Introduction

I. Background

It has been noted that since the inception of the World Trade Organization (the 'WTO') the disputes, particularly their factual component, brought before the WTO dispute settlement system have become ever more complex.[1] It is arguable that this complexity is partly a function of more complex obligations, and partly a function of the increased complexity of the measures challenged under the Understanding on Rules and Procedures Governing the Settlement of Disputes (the 'DSU'). In connection with the former, the establishment of the WTO on 1 January 1995 was accompanied by an increase in the regulation of international trade. Prior to the creation of the WTO, international trade was regulated by the General Agreement on Tariffs and Trade of 1947 (the 'GATT 1947') and a handful of agreements which were not widely accepted by all GATT 1947 contracting parties. The WTO brought with it new agreements—which bind all 153 WTO Members—in the areas of trade in services, intellectual property, agriculture, and sanitary and phytosanitary (SPS) regulation, among others. In addition, disciplines contained in pre-existing agreements were further elaborated. Without attempting to conduct a comprehensive analysis of all disputes brought to the WTO, it is worth noting that as a matter of fact some of the most factually complex disputes adjudicated under the DSU have indeed involved the new disciplines. Challenges to SPS measures are particularly illustrative. There have been seven[2] cases involving the Agreement on the Application of Sanitary and Phytosanitary Measures (the 'SPS Agreement'), which all resulted in the production of substantial amounts of scientific evidence, and consultations with experts and international institutions such as the Codex Alimentarius Commission.

As for the increased complexity of the measures challenged in dispute settlement, it is fair to say that the universe of measures which constitute blatant violations of the WTO rules has diminished on account of increased awareness of the WTO agreements. Accordingly, it is less common to find cases where all

[1] See, for example, Jeff Waincymer, *WTO Litigation: Procedural Aspects of Formal Dispute Settlement* (London: Cameron May, 2002) at 530; Mireille Cossy, 'Panel's Consultations with Scientific Experts: the Right to Seek Information under Article 13 of the DSU' in R Yerxa and B Wilson (eds), *Key Issues in WTO Dispute Settlement: the First Ten Years* (Cambridge: Cambridge University Press, 2005) 204 at 204; David Palmeter & Petros Mavroidis, *Dispute Settlement in the World Trade Organization: Practice and Procedure* (2nd edn, Cambridge: Cambridge University Press, 2004) at 116; Matthias Oesch, *Standards of Review in WTO Dispute Resolution* (Oxford: Oxford University Press, 2003) at 56.

[2] Excluding compliance proceedings under Article 21.5 of the DSU.

the evidence necessary to prove a violation of a WTO agreement is the text of the allegedly inconsistent domestic regulation or legislation. As Pauwelyn noted as early as 1998, WTO panels have been flooded with evidence and this has occurred not only in disputes under the more technical agreements such as the SPS Agreement, but also in disputes under the General Agreement on Tariffs and Trade of 1994 (the 'GATT').[3]

Another possible explanation for the increased factual complexity of the disputes—and related upsurge in the amount of evidence placed on the record of the panels—is that with the judicialization of the WTO dispute settlement system WTO Members are less likely to concede the facts of the case. While dispute settlement under the GATT 1947, particularly in the earlier years, was the domain of diplomats, in WTO dispute settlement diplomats have given way to lawyers. Law firms in Brussels, Geneva, and Washington represent WTO Members in proceedings before panels and the Appellate Body. An international organization, the Advisory Centre on WTO Law, was even created to provide support for developing countries in WTO dispute settlement proceedings. The judicialization hypothesis is in line with the fact that the reported GATT panel practice of establishing a 'cluster of undisputed facts' on which a decision was based has not been effective in the context of WTO disputes.[4]

In sum, the discussion above suggests that the evolution and increased sophistication of the WTO legal system has resulted in more complex disputes requiring the resolution of complex factual questions.

Against this background, it is important to note that the DSU contains few rules—and those mostly of a general character—to guide panels in the process of fact-finding. The most directly relevant provisions are Articles 11 and 13 of the DSU, and paragraph 4 of Appendix 3 to the DSU. The latter provides that 'the parties to the dispute shall transmit to the panel written submissions in which they present the facts of the case and their arguments'. Article 13 on its turn grants panels the 'the right to seek information and technical advice from any individual or body which it deems appropriate' including the power to establish expert review groups or to consult individual experts 'to obtain their opinion on certain aspects of the matter'. At a more general level, Article 11 of the DSU provides that 'a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements'. Clearly these provisions provide general guidance but few direct answers to specific questions regarding the process of fact-finding. Therefore, in order to render the dispute

[3] Joost Pauwelyn, 'Evidence, Proof and Persuasion in WTO Dispute Settlement: Who Bears the Burden?' (1998) 1 Journal of International Economic Law 227 at 227.

