

From Afterthought to Centerpiece

*The WTO Appellate Body and its Rise
to Prominence in the World Trading System*

Peter Van den Bossche



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Peter Van den Bossche¹

Table of Contents

1	Introduction	3
2.	The Humble Origins of the Appellate Body	4
2.1	Uruguay Round negotiations on dispute settlement.....	5
2.2	Establishment of the Appellate Body.....	7
3.	The Road to Prominence	13
3.1	Composition of the Appellate Body.....	14
3.2	<i>Working Procedures for Appellate Review</i>	16
3.3	Embracing the Vienna Convention rules of treaty interpretation	19
3.4	Frequent and broad recourse to appellate review.....	22
3.5	Use made of the authority of appellate review.....	27
3.6	Case law of the Appellate Body.....	32
4	Conclusion.....	37

Abstract

This paper deals with the Appellate Body of the World Trade Organization and its rise to prominence in the world trading system. The Appellate Body was not conceived by the Uruguay Round negotiators as the centerpiece of the WTO dispute settlement system. It was more an afterthought, linked to the introduction of the quasi-automatic adoption of panel reports under the new dispute settlement system. In little time, however, the Appellate Body grew into the most important and authoritative organ of WTO dispute settlement. The Appellate Body is now, in all but name, the World Trade Court. The significance of its

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contribution to the development of international trade law is generally recognized. Critics even accused the Appellate Body of having engaged in judicial legislation. This paper does not seek to assess whether the Appellate Body did indeed exceed its judicial mandate. The purpose of this paper is to recall the unassuming origins of the Appellate Body and to discuss the factors that have contributed to its rise to prominence over the last decade. These factors are multiple and often closely related. They include the first and subsequent compositions of the Appellate Body; the Working Procedures for Appellate Review; the early embracement and consistent application of the rules of interpretation of the Vienna Convention; the frequent and broad recourse to appellate review; the manner in which the Appellate Body used its authority of appellate review; and, finally, the case law of the Appellate Body to date, and in particular the case law balancing free trade and other societal values and the case law ensuring the fairness and effectiveness of the WTO dispute settlement system. It is important to identify and correctly appreciate these factors because the Appellate Body will retain its current status and role in the world trading system only to the extent that these factors continue to be sufficiently present.

Keywords: International Dispute Settlement, World Trade Organization, WTO dispute settlement, Appellate Body, World Trade Court

1. Introduction

Since February 1996, when the first appeal was filed, the Appellate Body of the World Trade Organization has heard and decided 65 appeals from panel cases.² The body of case law generated by the Appellate Body over the past nine years is, both in quantitative and qualitative terms, impressive. From 1996 tot 2004, the Appellate Body has issued twice as many decisions as the International Court of Justice did during the same period.³ The Appellate Body's case law is highly authoritative and has made a significant contribution to the development of international trade law. The decisions of the Appellate Body in, for example, *EC – Bananas* and *US – Shrimp*, have effectively put an end to politically as well as economically complex and sensitive disputes between WTO Members. Both panels and parties in WTO disputes have shown, and continue to show, much deference to the case law of the Appellate Body. The Appellate Body is undoubtedly the most important organ of WTO dispute settlement. The Appellate Body is, all but in name, the World Trade Court.⁴ In recent years, a few authors have accused the Appellate Body of exceeding the authority conferred to it and engaging in judicial

² See <http://www.worldtradelaw.net/dsc/database/abreports.asp>, visited on 6 March 2005. This number includes the appeal in *India – Autos*, which was withdrawn during the appellate review proceedings. This paper covers the period from 1 January 1996 to 31 December 2004.

³ See below, section 3.4.

⁴ It was Claus-Dieter Ehlermann, a former member and Chairman of the WTO Appellate Body, who referred in a 2002 article in the *Journal of World Trade* to the Appellate Body as the 'World Trade Court' (see C.-D. Ehlermann, 'Six Years on the Bench of the "World Trade Court": Some Personal Experiences as Member of the Appellate Body of the WTO' (2002) 36 *Journal of World Trade* 4, 605-639).

legislation, especially in cases on dumping and safeguard measures.⁵ More generally, WTO Members, when losing a case, allege not seldom, that the Appellate Body has added to or diminished the rights and obligations of Members.⁶ This paper does not seek to verify whether this is indeed the case.⁷ These accusations, and the ‘emotional’ terms in which they are often expressed, are, however, clear evidence of the importance that the Appellate Body and its case law now have in the WTO system. The key question addressed in this paper is what explains the prominent status which the Appellate Body and its case law have achieved since 1996. Was the ‘success’ of the Appellate Body ‘predetermined’ by its constituent instruments or is it primarily the result of other factors that have affected the Appellate Body and its case law in the past nine years?

2. *The Humble Origins of the Appellate Body*

The Understanding on the Rules and Procedures for the Resolution of Disputes, commonly referred to as the Dispute Settlement Understanding or DSU, provided in Article 17 that ‘a standing Appellate Body shall be established by the [WTO Dispute Settlement Body]’. Pursuant to this mandate, the Dispute Settlement Body, or DSB, set up the Appellate Body by its Decision of 10 February 1995 on the Establishment of the Appellate Body.⁸ Article 17 of the DSU and the DSB Decision of 10 February 1995 are the constituent instruments of the Appellate Body. Did the Uruguay Round negotiators, who reached agreement on the DSU and prepared the DSB Decision, already conceive the Appellate Body as the centerpiece of the WTO dispute settlement system that it is now?

⁵ See, e.g., J. Greenwald, ‘WTO Dispute Settlement: An Exercise in Trade Law Legislation’ (2003) 6 *Journal of International Economic Law*, 113-124.

⁶ Such statements are, for example, made in the Dispute Settlement Body on the occasion of the adoption of the report.

⁷ This has already been done in a very convincing manner by others. See, e.g., W. Davey, ‘Has the WTO Dispute Settlement System Exceeded its Authority?’ (2001) 4 *Journal of International Economic Law*, 79; and R. Howse, ‘The Most Dangerous Branch? WTO Appellate Body Jurisprudence on the Nature and Limits of the Judicial Power’, in Th. Cottier and P. C. Mavroidis (eds.), *The role of the judge in international trade regulation: experience and lessons for the WTO* (University of Michigan Press, 2003), 11. See also J. Durling, ‘Deference, but Only When Due: WTO Review of Anti-Dumping Measures’ (2003) 6 *Journal of International Economic Law*, 125-147.

⁸ WT/DSB/1, dated 19 June 1995. In 1994, the Preparatory Committee for the WTO made a number of recommendations concerning the ‘Establishment of the Appellate Body’. It were these recommendations which the DSB adopted in February 1995.

2.1 Uruguay Round negotiations on dispute settlement

2.1.1 GATT dispute settlement and the consensus requirement

The GATT 1947 did not provide for an elaborate dispute settlement system. In fact, the GATT 1947 contained only two brief provisions relating to dispute settlement: Articles XXII and XXIII. On the basis of these provisions, the GATT Contracting Parties built, in a very pragmatic manner over a period of decades, a fairly sophisticated and successful system for the resolution of trade disputes.⁹ However, the GATT dispute settlement system had some serious shortcomings, which became acute in the 1980s and the early 1990s. The most important shortcoming of the system was the fact that panel reports, to become legally binding, had to be adopted in the GATT Council by *consensus*. A Contracting Party that was found to have acted inconsistently with its GATT obligations, could thus block the adoption of the ‘unfavourable’ panel report and frustrate the operation of the dispute settlement system. Not surprisingly, the improvement of the GATT dispute settlement system was therefore high on the agenda of the Uruguay Round negotiations.¹⁰

The outcome of the Uruguay Round negotiations on dispute settlement was set out in Annex 2 of the 1994 Marrakesh Agreement Establishing the World Trade Organization, the Dispute Settlement Understanding or DSU. The DSU provides for a new WTO dispute settlement system and is often referred to as one of the most important achievements of the Uruguay Round negotiations. Claus-Dieter Ehlermann once described the dispute settlement system negotiated during the Uruguay Round as ‘an extraordinary achievement that comes close to a miracle’.¹¹ The most significant innovation, introduced by the new dispute settlement system, concerns the introduction of the ‘reverse consensus’ requirement for the adoption of panel

⁹ Bob Hudec’s 1993 statistical analysis of the results of GATT dispute settlement until the end of the 1980s indicated an overall success rate of almost 90 per cent (see R. Hudec *et al.*, ‘A Statistical Profile of GATT Dispute Settlement Cases, 1948-1989’ (1993) 2 *Minnesota Journal of Global Trade* 1, 285-287) and, as Hudec noted ‘... accomplishments to this point, if not unique, are at least rare in the history of international legal institutions.’ (see *ibid.*, 353). John Jackson noted: ‘... these procedures worked better than might have been expected, and some could argue that in fact they worked better than those of the World Court and many other international dispute settlement procedures. See J. Jackson, *The World Trade Organization: Constitution and Jurisprudence* (Chatham House Papers, 1998), 64.

¹⁰ GATT Contracting Parties, *Punta del Este Ministerial Declaration on the Uruguay Round*, 20 September 1986, BISD 33S/25. The Punta del Este Ministerial Declaration on the Uruguay Round stated with regard to dispute settlement: ‘In order to ensure prompt and effective resolution of disputes to the benefit of all contracting parties, negotiations shall aim to improve and strengthen the rules and the procedures of the dispute settlement process ...’.

¹¹ C.-D. Ehlermann, ‘Some Personal Experiences as Member of the Appellate Body of the WTO’, Policy Paper RSC No 02/9, The Robert Schuman Centre for Advanced Studies, European University Institute, 44.

reports. For a panel report to become legally binding, it no longer has to be adopted by consensus; adoption by ‘reverse consensus’ suffices. A panel report is adopted by ‘reverse consensus’ unless there is a consensus *not* to adopt the report. It is clear that the latter situation is very unlikely to occur. Under the new WTO dispute settlement system, the adoption of panel reports by the Dispute Settlement Body is thus quasi-automatic.

2.1.2 Reverse consensus and appellate review

The introduction of the ‘reverse consensus’ requirement for the adoption of panel reports resolved the problem of blockage and paralysis of the dispute settlement system which had existed under the GATT. However, the prospect of losing effective control over the adoption of panel reports made the negotiators quite apprehensive. It would no longer be possible to stop ‘bad’ panel reports from becoming legally binding. John Jackson referred to ‘a certain nervousness on the part of sovereign members about the potential of this process’.¹² During the Uruguay Round negotiations, the two main trading powers, the United States and the European Communities had both been exposed to a few panel reports which they, and others, regarded as ‘serious legal errors’.¹³ As a safety measure against such ‘bad’ panel reports, the negotiators provided for an appellate review mechanism. The European Communities proposed the creation of an appeals mechanism for parties who believed that panel decisions are ‘erroneous or incomplete’.¹⁴ The United States supported appellate review for ‘*extraordinary cases* where a panel report contains legal interpretations that are questioned formally by one of the parties’ (emphasis added).¹⁵ Canada viewed the appellate review mechanism as a way to correct errors of ‘fundamentally flawed decisions’.¹⁶ Not all countries participating in the negotiations supported the introduction of appellate review. Some participants feared extra delays and further procedural complication in the settlement of disputes.¹⁷ To improve the ‘quality’ of the

¹² J. Jackson, ‘Rule Implementation and Dispute Resolution’, in *The World Trading System: Law and Policy of International Economic Relations* (MIT Press, 1997), 125.

