WTO Antidumping Litigation: A Review of Some Procedural and Substantive Issues

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1 Introduction

The World Trade Organisation (WTO) settlement system constitutes the pillar of the multilateral trade system, which is important in assisting on how to best interpret and apply the associated agreements. The aim and object of the dispute settlement system is to achieve “a satisfactory settlement” of disputes between and/or amongst the WTO Members.

This article covers a selection of procedural and substantive aspects in the litigation of anti-dumping disputes. In particular, Part 2 provides the reader with a background to the WTO dispute settlement system by briefly discussing the dispute settlement body (DSB); outlining the scope of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU); and the application of the DSU to antidumping disputes. Part 3 discusses some procedural and substantive aspects of litigating antidumping disputes in the WTO. In particular, Part 3 it deals with the lack of locus standi for private individuals in WTO litigation, the incidence of the burden of proof, the standard of review in antidumping disputes, the manner in which decisions are reached by the Panels and the Appellate Body, and the role played by previous decisions in dispute settlement.

2. The WTO Dispute Settlement System: An Overview

2.1 The Dispute Settlement Body

The WTO dispute settlement system is one of the unique innovations and results of the Uruguay Round. It comprises the DSB, which operates through the panels and

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2 See Article 3.4 of the DSU.
3 Understanding on Rules and procedures governing the Settlement of Disputes (DSU): annex 2 of the Agreement Establishing the World Trade Organization (WTO Agreement), Art 1.2.
the Appellate Body to adjudicate disputes.⁴ The administration of the dispute settlement rules and procedures (DSU) is the responsibility of the DSB. The DSB has the authority to issue Panel reports and Appellate Body reports. It also oversees the implementation of rulings and recommendations and authorizes appropriate relief measures.⁵

2.2 Scope of the Dispute Settlement Body

Article 1.1 of the DSU establishes “an integrated dispute settlement system” which applies to all the covered agreement. The scope of the DSU, therefore, is not restricted to the provisions of the GATT 1994. For the purposes of consistency in WTO disputes settlement, the DSU is generally applicable except where otherwise provided by “special or additional rules and procedures on dispute settlement” contained in associated (covered) agreements."⁶ The DSU, thus, provides a basic framework and binding procedures for the settlement of disputes regarding the imposition of antidumping measures consistent with the ADA. The application of the DSU to the ADA was born of the desire for the ‘consistent resolution of dispute arising from antidumping … duty measures’.⁷

2.3 The DSU Deference to ADA Rules

In the above paragraphs we highlighted the overlapping relationship between the DSU and the ADA, and that the DSU establishes the general procedural rights and

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⁵ DSU, art 2.

⁶ DSU, art 1.2. The generality in application of the DSU is acknowledged in Article 17.1 of the ADA. Article 17.1 of the ADA Provides that: "[e]xcept as otherwise provided herein, the dispute Settlement Understanding is applicable to consultations and the settlement of disputes under this agreement."

channels for the settlement of disputes in the WTO. The DSB jurisprudence and rules are applicable to associated agreements. Antidumping disputes are subject to the DSU, which serves as both the substantive and 'procedural anchor of all WTO disputes'.

There is, however, some measure of difference regarding such associated agreements. If special or additional dispute settlement rules and procedures exist in the ADA, and are different from the general rules under the DSU, the ADA rules and procedures 'shall prevail.' This is particularly applicable where the use of the DSU rules and procedures would lead to the violation of the ADA. The Appellate Body in *Gautemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico* (Gautemala – Mexico Cement AB) stated that “it is only where the provisions of the DSU and the special or additional rules and procedures of a covered agreement cannot be read as complementing each other that the special or additional provisions are to prevail.”

Though deference to WTO covered agreements’ rules and procedures is acknowledged, there should be a harmonious reading and application of all the WTO agreements.