[4] Referring to the GATT panel practice of establishing a 'cluster of undisputed facts' and its fall into disuse see Christopher Thomas, 'Litigation Process Under the GATT Dispute Settlement System: Lessons for the World Trade Organization?' (1996) 30:2 Journal of World Trade 53 at 71; Pauwelyn, above n 3 at 227.

settlement system effective, panels and the Appellate Body have had to provide answers to those questions in each case.

In fact, after 158 panel reports and 94 Appellate Body reports,[5] panels and the Appellate Body have gone a long way in filling the gaps left by the WTO negotiators. In those reports, they have addressed a wide array of questions related to the process of fact-finding, including questions related to burden of proof, fact-finding powers of the panel, protection of confidential information, production of documents, and adverse inferences, among others. As panel and Appellate Body reports are publicly available, those decisions have helped the operators of the system (panelists, disputing parties, and lawyers in the WTO Secretariat) to gain a better understanding of the functioning of the process of fact-finding in WTO dispute settlement.

This book argues, however, that that patchwork approach has not been completely successful in shaping a clear and coherent process of fact-finding. It demonstrates that panels and the Appellate Body have on occasion issued inconsistent rulings, and rulings which were not in harmony with the overall structure of the WTO dispute settlement system. In other words, panels and the Appellate Body have failed to provide clear guidance on how the process of fact-finding in WTO dispute settlement functions, including with respect to issues such as the allocation of the burden of proof—which can be determinative of the outcome of a case.

The problems that may arise from lack of clear guidance are made clear in cases such as *US—Gambling* and *India—Additional Import Duties*.[6] Those cases will be examined in detail in different parts of this book, but for the moment it suffices to say that they ended with very little information being presented on core issues. If the parties and the panel had had a clear understanding of their obligations and their role in the process of fact-finding, the panels in those cases would have been able to address the core issues of the cases effectively, and the outcome of the cases (or at least some of the claims) might have been different.

Consistency and predictability are particularly important when the operators of the system come from different legal cultures. The problem becomes more acute as a greater number of WTO Members become involved in dispute settlement under the DSU. Although the majority of cases still revolve around a handful of WTO Members, among which are the European Communities and the United States, the number of non-traditional players has risen. As has been noted with respect to international commercial arbitration, 'even though logic

[5] These numbers are as of 20 May 2009, and include standard and compliance proceedings.

[6] See Panel Report, *India—Additional and Extra-Additional Duties on Imports from the United States*, WT/DS360/R, adopted 17 November 2008; Appellate Body Report, *India—Additional and Extra-Additional Duties on Imports from the United States*, WT/DS360/AB/R, adopted 17 November 2008; Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, adopted 20 April 2005; Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005.

would command that "local specificities" stay confined to national State courts', it is not uncommon for practitioners to seek to reproduce local practices in international proceedings.[7] The adoption of local procedures might work well when the parties involved come from similar legal systems. However, when parties have different expectations on how the process of fact-finding should function, problems are bound to arise. Accordingly, in an international legal system with a diverse membership, as is the case of the WTO legal system, the development of a common language that all operators can understand and speak is of utmost importance.

For those who prize flexibility, this is not to say that rigid rules covering all aspects of the process of fact-finding must be adopted. Parties should be given room to agree on their own common language. Experience, however, shows that the parties rarely agree on anything after they engage in dispute settlement proceedings. For those cases, clear guidelines would be beneficial. This could be achieved through a variety of means, ranging from amendments to the DSU at one end of the spectrum, to a line of consistent and clear panel and Appellate Body decisions at the other end, and including options such as guidelines drawn by the Dispute Settlement Body (the 'DSB') inbetween.

II. Outline of the Book

In keeping with the overarching objective of providing clear guidance to the operators of the WTO dispute settlement system, the motivation for this book is not only to provide guidance, but to provide *good* guidance. In other words, the goal is to set out an optimal process of fact-finding for the WTO dispute settlement system. With this in mind, this study seeks to determine the extent to which panels and the Appellate Body have set out optimal rules to govern the process of fact-finding through the existing jurisprudence. To the extent that that is not the case, suggestions for improvement are made.