¹³ P.-J. Kuijper, ‘The New WTO Dispute Settlement System: The Impact on the European Community’ (1995) 29 *Journal of World Trade* 6, 52. The United States considered some panel reports on anti-dumping and countervailing duties to be seriously flawed from a legal perspective. For the European Communities, the Panel Report in *EC – Airbus* was seen as a major legal error.

¹⁴ See 1990 Proposal by the EC; reported by T. Stewart (ed.), *The GATT Uruguay Round: A Negotiating History (1986-1992)*, Volume II (Kluwer Law and Taxation Publishers, 1993), 2767.

¹⁵ See 1990 Proposal by the US; reported by T. Stewart (ed.), *The GATT Uruguay Round: A Negotiating History (1986-1992)*, Volume II (Kluwer Law and Taxation Publishers, 1993), 2767-2768.

¹⁶ See 1990 Proposal by Canada; reported by T. Stewart (ed.), *The GATT Uruguay Round: A Negotiating History (1986-1992)*, Volume II (Kluwer Law and Taxation Publishers, 1993), 2768.

¹⁷ See Meeting of April 1990; reported by T. Stewart (ed.), *The GATT Uruguay Round: A Negotiating History (1986-1992)*, Volume II (Kluwer Law and Taxation Publishers, 1993), 2768.

panel reports, it was also proposed to introduce an ‘interim review procedure’ under which a panel would, following the completion of its work but prior to the adoption of the report, submit its interim report to the parties for their observations.¹⁸ This idea of an interim review procedure would eventually be adopted. Article 15 of the DSU provides for such an interim review procedure. However, also the idea of an appellate review procedure was adopted as ‘yet another check on panel influence’ (emphasis added) and to ‘make the automatic adoption of panel reports less risky to losing parties’.¹⁹ Bob Hudec described the appellate review procedure as a ‘safety valve’ against ‘bad’ panel decisions.²⁰ The introduction of appellate review has correctly been explained as a *quid pro quo* for the quasi-automatic adoption of panel reports.²¹ When they agreed to the establishment of a standing Appellate Body to which parties could appeal from panel reports, the ambitions of the participants to the negotiations were, however, quite modest. They certainly did not intend to create a strong international court at the apex of the new dispute settlement system. On the contrary, they only wanted to ensure that their biggest innovation, namely the quasi-automatic adoption of panel reports by the DSB, would not have the undesirable side-effect to be without protection against an occasional ‘bad’ panel report. The decision to establish a standing Appellate Body to provide such protection was an inspired *afterthought*, rather than the reflection of a grand design to create a strong, new international court.

2.2 Establishment of the Appellate Body

The proposition that the decision to establish a standing Appellate Body was an afterthought, rather than the reflection of a grand design to create a strong, new international court, finds support in the relevant provisions of the DSU as well as in the Decision of February 1995 on the establishment of the Appellate Body. Of the 27 articles of the DSU, only one article, Article 17, entirely deals with the Appellate Body and the appellate review process.²² None of

¹⁸ See also E.-U. Petersmann, *The GATT/WTO Dispute Settlement System* (Kluwer Law International, 1997), 186.

¹⁹ K. Abbott, ‘GATT as a Public Institution: The Uruguay Round and Beyond’ (1992) 18 *Brooklyn Journal of International Law*, 141.

²⁰ R. Hudec, ‘Dispute Settlement’, in J. Schott (ed.), *Completing the Uruguay Round: A Results-Oriented Approach to the GATT Trade Negotiations* (Institute for International Economics, 1990), 191.

²¹ See D. Steger, ‘WTO Dispute Settlement: Revitalisation of Multilateralism after the Uruguay Round’ (1996) 9 *Leiden Journal of International Law* 2, 322, and D. Steger, ‘The Appellate Body and its Contribution to WTO Dispute Settlement’, in D. Kennedy and J. Southwick (eds.), *The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec* (Cambridge University Press, 2002), 483. See also J. Jackson, ‘Rule Implementation and Dispute Resolution’, in *The World Trading System: Law and Policy of International Economic Relations* (MIT Press, 1997), 125.

²² Three other articles of the DSU, Articles 16, 18 and 19, concern in part the appellate review process.

the four appendices of the DSU concerns the Appellate Body or its work. Compared with the wealth of provisions on the panel process, the paucity of provisions on appellate review is indicative for the importance given by the negotiators to appellate review in the WTO dispute settlement system.

2.2.1 Article 17 of the Dispute Settlement Understanding (DSU)

As noted above, Article 17 of the DSU provides for the establishment of ‘a standing Appellate Body’.²³ The choice of the unappealing, technical, non-descriptive term ‘Appellate Body’ as the name for this new institution, is telling for the aspirations of the negotiators. It is no coincidence that the new institution was not called the International Trade (Appeals) Court (or anything similar with the word ‘court’ in it). It is no coincidence either that Article 17 does not refer to the persons serving on the Appellate Body as ‘judges’, but merely as ‘persons’.²⁴

Article 17 first defines the task of the Appellate Body in very general terms as hearing appeals from panel cases,²⁵ but then goes on to narrow considerably the scope of appellate review and the mandate of the Appellate Body. Appeals are limited to issues of law covered in the panel report and legal interpretations adopted by the panel.²⁶ Generally speaking, the panel’s findings on factual issues thus escape from appellate review.²⁷ The Appellate Body must address each of the legal issues raised during the appellate review proceeding²⁸ but its mandate is – according to Article 17.13 of the DSU – ultimately limited to upholding, modifying or reversing the panel’s legal findings and conclusions.²⁹ The possibility of remanding a case to the panel is not provided for.³⁰ Access to appellate review is also limited. Only parties to the dispute can appeal a panel report; third parties or other WTO Members cannot appeal a panel report, even if their interests are clearly at stake. Members other than the parties can be heard by the Appellate Body but only if these Members have notified the DSB of a substantial interest in the dispute at the very outset of the panel process.³¹

²³ See Article 17.1 of the DSU.

²⁴ See Articles 17.1, 17.2 and 17.3 of the DSU.

²⁵ *Ibid.*

²⁶ See Article 17.6 of the DSU.

²⁷ See below, section 3.5.

²⁸ See Article 17.12 of the DSU.

²⁹ See below, section 3.5

³⁰ *Ibid.*

³¹ See Article 17.4 of the DSU.

According to Article 17.6 of the DSU, the Appellate Body shall be composed of seven persons. Compared with international courts, such as the International Court of Justice ('ICJ'), the International Criminal Court ('ICC') and the International Tribunal for the Law of the Sea ('ITLoS'), which comprise 15, 18 and 21 judges respectively, the small size of the WTO Appellate Body is striking.³² Moreover, Article 17.2 provides that appeals are never heard by the Appellate Body *en banc*, but always by only three of the seven persons serving on the Appellate Body. It is clear that the authority of rulings by the full Appellate Body would have been greater than the authority of rulings by three persons, a number which does not exceed the number of panelists who 'produced' the panel report under review.³³ More importantly, the fact that only three of the seven Members would sit on each appeal created a significant danger to the consistency and coherence of the case law of the Appellate Body.

As to the qualifications required of persons serving on the Appellate Body, Article 17.3 of the DSU reflects rather limited expectations. Persons serving on the Appellate Body must be 'persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements'. In comparison, the Statute of the ICJ requires that judges of the ICJ are 'persons of high moral character, who possess the qualifications required in their respective countries for appointment to the *highest judicial offices*, or are jurisconsults of recognized competence in international law.' (emphasis added)³⁴ Judges of the ICC must be 'persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the *highest judicial offices*'.³⁵ Judges on the ITLoS must be 'persons enjoying the *highest reputation* for fairness and integrity and of recognized competence in the field of the law of the sea'.³⁶ The qualifications required of persons serving on the Appellate Body, as set out in Article 17.3, are hardly more demanding than the qualifications required of persons serving on panels.³⁷ A significant difference, however, is that persons serving on the Appellate Body must be

³² See Article 3 of the Statute of the International Court of Justice, at <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasicstext/ibasicstatute.htm>, visited on 29 December 2004; Article 36 (1) of the Rome Statute of the International Criminal Court, at http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf, visited 28 December 2004; and Article 2 (1) of the Statute of the International Tribunal for the Law of the Sea, at http://www.itlos.org/start2_en.html, visited on 29 December 2004.

³³ Note that theoretically it is even possible that a panel comprises five panelists. See Article 8.5 of the DSU.

³⁴ Article 2 of the Statute of the International Court of Justice, at <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasicstext/ibasicstatute.htm>, visited on 29 December 2004.

³⁵ Article 36 (3)(a) of the Rome Statute of the International Criminal Court, at http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf, visited 29 December 2004.

³⁶ Article 2 (1) of the Statute of the International Tribunal for the Law of the Sea, at http://www.itlos.org/start2_en.html, visited on 29 December 2004.

³⁷ See Article 8.1 of the DSU, which states that panels shall be composed of 'well-qualified ... individuals'.

unaffiliated with any government while many panelists will be government officials and diplomats of Members not involved in the dispute.³⁸

As the judges of the ICJ, ICC and the ITLoS, the persons serving on the Appellate Body are appointed by a political body. In the case of the Appellate Body, this is the DSB.³⁹ Unlike the other political bodies appointing the ICJ, ICC and ITLoS judges, however, the DSB must take the decisions on appointment by consensus, which means that any WTO Member can veto the appointment of a particular person to the Appellate Body.⁴⁰

Persons serving on the Appellate Body are appointed for a term of four years, renewable only once. Judges of the ICJ, ICC and the ITLoS are appointed for a term of 9 years, after which they can – at least in the case of the ICJ and ITLoS – be re-appointed.⁴¹ A term of four years is remarkably short and cannot but reflect the aspiration of Members to keep a certain degree of control over the persons serving on the Appellate Body.

The composition of the Appellate Body shall be broadly representative of membership in the WTO. The ICJ, the ICC and the ITLoS have similar, but more explicit requirements to guarantee the ‘representative nature’ of the court. In the ICJ, the ICC and the ITLoS ‘the principal legal systems of the world’ must be represented.⁴² No such requirement is explicitly stated with regard to the composition of the Appellate Body.

³⁸ See Articles 8.1 and 17.3 of the DSU.

³⁹ See Article 17.2 of the DSU. For the ICJ, this is the UN General Assembly and the Security Council. For the ICC, this is the Assembly of States Parties. For the ITLoS, this is the meeting of the States Parties.

⁴⁰ Article 1.4 of the DSU states that: ‘Where the rules and procedures of this Understanding provide for the DSU to take a decision, it shall do so by consensus.’ Footnote 1 to this provision states: ‘The DSB shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision.’

⁴¹ See Article 13 (1) of the Statute of the International Court of Justice, at <http://www.icj-cij.org/icjwww/basicdocuments/basictext/basicstatute.htm>, visited on 29 December 2004; Article 36 (9) (a) of the Rome Statute of the International Criminal Court, at http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf, visited 28 December 2004; and Article 5 (1) of the Statute of the International Tribunal for the Law of the Sea, at http://www.itlos.org/start2_en.html, visited on 29 December 2004.

⁴² See Article 9 of the Statute of the International Court of Justice, at <http://www.icj-cij.org/icjwww/basicdocuments/basictext/basicstatute.htm>, visited on 29 December 2004; Article 36 (8) (a) of the Rome Statute of the International Criminal Court, at http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf, visited 28 December 2004; and Article 2 (2) of the Statute of the International Tribunal for the Law of the Sea, at http://www.itlos.org/start2_en.html, visited on 29 December 2004.

