Non-Violation Nullification of Benefit Claims: Opportunities and Dilemmas for Australia in the WTO Dispute Settlement System

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Introduction

This paper considers the possibilities and dilemmas created for domestic-oriented industry, exporters, government and relevant trade law practitioners, by 'non-violation nullification of benefits' (NVNB) claims under the World Trade Organization (WTO) dispute resolution process. It examines whether such claims have a legitimate role in metamorphosing textual constructive ambiguities of multilateral and bilateral trade agreements into binding rules enforceable by trade sanctions.

The WTO dispute resolution process has been controversial since its inception.[2] The Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) was promoted as facilitating greater efficiency, security, predictability and compliance in the resolution of trade disputes.[3] Much has been made of the 'rule-based' features that supposedly provide such predictability.[4] The automatic judicial-type panels, rights of appeal and

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2 'Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations' (1994) *The Legal Texts: the Results of the Uruguay Round of Multilateral Trade Negotiations* (1999) 33 *International Legal Materials* 1125. J Waincymer, 'Settlement of Disputes Within the World Trade Organization: A Guide to the Jurisprudence,' (2001) 24 *The World Economy* 1247.

3 E U Peterman, *International Trade Law and the GATT/WTO Dispute Settlement System* (1997). See also D P Steger and S M Hainsworth, 'World Trade Organization Dispute Settlement: The First Three Years' (1998) 1 *JIEL* 199 and A W Shoyer, 'The First Three Years of WTO Dispute Settlement: Observations and Suggestions'(1998) 1 *Journal of International Economic Law* 277.

4 M Kantor (US Trade Representative), 'General Agreement on Tariffs and Trade' *Hearing Before House Committee on Ways and Means* 103rd Congress 26 April 1994.

requirement for adoption of reports, have made the system popular.[5] Yet NVNB claims have the potential to add a curious element of unpredictability into this process.

NVNB claims are directly referred to in Article 26 of the DSU, Article XXIII of the General Agreement on Tariffs and Trade 1994 (GATT 1994) Article XXIII of the General Agreement on Trade in Services (GATS) and Article 64 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).[6] Under such NVNB provisions, the full range of dispute resolution mechanisms may be invoked whether or not a breach of any specific provision is alleged or substantiated. The precondition is that a 'reasonably expected' 'benefit' accruing under the relevant trade agreement, has been 'nullified or impaired' by a 'measure' applied by a WTO Member.

Both the United States and European Economic Community have argued before a GATT 1994 panel that recourse to NVNB claims should remain 'exceptional' otherwise 'the trading world would be plunged into a state of precariousness and uncertainty.'[7]

In a well-known comment Judge Pescatore similarly stated that

> A merely grammatical turn of the words in the General Agreement; `whether or not' in Art XXIII:1(b) […"it conflicts with the provisions of this Agreement"]…creates an easy escape from the obligations imposed by the General Agreement. In my opinion, this part of the draft Understanding should be deleted and the matter should be left to the speculations of professors fond of legal paradoxes.[8]

Nevertheless, a theme of this chapter is that contemporary controversy over NVNB claims and proceedings arises in large part from their potential to allow a WTO Member to tactically exploit a trade agreement's textual constructive ambiguities and threaten a dispute if a wide and largely undefined range of domestic regulatory components are not altered, or compensation organised.[9]

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5 J H Jackson, 'The Changing Fundamentals of International Law and Ten Years of the WTO' (2005) 8 (1) *Journal of International Economic Law* 3.

6 The so-called 'TRIPS Agreement' is Annex 1C of the 1994 *Marrakesh Agreement Establishing the World Trade Organization.* The DSU is more formally styled, in Annex 2 to the same Agreement, as the *Understanding on Rules and Procedures Governing the Settlement of Disputes*. All relevant texts are published by the WTO (on line and in hard-copy with Cambridge University Press 1994) as *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations*.

7 *EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*, BISD 37S/86, 118 [114-113].

8 Judge P Pescatore, 'The GATT Dispute Settlement Mechanism: Its Present Situation and its Prospects,' (1993) 27 *Journal of International Arbitration* 5.

9 F M Abbott, *Non-Violation Nullification or Impairment Causes of Action under the TRIPS Agreement and the Fifth Ministerial Conference: A Warning and Reminder* (2003).

This development, it will be argued, while not necessarily endorsed by WTO jurisprudence, offers strategic advantages in certain trade sectors that may not have been entirely unforseen. It may facilitate a WTO dispute settlement process involving deliberate diplomatic 'gaming' of trade 'rules,' from what had otherwise been viewed as finely balanced textual truces, where uncertainty is deliberate and inherent and dispute panel interpretation more an act of ongoing negotiation, than judicial analysis. Other commentators, similarly, have described NVNB claims as potentially inserting corporate competition policy into the DSU.[10]

This chapter begins by examining the origins and place of NVNB provisions in the DSU, GATT 1994, GATS and TRIPS.[11] It then discusses the relevant WTO jurisprudence and some opportunities and dilemmas posed by such claims and provisions under a rule-based DSU. It concludes by offering some policy options.

