Food Products, the WTO Dispute Settlement System and Trade Remedies

Eduardo Bianchi

Introduction.

One of the Uruguay Round's more notable achievements was the establishment of the WTO Dispute Settlement System, considered as the "Jewel in the Crown" of the WTO. When the Uruguay Round negotiations were initiated in 1986, there was a growing consensus that the original GATT dispute settlement system was ineffective. Compliance was a key failing of the old system; GATT contracting countries either blocked or simply ignored the findings of panels. The GATT's consensus rule meant any party—including the potential respondent in a trade dispute who might be accused of wrongdoing—could block not only rulings but even the initiation of an inquiry. Thus, third-party intermediation was often not possible to resolve trade frictions (Bown, 2019).

This was particularly problematic and embarrassing for high-profile trade disputes involving food related products, such as bananas, beef hormones and tuna-dolphin. The failure to resolve these prominent disputes undermined the credibility of the GATT dispute process (Bown and Prusa, 2011). Consequently, a dispute settlement process that improved on both the timeliness and enforceability of dispute decisions was one of the major goals of the Uruguay Round and represented a significant advance over the GATT system.

The dispute settlement system of the WTO is one of the areas in public international law with a mechanism that provides binding third-party adjudication of disputes between sovereign states. With close to 600 cases in its twenty-five years of existence, it is also probably the busiest international dispute settlement system in the world, surpassing in cases for example to the International Criminal Court and the International Tribunal for the Law of the Sea. Hence, the wide use of the WTO dispute settlement system no doubt reflects its success and the fact that the member states have confidence in it to resolve their trade disputes. On the other hand, the system is considered far from perfect, and has drawn criticism from its users.

This paper presents a statistical analysis of twenty-five years of WTO disputes for the case of food products. In the next section we define what we understand for food products in this study and take a first look to the disputes related with them. In the third section we focus on food products disputes and trade remedies. Finally, in the fourth section we draw some conclusions.

Food products and the WTO dispute settlement.

The WTO dispute settlement system is regulated by the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). Pursuant to the rules detailed in the DSU, member states can engage in consultations concerning a trade dispute pertaining to a "covered agreement" or, if unsuccessful, have a WTO panel hear its case. So, the first stage in the WTO dispute resolution system is the consultation phase, where the complaining and respondent countries meet and attempt to negotiate a resolution. If they are unable to do so, they can request a panel, whose role is to determine whether the facts of the case show a violation to a WTO agreement. Other WTO members with an interest in the dispute can join the process at this stage as an 'interested third party'. The panel hears the evidence and issues a legal ruling. If either of the primary countries is unhappy with any aspect of the panel's rulings, it can appeal the case to the WTO's Appellate Body, which will issue a final decision. At that point, if a country's policy has been found to be in violation of its WTO obligations, it is supposed to bring its policy into compliance.

In this paper we are interested in analyzing those disputes that involve "food products". Our definition of food products is a traditional one, including all products considered in chapters 1 to 24 of the Harmonized Commodity Description and Coding System, generally referred to as "Harmonized System" or simply "HS". Our product coverage, then, differs from that adjoined in Annex 1 of the Agreement of Agriculture[121]. On the other hand, we focus on those disputes that affect food products either directly or indirectly, i.e. those disputes that refer to particular food products, like sugar, olives, bovine meat and tomatoes, for example, and at the same time those disputes that, although do not refer to a particular food product, can have consequences on their trade, such as disputes related to additional duties, tariff measures and systemic trade remedies measures, for instance, without distinction of particular goods. Finally, the figures presented in this paper are based on information published by the WTO on its official website and deals only with inter-governmental disputes under the DSU, and not with other types of dis-

