AUSTRALIA'S PARTICIPATION IN THE WTO DISPUTE SETTLEMENT SYSTEM

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OVERVIEW
The rules of the World Trade Organization (WTO) Agreements provide security and predictability in the conduct of international trade to over 140 markets, underpinned by the WTO disputes settlement system. More so than any other international legal regime, WTO rules have direct relevance to the day-to-day decisions of Australian governments—at Commonwealth, state, territory and local level—and cover not just traditional areas of customs and tariffs, but also industry development, agriculture, environmental protection, food safety, quarantine protection and intellectual property. Potentially any Australian government measure with an impact on international trade can be subject to WTO scrutiny.

Since the inception of the WTO dispute settlement system in 1995, Australia has been actively involved in 28 disputes, including in four completed panel disputes as a principal party. Australia was also involved in 16 disputes in the previous decade under the General Agreement on Tariffs and Trade (GATT) system. This level of activity exceeds Australia's participation in any other international legal regime, such as the International Court of Justice.

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1 This in part reflects the level of activity in the WTO dispute settlement system compared to other international legal regimes. Since 1 January 1995, there have been 231 complaints notified to the WTO (178 of which involve distinct matters) with 49 panel and Appellate Body reports adopted, 15 active cases and 37 settled or inactive cases. Since 1946, the International Court of Justice has delivered 71 judgments and provided 24 Advisory
This comment focuses on the four completed panel disputes in which Australia was a principal party and discusses the implications from the cases in terms of WTO law and on Australian governance and decision-making.

THE WTO DISPUTE SETTLEMENT PROCESS

The WTO dispute settlement system underpins the rules-based framework of the WTO Agreements by providing for a system of compulsory and binding jurisdiction. Any WTO Member may initiate a complaint under the WTO Dispute Settlement Understanding (DSU) against another Member for failure to comply with WTO obligations. The rules and procedures of the DSU apply to all WTO Agreements, subject to special or additional rules and procedures contained in specific agreements. While it is beyond the scope of this comment to provide a detailed examination of the WTO dispute settlement system, a brief overview is useful.2

The dispute settlement process consists of four stages—initial consultations, the panel process, Appellate Body review and implementation. Consultations (or negotiations) are the preferred means of dispute resolution and the DSU declares that a mutually acceptable solution 'is clearly to be preferred'. During the period 1995–99 for example, 77 disputes were resolved of which 41 were resolved without going to adjudication. In the event that consultations fail to settle a dispute, the complaining party may request the establishment of a panel to make legal findings on WTO-consistency of the measures at issue.

Panels are the 'court of first instance' and perform the function of clarifying and applying the WTO rules to a specific dispute. Panels are usually comprised of three individuals from a range of backgrounds in law, economics and trade policy, and are selected by agreement of the parties. Panels follow standard working procedures, which provide for inter alia two sets of written submissions and two oral sessions with the parties. Written submissions are the primary means of persuading the panel and address the factual aspects of the case and the legal arguments relating to the specific WTO obligations alleged to have been breached. A panel's reasoning and findings are set out in a panel report.

Where a party appeals a panel report, the matter is heard by the Appellate Body. This is a standing body comprising seven eminent persons, three of whom serve on any one appeal. The function of the Appellate Body is to hear appeals on issues of law covered in a panel report and legal interpretations developed by a panel. The Appellate Body cannot, as such, examine the panel's assessment of the facts of a case other than a claim that the panel failed to make an 'objective assessment of the facts' under Article 11 of the DSU.

Panel and Appellate Body reports must be adopted by the WTO Dispute Settlement Body (DSB) to have legal and binding force, and to give rise to obligations on the


2 For a more detailed discussion of the dispute settlement process and Australia's management of WTO disputes, see Gavin Goh and Trudy Witbreuk, 'The WTO Dispute Settlement System' (2001) 30 University of Western Australia Law Review 51.