3. Selected Procedural and Substantive Issues

3.1 Locus Standi, Third Parties, and Private Individual

Under the WTO dispute settlement system only governments have the *locus standi* to litigate anti-dumping issues before the DSB institutions as applicants or respondents. Any other Member of the WTO with a “substantial interest in the matter” may be given an opportunity as a ‘third party’ to be heard by the panel, and to make any recommendation to the panel. However, third party participation is limited. For example, third parties have the right to receive only the first written submission.

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9 Ibid.
11 *Gautemala – Mexico Cement AB* op cit (n 10) para 65.
12 *Gautemala – Mexico Cement AB* op cit (n 10) at para. 81.
13 See DSU, art 6.
14 See generally DSU, art 10.
15 It is left up to the individual Member to decide for itself if it has a “substantial interest” in the matter.
of the parties to the dispute, and to attend the first substantive meeting of the parties to the dispute.\textsuperscript{16}

Private parties have no \textit{locus standi} at DSB proceedings, despite the fact that dumping is occasioned by private parties. Neither the ADA nor the DSU expressly allow direct access to the WTO dispute settlement procedures by private individuals. The interests of private individuals are represented and their cause argued before the DSB by their governments. The approach is to lobby their governments to launch a formal complaint to the WTO on their behalf.

However, private parties may be indirectly involved in the anti-dumping proceedings before the WTO in at least two ways. Firstly, industry representatives may play a role in the proceedings as part of the WTO delegation. This is permissible since the WTO Members have the right to compose their own delegation. Secondly, private individuals or industry representatives may play a role through \textit{amicus curiae} briefs. Member representatives: The WTO rules permitting, private parties may indirectly be involved in the proceedings through \textit{amicus curiae} briefs. Note, however, that the \textit{amicus curiae} approach by private individuals and/or industry representatives is generally uncertain in the WTO, and has been a subject of several conflicting decisions by the panels and the Appellate Body.

The private parties’ participation before the DSB institutions through \textit{amicus curiae} briefs came before the Appellate Body review case in \textit{United States Import Prohibition of Certain Shrimp and Shrimp Products}\textsuperscript{17} (Shrimp-Turtles (AB)). The \textit{Shrimp-Turtles (AB)} case, initiated by Malaysia, India, Thailand and Pakistan against the United States, involved environmental regulation on the part of the United States through the Marine Mammals Protection Act (MMPA) of 1972, which required commercial shrimp trawlers operating in sea turtle habitat to use turtle excluder devices that would allow turtles to escape from the net before drowning. Moreover, this legislation banned the importation of shrimps harvested contrary to the MMPA regulation or harvested by methods harmful to certain sea turtle species.

In \textit{Shrimp-Turtles AB} the Appellate Body took an unprecedented step of receiving unsolicited \textit{amicus curiae} briefs from non-governmental organizations (NGOs) that included environmentalists and other interested parties.\textsuperscript{18} In this case the

\textsuperscript{16} But see \textit{EC – Banana III} were a third party developing country with a major interest in the outcome of the dispute was allowed to attend the entire first and the second substantive meetings of the panel with the parties to the dispute.

\textsuperscript{17} \textit{United States – Import Prohibition of Certain Shrimp and Shrimp Products}, WT/DS58/AB/R (12 Oct. 1998), [hereinafter Shrimp-Turtles (AB)].

\textsuperscript{18} \textit{Shrimp Turtles (AB)} supra (n 17) para. 202 – 209.
Appellate Body rejected assertion by the Panel\(^\text{19}\) that it would be incompatible with the DSU provisions to accept unsolicited *amicus curiae* briefs. The Panel held:\(^\text{20}\)

We had not requested such information as was contained in the above-mentioned documents. We note that, pursuant to Article 13 of the DSU, the initiative to seek information and to select the source of information vests with the Panel. In any other situations, only parties and third parties are entitled to submit information directly to the Panel. Accepting non-requested information from non-governmental sources would be incompatible with the DSU provisions currently applied...[I] f any party in the present dispute wanted to put forward these documents as part of their own submissions to the Panel, they were free to do so.

