat products from having access to EC [European Community, now EU: European Union] markets. The challenge was the most recent sally in a long-running conflict between the EU and the US concerning the chemical treatment of poultry products. Starting in 1997, the EC prohibited the use of pathogen reduction treatments (PRTs) in the treatment of poultry products. The EC prohibited poultry imports if the products had been treated with any substance other than water unless the substance had been approved by the EC. The US used various PRT chemical treatments. In challenging the EC measure, it invoked the Agreement on Agriculture, Articles III, X and XI GATT, the SPS Agreement and the TBT Agreement. Despite US requests and several EC scientific reports, the EC had not yet approved the import of poultry processed with PRTs. Indeed EC marketing standards defined “poultry meat” to include only “poultry meat suitable for human consumption, which has not undergone any treatment other than cold treatment.” As of November 2009, a panel was established but had not yet been composed. China, most likely because of the importance of its poultry sector and its poultry exports to the US and the EU, reserved its third party rights. There appears not to have been any change to date. It is fair to assume that the dispute has been abandoned or otherwise resolved, even though one author notes that “the [United States Trade Representative] and poultry industry officials remain interested in moving forward on this case.”

49 Id. at Summary of the Dispute to Date.
52 World Trade Organization, supra note 52.
Codex Alimentarius Commission adopted Guidelines for the Control of Campylobacter and Salmonella spp. in Chicken Meat, which may provide a “happy end” to this case.\textsuperscript{54}

\textbf{B Group 2: Import Bans - Procedures}

A second category of cases concerns measures establishing specific import procedures that in effect amount to a total ban on imports. Table 2 shows these cases.

<table>
<thead>
<tr>
<th>Case No., Filing Date</th>
<th>Case Name</th>
<th>Complainant</th>
<th>Product</th>
<th>Procedural Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>DS100, 18.8.1997</td>
<td>US – Poultry Products</td>
<td>EC</td>
<td>Poultry</td>
<td>In consultation</td>
</tr>
<tr>
<td>DS133, 7.7.1997</td>
<td>Slovak Republic – Dairy Products</td>
<td>Switzerland</td>
<td>Dairy products</td>
<td>In consultation</td>
</tr>
<tr>
<td>DS144, 19.12.1997</td>
<td>US – Cattle, Swine and Grain</td>
<td>Canada</td>
<td>Cattle, swine, grain</td>
<td>In consultation</td>
</tr>
<tr>
<td>DS237, 31.12.2001</td>
<td>Turkey – Fresh Fruit</td>
<td>Ecuador</td>
<td>Fresh fruit</td>
<td>Mutually agreed solution</td>
</tr>
<tr>
<td>DS270, 18.10.2002</td>
<td>Australia – Fresh Fruit and Vegetables</td>
<td>Philippines</td>
<td>Fresh fruit and vegetables</td>
<td>Panel established but not yet composed</td>
</tr>
<tr>
<td>DS284, 17.5.2003</td>
<td>Mexico – Black Beans</td>
<td>Nicaragua</td>
<td>Black beans</td>
<td>Withdrawn</td>
</tr>
</tbody>
</table>

Such total bans may result from very different kinds of factors, such as the exercise of overly broad discretion by policy-making institutions of the importing country, or a failure to provide specific information, or a general lack of transparency. Their common feature, however, is that on their face they seem to be deliberate attempts to limit imports. In order

to be legally acceptable under the WTO international trade regime, such
total bans must be justified under WTO law. Importing Members almost
always try to justify such bans on grounds of product safety, public health
or product quality. Rarely, however, are such justifications successful.

The poultry sector has been a continual source of tension between
the EU and the US since the early 1960s, at least until the recent
already noted Codex Guidelines. We have already noted its importance
to China. DS 100 US – Poultry Meat concerned an import ban that was
alleged to be due to food safety concerns but which also exemplified the
exercise of overly broad discretion on the part of domestic institutions of
the importing country. It arose during the period when the EC began to
prohibit imports of poultry treated with PRTs, a concern that eventually
led the US to bring DS389 EC – Poultry (discussed above). It was the
first case involving poultry brought to the WTO. On 18 August 1997 the
European Communities requested consultations with the United States. It
challenged a US ban on imports of poultry and poultry products from the
EC. A letter from the USDA Food Safety Inspection Service communi-
cated the ban in the following terms: “poultry and poultry products pro-
duced in the EC after April 30, 1997 will not be eligible for entry into the
United States until the United States is able to obtain additional assu-
rances of product safety.” However it did not indicate any grounds for
what appeared to be a sudden change of policy, which doubtless lay in
domestic market conditions and consequent political pressures. The EC
considered the ban to be contrary to the GATT, the SPS Agreement and
the TBT Agreement. Formally speaking, the case remains in consulta-
tion. China did not request third-party status.

DS133 Slovak Republic – Dairy Products also concerned measures
that in effect banned imports. On 11 May 1998 Switzerland requested
consultations with the Slovak Republic about several Slovak measures
concerning importation of dairy products and transit of cattle. It alleged
that the measures were incompatible with numerous articles of GATT,
Article 5 SPS and Article 5 of the Import Licensing Agreement. The

56 Joint FAO/WHO Food Standards Programme, supra note 56.
57 World Trade Organization, United State – Measures Affecting Imports of Poultry Products, Request for Consultations by the European Communities, WT/DS100/1 (Aug. 25, 1997), http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds100_e.htm (last visited Sept. 12, 2012); id. at Summary of the Dispute to Date.
58 World Trade Organization, Slovak Republic – Measures Concerning the Importation of Dairy Products and the Transit of Cattle, Request for Consultations by Switze-
dispute was apparently settled, as no further information appears to be available.

In DS144 United States – Cattle, Swine and Grain from Canada, Canada on 25 September 1998 requested consultations with the United States concerning US measures affecting Canadian exports of cattle, swine and grain.\(^{59}\) The measures were imposed by the state of South Dakota and other states and prohibited entry to Canadian lorries carrying these products. Canada considered the measures to be contrary to the Agreement on Agriculture, the GATT, the SPS Agreement and the TBT Agreement.\(^{60}\) The case remains in consultation.

The requirement of specific import documents can also constitute a ban on imports. For example, in DS237 Turkey - Fresh Fruit, Ecuador on 31 August 2001 requested consultations with Turkey regarding Turkey’s import procedures for fresh fruit, in particular bananas. For fresh fruit imports, Turkey required a specific import document, called “Kontrol Belgesi” (control certificate), which was to be issued by the Turkish Ministry of Agriculture, pursuant to a governmental Communiqué for Standardization in Foreign Trade. Ecuador claimed that the requirement was a trade barrier inconsistent with Articles II, III, X and XI GATT, several articles of the SPS Agreement, and provisions of other WTO Agreements.\(^{61}\) On the failure of consultations, a panel was established in late July 2002 but was immediately suspended since the parties were seeking to find a negotiated solution. The parties reached a mutually satisfactory solution in November 2002.\(^{62}\) Turkey changed its control certificate system to provide for automatic issue of import licenses once the

\(^{59}\) As to factors possibly explaining why Canada had recourse to the WTO rather than to NAFTA, see Marc L. Busch, Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade, 61 Int’l Org. 735 (2007) (Busch argues that a complainant chooses among different possible dispute-settlement institutions according to whether it wants to set a regional or multilateral precedent, or not file a case at all).

\(^{60}\) World Trade Organization, United States – Certain Measures Affecting the Import of Cattle, Swine and Grain from Canada, Request for Consultations from Canada & Summary of the Dispute to Date, WT/DS144/1, G/L/260/ G/SPS/W/90, G/TBT/D/18, G/AG/GEN/27 (Sept. 29, 1998), http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds144_e.htm (last visited Sept. 12, 2012).


