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XI.8 Scientific experts in WTO dispute settlement

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Abstract

Engaging with scientific expertise is necessary to insure the effectiveness of WTO dispute settlement in areas such as the SPS Agreement. In rejecting the Uruguay Round texts and basic principles concerning the processing of policy-relevant science for lay decision makers, panels and the Appellate Body have counterproductively tended to undermine the scientific integrity, institutional legitimacy, and ultimately the speed and efficacy of WTO dispute settlement.

Keywords

SPS, TBT, expert review group, technical expert group, scientific expertise, food safety, toxic substances, hormones, biotech, panel and appellate review, deference, standard of review

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XI.8.1 Uruguay Round

The Uruguay Round self-consciously added a new scientific dimension to trade-based disciplines, and consequently dispute settlement. In addition to the SPS Agreement, where the role of science is most obvious, the TBT Agreement could also be expected to raise scientific questions. The Article XX exceptions from GATT 1947, especially paragraph (b), similarly could be anticipated to engage questions of the relationship between a challenged measure and its scientific underpinning.

Principled reservations about the integrity of panel and Appellate Body review of scientific issues in anticipated WTO agreements, along with analogous provisions in the roughly contemporaneous NAFTA, were highlighted in public policy debates during negotiations, well before the Uruguay Round was adopted. Presumably with those concerns as a background, the Uruguay Round expressly addresses panel and Appellate Body consultation with scientific experts in two contexts.

The DSU (Annex 4) text anticipates that “a panel may request an advisory report in writing from an expert review group.” An expert review group is established by the panel,

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reports to it, and responds to the terms of reference established by the panel. Members are independent personalities appointed in their individual capacities. Expert review groups may seek advice from “any source they deem appropriate.” An expert review group prepares a draft report, which is to be made available to the parties to the dispute for comment, and a final version, which is transmitted to the panel and “shall be advisory only.”

The TBT Agreement (Appendix 2) establishes a very similar process, an embellishment of a precursor in the Tokyo Round Standards Code, where the analogous institution is known as a “technical expert group.” The contemporaneous NAFTA contains a comparable provision under which dispute settlement panels can request a written report from a “scientific review board” established either by the dispute settlement panel itself or at the urging of a disputing party.

In prescribing the format for panels and the Appellate Body to solicit expert scientific input, the drafters of the Uruguay Round were building on a rich and lengthy transnational history prescribing good practice standards for lay decision makers to tap technical expertise in evaluating questions of policy-relevant science. In the United States, these include the National Academies of Sciences/National Research Council study committees and the Environmental Protection Agency’s Science Advisory Board. Expert panels convened by The Royal Society (UK) and its counterparts in other Commonwealth countries such as Canada and New Zealand, operate along similar models.

Among international organizations, the International Agency for Research on Cancer monographs and the assessment reports of the UN Intergovernmental Panel on Climate Change (IPCC) establish standards for group undertakings involving technical experts in framing scientific issues for governmental authorities and the public. Tellingly in view of its role in the SPS Agreement, Codex Alimentarius’s science-based work in such areas as pesticide residues and food additives conform to the basic model. So, too, do the Scientific Committee and panels established under the exclusively science-focused European Food Safety Authority, constituted after the conclusion of the Uruguay Round.

Although the details vary from one institutional setting to another, core features replicated in the Uruguay Round texts include: (1) the establishment of a collective, expert group as a distinct entity; (2) peer-to-peer interactions of group members in search of common ground; and (3) preparation of a consensus report (although some settings admit of the inclusion of minority views). Experience with this model demonstrates that such scientific advisory committees can effectively distill the best scientific thinking on disputed policy-relevant science – frequently characterized by uncertainty – while reducing disagreement and framing scientific questions for lay decision makers in an operationally useful manner.

XI.8.2 Panel and Appellate Body practice

The WTO Analytical Index confirms that no expert group has ever been established under either of the two Uruguay Round authorities. In *Hormones I*,¹ the first dispute in

¹ Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R and WT/DS48/AB/R, World Trade Organization Appellate Body, 16 January 1998, paras 146–49 and 253(f).

which the question of context with technical experts arose, the panel jettisoned the DSU text and instead sought input from particular scientific experts in the field and the Codex Commission secretariat on an *ad hoc*, individual basis through the submission of written questions to each expert and subsequent in-person meetings involving each expert and the panel. No expert group was convened, nor was there a consensus report from the experts as a group.