Chapter 1 lays out the framework according to which that assessment will be conducted and suggestions developed. Pursuant to that framework, this book will seek to determine (i) whether the solutions developed by panels and the Appellate Body maximize the goals of the WTO dispute settlement system, among which are accuracy, participation, impartiality, equality, good faith cooperation, the efficient use of resources (time and money), and the protection of confidential information; (ii) whether panels and the Appellate Body have efficiently managed uncertainty and the related risk of error, which are constant features of the process of fact-finding in legal adjudication; and (iii) whether the rules developed are in harmony with the basic structure of the WTO dispute

[7] Pierre-Yves Gunter, 'Transnational Rules on the Taking of Evidence' in E Gaillard et al (eds), *Towards a Uniform International Arbitration Law?* (Huntington: Juris Publishing, 2005) 129 at 133.

settlement system laid out in the DSU. In making these assessments, particularly in relation to the last factor, this study draws on the approaches followed in the two major legal traditions of the world—the common law and the civil law—and, to the extent possible, the approaches adopted by other international courts and tribunals.

The questions examined in Chapters 2 through 5 are closely interrelated and are part of what is referred to in this book as the 'process of fact-finding' or the 'process of proof'.

The process of fact-finding is the process through which a panel formulates its conclusions with respect to the facts of a case, that is, it is the process through which the facts of a case are established. In this regard, it is important to note that panels consider and establish facts against the background of a legal provision—ie a provision in the WTO agreements. In other words, the legal provision defines at a general level the facts which must be proved; these are the elemental facts or elemental propositions. Elemental propositions are then usually broken down into more simple propositions (auxiliary propositions or auxiliary facts) each of which needs to be proved in order to prove the elemental proposition. For instance, Article III:4 of the GATT provides that '[t]he products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin [...]'. In the context of this provision, the question of whether the products at issue are 'like products' relates to an elemental fact. Proof of the 'likeness' of the products at issue may require on its turn for it to be shown that the products have the same (i) physical characteristics, (ii) end uses, and (iii) tariff classification, and that (iv) there are no differences in the consumers' perception and behaviour towards the products at issue.[8] Factors (i) to (iv) are auxiliary facts. These auxiliary facts can be further broken down into other auxiliary facts. For example, proof that the products at issue have the same physical characteristics may require the products to be shown to have the same chemical composition, size, and colour, among other factors. The word 'fact', therefore, encompasses different levels of propositions (elemental and auxiliary), all of which must be proved in order for a violation of the WTO agreements to be established. However, while elemental propositions are set by the law, auxiliary propositions will vary from case to case, especially when they are not part of a general test as is the case of factors (i) to (iv) in the likeness test—when part of a general test, auxiliary propositions can be referred to as sub-elemental propositions. In brief, the process of fact-finding is the process at the end of which conclusions are drawn with respect to auxiliary and elemental propositions, with the ultimate aim of determining whether a claim under a specific provision of the WTO agreements has been proved.

[8] In this regard, see for instance Panel Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R, adopted 17 December 2007 at para 7.415.

At this point, it is worth devoting a few words to explaining the meaning assigned to other common words used in this book. The word 'fact' was defined above. What the previous paragraph did not mention is that facts must be proved by 'evidence'. Evidence is defined as '[s]omething (including testimony, documents, and tangible objects) that tends to prove or disprove the existence of an alleged fact'.[9] When evidence is capable of demonstrating a fact, it can be said that it constitutes 'proof' of that fact. Moreover, facts are proved with the ultimate aim of proving a 'claim'. The word 'claim' is used in this book to refer to an allegation relating a specific measure to a provision of the WTO agreements—for instance, the allegation that measure *X* violates Article III:4 of the GATT because it fails to accord 'treatment no less favourable than that accorded to like products of national origin'. The party which bears the burden of proving a claim is referred to as the 'claimant' or 'proponent'; the party which does not bear the burden of proof is referred to as the 'respondent' or 'opponent'. The terms 'complainant' (or 'plaintiff') and 'defendant' are used to refer respectively to the party which sets the process of adjudication in motion and the party against which the action is brought; these terms do not convey a specific allocation of the burden of proof.

Chapters 2 through 5 cover the main aspects of the process of fact-finding including the questions of (i) which party bears the responsibility of ultimately convincing the panel of the truth of a claim; (ii) what quantum of proof is necessary to convince the panel of the truth of a claim; and (iii) what is the role of the panel and the disputing parties (complainant and defendant) in the development of the factual record on which the panel bases its decision on a claim.