\(^{62}\) Id. at Summary of the Dispute to Date.
required documents had been produced. It also undertook not to revert to its previous practices. However both parties stated that the mutually satisfactory solution was without prejudice to their WTO rights and obligations, thus making it clear that they might invoke WTO law in the event of problems in the future.\textsuperscript{63}

Often an import ban may reflect deep-seated political and economic conflicts. Such tensions are rarely evident in case reports, though clearly the poultry disputes between the EU and the US were based on competition and structural conflicts between the two parties’ poultry industries as well as differences in domestic regulatory arrangements. An exception is DS 270 \textit{Australia – Fresh Fruit and Vegetables}.\textsuperscript{64} On 18 October 2002 the Philippines requested consultations with Australia. The case concerned an Australian import ban on fresh fruits and vegetables, in particular bananas, papayas and plantain.\textsuperscript{65} Section 64 of the Australian 1998 Quarantine Proclamation provided that “the importation into Australia of a fresh fruit or vegetable is prohibited unless the Director of Quarantine has granted the person a permit to import it into Australia”.\textsuperscript{66} The Philippines claimed that Section 64, implementing regulations and amendments of the Section and the application of these measures was inconsistent with the GATT, the Import Licensing Agreement and numerous provisions of the SPS Agreement. There were powerful political and economic interests on both sides. The Philippine Banana Growers and Exporters Association (PBGEA) consisted mainly of larger companies affiliated with multinational companies such as Dole, Del Monte and Chiquita Brands, while the then Secretary of the Philippine Department of Agriculture was the “former chair of the PBGEA, the family-controlled Lapanday Foods Corporation,\textsuperscript{67} and Del Monte Philippines, Inc.”\textsuperscript{68} On the other side, the Australia Banana Growers’ Council (ABGC), established in 1961, represented 1,900 banana growers.\textsuperscript{69} The EC and Thai-

\begin{footnotesize}
\begin{enumerate}
\item Id. at Notification of Mutually Agreed Solution.
\item World Trade Organization, \textit{Australia – Certain Measures Affecting the Importation of Fresh Fruit and Vegetables}, Summary of the Dispute to Date, WT/DS270 (Feb. 24, 2010), http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds270_e.htm (last visited Sept. 11, 2012).
\item Id. at 59.
\item Id. at 59.
\item For more information, see LAPANDAY FOOD CORPORATION, http://www.lapanday.com (last visited Oct. 30, 2012).
\item Josyline Javelos & Andrew Schmitz, \textit{supra} note 67, at 67.
\end{enumerate}
\end{footnotesize}
land joined the consultations. On 7 July 2003 the Philippines requested the establishment of a panel, which however was deferred. A panel was established on 29 August 2003. China, the EC, Ecuador, India, Thailand and the US all reserved their third party rights. So far it does not seem as if a panel has been constituted. The long delay and lack of progress in dispute settlement indicate the political and economic sensitivity of the case.

Lack of transparency can also be equivalent to a ban on imports. An extreme example is the case in which an importing country simply fails to provide information on its domestic requirements. In DS284 Mexico – Black Beans, Nicaragua on 17 March 2003 requested consultations with Mexico. It complained that Mexico refused, contrary to Mexico’s own standards, to provide importers with documents containing phytosanitary requirements for importation of black beans from Nicaragua, gave more favorable treatment to like products from other countries and failed to publish phytosanitary requirements for imports of Nicaraguan black beans. It considered the Mexican measures to be violation of the GATT, the Licensing Agreement and the SPS Agreement. Following negotiations, Nicaragua formally withdrew its complaint. It is likely that the outcome took account of the transparency requirements in the WTO agreements. For example, Article X GATT requires WTO Members to publish their trade regulations, while the SPS requires them to publish and provide information about their sanitary and phytosanitary regulations.

These cases reveal that often countries do not really try to justify total bans on imports. Such bans are very difficult to justify under WTO law. In such instances, WTO Members often delay in providing any reasonable rationale or legal justification, perhaps seeking to gain time by delaying imports or to limit the quantity of imports to what policy-makers or specific interest groups consider to be the absorptive capacity of the domestic market. The main objective, which is more or less apparent in virtually all cases, is to avoid or restrict competition.

70 World Trade Organization, supra note 66.
72 Id. at Summary of the Dispute to Date.
C Group 3: Import Bans – Health and Quality Standards

In addition to the use of procedural devices to prohibit imports, countries frequently use health and quality standards as de facto import bans (see Table 3).

Table 3. Cases on Import Bans based on Health and Quality Standards

<table>
<thead>
<tr>
<th>Case No., Filing Date</th>
<th>Case Name</th>
<th>Complainant</th>
<th>Product</th>
<th>Procedural Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>DS256, 3.5.2002</td>
<td>Turkey – Pet Food</td>
<td>Hungary</td>
<td>Pet food</td>
<td>In consultation</td>
</tr>
<tr>
<td>DS297, 9.7.2003</td>
<td>Croatia – Live Animals and Meat Products</td>
<td>Hungary</td>
<td>Live animals, meat products</td>
<td>Mutually agreed solution</td>
</tr>
<tr>
<td>DS391, 9.4.2009</td>
<td>Korea – Bovine Meat</td>
<td>Canada</td>
<td>Beef</td>
<td>Mutually agreed solution</td>
</tr>
<tr>
<td>DS430, 6.3.2012</td>
<td>India – Agricultural Products</td>
<td>USA</td>
<td>Agricultural products</td>
<td>Panel established, not yet constituted</td>
</tr>
<tr>
<td>DS447, 30.8.2012</td>
<td>USA – Animals and Meat</td>
<td>Argentina</td>
<td>Beef</td>
<td>Panel established 28 January 2013</td>
</tr>
<tr>
<td>DS448, 3.9.2012</td>
<td>USA – Fresh Lemons</td>
<td>Argentina</td>
<td>Lemons</td>
<td>In consultation</td>
</tr>
</tbody>
</table>

This category is the most highly populated among the categories of cases distinguished for analysis here, with a total of seven cases.

Hungary joined the WTO in 1995. Subsequently it became a Member State of the European Union in 2004. On the eve of its accession to the EU, Hungary brought three complaints to the WTO dispute settlement system in rapid succession. The first case was DS240 Romania – Wheat and Wheat Flour. On 18 October 2001, Hungary requested consultations with Romania, which joined the EU only in 2007. It complained that a Romanian joint decree of the Ministry of Agriculture, Food Industry and Forestry, the Ministry of Family and Health and the National Consumer Protection Authority was contrary to Articles III and XI GATT. The joint decree prohibited the importation of wheat and wheat...
flour that did not meet certain quality standards; domestic products were not subject to the same requirements. Subsequently Hungary requested the DSU emergency procedure, because Romania proposed consultations only a month after the request and the decree totally blocked all Hungarian wheat exports. The Romanian measures clearly were incompatible with Romania’s WTO obligations, in particular the Article III GATT principle of national treatment. During the consultations, Romania abrogated the measures and on 20 December Hungary withdrew its complaint.

In a second case, DS256, Hungary on 3 May 2002 requested consultations with Turkey concerning Turkey’s import ban on pet food from Hungary. The ban had been applied since early 2001 to pet food imports from any European countries to protect against bovine spongiform encephalopathy (BSE, “mad cow disease”). However, Hungary was a BSE-free country, the products in question were used only for feeding cats and dogs, and Hungary claimed that the ban had been neither officially published nor notified to the relevant WTO committee. It argued that the ban was contrary to Article XI GATT, the Agreement on Agriculture, and Articles 2, 5, 6 and 7 and Annex B of the SPS Agreement. According to the WTO website the case is still in consultation. However, a Turkish Government website lists the case as having been resolved during consultations. The latter is the most likely result. Given Hungary’s accession to the EU and taking account of the strength of its legal arguments, it was to be expected that the case would be settled by mutual agreement, even though no mutually agreed solution seems to have been notified to the WTO.

76 Id. at Addendum.
77 Id. at Summary of the Dispute to Date.
78 The case is included here because it concerns public health and the SPS Agreement. Note that pet food is not considered to be “food” under EU food law. See Regulation (EC) No. 178/2002 of the European Parliament and of the Council of 28 January 2002, art. 2, 2002 O.J. (L31/1) 1, 2 (laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety).
80 Id. at Summary of the Dispute to Date.
Hungary and an alleged threat of BSE were also concerned in a third case, DS 297, Croatia – Live Animals and Meat Products. In 2003 Hungary challenged measures introduced by Croatia allegedly to prevent the spread of BSE. Referring to Articles XI and XX GATT and to the SPS Agreement, it argued that the measure had not been notified to the SPS Committee, was overly broad, was not based on any scientific principle or international standard relating to BSE and did not appear to be based on a risk assessment. The parties reached a mutually satisfactory solution later in 2003; this was notified to the WTO DSB about six years later, on 30 January 2009.82

Another import ban case, DS391 Korea – Bovine Meat and Meat Products, also involved BSE. Canada complained regarding Korean measures on importation of bovine meat and meat products from Canada. It requested consultations on 9 April 2009. It challenged a Korean administrative order prohibiting the importation of beef and other meat products from Canada and provisions of the Korean Livestock Epidemic Prevention Act, which subjected such meat imports to the approval of the Korean National Assembly. Korea purportedly maintained a ban on such products to protect against alleged risks from BSE. Canada argued that the measures contravened Articles 2.2, 2.3, 3.1, 3.3, 5.1, 5.5, 5.6 and 8, together with Annex C(1)(a) SPS; that the Korean measures did not meet the requirements of Article 5.7 SPS; and that the measures were inconsistent with Articles I:1, III:4 and XI:1 GATT. On 9 July 2009 Canada requested that a panel be established, but establishment was deferred until the DSB meeting on 11 August 2009. China reserved its third-party rights. However, on 19 June 2012 the parties notified the WTO that they had reached a mutually satisfactory solution; Korea confirmed that it would apply newly enacted import health requirements to Canadian beef.83

In DS430 India – Agricultural Products the United States in March 2012 requested consultations with India about the India Livestock Importation Act 1898, related orders and amendments and implementing measures. The measures prohibited various agricultural imports from the United States, purportedly because of the danger of Avian influenza. The


United States argued that the measures contravened Articles I and XI GATT as well as numerous provisions of the SPS Agreement. A panel was established on 23 June 2012. China, Colombia, Ecuador, the EU, Guatemala, Japan, Viet Nam and subsequently Argentina, Australia and Brazil reserved their third party rights, demonstrating the widespread concern and interest in the Indian measures. As of the date of writing (23 January 2013), the case is still in progress.

