The Professionalization Thesis: The TBR, the WTO and World Economic Integration

Eric A. Engle
INTRODUCTION

... International trade today is moving from a political multi polar system based on the nation-state to a loosely unified global legal system featuring even essentially unified continental trading regimes such as NAFTA, the EU, MERCOSUR, and ASEAN. ... To determine to what extent the DSU embodies the professionalization thesis and how it might better obtain the above objectives we shall study proceedings at the E.U. under the Trade Barriers Regulation (TBR) and the dispute settlement understanding of the Dispute Settlement Board (DSB) of the WTO. ... To that extent the TBR or any similar regional agreement is a weak point of the professionalization thesis: regional dispute settlement could act as a clearing-house for the WTO or could undermine it. ... The facts revealed by both these verifications will tend to prove the professionalization thesis. ... Enforcement efficacy is guaranteed by the ultimate sanction of economic retaliation (countervailing duties, import restrictions and other barriers to trade) by the injured party. ... Because this case exemplifies protectionism it is fairly clearly a violation of the free trade principles that justify TRIPS and the WTO. ... Thus the WTO cannot be democratic if it is to obtain the goal of global free trade. ... However without an effective anti-trust regime the WTO would turn into a vehicle for monopoly domination of the global marketplace. ...
International trade today is moving from a political multi-polar system based on the nation-state to a loosely unified global legal system featuring even essentially unified continental trading regimes such as NAFTA, the EU, MERCOSUR, and ASEAN. This transformation has had the effect of reorienting entire institutions. The globalization of law was made possible technologically by the rise of a telecommunication and transportation infrastructure unprecedented in human history. Ideologically globalization expresses itself as the rise of a consumption economy, which if it does not succeed in silencing opposition often anaesthetizes it.

If both technology and politics make it possible to create a truly global legal system recent events demonstrate that the world remains a dangerous place. However despite the challenges of fundamentalism and sectarianism—it is obvious that building global institutions of peaceful governance is the only way to prevent the backlash of the poor and desperate in a world divided into two great camps—one rich and the other poor.

Making the transition from politics—the Hobbesian war of all against all—to society has been a vision of utopians at least since Marx. Ironically one of the institutions that will help make that transition is capitalist to the core. The DSU of the WTO provides a juridical framework which replaces the former interminable and uncertain political process of GATT. The globalization of law was made possible technologically by the rise of a telecommunication and transportation infrastructure unprecedented in human history. Ideologically globalization expresses itself as the rise of a consumption economy, which if it does not succeed in silencing opposition often anaesthetizes it.

If both technology and politics make it possible to create a truly global legal system recent events demonstrate that the world remains a dangerous place. However despite the challenges of fundamentalism and sectarianism—in fact because of them—it is obvious that building global institutions of peaceful governance is the only way to prevent the backlash of the poor and desperate in a world divided into two great camps—one rich and the other poor.

Making the transition from politics—the Hobbesian war of all against all—to society has been a vision of utopians at least since Marx. Ironically one of the institutions that will help make that transition is capitalist to the core. The DSU of the WTO provides a juridical framework which replaces the former interminable and uncertain political process of GATT. The globalization of law was made possible technologically by the rise of a telecommunication and transportation infrastructure unprecedented in human history. Ideologically globalization expresses itself as the rise of a consumption economy, which if it does not succeed in silencing opposition often anaesthetizes it.

The professionalization thesis states that the planet is developing juridical institutions to replace political ones. Instead of the extreme political vacillations which characterize political institutions, advocates of the juridical professionalization thesis propose the replacement of political processes by judicial mechanisms which they say will lead to more rational predictable and stable decisions reducing transaction costs and increasing productivity. In the domain of the WTO, the professionalization thesis argues that that transition has already occurred via the DSU, this establishes a panel and appellate process plus remedies for violations of the substantive principles of the WTO. It is clear that the DSU is already a working example of Weber's theory of ideal rational bureaucratic neutrality.

This paper adopts a qualified professionalization thesis: the replacement of unstable political processes with rational judicial processes is possible. In the field of trade it is even desirable. But that transformation must at least avoid earning the enmity of the people. Given the waves of militant but essentially non-violent anti-WTO protest it is clear that the WTO is not inevitably legitimate. Consequently the WTO will have to earn the trust and respect of the third world. If the WTO can continue to adjudicate in an apolitical fashion over time it will obtain legitimacy as an institution determined to make peace through prosperity. The WTO could become one more success story of functionalism.

To determine to what extent the DSU embodies the professionalization thesis and how it might better obtain the above objectives we shall study proceedings at the E.U. under the Trade Barriers Regulation (TBR) and the dispute settlement understanding of the Dispute Settlement Board (DSB) of the WTO. Our expose of the procedures is intended to demonstrate the theoretical conformity of the WTO to the professionalization and functionalist theses. These these shall be verified by a consideration of empirical practice in the case law of the Panel and Appellate Body; which shall show that this theoretical professionalism is also followed in practice. We shall conclude with a brief examination of proposals for reform of the DSB.

I. THE THEORY OF PROFESSIONALIZATION

The professionalization thesis holds quite simply that the international trading system is moving from a model of governance determined by political process and dominated (albeit less so in the post-war world) by conflict toward a model based on consensus and governed by judicial decision. This thesis will be explored with respect to E.U. and WTO institutions which govern the adjudication of international trade disputes. There we will see that, with qualification, the WTO's Dispute Settlement Mechanism (DSM) institutes an arbitration panel which operates as a quasi-judicial body that issues judgments that carry precedential value.

A. E.U. REMEDIES: PROCEEDING UNDER THE TRADE BARRIERS REGULATION
Prior to seeking a remedy for trade restrictions before the DSB, an aggrieved party can seek relief before European courts under the E.U.’s TBR. From the perspective of the WTO however exhaustion of local remedies is not a pre-requisite to proceedings before the panel.

The E.U. procedures are relatively straightforward, though not without contention. Much like any other court, the complainant must first state their allegations. The complaint must identify the plaintiff and defendant, and state the practice(s) which constitute a barrier to trade. The complaint must be properly served, and should state, as clearly and specifically as possible the nature of the practice complained of that constitutes a barrier.

