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## Announcements

WTO Dispute Settlement - Papers by Meredith Kolsky Lewis, Associate Professor, School of Law, Victoria University of Wellington

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## **LEGAL SCHOLARSHIP NETWORK: LEGAL STUDIES RESEARCH PAPER SERIES** **VICTORIA UNIVERSITY OF WELLINGTON LEGAL RESEARCH PAPERS**

### **"Dissent as Dialectic: Horizontal and Vertical Disagreement in WTO Dispute Settlement"**

*48 Stanford Journal of International Law 1 (2012)*

*Victoria University of Wellington Legal Research Paper No. 113/2017*

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This article examines the phenomena of dissent within WTO dispute settlement panels and within Appellate Body divisions ("horizontal disagreement") and the failure of certain WTO dispute settlement panels to follow previous rulings of the Appellate Body ("vertical disagreement"). With respect to horizontal disagreement, the article responds to a recent critique of my earlier piece on the subject (The Lack of Dissent in WTO Dispute Settlement, 9 J. INT'L ECON. L. 895 (2006)). With respect to vertical disagreement, the article examines whether there are textual or normative reasons why panels should not disagree with the Appellate Body. It argues that the series of panels that have declined to follow previous Appellate Body decisions (in the context of the zeroing disputes) have been engaging in a dialectical process with the Appellate Body in an attempt to signal difficulties with the Appellate Body's prior reasoning. The article goes on to identify parameters within which it might be appropriate for panels to diverge from previous Appellate Body rulings; in particular, it identifies examples of what might be, in the words of the Appellate Body, "cogent reasons" not to follow prior Appellate Body decisions.

## "When Popular Decisions Rest on Shaky Foundations: Implications of Selected WTO Appellate Body Jurisprudence"

*Julien Chaisse and Tsai-yu Lin, eds., International Economic Law and Governance: Essays in Honour of Mitsuo Matsushita (Oxford University Press 2016)*

*University at Buffalo School of Law Legal Studies Research Paper No. 2016-029*

*Victoria University of Wellington Legal Research Paper No. 114/2017*

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This chapter argues that the WTO Appellate Body has not been consistent in applying Article 31 of the VCLT and considering the context of the relevant treaty text in light of its object and purpose. It has instead either been overly mechanistic in its textual interpretation or has strayed from the text, sometimes with the appearance of preferring an outcome-based result. Part I of the chapter discusses the appropriate role context should play in interpreting the WTO agreements. Parts II through IV critique aspects of the Appellate Body's jurisprudence in the zeroing cases; the 1916 Act dispute; and the early safeguards cases, as generating interpretive difficulties by failing to give enough attention to real-world context and object and purpose. Part V explores possible reasons for these departures by the Appellate Body from a contextualised textual analysis, and identify some systemic implications of these decisions.

## "The Lack of Dissent in WTO Dispute Settlement"

*Journal of International Economic Law, Vol. 9, Issue 4, pp. 895-931, 2006*

*Victoria University of Wellington Legal Research Paper No. 115/2017*

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This article analyses in detail the fact that there has been almost no dissent in World Trade Organization (WTO) dispute settlement reports. Only a handful of articles have noted this phenomenon, even in passing. The article first examines the empirical data with respect to dissenting and concurring opinions at both the panel and Appellate Body levels. Fewer than 5 percent of panel reports and 2 percent of Appellate Body reports contain separate opinions of any kind. Second, it shows that the WTO is in fact actively discouraging dissents and discusses why this might be the case. The article argues that dissents are valuable in general and assesses whether more dissents would be a positive for the WTO. It then reviews the few dissents that have been published and demonstrates that 50 percent of the arguments raised in dissents at the panel level were adopted in whole or in part on appeal by the Appellate Body, thus illustrating dissents can and do make a difference. The article concludes that keeping the lid on dissents may ultimately erode the strength of the dispute settlement system and hinder the ability of the WTO Members to make appropriate changes to the covered agreements.

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The Student/Alumni Series is a subseries of the Victoria University of Wellington Legal Research Paper Series. The subseries started in 2015 and publishes papers by students and alumni of Victoria University of Wellington, comprising primarily work for honours and postgraduate courses. Papers are collected into thematic or general issues.

The Victoria University of Wellington was founded in 1899 to mark the Diamond Jubilee of the reign of Queen Victoria of Great Britain and of the then British Empire. Law teaching started in 1900. The Law Faculty was formally constituted in 1907. The first dean was Richard Maclaurin (1870-1920), an eminent scholar of both law and mathematics. Maclaurin went on to lead the Massachusetts Institute of Technology as President in its formative years. Early professors included Sir John Salmond (1862-1924), still one of the Common Law's leading scholars. His texts on jurisprudence and torts have gone through many editions and remain in print.

Alumni include Sir Robin Cooke (1926-2006), one of the leading judges of the British Commonwealth. As

Baron Cooke of Thorndon, he sat on over 100 appeals to the Appellate Committee of the House of Lords, one of very few Commonwealth judges ever appointed to do so.

Since 1996 the Law School has occupied the Old Government Building in central Wellington. Designed by William Clayton and opened in 1876 to house New Zealand's then civil service, the building is a particularly fine example of Italianate neo-Renaissance style. Unusually among large colonial official buildings of the time it is constructed of wood, apart from chimneys and vaults.

The School is close to New Zealand's Parliament, courts, and the headquarters of government departments. Throughout Victoria's history, our law teachers have contributed actively to policy formation and to law reform. As a result, in addition to many scholarly articles and books, the Victoria SSRN pages include a number of official reports.

Victoria graduates approximately 230 LLB and LLB(Hons) students each year, and about 60 LLM students. The faculty has an increasing number of doctoral students. Ordinarily there are ten to twelve students engaged in PhD research.

Victoria University observes the British system of academic ranks. In North American terms, lecturers and senior lecturers are tenured doctrinal scholars, not legal writing teachers. A senior lecturer corresponds approximately to a North American associate professor in rank.

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