Two recent cases formed part of continuing trade conflicts between the US and Argentina. They reflect not only the significance of trading relationship between these countries but also other tensions between them, such as outstanding Argentinian payments of International Center for Settlement of Investment Disputes (ICSID) awards in investment disputes and the consequent US suspension of Argentina’s access to the US Generalized Scheme of Preferences (GSP) programme, which directly influences trade. In DS447 United States – Animals and Meat, Argentina on 30 August 2012 requested consultations with the United States concerning the US prohibition on imports of fresh (chilled or frozen) bovine meat and its failure to recognize Argentina as being free of foot-and-mouth disease (FMD). Argentina considered the US measures to be contrary to numerous provisions of GATT, the SPS Agreement and the WTO Agreement. It complained that there was no scientific or legal basis for the ban or for non-recognition, because the World Organization for Animal Health (OIE) had already recognized Argentina as FMD-free with vaccination and had recognized part of the country as FMD-free without vaccination. Argentina also complained about undue delays in the US approval procedure, even though the US recognized that a risk

---


85 World Trade Organization, Argentina and the WTO, http://www.wto.org/english/the WTO_e/countries_e/argentina_e.htm (as of Jan. 23, 2013, 5 of the 18 cases in which Argentina was a respondent were against the US, and 5 of the 22 cases in which Argentina was a complainant were against the US, and none of these cases concerned food safety). For examples of the different perspectives, see Argentina Hits Back at the US and will Complain to the WTO Trade Barriers on Meats and Lemons, MERCO PRESS (Aug. 21, 2012), http://en.mercopress.com/2012/08/21/argentina-hits-back-at-us-and-will-complain-in-wto-trade-barriers-on-meats-and-lemons (last visited Jan. 23, 2013); Tom Miles, US, EU Blast Argentina’s Trade Restrictions at WTO, REUTERS (Mar. 30, 2012), http://www.reuters.com/article/2012/03/30/us-argentina-wto-idUSBRE82T1H520120330 (last visited Jan. 23, 2013).

analysis had been completed and that the imports posed “a negligible risk.”\(^{87}\) Its first request for the establishment of a panel was blocked by the US,\(^ {88}\) but following Argentina’s second request a panel was established on 28 January 2013.\(^ {89}\) At this stage China reserved its third-party rights.\(^ {90}\)

In a second case, DS448, United States – Fresh Lemons, Argentina on 3 September 2012 requested consultations with the United States about US measures affecting, and in effect banning, for almost the previous eleven years imports of citrus fruits, including fresh lemons from the North-West region of Argentina, failure to grant approval for such imports and alleged delays in approval procedures. Argentina based its challenge of the ban on several US measures, including federal legislation, an administrative rule of the US Animal and Plant Inspection Service (APHIS) and a case brought successfully by 5000 Arizona and California citrus growers to challenge the US Department of Agriculture’s decision to allow citrus imports from Argentina.\(^ {91}\) Argentina considered the US measures to be lacking in scientific justification and to be contrary to numerous articles of GATT, the SPS Agreement and the WTO Agreement.\(^ {92}\) The case is currently underway.

\(^{87}\) World Trade Organization, United States – Measures Affecting the Importation of Animals, Meat and Other Animal Products from Argentina, Request for Consultations by Argentina, WT/DS447/1, G/L/998, G/SPS/GEN/1186 (Sept. 4, 2012), http://www.worldtradelaw.net/cr/ds447-1(cr).pdf; id. at Corrigendum.

\(^{88}\) DSU art. 6.1 (provides that “If the complaining party so requests, a panel shall be established at the DSB meeting following that at which the request first appears as an item on the DSB’s agenda, unless at that meeting the DSB decides by consensus not to establish a panel”). Hence the respondent is able to block establishment of a panel on the first request only.


\(^{92}\) World Trade Organization, United States – Measures Affecting the Importation of Fresh Lemons, Request for Consultations by Argentina, WT/DS448/1, G/L/1000, G/SPS/GEN/1187 (Sept. 5, 2012), http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds448_e.htm (last visited Sept. 12, 2012); id. at Corrigendum; id. at Summary of the Dispute to Date.
Group 4: Post-Importation Testing and Inspection

Challenges in the WTO system may also concern measures that require testing and inspection of products once imported (see Table 4).

<table>
<thead>
<tr>
<th>Case No., Filing Date</th>
<th>Case Name</th>
<th>Complainant</th>
<th>Product</th>
<th>Procedural Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>DS3, 4.4.1996</td>
<td>Korea – Testing and Inspection of Agricultural Products</td>
<td>US</td>
<td>Agricultural Products</td>
<td>In consultation</td>
</tr>
<tr>
<td>DS41, 24.5.1996</td>
<td>Korea – Inspection of Agricultural Products</td>
<td>US</td>
<td>Agricultural products</td>
<td>In consultation</td>
</tr>
</tbody>
</table>

The United States and Korea were both founding Members of the WTO. In April 1995, soon after the WTO was established, the United States in DS3 *Korea – Testing and Inspection of Agricultural Products* requested consultations with Korea about measures for testing and inspection of imported agricultural products.  

For most of the preceding years (and afterwards except for 1996), the United States had a negative trade balance with Korea. It may have seen recourse to the WTO as an important means of improving its export trade. Korea, in contrast, was a reluctant litigant, then characterized by an “dispute aversion attitude,” lacking sufficient expertise in WTO law and also benefitting from a trade surplus with countries, such as the US, which adopted protectionist measures, and therefore reluctant to litigate.

In June 1996, in DS41 *Korea – Inspection of Agricultural Products*, the United States again requested consultations with Korea about similar measures. The US request included “all amendments, revisions, and

---


new measures” adopted by Korea after the first US request for consultations. In both cases, the US argued that the measures were contrary to several WTO agreements, including GATT, the Agreement on Agriculture, the SPS Agreement and the TBT Agreement. According to the WTO website, both DS3 and DS41 are still in consultation. In fact they were both suspended, because after the request for consultations “the United States did not take additional steps.” However, there seems to have been no formal indication of a mutually agreed solution.

E Group 5: Shelf-Life

The final category of cases examined here concerns the shelf-life of product (see Table 5). Shelf-life refers to “the period of time under defined conditions of storage, after manufacture or packing, for which a food product will remain safe and fit for use.”

Table 5. Cases on the Shelf-Life of Products

<table>
<thead>
<tr>
<th>Case No., Filing Date</th>
<th>Case Name</th>
<th>Complainant</th>
<th>Product</th>
<th>Procedural Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>DS5, 20.7.1995</td>
<td>Korea – Shelf Life</td>
<td>US</td>
<td>Sausages, canned meat, etc.</td>
<td>Mutually agreed solution</td>
</tr>
<tr>
<td>DS20, 8.11.1995</td>
<td>Korea – Bottled Water</td>
<td>Canada</td>
<td>Bottled water</td>
<td>Mutually agreed solution</td>
</tr>
</tbody>
</table>

The shelf-life of food products is increasingly considered to be a crucial element in informing consumers about and seeking to ensure food safety. Rules about shelf-life affect when, and possibly whether a product can actually be marketed. Such rules may especially affect imports. They may thus in practice may have different effects on domestic and imported products.

Most countries use shelf-lives or “use-by” dates which are determined, usually but not always, by the manufacturer. DS5 Korea –

h/tratop_e/dispu_e/cases_e/ds41_e.htm (last visited Sept. 12, 2012).