If the claim is procedurally well founded the community will then consider the substance of the complaint. Proceedings under the TBR are inquisitorial rather than adversarial and thus more similar to the continental civil law than to the Anglo-American common law. The complained practice must constitute either an injury or threat of injury to the communities' industry or to the communities' trade (Art. 2(3) injury; Art. 2(4) adverse affects of the TBR). This "effects" based reasoning can of course be criticized as veiled protectionism. Such a complaint could later be made before the WTOs panel under the Dispute Settlement Mechanism—although the WTO also allows effects based reasoning. Nevertheless one limitation of the E.U. remedy is that it is conditioned by the WTO.

Having set out the claim of an actual or potential injury to community trade via an adverse trade practice, the plaintiff must then prove causation—meaning that the behavior in question causes or threatens to cause an injury. Adverse practices are not necessarily trade barriers. Whether a particular practice causes an injury to trade is determined according to EC Council Regulation 3286/94 22 Dec. 1994. That regulation considers both de jure and de facto prohibitions. Causation may be proven by adducing by statistical evidence as to the volume of trade and prices under art. 10 of the TBR.

One can criticize the TBR first, and perhaps unfairly, as veiled protectionism. That critique however ignores the necessity of an E.U. "clearinghouse" for the competing national claim and the fact that adjudication at the TBR may reduce the workload of the WTO. A more salient critique would be to attack the effects of biased reasoning of the TBR: the behavior that can be complained of under the TBR does not need to actually cause damage. The mere threat of a potential injury to community trade is sufficient to prove causation. Further, the injury complained of does not need to directly affect Europe but can affect third party states. Thus if a trade agreement between two states outside of the E.U. merely threatens to negatively effect E.U. trade it could be the basis for a complaint under the TBR. For example, a contractual agreement between a state and a company to perform an installment contract could constitute a threat to European trade with that non-member state--and thus be the basis for a TBR proceeding. This exorbitant jurisdiction explains why one could question the neutrality of the TBR. In so far as the TBR acts as a vector for European trade interests, its role as a neutral clearinghouse for the WTO is jeopardized. To that extent the TBR or any similar regional agreement is a weak point of the professionalization thesis: regional dispute settlement could act as a clearing-house for the WTO or could undermine it. However, even if the TBR were a political rather than judicial institution that would not necessarily imply that the DSU were also political rather than quasi-judicial. The neutrality of the TBR can be questioned and because litigation is conflict driven remedies before the E.U. may eventually be questioned before the WTO where we now turn our attention.

B. THE "TRIAL" LEVEL: THE DSB PANEL PROCESS

What procedure must be followed to make a complaint before the WTO? Proceedings begin with good faith consultations (DSU art. 4) which seek an amicable settlement. Third parties may at this time seek to intervene if their interests are implicated (art. 4 § 11). If the complaining party is dissatisfied with the outcome of the consultations, they may request the DSB to form a panel to decide the case. The request to form an arbitration panel must be made in writing, summarize the complaint, and indicate the parties (art. 6, § 2). The DSB may refuse, but only by consensus (art. 6, § 2). The panel itself is composed of three "well qualified" arbitrators, whose selection may only be opposed for compelling reasons. The panel may in the alternative, if both parties agree, be composed of 5 persons (art. 8). The panelists act in a personal capacity and are not representative of any government or non-governmental organ.
8). Naturally the panel must make its decisions fairly and equitably (art. 11). The parties' arguments are presented first in writing (art. 12, § 6). These provisions show that in theory the DSB arbitration is very similar to an ordinary judicial instance and should operate as an international court. That tends to prove the professionalization thesis, that functionalist approaches to solving problems of world trade through depoliticization are the best way to build peace through prosperity. Other provisions also support this view.

The panel, like the TRB, can be said to be "inquisitorial" in the sense that it can seek information from the parties and pose questions to them. (art. 13). That is of course not a standard judicial procedure in the Anglo-American common law but is the normal course of events in continental civil law jurisdictions and elsewhere in international law. The panel's deliberations are confidential. (art. 14). The procedure does foresee oral arguments as well as written submissions (art. 15, § 2) Prior to final delivery of the decision of the panel to the DSB, the parties are given "one last chance" to raise objections to the interim findings directly before the panel. (art. 16, § 2). After this "last chance", any objection either as to the substantive findings or procedural enforcement of those findings must then take place via appeal to the appellate body.

C. THE APPELLATE BODY

After the judgment of the panel, parties may appeal the decisions of the panel to the appellate body (art. 16, § 4 and art. 17). The provisions at the DSB "trial" level parallel those of a national court. This judicial parallel continues at the appellate level. In theory the appellate body should also operate like a national appellate court, that is, as a neutral and objective arbitrator. n19

The appellate process is relatively straightforward. There is however procedural limits on the openness which can with justice be criticized and which are not necessary to depoliticization of trade disputes. The reports of the appellate body are anonymous (art. 17, § 11). Its deliberations are confidential. (art. 17, § 10). Most problematic for legitimacy, third parties to the dispute may not directly appeal the decision of the panel (art. 17 § 4). Although they can intervene once an appeal is initiated by either party to the dispute. Further once an appeal has been initiated new third parties may join the appeal. n20 Thus while there are no explicit provisions for briefs filed as amicus curiae, n21 which is a point of criticism, a similar result can be reached by joining the appeal. Third parties are however correct in remarking that joinder is more burdensome than merely filing as amicus curiae. Thus some persons, notably NGOs, propose permitting amicus filings which would be one way to increase democratic legitimacy of the WTO.

The proceedings of the appellate body, like the panel, are intended to be neutral and objective. The members of the appellate body must be experts in the field of law and commerce n22 but may not be affiliated with any government. n23 All of these procedural requirements of fairness, neutrality, independence, and professional competence, as well as the stringent time limits on enforcement of judgments are further evidence of the professionalization thesis.

D. IMPLEMENTATION: REMEDIES FOR BREACH OF WTO TREATY OBLIGATIONS

Once the panel or the appellate body has reached a final decision, if the practice is determined to be illegal the order will reflect a ruling to cease such activity. The party in breach of their treaty obligation must remedy this breach within a reasonable time (art. 21, § 3). n24

What constitutes a "reasonable" time? In fact a consensus is emerging which parallels the understanding's provisions that reasonability is proportional to the difficulty of implementation. n25 A "reasonable" time to implement the remedy may be determined by the agreement of the parties, through arbitration. A practical guideline for the longest "reasonable" time period is 15 months, though provision here is made for [*19] accounting for time of appeal that still may not exceed 18 months (Art 21, § 4). Flexibility in the time required for the remedy is also permitted in cases where the state in breach is a developing country. (art. 21, § 8). However notwithstanding these derogations every case should, in principle, be decided at the very most two years after initiation, and on average six months to a year after initiation of proceedings.
The panel and appellate body seek a rapid and fair resolution of every claim. If the WTO can enforce this time schedule—and as we shall see it does—then the rapidity and certainty of these decisions is further evidence of the validity of the professionalization thesis: rather than endless negotiation instability and political theater the deliberations are judicial timely and rational.

