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A NEW WORLD COURT? DISPUTE SETTLEMENT IN THE WTO AND THE FIRST DECISION OF THE APPELLATE BODY

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ABSTRACT

The new dispute settlement system of the World Trade Organisation is considered to be one of the greatest achievements of the Uruguay Round of multi-lateral trade negotiations. The new procedures are a radical departure from the previous system and have the potential to address many of the shortfalls which have been present in the system to date. For the first time since its creation, the multi-lateral trading system has an explicitly rule-oriented dispute settlement system, which is both comprehensive and compulsory, and is binding on the parties to the dispute.

This paper examines the new WTO dispute settlement system, and its most important innovation, the Appellate Body. It considers the extent to which the new system and the Appellate Body appear to be standing up to the rigours of practice. Criteria are proposed against which the effectiveness of the Appellate Body might appropriately be judged.

To this end the paper examines the specific rules of procedure adopted by the Appellate Body and the Appellate Body's first decision, *United States — Standards for Reformulated and Conventional Gasoline*, released in April 1996. The Appellate Body's approach to this case, which raised complex factual, legal and political issues, and which revealed the soundness of many of the procedures it had adopted, is examined in detail. The conclusion is reached that the Appellate Body has in its first year performed well on many levels and that both the Appellate Body and the WTO dispute settlement processes are in robust health.

The text of this paper (excluding contents page, footnotes, bibliography and annexures) comprises approximately 16000 words.

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I INTRODUCTION

This year marked the 50th year of the operation of the International Court of Justice, the elder statesman of the international dispute settlement family. This important event was commemorated with colloquia at the Peace Palace in The Hague and around the world. However, while the champagne glasses were clinking at the anniversary celebrations in Hague and the good health of the Court was being toasted, elsewhere a less marked — but equally important — event was taking place.

In Geneva, there was a newcomer on the international dispute settlement scene: the Appellate Body of the World Trade Organisation. This body, still in its infancy, was taking its first important steps. While outwardly this appellate tribunal may lack the nobility and prestige of the "World Court" — with its imposing seat in the Peace Palace in The Hague, its fifteen robed Judges from all the "main forms of civilisation"[1] and its apparently unlimited jurisdiction to rule over all aspects of international law — it has nonetheless the potential to be of very significant consequence and influence.

The Appellate Body of the World Trade Organisation, despite its humble and pedestrian name, is in a practical sense the "World Court" of trade disputes. This newly formed body sits at the top of a dispute settlement system that has been greatly enhanced and strengthened by the reforms of the Uruguay Round and now provides compulsory, binding dispute settlement for the 123[2] member states of the World Trade Organisation. The matters that fall within its jurisdiction, while limited to the agreements covered by the World Trade Organisation, have the potential to touch the lives of billions of traders and consumers around the world. Cases coming before the Appellate Body are likely to involve far-reaching and controversial issues such as

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1 Statute of the International Court of Justice, Article 9.

2 Membership of the WTO as at 12 July 1996. The WTO, established by the Agreement Establishing the World Trade Organization, became operative on 1 January 1995.

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protection of the environment and the promotion of human health, the policing of intellectual property rules, and the balance of obligations between the developed and developing countries within the multi-lateral trading system.

Since its inception in 1947, the dispute settlement process in the multi-lateral trading system has evolved from a consensus-based political process to a binding and comprehensive system of adjudication. The introduction of an expert appellate tribunal to authoritatively decide issues of law and legal interpretations arising from the WTO agreements marks the crucial final step in this process of evolution. While this new body is currently in its infancy, it has the potential to build up an authoritative body of decisions that will reinforce the legal obligations members owe to one another and influence their future actions, thereby enhancing the security and predicability of the multilateral trading system. In addition the new WTO dispute settlement system may also provide a useful model for international dispute settlement generally. As such it is worthy of attention not just from those who have historically followed the GATT, but also from public international lawyers in general and all those interested in improving the effectiveness of international dispute settlement processes.