97 World Trade Organization, Korea – Measures Concerning Inspection of Agricultural Products, Request for Consultation by the United States, WT/DS41/1, G/L/76, G/SPS/W/64, G/TBT/D/6, G/AG/W/25 (May 31, 1996), http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds41_e.htm (last visited Jan. 23, 2013).

98 World Trade Organization, supra note 98.

99 Dukgeun Ahn, supra note 97.

100 DOMINIC MAN, SHELF LIFE: FOOD INDUSTRY BRIEFING SERIES 3 (2002).

Measures Concerning the Shelf-Life of Products exemplifies the conflict over who should determine shelf-life. Brought soon after the WTO was established, it was another case in which the US sought to use the WTO to open Korean markets and improve its trade balance. The shelf-life of many food products sold in Korea was determined by national legislation, the Korean Food Code. In contrast, the US does not have any uniform national system, an open-dating system addressed principally to retailers rather than a sell-by or use-by system is frequently used, dates are usually determined by manufacturers, and some food products are undated.¹⁰² The Republic of Korea in February 1994 applied its Food Code in enforcing a 30-day shelf life against United States sausages. According to the US, the period was so short that “by the time a product cleared … customs and reached the shops, the dates were close to expiration or had already expired.”¹⁰³ The dispute expanded to other products. Subsequently the main trade organizations of the United States meat industry, the National Cattlemen’s Association, the National Pork Producers’ Council and the American Meat Institute, filed a Section 301 petition against Korea. The USTR accepted the Section 301 petition in November 1994. Its investigation reportedly showed that “South Korean shelf-life standards were not supported by scientific studies and were applied in an arbitrary and discriminatory manner.”¹⁰⁴ The US and Korea began bilateral consultations but could not resolve the dispute, so the US requested consultations through the WTO. The US complained that the Korean Food Code requirements regarding the shelf-life of numerous products were contrary to Article III (national treatment) and Article XI (general elimination of quantitative restrictions) GATT, Article 2 (basic rights and obligations) and Article 5 (risk assessment and determination of the appropriate level of sanitary protection) of the SPS Agreement, Article 2 of the TBT Agreement (preparation, adoption and application of technical


¹⁰⁴ Id.
regulations by central government bodies), and Article 4 (market access) of the Agreement on Agriculture.  

Within a month the parties reached a mutually satisfactory solution. The discussions were not public, and available documents do not indicate what role specific WTO agreements played in the discussions, though it is likely that the parties invoked all three WTO agreements that formed the basis of the US complaint. The US and Korea agreed that, on the basis of the WTO principles of most-favored-nation and national treatment, shelf-life requirements for vacuum-packed chilled beef and pork, frozen meat, certain other frozen foods and numerous dried, packaged, canned or bottled products would be determined by the manufacturer of the product. The storage temperature of the products for which shelf-life requirements were removed from the Korean Food Code was also to be determined by the manufacturer. Korea also agreed to ensure that maximum residue levels for “imported excretory organ meats” (such as kidney) were consistent with Codex Alimentarius international standards. Korea subsequently notified the WTO Secretariat of the Harmonized System (HS) headings for the products for which self-life requirements had been removed from the Korean Food Code; it noted however that the classification method used in the Food Code differed from the HS system “in its basic purpose, nature, scope and coverage” so the fit between the two classification systems was not exact. Korean Food Code shelf-life requirements for other products were also eliminated. This mutually agreed solution set aside numerous provisions of the Korean Food Code. The mutually agreed solution was without prejudice to the rights or obligations of the parties under the WTO agreements.  

The USDA considered the case to be “a precedent-setting case for settling disputes on trade barriers couched as food safety requirements

---


106 World Trade Organization, Korea – Measures Concerning the Shelf-Life of Products, Notification of Mutually Agreed Solution, WT/DS5/5, G/SPS/W/27, G/TBT/D/3, G/AG/W/8 (July 31, 1995); id. at Corrigendum.

107 Id. at Revision, Communication from the Republic of Korea, WT/DS5/5/Add.1/Rev.1; id. at Communication from the Republic of Korea, Addendum, WT/DS5/5/Add.4.

108 Id. at WT/DS5/5/Add.2.

109 Id. at WT/DS5/5/Add.3; id. at WT/DS5/5/Add.5, G/SPS/W/27/Add.5 (a number of products remained subject to the shelf-life requirements in the Korean Food Code).

110 World Trade Organization, supra note 108.
under WTO Article XX".\(^{111}\) For the US, it was also a victory for the interests of the American meat industry and for the ideology of open markets. From the Korean standpoint, however, the WTO dispute settlement procedure provided an institutional mechanism for exporting and imposing the United States’ decentralized, market-based shelf-life system. In other words, it exported US shelf-life practices. Date-marking of foods, including shelf-life, has been a controversial issue in international discussions about food safety. It does not appear that international standards as such require shelf-life to be set by the manufacturer.\(^{112}\) For example, in September 2012, the Twelfth Session of the FAO/WTO Coordinating Committee for North America and the South West Pacific agreed to discontinue consideration of a discussion paper introduced by New Zealand on a harmonized approach to date marking.\(^{113}\) In this light, we may also recognize the case as constituting a victory, not only for the US shelf-life marking system, but also for a vision of the food economy as a global rather than a local activity. The case exported a view of food production, supply and consumption based on industrialized agriculture, global supply chains and international trade in food products, with market regulation determined by bilateral agreement, to the disadvantage of local food production, the consumption of local products and local regulation of local markets. From this perspective, it is easier to understand the logic underlying US recourse to WTO law in order to request consultations and thus begin the WTO dispute settlement process. It is less easy to grasp whether basic WTO principles were actually applied, as distinguished from justifying particular positions in the negotiations. Certainly a manufacturer may have the greater knowledge and be most capable of carrying out testing to determine the shelf-life for its products. However, this is not the only means of determining shelf-life, and there is no indication in the available documents of the case that Korean law actually discriminated among trading partners or against foreign products.

\(^{111}\) United States Department of Agriculture, supra note 105. Article XXII GATT refers to the settlement of disputes by consultation; DSU art. 4.

\(^{112}\) Codex Alimentarius Standard on Labelling of Prepackaged Foods (CODEX STAN 1-1985) applies to date marking, including date of manufacture, date of packaging, sell-by date, date of minimum durability and use-by date. Sell-by date refers to shelf-life. However, this standard does not give any indication about how the shelf-life or other date marking is to be determined. Nor are further details provided in Article 4.7 of the Standard.

DS20 Korea – Bottled Water also concerned shelf-life. After the US and Korea reached a mutually agreed solution in Korea – Shelf-Life, Canada separately complained about Korean measures setting the shelf-life of bottled water at six months from its production date, as well as about the Korea prohibition on certain treatment methods. Canada requested consultations in November 1995.\footnote{World Trade Organization, Korea – Measures Concerning Bottled Water, Request for Consultations by Canada, WT/DS20/1G/L/33, G/SPS/W/35G/TBT/D/4, G/MA/3, G/AG/w/14 (Nov. 22, 1995), http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds20_e.htm.} The parties agreed that Korea would make its best efforts to ensure transparency of procedures for extending the shelf-life of bottled water. In addition, by focusing on procedures rather than substance, the parties reached agreement on shelf-life. They agreed that Korea would make its best efforts to ensure transparency of procedures for extending the shelf-life of bottled water. However, Canada recorded its views that it considered the undertaking to be merely a temporary solution and that it intended “to continue to encourage Korea to adopt a manufacturer determined shelf-life system for bottled water.”\footnote{Id. at Notification of Mutually Agreed Solution, WT/DS20/6G/L/33, Add.1.} As with the US in Korea – Shelf Life, Canada achieved its aim of gaining ground in the process leading toward a system determining shelf-life which was market-based rather than state-based and which favored the development of a globalized food industry.

### III Discussion

#### A Introduction

Based on the preceding case summaries, this section looks at the number and types of cases and then considers which WTO Members were involved and how, the ways in which their disputes were resolved, who won the cases, and the implications for the globalization of food safety rules and practices. It also notes how dispute settlement in cases involving food safety is related to dispute settlement in WTO cases in general.

#### B Number and Categories of Cases

The paper presented a total of 21 cases.\footnote{One case (DS20 Korea – Bottled Water) is counted more than one because it falls into more than one category (pre-importation production and treatment measures, and shelf-life).} The cases fall into five categories: pre-importation production and treatment measures (4 cases),
post-importation testing and inspection (6 cases), import procedures (7 cases), import standards (2 cases), and rules about product shelf-life (2 cases).