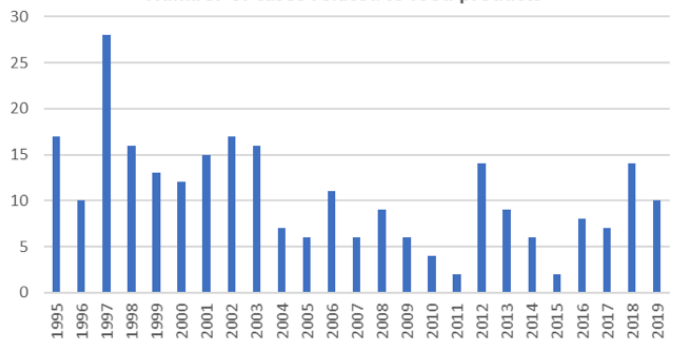
121. As a consequence, our definition includes fish and fish products and excludes mannitol, sorbitol, essential oils, albuminoidal substances, modified starches, glues, finishing agents, hides and skins, raw silk, silk waste, wool and animal hair, raw cotton, waste and cotton carded or combed, raw flax and raw hemp, all products that are covered by the Agreement of Agriculture.

putes settlement mechanisms provided for by the WTO system[122].

Taken into account this framework, between January 1st, 1995, when the WTO dispute settlement system became functional, and January 31st, 2020, the system has dealt with 594 requests for consultations or disputes. After a detailed examination of each one of these cases, we concluded that 265 of them are related to food products in the terms defined previously, either directly or indirectly. This figure represents 45% of total disputes, allowing us to affirm that almost half of the total cases under the WTO dispute settlement covers food products. The first implication of this result is that the WTO dispute mechanism is of substantial interest for international trade on food products.

Figure 1 presents the 265 cases by the year when the consultation was requested. We find a high number of cases during the first few years of the WTO, with the numbers going down gradually after year 2003. The explanation for this trend during this period is probably that in the period leading up to the conclusion of the Uruguay Round, when it was clear that a more effective dispute settlement system, compared to that of the GATT, was likely to take effect soon, many potential complaints were put "on hold" awaiting the new system. Once the new mechanism came into effect and proved itself during its first year of activity, many of those complaints were filed. One could also speculate that the proper functioning of the system, probably also clarified some unclear provisions and deterred states from disregarding their obligations, which in turn led to less complaints and requests for consultations after 2003. It is interesting to note that the number of disputes rises again in the years after the economic and financial crises of 2008 and in period 2016 – 2019 when trade conflicts among the major trading nations upraised.

Figure 1
Number of cases related to food products



Source: Author upon WTO website.

122. For instance, the WTO Agreement on Preshipment Inspection provides in Article 4 for "independent review procedures" to resolve disputes between preshipment inspection entities and exporters, and the Agreement on Government Procurement, in Article XVIII, provides for domestic review procedures, either judicial or administrative, where a supplier can challenge a decision by a government procurement entity.

As previously explained, a dispute arises when a member government believes another member government is violating a WTO agreement. The complaining member or "complainant" must submit a request for consultations identifying the agreements it believes are being violated by the other member or "respondent". A dispute can be, and often is, brought under more than one agreement. This is clearly the case of the 265 disputes related with food products, where in most of them more than one WTO agreement is cited as being violated in the request for consultations. For example, almost all the disputes that cite the Agreement of Agriculture, also cite one or more additional WTO agreements. Furthermore, it is frequent to find disputes that cite just one or two articles of the Agreement of Agriculture to be violated and at the same time cite many articles from other agreements, such as the Agreement on Implementation of Article VI (Antidumping Agreement) and/or the Agreement on Subsidies and Countervailing Measures (SCM Agreement) and/or the Agreement on the Application of Sanitary and Phytosanitary Measures (the "SPS Agreement"), for example.

Table 1 below shows some agreements cited in the request for consultations or disputes, both for the total number of cases during the period of 25 years and for the food products related cases. We focus on the following agreements: the Antidumping Agreement (ADA), the SCM Agreement, the Agreement on Safeguards, the Technical Barriers to Trade (TBT) Agreement, the SPS Agreement and the Agreement on Agriculture. Nevertheless, the following agreements are also cited in the food products related cases: Customs Valuation, Trade Facilitation, Dispute Settlement Understanding, GATT 1994, Import Licensing, TRIPS, Protocol of Accession, Preshipment Inspection, TRIMS, Rules of Origin, GATS.

