

**THE FORMATION PROCESS OF WTO (SOFT) NORMS:
WTO reaction to the financial crisis and transparency in WTO dispute settlement**

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This contribution describes two recent WTO developments: (i) the WTO's reaction to the financial crisis and (ii) open hearings and the selection of scientific experts in the recent *Hormone beef II* dispute. It then puts those developments in the context of the Global Administrative Law (GAL) project. Both developments illustrate the emergence of non-treaty standards or informal institutional arrangements ("norms" or soft law) within the traditionally hard law sphere of the WTO. As requested by the organizers, particular attention is given to the process of formation of these WTO "norms" and the questions of participation and due process that this process may raise.

1. The WTO's reaction to the financial crisis

The financial crisis is having a devastating effect on world trade. Two of its consequences have attracted particular attention from the WTO: trade finance and bailout/stimulus packages.

a. Trade Finance

Because of the financial crisis, the cost of trade financing has sky-rocketed, if it remains available at all. 90 per cent of world trade depends on short term credit. Such credit is crucial especially for developing country trade. Brazil, for example, has been particularly hit and prominently raised the issue at the WTO. The shortfall in trade financing was recently reported to be 25 billion US\$.

Although the WTO treaty sets out limits on, for example, export credits in the Subsidies Agreement, the WTO's reaction to this drying up of trade finance was not a normative one (e.g. by means of enacting a formal waiver or changing or adding new rules). Instead, the reaction was of a more managerial and informal type.

On 12 November 2008, the Director-General (DG) of the WTO (Pascal Lamy of France) convened a meeting at the WTO to discuss the issue with some 30 participants, including other multilateral institutions (e.g. IMF, World Bank's International Finance Corporation (IFC)), regional development banks as well as private banks (ING, HSBC, Citigroup, Commerzbank, etc.) and credit insurance agencies (so-called Bern Union). A follow-up meeting is planned for 18 March 2009. The issue was also raised at an informal meeting of the TNC (Trade Negotiations Committee) and is followed up in the Working Group on Trade, Debt and Finance. The DG has also referred to the possibility of convening a General Council meeting on the issue under the WTO's so-called coherence mandate (i.e. coherence amongst, especially, the WTO, IMF and World Bank). One tangible outcome is that the World Bank's IFC has tripled the ceiling of its trade finance guarantees from 1 to 3 billion US\$.

b. Monitoring bailouts and stimulus packages

A second consequence of the financial crisis that has attracted particular WTO attention is the enactment, across the globe, of so-called bailouts to safe financial institutions and carmakers, and stimulus packages to kick-start the slowing economy. With the world economy in an almost global recession, these bailouts and stimulus packages come in a broader atmosphere of renewed pressure for economic protectionism, reminiscent of the beggar-thy-neighbor policies of the 1930s Great Depression.

As with the problem of trade financing, the reaction at the WTO was not a formal or normative one: So far no formal dispute settlement proceedings have been filed, nor have waivers or new rules been proposed. Instead, the DG has set up an internal Task Force on the Financial Crisis within the WTO Secretariat (headed by a WTO official,

Richard Eglin). One of the main outcomes of this Task Force so far is an informal document produced by the WTO secretariat (JOB(09)2, dated 23 January 2008) listing country-specific bailouts and stimulus packages enacted across the globe. This “radar picture” or “pulse-taking” of the response by WTO members to the crisis has subsequently been discussed collectively at an informal meeting of the Trade Policy Review Body, held on 9 February 2009, where all WTO members have a seat and could raise their comments and remarks. It has been agreed that the WTO secretariat will provide regular updates of its “radar picture”.¹

This informal monitoring mechanism stands in sharp contrast to the usually hard law, dispute settlement approach for which the WTO is known. What the impact, if any, of this informal review process will be remains an open question. Even though the WTO secretariat admits to collecting its information from public media sources only (so far no reporting or notifications are filed or required by members themselves), most people agree that the process may serve an important data collection and information sharing purpose. The hope has also been expressed that publication and collective discussion of members’ responses to the crisis may exert some peer pressure and thereby avoid some instances of protectionism, albeit only at the edges.