C Participants

Leaving aside third party participants, the cases involved a total of 18 WTO Members. The United States was involved in the most cases with a total of 9 cases (5 as complainant and 5 as respondent), followed by Korea (6 as respondent), Canada (4 as complainant), EC (2 as complainant, 2 as respondent), Hungary (3 as complainant), Argentina (2 as complainant), Australia (2 as respondent), Turkey (2 as respondent). All other Members were involved in only one case each. These statistics reflect, in particular, the very active role of the US in the WTO dispute settlement system generally, the US government policy of supporting its exporters, and the desire of other WTO Members to have access to the large US market. They also reflect the attraction for food exporting countries of rapidly developing markets, in particular Korea. Overall, the statistics appear to be generally consistent with the pattern of WTO cases since 1995, with the notable exception that India has been much more active in WTO litigation overall than the food safety case law statistics might suggest.117

We can also analyze participation in these food safety cases according to the per capita income classification of the parties at the time the case was brought. Based on World Bank income classification of countries,118 the parties in these cases included 7 high-income countries (Australia, Canada, European Community, Korea, New Zealand, Switzerland and US), 5 upper-middle income countries (Argentina, Croatia, 

118 This income classification of countries according to per capita income is based on the World Bank classification for the year in which the case was brought, see WTO Complaints Sorted by Type of Economy, WORLDTRADELAW, http://www.worldtradelaw.net/dsc/database/complaintsclassification.asp (last visited Jan. 24, 2013). The World Bank fixes income classification of countries on July 1 each year. The most recent criteria are High Income $12,476 or more, Upper Middle Income $4,036-$12,475, Lower Middle Income $1026-$4,035 and Low Income $1,025 or less. See How we Classify Countries, THE WORLD BANK, http://data.worldbank.org/about/country-classifications (last visited Jan. 24, 2013). This range does not of course apply to all cases considered here, notably the older cases. It is given for general indicative purposes only. The income classification of countries when the case was brought is more important for present purposes.
Hungary, Mexico and Slovakia), 4 lower-middle income countries (Ecuador, Philippines, Romania and Turkey) and 2 low-income countries (Nicaragua and India). The classification according to income category is far from perfect. Nevertheless it is useful in giving a general indication of the per capita income differences between the parties that participate in WTO cases. This breakdown of parties in the food safety cases examined here appears to be generally consistent with the overall pattern of participation in WTO case law since 1995.

If, however, we distinguish between complainants and respondents according to income classification of the parties, a more interesting picture emerges. There are 21 cases with a total of 42 participants. Table 6 shows complainants and respondents in the food safety cases according to their income classification. For each entry, it gives the numbers and percentage [of 42 total participants].

Table 6. Income Classification of Complainants and Respondents in Food Safety Cases Considered Here

<table>
<thead>
<tr>
<th>Income Classification of Party</th>
<th>Complainant</th>
<th>Respondent</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>High Income</td>
<td>13 (31%)</td>
<td>14 (33%)</td>
<td>27 (64%)</td>
</tr>
<tr>
<td>Upper Middle Income</td>
<td>5 (12%)</td>
<td>3 (7%)</td>
<td>8 (19%)</td>
</tr>
<tr>
<td>Lower Middle Income</td>
<td>2 (5%)</td>
<td>3 (7%)</td>
<td>5 (12%)</td>
</tr>
<tr>
<td>Low Income</td>
<td>1 (2%)</td>
<td>1 (2%)</td>
<td>2 (4%)</td>
</tr>
<tr>
<td>Total</td>
<td>21 (50%)</td>
<td>21 (50%)</td>
<td>42 (100%)</td>
</tr>
</tbody>
</table>

This table shows that high-income countries bring the most cases and also are targeted most often as respondents, reflecting their export capacity and the attraction of their markets. Upper middle income countries participated slightly more often as complainants than as respondents, though their total participation was much lower than that of high income countries. Lower middle income countries and lower income countries participate most frequently as respondents, reflecting their trade balance and weak capacity to participate in the WTO.

---

119 WTO Complaints Sorted by Type of Economy, supra note 120; How we Classify Countries, supra note 120.
121 See generally Marc Busch, Eric Reinhardt & Gregory Shaffer, Does Legal Capacity Matter: A Survey of WTO Members, 8 WORLD TRADE REV. 559 (2009).
In this respect, however, food safety cases are not unique. While recognizing the potential shortcomings of statistics based on such a small universe of cases (21 cases in total), we can push the calculations one step further and compare these food safety cases to all WTO cases since 1995. The breakdown of WTO cases to date is shown in Table 7.

Table 7. Income Classification of Complainants and Respondents in All WTO Cases

<table>
<thead>
<tr>
<th>Income Classification of Party</th>
<th>Complainant</th>
<th>Respondent</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>High Income</td>
<td>274</td>
<td>263</td>
<td>537</td>
</tr>
<tr>
<td>Upper Middle Income</td>
<td>103</td>
<td>92</td>
<td>195</td>
</tr>
<tr>
<td>Lower Middle Income</td>
<td>66</td>
<td>76</td>
<td>142</td>
</tr>
<tr>
<td>Low Income</td>
<td>28</td>
<td>24</td>
<td>52</td>
</tr>
<tr>
<td>Total</td>
<td>471</td>
<td>455</td>
<td>926</td>
</tr>
</tbody>
</table>

Note: This Table is drawn from WorldTradeLaw.Net, WTO Complaints Grouped by Income Classification, http://www.worldtradelaw.net/dsc/database/classificationcount.asp (last visited 24 January 2013).

This pattern is consistent with the hypothesis of an implicit “institutional bias” in the WTO dispute settlement system, if by this we refer to the way in which the institution reflects an orientation to using or not using the system. At least as illustrated by the cases examined here, however, this bias is against low-income countries rather than against developing countries as a whole. In other words, it refers to the use of the system by specific groups of WTO Members classified according to per capita income. It does not necessarily refer to whether Members in such groups win cases or not, as will be seen below. WTO Members in the low-income category usually, if not always, have a lower trade volume and less legal and institutional capacity than other WTO Members.

Now we can compare the 21 food safety cases with 42 participants to the total of 455 WTO cases with 926 participants according to the in-
come classification of complainants and respondents.\textsuperscript{124} Table 8 presents a comparison of the food safety cases considered here with the totality of WTO cases to date according to the income classification of complaints and respondents.

Table 8. Comparison of Food Safety Cases Considered Here and Total WTO Cases According to Income Classification of Complainants and Respondents

<table>
<thead>
<tr>
<th></th>
<th>High Income</th>
<th>Upper Middle Income</th>
<th>Lower Middle Income</th>
<th>Low Income</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Complainant:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Food Safety</td>
<td>31%</td>
<td>12%</td>
<td>5%</td>
<td>2%</td>
<td>50%</td>
</tr>
<tr>
<td>Complainant:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>WTO</td>
<td>30%</td>
<td>11%</td>
<td>7%</td>
<td>3%</td>
<td>51%</td>
</tr>
<tr>
<td>Respondent:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Food Safety</td>
<td>33%</td>
<td>7%</td>
<td>7%</td>
<td>2%</td>
<td>49%</td>
</tr>
<tr>
<td>Respondent:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>WTO</td>
<td>28%</td>
<td>10%</td>
<td>8%</td>
<td>3%</td>
<td>49%</td>
</tr>
<tr>
<td>Total:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Food Safety</td>
<td>64%</td>
<td>19%</td>
<td>12%</td>
<td>4%</td>
<td>99%</td>
</tr>
<tr>
<td>Total: WTO</td>
<td>58%</td>
<td>21%</td>
<td>15%</td>
<td>6%</td>
<td>100%</td>
</tr>
</tbody>
</table>

The two sets of calculations are strikingly similar. From the standpoint of income classification groupings of the complainants and respondents, the food safety cases and WTO cases in general present virtually the same profile. From this standpoint at least, there is nothing special about the food safety cases considered here. The case law is dominated by high income countries, with upper middle income and lower middle income countries playing a much less significant role, and low income countries hardly being visible at all.

\textbf{D Mode of Settlement}

Next, let us consider how disputes are settled. Table 9 presents the procedural outcomes of the 21 cases on food safety.