The Appellate Body held that a “Panel has the discretionary authority either to accept and consider information and advice to it (even made by a private party) whether requested by a Panel or not.”\(^\text{21}\) This was the beginning of a series of decisions whereby the Appellate Body asserted that it has a discretionary authority in terms of Article 13 read with Article 17.9 of the DSU and Article 16.1 of the Working Procedures for Appellate Review\(^\text{22}\) to accept and consider/ or solicit *amicus* briefs. In terms of Article 13 of the DSU, the DSB can “seek information and technical advice from any individual or body which it deems appropriate” or “from any relevant source.”

Notable cases that followed the *Shrimp-Turtles AB* decision, and that attracted considerable criticism form the General Council of the WTO, were the *European Communities – Measures Affecting Asbestos-Containing Products*\(^\text{23}\) (EC- Asbestos), and the *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*\(^\text{24}\) (British Steel (AB)), *Thailand- Anti-dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel H-Beams from Poland*\(^\text{25}\) (Thailand- Steel (AB)) cases.


\(^{20}\) *Shrimp Turtles* supra (n 19) para. 7.8.

\(^{21}\) *Shrimp Turtles (AB)* supra (n 17), para. 108.


\(^{23}\) *European Communities – Measures Affecting Asbestos Containing Products*, WT/DS135/8 (12 March 2001), [hereinafter EC-Asbestos].

\(^{24}\) *United States – Imposition of Countervailing Duties on Certain Hot Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R (10 May 2000), [hereinafter United States-British Steel AB].

\(^{25}\) *Thailand Anti dumping Duties on Angles, Shapes and Sections of Iron or Non Alloy Steel H Beams from Poland*, WT/DS122/AB/R (adopted 5 April 2001) [hereinafter Thailand- Steel (AB)]
In *British Steel (AB)*, the Appellate Body stated that although pursuant to the DSU and the Working Procedures for Appellate Review it has no explicit legal obligation to accept and consider *amicus* briefs, it does have the legal authority to decide if it can accept and consider any useful information.26

The Appellate Body reiterated its *British Steel (AB) amicus* briefs position in the *Asbestos* case. In the *Asbestos* case the Appellate Body went further by adopting rules on procedures for accepting *amicus* briefs and published these rules on the WTO website. According to the General Council, the adoption of the rules on *amicus* procedures was beyond the limited authority of the Appellate Body. The General Council was of the opinion that the issue of non-governmental participation in dispute settlement was supposed to be settled by the WTO Members, who form the executive authority of the WTO.

*Thailand-Steel (AB)* was the first case in which the issue of *amicus curiae* briefs in antidumping disputes arose before the Appellate Body. In this case, the Appellate Body received unsolicited *amicus curiae* brief and rejected it on the basis that it did not find it “relevant to our task”.27 Though it did not fully elaborate its reasons for rejecting the brief, it seems that the Appellate Body position remains the same as in other cases, which is that individuals and organizations that are non-WTO members have no legal right to make submissions to or to be heard by the Appellate Body.

3.2 Terms of reference

The terms of reference (TOR) are the legal basis for the establishment of a panel and the adjudication of the issues. Unless the parties agree otherwise or propose otherwise pursuant to Article 6.2 of the DSU, the standard TOR are as provided in Article 7.1 of the DSU. Article 6.2 permits a complaining party to propose special TOR. The importance of the TOR was emphasized by the Appellate Body in *European Communities-Regime for the Importation, Sale and Distribution of Bananas,*28 (EC-Bananas AB) when it stated that:

> It is incumbent upon a panel to examine the request for the establishment of the panel very carefully to ensure its compliance with both the letter and spirit of Article 6.2 of the DSU. It is important that a panel request be sufficiently precise for two reasons: first, it often forms the terms of reference of the panel pursuant to Article 7 of the DSU; and,