Article 17 requires of the persons serving on the Appellate Body that they are available at all times and on short notice and stay abreast of developments in WTO law and policy.⁴³ No similar provision is found in the Statutes of the ICJ, the ICC and the ITLoS as it is undoubtedly considered to be self-evident that the judges on these courts are ‘available’ for work and remain well-informed. The negotiators of the DSU, however, did not view membership of the Appellate Body as a full-time activity and, therefore, considered it useful to ‘ensure’ the availability of persons serving on the Appellate Body to hear and decide appeals.

The Appellate Body also distinguishes itself from international courts such as the ICJ, the ICC and the ITLoS with regard to the timeframe for the proceedings. According to Article 17.5 of the DSU, the proceedings of the Appellate Body ‘shall in no case exceed 90 days’.⁴⁴ This period of maximum 90 days starts with the filing of the notice of appeal and includes also the time needed for parties to file their written submissions, to hold an oral hearing, to deliberate, to draft the report and to translate the report. No international court works under similar time constraints. For proceedings of the ICJ, the ICC and the ITLoS, such time constraints would undoubtedly be considered ‘unreasonable’ on the parties as well as the court, and likely to endanger proper consideration of the issues in the dispute. The negotiators of the DSU apparently did not have such concerns.

Article 17 of the DSU provides that the proceedings of the Appellate Body shall be confidential.⁴⁵ This blanket requirement of ‘secrecy’ is clearly a legacy from the days trade disputes were resolved through diplomacy rather than adjudication. Confidentiality of this nature is alien to international court proceedings. The proceedings of the ICJ, the ICC and the ITLoS are public, unless the court has reason to decide otherwise.

Finally, Appellate Body reports must be adopted by the DSB,⁴⁶ they are not legally binding on the parties to the dispute without such adoption. Although the DSB adopts Appellate Body reports by reverse consensus, and the adoption is thus quasi-automatic, this adoption is still a formal requirement. The legal power of decisions of international courts is never subject to the approval by a political body.

⁴³ See Article 17.3 of the DSU.

⁴⁴ Note that *as a general rule* Appellate Body proceedings shall not exceed 60 days. However, if the Appellate Body considers it impossible to provide its report within 60 days, it can take up to 90 days.

⁴⁵ Article 18.2 of the DSU makes clear that this requirement of confidentiality also concerns all written submissions to the Appellate Body.

⁴⁶ Article 17.14 of the DSU.

2.2.2 *Decision on the Establishment of the Appellate Body of 10 February 1995*

As noted above, Article 17.1 of the DSU left it to the DSB to establish the Appellate Body.⁴⁷ The DSB did so at its very first meeting on 10 February 1995.⁴⁸ The DSB in fact adopted the relevant 1994 recommendations by the Preparatory Committee for the WTO. In addition to formally establishing the Appellate Body, the Decision of the DSB of 10 February 1995, also clarified a number of issues relating to the composition of the Appellate Body, the conditions of employment of Appellate Body Members, conflict of interest guidelines for Appellate Body Members and supporting staff, and the administrative and other support to be given to the Appellate Body. While the Decision of 10 February 1995 explicitly stated that ‘the success of the WTO will depend greatly on the proper composition of the Appellate Body, and persons of the highest calibre should serve on it’, the Decision barely clarifies the required qualifications set out in Article 17.3 of the DSU. The Decision merely stated that the qualifications should be of a type that allows Appellate Body Members to resolve ‘issues of law covered in the panel report and legal interpretations developed by the panel’.⁴⁹ The Decision did, however, clarify that to ensure that the membership of the Appellate Body is broadly representative of membership in the WTO, factors such as different geographical areas, levels of development, and legal systems must be duly taken into account.⁵⁰ The Decision also made clear that the requirement that Appellate Body Members not be ‘affiliated with any government’ should be applied with common sense⁵¹ and emphasized that the scope of the requirement that Appellate Body Members not participate in the consideration of disputes that would create a conflict of interest, should be clarified through the elaboration of high standards of conduct.⁵² The most revealing part of the Decision on the Establishment of the Appellate Body concerns the conditions of employment of the Members of the Appellate Body. While the DSB explicitly stated that ‘the contractual basis of members of the Appellate Body should reflect the overriding concern that candidates are of a high enough calibre’, it decided to appoint the Members on a part-time basis. The DSB did not see a contradiction in this. On the contrary, it argued that a part-time contractual arrangement,

⁴⁷ Note that Article 17.1 did not give any indication as to the timeframe within which this establishment was to occur. However, this has not been a problem.

⁴⁸ Dispute Settlement Body, *Establishment of the Appellate Body*, Decision adopted on 10 February 1995, WT/DSB/1, dated 19 June 1995.

⁴⁹ *Ibid.*, para. 5.

⁵⁰ *Ibid.*, para. 6.

⁵¹ *Ibid.*, para. 7. According to the DSB, this requirement prohibits only attachments to a government that would compromise the independence of judgment. However, this requirement would not necessarily rule out persons who, although paid by a government, serve in a function rigorously and demonstrably independent from that government.

⁵² *Ibid.*, para. 8. According to the DSB, Members of the Appellate Body would adhere to such standards and, in a particular case, disclose any relevant financial, business and professional interests.

with a monthly retainer plus a fee for actual days worked,⁵³ could lead to a wider range of candidates being available, since Members could continue to pursue other activities in their country of origin.⁵⁴ In February 1995, Members were still convinced that the Appellate Body would not be busy enough to warrant full-time employment. The Decision of 10 February 1995 referred to the need for Appellate Body Members to undertake ‘*sporadic* trips to Geneva’ (emphasis added).⁵⁵ It is clear that not all Members were satisfied with the part-time contractual arrangement for Appellate Body Members. Note that the Decision of 10 February 1995 stated that the contractual arrangement *could* be kept under review by the DSB, and considered at the latest at the first Ministerial Conference to determine whether a move to full-time employment was warranted.⁵⁶

From the above analysis of the relevant provisions of the DSU and the Decision of the DSB of 10 February 1995, it follows that the decision to establish a standing Appellate Body was certainly not the reflection of a grand design to create a strong, authoritative court that would be at the epicenter of the new WTO dispute settlement system.

3. *The Road to Prominence*

While the Uruguay Round negotiators had limited ambitions when providing for a standing Appellate Body, the Appellate Body is now the centerpiece of the WTO dispute settlement system and, all but in name, the World Trade Court.⁵⁷ Several factors have contributed to this rise to prominence. These factors include: the first and subsequent compositions of the Appellate Body; the Working Procedures for Appellate Review; the early embracement and consistent application of the rules of interpretation of the Vienna Convention; the frequent and broad recourse to appellate review; the manner in which the Appellate Body used its authority

⁵³ *Ibid.*, paras. 11 and 12. The monthly retainer was set at a minimum of SF 7,000 per month while with regard to the daily fee (as well as travel expenses and a per diem), it was agreed that this fee would be set on the basis of further research on current rates for equivalent services under similar conditions.

⁵⁴ *Ibid.*, para. 11.

⁵⁵ *Ibid.*, para. 12.

⁵⁶ *Ibid.*, para. 11.

⁵⁷ Bob Hudec noted already in 1999, ‘whether intended or not, ... the decision to create an Appellate Body has ... caused a pronounced shift in the center of power in the GATT/WTO legal machinery. In the previous GATT panel proceedings, the decisive influence had generally rested with the legal analysis performed by the GATT Secretariat’s Office of Legal Affairs. Under the present GATT/WTO procedure, the Appellate Body now has the final word on all issues of law.’ See R. Hudec, ‘The New WTO Dispute Settlement Procedure: An Overview of the First Three Years’ (1999) 8 *Minnesota Journal of Global Trade* 1, 27.

of appellate review; and, finally, the case law of the Appellate Body to date, and in particular the case law balancing free trade and other societal values and interests and the case law ensuring the fairness and effectiveness of the WTO dispute settlement system.

3.1 Composition of the Appellate Body

A first important factor contributing to the rise to prominence of the Appellate Body has been its first and subsequent compositions. Whether intentionally or not, the DSB appointed the ‘right’ persons to serve on the Appellate Body. While Article 17.3 of the DSU requires Members of the Appellate Body to have ‘demonstrated expertise in law, international trade *and* the subject matter of the covered agreements generally’ (emphasis added), few of the seven Members appointed in November 1995 met this requirement. With the exception of Ambassador Julio Lacarte-Muró, none of the Members then appointed were renowned international *trade* law experts. Four of the seven Members had in fact no expertise in the field of GATT law at all. Apart from Lacarte, no Member had ever served as a panelist on a GATT panel.⁵⁸ The extensive expertise of the Appellate Body Members appointed in November 1995 was in international law in general, in European Community law, in competition law, in commercial law, in (development) economics, and in national and international dispute resolution and adjudication.⁵⁹ The breadth as well as the depth of this non-GATT expertise of the Members appointed in November 1995 had an important impact on the early case law of the Appellate Body. As most Members were not familiar with GATT practice and had not been involved in the Uruguay Round negotiations, they were not ‘burdened’ with preconceived ideas on WTO law. This made it easier for them, than it would have been for GATT veterans, to inject new ideas and approaches in the interpretation and application of WTO law. It is not surprising that an Appellate Body of this composition saw cause to state already in its very first case that the GATT 1994 ‘is not to be read in clinical isolation from public international law.’⁶⁰

⁵⁸ Prior to his appointment to the Appellate Body, Ambassador Julio Lacarte-Muró had served on 4 GATT panels, including the 1962 Panel in *United Kingdom Waivers, Application in Respect of Customs Duties on Bananas*.

⁵⁹ For a moving and very personal description of the personalities and backgrounds of these first Appellate Body Members, see J. Bacchus, *Trade and Freedom* (Cameron May, 2004), 53-106. As Debra Steger noted, ‘[a]ll seven original Appellate Body Members had legal training, although not all of them had practiced law. Four of them had previous careers as senior bureaucrats or diplomats with a strong legal dimension to their work; one had been a professor of law; one had been a judge of the Supreme Court of his country; and one had been a lawyer and a politician.’ See D. Steger, ‘The Appellate Body and its contribution to WTO Dispute Settlement’, in D. Kennedy and J. Southwick (eds.), *The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec* (Cambridge University Press, 2002), 485.

⁶⁰ Appellate Body Report, *US – Gasoline*, p. 16.

With the exception of Ambassador Lacarte (who had already been involved in GATT matters in the late 1940s), the Members of the Appellate Body were, and remained, *outsiders* in Geneva. All Members deliberately kept a low profile and, wisely, never engaged in a public debate on their rulings. They did not seek publicity. They would seldom, if ever, be seen at official diplomatic functions, partly because they did not permanently reside in Geneva, partly because they deliberately chose to keep their distance. This ‘aloofness’ created a certain aura of mystic and charisma which served the Appellate Body well in establishing itself as the supreme organ of WTO dispute settlement.

The DSB did not only appoint in November 1995 Members lacking expertise in GATT law, it also appointed mainly Members that had already retired and had few, if any, other professional activities or obligations. Ambassador Lacarte was 77 and Dr. El-Naggar 75 years old at the time of their appointment to the Appellate Body. Whether the DSB intentionally appointed persons with this profile is unclear but it definitely ensured a high degree of availability for the work on hand. Moreover, most, if not all, Members appointed in November 1995 also shared a nearly missionary belief in the importance of the task entrusted to them. Curtis Reitz wrote in 1996 that ‘the initial appointees to the WTO Appellate Body have an especially heavy responsibility to give that important body and its decisions stature and credibility’.⁶¹ The first seven Appellate Body Members were acutely aware of this responsibility.