\textsuperscript{124} These calculations are my own (FS), based on the statistical information provided by WorldTradeLaw.Net, see \textit{WTO Complaints Grouped by Income Classification}, \textit{supra} note 122.
Table 9. Procedural Outcome of Cases on Food Safety

<table>
<thead>
<tr>
<th>Case Numbers</th>
<th>Procedural Outcome</th>
<th>Total Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>DS5, DS20, DS20, DS20, DS72, DS237, DS287, DS297, DS391</td>
<td>Mutually agreed solution</td>
<td>8</td>
</tr>
<tr>
<td>DS240, DS284</td>
<td>Complaint withdrawn, measure abrogated and complaint withdrawn</td>
<td>2</td>
</tr>
<tr>
<td>DS3, DS41, DS100, DS133, DS144, DS256</td>
<td>In consultation &gt; 3 years</td>
<td>6</td>
</tr>
<tr>
<td>DS270, DS389</td>
<td>Panel established &gt; 3 years ago but not composed</td>
<td>2</td>
</tr>
<tr>
<td>DS448</td>
<td>In consultation &lt; 3 years</td>
<td>1</td>
</tr>
<tr>
<td>DS430, DS447</td>
<td>Panel established &lt; 3 years ago but not yet composed</td>
<td>2</td>
</tr>
</tbody>
</table>

Eight cases were resolved by a mutually satisfactory agreement. One case was withdrawn. In another case the challenged measure was abrogated and the case was withdrawn. Six cases were at least nominally in consultation even after a period of three years. In two cases a panel was established more than three years ago but had not yet been composed. These cases are sufficiently old that we may consider them to have been settled by stalemate or de facto withdrawal, even though no procedural outcome was notified to the WTO. One recently registered case is still in consultation. In two recent cases a panel has been established but not yet composed. In other words, out of a total of 21 cases, 18 cases have been settled by negotiations, were withdrawn, or otherwise ended in apparent stalemate during the consultation phase of the WTO dispute settlement process. So far, none of these cases have proceeded to a panel, and none have been appealed to the Appellate Body. Since so far only one of these cases has proceeded to a panel, these findings do not lend support Busch and Reinhardt’s suggestion suggest that democratic states are most likely to settle their disputes early and cooperatively because their governments are accountable at the ballot box and do not want to risk greater publicity of alleged breaches of WTO law.

---

125 DS20 is counted twice because it involves two distinct issues.
127 Id. at 167.
From this perspective, the food safety cases examined here might seem to differ significantly, not only from the high-profile SPS and TBT cases which have been heard by a panel or by a panel and the Appellate Body, but also from WTO cases in general. They differ of course from cases which, following consultations, went to a panel and sometimes also to the Appellate Body, because the cases examined here were all settled before the panel stage, except for those few cases (see above) for which a panel has been established but not yet composed. Regarding WTO cases in general, however, the food safety cases considered here are typical of all WTO cases in their mode of settlement. On the basis of a study of 600 GATT/WTO disputes from 1948 through 1999, Busch and Reinhardt report that 60% of all disputes end before a panel ruling, most without even a request for a panel. In about 55% of cases a panel is not established, and another 8% end before issuance of a panel report. According to another study, between 1 January 1995 and mid-December 1999, there were 185 requests for consultations, of which 78 were resolved. Forty-one of the 78 (53%) were resolved without recourse to a panel, “thirty … by bilateral settlement, three by withdrawal of the contested measure, and seven by withdrawal of the request for establishment of a panel or other provable abandonment.” “Settlement and the withdrawal of cases are thus the norm, not the exception.”

On the whole, the DSU “is crafted to facilitate pre-panel resolutions.” Consultations are confidential, with no published record. Usually consultations focus on factual issues, since governments are often reluctant to discuss legal issues, which could be used in any subsequent panel proceedings. In addition, as Davey and Porges report, “[a] typi-
cal consultation lasts no longer than two to three hours and takes place in a small WTO meeting room or a Geneva mission. Consultations are generally conducted in English with no interpreters, no transcript, and no taping.135 Usually only the parties to the dispute are involved, unless a party approves the request of other Members with a substantial trade interest in the dispute to join the consultations.136 Any mutually accepted solution reached during the consultation phase must be compatible with the WTO agreements.137 Parties are required to notify mutually agreed solutions to the DSB and relevant Councils and Committees.138 If a dispute proceeds to litigation, the panel, the Appellate Body and the DSB consider only whether consultations have taken place as required. They do not review the conduct or substance of consultations, so there is no formal WTO supervision over the requirement to consult in good faith or the adequacy of consultation.139

Now we can consider the outcomes of these cases in relation to several hypotheses regarding the escalation of WTO disputes, in other words, whether disputes are settled during consultations or whether they continue to the panel/Appellate Body stage.140 Guzman and Simmons analyze how the nature of the disputed issue affects the mode of dispute

135 William J. Davey & Amelia Porges, supra note 136, at 704. When the article was written, Professor Davey was Director of the Legal Affairs Division of the WTO, and Dr. Porges was Senior Counsel for Dispute Settlement of the United States Trade Representative.
136 DSU art. 4.11.
137 DSU art. 3.5. For further discussion, see Hélène Ruiz-Fabri, supra note 136.
138 DSU art. 3.6. However, most mutually agreed solutions are not notified to the WTO, or if at all are notified after full implementation: see Hélène Ruiz-Fabri, supra note 139, at 109, 116.
139 Panel Report, European Communities—Regime for the Importation, Sale and Distribution of Bananas, ¶ 7.17, WT/DS27/R/USA (May 22, 1997). The DSB is not involved; no panel is involved and the consultations are held in the absence of the Secretariat; Panel Report, Korea – Taxes on Alcoholic Beverages, ¶ 10.19, WT/DS75/R, WT/DS84/R (Sept. 17, 1998) (adopted Feb. 17, 1999) (“In our view, the WTO jurisprudence so far has not recognized any concept of ‘adequacy’ of consultations. The only requirement under the DSU is that consultations were in fact held, or were at least requested, and that a period of sixty days has elapsed from the time consultations were requested to the time a request for a panel was made. What takes place in those consultations is not the concern of a panel. … [C]onsultations are a critical and important part of the DSU. But, we have no mandate to investigate the adequacy of the consultation process that took place between the parties”); for further discussion, see Christiane Schuchhardt, supra note 136, at 1222–26.
settlement. They argue that “continuous, easily divisible problems would tend to be resolved in the consultation phase, while issues that have an all-or-nothing quality—lumpy issues—are more likely to escalate to the panel phase.”\textsuperscript{141} The disputes considered here concern pre-importation production and treatment methods, import bans by means of procedures, import bans by means of health and quality standards, testing and inspection and shelf-life. In Guzman and Simmons’ terms, they involve discontinuous, or all-or-nothing, issues.\textsuperscript{142} The analysis here is admittedly based on a small universe of cases. It shows that these food safety cases were, with few exceptions, settled during the consultation phase. It does not support Guzman and Simmons’ main hypothesis. It gives slightly more support to their suggestion that democracies “tend to take lumpy problems to panels.” DS270 (brought by the Philippines against Australia), DS389 (brought by US against EC), DS430 (brought by US against India) and DS447 (brought by Argentina against the US) all involved democracies. However, in DS270 and DS389 a panel was established but even after three years has not yet composed; DS430 is too recent; and in DS447 a panel was established only on 28 January 2013. The number of cases examined here is too small to support or contest Schuchhardt’s finding that larger Members take consultation seriously in cases with each other, while in cases against smaller Members they frequently view consultations merely as a formal step on the way to a panel.\textsuperscript{143}

In contrast, the cases analyzed here would tend to support Bernauer and Sattler’s finding that disputes over environment, health and safety (EHS) are not more likely than other cases to escalate from consultation to a panel. None of the cases analyzed here actually went before a panel, so it is not possible to comment on their other hypothesis to the effect that if EHS cases do go to a panel, they “are more likely than other disputes to escalate into compliance disputes.”\textsuperscript{144} In another recent paper, Sattler, Spilker and Bernauer distinguish between WTO disputes concerned with enforcement and those concerned with reduction of complexity and clarification of rules. They argue that the WTO DSM focuses

\begin{itemize}
\item \textsuperscript{141} Andrew Guzman & Beth A. Simmons, \textit{To Settle or Empanel? An Empirical Analysis of Litigation and Settlement at the World Trade Organization}, 31 J. LEGAL STUD. 205, 227 (2002).
\item \textsuperscript{142} Id. at 211 & note 17.
\item \textsuperscript{143} Christiane Schuchhardt, \textit{supra} note 136, at 1199 & 1225.
\end{itemize}
primarily on the former, with more complex or more politicized disputes being more likely to escalate to the panel stage.\textsuperscript{145} As virtually all of the cases analyzed here were settled during consultations, and the complainant won in all cases, they would appear to be most concerned with enforcement; we simply have no information about whether and how the consultations might have clarified the rules. However, the hypothesis that complex or more politicized cases are more likely to escalate to the panel stage is borne out by the only cases in which a panel was established. All four of these cases, DS270 Australia – Fresh Fruit and Vegetables (complainant: the Philippines against Australia), DS389 EC - Poultry (complainant: US), DS430 India – Agricultural Products (complainant: US against India), and DS447 US – Animals and Meat (complainant: Argentina) were highly politicized. They signal long-standing structural conflicts, which are deeply embedded in a set of multi-stranded continuing relations and complex domestic legal regulatory schemes.