**E. SANCTIONS FOR VIOLATION OF CONTINUED NON-COMPLIANCE: REASONABLE AND PROPORTIONAL RETALIATION**

The non-breaching party may demand monetary compensation in cases of continued non-compliance (art. 22, § 2) or retaliatory trade sanctions will be permitted (art. 22, § 3). Though 23, § 3 does not use the terms "proportionality" or "reasonability" the escalating series of potential retaliatory measures that it enumerates can best be understood with those two qualifications. This interpretation will be supported infra in the case law. Thus the retaliation should be in the same sector of the agreement. If that is not possible the retaliation should be within other sectors of the same agreement. If that is also not possible or impractical, permissible retaliation in other agreements between the parties is permitted as a remedy. However while retaliation is permissible punitive damages are not a part of the escalating sanctions. Compensation rather than punishment is the rationale of the WTO. An argument that retaliation must be reasonable and proportional can also be supported elsewhere in the treaty. art. 22, § 3(d)(ii) permits economic analysis to determine the correct remedy. Overburdensome and disproportional remedies would thus be prohibited where more reasonable remedies are available.

The requirement that the remedy be reasonable and proportional can also be supported by general principles of law and specific examples of other areas of remedies under international law. As general principles and canons of construction the concepts of reasonability and proportionality permeate the law. The principles of proportionality and reasonability can be found in the field of remedies for breach of rights under international. For example, national self-defense must be reasonable and proportional. The right of retaliation and reprisal under international law is also required to be reasonable and proportional. For these reasons the better view is that retaliation for continued non-compliance with WTO orders, like other international law defenses such as reprisals or self-defense, must be proportional and reasonable. That view is also the fairest if we see the purpose of the WTO as building peace through prosperity: punitive or vindictive remedies would frustrate that purpose both by generating ill will and because they are less economically efficient than more measured responses. Because retaliation poses the risk of vindication, arbitration exists as a possible method to resolve the dispute over compensation or retaliation. (art. 22 § 7; art. 25).

The fact that the panel and appellate body are established according to, and enforce, objective procedures for the regular determination of diverse trade disputes is further evidence of the validity, at least in theory, of the professionalization thesis. We now turn to the practice of the courts in order to determine the validity of the professionalization thesis in practice. There we will see that while the cases are still few in number they demonstrate a rapidity and certainty of decision that supports the professionalization thesis.

**II. THE PRACTICE OF PROFESSIONALIZATION: CASES RAISED BEFORE THE DSB**

The expose of the procedural mechanisms of the DSB and DSU shows the theoretical validity of the professionalization thesis. We now verify the theoretical hypothesis of professionalization through a material comparison of the actual empirical facts of disputes brought before the panel with the theory. This will show that the validity of the professionalization thesis is confirmed in practice.

This verification shall draw on two empirical sources. First it shall examine the substantive issues of recent or pending litigation before the WTO. Then it shall perform a statistical analysis of the WTO caseload. The facts revealed by both these verifications will tend to prove the professionalization thesis.

**A. CASES**

The cases which we shall study are either not yet resolved, resolved through settlement or resolved through the
decision of the panel or appellate body. They show that the WTO encourages amicable settlement where possible but arbitrates settlements when necessary. All of the cases involve intellectual property law and all cases but one involves the U.S. and the E.U. or an E.U. member state.

These cases tend to prove that the dispute settlement mechanism is an example of coherent bureaucratic operational efficiency of the type described by Max Weber. The settlement procedure encourages dispute resolution through hierarchical procedures of trial and enforcement of judgment. Settlement is also encouraged by the fact that the mechanisms of enforcement are efficacious. Enforcement efficacy is guaranteed by the ultimate sanction of economic retaliation (countervailing duties, import restrictions and other barriers to trade) by the injured party. n28 That sanction however must be proportional and reasonable.

The WTO remedy succeeds because it turns the self-interest of the state toward enforcement. Thus the DSB is also a working example of effective realist-functionalist state theory. However in so far as these mechanisms remain undemocratic (apart from the virtual representation of appointed governmental ministers) the WTOs DSM has not yet squared the circle by forming a synthesis of the competing thesis of realist and transformationist state theories. That may not be possible. However it may not be necessary. Functionalism provides a means of resolving at least the mundane problems of daily life. Perhaps those are the only problems that can ever be solved. They are in any event the most immediate. If the DSM "only" succeeds in normalizing world trade then it will serve the purpose of encouraging commerce and economic growth thereby reducing the risk of war, at least within the first world. In sum, the panel procedure encourages amicable settlement at several levels, is in all cases relatively rapid (particularly when compared to the political system which preceded it) and creates enforceable judgments through a series of ever-stronger remedies for non-compliance. This practice validates the theory that supports the professionalization thesis.

The following cases have been selected for their subject matter, intellectual property, and their parties; which in all cases save one are the U.S. challenging either the E.U. or an E.U. member state.

1. Pending Cases (Consultation Phase)

The following cases are currently pending before the arbitration panel:

United States - Section 337 of the Tariff Act of 1930 and amendments thereto, complaint by the European Communities and their member States (WT/DS186/1). n29 Section 337 of the U.S. Tariff Act (19 U.S.C. § 1337) and the related Rules of Practice and Procedure of the International Trade Commission contained in Chapter II of Title 19 of the U.S. Code of Federal Regulations permits the U.S. to take unilateral action for violation of intellectual property rights. 19 U.S.C. § 1337 is challenged as contravening Article III of GATT 1994 and TRIPS Agreement Articles 2 (in conjunction with Article 2 Paris Convention), 3, 9 (in conjunction with Article 5 Berne Convention), 27, 41, 42, 49, 50 and 51. Since the law in question was enacted prior to the last world war it may well be stricken as inconsistent with TRIPS. While unilateral self help was the ordinary remedy in 1930, such is no longer the case.