3 Article 3.7 of the DSU.
responding party to bring its measures into conformity. Adoption of panel and Appellate Body reports is 'quasi-automatic', i.e. a panel report must be adopted unless a party to the dispute notifies an intention to appeal the report, or if the DSB decides by consensus not to adopt the panel report. There is no right of appeal from an Appellate Body report.

In the event of a finding of WTO-inconsistency, the responding Member has a 'reasonable period of time' to bring its measures into conformity with the WTO rules. Where the parties fail to agree on a reasonable period of time, this is determined by an arbitrator. The DSU provides accelerated panel procedures to examine implementation in the event of disagreement between the parties on the existence or consistency of measures taken to comply with the WTO rulings. The practice has also emerged among WTO Members for an appeal to the Appellate Body from an implementation panel report.

Where a Member fails to implement the WTO rulings within the reasonable period of time, the DSU provides for effective remedies in the form of compensation or WTO-sanctioned retaliation. Compensation is through improved access to the responding Member's market and must be on a non-discriminatory basis to other WTO Members, i.e. it must be extended to the like products of all WTO Members. Retaliation or the suspension of concessions is usually in the form of punitive tariffs applied by the complaining Member on specific products of the responding Member. Normally, this will stop trade in those products, which acts as a powerful force in securing compliance by the responding Member.

AUSTRALIA'S PARTICIPATION IN WTO DISPUTES

Australia has been successful in all four of the WTO complaints it has prosecuted to date. Two complaints—against India on quantitative restrictions on a range of agricultural and manufactured products, and against Hungary on agricultural export subsidies—were resolved without resorting to full panel processes. Australia's complaints against Korea on its measures on imported beef, and against the United States on its safeguard measures on lamb meat, were both upheld by the panel and Appellate Body. At the time of writing, a fifth complaint, against the United States on anti-dumping subsidies, was before a WTO panel.

Australia was a respondent in two panel disputes—the Australia–Automotive Leather dispute and the Australia–Salmon dispute. While Australia's measures were found to be inconsistent with the WTO Agreements, both disputes have now been resolved without recourse to WTO-sanctioned retaliation against Australia.

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4 The DSB is made up of all WTO Members and has the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations and authorize retaliation in the event of non-implementation by a Member.

5 It would be very difficult in practice for consensus not to adopt a panel or Appellate Body report to be reached, given this would require the successful party to join the other Members to block the report.

In addition, Australia has participated as a third party in nineteen disputes. While third party participation does not give rise to rights of compensation or retaliation in the event of a finding of inconsistency against another Member’s measures, it served to secure ‘access wins’ in markets where Australia has commercial interests or to confirm the WTO-consistency of existing Australian measures. On a systemic level, Australia’s legal reasoning influenced the interpretation of WTO rules in areas such as agricultural export subsidies, the relationship between trade and the environment, and trade-related intellectual property.

This comment will focus on the four completed panel disputes in which Australia was a principal party: Australia–Salmon, Korea–Beef, Australia–Automotive Leather and United States–Lamb. For each of these disputes, the comment will examine the international contributions made by Australia to the development of WTO jurisprudence and the domestic implications for Australian governance and government decision-making.

**Australia–Salmon**

The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) recognises the right of WTO Members to determine their own appropriate level of protection, and to take measures necessary to protect human, animal or plant life or health against risks from pests or diseases, or from food-borne risks.

In applying SPS measures, Members must ensure inter alia that:

- the measures are scientifically justifiable by being based on a proper risk-assessment or an international standard (Article 5.1);
- the Member avoids arbitrary or unjustifiable inconsistencies in treatment in comparable situations (Article 5.5); and
- that the measures are not more trade restrictive than necessary to achieve the appropriate level of protection, taking into account technical and economic feasibility (Article 5.6).