Background to NVNB Claims in the WTO

In the 50-year history of the GATT and WTO, there have been less than ten cases where panels have substantially discussed NVNB claims.[12] In GATT jurisprudence, NVNB complaints appear to have originally been designed to counter the capacity of countries to avoid relatively simple obligations and specific tariff concessions in multilateral trade agreements, by making ambiguous domestic regulatory arrangements.[13]

NVNB provisions comparable to Article XXIII:1(b) of GATT 1994 featured in pre-World War II treaties of commerce.[14] The NVNB concept, however, appears to have suffered, in terms of normative sophistication, from its development outside the general corpus of international law. Some commentators have seen NVNB claims as a vestigial concept from the days when binding dispute settlement proceedings were not possible.

> With the considerable growth of international trade regulation in terms of scope and subject matter, the potential role of the non-violation complaint

10 F Roessler, 'Should Principles of Competition Policy be Incorporated into WTO Law Through Non-Violation Complaints?' (1999) 3 *Journal of International Economic Law* 413.

11 NVNB complaints would rarely be necessary to protect the exchange of rights and obligations in the other agreements in Annex 1 of the Marrakesh Agreement, as these already include substantial flexibility within their rules to address borderline cases.

12 Abbott, above n 9.

13 Communication from Canada to WTO, *Non-Violation Nullification or Impairment Under the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)* IP/C/W/127 10 Feb 1999.

14 P J Kuyper, 'The Law of GATT as a Special Field of International Law' (1994) 25 *Netherlands Yearbook of International Law* 227.

has been considerably reduced. It will be further reduced as general principles of law are applied in the process of interpreting WTO law. [15]

Article XXIII ('Nullification or Impairment') of GATT 1994 states:

> 1. If any contracting party should consider that any *benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired* or that the attainment of any objective of the Agreement is being impeded as the result of
> a. the failure of another contracting party to carry out its obligations under this Agreement, or
> *b. the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement*, or
> c. the existence of any other situation,
> the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it [emphasis added]."

Article XXIII.1(b) contains the NVNB provision or so-called 'non-violation complaint.' Article XXIII.1(c) is the even broader 'situation complaint.' Yet to be invoked or ruled upon before a DSU panel, this could cover any situation whatsoever, even if it did not result from any action of a WTO Member, as long as it resulted in 'nullification or impairment' of a 'benefit.'

Article XXIII.3 of GATS states:

> If any Member considers that *any benefit it could reasonably have expected to accrue* to it under a specific commitment of another Member under Part III of this Agreement is being *nullified or impaired as a result of the application of any measure which does not conflict with the provisions of this Agreement*, it may have recourse to the DSU. If the measure is determined by the DSB to have nullified or impaired such a benefit, the Member affected shall be entitled to a mutually satisfactory adjustment on the basis of paragraph 2 of Article XXI, which may include the modification or withdrawal of the measure. In the event an agreement cannot be reached between the Members concerned, Article 22 of the DSU shall apply [emphasis added].

The NVNB remedy has clearly been narrowed in scope under GATS Article XXIII:3. This article limits NVNB complaints to benefits accruing from 'specific commitments' undertaken by Members. Unlike NVNB claims under GATT 1994, however, the NVNB remedy under GATS may include the 'modification or withdrawal' of a 'measure.' The specific application of Article 22 of the DSU to NVNB claims means that compensation and the suspension of concessions are available in the event that a dispute panel's recommendations and rulings are not implemented within a reasonable period of time.

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15 T Cottier and K Schefer, 'Good Faith and the Protection of Legitimate Expectations in the WTO,' in M Bronckers and R Quick (eds), *New Directions in International Economic Law* (2000) 47.

Article 26 of the WTO DSU reads as follows:

> 1. Non-Violation Complaints of the Type Described in Paragraph 1(b) of Article XXIII of GATT 1994
> Where and to the extent that such party considers and a panel or the Appellate Body determines that a case concerns a measure that does not conflict with the provisions of a covered agreement to which the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable, the procedures in this Understanding shall apply, subject to the following:
>
> (a) the complaining party shall present *a detailed justification* in support of any complaint relating to a measure which does not conflict with the relevant covered agreement;
>
> (b) where a measure has been found to nullify or impair benefits under, or impede the attainment of objectives, of the relevant covered agreement without violation thereof, there is *no obligation to withdraw the measure*. However, in such cases, the panel or the Appellate Body shall recommend that the Member concerned make *a mutually satisfactory adjustment;*
>
> (c) notwithstanding the provisions of Article 21, the arbitration provided for in paragraph 3 of Article ther party, may include a determination of the level of benefits which have been nullified or impaired, and may also suggest ways and means of reaching a mutually satisfactory adjustment; such suggestions shall not be binding upon the parties to the dispute;
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> (d) notwithstanding the provisions of paragraph 1 of Article 22, compensation may be part of a utually satisfactory adjustment as final settlement of the dispute [emphasis added].

