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# Institutionalized Fact Finding at the WTO

by DAVID COLLINS\*

## ABSTRACT:

This short article argues that the WTO should have a standing agency to conduct fact finding in order to correct evidentiary deficiencies in submissions by members to panels during dispute settlement. This will compensate for both the incapacity to produce full disclosure on the part of developing nations and the unwillingness to do so from other members due to strategic reasons or purposes of confidentiality. It is suggested that such an investigatory mandate could fit into the panels' existing right to seek information or within the broad scope of powers granted tribunals in international law. Separation between fact finding and decision-making achieved by a specialized fact finding body would insure judicial impartiality and promote legitimacy.

## I. INTRODUCTION

The recent World Trade Organization (WTO) panel report on investigations relating to the softwood lumber dispute between Canada and the United States<sup>1</sup> demonstrates that international trade disputes are increasingly turning upon conclusions drawn from a complex factual background and as a result the need for WTO panels to possess a complete evidentiary record has never been clearer. As Matthias Oesch wrote of WTO dispute settlement in 2003: "...a wide investigative authority and the necessary technical and personnel means are prerequisites for a comprehensive a thorough panel examination of facts..."<sup>2</sup> Despite this need, currently WTO panels cannot engage in *de novo* review of members' factual submissions and while parties to WTO disputes

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<sup>1</sup> *US Investigation of the International Trade Commission In Softwood Lumber From Canada* WT/DS277/RW (15 Nov 2005) [hereinafter *Softwood Lumber Investigation*].

<sup>2</sup> STANDARDS OF REVIEW IN WTO DISPUTE SETTLEMENT (Oxford U Press 2003) at 55.

are required to tender all evidence requested by the panels, they are often unable or unwilling to do so. The problem could be alleviated by the implementation of a dedicated fact finding agency within the WTO to conduct investigations in order to clarify existing facts as well ascertain missing information helpful to the rendering of judgment. Such an investigative body would not make recommendations or draw conclusions but instead gather the evidence requested by the panel at the behest of the parties or of the panel itself on its own motion (*proprio motu*). The fact finding body's role would therefore in a sense be remedial; it would step in to address inadequacies in the evidence as submitted by the parties for the purpose of fully informed decision-making. The purpose of institutionalized fact finding is thus seen as supplemental to existing disclosure requirements or as a 'last resort' which would engender WTO proceedings, suffering from deficient evidence, with crucial fairness and legitimacy. This article will demonstrate the need for such an agency first by framing a fact finding mandate within the current evidentiary powers of panels under the WTO Dispute Settlement Understanding (DSU) and by suggesting that a WTO fact finding body can fit within existing principles of international law which are applicable to the WTO. This article will then discuss necessary limitations on such an agency's role, evaluate associated benefits and detriments, and conclude with an outline of the form that the fact finding body would take.

Before embarking on this analysis, a distinction must first be drawn between a WTO panel reviewing information already before it, where the panel is limited to an "objective assessment" of the facts as presented by the member states<sup>3</sup>, and obtaining new information to fill gaps in the evidentiary record. The former, it is suggested, involves a direct challenge to the conclusions drawn by the authorities of the member

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<sup>3</sup> Article 11 WTO DSU. A *de novo* standard which would give the panels complete freedom to come to different conclusions on evidence presented by authorities from within member states was rejected by the Appellate Body in *EC Hormones* WT/DS26/AB/R ¶117-118 (13 Feb 1998).

states, and the latter, which is the focus of this article, involves an evaluation of the fullness of the information tendered relative to what is needed for the panel properly to arrive upon its decision. The distinction is admittedly a subtle one – questioning the facts themselves does cast into doubt theories drawn from them-- and may accordingly necessitate the establishment of a stricter standard of review, a reform which will not be discussed here and has been addressed by others.<sup>4</sup> For the purposes of this article *reviewing* conclusions and *investigating* into omission (which does not involve review *per se*) will be treated as separate fact finding concepts.

## II.. THE RIGHT TO SEEK INFORMATION

It is necessary to begin with an examination of the current scope of WTO panels to obtain evidence lacking from party submissions. In order to achieve a more complete picture of evidence, panels already have broad authority to seek information from the parties themselves and elsewhere, as provided in Article 13 of the DSU:

1. Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate....

2. Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may

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<sup>4</sup> For a detailed analysis of the standard of review see Oesch supra note 2; L. Hamilton *US Anti Dumping Decisions and the WTO Standard of Review: Deference or Disregard* 4 CHICAGO JOURNAL OF INTERNATIONAL LAW 265 (2003); J. Pauwelyn *Evidence, Proof and Persuasion in WTO Dispute Settlement – Who Bears the Burden* 1 JOURNAL OF INTERNATIONAL ECONOMIC LAW 242 (1998) and S Zleptnig *The Standard of Review in WTO Law* EUROPEAN INTEGRATION ONLINE PAPERS 2002 vol 6. <<http://econpapers.repec.org/article/erpeioxxx/p0090.htm>> (last accessed 9 December 2005).

request an advisory report in writing from an expert review group....