Table 1: WTO agreements cited in the request for consultations

	All disputes		Food products disputes	
WTO Agreement	**Number of cases**	**% total**	**Number of cases**	**% total**
ADA	133	22	40	15
SCM	130	22	40	15
Safeguards	61	10	22	8
TBT	55	9	42	16
SPS	49	8	46	17
Agriculture	84	14	80	30
Total	**594**	-	**265**	-

Source: Authos upon WTO website.

Of the 594 cases brought to the WTO between 1995 and January 2020, the United States filed 124 cases against other WTO members, and 155 cases were brought against the United

States. The United States and the European Union are the main users of the dispute settlement system, participating either as complainants or respondents in a total of 279 and 190 cases, respectively. The main targets of US litigation have been China and the European Union, while the European Union and Canada have been the leading complainants about US practices, accounting for about one-third of the cases against the United States. These WTO complaints cover a broad range of US practices, including subsidies, tariff rate quotas, export restraints, sanitary and phytosanitary measures, safeguards, antidumping, and countervailing duties (Schott and Jung, 2019).

We are interested, on one hand, in the trade remedies cases. From Table 1 we can notice that 324 disputes cite the trade remedies agreements (ADA, SCM and Safeguards) in the request for consultations, representing 54% of total disputes, i.e., half of total disputes in the 25 years period of the DSS deals with trade remedies. In the case of the food products related cases, 102 disputes cite trade remedies agreements, amounting to 38% of total, i.e., approximately one of three food products disputed is related with trade remedies. The TBT agreement is also relevant in the disputes of food products with 42 cases, cited in 16% of total food related disputes. The SPS agreement is significant as well in the analyzed disputes, representing 17% of total. Note that TBT and SPS agreements are predominantly cited in food products disputes. Finally, the Agreement on Agriculture accounts for 30% of food products related disputes.

Food products disputes and trade remedies.

Trade remedies concern trade in goods and provide rules permitting member states to apply remedial import measures in the form of countervailing duties, antidumping duties, price undertakings or safeguard measures[123]. In addition to disputes concerning subsidies, antidumping and safeguards issues, WTO dispute settlement has been invoked to address other types of trade remedies, as for example US measures under Section 301 of the Trade Act of 1974 or under Section 337 of the Tariff Act of 1930.

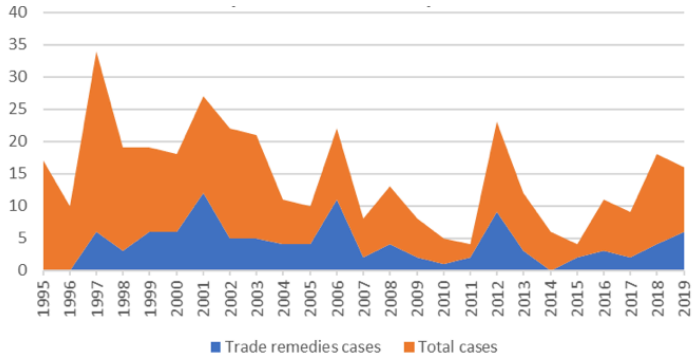
The trade remedies area has been the focus of a significant number of disputes under the WTO Agreement. Indeed, as illustrated by Table 1, almost half of all disputes or consultations addressed a trade remedy instrument. In the case of food products related cases, little more than one third of all these disputes refer to trade remedies. This fact is illustrated in Figure 2, where we plot both all food products related disputes and the subset concerning trade remedies. We can see that the "blue area" overlaps in approximately one third of total food products related cases and also that both areas have similar contour lines. That such a

123. The SCM, Antidumping and Safeguards Agreement and the relevant provisions in GATT 1994 permit member states to take remedial measures in response to certain trade disputes. The SCM and the Antidumping Agreements allows countries to remedy subsidies and dumping, respectively, by imposing duties on imported products. The Safeguards Agreement authorizes member states to apply safeguards measures to an imported product base on a determination that the product is being imported in such increased quantities and under such conditions that it causes or threatens to cause serious injury to the domestic industry. Unlike countervailing or antidumping duties which apply to a particular product from a particular country, safeguards measures are applied to imported products regardless of their source.

large share of the WTO dispute settlement caseload involving challenges to antidumping, countervailing duties and safeguards is perhaps not surprising, given the cross-country proliferation of contingent protection.