Table 10 indicates the mode of settlement according to the income categories of the complainant and respondent. The cases examined here involved the following complainant/respondent pairs: HC vs. HR, HC vs. UMR, HC vs. LR, UMC vs. HR, UMC vs. UMR, UMC vs. LMR, UMC vs. LR, LMC vs. HR, LMC vs. LMR, and LC vs. LMR.

Table 10. Mode of Settlement by Income Category of Parties

<table>
<thead>
<tr>
<th>Parties by Income Category (Respondent First)</th>
<th>MAS</th>
<th>Withdrawn</th>
<th>In Consultation &gt; 3 Years But Not Composed</th>
<th>Panel Established &gt; 3 Years &lt; 3 Years</th>
<th>In Consultation &lt; 3 Years</th>
<th>Panel Established &lt; 3 Years</th>
</tr>
</thead>
<tbody>
<tr>
<td>HC/HR</td>
<td>DS5, DS20, DS20, DS72, DS287, DS391</td>
<td>DS3, DS41, DS100, DS144</td>
<td>DS389</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>HC/UMR</td>
<td>DS133</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>HC/LR</td>
<td>DS133</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>UMC/HR</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>DS447, DS448</td>
<td></td>
</tr>
</tbody>
</table>

Based on these cases, it would seem that parties of the same income category tend to (a) reach a mutually agreed solution, or (b) have a long consultation period with no notified result, or (c) move to the beginning of litigation without proceeding further, with a panel being established but not composed, even after three years. In cases in which the parties belong to different income categories, the patterns are different. If the complainant belongs to a higher income category than the respondent, the case tends to settle during consultations. I hypothesise that the settlement reflects the power imbalance between the two parties, which renders potentially very effective any threat by the complainant to move towards request for a panel. However, if the respondent belongs to a higher income category than the complainant, the case ends more often with withdrawal of the complaint. In this case, I hypothesise that the settlement reflects either the respondent’s capacity at least partly to satisfy the complaint or the respondent’s refusal to change its law. In the two cases of UMC/HR (DS447, DS448) a panel has been established but is not yet composed. In the single LMC/HR case (DS270) a panel has not yet been composed even three years after its establishment. In the single LC/LMR case (DS284) the complaint was withdrawn. These cases thus tend to support Schuchhardt’s conclusion that, because of their weaker bargaining power, developing countries are less likely to settle a dispute during consultations in a case against a developed country and more likely to go to the panel stage. Overall, the cases examined here support Palin’s conclusion, based on all cases during the first five years of the WTO, that “[n]o one category of dispute—developed v. developed Member, developed v. developing Member, developing v. developed Member, or developing v. developing Member—appears to have a markedly different rate of settlement.”

E  Who Wins

---

146 Christiane Schuchhardt, supra note 136, at 1222–26 & 1230.
147 C. Christopher Parlin, supra note 132, at 569.
We can carry the analysis further by focusing on who complains, against whom, and who wins. For the 21 cases, Table 11 shows the winners according to two dimensions: whether the winner was the complainant (or not), and the winner’s income category compared to that of the loser. Parties are grouped, as above, into four categories: High Income, Upper Middle Income, Lower Middle Income, and Low Income. The left-hand column indicates cases brought by Members in each category against Members in each of the other categories. Complainants are indicated first. Most cases (11 of 21) were brought by High Income WTO Members against other High Income Members. All of these cases, however, involved Members which, with one exception (Canada-US), were not geographically contiguous (US-Korea, Canada-Korea, New Zealand-EC, EC-Australia, USA-EC). In all cases, complainants and respondents were important trading partners for at least one and often both of the pair. Of the remaining ten cases, more than half were brought by higher income countries against lower income countries. In four of these ten cases, however, the complainant belonged to a lower income category than the respondent in four cases. In DS447 and DS448 the complainant was an Upper Middle Income country (Argentina in both) and the respondent was a High Income country (US in both). In DS270 the complainant was a Lower Middle Income country (Philippines) and the respondent was a High Income country (Australia). In DS284 a Low Income country (Nicaragua) was the complainant and an Upper Middle Income country (Mexico) was the respondent. Some potential category pairs did not produce any cases (HC/LMR, LMC/UMR, LMC/LR, LC/HR, LC/LMR, LC/LR). Lower Middle Income and Low Income Members participated in fewer food safety cases than did other groups of Members.

Table 11. Complainants, Respondents and Winners in Food Safety Cases

<table>
<thead>
<tr>
<th>Parties by Income Category (Respondent first)</th>
<th>Case Numbers</th>
<th>Number of Cases</th>
<th>Complainant Wins</th>
<th>Income Category of Winner</th>
</tr>
</thead>
<tbody>
<tr>
<td>HC/HR</td>
<td>DS3, DS5, DS20, DS20, DS41, DS72, DS100, DS144, DS287, DS389, DS391</td>
<td>11</td>
<td>11</td>
<td>parties equal</td>
</tr>
<tr>
<td>HC/UMR</td>
<td>DS133</td>
<td>1</td>
<td>1</td>
<td>higher</td>
</tr>
<tr>
<td>HC/LMR</td>
<td>none</td>
<td>none</td>
<td></td>
<td></td>
</tr>
<tr>
<td>HC/LR</td>
<td>DS430</td>
<td>1</td>
<td></td>
<td>in progress</td>
</tr>
</tbody>
</table>

© 2013 Peking University School of Transnational Law
Based on this distribution of complainants and respondents, Table 11 indicates who won according to two dimensions. First, the fourth column from the left indicates cases in which the winner was the complainant. The complainant won in all 18 cases that have been concluded; three of the 21 cases are still in progress. Second, in all cases the winner was of equal or higher income category than the loser. None of these cases went to a panel, though in some cases (DS389, DS270, DS430, and DS447) a panel was established but has not (or not yet) been composed. In the absence of an adjudicated settlement I treat three different situations as a win for the complainant. (a) A mutually agreed settlement is treated as a win for the complainant, because if the complainant had not achieved its (main) objectives it would have requested a panel. Mutually agreed settlement occurs in the shadow of and in the light of a threat to request a panel. (b) The complainant is considered to have won the case if the case has been in consultation for more than three years (DS3, DS41, DS256, and DS389), even though no mutually agreed settlement has been notified to the WTO. I assume that, if the complainant were not satisfied with the result, it would have requested a panel before the end of three years of consultations.148 (c) The complainant is considered as having

---

148 This cut-off is consistent with the assumption by Guzman and Simmons that a panel is “highly unlikely to be formed” in cases which have been in consultation for
won the case if a panel was established more than three years ago but it has not yet been composed (DS287 and DS270). This is consistent with Schuchhardt’s hypothesis that developed countries tend to settle cases against other developed countries, and developing countries tend to settle cases in which they are respondents against complaints brought by developed countries.\textsuperscript{149} It is also consistent with Palmer and Roberts’ conclusions about the role of power in negotiations.\textsuperscript{150} In sum, winners tend to be the complainants, and they are usually but not always of equal or higher income category than respondents, unless the case goes to a panel or ends in stalemate. In the first respect at least, these cases echo the pattern of WTO cases in general.\textsuperscript{151}

IV Conclusion

The WTO dispute settlement system deals with food safety more frequently than is sometimes thought. If we are interested in the role of the WTO in regulating food safety, we cannot limit our attention to the relatively small number of high-profile WTO cases that deal with international standards. This article analyzed all WTO cases up to now which arose under WTO agreements other than or in addition to the SPS or TBT Agreements and which were not directly concerned with relations between the WTO and international standards bodies. Virtually all such cases were settled, withdrawn or reached stalemate during consultation; in only a very few cases was a panel established. Complainants always won, and except when the case went to a panel, the winner was of equal or higher income category than the respondent.