**The dispute**

In March 1997, Canada initiated a WTO complaint against Australia’s long-standing quarantine ban on imports of fresh, chilled and frozen salmon. Australia justified this ban on the need to protect against the introduction of exotic diseases through imported salmon. As part of its complaint, Canada claimed that: the 1996 Australian Quarantine Inspection Service (AQIS) risk-assessment on which Australia had based its ban was not a proper risk-assessment; there were arbitrary and unjustifiable inconsistencies in the way Australia addressed disease risks in imported salmon as opposed to other imported fish such as bait fish and ornamental fish; and that the ban was more trade restrictive than necessary to achieve Australia’s appropriate level of protection.

The panel and the Appellate Body upheld Canada’s complaint (except in regard to the measures being more trade restrictive than necessary) and Australia was given until July 1999 to bring its measures into conformity. Following a new import risk-assessment by AQIS, Australia replaced the original import ban with 11 new measures to manage the quarantine risk. Canada subsequently challenged Australia’s implementation and in February 2000, an implementation panel upheld all but one of the replacement measures. An import ban introduced by the Tasmanian government in the course of the panel proceedings was also found to be WTO-inconsistent. In May
2000, Australia and Canada reached a mutually satisfactory settlement which involved changes to the one measure found to be WTO-inconsistent and an undertaking by Australia to continue to seek compliance by Tasmania of Australia's WTO obligations.

Implications
The panel and Appellate Body's findings were significant given this was the first dispute under the SPS Agreement on animal quarantine. The dispute made a number of key findings. First, the Appellate Body affirmed the sovereign right of WTO Members to determine their own appropriate level of protection—which could be higher than that accorded by international standards—and to take scientifically justifiable measures to meet this level of protection. Nor was it necessary for the appropriate level of protection to be articulated in quantitative (for example, number of deaths per thousand) as opposed to qualitative terms.

Second, Article 5.1 of the SPS Agreement imposes a very strict test on the requirement to base measures on a proper risk-assessment. A risk-assessment must: identify the diseases or pests whose entry, establishment or spread a Member wants to prevent within its territory, as well as the associated potential biological and economic consequences; evaluate the likelihood (i.e. probability) of entry, establishment or spread, as well as the associated potential biological and economic consequences; and evaluate the likelihood of entry, establishment or spread according to the measure which must be applied. The measure must also be 'based on' the risk-assessment in the sense of a rational relationship. The Appellate Body and the implementation panel agreed with Australia that a risk-assessment need not be quantitative, and that a qualitative assessment of likelihood and consequences was equally valid.

Third, the implementation panel accepted Australia's arguments that an approach based on simplistic comparisons of the measures applied for the same diseases in different products was not appropriate under Article 5.5 of the SPS Agreement—avoiding arbitrary or unjustifiable distinctions in levels of protection. Australia successfully demonstrated that different products gave rise to different disease risks, warranting the application of different measures. Nor could it be presumed that the same disease in different fish, or different diseases in different fish, posed the same risk. The implementation panel also rejected Canada's quarantine contention that there should be symmetry in measures applied to protect against exotic diseases and those diseases that are endemic to certain regions of Australia.

The Australia-Salmon dispute highlighted the broad reach of WTO rules into areas of national decision-making traditionally held to be the exclusive preserve of national governments, such as human health and quarantine. Given their broad scope, Australia successfully argued for an interpretation of SPS provisions that took into account the scientific and practical realities of national quarantine decision-making. This was reflected, for example, in the WTO upholding Australia's arguments that the scientific and practical realities of national quarantine decision-making.

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7 WT/DS18/AB/R, para [207].
8 SPS Agreement, Annex A, para 4. A different standard applies to food safety risk-assessments, which must evaluate the potential for adverse effects on human or animal health.
9 WT/DS18/AB/R, para [121].
10 WT/DS18/RW, paras [7.56-7.58].
11 WT/DS18/RW, para [7.90].
SPS Agreement did not require WTO Members to express their appropriate level of protection in quantitative terms, or to conduct a quantitative risk-assessment. The dispute also highlighted the legal and scientific rigour applied by panels and the Appellate Body in examining compliance of national measures with SPS obligations. The 1999 AQIS risk-assessment was subject to close scrutiny by three scientific experts advising the panel, including experts in fish pathology, quarantine management and import risk-assessment.