United States - U.S. Patents Code (WT/DS224/1), n30 request by Brazil. This request concerns the provisions of the United States Patents Code (US Patents Code), in particular those of Chapter 18 [38], "Patent Rights in Inventions Made with Federal Assistance". Essentially the U.S. law at issue in DS224 requires that any patent procured as a result of U.S. federal research aid is manufactured thereafter in the United States. This is another paradoxical example of TRIPS being invoked to limit the extent of intellectual property rights! Brazil has requested consultations with the U.S. to understand the U.S. position justifying the consistency of its limitation on federal research subventions with the TRIPS and TRIMS agreement (TRIPS, Articles 27 and 28; TRIMS Agreement, Article 2 in particular, and Articles III and XI of GATT 1994). n31

The perception is that U.S. funded researchers will go to Latin America in search of local species to patent. Thus this case represents not only an example of anti-competitive government subsidization and monopoly, it also represents an attempt by the first world to develop and seize the resources of the third world. Because this case exemplifies
protectionism it is fairly clearly a violation of the free trade principles that justify TRIPS and the WTO. For these reasons it is possible that this case will be settled amicably.

This case is also interesting in that it will illustrate the limits of the DSB: while we have already seen the DSB can in effect order legislative amendment, it is not likely that the DSB will go so far as to order one state to essentially subsidize another state's research and development costs. While it is perfectly consistent with a free-trade rationale to order a state to cease subsidization of its industries, even indirectly, it is inconsistent with that theory to require a state to essentially subsidize foreign and domestic industries equally. The former is a passive integration wholly appropriate to the WTO. The latter however is an active form of positive integration, more appropriate for political arrangements and regional customs unions such as the EU. Thus DS224 is not posed in its proper terms: the question should not be whether the U.S. should subsidize the Brazilian industry, but whether it can subsidize its industries at all. Because of these two questions this case could serve to delimit the different nature and scope of regional as opposed to global trading regimes.

[*21] These two cases that are at the consultation phase and have not yet been settled are examples of the first step in the process, seeking a hearing before the panel. They show that the process of negotiation toward amicable settlement continues even in the midst of preparation for litigation and thus tend to show that the mechanism of settlement and judicial decision is working. During negotiations, either the case settles, or goes forward. If the case goes forward a decision is issued. Either the decision is appealed or enforced or avoided. If the decision is appealed either the decision may be changed. However, the decision has avoided a series of escalating retaliatory measures are allowed proportional to the injury resulting from breach of the treaty obligations. This is very similar to the process before any other court, and this similarity is further evidence of the validity of the professionalization thesis.

2. Settled Cases

Swedish - Measures Affecting the Enforcement of Intellectual Property Rights, complaint by the U.S. (WT/DS86/1). n32 Here, in essence, the U.S. argued that the Swedish remedy for infringement of intellectual property rights was inadequate and thus violated Articles 50, 63 and 65 of the TRIPS Agreement. The parties reached a mutually agreeable settlement. This case is thus another example of the efficacy of the agreement in terms of encouraging settlements.

Portuguese - Patent Protection under the Industrial Property Act, complaint by the U.S. (WT/DS37). n33 In that case the U.S. argued that Portuguese domestic law on (Portugal's Industrial Property Act) was in violations of Articles 33, 65 and 70 of TRIPS. Both parties notified a mutually agreed solution to the DSB. Again the procedures are effective as they encourage enforceable settlement of disputes.

European Communities - Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs, complaint by the U.S. (WT/DS124/1). n34 Essentially this was a case asserting copyright infringement. The U.S. alleged that Greek television stations regularly broadcast copyrighted movies and television programmes without securing permission from their owners. The U.S. argued that the Greek remedies are either unenforced or inadequate and asserts a violation of Articles 41 and 61 of the TRIPS Agreement. A mutually satisfactory negotiated solution was reached. n35

The disposition of these three cases by settlement tends to prove the professionalization thesis. Rather than seeing long drawn out procedures, the trade disputes are adjudicated fairly and rapidly and thus more often than not are settled.

3. Case Resolved Via Appellate Decision

United States - Section 110(5) of the U.S. Copyright Act (DS160) n36 This case is interesting because it is the first litigation of one of the U.S. "Fair Use" exceptions to copyright protection. It is also the only case considered which neither settled nor is pending. The case demonstrates that even in contentious issues the WTO is able to enforce its judgments--even against the U.S. Thus this case is very strong proof of the validity of the professionalization thesis.
Essentially, U.S. copyright law permits display in public places of current (as opposed to recorded) broadcasts without paying royalties provided only that the receiver be of the type ordinarily used in the home and that no charge be imposed for such display. This permits, for example, bus stations, cafes, bars etc. to play a radio and television. This exception to the author's monopoly right was permitted as being in the public interest and on the merits can be defended (not only because free diffusion of news and entertainment is in the public interest but also because enforcement of the right of the copyright holder would be impossible in practice).

The U.S. law (Section 110(5) of the U.S. Copyright Act, as amended by the Fairness in Music Licensing Act, 27 October 1998) was challenged as being in violation of Article 9(1) of the TRIPS Agreement, which incorporates by reference Articles 1-21 of the Berne Convention. Australia, Japan and Switzerland reserved their third-party rights. The dispute focused on the business exemption of Section 110(5) of the U.S. Copyright Act and its partial incompatibility with Article 13 of the TRIPS Agreement. TRIPS Art. 13 does permit limits on the rights of copyright holders, provided that those limits do not interfere with their economic rights or prejudice the legitimate interests. This author believes that that would also include the moral rights (droit moral) of the authors. The business exemption of sub-paragraph (B) of Section 110(5), essentially allowed the on site diffusion of music broadcasts without an authorization or a payment of a fee by businesses frequented by the public (stores, cafes, bars, restaurants) provided that they do not exceed a certain size limit. The business in question may even use amplification equipment (speakers etc.) provided that such broadcast or amplification equipment is of the kind ordinarily used in private homes under the "home style" exemption.

The panel determined that the "business" exemption provided for in sub-paragraph (B) of Section 110(5) of the U.S. Copyright Act did not meet the requirements of Article 13 of the TRIPS Agreement and was thus inconsistent with Articles 11bis(1)(iii) and 11(1)(ii) of the Berne Convention (1971) as incorporated into the TRIPS Agreement by Article 9.1 of that Agreement. At the same time however the panel found that the "home style" exemption provided for in sub-paragraph (A) [22] of Section 110(5) of the U.S. Copyright Act met the requirements of Article 13 of the TRIPS Agreement and was thus consistent with Articles 11bis(1)(iii) and 11(1)(ii) of the Berne Convention (1971) as incorporated into the TRIPS Agreement by Article 9.1 of that Agreement. Thus the effective decision of that case is that a patron, employer, or employee may casually use their radio, or even television on the premises but for personal uses only.