It is interesting to recall that the WTO system had been in place for 18 months before the first formal challenge to America's use of trade remedies. In this first case, the complainant was the Mexican government and the dispute was over antidumping duties on Mexican tomatoes. After that slow start, challenges to US's use of trade remedies quickly mounted. WTO members filed disputes also over US safeguard tariffs, where food products were also relevant, for example wheat gluten and lamb. The US also faced disputes over its use of countervailing duties, where food products were also relevant. Beginning in 1997, Chile, the European Union, Canada, and India challenged a series of US antisubsidy tariffs imposed on their exports of salmon and live cattle, for example (Bown and Keynes, 2020).

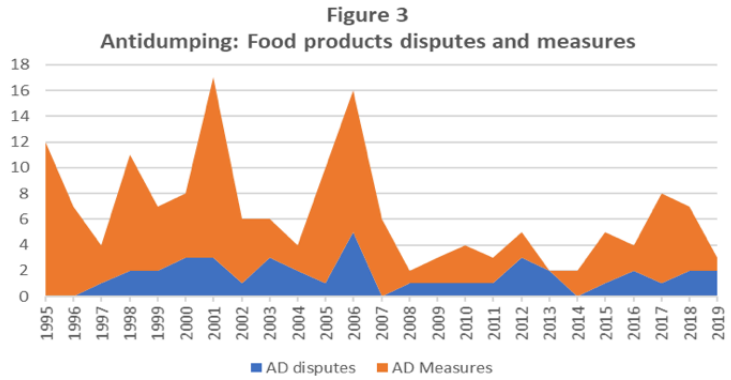
Figure 2. Food products related disputes



Source: Author upon WTO website.

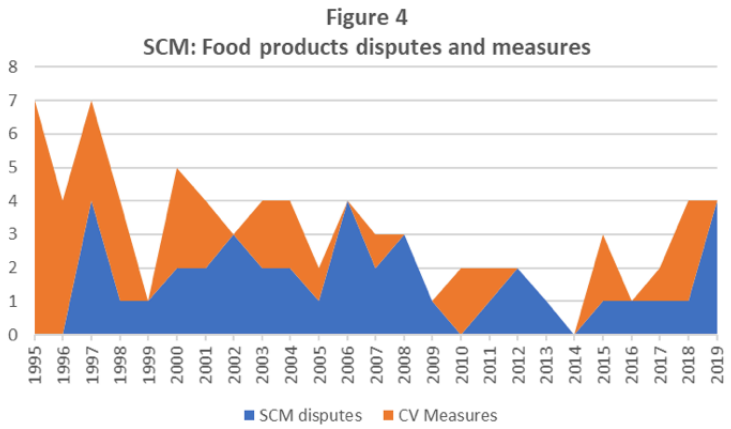
Other relevant question is: how are food product disputes related with trade remedies measures in these products? Is it the case that few trade remedies measures in food products are brought into consultations? Or, by contrast, most of trade remedies measures in these goods are being disputed into the DSS? To answer these questions, we represent graphically both trade remedies measures applied on food products during the last 25 years together with the number of food products related disputes. Figures 3, 4 and 5 show this relation for the case of antidumping, SCM and safeguards, respectively.