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26 *British Steel (AB)* supra (n 24) para 39.
27 *Thailand Steel (AB)* supra (n 25) para 74.
second, it informs the complaining party and third parties of the legal basis of the complaint.\textsuperscript{29}

TOR are important as they help in identifying the jurisdiction of panels, and crystallizing matters to be entertained by panels. The Appellate Body in Brazil Measures Affecting Desiccated Coconut\textsuperscript{30} (Brazil–Desiccated Coconut AB) stated that:

[T]he ‘matter’ referred to a panel for consideration consists for the specific claims stated by the parties to the dispute in the relevant documents in the terms of reference. We agree with the approach taken in previous adopted panel reports that a matter, which includes the claims composing that matter, does not fall within a panel’s terms of reference unless the claims are identified in the documents referred to or contained in the terms of reference.\textsuperscript{31}

Generally, the panels may not deal with matters not referred to or contained in the TOR,\textsuperscript{32} unless such other matter is related to the specific matter at issue.\textsuperscript{33} Parties have to confine themselves to matters and evidence in the administrative records of national authorities. The ADA contains no specific TOR provisions. In view of this, and in cases where parties have not agreed to a special TOR, Article 7.1 of the DSU is applicable. The panel shall “examine, in the light of the relevant provision in (the ADA), the matter referred to the DSB…in the document…and make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for (in the ADA).”\textsuperscript{34}

3.3 Claims and measures to be challenged

Article 3.3 of the DSU calls for the prompt settlement of disputes in “situations in which a Member considers any benefits accruing to it directly or indirectly under the covered agreement are being impaired by measures taken by another Member.” If the case is brought before the DSB, in terms of Article 4.4 of the DSU, a complaining party is required to clearly identify the measures or matters at issue, and indicate the legal basis for the complaint.

\textsuperscript{29} EC Banana AB
\textsuperscript{30} Brazil–Measures Affecting Desiccated Coconut, WT/DS22/AB/R (adopted 20 March 1997) [hereinafter Brazil–Coconut AB]
\textsuperscript{31} Brazil–Coconut AB supra (n 30) paras 22 – 23.
\textsuperscript{32} See EC Bananas AB supra (n 28) para 143.
\textsuperscript{33} For instance, in Mexico Anti-dumping Investigation of High Fructose Corn Syrup from the United States, WT/DS132/R (adopted 24 Feb 2000), [hereinafter Mexico–United States HFCS], para. 7.53, a claim regarding the duration of a provisional measure was determined by the Panel as relating to the definitive anti-dumping duty at issue, though the provisional measure was not included in the terms of reference (TOR).
\textsuperscript{34} DSU, art 7.1.
In the context of antidumping disputes, Article 17.4 of the ADA read with Article 17.3, specifies three separate and distinct measure or ‘matters’ that are generally referred to the DSB or that can be challenged before the DSB. These are price undertakings, provisional measures, and definitive antidumping duties. The relevant provision of Article 17.3 states:

If any Member considers that any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired, or that achievement of any objective is being impeded, by another Member or Members, it may, with a view to reaching a mutually satisfactory resolution or the matter, request in writing consultations with the Member or Members in question.

Article 17.4 of the ADA goes further and states that:

If a Member that requested consultations considers that the consultations pursuant to paragraph 3 have failed to achieve a mutually agreed solution, and if the final action has been taken by the administering authorities of the importing Member to levy definitive anti-dumping duties or to accept price undertakings, it may refer the matter to the dispute Settlement Body (‘DSB’). When a provisional measure has a significant impact and the Member that requested consultations considers that the measure was taken contrary to the provisions of paragraph 1 of article 7, that Member may also refer such matter to the DSB.