c. Assessment and questions

From a GAL perspective, the WTO’s reaction to the financial crisis presents the following, interesting features and questions:

1. The WTO reaction constitutes informal emergency actions where formal, treaty-based mechanisms seem too heavy to get anything done in time. At the

¹ “Radar picture” is the term used by DG Lamy. Although the idea is not to unearth and decide on breaches of the WTO treaty, I cannot resist the remark that the main purpose of “radar pictures” in traffic control is to collect evidence so as to fine speeding conductors ... But see footnote 1 to JOB(09)2: “This is intended to be a purely factual report and is issued under the sole responsibility of the Director-General. It has no legal effect on the rights and obligations of Members, nor does it have any legal implication with respect to the conformity of any measure noted in the report with any WTO Agreement or any provision thereof. This report is also without prejudice to Members’ negotiating positions in the Doha Round”.

same time, the formal mechanism of, for example, WTO dispute settlement may serve one function of the WTO (e.g. deterring, defining and punishing defection from the WTO treaty especially where the treaty presents a prisoners' dilemma where WTO members have incentives to breach the rules). The informal mechanism of Trade Policy Reviews and JOB(09)2 serves another and quite distinct function of IOs, namely information sharing, data collection and peer pressure in something more akin to a coordination or assurance game.

2. Although surely with the support of major WTO members, the initiator of both responses was the WTO secretariat or DG (something that is rather exceptional and controversial in this organization which prides itself to be "member-driven"). In the monitoring process of bailouts and stimulus packages, it is also the WTO secretariat that does the research and compiles the list (JOB(09)2). This has further highlighted the delicate balance between, on the one hand, secretariat initiative, neutrality and freedom to act and, on the other hand, member state control (in what is conventionally seen as a strict agent-principle relationship).
3. Such emergency actions (spearheaded by the secretariat) do, however, raise the question of whether the action fell within the mandate of the WTO and was pursued according to the rules. It is noteworthy that the DG went to great pains to find formal hooks on which he could hang his initiatives (trade finance: WG on Trade, Debt and Finance; GC's coherence mandate; JOB(09)2: paragraph G of the Trade Policy Review Mechanism²). Nonetheless, Bolivia and other developing countries contested the WTO's monitoring of the bailouts and stimulus packages on the ground that there was no formal mandate to do so, and that not all 153 WTO members had been involved in the process of setting up the mechanism (Bolivia called for the

² Paragraph G states: "An annual overview of developments in the international trading environment which are having an impact on the multilateral trading system shall also be undertaken by the [Trade Policy Review Body]. The overview is to be assisted by an annual report by the Director-General setting out major activities of the WTO and highlighting significant policy issues affecting the trading system".

“G-153” to meet, rather than the G-20 or any other sub-group of WTO members). Bolivia required further precision on, more specifically: (i) the purpose of the activity, (ii) how long it would last, (iii) the periodicity of reports and meetings, and (iv) special rules for developing countries. Technically speaking, where the WTO would exceed its mandate, opposing WTO members could block any decision or progress (arguably even the adoption of the agenda of a particular meeting), since the fall-back rule of WTO decision-making is and remains consensus. A so far unexplored alternative avenue or mandate to pursue (or contest) WTO activity in response to the financial crisis could be so-called “situation complaints” under GATT Article XXIII:1(c). This mechanism can be triggered by any WTO member single-handedly in respect of “any other situation” that is not claimed to be a breach of the WTO treaty, nor a so-called non-violation complaint. The negotiating history of this provision (written in 1947, shortly after the Great Depression) refers to global economic crises which transcend individual countries as the typical “situation” that the drafters had in mind. Under WTO dispute settlement rules, this “situation” would then be automatically examined by a WTO panel. Yet, panel reports could only be adopted by positive consensus of all WTO members (and no appeal seems possible, see DSU Article 26.2). However, even if an eventual “situation” panel report were not adopted, the fact that it was written and issued may well be sufficient to serve the purpose of information gathering, neutral analysis and peer pressure.