Finally, the DSB succeeded in appointing an Appellate Body, the membership of which was indeed broadly representative of membership in the WTO. Among the first seven Appellate Body Members, all continents were represented, and four of them came from developed country Members (including the European Communities and the United States) and three from developing country Members. Such degree of representativeness did contribute to the legitimacy and acceptability of the Appellate Body.

None of the ‘original’ seven Members of the Appellate Body still serves on the Appellate Body. New appointments to the Appellate Body took place in 1999, 2001 and 2003. While the average age of Appellate Body Members is now somewhat lower and more of them are (former) professors of law, the DSB has continued to appoint Members with no or little prior expertise in GATT or WTO law. Note that of the Members appointed since November 1995,

⁶¹ C. Reitz, ‘Enforcement of the General Agreement on Tariffs and Trade’ (1996) 17 *University of Pennsylvania Journal of International Economic Law*, 600.

only A.V. Ganesan and M. Janow had experience as a panelist prior to their appointment to the Appellate Body.⁶² It is, however, the breadth and depth of the non-WTO expertise of its Members that has served the Appellate Body well.

3.2 Working Procedures for Appellate Review

A second important factor in the rise to prominence of the Appellate Body has been the Working Procedures for Appellate Review adopted by the Appellate Body in February 1996. The first task of the Members of the Appellate Body after their appointment in November 1995 was to draw up detailed working procedures. In their Working Procedures, the Members made fundamental choices with regard to the nature and the conduct of appellate review proceedings. The two main characteristics of the proceedings are their judicial nature and the importance given to collegiality.

As discussed above, Article 17.1 of the DSU provides that appeals are not heard and decided by the Appellate Body *en banc* but by a division of three Members serving in rotation. This ‘rotating pattern of decision-making’ provided for by DSU negotiators, might well have created a significant obstacle to the development of a consistent body of case law.⁶³ However, the Appellate Body recognized and addressed this danger in its Working Procedures. Rule 4 of the Working Procedures, entitled ‘Collegiality’, requires of the division responsible for deciding an appeal ‘to exchange views with the other Members before the division finalizes the appellate report’.⁶⁴ This mechanism of ‘exchange of views’ – quite unique in national and international dispute settlement – has been of ‘enormous benefit to the work of the Appellate Body’.⁶⁵ While the responsibility for deciding the appeal remains with the division, the exchange of views

⁶² A.V. Ganesan served in 2000 as a panelist in *US – Copyright*, and Merit Janow served in 2002 in *EC – Sardines*.

⁶³ R. Hudec, ‘The New WTO Dispute Procedure: An Overview of the First Three Years’ (1999) 8 *Minnesota Journal of Global Trade* 1, 28. See also K. Joergens, ‘True Appellate Procedure or Only a Two Stage Process? A Comparative View of the Appellate Body under the WTO Dispute Settlement Understanding’ (1999) 30 *Law and Policy in International Business*, 217-218.

⁶⁴ Rule 4.3 of the Working Procedures for Appellate Review.

⁶⁵ C.-D. Ehlermann, ‘Some Personal Experiences as Member of the Appellate Body of the WTO’, Policy Paper RSC No 02/9, The Robert Schuman Centre for Advanced Studies, European University Institute, 12. Note that some authors have stated that this process of the Appellate Body, whereby the members of a division decide after having consulted all the members of the Appellate Body ‘appears inconsistent with principles of due process in common law systems where only those who have heard a case can be involved in decision-making. See D. McRae, ‘What is the Future of WTO Dispute Settlement?’ (2004) 7 *Journal of International Economic Law*, 3.

actively involves the full Appellate Body in every single appeal.⁶⁶ This has allowed the Appellate Body to ensure consistency and coherence in its case law. It has also allowed to Appellate Body to draw on the individual and collective expertise of all seven Members.⁶⁷ The mechanism of ‘exchange of views’ has thus significantly contributed to the quality and authority of the decisions of the Appellate Body. After retiring from the Appellate Body, several of its former Members publicly paid tribute to the high degree of collegiality among the Members of the Appellate Body and the positive effect thereof on its case law.⁶⁸

The Working Procedures for Appellate Review, as adopted by the Appellate Body in February 1996, also provide for judicial-type proceedings and a court-like appeals body. The Appellate Body made it clear as from the outset that it expected a ‘fairly high standard of practice’, as compared with the ‘more easy-going standard of practice common to party-controlled panel proceedings.’⁶⁹ Part I of the Working Procedures sets out the duties and responsibilities of the Appellate Body Members and put much emphasis on their independence and impartiality, as well as on the avoidance of conflicts of interest.⁷⁰ The Appellate Body adopted on a provisional basis the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes and attached these Rules in Annex II to the Working Procedures. Almost a year later, in December 1996, the DSB approved these Rules of Conduct and made them applicable to all stages of WTO dispute settlement.⁷¹ The Rules of Conduct, as they apply to Appellate Body Members and the Appellate Body Secretariat, are more elaborated than those of established international courts, such as the ICJ. Part I of the Working Procedures also set out the rules on the composition and operation of divisions.⁷² Members constituting a division shall be selected on the basis of rotation, while taking into account the principles of random selection, unpredictability and opportunity for all Members to serve regardless of their national origin. It is remarkable that in the selection of the Members constituting a division, the nationality of the Members is of no importance.⁷³ In international courts such as the ICJ, the ICC

⁶⁶ The four Members not serving on the division receive all written submissions of the participants and third participants in the appeal and can (and will) consult the verbatim typescript made of the oral hearing.

⁶⁷ This was also the dual objective of the exchange of views set out in Rule 4.1 of the Working Procedures for Appellate Review.

⁶⁸ See C.-D. Ehlermann, *op.cit.*, 27; and J. Bacchus, *op.cit.* 35-49.

⁶⁹ R. Hudec, ‘The New WTO Dispute Settlement Procedure: An Overview of the First Three Years’ (1999) 8 *Minnesota Journal of Global Trade* 1, 28.

⁷⁰ Rules 2, 14 and 15 and Rules 8 to 11 of the Working Procedures for Appellate Review.

⁷¹ WT/DSB/RC/1, dated 11 December 1996

⁷² Rules 3, 6, 7, 12 and 13 of the Working Procedures for Appellate Review.

⁷³ This is even more remarkable given the fact that the divisions hearing and deciding the appeals consist of only 3 Members. However it must be noted that a result of the small size of the Appellate Body and the fact

and the ITLoS, the nationality of the judges is still taken into account. In the ICJ, for example, if one of the parties has a national on the Court, the other party is entitled to an *ad hoc* judge to be added to the Court to hear and decide the case.⁷⁴ While Appellate Body divisions often comprised Members with the nationality of the appellant or appellee and in some appeals such a Member even presided the division,⁷⁵ there has been no criticism of national bias.

Part II of the Working Procedures for Appellate Review describes, in great detail and with particular concern for due process, the appellate review process. It provides for specific rules on the commencement of an appeal, on the working schedule of an appeal, on the appellant's and appellee's submissions, on the rights of third participants, on the oral hearing, on the filing and circulation of documents, on the prohibition of *ex parte* communications, on multiple appeals, on the transmittal of the record to the Appellate Body, on additional memoranda, on the consequences of failure to appear and on the withdrawal of an appeal. Annex I of the Working Procedures contains a detailed time table for appeals. To fit in the overall timeframe of maximum 90 days mandated by Article 17.5 of the DSU, this working schedule is dreadfully tight, with very short time periods in which the participants in the appeal must file their written submissions and in which the division of the Appellate Body hearing the appeal must conduct the oral hearing, deliberate, exchange views, deliberate again, draft, translate and finally circulate the report. The Working Procedures for Appellate Review leave no doubt that the Appellate Body division hearing the appeal (and not the participants) is firmly in control of the appellate process, just as one would expect from a court as opposed to an arbitral body. At the request of the participants, the division could deviate from the time periods set out in the Working Procedures but it will only do so – and has only done so – in exceptional circumstances, where strict adherence to a time period set out in the Working Procedures would result in a manifest unfairness. Where in an appeal a procedural question arises that is not covered by the Working Procedures, the Appellate Body division hearing that appeal has the authority to adopt an additional procedural rule for the purposes of that appeal. The Working Procedures give this authority to the division 'in the interests of fairness and orderly procedure in the conduct of an appeal'. The Appellate Body division in *EC – Asbestos* used this authority to adopt an Additional Procedure to deal with the many *amicus curiae* briefs submitted to the division in that appeal.⁷⁶

that the United States and the European Communities are involved in many appeals, excluding nationals from the participants to sit on the divisions may never have been a real option.

⁷⁴ See Article 31 of the Statute of the International Court of Justice.

⁷⁵ See, for example, the Appellate Body Division in *EC – Bananas*. This division was chaired by James Bacchus while the United States was an appellee in this case.

⁷⁶ Appellate Body Report, *EC – Asbestos*, paras. 50 – 57.

The Working Procedure adopted in February 1996 have served the Appellate Body very well and have allowed it to conduct its work in a fair, efficient and genuinely judicial manner. The Working Procedures were amended in 1997, 2002, 2003 and 2005. With each of these amendments specific deficiencies of the Working Procedures were remedied. This was in particular the case with the amendments effective as of 2002, which made it easier for third parties to participate in the oral hearing, and the amendments effective as of 2005, which elaborated on the content requirements for the notice of appeal, introduced the requirement of notice of other appeal to be filed by other appellants, modified the timing of the oral hearing.⁷⁷ These and other amendments further strengthened the court-like nature of the Appellate Body and the judicial-type nature of the appellate review proceedings.

3.3 Embracing the Vienna Convention rules of treaty interpretation

A third important factor in the rise to prominence of the Appellate Body has been the early embracement and consistent application of the rules of interpretation of the Vienna Convention on the Law of Treaties. Article 3.2 of the DSU stipulates in relevant part that the dispute settlement system serves ‘to clarify the existing provisions of [the covered] agreements in accordance with *customary rules of interpretation of public international law.*’ (emphasis added) Already in its very first report, the report in *US – Gasoline*, the Appellate Body ruled that the ‘general rule of interpretation’ set out in Article 31(1) of the Vienna Convention on the Law of Treaties forms part of the ‘customary rules of interpretation of public international law’ which the Appellate Body has been directed, by Article 3(2) of the DSU, to apply.’⁷⁸ In its second report, the report in *Japan – Alcoholic Beverages II*, the Appellate Body added that Article 32 of the Vienna Convention, dealing with the role of supplementary means of interpretation, has also attained the same status of a customary rule of interpretation and must

⁷⁷ See Working Procedures for Appellate Review, circulated 15 February 1996, WT/AB/WP/1; Working Procedures for Appellate Review, circulated 28 February 1997, WT/AB/WP/2; Working Procedures for Appellate Review, circulated 24 January 2002, WT/AB/WP/3; Working Procedures for Appellate Review, circulated 1 May 2003, WT/AB/WP/4; and Working Procedures for Appellate Review, circulated 4 January 2005, WT/AB/WP/5. Note that a 2004 proposal for a different calculation of the time limits in appellate proceedings, allowing to take account of holiday periods (Christmas/New Year and August) was dropped by the Appellate Body in the light of reactions from WTO Members. While the Appellate Body has the authority to amend its Working Procedures after consulting the Chairperson of the DSB and WTO Director General, the Appellate Body has apparently become reluctant to adopt amendments to its Working Procedures without the support of the WTO Membership. The Appellate Body stated that it dropped its amendment on the calculation of the time limits in order to allow Members an opportunity, themselves, to decide how to deal with this issue. However, the Appellate Body stressed that this decision to drop this proposal is without prejudice to its right to revisit this issue at a later date. See WT/AB/WP/W/9, dated 7 October 2004, 7.