At a domestic level, the dispute excited a high level of media and public interest—including a Senate inquiry—into the WTO and AQIS quarantine processes. This in part reflected the wide range of domestic stakeholders involved, including recreational fishermen, Tasmanian salmon growers, Victorian trout farmers, the Tasmanian government, the Western Australian lobster industry and South Australian tuna industry, the imported ornamental fish sector, as well as those exporters targeted by potential WTO-sanctioned retaliation by Canada.

Importantly, the implementation panel upheld Australia's right to establish its own appropriate level of protection and to apply measures over and above the international standard. Throughout the dispute, Australia stated its appropriate level of protection to be a high or very conservative level of sanitary protection aimed at reducing risk to very low levels, while not based on a zero-risk approach. The Appellate Body affirmed that Australia had determined its appropriate level of protection and had done so with sufficient precision. The WTO findings are also relevant to the decision of successive Commonwealth governments not to apply a zero risk approach. The Appellate Body observed that while there was nothing in principle preventing a Member from adopting such an approach, it would be difficult in practice to sustain this across a range of different products in a way that meets the consistency requirements of Article 5.5 of the SPS Agreement.

The implementation panel also upheld the 1999 AQIS risk-assessment on salmon as meeting the strict tests imposed by Article 5.1. This affirmed the WTO-consistency of Australia's general approach to risk-assessment as set out in the AQIS Import Risk Analysis Handbook. The 1999 salmon risk-assessment remains the benchmark by which other WTO Members assess compliance of national measures against the relevant SPS provisions.

Finally, the dispute raised important Commonwealth–State issues. Following the lifting of the Commonwealth's import prohibition, the Tasmanian government introduced its own quarantine ban applying to Tasmania. Under customary international law, government signatories to international treaties are responsible for the actions of regional and other authorities within their territories. This general principle is given explicit recognition in Article 13 of the SPS Agreement which deems WTO Members 'fully responsible under this Agreement for the observance of all obligations set forth herein'. Article 13 also requires Members to 'formulate and

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12 WT/DS18/AB/R, para [197].
13 WT/DS18/AB/R, para [207].
14 Article 27 of the Vienna Convention on the Law of Treaties provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.
15 Article 22.9 of the DSU also provides that the dispute settlement provisions of the WTO Agreements may be invoked in respect of measures taken by regional or local governments or authorities within the territory of a WTO Member.
implement positive measures and mechanisms in support of the observance of the provisions of this Agreement by other than central government bodies.' The Tasmanian government's action therefore placed Australia in the position of defending not only the Commonwealth measures, but also the Tasmanian measure which was clearly in conflict with the Commonwealth's measures.

The Tasmanian measure was found by the implementation panel to be WTO-inconsistent, giving rise to potential retaliation by Canada. As part of the mutually agreed solution with Canada, Australia undertook to continue to seek observance of Australia's WTO obligations by Tasmania. The Tasmanian government's action nevertheless underlined the potential WTO implications of state and territory action, including possible retaliation against the exporters of other states and territories. Canada also sought to read down the WTO-consistency of the Commonwealth's measure by claiming that 'Tasmania's new measure nullifies even such measures Australia has taken to comply.'

**Korea–Beef**

The principle of 'National Treatment' was one of the fundamental principles of non-discrimination in international trade established in GATT 1947 and is reflected in many of the WTO Agreements. Article III:1 of GATT 1994 sets out the basic principle that WTO Members must not discriminate against imported products in relation to internal taxes and charges, and laws, regulations and requirements affecting the internal sale, purchase, distribution or use of products. Article III:4 imposes a specific requirement that internal laws, regulations and requirements do not, in their application, result in 'less favourable treatment' for imported products than for like domestic products. Panels and the Appellate Body have interpreted Article III as requiring 'equality of competitive conditions' for imported products vis-a-vis domestic products.