One important element to note in Article 26, is the requirement for a 'detailed justification' of the NVNB claim. One WTO Member may thus be able to predict when another is strategically preparing for a NVNB claim by the manner in which it sets up (during negotiations) mechanisms allowing it to subsequently claim a 'measure' was not 'reasonably expected' and to acquire the data necessary to calculate damages. It also encourages the view that for a State to prevent its legitimate expectations of benefit under a trade agreement containing a NVNB provision being undermined, it must develop expertise in accumulating the necessary detailed information to justify them. The second important aspect of Article 26 of the DSU in this context, concerns the capacity of the complaining party to request that a panel use the data prepared to put a money value on the 'benefits' nullified or impaired and to claim that as compensation.

Article 64 (Dispute Settlement) of the TRIPS agreement provides:

> 1. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement except as otherwise specifically provided herein.

2. Subparagraphs 1(b) and 1 (c) of Article XXIII of GATT 1994 shall not apply to the settlement of disputes under this Agreement for a period of five years from the date of entry into force of the WTO Agreement.

3. During the time period referred to in paragraph 2, the Council for TRIPS shall examine the scope and modalities for complaints of the type provided for under subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 made pursuant to this Agreement, and submit its recommendations to the Ministerial Conference for approval. Any decision of the Ministerial Conference to approve such recommendations or to extend the period in paragraph 2 shall be made only by consensus, and approved recommendations shall be effective for all members without further formal acceptance process.

The delayed entry into force of the NVNB provision in Article 64 reflected the intense disagreement expressed on the concept during the TRIPS negotiations. It may also reveal how determined certain developed nations (the dominant rent-gatherers from intellectual property rights) were to ensure its inclusion, despite the fact that there was little in TRIPS that would have justified a NVNB claim as the concept was originally developed. The United States, for example, subsequently has argued that the initial and subsequent moratoria is over and the NVNB remedy must now be accepted, by all WTO Members, as applying to the TRIPS Agreement.[16] At the WTO meeting in Hong Kong in December 2005, United States negotiators attempted to obtain concessions in return for their support for the continuance of the NVNB moratorium.[17] This emphasis, as will be shown, is but one indication suggesting the likelihood of a new strategic agenda on NVNB claims being pushed by some developed nations in more politically convenient circumstances.

Some Key Principles of NVNB Claims

The original rationale for NVNB claims, under GATT 1994, was articulated in *EEC – Oilseeds 1*:

> The idea underlying them is that the improved competitive opportunities that can legitimately be expected from a tariff concession can be frustrated not only by measures proscribed by the General Agreement but also by measures consistent with that Agreement. In order to encourage contracting parties to make tariff concessions they must therefore be given a right of redress when a reciprocal concession is impaired by another contracting party as a result of the application of any measure, whether or not it conflicts with the General Agreement.[18]

16 Communication from the United States, Scope and Modalities of Non-Violation Complaints Under the TRIPS Agreement, (IP/C/W/194).

17 Professor P Drahos, personal communication 20 December 2005.

18 *EEC – Oilseeds 1*, above n 7, [144].

This explanation was quoted with approval by the Appellate Body in *EC – Asbestos*.[19] The concept was further explored in *Japan - Film*, where the purpose of Article XXIII(1)(b) was described as being:

> [T]o protect the balance of concessions under GATT by providing a means to redress government actions not otherwise regulated by GATT rules that nonetheless nullify or impair a Member's *legitimate expectations* of benefits from tariff negotiations[20] [emphasis added].

In summary, four requisite elements of a NVNB claim under Article XXIII(1)(b) have been identified:

1. That a 'measure' has been applied by a party subsequent to the entry into force of the relevant trade agreement;
2. That a 'benefit' was reasonably expected by the other party as being negotiated in return for some textual agreement; and
3. That as a result of the application of the measure that benefit has been 'nullified or impaired.'[21]
4. That the nullification or impairment was contrary to the legitimate or reasonable expectations of the complainant at the time of the negotiations
    4. That such claims will only be used in extremely rare circumstances (for example proven bad faith during negotiations), due to their capacity to upset the certainty of the international trading order

In relation to the first element, the 'measures' initiating a NVNB claim may include laws, regulations, general policy statements by government agencies and officials. Nonetheless

> At the same time, it is also true that not every utterance by a government official or study prepared by a non-governmental body at the request of the government or with some degree of government support can be viewed as a measure of a Member government.[22]

The panel in *Japan - Film* was even prepared to entertain the idea that government incentives or disincentives to private actors could become a measure, although it stressed that this broad interpretation was only possible because of the explicit balance of concessions that had previously been made under GATT1994.[23]

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19 *Ec – Measures Affecting Asbestos and Asbestos-Containing Products,* WTO Doc WT/DS135/AB/R, AB-2000-11 (2001) [185] (Report of the Appellate Body).

20 *Japan - Measures Affecting Consumer Photographic Film and Paper,* WTO Doc WT/DS44/R (1998) [10.50] (Report of the Panel).