This decision is open to critique on the merits. First it will be difficult to enforce. One has difficulty imagining police raids on restaurants for copyright infringement. The decision can also be criticized for it reduces the availability of information to consumers. The decision is even bad for authors since it will reduce the size of the advertising audience and thus reduces the merchantability of author's works. However it is also clear that a fair reading of the Berne treaty does indicate that the E.U. is in its rights to oppose the fair-use "home style" exception as unfairly depriving authors of their legitimate royalties.

Given the nature of the case, which ordered the U.S. to amend its internal law, it is not surprising that its implementation was contentious. The U.S. did not seek to overturn the decision but rather sought an extension to the maximum possible time for legislation to correct the inconsistency between U.S. domestic law and its TRIPS treaty obligations. Thus rather than appeal the decision the U.S. sought to negotiate the time frame in which the decision would be implemented under Article 21.3(c). The question of enforcement was heard before binding arbitration, pursuant to the DSM. n37

Essentially the U.S. sought at least 15 months for compliance, and preferably a full congressional term of two years, due to the change in administrations caused by the presidential election. The E.U. sought to limit the U.S. implementation time to a maximum of ten months. The question then was what exactly is the reasonable time? n38

In the case the arbitrator found that: "Article 21.3(c) makes clear that the 'reasonable period of time' may be shorter or longer, depending upon the 'particular circumstances". The arbitrator noted that the compliance must be "prompt" and cited previous arbitrators who noted that reasonable period of time" meant the following: "it is clear that the reasonable period of time, as determined under Article 21.3(c), should be the shortest period possible within the legal system of the
Member to implement the recommendations and rulings of the DSB.” (emphasis added)

In the instance the arbitrator decided that twelve months from the time of the panel decision would be a reasonable time, noting that legislative procedures take longer than administrative ones, and that the panel’s decisions should not oblige extraordinary measures to be taken by members of the trading body, but that ordinary legislative procedures should normally be allowed.

This case is very strong evidence in support of the professionalization thesis. First, the arbitrator’s citation to the previous decisions of the panel shows that the panel is developing a case-law jurisprudence which is one of the preconditions to the normalization of world trade, i.e. the transformation of international trade disputes from a political to a juridical system of governance via international organizations such as the WTO. Second, the WTO has effectively ordered the United States to alter its internal legal regime and can enforce that decision. Finally, the case went through the entire process of negotiations, decision, and enforcement. Were the WTO beset with inter-elite disputes then this decision would never have been reached: political pressures would have intervened. Thus the legal practice confirms the theory of the professionalization thesis.

*United States - Section 211 Omnibus Appropriations Act*, complaint by the European Communities and its member States (DS176/1). Essentially, a U.S. law prohibits the registration of a trademark which has fallen into disuse where the mark had been abandoned following confiscation of the trade mark owner’s business assets located in Cuba. Section 211 of the U.S. Omnibus Appropriations Act was challenged for inconformity with TRIPS Article 2 and by reference the Paris Convention’s articles 3, 4, 15-21, 41, 42, and 62. Canada, Japan and Nicaragua reserved their third-party rights.

The appellate body reversed in part and affirmed in part the decisions against the United States. This case is paradoxical in that ordinarily TRIPS is criticised on the grounds that it extends too much protection over intellectual property. However, in this case TRIPS was being invoked as a defense against such overreaching. This is not the only challenge to U.S. laws of intellectual property under TRIPS (infra). The result of this, qualified and cautious limitation of the U.S. position, may set the tone for TRIPS as shield to protect the third world against abuse of intellectual property rights.

**B. STATISTICAL ANALYSIS OF THE CASES n41**

The cases studied have been completed either through settlement or through binding arbitration. As such they illustrate the efficacy of the DSB. The parties preferred settling in two of the three cases studied which supports the professionalization thesis since the efficacy of enforcement is key to the validity of that thesis. Were the enforcement mechanism ineffective, parties would be unlikely to settle. Yet in most cases parties prefer to settle, at least in this small case survey.

While half dozen cases are very few, these are nevertheless all cases involving intellectual property with the U.S. and the E.U. or an E.U. member state as parties. Further the statistic being studied here is not stochastic but deterministic, i.e. all parties have volition and seek strategies to win a positive sum game. Finally the fact that the DSM is a new legal development explains why there would be few cases even if we looked at those cases outside the field of intellectual property and the first world. Is this study reflected in across the board in the WTO or is it unique to intellectual property questions? In fact, a survey of all WTO cases confirms the analysis that the dispute settlement mechanism is effective and encourages settlement. Further our survey of other cases will show that both the U.S. and the E.U. win more cases at the WTO than they lose, but that the E.U. tends to do somewhat better than the U.S.

**1. The DSM of the WTO Globally**

We first examine the DSM of the WTO globally because it will confirm our analysis of intellectual property claims. Many cases either settle or are dropped outright.
THE WTO DISPUTE SETTLEMENT MECHANISM SINCE JANUARY 1, 1995

<table>
<thead>
<tr>
<th>Complaints Notified to the WTO&lt;1&gt;</th>
<th>Active Cases&lt;2&gt;</th>
<th>Appellate Body and Panel Reports Adopted&lt;3&gt;</th>
<th>Settled or Inactive Cases&lt;4&gt;</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of Cases</td>
<td>228</td>
<td>16</td>
<td>47</td>
</tr>
<tr>
<td>(175 of which involve distinct matters)</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Explanatory notes:

<1> This category encompasses all requests for consultations notified to the WTO, including those requests which have led to panel and appellate review proceedings.

<2> This category encompasses pending or suspended panel proceedings or appellate review proceedings, with the exception of proceedings pursuant to Article 21.5 of the DSB.

<3> This category does not include reports resulting from proceedings pursuant to Article 21.5 of the DSB.

<4> This category includes cases where the contested measure has been terminated, a panel request was withdrawn, etc.

See: WTO at http://www.wto.org/

2. The E.U. Before the WTO

About half of E.U. complaints reach panel stage, whereas only about 1/3 of claims against the E.U. reach panel stage. This is illustrated at right.

However this correlation is not itself a proof of the reasonability of the E.U.: for example if the E.U. has "overplayed" its hand early in the settlement process then settlement would be the best choice. More interestingly the number of cases brought against the E.U. which go to panel have dropped in a linear fashion from 1995 (over 1/3) to none in 1999 so apparently the E.U. is becoming skilled at the procedures.