These cases are the “hidden jurisprudence” of the WTO with regard to food safety. They are not high-profile cases well known to the public. They do not reach the upper levels of the WTO dispute settlement system, and indeed they rarely proceed to the panel stage. Instead they are mostly handled, by settlement or otherwise, during consultations. Disputes are resolved, or at least concluded, by bilateral negotiations, sometimes between very unequal parties, rather than by decisions taken by a third party

more than 3 years. In their study of settlement and litigation before the WTO, they coded such cases as “nonpaneled,” see Andrew Guzman & Beth A. Simmons, \textit{supra} note 143, at 212.

\textsuperscript{149} Christiane Schuchhardt, \textit{supra} note 136, at 1199 & 1231.

\textsuperscript{150} \textsc{Michael Palmer & Simon Roberts}, \textsc{Dispute Processes: ADR and the Primary Forms of Decision Making} 70–71 (1998).

\textsuperscript{151} Matthew Turk, \textsc{Why Does the Complainant Always Win at the WTO: A Reputation-Based Theory of Litigation at the World Trade Organization}, 31 \textsc{Nw. J. Int’l L. & Bus.} 385 (2011).
on the basis of multilaterally agreed rules. These processes represent “bargaining in the shadow of WTO law,” if only because both complainants and respondents initially justify their position in terms of compatibility with WTO law. This is even though, as others have argued, in WTO law the “shadow” is much less menacing than in domestic courts, because respondents who lose in WTO cases often do not comply with panel, Appellate Body or Dispute Settlement Body reports and, in any event, compliance in the WTO setting falls along a spectrum instead of being an either-or situation.152

In a second sense also, these cases represent the “hidden jurisprudence” of the WTO. This sense refers to the basic philosophy or orientation of the WTO regarding food safety. It has two aspects. First, food safety is treated in these cases as simply another trade issue, rather than as a distinct subject matter with economic, political, social and cultural implications far beyond trade, as it should be. Second, complainants use the WTO dispute settlement mechanism to export and if possible impose their national standards and practices. Of the 21 cases, the US won 5, Canada won 4, and the EC [now EU] won 2, so that the WTO dispute settlement system served to globalize their local law and practices. This pattern reflects a distribution of power, which is becoming less and less appropriate in the contemporary world.153

Are these results compatible with WTO law? In principle, the answer should be “yes.”154 However, a mutually agreed solution, or other pre-panel settlement, does not necessarily resolve questions of the interpretation and application of WTO law. Nor does it decide which of the two parties’ view of the law is legally correct. The basic features of consultations include a lack of “hard constraints” regarding the identification of legal issues.155 Consequently, it is open to question whether a pre-panel conclusion, except for a mutually agreed solution, is consistent with Article 3.7 DSU to the effect that “In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are

154 DSU art. 3.6.
found to be inconsistent with the provisions of any of the covered agreements. Indeed, Article 3.7 DSU suggests that, in legal terms, the withdrawal of a contested measure belongs not to the consultation stage but instead to later stages in the WTO dispute settlement procedure, namely the reports of the panel, Appellate Body and Dispute Settlement Body. The interpretation that the consultation phase itself does not compel withdrawal of a measure is strengthened by Article 4.5 DSU, which provides that “[i]n the course of consultations in accordance with the provisions of a covered agreement, before resorting to further action under this Understanding, Members shall attempt to obtain satisfactory adjustment of the matter.” Satisfactory adjustment based on good faith negotiations, as distinguished from mere withdrawal of the challenged measure, is the core of a mutually agreed solution. So far, panels have not reviewed whether the good faith requirement was met. In consultations, the very meaning of what is “satisfactory” in the sense of acceptable to both parties is inevitably informed by considerations of relative power, even though both power and rules are present, in varying degrees and serving varying purposes, in all forms of dispute settlement.

This suggests two points for countries such as China that are developing a complete system of food safety standards. First, such countries should pay special attention to the consultation phase of WTO dispute settlement. This means that they should aim to participate in relevant consultations as much as possible, in the same way that China has participated very actively as a third party in general. The cases show that China frequently reserved its rights under Article 10 DSU to participate as a third party once a panel had been established, but that it rarely exercised its rights under Article XX GATT and Article 4.11 DSU to participate in consultations. While this pattern might be ascribed partly to the Chinese government’s policy during China WTO “learning period,” one might conclude that this period has now ended and suggest that China should participate more actively throughout the WTO dispute settlement procedures, including consultations. As we have seen, many disputes end at the consultation phase, and certainly China and other BRICSAM countries could benefit by giving this phase more attention.

156 DSU art. 3.7.
157 DSU art. 4.5.
158 Christiane Schuchhardt, supra note 13.
Second, China and other BRICSAM countries are well advised for the time being to use a strategy of “assertive legalism” or of “aggressive legalism.”

“Assertive legalism” means “primarily aim[ing] to protect … legitimate trade interests by increasingly resorting to WTO rules.” In contrast, “aggressive legalism” means “a conscious strategy where a substantive set of international trade rules can be made to serve as both a ‘shield’ and ‘sword’ in trade disputes among sovereign states.”

The core idea behind aggressive legalism is the active use of the legal rules in the treaties and agreements overseen by the WTO to stake out positions, to advance and rebut claims, and to embroil all concerned in an intricate legal game…[i]t is meant to be measured, slow, and cautious, carefully trapping everything into the legitimate game of legal tactics.

Both “assertive legalism” and “aggressive legalism” are easy to distinguish from legal passivism. They differ, however, in the extent to which they embody a conscious longer-term strategy, the extent to which they are mainly proactive or mainly reactive, and the extent to which law and politics are intermeshed. Differences in legal culture and legal capacity inform the extent to which a party wishes to use, or is able to use, “assertive legalism” or “aggressive legalism.” China already engages in “assertive legalism” to protect its legitimate interests. The main point here, however, is that China and the other BRICSAM countries should seek to develop a proactive, conscious strategy about the use of WTO law and WTO institutions as part of their normal trade policy.

Such strategies can be especially useful for a complainant in cases where the complainant comes from a lower per capita income group than the respondent. They acquire special force in the cases examined here, which focus mainly on the consultation phase of WTO dispute settlement. To take the example of “aggressive legalism,” such a strategy offers three advantages. First, it may greatly strengthen a complainant’s position at the stage of request for consultations. Second, it offers the possibility of a

---

163 Pasha L. Hsieh, supra note 163, at 1025.
164 Saadia M. Pekkanen, supra note 164, at 708.
165 Saadia M. Pekkanen, supra note 164, at 732.

© 2013 Peking University School of Transnational Law
much stronger and more complex negotiating strategy justified in legal terms during the consultation phase. Third, if a party achieves no satisfaction during consultations, it can justify holding out for a panel and strengthen a party’s position before a panel, where a lower-income party may have more advantages than during consultations. The facts that consultations do not reach a legal decision on the merits and do not produce a binding interpretation of WTO law may actually be advantages for a party which resorts to “aggressive legalism” or “assertive legalism.”

Neither “assertive legalism” nor “aggressive legalism” by itself, however, can in any way guarantee food safety. Consequently, these conclusions are intended, not as an argument against consultation as a means of settling trade disputes, but rather as a plea for a different institutional solution to the problem of how to regulate international food safety. The cases examined here show that a WTO Member, especially a powerful WTO Member, can usually globalize its own food safety standards, assuming they can arguably be justified in the light of WTO law, by bringing a complaint to the WTO and then reaching a settlement during consultation. To be successful, such cases should ideally be brought against a respondent in a lower per capita income category; a favorable settlement is likely also in cases brought against a respondent of the same income category. However, the results of this process are not necessarily equal to international food standards, even though during or after a dispute, Codex Alimentarius may step in and engage in re-regulation of food safety, as in DS389 EC - Poultry. Nor do the results of WTO consultations necessarily amount to an optimum solution from the standpoint of food safety, global or national. Indeed international standards and an optimum solution may not be the same.

What is clear, however, is that the globalization of local food safety standards through a dispute settlement mechanism designed to settle trade disputes is not an appropriate way to determine which standards should regulate food safety in an increasingly integrated, yet inescapably diverse global food economy. The hidden jurisprudence of the WTO is not a good way to regulate food safety today. We need a global food safety agency.\(^\text{167}\)

---

\(^{167}\) For discussion of how this might be done, see Francis Snyder, supra note 155, at 381–423; Ching-Fu Lin, Global Food Safety: Exploring Key Elements for an International Regulatory Strategy, 51(3) VA. J. INT’L L. 637, 684–94 (2011); Global Food Protection: A New Organization is Needed, in IMPROVING IMPORT FOOD SAFETY (Wayne Ellefson, Lorna Zach & Darryl Sullivan eds., 2013).