A ‘matter’ was explained or defined by the Appellate Body in *Gautemala – Mexico Cement AB* as consisting of the measure at issue, and the claims that challenge the measure at issue. In *United States-Sunset Review of Anti-dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan* (Japan Steel AB), the Appellate Body reaffirmed the Panel decision in the Panel Report in US DRAMS, and gave the term “measure” a broader meaning for the purposes of DSB challenges in connection with the ADA. According to the Appellate Body, Article 17.4 of the ADA should not be construed as setting out limitations on anti-dumping measures that can be challenged before the DSB panels and the Appellate Body.

A “measure” would, in addition to measures articulated in Article 17.4 of the

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35 Should be read with Article 3.3 of the DSU.
36 Emphasis added.
37 Emphasis added, and footnotes omitted.
38 *Gautemala – Mexico Cement AB* supra (n 10) para 72.
39 *United States Sunset Review of Anti dumping Duties on Corrosion Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R (adopted 15 Dec. 2003), [hereinafter Japan Steel AB].
40 See *Japan Steel AB* supra (n 39) para 83.
ADA to include “in principle, any act or omission attributable to a WTO Member that can be a measure of that Member for purposes of dispute settlement proceedings.” Therefore, instruments, whether binding or not binding, legislation, administrative policy or “anything else,” containing rules or norms pertaining to antidumping may be challengeable.

3.4 Special Standard of Review

Article 11 of the DSU set forth a generally appropriate standard of review to be applied by Panels, except in the case of disputes brought under the ADA. Article 11 of the DSU states:

[A] panel should make an objective assessment of the matter before it, including assessment of the facts of the case and the applicability of and conformity with relevant covered agreement, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreement.

The review standard set in Article 11 of the DSU for panels applies to all but the ADA. A unique and special standard of review for anti-dumping disputes is set in Article 17.6 of the ADA, which is different from the standard set in Article 11 of the DSU. Article 17.6.(i) of the ADA that:

[I]n its assessment of the facts of the matter, the panel shall determine whether authorities’ establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned.

Article 17.6(ii) of the ADA further provides that:

[T]he panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities’ measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

41 Japan Steel AB supra (n 39) para 81.
42 Japan Steel AB supra (n 39) paras 82 - 83. In this regard, the Appellate Body, at para. 82 footnote 80 quoted extensively from previous decisions.
43 This was acknowledged by the Appellate Body as a standing position in Argentina – Safeguard Measures on Import Footwear, WT/DS121/AB/R (adopted 12 January 2000) [hereinafter Argentina-Footwear AB].
44 Emphasis added.
Two important issues may be observed from the provisions of Article 17.6 of the ADA. The first observation is that Article 17.6(i) of the ADA enjoins the WTO panels to have regard in their review for national investigations, processes and decisions, and not to try to act as a substitute for national proceedings, or to review the findings of the national authorities de novo. Moreover, Article 17.6(ii) of the ADA encourages the panels to strive to identify all the possible permissible interpretations of the relevant provision of the ADA, and to uphold the anti-dumping measure by national authorities on the grounds of any such permissible interpretation, if there is any. In this instance Article 17.6, read with Article 17.5, of the ADA can be said to buttress the practice and requirement for deference to national authorities in deciding on anti-dumping measures.

The second observation is that substantively the ADA standard of review is two-pronged. The first part is for the panel to determine whether the national authorities established the facts in a proper manner. The second part is to determine whether the evaluation of these facts by national authorities was unbiased and objective. If the answer to both the first and the second part is positive, the panel should not overturn the evaluation by national authorities.

3.5 The Burden of Proof

The traditional doctrine used in many judicial systems to apportion the burden of proof is that “he who avers must prove.” The panels of the GATT 1947 followed a different approach in this regard. The GATT 1947 panels generally placed the burden on the party whose antidumping measures and policies were being challenged. The mere assertion of a claim by a party was sufficient.