Figure 3. Antidumping: Food products disputes and measures



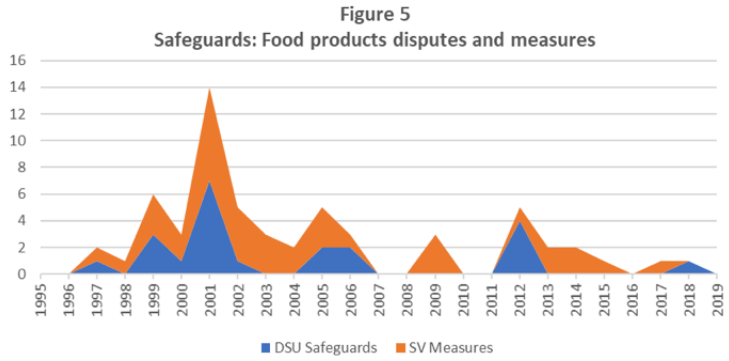
Source: Author upon WTO website.

Figure 4. SCM: Food products disputes and measures



Source: Author upon WTO website.

Figure 5. Safeguards: Food products disputes and measures



Source: Author upon WTO website.

As we can see from the three figures, SCM disputes on food related products represent an important share of SCM measures on food products, since disputes overlap an important portion of measures. We find a similar case, although less marked, regarding safeguards, where in some years the overlap is significative. In antidumping, the measures of food products surpass to a great extent the number of complaints or disputes in this kind of products. We can conclude that in relative terms trade remedies measures on food products are more intensive on SCM, followed by Safeguards.

Another question that we can pose is: who are the main users of the dispute settlement system in the cases of trade remedies for food products? In Table 2 below we present the respondents and the complainants in food products disputes related with trade remedies. It is important to remember that only WTO member states can initiate a dispute settlement procedure under the DSU (complainants), and only states can serve as respondents to such procedures. The table shows that the United States and the European Union are by far the biggest users of the system in the case of food products, as it is also the case for the total of the disputes. The United States accounts for 40% of cases as respondent and 12% of disputes as complainant. On the other hand, the European Union represents 14% of trade remedies disputes on food products as respondent and 16% as complainant.

Table 2: Respondents and Complainants in food product disputes, 1995 - 2019. Number of cases.								
	As Respondent				As Complainant			
Member State	AD	SCM	SV	Total	AD	SCM	SV	Total
United States	22	16	3	41	6	6	3	15
European Union	4	7	3	14	7	9	3	19
Mexico	4	3	0	7	1	2	1	4
China	1	4	1	6	3	2	0	5
Canada	1	3	0	4	3	6	0	9
Chile	1	0	8	9	1	2	2	5
Argentina	1	3	5	9	2	0	5	7
India	1	3	0	4	2	2	0	4
Brazil	0	0	0	0	4	5	1	10
Australia	0	0	0	0	1	3	1	5
Other	5	1	2	8	17	11	7	35
Total	40	40	22	102	47	48	23	118

Source: Authos upon WTO website.

Just for completeness, let´s look to the Appellate Body Reports. To date the AB has issued 158 reports, 61 of them related to food products (39% of total). Table 3 shows that trade remedies sum up 24 cases (also 39% of total), reaffirming the importance of food products and contingent protection in the dispute settlement system.

Table 3: WTO agreements cited in AB Reports for food products disputes		
WTO Agreement	**Number of cases**	**% total**
ADA	11	18
SCM	7	11
Safeguards	6	10
TBT	7	11
SPS	11	18
Agriculture	19	31
Total	**61**	100

Source: Authos upon WTO website.

Finally, we take a look to the main users of the AB instance. Table 4 shows clearly that the United States and the European Union are the most active members as appellants, but also as appellees[124].

124. Since each dispute can have more than one appellant and more than one appellee, the total number of cases exceeds the total of 61 cases.

Conclusions.

From the previous analysis we can conclude that the WTO dispute settlement system is substantial for trade in food products. We can also affirm that almost one third of disputes related with food products are concerned with trade remedies or contingent protection. In this sense, regardless of whether the WTO's dispute settlement process and institutional framework was designed to handle substantial litigation over nationally imposed trade remedies, it currently finds disputes over trade remedies as a central topic of concern. One implication of the global trend in administered use of contingent trade policy protection is that how the DSU resolves conflicts over antidumping, countervailing duties and safeguards is an important factor in determining at least the perception of the WTO's broader record of success in the multilateral trading system. A large and increasing share of the dispute settlement caseload involves challenges to nationally imposed trade remedies over imports.