⁷⁸ Appellate Body Report, *US – Gasoline*, p. 16.

therefore be applied by the Appellate Body.⁷⁹ From the very beginning, the Appellate Body has left no room for doubt regarding the basic rules of interpretation it would apply. As Article 31.1 of the Vienna Convention requires, the Appellate Body has consistently interpreted provisions of the covered agreements in accordance with the ordinary meaning of the words of the provision taken in their context and in the light of the object and purpose of the agreement involved. It has been observed that of the three elements referred to in Article 31.1 – text, context and object-and-purpose – the Appellate Body has attached the greatest weight to the first element, the text or ordinary meaning of the words of the provision to be interpreted. This is illustrated by the frequent references in Appellate Body reports to, for example, the Shorter Oxford Dictionary, ‘which, in the words of certain critical observers, has become “one of the covered agreements”’.⁸⁰ As the Appellate Body ruled in *Japan – Alcoholic Beverages II*, Article 31 of the Vienna Convention provides that the words of the treaty form the foundation for the interpretive process; interpretation must be based above all upon the text of the treaty.⁸¹ The Panel in *US – Section 301 Trade Act* correctly noted, however, that the elements of Article 31 of the Vienna Convention – text, context, object-and-purpose – constitute ‘one holistic rule of interpretation’, and not ‘a sequence of separate tests to be applied in a hierarchical order’.⁸² To determine the ordinary meaning of a term, it makes sense to start with the dictionary meaning of that term but, as the Appellate Body noted more than once, a term often has several dictionary meanings and dictionary meanings thus leave many interpretative questions open.⁸³ The ordinary meaning of a term cannot be determined outside the context in which the term is used and without consideration of the object and purpose of the agreement at issue.

An important corollary of the ‘general rule of interpretation’ of Article 31 of the Vienna Convention already identified by the Appellate Body in its second report, the report in *Japan – Alcoholic Beverages II*, is that interpretation must give meaning and effect to *all* the terms of a treaty (i.e., the interpretative principle of effectiveness). An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.⁸⁴ Furthermore, the Appellate Body in *EC – Hormones* cautioned interpreters that ‘the fundamental rule of treaty interpretation requires a treaty interpreter to read and interpret the

⁷⁹ Appellate Body Report, *Japan – Alcoholic Beverages II*, p.104.

⁸⁰ As reported by C.-D. Ehlermann, ‘Some Personal Experiences as Member of the Appellate Body of the WTO’, Policy Papers RSC No 02/9, The Robert Schuman Centre for Advanced Studies, European University Institute, 16.

⁸¹ Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 105-106.

⁸² Panel Report, *US – Section 301 Trade Act*, para. 7.22.

⁸³ See Appellate Body Report, *Canada – Aircraft*, para. 153; and Appellate Body Report, *EC – Asbestos*, para. 92.

⁸⁴ See Appellate Body Report, *US – Gasoline*, DSR 1996:I, 21.

words actually used by the agreement under examination, not words the interpreter may feel should have been used.’⁸⁵ In *India – Patents (US)*, the Appellate Body ruled that the principles of treaty interpretation ‘neither require nor condone’ the importation into a treaty of ‘words that are not there’ or ‘concepts that were not intended’.⁸⁶

Bob Hudec once noted that the care and attention given to the Vienna Convention could be viewed as ‘bit excessive’, given the rather open-ended drafting the Articles 31 and 32 of the Vienna Convention and the differences among scholars as to what they mean.⁸⁷ Hudec immediately added, however, that in defence of the Appellate Body, it must be remembered that ‘the WTO dispute settlement procedure is facing a difficult task of obtaining government compliance with its new and more demanding rules’ and that ‘in this situation, a normal measure of prudence would dictate giving legal rules the greatest possible appearance of objective legal authority’.⁸⁸ According to Hudec, claiming that a specific interpretation of a rule is called for by the Vienna Convention rules of interpretation is ‘the first thing any rational tribunal would do in these circumstances.’⁸⁹

In its efforts to clarify provisions of the covered agreements, the Appellate Body has from the outset given primary importance to the ordinary meaning of the wording actually used in the provisions to be interpreted. It is beyond doubt that the results of this interpretative approach are more easily accepted by the parties to the agreement than the often surprising results of interpretative approaches that give relatively less importance to the text, but more to the context and the object and purpose of the agreement. By choosing for, and then consistently applying, a ‘text first’ approach to interpretation, the Appellate Body has given itself credibility and reliability in the eyes of WTO Members. As Claus-Dieter Ehlermann, one of the original seven Appellate Body Members, wrote in 2002: ‘... the interpretative method, established and clearly announced by the Appellate Body, has had a legitimising effect, and this from the very beginning of its activities’.⁹⁰ An interpretative approach based on ‘legitimate expectations’ of one of the parties to the dispute – an approach adopted by the Panel in *EC – Computer*

⁸⁵ Appellate Body Report, *EC – Hormones*, para. 181.

⁸⁶ Appellate Body Report, *India – Patents (US)*, para. 45.

⁸⁷ See R. Hudec, ‘The New WTO Dispute Settlement Procedure: An Overview of the Three First Years’ (1999) 8 *Minnesota Journal of Global Trade* 1, 29-30.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ C.-D. Ehlermann, ‘Some Personal Experiences as Member of the Appellate Body of the WTO’, Robert Schuman Centre for Advanced Studies, European University Institute, Policy Papers, RSC No. 02/9, 16.

Equipment but on appeal explicitly rejected by the Appellate Body – would definitely not have had this ‘legitimising effect’ referred to by Ehlermann.

While the Appellate Body has consistently followed the Vienna Convention rules of interpretation, this does not mean that it never strayed from its chosen method of interpretation. There are undoubtedly a number of instances in which the interpretation given by the Appellate Body to a specific term or provision does not seem to be the obvious result of a textual approach to interpretation. Two examples that come to mind are the interpretations of the term ‘seek’ (interpreted to mean ‘receive’) and the term ‘should’ (interpreted to mean ‘shall’), both terms in Article 13 of the DSU and interpreted in *US – Shrimp* and *Canada – Aircraft* respectively.⁹¹ Note, however, that in these and other instances the Appellate Body did make a valiant attempt to argue that the interpretative result reached was based on the text in its context and in the light of the object and purpose of the relevant agreement. Quite to the point, Konstantin Joergens once noted that while ‘[t]he case law reveals that the Appellate Body has sometimes failed to achieve the desired degree of consistency in its analysis’, ‘in the light of the complex nature of the WTO Agreement, one has to concede that it is also difficult for the Appellate Body to produce consistent legal conclusions all of the time.’⁹² I add that, as the Appellate Body stated already in its second report, the report in *Japan – Alcoholic Beverages II*, WTO rules are to be interpreted having in mind that they ‘are not so rigid or so inflexible as not to leave room for reasoned judgements in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world.’⁹³

3.4 Frequent and broad recourse to appellate review

The Appellate Body would not have gained the prominence it has today if parties to disputes had not made such frequent use of the possibility to appeal panel reports and if recourse to, or involvement in, appellate review had been limited to a few WTO Members only. Likewise, the Appellate Body would not have gained its current prominence if only a few WTO agreements would have been the subject of appellate review. A fourth important factor in the rise to prominence has therefore been the high number of appeals, the relatively high percentage of

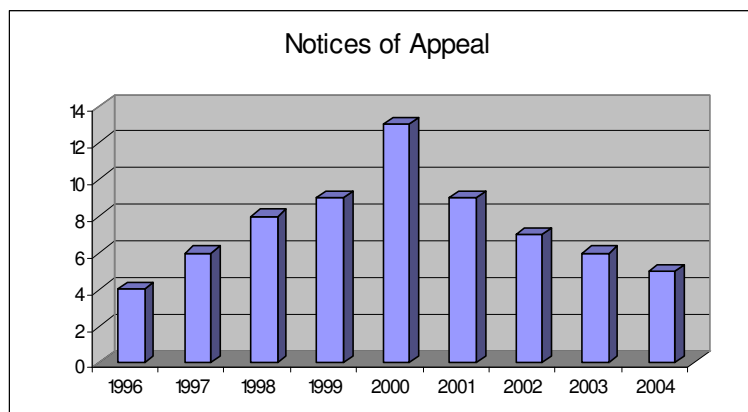
⁹¹ Appellate Body Report, *US – Shrimp*, paras. 104-110; and Appellate Body Report, *Canada – Aircraft*, para. 187.

⁹² K. Joergens, ‘True Appellate Procedure or Only a Two Stage Process? A Comparative View of the Appellate Body under the WTO Dispute Settlement Understanding’ (1999) 30 *Law and Policy in International Business*, 219.

⁹³ Appellate Body Report, *Japan – Alcoholic Beverages II*, 122-123.

the WTO Membership that has been involved in appellate review proceedings to date and the broad substantive scope of appeals.

The first appeal was filed on 21 February 1996 by the United States in *US – Gasoline*. Between 1996 and 2004, a total of 67 notices of appeal were filed.⁹⁴ When compared with the number of cases brought to the International Court of Justice or the International Tribunal for the Law of the Sea in this same period, respectively 37 and 13 cases,⁹⁵ the true significance of the number of appeals cases brought to the Appellate Body becomes clear.



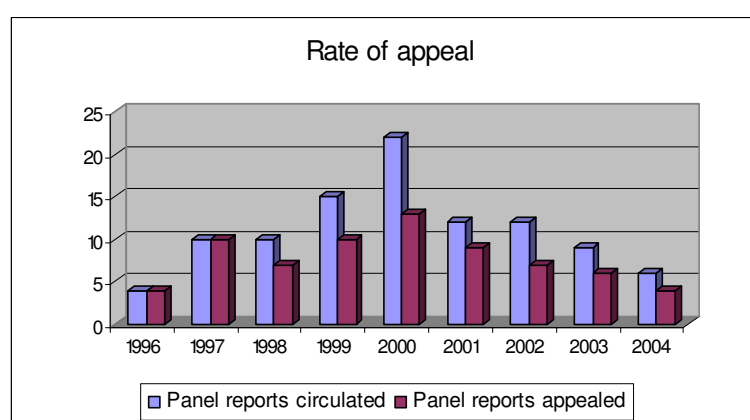
After gradually increasing between 1996 and 1999, the number of appeals peaked in 2000 with 13 appeals and has steadily declined since. With only 5 appeals, the number of appeals reached in 2004 its lowest level since 1996.⁹⁶ The trend of the number of appeals per year follows the trend of the number of panel reports quite closely. When the number of panel reports goes up or down, the number of appeals does likewise (although obviously with some delay). From the

⁹⁴ See <http://www.worldtradelaw.net/dsc/database/noticecount.asp>, visited on 3 January 2005. The total number of 67 notices of appeals includes the two notices of appeal filed by the European Communities in *EC – Hormones*, complaints by the US and Canada, and by the United States in *U.S. - 1916 Act*, complaints by the EC and Japan. In each of these disputes, the panel circulated two separate reports and the appellants therefore filed two notices of appeal. Note, however, that in *U.S. - Steel Safeguards*, the United States filed only one notice of appeal against eight separate panel reports (be it that these reports were contained in one single document). The total number of 67 notices of appeal does *not* include the notices of appeal that were withdrawn and later re-filed, as was the case in *U.S. - FSC*, *U.S. - Line Pipe Safeguards*, *EC - Sardines* and *U.S. - Lumber CVDs Final*.