4. Interesting and quite novel for the WTO as a strictly inter-governmental organization is that the meetings on trade financing not only included other IOs, but also private banks and export credit agencies (a weak form of public-private partnership).
5. The JOB(09)2 process clearly aims at increasing transparency in the enactment by WTO members of responses to the crisis. Such transparency, neutral reporting and collective appreciation and evaluation is in line with substantive principles of GAL, imposed, in this case, not on the IO itself, but

on the member states through the IO. The question of whether the JOB(09)2 process itself was transparently established and is conducted in line with due process and ideas of “publicness” is, of course, a different question. On the positive side, the WTO has openly reported to the public on the establishment and progress of this process. On the negative side, but fully in line with standard WTO operating proceeding, JOB(09)2 remains a formally confidential document (even though it can be readily found on the internet) and the informal meetings where the secretariat’s “radar picture” is discussed are closed to the public.

2. Open hearings and scientific experts in *Hormone beef II*

Opening-up and increasing the transparency of the WTO dispute settlement process has been a matter of discussion almost since the creation of the WTO in 1994 (see, for example, the debate on *amicus curiae* briefs and transparency proposals in the DSU review process submitted, originally, by the United States). After years of negotiations, no progress has been made at the formal, DSU-wide level. The DSU review process has still not been completed. Since reforming the WTO treaty, including the DSU, requires a consensus of all WTO members, one could be tempted to despair and give up any attempt to reform the system. Yet, in recent years, an interesting development has been unfolding: panels and the Appellate Body themselves have taken *ad hoc* and case-specific decisions, albeit at the request of disputing parties in particular cases, to open-up the WTO dispute settlement process, making it more transparent and subjecting it to broad rules of due process.

One recent case stands out: *Hormone beef II* (October 2008), a procedure initiated by the EC against continued US sanctions in response to the first Hormone beef ruling on the ground that, according to the EC, the hormone beef ban was now in line with WTO rules since based on a new risk assessment and/or the precautionary principle. Since, for the EC, the hormone beef ban was now consistent with WTO rules, the US had to withdraw its sanctions. In this context, both the panel and the Appellate Body held open hearings

for the first time in the history of WTO dispute settlement. In addition, the Appellate Body reversed the panel on how it selected scientific experts to assist it, finding that the EC's due process rights had been violated.

a. Open hearings

During the panel stage, DSU Article 14.1 provides that “[p]anel deliberations shall be confidential”. In addition, Rule 2 of the standard Working Procedures for panels provides that “[t]he panel shall meet in closed session”. Notwithstanding these directions, the panel in *Hormone beef II* held open hearings (with the exception of its separate hearing with the third parties) on the following argument:

- 1) The disputing parties all agreed to open hearings (i.e., US, EC and Canada; even though some third parties disagreed).
- 2) Art. 12.1 of the DSU allows panels to change the standard working procedures subject only to prior “consultations” with the parties (there is no need for agreement by all parties, let alone third parties); hence, Rule 2 on meetings “in closed session” can be changed by a panel after “consultations” with the parties.
- 3) A panel cannot, however, deviate from DSU rules themselves when altering the working procedures. Yet, DSU Art. 14.1 only refers to confidential “deliberations” which, according to the panel, “was not intended to cover the exchange of arguments between the parties, but rather the internal discussion of the Panel with a view to reach its conclusion” (para. 7.49).