21 Ibid, [10.41].

22 Ibid, [10.43].

23 Ibid, [10.50].

In *EC – Asbestos* the Appellate Body agreed with the panel in *Japan - Film* that Article XXIII:1(b) "should be approached with caution and should remain an exceptional remedy."[24] It also rejected the interpretation that "any measure" in Article XXIII(1)(b) applied only to"commercial measures." Instead, the Appellate Body held it applied to "measures which affect trade in goods" and which "have a commercial impact."[25] This meant that health-related measures could fall within such provisions, in rare circumstances such as where such a measure was not impliedly or expressly addressed by either party during negotiations. It explicitly left open the question of whether a party could have "reasonable expectations" for NVNB purposes in relation to "continued market access for products which are shown to pose a serious risk to human life or health."[26] This also meant it also left open the question as to whether protection of a public health policy from nullification or impairment by a commercial measure, could be regarded as an actionable "benefit" for the purposes of a NVNB claim. The Panel indicated that parties cannot bring NVNB claims against "old" measures that are no longer applied.[27]

Article 26.1(a) of the DSU, as mentioned, requires parties invoking Article XXIII(1)(b) to present 'a *detailed justification* in support of any complaint relating to a measure which does not conflict with the relevant covered agreement' [emphasis added]. The burden of proof on the complainant in this regard is likely to be higher where the measure is justified under an exception like Article XX (general exceptions to the GATT), whereby the parties recognise that accrued benefits may be overridden by measures considered by the parties to be of greater importance. Specifically it will be much harder then to prove such measures could not have been reasonably anticipated at the time of negotiations, and that they thus run contrary to the complaining party's legitimate expectations.[28] In addition the burden of proof increases with the amount of time between the negotiations and the claim, recognising that it is much harder to reasonably anticipate measures in the distant as opposed to the near future.[29]

As regards the second component, 'benefit,' in almost all prior NVNB cases under GATT1994, the claimed 'benefit' 'nullified or impaired,' involved legitimate or reasonable expectations of market access arising from tariff concessions

24 Ibid, [10.37], see also *EC – Asbestos,* above n 19, [186].

25 *EC – Asbestos,* above n 19, [189].

26 Ibid, [190].

27 *Japan – Film*, above n 20, [10.57-9].

28 *EC – Measures Affecting Asbestos and Asbestos – Containing Products*, WTO Doc WT/DS135/R (2000) [8.281-2], (Report of the Panel).

29 Ibid,[8.282].

negotiated in return for textual obligations.[30] It follows that a NVNB claim is unlikely to be successful if made in relation to sections of a trade agreement where no specific and unequivocal concessions about market access were made during negotiations.

Concerning the third component of a NVNB claim, that a benefit has been 'nullified or impaired as the result of' the application of a measure, the complainant is required to show that the measure upset the relative *competitive relationship* established by a specific negotiated concession between domestic and imported products, language used consistently throughout the jurisprudence on Article XXIII(1)(b) [emphasis added].[31]

Thus, if it can be established that the alleged 'measure,' in fact was pro-competitive, or that the complainant's nullified 'benefit' itself has anti-competitive elements, then an NVNB claim should not succeed. This will also be the case if it can be proven that the agreement itself contemplated only a relative alteration in competition, or that the terms directly express the differing expectations of the parties over particular benefit. Conversely, a country wishing to protect its 'reasonably expected' 'benefits' (for example from continuance unchanged of a public health or environment program), would need to show that the potentially nullifying or impairing 'measure' arose explicitly or implicitly from a government decision or action (for example by relevant documented links between the relevant industry and a government agency) of the other country.

The burden of proving that a 'measure' 'nullifies or impairs' 'benefits' rests with the complainant.[32] Four main causation issues have been identified in this context:

1. The degree of causation, established by the complainant's Article 26 DSU 'detailed justification.'
2. Whether the measure is 'origin-neutral' (in both *de jure* and *de facto* terms), so that the complainant has not discharged the burden of establishing it has a disproportionate impact on its products.
3. Whether the measure was intended to 'nullify or impair' a benefit.
4. Whether the 'nullification or impairment' impact of measures can be measured collectively.[33]

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30 *Japan – Film,* above n 20, [10.61].

31 *Australia – Ammonium Sulphate,* GATT BISD II/188) (1950) [12], *Treatment by Germany of Imports of Sardines*, GATT Doc 1S/53 (1952) [16](Report Adopted by the Contracting Parties), *EEC – Oilseeds*, above n 7, [77].

32 *Japan – Film*, above n 20, [10.36].

33 *Japan – Film*, above n 20, [10.83].