Panels are entitled to request information from the parties and to ask questions that panels deem relevant to an assessment of the issues, irrespective of whether the complaining party has already established a *prima facie* case.<sup>5</sup> Article 13 has been viewed as establishing a *duty* to disclose information rather than a mere preference and members are expected to approach the DSU in good faith.<sup>6</sup> Joost Pauwelyn has observed that the scope of the fact seeking power conferred under Article 13 is so broad that it may include the right to “*force* the parties to a dispute to submit certain information not yet on record”<sup>7</sup> which identifies the legitimate concern that members may be unwilling to produce all the evidence that is requested. Indeed, the importance of a broad right to seek information is illustrated by the failure of one of the parties to provide the evidence required for a properly informed legal determination. When the DSU had been drafted it was assumed that the requisite facts would be brought to the attention of panels through the written and oral arguments of the Member nations.<sup>8</sup> Unfortunately this does not always occur.<sup>9</sup> There

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<sup>5</sup> J. WAINCYMER, WTO LITIGATION – PROCEDURAL ASPECTS OF FORMAL DISPUTE SETTLEMENT (Cameron May London 1999) at 543 referring to *AB Report, Thailand – Anti Dumping Duties* WT/DS122/AB/R ¶135 ( 5 April 2001).

<sup>6</sup> *AB Report Canada – Aircraft* WT/DS70/AB/RW ¶187 (4 August 2000).

<sup>7</sup> J. Paulweyn *The Use of Experts in WTO Dispute Settlement* 51 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 325 (2002) at 329. Emphasis mine.

<sup>8</sup> J. JACKSON, THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE (The Royal Institute of International Affairs, London, 1998) at 92.

<sup>9</sup> Allegations of evidentiary shortcomings have been made by opposing parties recently in *Softwood Lumber Investigations* (supra note 1) and *Panel Report - US Countervailing Duties on Certain Products from the EC* WT/DS212/RW (17 August 2005) where new evidence subsequently modified the nature of party’s claims (¶7.67-7.71). The adequacy factual record presented by parties has also been questioned by GATT panels: *Brazil – Milk Powder*, GATT doc.SCM/179 (12 April 1994) and *US - Hot Rolled Lead* GATT doc.DRS/1a (14 October 1994), see G. Horlick and P. Clarke *Standards for Panels Reviewing Anti-Dumping Determinations Under GATT and the WTO* in G. Horlick ed. WTO AND NAFTA RULES AND DISPUTE RESOLUTION (Cameron and May London 2003) at 296.

is a tendency for governments to ignore panel requests for facts.<sup>10</sup> Parties might be unwilling to provide information because of a duty of confidentiality to third parties or because they feel that the information is irrelevant and therefore could be prejudicial. This is particularly problematic in commercial defence proceedings because business confidential information is often protected in domestic administrative proceedings.<sup>11</sup> The scope of a Member's responsibility to comply with disclosure requests from panels remains clouded. For example, it is unclear as to whether the obligation to produce information extends to data in the possession of the member at the time of the request or whether it must also gather relevant information, which may possibly be in the possession of a private party. It has been suggested that if it is reasonably within a Member's power to obtain such information then it should do so.<sup>12</sup>

The Appellate Body has urged that the integrity of the WTO dispute settlement process depends on the Panel's ability to induce parties to a dispute to comply with their duty to provide necessary information and that the failure of a party to do so may lead to adverse inferences being drawn.<sup>13</sup> Although panels have been hesitant to draw adverse inferences against parties that do not provide requested information that is within their possession, the Appellate Body has clarified that Panels have the authority to do so.<sup>14</sup> A respondent's decision not to tender evidence on a particular issue when the party has denied or refused to admit elements of the

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<sup>10</sup> J. Ragosta, *Unmasking the WTO: Access to the DSB System: Can the WTO Live Up to the Moniker 'World Trade Court'* 31 LAW AND POLICY IN INTERNATIONAL BUSINESS 739 (2000) at 762.

<sup>11</sup> E. VERMULST and F. GRAAFSMA, *WTO DISPUTES ANTI-DUMPING, SUBSIDIES AND SAFEGUARDS* (Cameron May London 2002) at 52. For additional commentary on the confidentiality of WTO DSB proceedings see D PALMETER and P MAVROIDIS, *DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION – PRACTICE AND PROCEDURE* (Kluwer International London 2002) at 91-93 and A LOWENFELD, *INTERNATIONAL ECONOMIC LAW* (Oxford U Press 2002) at 164.

<sup>12</sup> Waincymer *supra* note 5 at 549.

<sup>13</sup> *AB Report, Canada Aircraft* *supra* note 6 ¶204.

<sup>14</sup> *Indonesia Auto* WT/DS54/R (23 July 1998). For additional commentary on adverse inferences see Palmeter and Mavroidis *supra* note 11 at 118-120.

claim does not prevent a panel from seeking info on that issue.<sup>15</sup> While an adverse inference may offer some assistance in arriving upon a determination of fact, independent verification of evidence through investigation would be infinitely more useful from the perspective of completeness and accuracy. In addition to the unwillingness of member states to tender all necessary evidence, developing nation members may be incapable because of resource limitations to provide a complete factual record as requested. Finally, efforts to obtain information by one member could be frustrated by another member.