3. The U.S. and the E.U. Before the WTO

U.S. and European cases together are the majority of WTO DSB cases. Both tend to win their cases but the E.U. tends to win more cases than the U.S.
## THE E.U. BEFORE THE WTO

<table>
<thead>
<tr>
<th></th>
<th>Complainant</th>
<th>Defendant</th>
<th>Third Party</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Request</td>
<td>Request</td>
<td>Request</td>
<td>WTO</td>
</tr>
<tr>
<td></td>
<td>Consult</td>
<td>Consult</td>
<td>Consult</td>
<td>Total</td>
</tr>
<tr>
<td>Consult</td>
<td>Panel</td>
<td>Panel</td>
<td>Panel</td>
<td></td>
</tr>
<tr>
<td>1995</td>
<td>2</td>
<td>1</td>
<td>8</td>
<td>3</td>
</tr>
<tr>
<td>1996</td>
<td>7</td>
<td>1</td>
<td>4</td>
<td>3</td>
</tr>
<tr>
<td>1997</td>
<td>16</td>
<td>6</td>
<td>4</td>
<td>3</td>
</tr>
<tr>
<td>1998</td>
<td>16</td>
<td>4</td>
<td>9</td>
<td>1</td>
</tr>
<tr>
<td>1999</td>
<td>6</td>
<td>9</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>1999</td>
<td>8</td>
<td>4</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td>TOTAL</td>
<td>55</td>
<td>25</td>
<td>31</td>
<td>11</td>
</tr>
</tbody>
</table>


1995  2  1  8  3  2  1  25  
1999  8  4  3  0  5  8  39  
Average  9  4  5  -1  5  5  36  
Trend  +  +  -  -  +  +  +  

See: E.U. Multilateral Issues: Dispute Settlement, Overview at [http://europa.eu.int/comm/trade/miti/dispute/overview.htm](http://europa.eu.int/comm/trade/miti/dispute/overview.htm) Summaries of all DSU litigation can be seen at: "Basic Information for WTO Dispute Cases" at [http://www.law.georgetown.edu/iiel/DSUTable1.doc](http://www.law.georgetown.edu/iiel/DSUTable1.doc) [*24*]
TOTAL CASES AT THE WTO INVOLVING THE U.S. OR THE E.U.

<table>
<thead>
<tr>
<th>Initial Data</th>
<th>Derived Data</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Plaintiffs</td>
</tr>
<tr>
<td>U.S.</td>
<td>30</td>
</tr>
<tr>
<td>E.U.</td>
<td>26</td>
</tr>
<tr>
<td>Others</td>
<td>44</td>
</tr>
</tbody>
</table>

See: WTO at http://www.wto.org/However while the U.S. and E.U. both go before the WTO more often than all other WTO members the U.S. does not do as well as the E.U.-although the U.S. wins more cases than it loses.

WINS VS. LOSSES OF THE U.S. AND E.U. BEFORE THE WTO

<table>
<thead>
<tr>
<th>Initial Data</th>
<th>Derived Ratios</th>
</tr>
</thead>
<tbody>
<tr>
<td>U.S. as Plaintiff</td>
<td>U.S. as Defendant</td>
</tr>
<tr>
<td>Wins: 13</td>
<td>1</td>
</tr>
<tr>
<td>Draws: 10</td>
<td>10</td>
</tr>
<tr>
<td>Losses: 2</td>
<td>6</td>
</tr>
</tbody>
</table>


This data shows that while the E.U. does better at the WTO than the U.S. the U.S. still wins more cases than it loses. One could conclude from this mere statistic either that the E.U. is a sharp negotiator or that it has outright "captured" the DSB. We do not make either conclusion since each case has to be considered on its merits. Statistical studies tend not to prove but to corroborate evidence gathered through thorough analysis of concrete cases on their merits. There is a lesser correlation of cases invoking the DSB by the E.U. going to panel that fluctuates but on average shows greater invocation of the DSB by the E.U. At the same time however we can see that all members are more and more regularly using the DSB, this fact tends to support the professionalization thesis.

Thus an argument that the E.U. does well at the WTO because of agency "capture" (regulators effectively acquiring self regulatory power through informal professional ties) appears ill founded. "Playing the game well" is not the same as "cheating". To the extent that the "game" of the WTO represents a subjective zero sum game (the conflict to see who will win or lose the dispute) in the larger positive sum game of trade would imply that the E.U. must have a winning strategy if it wins. Even in cooperative positive sum games such as trade there are still relative winners and losers. Both
the U.S. and the E.U. are absolute winners in global trade though the E.U. is winning slightly more than the U.S. This fact becomes clearer when one considers the position of the first world and compares it with the third world or even Eastern Europe.

This thesis of bureaucratic neutrality and fairness can also be supported when we remember that there are similar symmetric cases either pending or resolved which have or may be found in the U.S. favor. While the Brazilian case seems likely to result in an ambiguous condemnation of non-tariff barriers coupled with an affirmation of state sovereignty, the cases involving Europe are rather clearer. Sweden smartly accepted the inadequacy of its laws, and has taken or is taking steps to redress them having settled. Greece may or may not insist on going to panel, but if the facts were as the U.S. claimed, then they would also be wiser to settle. These cases demonstrate the "normalization" thesis. This thesis argues that the formerly political area of trade disputes can be better handled through juridical structures such as the WTO's DSM. Since we see symmetrical issues and similar out-comes the normalization thesis is operationally compelling, at least when considered within its own terms.

How then to explain the necessarily costly U.S. intransigence in the field of intellectual property law? The loss suffered by the U.S. before the WTO in the case of 110(5) of the copyright act and Art. 337 demonstrate tactical errors by the US. Strategically the U.S. has been a long time advocate of market capitalism and free trade has, as a result of its cold war victory been able to forge a regime for global trade liberalization. However in seeking to maintain its own laws even where they are in contravention of the regime that its foreign policy elites created it is not merely behaving unreasonably and overreaching its own power-it is also making tactical errors which are not only embarrassing but also costly. To put it colloquially, in its persistent attempts to unilaterally impose its agenda the U.S. has "overplayed its hand".

III. REFORM PROPOSALS

The normalization thesis seems reasonably well supported through this limited empirical study. However no system, no matter how well conceived, is ever perfect. Thus we can ask ourselves what types of reforms have been requested or proposed for this system? One point that might be important is that the E.U. does not, de facto, give the WTO implementation any vertical direct effect. Individuals are not granted any right by the implementation of law pursuant to enforcing the WTO agreement (dicta). Further only persons with a concrete interest have standing to sue before the WTO.