A fourth requisite element for a NVNB claim was identified in the *Korea – Procurement* dispute: 'that the nullification or impairment of the benefit as a result of the measure must be contrary to the *reasonable expectations* of the complaining party at the time of the agreement'[34] [emphasis added]. In *Japan – Film* it likewise was held that the 'legitimate expectation' of improved market access could be nullified if the complainant anticipated the nullifying or impairing measure during negotiations.[35]

To succeed in an NVNB claim, in other words, a WTO Member has to prove to the relevant dispute resolution panel that it couldn't have reasonably anticipated, for example, the domestic legislation that nullified its 'legitimate expectations.'[36] The passage of amendments creating or dealing with a 'measure' by way of the implementing legislation for a particular trade agreement, would almost certainly thwart a claim that such a 'measure' was not 'reasonably expected.' Also having this chilling effect on a NVNB claim would be an exchange of letters or some other interpretive document attached as part of the agreement, or capable of being consulted in relation thereto, which clearly establishes the differing expectations of the parties over a particular 'benefit.'

It is important to reiterate, however, that the Appellate Body in *EC - Asbestos* agreed with the Panel *Japan – Film*, stating that the non-violation nullification or impairment remedy in GAT Article XXIII:1(b): "should be approached with caution and treated as an exceptional concept. The reason for this caution is straightforward. Members negotiate the rules that they agree to follow and only exceptionally would expect to be challenged for actions not in contravention of those rules."[37]

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34 *Korea – Measures Affecting Government Procurement*, WTO Doc WT/DS163/R (2000) [7.85] (Report of the Panel).

35 *Japan – Film*, above n 20, [10.76-7].

36 Ibid. See also the following decisions: *Report of the Panel on Uruguayan recourse to Article XXIII*, L/1923-11s/95 (1962); *EEC – Payments and Subsidies Paid to Processors and producers of oilseeds and Related Animal-Feed Proteins*, L/6627-37S/86 (1989); *The Australian Subsidy on Ammonium Sulphate*, GATT/CP4/39 II/188 (1950); *United States-restrictions on the Importation of Sugar and Sugar-Containing Products Applied Under the 1955 Waiver and under the Headnote to the Schedule of Tariff Concessions* L/6631-37S/228 (1990); *European Japan-Trade in Semi-Conductors* L/6309-35S/116 (1988); *EEC - Production Aids Granted on Canned Peaches, Canned Pears, Canned Fruit, Cocktail and Dried Grapes* L/5778 (1985); *EC - Measures Affecting Asbestos and Asbestos-Containing Products* WT/DS135/R (2000); *Canada-Generic Pharmaceuticals Case* WT/DS114/R; DSR 2000 V 2289 (2000).

37 *Japan – Film*, above n 20, [10.37]; *EC – Asbestos*, above n 19 [186].

Emerging Problems for NVNB Jurisprudence

A convenient place to begin discussing emerging problems in the jurisprudence of NVNB claims is the WTO case involving Inchon Airport, formally known as the *Korea - Procurement* dispute.[38] Here, a WTO DSU panel dealt with a United States NVNB complaint that Korean measures concerning bidding and contracts ('government procurement') for the Inchon International Airport (inadequate bid deadlines, imposition of certain qualifications and some domestic partnering requirements, as well as no domestic procedures for challenges) violated the 'reasonable expectations' of the US arising out of particular trade negotiations.

The Panel (Cartland, Ineichen-Fleisch and Armin Trepte), stated that Article XXIII.1(b) of GATT1994 could be used to claim impairment or nullification of a 'reasonable expectation' of benefit, not only for lack of good faith in implementation, but lack of good faith in negotiations.[39] The panel held:

> A key difference between a traditional non-violation case and the present one would seem to be that, normally, the question of 'reasonable expectation' is whether or not it was reasonably to be expected that the benefit under an existing concession would be impaired by the measures. However here, if there is to be a non-violation case, the question is whether or not there was a reasonable expectation of an entitlement to a benefit that had accrued *pursuant to the negotiation rather than pursuant to a concession*[40] [emphasis added].

Article 3.2 of the DSU requires panels to clarify existing provisions of agreements in accordance with customary rules of interpretation of public international law. This lead the Panel to consideration of how the NVNB principle interacts with Article 26 of the Vienna Convention on the Law of Treaties, incorporating the principle of *pacta sunt servanda*: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." NVNB claims appear to undermine this fundamental principle of international law by subsequent reinterpretations based on the 'spirit' of the agreement.

The Panel considered that non-excusable error in treaty interpretation during negotiation could not be subsequently addressed by a NVNB claim.

> Parties have an obligation to negotiate in good faith. It is clear to us that it is necessary that negotiations in the Agreement before us (the Government

38 *Korea - Procurement*, above n 34.

39 Ibid.

40 Ibid [7.87].

> Procurement Agreement) be conducted on a particularly open and forthcoming basis.[41]

The Panel continued:

> Customary international law applies generally to the economic relations between WTO members. Such international law applies to the extent that the WTO treaty agreements do not 'contract out' from it. To put it another way, to the extent there is no conflict or inconsistency, or an expression in a covered WTO agreement that implies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO.[42]

These comments highlight that problems with a Party using NVNB claims to undermine good faith treaty interpretation and continue negotiations about constructive textual ambiguities. If a panel, for example, determines that the absence of explicit definition for a WTO treaty term was deliberate (for example because evidence establishes that the parties manifested opposing points of view during the negotiations that were not resolved) then a corollary is that the parties were unable to agree on what 'benefits' or concessions were being granted. This removes one of the essential preconditions for use of a NVNB claim.