In recognition of the need to rectify such factual deficiencies, the Appellate Body stated that: “If ... any party believes that all the pertinent facts relating to a claim are, for any reason, not before the panel, then that party should ask the panel in that case to engage in *additional* fact-finding.”<sup>16</sup> This statement suggests that the panel may be entitled to engage in investigation beyond that which is outlined in DSU Article 11 in order to resolve omissions in a party’s factual submissions. Panels’ broad based authority to consult experts may support a wider interpretation of panel’s powers with respect to evidence collection. Permanent groups of experts are already established to provide technical advice to WTO panels when needed under Article 24 the Subsidy Agreement, Article 18.2 of the Customs Valuation Agreement and Article 8 of the Textiles Agreement. Given the above noted breadth of scope of the DSU, the need and possibly also the authority to allow a *de novo* fact finding function, as distinct from a *de novo* reviewing function, for the panels is apparent. Less clear is the ability to extend this authority to permit the procurement of additional facts without a request from one of the parties – *propio motu*. However, such power may fit into the even wider discretion available to tribunals in international law.

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<sup>15</sup> *Panel Report - Canada Aircraft* WT/DS70/R ¶9.83 (14 April 1999).

<sup>16</sup> *India – Patents* WT/DS50/AB/R ¶ 94. (19 December 1997). Emphasis mine.

### III. FACT FINDING IN INTERNATIONAL LAW

Third party fact finding is well-entrenched in international law and for this reason we should not be immediately disturbed by the extension of this power in the WTO arena. Article 9 of the 1907 Hague Convention for the Pacific Settlement of Disputes contemplated Commissions of Inquiry, the function of which was “to facilitate a solution of ...disputes by elucidating the facts by means of an impartial and conscientious investigation.” Many modern treaties provide for the establishment of fact finding bodies. For example, the 1982 United Nations (UN) Convention on the Law of the Sea makes provision for an inquiry whose findings of fact are in most cases to be considered final by the parties to the dispute.<sup>17</sup> The European Economic Community Treaty grants authority to the Commission to investigate potential treaty violation (Art 85). Similarly, international organisations have frequently implemented fact finding bodies to facilitate their decision-making, such as the International Labor Organization which has created commissions of inquiry on several occasions to assess complaints relating to alleged violations of labor conventions.<sup>18</sup> The UN Security Council deployed a fact finding mission in 1981 regarding the political unrest in the Seychelles.<sup>19</sup> The UN Secretary General sent a fact finding team to look into the Iran/Iraq war in 1987.<sup>20</sup> The UN General Assembly’s policy of fact finding was embodied in a 1992 Resolution and Declaration which encouraged the use of such

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<sup>17</sup> Annex VIII Special Arbitration Article 5(2).

<sup>18</sup> J. MERRILLS, *INTERNATIONAL DISPUTE SETTLEMENT* (Cambridge U Press, 1993) at 56. Article 26 of the ILO Constitution provides for the establishment of fact finding inquiries.

<sup>19</sup> SC Res 496 (1981).

<sup>20</sup> SC Res 598 (1987).

missions by UN organisations. This statement authorized the Security Council to conduct fact finding without the consent of the state in which they took place.<sup>21</sup>

Perhaps more importantly for the purposes of analogy to WTO dispute settlement, fact finding is not without precedent in the activities of international judicial bodies which have traditionally operated without the restrictive rules of evidence seen in municipal courts. Indeed, as Mojtaba Kazari has observed:

The liberalism of international law and the inherent flexibility of international procedure, too, naturally favour the authority of international tribunals to investigate, *proprio motu*, the facts at issue.<sup>22</sup>

Examples of judicial fact finding in international law are numerous. It is extended to the European Court of Human Rights under article 40 of the European Convention on Human Rights. Tribunals established under the International Convention for the Settlement of Investment Disputes have the authority to conduct investigations under Article 43 of the Convention. The International Court of Justice (ICJ) has an express entitlement to conduct a site inspection to procure evidence under Article 44(2) of its Statute. This authority also belonged to its predecessor, the Permanent Court of International Justice (PCIJ).<sup>23</sup> Examples of fact finding in international law include the submission of questionnaires, pre-hearing conferences, on-site inspection, summoning witnesses, and judicial notice.<sup>24</sup>

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<sup>21</sup> GA Res 46/59 (1992) 31 ILM 235.

<sup>22</sup> M. KAZARI, BURDEN OF PROOF AND RELATED ISSUES: A STUDY OF EVIDENCE BEFORE INTERNATIONAL TRIBUNALS (Kluwer Law International, London, 1998) at 154.

<sup>23</sup> Although the PCIJ rules had been silent on the issue of fact finding, authority was found in a technical regulation which provided for the payment of judge's expenses while travelling on duty to examine locations concerned in the proceedings. See M Hudson *Visits By International Tribunals to Places Concerned in the Proceedings* 31 AMERICAN JOURNAL OF INTERNATIONAL LAW 696 (1937).

<sup>24</sup> See Kazari *supra* note 22 at 168-176. Waincymer has suggested that WTO panels are already empowered to conduct site inspections *supra* note 5 at 544.