The WTO has discarded the GATT 1947 approach, and followed the traditional doctrine in terms of which a party that asserts the affirmative of a particular claim or defense has to establish a prima facie for his/her claim or defense. In United States - Measure affecting Imports of Woven Wool Shirts and Blouses from India, WT/DS33/AB/R (adopted 23 May 1997), [hereinafter US - Indian Wool Shirts AB] the Appellate Body found it difficult to depart from this traditional approach. The Appellate Body stated:

In addressing this issue, we find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof. It is, thus, hardly surprising that various international tribunals, including the International Court of Justice, have generally and


46 United States Measure affecting Imports of Woven Wool Shirts and Blouses from India, WT/DS33/AB/R (adopted 23 May 1997), [hereinafter US - Indian Wool Shirts AB].
consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof. Also, it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions that the burden of proof rests upon the party whether complaining or defending, who asserts the affirmation of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.  

The Appellate Body invokes a shifting burden of proof that places an initial burden of establishing a *prima facie case* on the complaining party, which burden would then shift to the defending party, which would have to “counter or refute the claimed inconsistency” with the covered agreement, once the *prima facie case* has been sufficiently established. The establishment of a *prima facie* case is aided by Article 3.8 of the DSU, in terms of which an infringement of the WTO obligations constitutes a *prima facie* case.

There is a kind of absolution from the instance position advocated by the Panel in *United States - Sections 301-310 of the Trade Act of 1974* (US-Sections 301-310). According to the Panel, in a case of uncertainty because 'evidence and arguments remain in equipoise', the benefit of the doubt must be given to the defending party. The question of who bears the final burden of persuasion seems to be left to a case-by-case determination by panels, as is the question of the amount and nature of evidence required to satisfy the doctrine that he who avers must prove.

In general, the burden of proof normally lies with the complainant, to whom it falls to establish that a violation of GATT/WTO provisions has occurred. There is, however, a slight modification with regard to the incidence of the burden of proof where the case involves the so-called ‘non-violation complaint’. In terms of Article 26(1)(a) of the DSU, the complaining party in non-violation complaints “shall present a detailed justification in support of any complaint relating to a measure which does not conflict with the relevant covered agreement.” This modification of the onus of proof also applied in GATT 1947. It is particularly provided for in the 1979

47 *US Indian Wool Shirts AB* supra (n 46) para 16.
48 See *EC Beef Hormones AB*, para. 98.
50 *US Sections 301 310* supra (n 49) para 7.14.
51 See *United States Indian Wool Shirts AB* supra (n 46) paras 11-15.
52 *United States Indian Wool Shirts AB* supra (n 46) para 14.
DSU,\textsuperscript{53} which saddles the complainant with the onus to provide the DSB with a detailed justification of its claim.

\section*{3.6 The importance of previous reports}

Under the GATT 1947 dispute settlement system adopted panel reports only bound the parties to the dispute. The reports and their reasoning and conclusions were not legally biding on subsequent panels. The GATT panels did not apply the system of precedence in decision-making. For example, it was stated in \textit{European Economic Community-Restrictions on Imports of Dessert Apples},\textsuperscript{54} (ECC - Dessert Apples) that:

The panel took note of the fact that a previous panel, in 1980, had reported on a complaint involving the same product and the same parties as at the present matter and a similar set of issues. It would take into account the 1980 panel report and the legitimate expectation created by the adoption of this report, but also other GATT practices and panel reports adopted by contracting parties and the particular circumstances of this complaint. The panel, therefore, did not feel it was legally bound by all the details and legal reasoning of the 1980 panel report.\textsuperscript{55}

The application of stare \textit{decisis} by the DSU panels and Appellate Body remains unclear. The current position seems to be that DSB reports do not create precedent or "subsequent practice" within the meaning of Article 31(3)(b) of the Vienna Convention on the Law of Treaties.\textsuperscript{56} In \textit{Patent Protection for Pharmaceutical and Agricultural Chemical Products}\textsuperscript{57} (India – Pharmaceuticals AB) case the Appellate Body reiterated its previous stance\textsuperscript{58} that "Panels are not [legally] bound by previous decisions of panels or the Appellate Body even if the subject matter is the same."\textsuperscript{59}