During the Appellate Body stage, however, DSU Article 17.10 directs that “[t]he proceedings of the Appellate Body shall be confidential”. The Appellate Body read the word “proceedings” (as opposed to “deliberations”) to mean “the entire process by which an appeal is prosecuted, from the initiation of an appeal to the circulation of the Appellate

Body report, including the oral hearing” (Annex IV, para. 3). Nonetheless, the Appellate Body also opened its hearing to the public, this time on the following argument:

- 1) The disputing parties all agreed to open hearings (i.e., US, EC and Canada; even though some third parties disagreed).
- 2) Although DSU Article 17.10 states that “proceedings” (including the oral hearing) “shall be confidential”, this direction is not absolute and permits of derogation. More specifically, in their bilateral relationship to the Appellate Body, parties may forego or waive their confidentiality protection for as long as the right of confidentiality of any other party or third party, and “the integrity, impartiality, and independence” of the appellate process, is not affected.

The Appellate Body hearing, held on 28-29 July 2008, was opened to the public by means of simultaneous closed-circuit television, shown in a separate room. Oral statements and responses to questions by third participants such as China and Brazil wishing to maintain the confidentiality of their submissions were not subject to public observation. Each time these countries took the floor, the closed-circuit TV connection was switched off.

From a GAL perspective, this opening-up of hearings to the public presents the following, interesting features and questions:

1. Transparency and open hearings were not achieved through formal treaty rules or amendments, but by case-specific decisions by panels and the Appellate Body. Since *Hormone beef II*, it has become something of a pattern (“norm”?) for panels and the Appellate Body to hold open hearings, albeit each time subject to the parties’ agreement.
2. This new pattern or norm is driven to a great extent by the WTO judiciary, not the WTO legislature (which is currently blocked given the consensus rule).

3. That said, panels and the Appellate Body explain this opening-up not based on some broad, GAL principle of transparency or “publicness”³ that comes with the judicial function or derives from some general principle of law that applies also in the WTO context (in contrast, for example, to rules on burden of proof which panels and the AB have borrowed from general principles of law and applied in the WTO context given the absence of any rules on burden of proof in the WTO treaty itself). Instead, hearings have been opened because disputing parties themselves had agreed to do so. In other words, it is not some general principle of GAL transcending individual state interests that led the WTO judiciary to open its hearings; on the contrary, it is the traditional idea of state consent or state sovereignty (“if states so wish we follow”) that led to this result. Indeed, the Appellate Body referred to “the integrity, impartiality, and independence” of the appellate process not to support open hearings, but rather as a limit or reason to keep parts of the process (e.g. internal deliberations) confidential.⁴
4. As with the WTO reaction to the financial crisis, questions can be raised as to the mandate or legality of panels and the Appellate Body thus opening its hearings to the public on an *ad hoc* basis without a formal amendment to the DSU or the agreement of all parties to the dispute (including third parties). Brazil, China and India, for example, have argued that if hearings are to be opened, this is something for the membership as a whole to decide in the context of the DSU review (where, these countries seem to hope, open hearings should be compensated by US/EC concessions in other areas). In

³ On “publicness”, see Benedict Kingsbury, The Concept of ‘Law’ in Global Administrative Law, Working Paper, p. 13, available at <http://iilj.org/publications/documents/2009-1.GAL.Kingsbury.pdf> (“‘Publicness’ is a necessary element in the concept of law under modern democratic conditions. The claim is that the quality of publicness, and the related quality of generality, are necessary to the concept of law in an era of democratic jurisprudence. By publicness is meant the claim made for law that it has been wrought by the whole society, by the public, and the connected claim that law addresses matters of concern to the society as such”).

⁴ “The requirement that the proceedings of the Appellate Body are confidential ... is intended to safeguard ... the adjudicative function of the Appellate Body, so as to foster the system of dispute settlement under conditions of fairness, impartiality, independence and integrity”. On this ground, the Appellate Body found, for example, that the obligation that Appellate Body reports “be drafted without the presence of the parties” (DSU Art. 17.10) cannot be derogated from.