The prevalence of tribunals which have engaged in fact finding may suggest that the ability to do does not require authorization through statute or other incorporating instrument such as a tribunal's rules of procedure but rather is inherent. It may be tempting to conclude that fact finding is an established general principle of law or a custom. Like any international tribunal, the WTO panel has the implied jurisdiction once seized of a matter to "interpret the submissions of the parties" so as to "isolate the real issue in the case and to identify the object of the claim."<sup>25</sup> The doctrine of implied powers requires that the implied power does not contradict the "essential nature of the organization" but enables it "to discharge the functions laid upon it" by its constituent instrument<sup>26</sup> – in this case the DSU. The procurement of facts is easily seen as an important aspect of the WTO's purpose to adjudicate trade disputes. Although the WTO must be viewed as part of public international law, the extent to which the fact finding feature, as well as other principles of international law, such as the doctrine of implied powers, may be extended to what is essentially a bi-lateral, self-contained regime is admittedly uncertain. However, the statement in Article 3.2 of the DSU which specifies that WTO agreements must be interpreted "in accordance with customary rules of interpretation of public international law" suggests that precedents in international law, such as those involving fact finding, may not only offer guidance when evaluating the powers of WTO DSB but may actually inform any extensions thereof.<sup>27</sup> In this regard it may also be significant that the WTO agreements do not explicitly mention that the panels *do not* have a fact finding mandate such that it cannot be asserted that WTO members have "contracted

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<sup>25</sup> *Nuclear Test Case* (ICJ) 1974 ICJ Rep 259-260 para 23 and J. Pauwelyn *The Role of Public International Law in the WTO: How Far Can We Go* (2001) 95 AMERICAN JOURNAL OF INTERNATIONAL LAW 578 at 555.

<sup>26</sup> *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras) Application to Intervene* ICJ Reports 1990 at 3 at 41-42 per Shahabudeen (28 February 1990).

<sup>27</sup> J. Pauwelyn *The Role of Public International Law in the WTO: How Far Can We Go* (2001) 95 AMERICAN JOURNAL OF INTERNATIONAL LAW 535 at 578.

out” of the principles of international law or even that there is any indication of conflict between them in this area. Potential limitations on the panel’s jurisdiction to conduct factual investigation will now be considered.

#### IV. LIMITATIONS ON JUDICIAL FACT FINDING

Under a strict adversarial system, a fact finding role for judges in any tribunal raises concern that the impartiality and objectivity of their rulings will be compromised. This is reflected for example in the Code of Conduct for United States Judges which prohibits judges from actively participating in investigations.<sup>28</sup> But as the foregoing section indicated, the WTO DSB should arguably be viewed in the light the inquisitive model of adjudication common to Civil Law systems such as Japan and Continental Europe and as such may possess a more proactive role characterized by increased emphasis on negotiation over litigation.<sup>29</sup> There is a further intuitive justification for a fact finding role on the part of any court of first instance, such as the WTO panels, even within an adversarial framework. Leaving aside the use of the jury which persists in some justice systems, any trial level court must necessarily make determinations of the truth or validity of facts upon which legal claims are based just as an appellate court will make rulings of law. But appellate judges do not merely take submissions on the law from the parties to the dispute and weigh them against each other; they conduct their own research by consulting textbooks, case law, and statutes to arrive upon their own conclusions, colored as they should be by the legal arguments presented by counsel. Some, if not most of this legal research is conducted

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<sup>28</sup> A judge shall disqualify himself if he has “personal knowledge of disputed evidentiary facts concerning the proceeding.” 28 U.S.C. §455(b)(1). For further discussion of this topic see E. Sward *Appellate Review of Judicial Fact Finding* (1991-92) 40 U KANSAS LAW REVIEW 1.

<sup>29</sup> See also J. Pauwelyn *The Limits of Litigation: ‘Americanization’ and Negotiation in Settlement of WTO Disputes* 19 OHIO STATE JOURNAL ON DISPUTE RESOLUTION 121 (2003-04) and C. BARFIELD, *FREE TRADE, SOVEREIGNTY, DEMOCRACY AND THE FUTURE OF THE WTO* (AEI Press, Washington, 2001) at 111-131.

by others, viz trained legal clerks, usually recent law graduates who are in the direct employ of individual judges for that purpose. Thus by analogy, trial judges should be able to implement independent fact finding specialists to compliment litigants' disclosure to the extent that it is incomplete or not credible. Surely it is preferential for judges to ascertain additional facts to illuminate their understanding of evidence presented at trial rather than rely solely upon extrapolation from facts already in their possession, which would exacerbate the already dangerously subjective doctrine of judicial notice.<sup>30</sup>

Although we have seen above that the Appellate Body has taken a liberal view of the panel's right to seek information, Appellate Body has also voiced concern as to the limits of that right: "A panel is entitled to seek information and advice from experts and from any other relevant source it chooses ... to help it to understand and evaluate the evidence submitted and the arguments made by the parties, but not to make a case for a complaining party."<sup>31</sup> The Appellate Body cautioned that questions directed to the parties do not "overstep the bounds of legitimate management or guidance of the proceedings ... in the interest of efficiency and dispatch."<sup>32</sup> This may mean that panels' questions should not relieve the complainant of its burden of establishing the inconsistency of the respondent's measures<sup>33</sup> but it is unlikely that it means the panel should not even identify gaps in the factual record that necessitate further investigation. It seems most likely that the Appellate Body simply intended that the panel's inquisitive role should operate within a reasonable limit. Such a limit can be found in the principle of *non ultra petita*: a judge can only examine the claims that are put before it. Although identifying factual deficiencies is a different matter

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<sup>30</sup> See Sward supra note 28.