⁹⁵ For the International Court of Justice, see <http://www.icj-cij.org/icjwww/idecisions.htm>, visited on 1 April 2005. For the International Tribunal on the Law of the Sea, see http://www.itlos.org/start2_en.html, visited on 1 April 2005.

⁹⁶ See <http://www.worldtradelaw.net/dsc/database/appealcount.asp>, visited on 7 January 2005. The two Panel Reports in *EC – Scallops* and the Panel Reports in *EC - Butter* and *U.S. - DRAMS, Article 21.5* are not included as these reports simply reported that a mutually agreed solution was reached. The Panel Report in *EC - Bananas, Article 21.5* relating to the request made by the European Communities, is included as a non-appealed panel report, even though it was never placed on the agenda of a DSB meeting for adoption. The Panel Report in *India – Autos*, is counted as a panel report that was appealed, even though the appeal was later withdrawn.

data on the evolution of the number of appeals in the period 2001-2004, one cannot, therefore, conclude that it has become less ‘popular’ to appeal panel reports. On the contrary, the rate of appeal, i.e., the number of panel reports that is appealed, has gone up in recent years.⁹⁷ Of all the panel reports circulated in the period from 1996 to 2004, 70 per cent has been appealed. This is undoubtedly a much higher percentage than the Uruguay Round negotiators had ever expected. As discussed above, to the Uruguay Round negotiators, appellate review was to be a rather exceptional process to weed out particularly ‘bad’ panel reports.⁹⁸ Instead, during the first two years, the rate of appeal was 100 per cent as all panel reports circulated were appealed.⁹⁹ The first panel report *not* appealed was the report in *Japan – Film*, circulated on 31 March 1998.



It is wrong to conclude from the high rate of appeal that most panel reports are of poor quality. The high rate of appeal is primarily due to the fact that, in most cases, a respondent whose legislation or trade measures were found to be WTO-inconsistent by the panel,¹⁰⁰ has very little to lose by appealing the findings of inconsistency. Even if the Appellate Body upholds the

⁹⁷ The rate of appeal fell to a low of 58 per cent in 2002 but was back at 67 per cent in 2004.

⁹⁸ See above, section 1.2.1.

⁹⁹ Some commentators correctly predicted as early as 1993 that ‘a risk exists that the appeal procedure will be not an extraordinary remedy, but the normal procedure to definitively resolve the dispute’. See M. Mora, ‘A GATT with Teeth: Law Wins over Politics in the Resolution of International Trade Disputes’ (1993) 31 *Columbia Journal of Transnational Law*, 151. They were correct. *Contra*: R. Hudec, ‘The New WTO Dispute Settlement Procedure: An Overview of the Three First Years’ (1999) 8 *Minnesota Journal of Global Trade* 1, 28, who wrote in 1999: ‘as *most observers* expected, all but a handful adverse panel rulings have been appealed to the Appellate Body.’ (emphasis added).

¹⁰⁰ This is the case in 86 per cent of all disputes that come before a panel. See <http://www.worldtradelaw.net/dsc/database/violationcount.asp>, visited on 7 January 2005.

findings of inconsistency, the respondent will have, at least, delayed the amendment of the legislation or trade measures concerned. The respondent will also be able to contend – to the domestic constituency – that it has exhausted all legal means available to it to ‘defend’ the legislation or trade measures concerned.

Not only were many appeals filed, also many WTO Members were in some capacity involved in appellate review proceedings. From 1996 to 2004, 17 Members, of which 11 developing country Members, have been an appellant in one or more appeals.¹⁰¹ The most active user of the appellate review mechanism has been the United States. The United States has been the appellant in 21 appeals, i.e., 31 per cent of all appeals.¹⁰² On a distant second and third place come the European Communities and Canada, who have been appellants in respectively 9 and 8 appeals, i.e., 13 and 12 per cent of all appeals.¹⁰³ Brazil and India have each been an appellant in 5 appeals. Note also that in about half of all appeals, after an appeal was initiated by one of the parties, other parties also appealed the panel report at issue.¹⁰⁴ 16 Members have been such ‘other appellants’, of which 6 Members have never been original appellants.¹⁰⁵ The United States has not only been the most active appellant, it has also been the most frequent appellee, again followed by the European Communities and Canada.¹⁰⁶ In total, 26 Members

¹⁰¹ From 1996 to 2004, the following Members filed one or more notices of appeal: United States, European Communities, Canada, Brazil, India, Japan, Mexico, Chile, Malaysia, Thailand, Korea, Argentina, Turkey, Guatemala, Australia, the Philippines and Costa Rica. Most of these Members were an appellant only once.

¹⁰² This number does not include the notices of appeal which the United States withdrew and later re-filed. See http://www.worldtradelaw.net/dsc/database/appealnotices.asp?f1001=&f1002=&f1003=&f1004=&datefieldstart=&datefieldstarty=0&datefieldstartm=0&datefieldstartd=0&datefielddend=&datefielddeny=0&datefielddendm=0&datefielddendd=0&backlink=http%3A%2F%2Fwww.worldtradelaw.net%2Fdsc%2Fstats.htm&form1_btn5=Search&id=&form1_mode=1, visited on 7 January 2005. Note that the United States was a complainant in 26 of the 106 panel reports, i.e., 24 per cent of all panel reports.

¹⁰³ See http://www.worldtradelaw.net/dsc/database/appealnotices.asp?f1001=&f1002=European+Communities&f1003=&f1004=&datefieldstart=&datefieldstarty=0&datefieldstartm=0&datefieldstartd=0&datefielddend=&datefielddeny=0&datefielddendm=0&datefielddendd=0&backlink=http%3A%2F%2Fwww.worldtradelaw.net%2Fdsc%2Fstats.htm&form1_btn5=Search&id=&form1_mode=1, visited on 7 January 2005. Note that the European Communities was a complainant in 25 of the 106 panel reports, i.e., 24 per cent of all panel reports.

¹⁰⁴ This was the case in 31 of the 64 appeals in which an Appellate Body report was circulated in the period from 1996 to 2004. See <http://www.worldtradelaw.net/dsc/database/partiesab.asp>, visited on 7 January 2005. See also Rule 23 of the Working Procedures for Appellate Review.

¹⁰⁵ The United States, the European Communities, Japan, Brazil, India, Canada, Mexico, Korea, Argentina, Australia, *China*, *New Zealand*, *Norway*, *Switzerland*, *Honduras* and *Ecuador*. The Members that have never been original appellants are indicated in *italics*. See http://www.worldtradelaw.net/dsc/database/partiesab.asp?f1001=&f1002=&f1003=&f1004=&f1005=&f1006=&form1_btn5=Search&id=&form1_mode=1, visited on 7 January 2005.

¹⁰⁶ The United States was an appellee in 38 appeal proceedings, the European Communities in 25 and Canada in 14. See <http://www.worldtradelaw.net/dsc/database/abreports.asp>, visited on 16 January 2005. Among the developing country Members, Brazil (7) and India (5) were the most frequent appellees.

were at least once an appellee in appellate review proceedings.¹⁰⁷ This group includes both developed and developing countries. Between 1996 and 2004, a total of 50 Members were third participants in appellate review proceedings.¹⁰⁸ Participation as a third participant is a useful experience, especially for developing country Members, to gain a better understanding of proceedings which are otherwise confidential and take place behind closed doors.¹⁰⁹ In total, over 30 per cent of the WTO Membership have been involved, as appellants, other appellants, appellees and/or third participants in appellate review proceedings.

Between 1996 and 2004, provisions of 13 of the 18 covered agreements have been the subject of findings of the Appellate Body.¹¹⁰ The provisions of the DSU and the GATT 1994 have been most frequently the subject of Appellate Body findings. The Appellate Body made findings on provisions of the DSU and the GATT 1994 in respectively 36 and 34 of its 64 reports. The provisions of the *SCM Agreement* and the *Anti-Dumping Agreement* were at issue in respectively 13 and 12 Appellate Body reports. In fact, only a few WTO agreements of lesser importance have not been subject to findings of the Appellate Body.¹¹¹

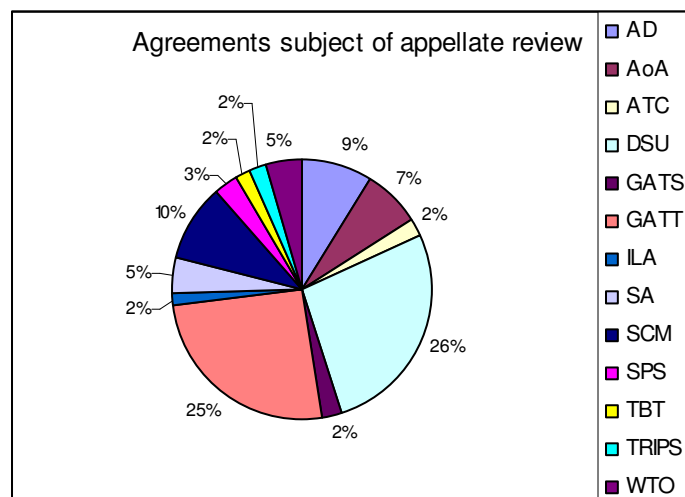
¹⁰⁷ Argentina, United States, Canada, India, Japan, Brazil, China, European Communities, Korea, New Zealand, Norway, Switzerland, Australia, Chile, Indonesia Venezuela, Mexico, Thailand, Peru, Pakistan, Poland, Malaysia, Ecuador, Guatemala, Honduras and the Philippines. See <http://www.worldtradelaw.net/dsc/database/abreports.asp>, visited on 16 January 2005.

¹⁰⁸ Chinese Taipei, European Communities, Japan, Korea, Mexico, Australia, China, India, Bolivia, Brazil, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Honduras, Mauritius, Nicaragua, Pakistan, Panama, Paraguay, Peru, United States, Venezuela, Chile, Senegal, Suriname, Norway, New Zealand, Thailand, Turkey, Hong Kong, Israel, Zimbabwe, Egypt, Dominica, Jamaica, Saint Lucia, Indonesia, the Philippines, Nigeria, Belize, Cameroon, Cote d'Ivoire, Dominican Republic, Ghana, Grenada, St. Vincent and the Grenadines. See <http://www.worldtradelaw.net/dsc/database/partiesab.asp>, visited on 16 January 2005.

¹⁰⁹ To facilitate the involvement of developing country Members, the Appellate Body applied as from 1999 until 2002 its own rules concerning participation in the oral hearing, in a flexible manner, by allowing third participants to attend the oral hearing even though they had not filed a third participant's submission. In 2002, the Appellate Body amended its Working Procedures to allow participation in the oral hearings without the need to file a third participant's submission.

¹¹⁰ See http://www.worldtradelaw.net/dsc/database/abreports.asp?f1001=&f1002=&f1003=&f1004=&f1005=&datefieldstart1=&datefieldstart1y=0&datefieldstart1m=0&datefieldstart1d=0&datefieldend1=&datefieldend1y=0&datefieldend1m=0&datefieldend1d=0&datefieldstart2=&datefieldstart2y=0&datefieldstart2m=0&datefieldstart2d=0&datefieldend2=&datefieldend2y=0&datefieldend2m=0&datefieldend2d=0&f1010=&f1011=&backlink=http%3A%2F%2Fwww.worldtradelaw.net%2Fdsc%2Fstats.htm&form1_btn5=Search&id=&form1_mode=1, visited on 7 January 2005.