**The dispute**

In April 1999, Australia and the United States initiated a complaint against Korea on a range of measures that discriminated against imported beef. These included a requirement that imported beef be sold separately from Korean beef, subsidies to Korea's beef producers, minimum wholesale pricing, limitations on which private sector operators can buy and sell imported beef, and discriminatory labelling and record-keeping requirements.

In July 1999, a panel upheld the complaint and Korea appealed only two findings: the dual retail system and subsidies. In December 1999, the Appellate Body upheld Korea's appeal on subsidies but ruled that the dual retail system discriminated against imported beef. Korea eliminated the majority of its restrictions in January 2001. In September 2001, Korea abolished the remaining restrictions—the dual retail system and the discriminatory record-keeping requirements.

**Implications**

The case raised a number of WTO legal issues, including under Article III:4 of GATT 1994. Under the Korean dual retail system, a small retailer such as a domestic butcher shop could either sell imported or domestic beef but not both. Stores selling imported beef were required to display a sign stating 'Specialized Imported Beef Store' and were...
subject to more stringent record keeping requirements. Large retailers such as supermarkets and department stores could sell both imported and domestic beef provided they were sold in separate sales areas or display cabinets, and provided also that separate storage facilities were maintained.

The panel and Appellate Body upheld Australia's and the United States' claims that the dual retail system discriminated against imported beef under Article III:4 of GATT 1994. The Appellate Body considered that the practical effect of the dual retail system was to exclude imported beef from the retail distribution channels through which domestic beef was sold to Korean households and consumers. This drastic reduction of commercial opportunity was reflected in the much smaller number of specialized imported beef shops (5,000 shops) as compared with domestic beef shops (45,000 shops). Accordingly, imported beef was accorded less favourable treatment in terms of competitive conditions.

The Appellate Body rejected Korea's arguments on 'perfect regulatory symmetry' and that the dual retail system did not discriminate against imported beef since retailers were free to choose whether to sell imported or domestic beef. In the Appellate Body's view, the case was not one about private entrepreneurs making their own commercial decisions on differentiated distribution systems, but governmental intervention that forced retailers to choose to sell either domestic beef only or imported beef only.

The panel and Appellate Body also rejected Korea's defence that its measures were necessary to prevent consumer fraud. Article XX(d) of GATT 1994 provides a qualified exemption for measures 'necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to ... the prevention of deceptive practices', provided they are not applied in a manner that would constitute arbitrary or unjustifiable discrimination or disguised restriction on international trade. The panel and Appellate Body considered that there were alternative WTO-consistent measures reasonably available to Korea to prevent deceptive practices. Accordingly, Korea had failed to demonstrate that the dual retail system was 'necessary' to prevent misleading practices.

The panel and Appellate Body findings were useful in reinforcing the stringent non-discrimination provisions of GATT 1994 and the dispute remains a textbook application of Article III:4. WTO Members are free to maintain a regulatory system for imported and domestic product provided it does not discriminate against imported product in terms of competitive opportunities. The Appellate Body also emphasised that the intervention of some element of private choice does not relieve a Member of responsibility if its regulatory system resulted in less favourable treatment for imported product.

In terms of domestic implications, Korea is Australia's third largest export market for beef. Implementation by Korea of the WTO rulings has the potential to increase exports by $200 million a year. The case highlighted the tactical use of the WTO dispute settlement system to accelerate trade liberalisation by Korea. Under its

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17 WT/DS161/AB/R, para [145].
18 WT/DS161/AB/R, paras [147] and [149].
19 WT/DS161/AB/R, para [182].
Uruguay Round commitments, Korea had undertaken to liberalise its heavily regulated imported beef market, including by eliminating a range of restrictions by 1 January 2001. Initiation by Australia of a WTO complaint in 1999 therefore served to secure WTO findings of inconsistency prior to that date.