<sup>31</sup> *AB Report Japan Agricultural Products* WT/DS76/AB/R ¶129 (10 Feb 1999).

<sup>32</sup> *Panel Report, Thailand – Anti Dumping Duties* WT/DS122/R ¶7.50 (5 October 2000).

<sup>33</sup> Waincymer supra note 5 at 543.

from rectifying them through proactive investigation, this second action should be permissible provided that the investigation is apposite to the specific allegations made by the parties in their submissions. Thus the more detailed an allegation, the more likely evidence will be sought relating to it. It has been further suggested that the panel should either engage in fact finding or refuse to do so depending on whether the legal issue to which the facts apply is seen as central to the overall dispute. Accordingly, if a party concedes a particular fact, there is less need for the panel to make an independent inquiry into it and if a question remains unanswered even if a party chooses not to present any specific arguments for or against it, then it clearly remains open to the panel to investigate.<sup>34</sup> Beyond these guiding principles, the nature of the directions given to the investigatory body and the use put to the information it gathers will depend on the circumstances of each case.

Another key limitation on judicial fact finding is the need for impartiality in order to avoid an apprehension of bias. Separation is required between fact gathering and decision making or else objectivity is threatened. This is precisely the reason why missing information should be obtained by a third party at the behest of judges rather than by the judges themselves; the decision-makers are insulated from any potential taint that could be engendered during the investigative process such as closeness or sympathy to the individuals involved. There is also a practical advantage in the separation of investigation from decision: institutionalized fact finding would obviate problems such as the lack of time available to part-time panellists and their location outside the countries where the facts originate.<sup>35</sup> Additional benefits and problems associated with a fact finding body within the WTO will now be considered.

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<sup>35</sup> Oesch supra note 2 at 57.

## V. ARGUMENTS IN FAVOR OF A WTO FACT FINDING BODY

The first clear justification for the existence of a fact finding body within the WTO is evident in instances of resource inequality between the parties to a dispute. As suggested above, many developing nations cannot finance the collection of evidence to support their allegations and consequently could benefit from assistance from the WTO itself in this area. Concern for the trading needs of developing countries is a central feature of the DSU, reflecting the recognition that trade disputes in such nations can have wide reaching effects where lives could be lost.<sup>36</sup> Such procedural inequality between parties to WTO disputes was acknowledged when the Appellate Body granted a developing nation the use of outside counsel because it could not afford permanent trade law experts.<sup>37</sup> The redressing of asymmetrical resources through the intervention of the WTO Dispute Settlement Body (DSB) has also been recommended during the informal consultation stage.<sup>38</sup> Concern for procedural fairness reflects the public dimension of the WTO DSB which does not adjudicate private actions but rather disputes between sovereign states.

As noted in Section II, a significant problem of fact gathering by members has been that of non-cooperation from parties, on whose goodwill fact collection often depends.<sup>39</sup> For example, in the recent softwood lumber dispute, The United States complained to a WTO panel that the International Trade Commission (USITC)'s efforts to gather information regarding softwood lumber subsidization were obstructed by Canadian producers.<sup>40</sup> Such non-cooperation may well have been

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<sup>36</sup> Eg DSU Articles 4(10), 8.(10) and 12(11).

<sup>37</sup> *EC Bananas* WT/DS27/AB/R (9 Sept 1997).

<sup>38</sup> Pauwelyn *Limits of Litigation* supra note 29 at 134. Pauwelyn envisioned fact finding only at the consultation stage.

<sup>39</sup> Oesch supra note 2 at 57.

<sup>40</sup> *Softwood Lumber Investigation* supra note 1 ¶4.282. For another recent example of alleged non-cooperation in fact gathering see *Panel Report - US Countervailing Measures on Certain Products from the EC* WT/DS212/RW ¶7.68 (17 August 2005).

avoided were neutral WTO agents conducting the investigation rather than those representing a foreign state. This is because WTO agents would be seen as non-biased and therefore non-threatening to the interests of that state.

In a similar fashion, institutionalized fact finding would demonstrate the significance of the interests at stake to the parties, and possibly also to third parties in the case of *amicus curiae* briefs, as it would embody the WTO's commitment to the factual integrity of the dispute settlement process, a concept that cannot be over-valued as it is vital to the bestowing of legitimacy to WTO decisions. This is not to suggest that fact finding conducted by domestic authorities like the USITC is inherently flawed or biased. However a panel decision based on facts obtained by a neutral agency would have greater perceived validity than one based upon facts obtained by the parties themselves, even though those facts are subject to subsequent independent evaluation of the panel under the objective reasonableness standard. This procedural weakness in the current system may be one explanation for Canada's expression of disregard for the USITC's fact finding methodology in the recent Softwood Lumber panel decision. Canada might well not have declared its intention to appeal the panel's ruling<sup>41</sup> based as it was on the USITC's submissions had this evidence been obtained by an arm of the WTO rather than by their opponents in the dispute.

John Jackson has argued that augmented legitimacy of WTO panel decisions would assist with compliance.<sup>42</sup> Speaking of fact finding in particular, Manley Hudson similarly wrote in 1937:

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<sup>41</sup> Canada Department of Foreign Affairs and International Trade, News Release no. 216. (15 November 2005).