They also indicate, however, that NVNB claims can be used to correct concessions agreed to after deliberate misrepresentations by the other Party. If, for example, one party was mislead concerning the extent of their obligations by the differing position of an annex or appendix in the draft and final agreement, that documentary history could be adduced before a panel to counter a NVNB claim in relation thereto. Yet, the Panel in the *Korea - Procurement* case indicated that error as a basis for a NVNB claim will not be easy to establish. It concluded that certain circumstances in the 2-1/2 year interval between Korea's answer and the final offer, put the United States on notice of a possible error under Article 48 of the Vienna Convention on the Law of Treaties. This circumstance removed the basis for a claim of non-violation nullification or impairment of a benefit it had legitimately expected.[43]

Article 26(1)(b) prevents the panel or Appellate Body from recommending the withdrawal of measures found to nullify or impair benefits, merely allowing it to propose that a 'mutually satisfactory adjustment' be made. Commentators have considered that this means the DSU explicitly excludes a right to force

41 Ibid [7.110 and 7.121], see also *Gabcikovo-Nagymaros Project (Hungary/Slovakia) Judgment, ICJ Reports* (1997) [142]: "…it is the purpose of [Article 26] of the Treaty, and the intentions of the parties in concluding it, which should prevail over its literal application. The principle of good faith obliges parties to apply it in a reasonable way in such a manner that its purpose can be realised."

42 *Korea - Procurement*, above n 34, [7.96].

43 Ibid [7.125-7.126].

a Member to grant restitution for an established NVNB claim. Rather, while changed behavior may be recommended, there is no binding demand that the dispute settlement body can make of the injuring Member.[44]

The governments of Canada, the Czech Republic, the European Communities, Hungary and Turkey have recently stated at the WTO that "the uncertainty regarding the application of such non-violation complaints needs to be resolved so as to minimize the possibility of unintended interpretation."[45] Developing countries have also expressed concern about expansive interpretations of WTO obligations, and the 'activist' nature of the Appellate Body. Related appeals have been made for greater transparency in the DSU process. [46] Some of these advocate third part State and even Non-government Organisation (NGO) involvement.[47] Decisions of the DSU Appellate Body cannot easily be reversed by WTO Members. Developing nations are concerned that expanding the non-violation remedy - and with it the right to challenge measures that are otherwise consistent with WTO obligations - may further imbalance the proper distribution of responsibilities between WTO Members, and panels and the Appellate Body.

A number of WTO Members have noted that non-violation complaints under the TRIPS Agreement may give rise to incoherence among other WTO Agreements. All WTO obligations apply cumulatively, and consequently something that is consistent with one WTO agreement (ie: GATT 1994) may potentially be found to nullify and impair benefits under another (ie: TRIPS).

> It is highly questionable whether WTO Members would be in favour of leaving the option open for countries to file a non-violation complaint under the TRIPS Agreement, if the measure is found to be in full compliance with ... the GATT and its annexed agreements or the GATS.[48]

Having given a summary of the key elements of NVNB claims and some of their more contentious issues in relation to them, we will now address the question why NVNB complaints may become an important factor in the evolution of the DSU, given the relatively small number of past cases dealing with them.

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44 Cottier and Schefer, above n 15 at 66.

45 Communication from Canada, the Czech Republic, the European Communities and their Member States, Hungary and Turkey, *Non-Violation Complaints under the TRIPS Agreement - Suggested Issues for Examination of Scope and Modalities under Article 64.3 of the TRIPS Agreement*, [13], (IP/C/W/191).

46 See the detailed comments of Waincymer, 'Transparency of Dispute Settlement Within the World Trade Organization' (2000) 24 *Melbourne University Law Review* 797-838.

47 On the former point see: N H Yenkong, 'Third party Rights and the Concept of Legal Interest in World Trade Organization Dispute Settlement: Extending Participatory Rights to Enforcement Rights' (2004) 38 (5) *Journal of World Trade* 757-772.

48 Jackson, above n 4.

Evolving Roles for NVNB Provisions

An increased interest in NVNB claims may have a significant influence on the ongoing debate about the nature of the WTO DSU.[49] One possibility sees the latter evolving to resemble a judicial model set firmly within the general corpus of international law.[50] An alternative sees it become more clearly recognised to be part of a 'gaming' process, often at the service of powerful corporate multinationals. The latter possibility may be detected in suggestions for a more 'flexible,' 'conciliatory' or 'diplomatic' version of the DSU, in which dispute settlement panels issue preliminary reports that the parties can modify by mutual consent and where such panels give greater deference to domestic tribunals.[51] It may also be implicit in claims that the WTO DSB has been making rules, or legislating.[52] This is despite DSU Art. 3.2, which states: "Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements." Such differences of opinion have led to a stalling in the process of revising the DSU.[53]

What we wish to consider here is whether economically powerful trading nations with the legal resources to 'game' the complex mechanisms behind rule creation and implementation in the DSU, may gain increasing advantage through NVNB claims. Particularly vulnerable may be WTO Members, who have failed to develop the expertise and data necessary to carve out from trade obligations their key public goods, whose continuance then becomes a legitimate 'benefit' reasonably expected.