Another proposal has been to permit greater third party participation either in the panel or appellate process or both. Requiring the panel to consider amicus curiae briefs would be one way to increase democratic legitimacy of the panel or appellate body. The amicus curiae is a non-implicated third party. Their brief is simply an argument in favor of what they see as the best resolution of the case or facts. The court is currently free to ignore amicus curiae briefs. However a well founded and properly filed brief will in ordinary practice at least be read. Thus the practice of requiring consideration of amicus curiae briefs would cost the court nothing in terms of obligation but would increase the sense of fairness and democracy since in such a case NGOs, and the people they represent, would be able to have a voice on decisions, if only in theory.

Other reforms are possible. The E.U. argues for an acceleration of some elements of the process, though others argue that the process is already too rapid. The E.U. also argues for the creation of professional full time panels. Other reforms have been proposed by the E.U. permitting the joinder of multiple defendants and facilitating third party intervention. Still others suggest that the WTO should address environmental concerns. The reforms proposed by the E.U. seem to be only procedural rather than substantive-which is a further support for the "normalization" thesis that the DSB is succeeding in transforming the uncertain and costly political treatment of trade disputes into a smoother juristic model.

CONCLUSION
The statutory and case law cited supports the arguments of the professionalization thesis. In practice the DSB of the WTO is an example of Weberian bureaucratic professionalism and proves the validity of functionalist theory.

Some commentators may not like the loss of sovereignty involved in establishing a multilateral binding trade liberalization system. However if one is consistent with liberal economic theory that is exactly what is required to ensure global free trade. That end can be further justified in that open global trade ensures world peace not only through augmenting production but also by disassociating production and political territorium. Rather than conqueting foreign countries a free trading system seeks to "conquer" market share. If anti-trust laws be effective and if free trade is taken seriously then by encouraging specialization (on this point see Ricardo) it will augment global wealth reducing global violence.

The professionalization thesis, that the WTO is replacing political procedures with juristic ones, is empirically validated by this study that shows that the proceedings work to "filter" and determine at each stage the different issues litigated. This filtering and decision process is less contentious than the political regime which it replaced. This is also shown by the fact that the decisions of the court are even handed and do not arbitrarily favor any particular state.

This study has also shown the surprising point that TRIPS can serve either to support or deny intellectual property rights. This use of TRIPS as a shield for example in opposition to multinational and first world predation of third world labor and resources may be further evidence of the impartiality of the panel and appellate body. It will in all events be key to maintaining a stable and fair global economy.

This paper's support of the free trade rationale and objectives of the WTO is however only contingent. Effective anti-trust laws are also required if the competition needed to maintain economic prices is to be had. Without it globalization would become monopolization as the series of mega-mergers in the last decade has shown. These are not the only reasons that theoretical support of the WTO support must be contingent upon practical realities. One can critique the structure of the WTO as being undemocratic and thus illegitimate. The WTO is essentially a conference of bankers and government representatives with little real popular input. Worse this is necessarily so: since liberalization implies elimination of inefficient national industries every-where. Thus the WTO cannot be democratic if it is to obtain the goal of global free trade. This inevitable lack of democratic legitimacy explains why a theoretically good idea must be in practice contingent upon an effective competition regime. A politically illegitimate institution will be nevertheless tolerated if it is economically effective and substantively fair. However without an effective anti-trust regime the WTO would turn into a vehicle for monopoly domination of the global marketplace.

A second ground for skepticism is that while the WTO does not have democratic support it could have avoided popular backlash-and has failed to do so. Visiting the next local WTO conference alone can prove this fact. For these reasons while the theoretical goals of peace through prosperity growing out of trade and the disassociation of the national economy and the state via globalization are in fact legitimate goals they can only be obtained if they are founded upon a serious anti-trust regime to maintain competition to keep prices low and to prevent monopoly profits for hypernational corporations.

Commentators have noted the problematic nature of jurisdictional expansionism of the Appellate body as well as its democratic deficit. However the relationship between democracy and free trade is problematic if not antithetical. Prior to the WTO the political processes of GATT often raised the spectre of trade-war. And prior to the last world war trade disputes were often the cause of war. So solving democratic deficit may not be desirable. This is all the more so because the objectives of the WTO, global peace and prosperity, are outside the ambit of most persons daily lives and can even be in opposition to their parochial interests. Free trade may be good for all, but in risk averse conservative societies is resisted-and not only in the third world. Seeking democratic input, even if it did not risk maintenance of inefficient industries, would risk demagoguery. Further popular input in trade issues did not work at all prior to GATT and only worked badly during GATT. During the WTO the absence of democracy has resulted in rioting-which is preferable to war and even possibly preferable to trade war. Rather than seeking democratic support for policies which, if pursued in a principled manner would indeed augment global wealth, the WTO should seek merely to avoid
alienating consumers which it can do if it is consistent in its free trade/competition rationale.

    Although the DSB of the WTO has not bridged the gap between transformationalism and realism, perhaps that gap is unbridgeable. It is clear that closed borders and poverty lead to war and that prosperity brings peace. Theoretically open borders and trade will lead to prosperity-if that prosperity is shared by all it will also lead to peace. So while utopian ideals may not be met, and persistent democratic deficit will be the norm, perhaps the WTO will be able to meet more prosaic daily needs. That remains to be seen.

[*29] ANNEX: THE PANEL PROCESS

The panel process

    The various stages a dispute can go through in the WTO. At all stages, countries in dispute are encouraged to consult each other in order to settle 'out of court'. At all stages, the WTO director-general is available to offer his good offices, to mediate or to help achieve a conciliation.