<sup>42</sup> THE JURISPRUDENCE OF GATT AND THE WTO (Cambridge U Press, 2000) at 160. Although some have noted that the WTO has been a success in terms of compliance eg C Carmody *Remedies and Conformity under the WTO Agreement* (2002) 5 JOURNAL OF INTERNATIONAL ECONOMIC LAW 307 at 309, K. Leitner and S. Lester record a large number of requests for panels to decide whether

An international tribunal cannot ignore the possible usefulness of such procedure, not only for ensuring that results will be arrived at on the basis of the fullest possible information, but also for creating that support in public opinion which is the one sure sanction of its judgments.<sup>43</sup>

Indeed, as M Bassiouni remarked, some fact finding missions are “designed to simply show [*sic*] responsiveness to public outcry in certain egregious situations. In these cases they are more akin to public relations missions.”<sup>44</sup> Thus the very presence of a WTO investigation team within a state’s territory might reduce tensions such that harsh retaliation through countervailing duties or other such measures would not be necessary. It is unlikely that the investigators would be viewed as an intrusion given that they would represent the global community, be appointed by the Member states and would partially consist of their own nationals (as will be suggested in Section VII). As the process of WTO adjudication itself can be key to restricting harmful trade practices prior to the issuance of a ruling, the gravitas of a fact finding mission authorized by the WTO would emphasize the need to modify trade practices and induce concessions between members before a formal sanction is imposed. Moreover, panel reliance on facts revealed by third party investigation allows a member state to accept compromise in a face-saving manner that would not be politically feasible were the panel’s ruling based on facts presented and unearthed exclusively by the opponents, or perhaps worse, by an agency appointed under its

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recommendations have been properly implemented: *WTO Dispute Settlement 1995-2002: A Statistical Analysis* (2003) 6 JOURNAL OF INTERNATIONAL ECONOMIC LAW 251 at 261.

<sup>43</sup> Hudson *supra* note 23 at 697.

<sup>44</sup> M. Bassiouni *Appraising UN Justice-Related Fact Finding Missions* (2001) 5 WASHINGTON UNIVERSITY JOURNAL OF LAW AND POLICY 35 at 45.

own authority. This is the essence of the advantage to adjudication before a multi-lateral dispute body like the WTO.

## VI. ARGUMENTS AGAINST A WTO FACT FINDING BODY

There are various other criticisms that could be directed at the notion of a dedicated fact finding body within the WTO and these will now be considered in turn. Firstly, institutional fact finding at the WTO might be seen as unnecessary given the nature of the evidence with which the panels are confronted. As most WTO disputes involve assessment of “measures” undertaken by Member governments, it is the text of the measure itself which normally composes the factual foundation of panel proceedings, which tend to consist primarily of legal argument regarding those measures, rather than evaluation of particular facts.<sup>45</sup> While this statement may have been accurate at one time it is less apt today. Increasingly complex questions such as the assessment of the threat of injury from subsidization necessitate the evaluation of facts such as export, price and production figures<sup>46</sup> and this demands the assistance of investigators with some familiarity with the nature of the data with which they are confronted. Fact gathering could also be crucial where the panel is required to make determinations of environmental exemptions<sup>47</sup>, or regarding financial services<sup>48</sup> or intellectual property<sup>49</sup> obligations, issues which are becoming more common at the WTO.

Enhanced fact finding capability at the panel stage could frustrate the consultation process. Consultations have been successful in achieving pre-panel settlement in part because of their open atmosphere and confidentiality.

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<sup>45</sup> Palmeter and Mavroidis supra note 11 at 116.

<sup>46</sup> As in *Softwood Lumber Investigation* supra note 1.

<sup>47</sup> As under GATT XXb,

<sup>48</sup> As outlined under the GATS Annex on Financial Services.

<sup>49</sup> As outlined under the TRIP Agreement.

Consequently, concern has been expressed that increased formality at the consultation stage, such as pressure for full factual disclosure, could diminish that forum's ability to facilitate settlement.<sup>50</sup> Emphasizing the importance of the lessened evidentiary rigor in the consultation phase of WTO dispute settlement, Gary Horlick and Glenn Butterton commented emphatically: "[the] ideal degree of disclosure by the parties ...seem[s] to be at odds with the spirit, if not the letter, of the WTO resolution process."<sup>51</sup> The Appellate Body disagrees, stating that all parties should fully disclose the facts on which their claims are based from the point of consultation onwards.<sup>52</sup> Despite this latter direction, it is advisable that in order to retain the potential for resolution derived from the more relaxed consultation stage, the fact finding agency should only be available once a formal panel proceeding has begun.

Maintaining a fact finding agency and conducting prolonged investigation throughout the world could be expensive. John Jackson has warned that "a serious and prolonged fact-type hearing could easily bankrupt the resource allocation to the WTO dispute settlement system."<sup>53</sup> In contrast, James Bacchus has observed that the WTO's budget is already small in global terms – only US\$80M annually,<sup>54</sup> and therefore additional costs resulting from fact finding would hardly justify abandoning the project. Availability of an improved evidentiary record would assist in identifying and correcting benefit impairments under the WTO agreements, and the resulting maximization in world trade would compensate for the cost of financing the fact

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<sup>50</sup> G. Horlick and W. Davey *The Consultation Phase of WTO Dispute Resolution: A Private Practitioner's View* in G. Horlick ed WTO AND NAFTA supra note 9.