Of several hundred WTO disputes since 1995, although few initially required additional steps to ensure compliance, this picture may be changing particularly in relations to claims with strategic economic importance.[54] Also the average length of a dispute resolution process is increasing.[55] As it does so do the

49 G Umbricht, 'An 'Amicus Curiae Brief' on Amicus Curiae Briefs at the WTO,' (2001) 4 *Journal of International Economic Law* 773.

50 J Hu, 'The Role of International Law in the Development of WTO Law' (2004) 7 *Journal of International Economic Law* 143.

51 B Mercurio, 'Improving Dispute Settlement in the World Trade Organization: The Dispute Settlement Understanding Review-Making it Work' (2004) 38 (5) *Journal of World Trade* 795 at 817.

52 G G Yerkley, 'Sen. Baucus Calls WTO "Kangaroo Court" with Strong "Bias" Against the US' (2002) 19 *Int'l Trade Rep.* 1679. The comments of the United States are also rather unusual given that studies show that that country has been one of the highest users (either as a complainant or respondent) of the WTO/DSU. J Jackson and W Davey, *Legal Problems of International Economic Relations: Cases, Materials and Text* (1986).

53 R Buckley (ed), *The WTO and the Doha Round: The Changing Face of World Trade* Loumer Law International (2003).

54 WTO Dispute Settlement website <http://www.wto.org/english/tratop_e/dispu_e/dipu_.htm>.

55 The average time from Panel establishment to report adoption was 15 months in 2003. In the *Australia - Salmon* case, it took three years from initial Panel request to acceptable implementation, a second Panel proceeding being required.

opportunities for WTO Members to bargain behind the scenes using NVNB claims.[56]

One major area where (because of the high levels of investment and return involved) increased use of NVNB claims could occur is in relation to intellectual property rights. The application of NVNB claims to protect inherently anti-competitive private property rights under the TRIPS agreement, represents a decidedly novel and innovative employment of the remedy that could hardly have been foreseen in the early days of GATT. In the negotiations between technological creators and receivers on the TRIPS agreement, there was no clear balance of concessions produced and many of the provisions (such as the patent exceptions under Article 30) were deliberately vague in initial drafts. [57] In this context, NVNB claims could create great vulnerability for nations, such as Australia, that are likely for some time to remain net importers of intellectual property.

At the WTO meeting in Hong Kong in December 2005, as mentioned, the United States delegation pushed hard behind the scenes for trade concessions in return for its acquiescence to the moratorium on the use of NVNB provisions under TRIPS.[58] The resultant Ministerial Declaration left the position of NVNB claims under TRIPS extremely uncertain.

> 45. We take note of the work done by the Council for Trade-Related Aspects of Intellectual Property Rights pursuant to paragraph 11.1 of the Doha Decision on Implementation-Related Issues and Concerns and paragraph 1.h of the Decision adopted by the General Council on 1 August 2004, and direct it to continue its examination of the scope and modalities for complaints of the types provided for under subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 and make recommendations to our next Session. It is agreed that, in the meantime, Members will not initiate such complaints under the TRIPS Agreement.[59]

A formal NVNB claim in the WTO dispute settlement system could also arise under Article 21.2(c) of the Australia-United States Free Trade Agreement (AUSFTA). One circumstance could be where a Panel is called upon to settle a dispute over deliberately (or constructively) ambiguous terms such as 'innovation' in Annex 2C on Pharmaceuticals, as well as various provisions in Chapter 17 on intellectual property. If Australia is able to withstand the

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56 W J Davey, 'The WTO Dispute Settlement System: The First Ten Years' (2005) 8 *Journal of International Economic Law* 17.

57 M Geuze and H Wager, 'WTO Dispute Settlement Practice Relating to the TRIPS Agreement' (1999) 2 *Journal of International Economic Law* 347-384.

58 Professor P Drahos, above n 17.

59 WTO Ministerial Conference Sixth Session Hong Kong, 13 - 18 December 2005. Doha Work Programme. Draft Ministerial Declaration. WT/MIN(05)/W/3/Rev.2 18 December 2005.

associated lobbying pressure, than it may be advantageous in such a case to be the first Party to initiate dispute settlement proceedings. This would allow Australia to choose WTO dispute settlement procedures under the choice of forum provision in Article 21.4 of the AUSFTA. This WTO dispute resolution option (where Australia is more likely to be successful), could be closed off if the United States was the first Party to initiate such an AUSFTA dispute.[60] In such a situation it would be important for the Parties and the Panel to ensure that any NVNB claim does not merely represent a continuing mechanism of unfinished negotiations over a deliberately ambiguous treaty term associated with uncertain expected benefits (such as 'recognition of pharmaceutical innovation'). Australia, however, could undoubtedly make an NVNB claim concerning clearly defined benefits manifested to the other Party during negotiations. One in this context would be continuation of the basic architecture of Pharmaceutical Benefits Scheme (PBS) cost-effectiveness processes as a legitimate expected benefit or concession obtained in return for the 'transparency' provisions in Annex 2C.