The Korea–Beef case demonstrated the effectiveness of the government-industry partnership approach in managing Australia's WTO disputes. Throughout the dispute, the Department of Foreign Affairs and Trade worked closely with the Department of Agriculture, Fisheries and Forestry and industry (Meat and Livestock Australia) in gathering evidence on the Korean regulatory system, identifying areas of potential WTO-inconsistency, preparing legal submissions and engaging in negotiations with Korea on implementation. Industry provided detailed market information on the application of the Korean measures, and advised the Australian delegation at oral panel hearings in Geneva.

Australia–Automotive Leather

WTO disciplines on the provision of government subsidies to companies or industries are set out in Article XVI of GATT 1994 and the Agreement on Subsidies and Countervailing Measures (SCM Agreement)\(^{21}\). The SCM Agreement defines a subsidy as a financial contribution by a government or public body, or any form of income or price support, which confers a benefit. A subsidy must also be 'specific' to be subject to the disciplines of the SCM Agreement, i.e. it must be available only to an enterprise, industry, or group of enterprises or industries, within the jurisdiction of the granting authority.\(^{22}\)

The SCM Agreement sets out three categories of subsidies. 'Prohibited' subsidies are subsidies contingent in law or in fact upon export performance or the use of domestic over imported goods. 'Actionable subsidies' are subsidies that cause adverse effects to another WTO Member, such as injury to the domestic industry of another Member. 'Non-actionable' subsidies are non-specific subsidies.

The SCM Agreement provides remedies where a measure is found to be a prohibited or actionable subsidy. For prohibited subsidies, the Member must 'withdraw the subsidy without delay'. For actionable subsidies, the Member must 'remove the adverse effects of the subsidy or withdraw the subsidy'. Failure to comply with WTO rulings gives rise to the right for the complaining Member to apply WTO-sanctioned countermeasures (retaliation) against the responding Member. A non-actionable subsidy does not give rise to any remedy or retaliation rights.\(^{23}\)

The dispute

The Australia–Automotive Leather dispute involved a complaint by the United States against payments made by the Australian government, in the form of a grant and a loan, to the Howe Leather company. In May 1999, a panel found the grant to constitute a prohibited export subsidy and requested Australia to 'withdraw the subsidy' as required under Article 4.7 of the SCM Agreement. Subsequent measures taken by

\(^{21}\) It is noted that agricultural subsidies are subject to their own disciplines under the WTO Agreement on Agriculture.

\(^{22}\) Articles 1 and 2 of the SCM Agreement.

\(^{23}\) For a more detailed discussion of the SCM Agreement, see the WTO website at <http://www.wto.org/english/tratop_e/scm_e/scm_e.htm>
Australia to implement the WTO findings were also found to be WTO-inconsistent. In particular, the implementation panel ruled that Australia had failed to 'withdraw the subsidy' by failing to retrospectively recall the $30 million grant already paid to the company. In May 2000, Australia and the United States reached a mutually agreed solution settling the dispute and removing the threat of retaliation against Australian exporters.

**Domestic implications**

In making its findings on remedy, the panel rejected arguments by all parties, including the United States, that 'withdraw the subsidy' did not have retrospective effect. In the panel's view, the remedy of 'withdraw the subsidy' was intended not merely to counteract future adverse trade effects, but also to enforce the absolute prohibition on export subsidies. The panel considered that retrospectivity was necessary to provide an effective remedy for subsidies already paid in the past, for which there was no continuing export contingency.

The implementation panel's findings on retrospective remedy attracted intense criticism by WTO Members at the DSB meeting of 11 February 2000. In the view of most Members, there was no basis for retrospective remedies either in prior GATT practice, or under the WTO Agreements. Such remedies were inconsistent with the object and purpose of the multilateral trading system that was for securing of future trade opportunities rather than punishing Members for past actions. If followed by future panels, the Australia–Automotive Leather findings on retrospectivity would open WTO Members to potential challenge on a whole range of historical measures. A subsidy paid 5 years ago, and subsequently found to be a prohibited subsidy, could now have to be repaid irrespective of whether or not the company or even the industry still existed.