<sup>51</sup> G. Horlick and G. Butterton *A Problem of Process in WTO Jurisprudence: Identifying Disputed Issues in Panels and Consultations* in G. Horlick ed. WTO AND NAFTA ibid at 363.

<sup>52</sup> *India – Patents*, WT/DS50/AB/R ¶94 (19 December 1997). This remark has not resulted in significant fact-finding at the consultation stage but some commentators believe that this may encourage panels to exercise their existing fact finding powers more assertively in later stages of proceedings: D. Palmetier and P. Mavroidis supra note 11 at 90.

<sup>53</sup> JACKSON, WTO CONSTITUTION AND JURISPRUDENCE supra note 8 at 92.

<sup>54</sup> Of which the US contributes a "pittance" of \$15M: *A Few Thoughts On Legitimacy, Democracy and the WTO* in E. Petersman ed REFORMING THE WORLD TRADING SYSTEM (Oxford U Press 2005) 429 at 430.

finding body born by individual members (as reflected in their contributions to the WTO).

Expanded fact finding powers of the WTO DSB might be perceived by members as a further threat to sovereignty as guaranteed under Article 2(7) of the UN Charter in that such powers could interfere in sensitive areas of domestic jurisdiction. A stricter standard of review of factual determinations by member states, such as correctness rather than objective assessment would be intrusive enough<sup>55</sup> without the further probing that would be associated with *de novo* fact finding. However, this view is not compelling because WTO members have already surrendered a degree of sovereignty by virtue of their consent to membership in the WTO. It is difficult to imagine that fact finding within a member nation's borders would further exacerbate the concern for sovereignty because the conducting of investigations seems to be less an aspect of self-government and therefore less intrusive than submitting to sanction at the hands of the DSB –albeit that DSB conclusions merely have the status of recommendations. Fact finding by its nature concerns *process* – such as in the maintaining of complete, accurate and accessible records - and accordingly does not directly challenge substantive issues of policy or the purpose behind government programs, such as the promotion of a particular industry or sector of the economy and therefore any intercession into sovereignty is more symbolic than actual. Any perceived sacrifice of a member's autonomy would also be mitigated by that the fact finding was done fairly and without bias against particular member states. This could be achieved by member states playing a strong role in the establishment and composition of the body itself, as discussed in the next section.

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<sup>55</sup> Zleptnig supra note 4.

There may be concern that expanded fact finding powers for the WTO might reduce parties' willingness to provide the requisite information under Article 13.1 and thus paradoxically lead to less information. Rather than suffer the cost burden of conducting its own investigations, a party might be motivated to let the fact finding body obtain the information. This would be permissible in the case of a developing nation unable to afford its own investigation, but not as a less-expensive alternative to a member state that could have obtained the information on its own. However this eventuality is unlikely. Despite the foregoing suggestion that sovereignty would not be threatened by fact finding, members it is safe to assume that members would still prefer to conduct their own investigations both for purposes of confidentiality and also because of their perception that fact finding by its own domestic agencies would tend to yield information that was more favorable to the member's own case.

Fact finding at the WTO could arguably be left for arbitration as provided for under Article 25 of the DSU. However, as Pauwelyn has observed, the arbitration route is unlikely to be used with any frequency because of the multi-lateral nature of trade disputes and also because there is no appeal mechanism.<sup>56</sup> The important feature of appeal is one of the reasons that member states are placing increased reliance on the WTO DSB to handle a wide range of trade related disputes. The fact-finding power should be inserted into this mechanism for maximum efficiency leaving the successful less-formal arbitration stage intact.

One might contend that any benefits derived from WTO fact finding could be achieved through *ad hoc* investigation, similar to how most expert advice is currently sought by the WTO. The first problem with this is that the use of temporary agencies would not convey the aforementioned symbolic importance that a standing body

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<sup>56</sup> Pauwelyn *The Limits of Litigation* supra note 29 at 138.

would. Secondly, *ad hoc* fact finding bodies, such as those that have been used by the UN Security Council involving human rights violations, have been criticised for their lack of organisation which inhibits their objectivity and effectiveness.<sup>57</sup> Efficiency engendered by standardization could be achieved by a standing body of investigators with an established procedure for finding, documenting and reporting. Still, rather than create its own investigative agency, it might be more prudent for the WTO to make use of a fact finding body of another organisation, such as one commissioned by the UN Security Council, which might arguably achieve the same demonstrative legitimacy of a dedicated WTO panel with less expense. Of course the Security Council's mandate only permits it to take action if there is a threat to the peace<sup>58</sup> which would not normally be relevant to trade issues.<sup>59</sup> The primary problem here is that an *ad hoc* body or one belonging to another international organization such as the UN might not have the requisite expertise in trade related matters. It is conceivable that the WTO's standing investigatory agency could be shared by the IMF or possibly by the UN Security Council, when evaluating the latter organization's need to resort to economic sanction.<sup>60</sup>

## VII. THE WTO BUREAU OF INVESTIGATION

The form that the WTO fact finding agency would take, which has been mentioned in brief throughout this article, will now be reviewed and discussed. The best model for

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<sup>57</sup> Bassouni supra note 44 at 40.