Chapter 2 discusses the meaning of basic concepts such as the burden of proof, standard of proof, and presumptions. It explains how those concepts are defined in the common law system, the civil law system, and in international law. It argues that because those concepts do not have exactly the same meaning in all legal systems, WTO panels and the Appellate Body should clearly define those concepts in the context of WTO law, taking into consideration the basic structure of the WTO dispute settlement system.

The definitions laid out in Chapter 2 will be relied upon in the rest of this study. In this regard, it is worth emphasizing that there is much indeterminacy surrounding the concepts of the burden of proof, standard of proof, and presumption. This indeterminacy occurs across and even within legal systems. At least part of the blame for this lies on the fact that the expressions 'burden of proof', 'standard of proof', and 'presumption' are frequently used in a variety of different situations including everyday non-legal speech. In light of this, the reader should be willing to accept that familiar concepts may receive a different label in this book.

[9] *Black's Law Dictionary* (8th edn, St Paul: Thomson West, 2004) at 595.

Chapter 3 focuses on the question of how the concept of the burden of proof has operated in WTO dispute settlement and the related question of the degree of persuasion that panels must reach in order to determine that the burden of proof has been discharged—ie the applicable standard of proof. Some of the more specific issues discussed include: whether the claimant must meet a threshold requirement—ie it must present a minimum amount of evidence in support of its claim—in order for the proceedings to continue; whether the burden of proof shifts between the parties during the proceedings; what is the meaning of a *prima facie* case; what evidence should the panel take into account in determining that the burden of proof has been discharged; and what standard of proof should be adopted to make such determinations. Chapter 3 not only discusses the state of WTO law on these issues, but, drawing on the framework set out in Chapter 1, also makes suggestions for improving the treatment of these questions in future cases.

Chapter 4 examines the question of the allocation of the burden of proof, that is, the question of which party—complainant or defendant—must prove a certain issue or suffer the consequences of a finding against it. In light of the fact that the DSU does not address this question, Chapter 4 conducts a critical analysis of the rules that panels and the Appellate Body have developed to allocate the burden of proof between the parties. This chapter briefly reviews some of the decisions where the question of the allocation of the burden of proof was discussed. It then sets out to demonstrate that panels and the Appellate Body have not adopted a coherent approach to the allocation of the burden of proof. Most of the chapter is then devoted to developing a framework for the allocation of the burden of proof in WTO disputes. The last part of Chapter 4 briefly addresses the question of whether the burden of proof should be allocated differently in compliance proceedings under Article 21.5 of the DSU.

Chapter 5 examines the role of the panel and the disputing parties in the development of the factual record on which the panel must base its decision. The first part of the chapter explains that in certain circumstances, particularly in challenges to domestic trade remedy investigations, the role of the panel is more limited in that the factual record of the panel will essentially be restricted to the record which was developed during the domestic investigation. Chapter 5 focuses primarily on those cases where the panel develops its own factual record free from the constraints of a previous domestic investigation. In this connection, Chapter 5 argues that the disputing parties have a duty to be forthcoming in providing relevant and necessary information, and that panels not only can, but should, be actively engaged in the process of fact-finding.

In discussing the role of the disputing parties in the process of fact-finding Chapter 5 examines different aspects of the duty of the parties to cooperate in presenting information to the panel such as (i) its scope—including whether it extends to the production of confidential information; (ii) when that duty commences; and (iii) how its observance can be ensured—including the

question of whether, when, and how adverse inferences can be drawn. It also examines certain obligations which WTO Members have to provide information on their measures outside the context of the panel process and the impact which these obligations have on the development of the factual record of the panel.

As for the role of the panel in the development of the factual record, Chapter 5 first explores the question of why panels should play an active role in the process of fact-finding. It then discusses the fact-finding powers of the panel which include the authority to seek and rely upon information from the disputing parties as well as any other relevant source such as WTO Members not involved in the dispute, experts, international organizations, and private parties. In connection with the discussion of the panel's authority to seek information from the disputing parties, Chapter 5 examines the question of whether the WTO dispute settlement system should follow the adjudicator-controlled disclosure model or the party-led pre-trial discovery model. The question of the limits of the authority of the panel is then taken up in the last part of Chapter 5.

This study concludes that many of the rules governing the process of fact-finding in WTO dispute settlement are not optimally designed. The concluding chapter of this book reviews the main findings in this regard and puts forward suggestions for improving different aspects of the process of fact-finding, including a brief note on how such suggestions could be implemented.