The panel's findings raised important concerns on constitutional and democratic governance. There are significant legal constraints on WTO Member governments securing repayment of monies already paid to private companies legally and in good faith. Section 51(xxxi) of the Australian Constitution requires any acquisition of property by the Commonwealth government to be on 'just terms'. Similarly, the Fifth Amendment of the United States Constitution prohibits the taking of private property for public purpose 'without just compensation'.

Action by the Commonwealth to recall past subsidies could therefore give rise to claims for compensation or damages. This could result in the absurd situation where the 'just terms' payable under Section 51(xxxi) will be the value of the monies recalled. While it is accepted under customary international law and in the WTO that countries cannot rely on domestic law to justify non-performance of international obligations, it serves no purpose for the WTO to enforce a remedy which a country could theoretically never be able to comply with, and to sanction retaliation in the event it fails to do so.

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24 WT/DS126/RW, paras [6.33-6.34].
25 WT/DS126/RW, para [6.35].
26 The arbitrators in EC–Bananas considered that the authorization to suspend concessions or other obligations (retaliation) is a temporary measure pending full implementation of WTO findings by the Member. This temporary nature indicates that the purpose of countermeasures is to induce compliance and not to provide a punitive remedy. The
The Australia–Automotive Leather findings on retrospective remedy were subsequently examined in the Brazil and Canada–Aircraft Subsidies disputes. The complainants in both cases were at pains to criticise the Australia–Automotive Leather findings and to emphasise that they were not seeking a retrospective remedy. Both panels considered it outside their mandate to make findings on remedy not requested by the parties and addressed only those claims made to them. The cases highlight the marked reluctance of complainants—given the potential implications on their own measures—to claim retrospective withdrawal of subsidies. Canada’s comments at the DSB meeting of 11 February 2000 may likely prove accurate. In the absence of an Appellate Body ruling, the Australia–Automotive Leather findings on retrospectivity will be treated by Members as ‘a one-time aberration of no precedential value.’

**United States–Lamb**

As part of their WTO obligations, Members undertake to maintain tariff and other market access concessions as set out in their tariff schedules. Article XIX of GATT 1994 and the Safeguards Agreement however permit Members to take emergency action to temporarily restrict imports of a product where an unexpected surge in imports causes or threatens to cause serious injury to a domestic industry (safeguard action). These provisions set out detailed requirements, which must be satisfied for the application of a safeguard measure. Given the extraordinary nature of the remedy—the unilateral suspension of WTO concessions by an importing Member not dependent on any ‘unfair’ trade action—panels and the Appellate Body will closely scrutinise compliance of safeguard measures with the WTO requirements.

The dispute

In October 1999, Australia and New Zealand initiated a WTO complaint against a safeguard measure—in the form of a restrictive tariff rate quota and increased tariffs—introduced by the United States on imports of lamb meat from Australia and New Zealand. This was found by a panel to be inconsistent with the United States’ obligations under Article XIX of GATT 1994 and the Safeguards Agreement and the United States appealed the panel’s findings. In May 2001, the Appellate Body upheld the panel’s findings that the United States measure was WTO-inconsistent.

In summary, the panel and the Appellate Body found that: the United States failed to demonstrate that imports were the cause of the injury to its industry; the United States’ definition of the domestic industry was too broad; the United States failed to demonstrate that the increase in imports was unexpected; and that the data collected by the United States in its safeguard investigation was inadequate to support its conclusions. The Appellate Body also upheld Australia’s cross-appeal claim that the United States failed to demonstrate a threat of serious injury.