<sup>58</sup> UN Charter Article 39.

<sup>59</sup> Stronger cooperation between the WTO and UN agencies has already been recommended, notably regarding evaluations of intellectual property and national policy exceptions. G. Sampson *Is There a Need for Restructuring the Collaboration Among WTO and UN Agencies So As to Harness Their Complimentarities?* in J. Jackson ed. REFORMING THE WORLD TRADING SYSTEM (Oxford U Press, 2005) at 533.

<sup>60</sup> UN Charter Article 41.

the WTO investigative body would consist of a team of individuals appointed equally by and representative of WTO member states to avoid the apprehension of bias. WTO investigators would possess qualifications necessary to find and collect economic and other trade related data. While they would not need to be qualified to the level of experts, relevant backgrounds in forensic accounting, law or economics would be preferable. Document review paralegals also known as Project Lawyers, which are used with increasing frequency by large law firms to assist with documentary discovery requirements in complex files would be suitable candidates for this role because of their attention to detail and familiarity with locating key evidence among massive quantities of documentation. Individuals with police training would be helpful to deal with recalcitrant individuals who may obstruct the fact gathering process and also to conduct on site inspections, perhaps of factories, warehouses or other industrial plants. Such investigation would be particularly relevant to issues of dumping and subsidization. The need for police-type powers (which may involve searching private premises) demonstrate the public character of WTO dispute settlement which affects the rights of all citizens, not just the private concerns of the industries involved. Investigators would not consist of government employees because this might increase the likelihood of a conflict of interest with respect to the state which appointed them particularly were an agent to engage in fact finding within his own state. As WTO investigators' mandate would be at the behest of the parties and the panel judges (in keeping with the consent based nature of international dispute settlement), their activities would not be covert. Such a mandate might undermine the legitimacy of WTO DSB decisions and ultimately hinder compliance. WTO investigators would not be spies and as such FBI agents would be reasonable model.

To avoid the problems associated with the *ad hoc* fact finding missions of the UN, the WTO investigative team would operate under an established code of procedure that outlines the extent of their powers and duties. The first clear rule must be that the investigators would not offer conclusions but simply find and present the facts to the panel as revealed, enabling judges to arrive upon their own conclusions. Secondly, it would be important for each WTO member state to grant investigators the same authority that domestic law enforcement would possess, particularly since most WTO disputes involve to a large degree the trading activities of private entities rather than government bodies. Domestic constitutional oversight over the exercise of these powers would ensure that rights were not infringed during fact finding and also minimize encroachment upon members' sovereignty in the field of civil rights. Thirdly, procedure must be established for the format and timing for presentation of the agency's evidence to the WTO panels. Given the fairly strict chronology of the dispute settlement framework, additional time should be allocated to facilitate the investigator's role in proceedings at the panel stage. The panel has stated that parties should wait until the first written submission before they make a request to the panel to seek information, which would accord the panel sufficient time to ascertain the nature of the additional data that might need to be obtained.<sup>61</sup> Accordingly, the investigatory body should not be deployed until after the first submissions. Unlike the current regime, the investigatory body would be under an obligation to disclose any information gathered to the member state from which it is obtained. The member state would then have the opportunity to modify its stance or rectify its trade practices without need for a panel ruling which would foster settlement. This "sharing of

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<sup>61</sup> *Panel Report Canada – Aircraft* WT/DS70/R ¶9.83 (14 April 1999).

information” would also contribute to the image of the investigatory body as one of collaboration and assistance which would in turn engender cooperation.

### VIII. CONCLUSION

Although the agreements which constituted the WTO DSU contemplate the production of new evidence to the panels upon request of the parties, the organization currently has no *de novo* fact finding mandate on its own motion. But as such a function is not unknown to international dispute settlement, it may be extended to WTO panels. This article has accordingly proposed the establishment of a standing fact finding body within the WTO to seek information to rectify omissions in the evidence submitted by parties. This function is in keeping with the inquisitive model of international tribunals which emphasizes negotiation. Caution must be exercised that the WTO’s fact finding power is not taken too far. Accordingly the panel must not use evidence obtained from the investigators to make a party’s case for them and any information sought must relate to specific allegations from the parties. As it would not reach its own conclusions or make recommendations, the fact finding agency would not compromise essential judicial impartiality.

Institutionalized fact finding would enhance the WTO’s ability to resolve international trade disputes, most notably by neutralizing the disadvantage to developing nations and by increasing the legitimacy of decisions, ultimately leading to better compliance. In addition to these practical advantages, it seems impossible to argue that it is not always preferable for an adjudicating body to have an optimal knowledge of the facts before them. The more complete the evidence, the closer the proximity to the truth and therefore the stronger likelihood that justice will be done when the law is applied. This is the essential goal of institutionalized decision-

making and one of the primary reasons why sovereign parties choose to place their trust in international tribunals. Failure to establish as complete an evidentiary record as reasonably possible through the assistance of a fact finding body would therefore undermine the credibility of the WTO as an organization that seeks to promote judicious resolution of international disputes.