The Appellate Body affirmed this approach as an acceptable alternative to the procedures specified in the Uruguay Round agreements. It has been followed without exception since, including in disputes arising under the TBT Agreement and the GATT 1947 disciplines. Indeed, the formula for consultation with scientific experts established in *Hormones I* was subsequently refined and codified, but without apparent modifications to reflect the original intent of the Uruguay Round texts.

WTO dispute settlement is unusual as a rule-of-law, adjudicatory, adversarial, multi-level interaction between sovereign regulatory authorities and a multilateral organization, constituted to evaluate compliance with the negative trade disciplines. The existing literature focuses on panels' authority, and the legality *vel non* of panels rejecting the Uruguay Round texts, relying on a legalistic interpretation of the word "may." But the question of consultation with scientific experts instead is much broader, engaging first principles of sound public policy and scientific legitimacy.

The models on which the Uruguay Round expert group texts appear to rely are designed to provide advice to public officials primarily operating in generic, prospective legislative, regulatory or policy-making modes, such as those that gave rise to the EC hormone ban in the first instance. Sometimes, however, a collaborative group approach has also been deployed in a retrospective, oversight mode, which is more similar to WTO dispute settlement.

Notably, however, non-technically expert courts and judges engaged in judicial review of governmental decision making predicated on policy-relevant science typically do not seek the advice of technical experts.² There, the emphasis tends to be on deference and the standard of review – another contested area of WTO jurisprudence.

When the application of trade-based disciplines hinge on governments' determinations with respect to sometimes controversial questions of policy-relevant science, as in the SPS Agreement and the *Hormones* dispute, the adjudication of scientific questions are well-nigh unavoidable. By comparison with the alternative expert review group process prescribed in the DSU, the process employed in *Hormones I* and thereafter can be expected to result in the concentration of authority – and responsibility – for the identification and evaluation of scientific questions in the hands of the lay panel members.

*Hormones II*³ provides an illustrative example of the attributes, and the perils, of the practice of WTO panels. After rejecting the EC's request for the creation of an expert review group as prescribed by the DSU, the panel published working procedures for

² This situation is entirely distinct from a setting such as toxic torts in which judges of necessity must reach their own conclusions with respect to scientific integrity. Cf. *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

³ Appellate Body Report, United States – Continued Suspension of Obligations in the EC – Hormones Dispute, WT/DS320/AB/R, 16 October 2008, paras 585–615 and 736(c)(v).

consultations with scientific and technical experts. Consistent with practice to date, those included written questions and an oral hearing directed by the panel chair, with a transcript published as an annex to the panel's report.

The Appellate Body's review of this process was scathing, exposing the deficiencies in a process of consultation with scientific experts that has now become standard. After noting that the purpose of expert advice is to verify that the scientific basis for the measure comes from a qualified and respected source, the Appellate Body observed that inquiry is to be made "irrespective of whether it represents minority or majority scientific views."

Instead, in synthesizing the scientific advice it had received, the panel had explicitly "followed the *majority* of experts expressing scientific views" (emphasis added). The panel itself had, moreover, "somewhat peremptorily decided what it considered to be the best science." The Appellate Body consequently concluded that the panel's analysis was inconsistent with its task of engaging in an objective assessment of the data underlying the EC's risk assessment. Unable to complete the analysis on critical issues, the Appellate Body rejected the panel's findings while in effect leaving the dispute undecided.

Reliance on the opinion of a majority of scientific experts is exactly the sort of fundamental error that the Uruguay Round texts are designed to prevent. An expert review group's report would be expected to address precisely the dynamics of the scientific questions which the panel decided for itself.

Moreover, the trajectory of the *Hormones* dispute is revealing in response to concerns about speed, one of the principal criticisms of a consensus-building process involving a balanced group of respected experts to address a scientific or technical issue. More than a decade after the creation of the WTO, *Hormones II* was the latest – and ultimately, from a jurisprudential point of view, inconclusive – iteration of litigation in the seminal dispute that gave rise to the SPS Agreement in the first place.

In arrogating to themselves an inappropriate role in the scientific decision-making process, the panel members in effect applied an insufficiently deferential standard of review and improperly diminished the requisite margin of appreciation allowed for the Member maintaining the measure. Meanwhile, the underlying models have evolved. For example, the US National Academies of Science over the last decade have refined a "fast-track" process to meet urgent needs, applied most notably in the context of the COVID pandemic.

At a time of upheaval within the WTO itself, the potential chilling effect of WTO adjudication on the exercise of domestic regulatory authority and the legitimacy of the scientific integrity of WTO dispute settlement are topics of ongoing concern. In a system unburdened by the force of binding precedent, future panels, the Appellate Body, and the DSB should reexamine working procedures for consultation with scientific and technical experts at the earliest opportunity.

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