Therefore, an antidumping dispute before the DSB may not be determined based

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\item \textsuperscript{53} See clause 5 of the 1979 DSU Annex headed - ‘Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement (Article XXIII: 2). See also United States Restrictions on the Importation of Sugar and Sugar Containing Products Applied Under the 1955 Waiver and Under the Headnote to the Schedule of Tariff Concessions, 37 Supp BISD 288 (1990).
\item \textsuperscript{54} For example, in \textit{European Economic Community Restrictions on Imports of Dessert Apples}, B.I.S.D.36s/93 (adopted 22 June 1989) [hereinafter ECC- Dessert Apples].
\item \textsuperscript{55} \textit{ECC Dessert Apples} supra (n 54) para. 12.1.
\item \textsuperscript{57} \textit{Patent Protection for Pharmaceutical and Agricultural Chemical Products} (WT/DS50/AB/R 19 Dec 1997 (adopted 16 Jan 1998), [hereinafter India – Pharmaceuticals AB].
\item \textsuperscript{59} \textit{India Pharmaceutical AB} supra (n 57) para 7.30.
\end{itemize}
on previous decisions of the DSB, even though the matter is the same. Previous decisions may only be taken into account because they create a “legitimate expectation” among WTO Members in similar cases. Previous decisions are only relevant references of persuasive value, and are not dispositive.

The WTO position in this regard is similar to that of the GATT 1947 Panels, which favoured a “clean slate” case-by-case approach to dispute settlement. It is, however, becoming a practice for the DSB to consider previous decisions, even un-adopted reports, in subsequent disputes settlement proceedings despite the case-by-case approach followed by the WTO. The WTO panels have gone as far as to consider previous un-adopted reports to be useful and relevant. In this regard the Appellate Body in *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items* (Argentina Footwear AB) made it clear that a distinction must be drawn between deriving useful guidance from an un-adopted report and relying upon an un-adopted report.

3.7 Adoption of reports

The DSB is much like a court of international trade, with a unique approach to the adoption of decisions, compared with the system under GATT 1947. GATT 1947, which was codified after the 1979 Tokyo Round of trade negotiations, employed a power-oriented, diplomatic approach. Under the GATT 1947 system, decisions could only be adopted if there was a positive consensus between all the Parties involved, including the parties to the dispute. As a result, and for obvious reasons, a losing party could block the adoption of a panel report.

The DSB is quasi-judicial in nature; it is a legalistic and rule-based dispute settlement system with appeal rights. Although the WTO practices decision-making by consensus as under GATT 1947, the consensus system under the WTO is almost

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61 See *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/R [hereinafter Argentina Footwear].
62 *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R [hereinafter Argentina Footwear AB].
63 *Argentina Footwear AB* supra (n 62) at para. 44.
automatic, subject to review on questions of law by the AB. The current rule is that the adoption of reports can only be blocked by a negative consensus or reverse consensus.67

4 CONCLUSION

The adjudication of disputes within the WTO is a complex process requiring a specialised skill and capacity. Most importantly, representatives of member countries in the DSU proceedings should master the art of adjudicating issues relating to specific agreements. In particular, such representatives should be well versed with the procedural and substantive aspect of litigating certain of the WTO agreements like ADA. It is in this regard important to acquire the required skill and knowledge not only comes from texts of the WTO, but also from previous WTO cases.

67 DSU, art17.14. Reverse or negative consensus is required in the following instances in order to prevent action been taken: establishing a panel (DSU, art .1); circulating and adopting a panel report (DSU, art16.4); circulating and adopting an appellate body report (DSU, art 174); and authorizing the suspension of concessions (DSU, art 22.6).