The question of what either Party can reasonably claim as a negotiated 'benefit' subsequently nullified or impaired is extremely controversial in the area of intellectual property.[61] It may come down to proof of what was explicitly declared during the negotiation period.[62] The passage prior to the conclusion of a trade agreement of legislative amendments to counter any anticipated 'measure', would almost certainly thwart a claim that the 'benefit' obtained by such amendments was not 'reasonably expected.'[63] The harmonisation of our laws with the world's largest intellectual property market may provide Australian exporters with a more familiar environment and to attract US

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60 Australia-United States Free Trade Agreement Article 21.2 Scope of Application

Except as otherwise provided in this Agreement or as the Parties otherwise agree, the dispute settlement provisions of this Section shall apply with respect to the avoidance or settlement of all disputes between the Parties regarding the interpretation or application of this Agreement or wherever a Party considers that:

(a) a measure of the other party is inconsistent with its obligations under this Agreement

(b) the other Party has otherwise failed to carry out its obligations under this Agreement; or

(c) a benefit the Party could reasonably have expected to accrue to it under Chapters Two (National Treatment and Market Access for Goods [*including Annex 2C on pharmaceuticals*]), Three (Agriculture), Five (Rules of Origin), Ten (Cross-Border Trade in Services), Fifteen (Government Procurement) or Seventeen (Intellectual Property Rights) is being nullified or impaired as a result of a measure that is not inconsistent with this Agreement.

61 Communication from Canada to WTO, *Non-Violation Nullification or Impairment Under the Agreement on Trade Related Aspects of Intellectual Property Rights* (TRIPS) IP/C/W/127 10 Feb 1999.

62 United States Department of Commerce, International Trade Administration. 2004. *Pharmaceutical Price Controls in OECD Countries. Implications for US Consumers, Pricing, Research and Development and Innovation* Washington DC.

63 T Faunce et al, 'Assessing the impact of the Australia-United States Free Trade Agreement on Australian and Global Medicines Policy' *Globalisation and Health* (2005) [1-15] <http://www.globalizationandhealth.com/>.

investors.[64] Others, however, are greatly concerned about Australia's potentially vulnerable position if (despite Article 3.2 of the DSU) subsequent NVNB trade disputes in such an area encouraged speculative ambit claims for increased levels of intellectual property protection or compensation backed by threat of trade sanctions.[65]

Conclusion - Australian Policy Options on WTO NVNB Claims

It is important for the successful growth of international trade under the auspices of the WTO, that its rules should be seen to harmonise with the certainty, transparency and normative legitimacy that characterises the corpus of international law.[66] NVNB claims should be no exception in this regard.[67] If their use increases without strict bounds being established, they may replace the commercial certainty implicit in a regime predicated on basic principles of international law concerning good faith in treaty interpretation, with process of tactical 'gaming' of deliberate textual ambiguities in which negotiations are designed to continue into the WTO dispute resolution mechanism.[68]

Our hypothesis is that pressure from NVNB claims is most likely to arise from 'behind doors' lobbying using threats of cross retaliation linked to claimed breaches of the 'spirit' of the agreement.[69] Formal dispute resolution proceedings may never be initiated if such lobbying is persuasive.

One way of circumscribing NVNB claims so they don't conflict with the obligation to act in good faith, or with other rules of treaty interpretation under Articles 31 and 32 of the Vienna Convention on the Law of Treaties, is to restrict their operation to ensuring 'transparency and openness' in the negotiating process.[70] In consequence, in NVNB disputes, the inquiry to be made by a dispute resolution Panel is whether the complaining party was induced into error during negotiations by the other treaty Party about a fact or situation, that the former could not reasonably have foreseen.[71]

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64 Commonwealth Department of Foreign Affairs and Trade, *Regulatory Impact Statement Australia-United States of America Free Trade Agreement* (2004)<http://www.aph.gov.au/house/committee/jsct/usafta/treaties/newris.pdf>.

65 P Drahos, 'Intellectual Property Industries and the Globalization of Intellectual Property: Pro-Monopoly and Anti-Development?' (2004) 3 *Intellectual Property Law and Policy Journal* 65.

66 Nathan Miller, 'An International Jurisprudence? The Operation of 'Precedent' Across International Tribunals' (2002) 15 *Leiden Journal of International Law* 483 at 499.

67 J P Trachtman, 'The Domain of WTO Dispute Resolution' (1999) 40 *Harvard International Law Journal* 333.

68 Davey, above n 56.

69 See, for example: S Lewis, 'FTA Drug Safeguard at Risk' *The Australian* 3 January 2006.

70 *Korea - Procurement*, above n 34, [7.100-7.102].

71 Ibid, [7.122].