¹¹¹ These WTO agreements are the *Agreement on Rules of Origin*, the *Customs Valuation Agreement*, the *Agreement on Government Procurement*, the *Agreement on Preshipment Inspection* and the *TRIMS Agreement*.



In summary, the Appellate Body has been in all respects very active. The number of appeals has been, both in absolute and relative terms, quite significant. The Appellate Body has heard appeals initiated by a fairly broad section of the WTO Membership, including both developed and developing country Members. One third of all WTO Members has at least once been involved, in some capacity, in appellate review proceedings. The provisions of most WTO agreements have been the subject of Appellate Body findings. Without this degree of activity, the Appellate Body obviously would not have been able to contribute to the development of international trade law to the extent that it did nor would it have been so ‘familiar’ to so many Members.

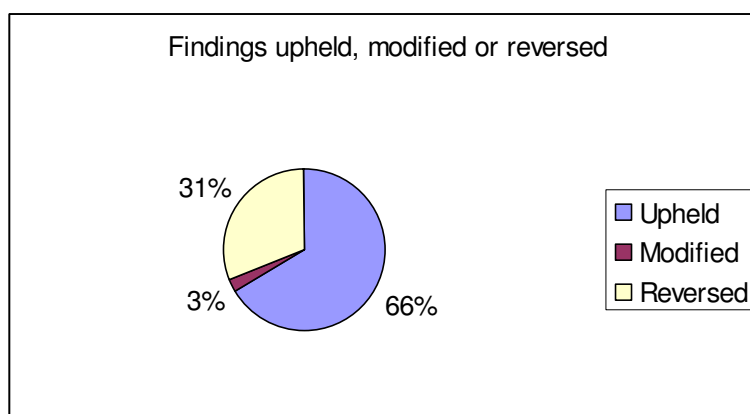
3.5 Use made of the authority of appellate review

A fifth factor that has contributed to the rise in prominence of the Appellate Body has been the manner in which the Appellate Body has used its authority of appellate review. As discussed above, the Appellate Body has, pursuant Article 17.13 of the DSU, the authority ‘to uphold, modify or reverse’ legal findings and conclusions of a panel. In its 64 reports issued between 1996 and 2004, the Appellate Body made in total 414 different rulings. In 349 of these rulings (84%), the Appellate Body upheld, modified or reversed legal findings of panels.¹¹² In the

¹¹² In many instances the Appellate Body upheld or reversed findings of panels without using the very words “to uphold” or “to reverse”. In these cases the Appellate Body usually stated that “the Panel did not fail to...”, “the Panel did not err in its finding...” (upholding) or, on the contrary, that “the Panel failed to...”, “the Panel erred in its finding...” (reversal).

remaining 65 rulings (16%), the Appellate Body took an action not explicitly provided for in Article 17.13 of the DSU.

Of the findings either upheld, modified or reversed, 66 per cent was upheld, 31 per cent was reversed and 3 per cent was modified. The share of the findings that was upheld by the Appellate Body is thus quite significant.



This is an indication of the good work done by panels. However, these data, and in particular, the data relating to the number panel findings upheld and modified, are to some extent misleading. Close reading of the rulings of the Appellate Body in which it upheld panel findings, reveals that in many instances the Appellate Body in fact did not agree with the reasoning of the panel and substituted its own reasoning for that of the panel. In a number of these instances, it would have been more correct for the Appellate Body to state that it modified the panel's finding under appeal. On the other hand, by 'upholding' such a finding rather than 'modifying' it, the Appellate Body strengthens the authority of panels, which is beneficial for the operation of the WTO dispute settlement system as a whole.

Especially in the early days of the Appellate Body, some observers argued that the Appellate Body was needlessly 'harsh' on panels. An example of such alleged 'harshness' was the rebuke in *US – Wool Shirts and Blouses* that the panel's reasoning on one of the issues in that case – namely the burden of proof – was not 'a model of clarity'.¹¹³ In later reports, the Appellate Body refrained from such sarcastic comments. In general, the tone of the Appellate Body

¹¹³ Appellate Body Report, *US – Wool Shirts and Blouses*, DSR 1997:I, p. 334.

reports of the first few years was often described as ‘schoolmasterish’. While intended as a criticism, the then Appellate Body Members may not have seen it that way. It is clear from those reports that they considered it useful to explain their conclusions in a very careful and ‘pedagogic’ manner. With the years, the Appellate Body reports have become more technical and somewhat less accessible for a non-specialist, although when compared with panel reports they are still a ‘joy’ to read. Even when the Appellate Body agrees with the Panel, it still wields a very sharp knife and often finds it useful to make the effort to say the same in a different, and hopefully, more comprehensible manner. The Appellate Body has been criticized for doing this, but wrongly so. An important reason for the ‘success’ of its case law is that Members often found the reasoning in Appellate Body reports quite clear.

As stated above, in 65, or 16 per cent, of its 414 rulings, the Appellate Body took an action other than upholding, modifying or reversing an appealed panel finding, i.e., the three types of action explicitly provided for in Article 17.13 of the DSU. This ‘other action’ took various forms, including: (1) making findings on issues on which the panel had not made findings (i.e., completing the legal analysis); (2) declining to complete the legal analysis; (3) ruling on the scope of the appellate review; (4) ruling on procedural issues; and (5) declining to rule on moot issues.

In a number of appeals, the Appellate Body found itself compelled to rule on the scope of the appellate review or on procedural issues. While WTO Members may not always have agreed with the Appellate Body’s rulings on these matters in specific cases, they did not challenge the Appellate Body’s competence to take ‘other action’ in these forms.¹¹⁴ This competence was correctly considered to be inherent in the explicit competence to uphold, modify or reverse the panel findings appealed. Also the Appellate Body’s competence to decline to rule on moot issues was not contested. Article 17.12 of the DSU states that the Appellate Body must address each of the issues raised in an appeal, but the Appellate Body has always given this obligation a flexible and pragmatic interpretation.

The most surprising form of this ‘other action’ by the Appellate Body is undoubtedly the making of findings on issues on which the panel had not made findings, an action usually referred to as ‘completing the legal analysis’. A complainant often makes claims of violation of multiple provisions of WTO law with regard to the measure at issue. After the panel has found

¹¹⁴ Note that this is *not* the case for the Appellate Body’s rulings on the *amicus curiae* issue but this issue was not considered to be a procedural issue by most Members.

a violation of one or some of these provisions, the panel may decide, for reasons of judicial economy, not to make findings with respect to the claims of violation of other provisions. However, if the panel report is appealed and the Appellate Body reverses the panel's findings of violation, the question arises as to what the Appellate Body can do with regard to the claims of violation which the panel, in its exercise of judicial economy, did not address. A similar question arises in cases in which a panel concludes that a provision or provisions of WTO law (e.g. the TBT Agreement) is not applicable in the case at hand but in which, on appeal of this finding of inapplicability, the Appellate Body comes to the opposite conclusion. In many other judicial systems, the appeals court would in similar situations 'remand' the case to the first instance judge. However, the DSU does not provide for the possibility of 'remand' to panels. In the absence of a remand authority, the Appellate Body is left with two options:

- either to leave the dispute unresolved, or
- to go on to 'complete the legal analysis'.

In *Canada – Periodicals*, the Appellate Body stated that “the Appellate Body *can, and should,* complete the analysis of Article III:2 of the GATT 1994 in this case by examining the measure with reference to its consistency with the second sentence of Article III:2, *provided that there is a sufficient basis in the Panel Report to allow us to do so.*”¹¹⁵ (emphasis added) In the circumstances of that case, the Appellate Body considered that it would be ‘remiss in not completing the analysis of Article III:2’.¹¹⁶ However, the Appellate Body has ‘completed the legal analysis’ only in cases in which there were sufficient factual findings in the panel report or undisputed facts in the panel record to enable it to carry out the legal analysis.¹¹⁷ In practice, the Appellate Body has often found it impossible to ‘complete the legal analysis’ due to insufficient factual findings in the panel report or a lack of undisputed facts in the panel record. In addition, the Appellate Body has also declined to complete the legal analysis because of the novel character of the claims which the Panel did not address. Claims are ‘novel’ when they concern issues which have not yet been dealt with in the WTO case law. In *EC – Asbestos*, the Appellate Body stated that ‘in light of their novel character, we consider that Canada's claims under the TBT Agreement have not been explored before us in depth. As the Panel did not address these claims, there are no “issues of law” or “legal interpretations” regarding them to be analyzed by the parties, and reviewed by us under Article 17.6 of the DSU. We also observe

¹¹⁵ Appellate Body Report, *Canada – Periodicals*, 469.

¹¹⁶ *Ibid.*

¹¹⁷ Appellate Body Report, *Australia – Salmon*, para. 118.

that the sufficiency of the facts on the record depends on the reach of the provisions of the TBT Agreement claimed to apply – a reach that has yet to be determined.’¹¹⁸

Some authors have strongly argued against the practice of ‘completing the legal analysis’. First of all it is difficult to argue that this practice is within the mandate of Article 17.13 of the DSU to uphold, modify or reverse panel findings, as there are no findings by the panel. Second, by dealing with an issue not dealt with by a panel, the Appellate Body deprives parties of their right of appeal provided for in the DSU.¹¹⁹ Other authors have defended the Appellate Body’s practice of ‘completing of the legal analysis’ and have argued that in cases such as *US – Shrimp* and *EC – Hormones* this practice has contributed to the credibility of the WTO dispute settlement system.¹²⁰ It is argued that, until the DSU is amended to address the problem of the absence of remand power, the Appellate Body’s practice of completing the legal analysis is preferred to leaving disputes unresolved.¹²¹ The Appellate Body had to make, and has made, a choice for the lesser of two evils.

While the Appellate Body has in a number of instances been willing to complete the legal analysis and act as a first instance court, in many other instances the Appellate Body has shown great restraint not to go further than needed in the particular case. The Appellate Body has made a significant, albeit not always successful, effort to avoid ‘obiter dicta’. In fact, it has occasionally been criticized for not ‘taking the extra step’ to clarify the law and thus perhaps avoid related disputes in the future. The Appellate Body was, and is, well advised to show such restraint.¹²²

A final observation with respect to the manner in which the Appellate Body has made use of its authority of appellate review relates to the fact that in only *two* reports to date an Appellate Body Member made use of the possibility, provided for in Article 17.11 of the DSU, to express

¹¹⁸ Appellate Body Report, *EC – Asbestos*, para. 82.

¹¹⁹ See, e.g., J. Bourgeois, ‘Some Reflections on the WTO Dispute Settlement System from a Practitioner’s Perspective’ (2001) 4 *Journal of International Economic Law*, 152; and E. Vermulst, P. Mavroidis and P. Waer, ‘The Functioning of the Appellate Body after Four Years: Towards Rule Integrity’ (1999) 33 *Journal of World Trade*, 6-7.

¹²⁰ See, e.g., Viji Rangaswami, ‘Operation of the Appellate Process and Functions, Including the Appellate Body’ (2000) 31 *Law and Policy in International Business*, 704.