The WTO dispute settlement system was created by and for its members to preserve the important commitments made in the WTO Agreement. Whether that system can produce reasonable and accurate decisions is most likely a function of many factors, including the ability and resources of trade negotiators during negotiations, government representatives involved in particular disputes, and panelists or Appellate Body members drafting decisions. The system has until now been very busy, which would seem to reflect that member states have confidence in the ability of the system to resolve disputes and to uphold their rights under the trade bargain embedded in the WTO agreements. At the same time, the system is far from perfect and there is a keen interest of many member states to improve its effectiveness and solve some problems that have emerged.

Today, the dispute settlement mechanism is in crisis. WTO members have failed to negotiate updates to the rulebook, including rules on dispute settlement itself. As a result, the WTO Appellate Body increasingly is asked to render decisions on ambiguous or incomplete WTO rules. Its interpretations of such provisions have provoked charges by the WTO members that binding Appellate Body rulings ("judicial overreach"), which establish precedents for future cases, effectively circumvent the prerogative of member countries to revise the WTO rulebook and thus undercut the national sovereignty of WTO members.

Nowadays, the Appellate Body do not have enough members to review cases. As a consequence, the WTO had lost its system of final appellate review. Aggrieved countries would then lose their legal rights under WTO rules. WTO panels will still be able to adjudicate disputes but, if either side exercises its WTO right to appeal, the rulings will be in an indefinite legal limbo pending conclusion of the appeals process. Failure to resolve this crisis runs the risk of returning the world trading system to a power-based free-for-

all, allowing big players to act unilaterally and use retaliation to get their way. In such an environment, less powerful players would lose interest in negotiating new rules on trade. Self-help in the form of unilateral actions would become the operating principle of the world trading system (Payosova et al, 2018).

Without a functioning Appellate Body but with the continuing right to appeal panel rulings, the system of WTO adjudication will resemble its predecessor under the GATT to the extent that either the complainant or respondent can block the resolution of disputes. In the GATT era, the dispute settlement system broke down when major trading powers, the United States and the European Communities, each blocked panel rulings favoring the other side in several high-profile bilateral disputes.

The Appellate Body impasse will soon damage not only the WTO's judicial function but also its viability as a negotiating forum. In practice, there are few options for resolving the crisis unless WTO members commit to new approaches to updating and clarifying WTO rights and obligations. The WTO Dispute Settlement is a public good that must be preserved and improved through negotiations.

As we showed in this paper, the WTO Dispute Settlement is crucial for international trade of food products. For food products, as well as for the rest, the best solution to the current crisis is constructive discussions and negotiations.

References.

Bown, C. and T. Prusa (2011), "U.S. Anti-dumping: Much Ado about Zeroing", in Unfinished Business? The WTO's Doha Agenda, edited by W. Martin and A. Mattoo, CEPR and World Bank.

Bown, C (2019), "Can We Save the WTO Appellate Body?" Testimony before the European Parliament Committee on International Trade, December 3, 2019.

Bown, C. and S. Keynes (2020), Why Trump Shot the Sheriffs: The End of WTO Dispute Settlement 1.0, Working Paper, Peterson Institute for International Economics.

González, A. and E. Jung (2020), Developing Countries Can Help Restore the WTO's Dispute Settlement System, Policy Brief, Peterson Institute for International Economics.

T. Payosova, G. Hufbauer, and J. Schott (2018), The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures, Policy Brief, Peterson Institute for International Economics.

Reich, A. (2017), "The Effectiveness of the WTO Dispute Settlement System: A Statistical Analysis", EUI Working Paper LAW 2017/11, European University Institute.

J. Schott and E. Jung (2019), The WTO's Existential Crisis: How to Salvage Its Ability to Settle Trade Disputes, Policy Brief, Peterson Institute for International Economics.