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 arbitralists also assessed the level of retaliation on the basis of potential or future trade opportunities as opposed to past injury: WT/ DS27/ ARB, paras [6.3, 6.11].
27 WT/ DS46/ RW, footnote 17; WT/ DS70/ RW, paras [5.46-5.48].
28 WT/ DS87/ M/ 75, 8.
29 Argentina–Footwear, WT/ DS121/ AB/ R, paras [93-94].
30 WT/ DS177/ AB/ R.
The panel and Appellate Body findings were adopted by the DSB in May 2001. In September 2001, the United States notified the WTO that it would comply with the WTO rulings and remove the safeguard measure in November 2001.

Implications

The dispute clarified a number of key legal issues on the application of safeguard measures, including on domestic industry, causation, unforeseen developments, data representativeness and threat of serious injury. In narrowly construing these legal tests, the Appellate Body reaffirmed safeguard action to be an extraordinary remedy to be applied only in exceptional circumstances.

One issue that the panel and Appellate Body clarified was the definition of domestic industry under Article 4.1(c) of the Safeguards Agreement. This provides that in determining injury or threat of injury, the 'domestic industry' shall be defined as inter alia 'the producers ... of the like or directly competitive products'. The definition of domestic industry is therefore relevant in determining the scope of a safeguard investigation and the application of a safeguard measure.

The United States' investigation report on lamb meat identified only one 'like product' (lamb meat) but went on to define the domestic lamb meat industry as including growers and feeders of live lambs, as well as processors of lamb meat. The United States did not consider whether live lambs and lamb meat were 'directly competitive' products. The United States sought to justify its approach on the basis that there was a 'continuous line of production' between the live lambs and the processed product of lamb meat, and that there was a 'substantial coincidence of economic interests' between growers and feeders of live lambs and processors of lamb meat.

Australia and New Zealand argued that under the WTO rules, producers of an article are simply those who make that article. Accordingly, growers and feeders of live lambs produce live lambs, and processors of lamb meat produce lamb meat. The United States' approach would leave it to the discretion of importing Members how far upstream or downstream the production chain of a given 'like' end product constitutes the 'domestic industry'.

Australia's and New Zealand's arguments were upheld by the panel and the Appellate Body. In the Appellate Body's view, the sole focus of a domestic industry inquiry is to identify the products at issue and whether they were 'like', rather than the processes by which those products were produced. Accordingly, the United States acted inconsistently under Article 4.1(c) by including producers of live lambs in the domestic industry of lamb meat.31

Together with Australia's win in Korea-Beef, the Appellate Body's findings on lamb underlined the importance of the WTO dispute settlement system in protecting and advancing Australian trade interests. The rulings are a significant win for Australian industry. Elimination of the measure could also see a significant expansion in Australia's $150 million export market in the United States.

31 WT/DS177/AB/R, paras [94-95].
CONCLUSION

The six year period from the entry into force of the WTO in January 1995 has been described by many commentators as the high-water mark of WTO jurisprudence. This period saw the gradual 'bedding down' of the new WTO Agreements as panels and the Appellate Body interpreted and applied new provisions covering areas not previously covered by the GATT. Australia's active participation in the WTO placed it at the forefront of the development of WTO law and allowed it to influence the WTO rules and to advance Australia's international and domestic interests.

In the Australia–Salmon dispute, Australia successfully argued for an interpretation of the SPS Agreement that reflected the scientific and practical realities of national quarantine decision-making. Similarly in United States–Lamb, Australia's legal reasoning was followed by the panel and Appellate Body in interpreting key provisions of the Safeguards Agreement, including on domestic industry and causation. Australia's participation as a third party in nineteen disputes influenced the development of WTO rules in areas such as agricultural export subsidies, the relationship between trade and the environment and trade-related intellectual property.

At a domestic governance level, the disputes highlighted the direct and immediate relevance of the WTO rules on Australian governments. WTO rules extend not just to traditional areas of customs and tariffs, but also industry development, agriculture, environmental protection, food safety, quarantine protection and intellectual property. WTO rules affect a wide spectrum of government decision-making and, as demonstrated in the Australia–Salmon dispute, across all levels of government. Potentially any government measure with an impact on international trade can be subject to WTO scrutiny.