¹²¹ *Ibid.*

¹²² The Appellate Body has of course not always shown restraint. In *EC – Asbestos*, for example, it could have chosen not to rule on the Panel’s findings on Article XX of the GATT 1994 after it had reserved the Panel’s finding of inconsistency with Article III:4 of the GATT 1994. As the Appellate Body found that the measure at issue in *EC – Asbestos* was not GATT-inconsistent, there was no real need to review the Panel’s findings on the justification under Article XX of the measure at issue. Nevertheless, the Appellate Body did take this opportunity to further clarify Article XX. See Appellate Body Report, *EC – Asbestos*, paras. 155-175.

an individual opinion in the report. The report in *EC – Asbestos* (with a separate opinion reflecting a fundamental difference in opinion on a central issue in that case) as well as the very recent report in *US - Cotton* are thus far the only reports in which the three Members of the division were unable to show a united front. There have undoubtedly been other cases in which not all three Members were in full agreement with the reasoning in the report, but the Appellate Body manifestly realized that (frequent) recourse to separate opinions would undermine the authority of its case law.

3.6 Case law of the Appellate Body

The last but arguably most important factor in the rise to prominence of the Appellate Body has been its case law, and in particular the case law balancing free trade and other societal values and interests and the case law ensuring the fairness and effectiveness of the WTO dispute settlement system.

In general, the case law of the Appellate Body carefully balances free trade with other societal values, such as public health, the environment, or consumer protection. This balance is of course primarily set out in numerous provisions of the WTO agreements but the Appellate Body has clarified this delicate balance and applied it in specific cases. Over the last nine years, the Appellate Body has not been the ‘champion’ of free trade. True to the common intentions of the WTO Members, the Appellate Body – when called upon to interpret and apply provisions of, for example, the GATT 1994, the SPS Agreement or the TBT Agreement – balances free trade with other societal values and interests and leaves Members the largest degree of discretion possible to take measures for the protection and promotion of these societal values and interests. An excellent example of this is the Appellate Body’s approach to the General Exceptions of Article XX of the GATT 1994. While it could be argued that it is an accepted principle of interpretation that exceptions are to be construed narrowly (*singularia non sunt extendenda*) and that Article XX should, therefore, be construed narrowly, the Appellate Body has not adopted this approach. Instead, it has advocated in *US – Gasoline* and *US – Shrimp* a kind of balancing between the general rule and the exception. It stated, with regard to Article XX(g), the exception at issue in these cases:

The context of Article XX(g) includes the provisions of the rest of the General Agreement, including in particular Articles I, III and XI; conversely, the context of

Articles I and III and XI includes Article XX. Accordingly, the phrase “relating to the conservation of exhaustible natural resources” may not be read so expansively as seriously to subvert the purpose and object of Article III:4. Nor may Article III:4 be given so broad a reach as effectively to emasculate Article XX(g) and the policies and interests it embodies. The relationship between the affirmative commitments set out in, *e.g.*, Articles I, III and XI, and the policies and interests embodied in the “General Exceptions” listed in Article XX, can be given meaning within the framework of the General Agreement and its object and purpose by a treaty interpreter only on a case-to-case basis, by careful scrutiny of the factual and legal context in a given dispute, without disregarding the words actually used by the WTO Members themselves to express their intent and purpose.¹²³

Clearly, therefore, the Appellate Body considers a *narrow* interpretation of the exceptions of Article XX, *i.e.*, the exceptions allowing for, *inter alia*, trade-restrictive measures to protect public health or the environment to be inappropriate. The Appellate Body advocates a *balance* between trade liberalisation and other societal values. With respect to the interpretation and application of the all-important chapeau of Article XX of the GATT 1994, the Appellate Body ruled in *US – Shrimp*:

The task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (*e.g.*, Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement. The location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ.¹²⁴

In short, the interpretation and application of the chapeau in a particular case is a search for the appropriate *line of equilibrium* between the right of Members to adopt and maintain trade-restrictive legislation and measures that pursue certain legitimate societal values or interests *and* the right of other Members to trade.

¹²³ Appellate Body Report, *US – Gasoline*, 18.

¹²⁴ *Ibid.*, para. 159.

In a number of reports, the Appellate Body has explained, in straightforward language, the scope for Members to enact trade-restrictive legislation and measures that pursue certain legitimate societal values or interests. In *US – Shrimp*, for example, the Appellate Body concluded with the following observation:

In reaching these conclusions, we wish to underscore what we have *not* decided in this appeal. We have *not* decided that the protection and preservation of the environment is of no significance to the Members of the WTO. Clearly, it is. We have *not* decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should. And we have *not* decided that sovereign states should not act together bilaterally, plurilaterally or multilaterally, either within the WTO or in other international fora, to protect endangered species or to otherwise protect the environment. Clearly, they should and do.

What we *have* decided in this appeal is simply this: although the measure of the United States in dispute in this appeal serves an environmental objective that is recognized as legitimate under paragraph (g) of Article XX of the GATT 1994, this measure has been applied by the United States in a manner which constitutes arbitrary and unjustifiable discrimination between Members of the WTO, contrary to the requirements of the chapeau of Article XX. For all of the specific reasons outlined in this Report, this measure does not qualify for the exemption that Article XX of the GATT 1994 affords to measures which serve certain recognized, legitimate environmental purposes but which, at the same time, are not applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade. As we emphasized in *United States – Gasoline*, WTO Members are free to adopt their own policies aimed at protecting the environment as long as, in so doing, they fulfill their obligations and respect the rights of other Members under the WTO Agreement.¹²⁵

Over the years, the Appellate Body has shown itself to be quite balanced in its approach to the inevitable conflicts between trade liberalisation and other societal values and interests. Directly

¹²⁵ Appellate Body Report, *US – Shrimp*, paras. 185 and 186. See also Appellate Body Report, *US – Gasoline*, 29-30.

linked to this the Appellate Body has also been rather respectful of the sovereignty of WTO Members and their right to pursue the protection and promotion of these other values and interests. In 1995, Richard Shell wrote that ‘it ... seems likely that when domestic political realities make it difficult or impossible for the leading states in the world trade system to take the risk of championing a particular free trade reform, the WTO Appellate Body may step into the role of an advocate for the free trade agenda’.¹²⁶ This did *not* happen. The Appellate Body never was, and also currently is not, a ‘devotee’ of the free trade cause. As is reflected in its case law, the Appellate Body is a promoter of the *balance* between free trade and other societal values set out in the WTO agreements. The eminent status of the Appellate Body and its case law is to a large extent due to the fact that the Appellate Body has struck this balance correctly or is generally seen as genuinely trying to strike the correct balance.

Finally, the Appellate Body also gained significant stature as a result of its case law ensuring the fairness and effectiveness of the WTO dispute settlement system. The agreement on the rules and procedures of WTO dispute settlement reached by the Uruguay Round negotiators and reflected in the DSU was undoubtedly a very significant achievement. However, when the WTO dispute settlement system was put in operation, it soon became clear that there were important gaps in the rules and procedures of WTO dispute settlement. As from the first disputes brought to Geneva for resolution onwards, panels and the Appellate Body confronted with these gaps in the system. The rulings of the Appellate Body on issues such as burden of proof, judicial economy, the use of experts, the submission and admission of evidence, standard of review, terms of reference, (extended) third party rights, good faith in dispute settlement proceedings, and representation by private counsel, have made an important contribution to the fair and effective functioning of the WTO dispute settlement system. These rulings have ‘completed’ the dispute settlement system and have made it into the system as we now know it.

An excellent example of this are the rulings of the Appellate Body on representation by private counsel in Appellate Body hearings and panel meetings. The DSU does not address the issue of representation of the parties before the Appellate Body or panels. In *EC – Bananas III*, the issue arose whether private counsel, not employed by government, may represent a party or third party (such as Saint Lucia) before the Appellate Body. In its ruling, the Appellate Body noted that nothing in the WTO Agreement or the DSU, nor in customary international law or

¹²⁶ R. Shell, ‘Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization’ (1995) 44 *Duke Law Journal*, 906.

the prevailing practice of international tribunals, prevents a WTO Member from determining for itself the composition of its delegation in WTO dispute settlement proceedings.¹²⁷ A party can, therefore, decide that private counsel forms part of its delegation and will represent it in WTO dispute settlement proceedings. While the ruling of the Appellate Body concerned the proceedings before this body, the reasoning of this ruling is equally relevant for panel proceedings. This was confirmed in the Panel Report in *Indonesia – Autos*, adopted one year after the Appellate Body Report in *EC – Bananas III*.¹²⁸ Private counsel now routinely appear in panel as well as Appellate Body proceedings as part of the delegation of a party or third party. As the Appellate Body noted in *EC – Bananas III* ‘representation by counsel of a government’s own choice may well be a matter of particular significance -- especially for developing country Members -- to enable them to participate fully in dispute settlement proceedings.’¹²⁹

Another, perhaps less well-known example of Appellate Body case law that contributed to the fairness and effectiveness of the dispute settlement system, is its ruling in *US – FSC* on the obligation in Article 3.10 to use the dispute settlement system in good faith. Generally speaking, the parties to a dispute enjoy a high degree of discretion to argue before panels in the manner they deem appropriate. The Appellate Body ruled, however, that this discretion, however, does not detract from the parties’ obligation under the DSU to engage in dispute settlement proceedings ‘in good faith in an effort to resolve the dispute’.¹³⁰ Both complaining and responding parties must comply with the requirements of the DSU in good faith. In *US – FSC*, the Appellate Body held:

By good faith compliance, complaining Members accord to the responding Members the full measure of protection and opportunity to defend, contemplated by the letter and spirit of the procedural rules. The same principle of good faith requires that responding Members seasonably and promptly bring claimed procedural deficiencies to the attention of the complaining Member, and to the DSB or the Panel, so that corrections, if needed, can be made to resolve disputes. The procedural rules of WTO dispute settlement are designed to promote, not the

¹²⁷ Appellate Body Report, *EC – Bananas III*, para. 10.

¹²⁸ Panel Report, *Indonesia – Autos*, para. 14.1.

¹²⁹ Appellate Body Report, *EC – Bananas III*, para. 12.

¹³⁰ Article 3.10 of the DSU.

development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes.¹³¹

WTO Members have of course not all or always agreed with the Appellate Body's rulings on 'procedural' matters in particular cases. However, with the obvious exception of the rulings on the issue of *amicus curiae* briefs, this case law has found general acceptance. WTO Members appreciate the importance of the contribution of this case law to the proper functioning of the WTO dispute settlement system.

4. Conclusion

The Appellate Body was not conceived by the Uruguay Round negotiators as the centerpiece of the WTO dispute settlement system. It was more an afterthought, linked to the introduction of the quasi-automatic adoption of panel reports under the new dispute settlement system. In little time, however, the Appellate Body grew into the most important and authoritative organ of WTO dispute settlement. The Appellate Body is now, in all but name, the World Trade Court. The significance of its contribution to the development of international trade law is generally recognized. The factors that have contributed to its rise to prominence over the last decade are multiple and often closely related. They include the first and subsequent compositions of the Appellate Body; the Working Procedures for Appellate Review; the early embracement and consistent application of the rules of interpretation of the Vienna Convention; the frequent and broad recourse to appellate review; the manner in which the Appellate Body used its authority of appellate review; and, finally, the case law of the Appellate Body to date, and in particular the case law balancing free trade and other societal values and the case law ensuring the fairness and effectiveness of the WTO dispute settlement system. It is important to identify and correctly appreciate these factors because the Appellate Body will retain its current status and role in the world trading system only to the extent that these factors continue to be sufficiently present.

¹³¹ Appellate Body Report, US – FSC, para. 166. See also Appellate Body Report, *US – Lamb*, para.115.

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