[SEE CHART IN ORIGINAL]

SOURCE: WTO at http://www.wto.org/

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright LawForeign & International ProtectionsProtected RightsCivil ProcedureAlternative Dispute ResolutionMandatory ADRInternational Trade LawDispute ResolutionArbitration

FOOTNOTES:


n5 While at least one person, Carlo Giuliani, has been martyred by the police in the anti-WTO protests, a comparison with the violence attendant to the Israeli occupation of Palestine and the reaction of the Intifadah
explains why the claim that anti-WTO protest is relatively non-violent is justified. The Intifadah proves that low tech weapons work, yet we do not see kamikaze bombers at the WTO protests. Martyrdom is the correct word: See, e.g. http://www.carlo-giuliani.com/

n6 Rahmatullah Khan, *The Anti-Globalization Protests: Side-show of Global Governance, or Law-making on the Streets?*, Heidelberg J. Int'l. L. 61/2-3(2001), at 323. (“Anti-globalization demonstrations have by now become a standard feature of meetings of institutions associated with globalization. (As I finalize this piece, there is a raging demonstration that is going on in Genoa, Italy, at the G8 summit.) The response to the phenomenon has varied: the media, barring a few exceptions, goes hysterical over them; the academia ignores them; and the general public seems to be amused. I view them with some fascination; for, I suspect anti-globalization demonstrations have begun to have a measurable impact on global governance, and are forcing U.S. to view afresh the structured layers of international policy and law formation.”)


n8 Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?, 95 Am. J. Int’l. L. 535, 553 (2001)” At first glance, one may doubt whether the DSU actually provides for the judicial settlement of disputes. First, contrary to the Appellate Body WTO panels are not standing bodies but ad hoc tribunals created pursuant to predetermined procedures in the DSU. Panels must be established ad hoc for each case by the WTO Dispute Settlement Body. (They cannot be established by the mere will of the disputing parties). Still, their establishment is quasi-automatic pursuant to the negative consensus rule in DSU Article 6 (1). In terms of their mode of establishment, panels could thus be qualified as encompassing a mixture between arbitration and judicial dispute settlement...The legal findings and conclusions of both panels and the Appellate Body culminate only in “recommendations” to the defending party. These recommendations must still be adopted by the Dispute Settlement Body to obtain their legally binding force [albeit] quasi-automatically (under DSU Articles 16.4 and 17.14). At most, this procedure could mean that the WTO judiciary includes the WTO Dispute Settlement Body. In practice, however, both panels and the Appellate Body are established, operate, and reach their legal conclusions in an entirely independent and law-based fashion. They are judicial tribunals in the international law sense.”)

n9 For an example of German Reporting of WTO panel reports. See, Nikolaos Lavranos, *Die Rechtswirkung von WTO panel reports in Europäischen Gemeinschafts-recht sowie im deutschen Verfassungsrecht*, EuropaRecht, 289 EuR-Heft 3 (1999), at 289. (In diesem Zusammenhang gehört auch die Forderung, daß die endgültig festgestellten panel reports als rechtlich bindende quasi-Urteile und damit als verbindliche Interpretation der WTO Verträge vom EuGH anerkannt und beachtet werden müsssen.)


n16 Petros C. Mavroidis, *Remedies in the WTO Legal System: Between a Rock and a Hard Place*, European J. Int'l. L., Vol. 11 No. 4, 763-81, 778 (2000) (An argument in favor of effects based reasoning is that it is a method also used by the WTO. However have member states considered the threat to their sovereignty and the popular legitimacy of trade bodies that prospective judgment entails?)


n19 supra, n. 11, Cameron, Gray, Int'l. & Comp. L. Q., Vol. 50 248, The DSB, especially the Appellate Body, has many characteristics of an administrative tribunal)


n21 Chakravarthi Raghavan, *Appellate body asserts right to receive amicus curiae briefs*, Third World Network, available at, http://www.twnside.org.sg/title/amicus.htm (Note that the Appellate Body of the WTO does in fact assert its procedural right to accept and consider *amicus curiae* briefs from individuals and organizations both members and non members of the WTO, ignoring the harsh criticism it got from most members in 1998 for accepting and considering amicus briefs in the Shrimp-Turde dispute”).


n24 Id.

n25 Petros C. Mavroidis, Remedies in the WTO Legal System: Between a Rock and a Hard Place, European J. Int'l. L., Vol. 11 No. 4 (2000), 763-81, 793. ("Practice seems to emerge according to which the extent of the reasonable period of time depends on ... whether legislative action according to domestic constitutional channels is necessary for the act found to be illegal to be brought into conformity with the WTO contract."). [hereinafter, Mavtoidis, European J. Int'l. L., Vol. 11 No. 4]

n26 supra, n. 11., Cameron, Gray, Int'l. & Comp. L. Q., Vol. 50 248

n27 Supra, n. 25, European J. Int'l. L., Vol. 11 No. 4, at 800. ("According to Article 22(4) DSU countermeasures must be equivalent to the level of nullification of impairment. From a technical point of view, the term 'equivalent' makes it plain that there is no room for punitive damages in the WTO context.")


n29 This case is available on-line at the WTO site: United States-Section 337 of the Tariff Act of 1930 and Amendments Thereto-Request for consultations by the E.C. and the Member States, WT/DS186/1 (Jan. 18, 2000), available at, http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm

n30 WTO, United States-U.S. Patents Code, Request for Consultations by Brazil, WT/DS224/1, available at, http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm

n31 Id., see also, http://www.ipo.org/2001/IPcourts/Brazil.pdf


n34 Id.

n35 WTO, European Communities--Enforcement of Intellectual Property Rights for Motions Pictures and Television Programs, WT/DS125/2 IP/D/14/Add.1, (Mar 2001), available at,

n37 Id.; See also, WTO, U.S.-Section 110(5) of U.S. Copyright Act, (Jan 2001), available at, http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm

n38 Supra, n. 36.

n39 Supra, n. 11. Cameron, Gray, Int'l. & Comp. L. Q., Vol. 50 24 4, 275, "In the new era in dispute settlement it appears that the development of case-law under the WTO Dispute Settlement Body may provide guidance".


n42 For an excellent list of links to third world intellectual property issues under TRIPs see: http://www.cid.harvard.edu/cidtrade/Issues/ipr.html

n43 For further information on the possibility of direct effect and vertical effect of the WTO in the E.U. see, Pascal Royla WTO Recht - EG-Recht: Kollision, Justiziabilitat, Implementation Europarecht, EuR-Heft 4-2 II p. 495 (which contemplates the possibility of direct vertical effect of the WTO on the E.U. and its citizens).

n44 Steve Peers, "W.T.O. dispute settlement and Community law", 26 E.L.Rev. Dec. 605 (2001), "The Court of Justice and Court of First Instance have recently ruled that amendments to the E.C. banana regime dating from 1998 were not intended to implement W.T.O. obligations despite their apparent link with rulings of the W.T.O. dispute settlement body. This means that the legislation cannot fall within the "implementation exceptions" which allow individuals to challenge the legality of Community measures In light of the WTO."

n45 Mavroidis, European J. Int'l L., Vol. 11 No. 4, 763-81, 777.