addition, even if one agrees that confidentiality rules operate in “bilateral”, one-to-one relationships between the adjudicator and a specific party, the fact remains that a change in this “bilateral” relationship may affect third parties that want to maintain confidentiality in their “bilateral” relation with the Appellate Body. The Appellate Body brushed away the existence of any such third party effects. Yet, the argument could be made that opening-up hearings in some cases, for some members, puts tremendous pressure on other members to do the same or at least makes these other members look bad (it was no pleasant sight to see Brazil and China “bleeped-out” from the public screen whenever they spoke, somehow creating the impression that these countries had something to hide). Proponents of more transparency may see this pressure on reluctant members to open-up as a good thing (slowly creating a new pattern or “norm” of broader application). Yet, if this opening-up is, as explained earlier, explicitly based on state consent (rather than general principles of “publicness”), then these third party effects must be taken seriously.⁵

b. Selection of experts

A second major decision in *Hormone beef II* of relevance to the GAL project, is the Appellate Body’s ruling that the panel violated the EC’s due process rights (and, as a result, the panel’s duty to make an “objective assessment” pursuant to DSU Art. 11) when appointing two scientific experts who had been heavily involved in the risk assessments and establishment of JECFA/Codex/WHO standards at issue in this dispute from which the EC wanted to deviate.⁶ On that basis, and other additional grounds, the

⁵ In support of the idea that most WTO obligations are of the bilateral type that can be contracted-out from in bilateral, state-to-state relations, for as long as third parties are not affected, see Joost Pauwelyn, *A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?* 14 EUROPEAN JOURNAL OF INTERNATIONAL LAW (2003) 907-952. See also Article 41 of the Vienna Convention on the Law of Treaties.

⁶ “... there was an objective basis to conclude that the institutional affiliation with JECFA of Drs. Boisseau and Boobis, and their participation in JECFA’s evaluations of the six hormones at issue, was likely to affect or give rise to justifiable doubts as to their independence or impartiality given that the evaluations conducted by JECFA lie at the heart of the controversy between the parties.

Appellate Body also reversed the substantive findings of the WTO panel under the SPS Agreement. The Appellate Body's statement on due process is worthy of full quotation:

433. The Appellate Body has previously found that the obligation to afford due process is "inherent in the WTO dispute settlement system" and it has described due process requirements as "fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings". In our view, the protection of due process is an essential feature of a rules-based system of adjudication, such as that established under the DSU. Due process protection guarantees that the proceedings are conducted with fairness and impartiality, and that one party is not unfairly disadvantaged with respect to other parties in a dispute.

...

436. Scientific experts and the manner in which their opinions are solicited and evaluated can have a significant bearing on a panel's consideration of the evidence and its review of a domestic measure, especially in cases like this one involving highly complex scientific issues. Fairness and impartiality in the decision-making process are fundamental guarantees of due process. Those guarantees would not be respected where the decision-makers appoint and consult experts who are not independent or impartial. Such appointments and consultations compromise a panel's ability to act as an independent adjudicator.

From a GAL perspective, this application of due process rights in the process of expert selection presents the following, interesting features and questions:

1. Unlike the decisions to open hearings to the public (which were based on state consent and party agreement; not on general principles), the Appellate Body's reversal in the expert selection process was explicitly based on the general principle of due process, of great relevance also to GAL.
2. The principle of due process is nowhere to be found in the WTO treaty itself, but was transposed from general principles of law into the WTO context, even in the absence of any direction to this effect in the DSU or elsewhere in the WTO treaty. This underlines the connection between the WTO treaty and the broader corpus of international law. At the same time, for some countries or

The appointment and consultations with Drs. Boisseau and Boobis compromised the adjudicative independence and impartiality of the Panel" (para. 481).

commentators, this incorporation of a principle not explicitly referred to in the WTO treaty may raise questions of mandate or legality (as well as, somewhat paradoxically, raise the question of whether the decision-making process of incorporating due process into the WTO itself respected due process, i.e. “fairness and impartiality in the decision-making process”). In this respect, it is interesting to point out that the Appellate Body did not reverse the panel on grounds of due process as such, but linked the due process violation to the formal obligation on panels to conduct an objective assessment which is explicitly included in Art. 11 of the DSU (used as the formal hook to incorporate due process).