This paper attempts to place the new WTO dispute settlement system in the context of international dispute settlement procedures in general and considers the extent to which the new system and the Appellate Body appear to be standing up to the rigours of practice. To this end the paper examines the Appellate Body's first year of operation and focuses on its first case, *United States — Standards for Reformulated and Conventional Gasoline* ("the *Reformulated Gasoline* case").

The first section of the paper describes the new WTO dispute settlement procedures set out in the Understanding on Rules and Procedures Governing the Settlement of Disputes and explains the role of the Appellate Body in the new process. It identifies the ways in which the new procedures represent a departure from the history of

dispute settlement in the multi-lateral trading system and remarks on the aspects of the new system which are innovative in terms of dispute settlement generally.

The challenges that will confront the Appellate Body in its first years are acknowledged. The new dispute settlement system is a decisive step forward but whether it will deliver the intended benefits will depend to a large degree on the authority and prestige of the Appellate Body and the calibre of its decisions. The final part of the first section puts forward suggested criteria against which the success of the Appellate Body over the next few years might appropriately be judged.

The second section looks at the establishment of the first Appellate Body. The selection and appointment and procedures are described, and the seven individuals selected to make up the first Appellate Body are listed. The paper then turns to consider the Rules of Procedure which were adopted by the Appellate Body earlier this year in preparation for the first case on appeal.

The third and main section of the paper examines the Appellate Body's first decision, the *Reformulated Gasoline* case. This appeal, filed by the United States in February of this year, was the first case under the new system to reach the Appellate Body. The decision was issued at the end of April and became publicly available shortly afterwards. As the pleadings and hearings remain confidential this first decision provides the first opportunity to assess whether the new system is fulfilling its promise. The case, which involved some difficult issues of interpretation and raised the issue of the compatibility of environmental measures with the WTO, posed a real challenge to the Appellate Body.

This section sets out the background to the case and the issues raised in the appeal. It summarises the Appellate Body's decision and analyses the decision both in terms of its content and in terms of how the Appellate Body has approached its broader task, drawing conclusion on the extent to which the Appellate Body appears to be meeting

the challenges presented to it. The conclusion is reached that, as we approach the end of the Appellate Body's first year, it and the dispute settlement process, are in robust health.

II THE NEW WTO DISPUTE SETTLEMENT SYSTEM

The multilateral trading system has undergone a gradual process of "legalisation" over its nearly fifty years of operation — from the shaky institutional and legal beginnings of the GATT[3] as the surviving aspect of the failed International Trading Organization (ITO) to the current situation where the system is underpinned by some 400 pages of legal agreements and an international organisation. This shift of emphasis from a system governed by political and diplomatic forces to one bound by rules and law has been identified as one of the significant successes of the GATT.[4]

The "legalisation" of the GATT has been matched by a "judicialisation" of GATT dispute settlement procedures. What began as a consensus-based process, in which the resolution of disputes was dependent on the political will of the parties and the pressures brought to bear by the rest of the members, has become a comprehensive and binding system in which the final decisions are made by an independent legal tribunal. While to some degree this process of judicialisation has been incremental and can be observed over most of the history of the GATT, the recent reforms which came out of the Uruguay Round of negotiations clearly constitute the most dramatic shift in this direction.

This part of the paper is intended to provide an introduction to new WTO dispute settlement procedures. It briefly outlines the history of GATT dispute settlement

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3 In this paper the term GATT is used to refer in a general manner to the system formed by the General Agreement on Trade and Tariffs 1947 and associated agreements and documents.

4 One commentator has stated, "The progressive transformation of traditional 'power-oriented' trade, monetary and other international policies into 'rule-oriented' policies constitutes one of the most important achievements of international law and policy since World War II." E Petersmann"The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System since 1948" (1994) 31 CML Rev 1157.

since its inception in 1948 until 1994, and identifies the motivations behind the shift to a more judicial process. It then goes on to explain the major aspects of the new procedures contained in the Dispute Settlement Understanding focussing on the key innovation, the introduction of the Appellate Body.

A Background to Dispute Settlement in the WTO

1 Dispute settlement practice and procedures: 1948 – 1994[5]

The provisions in GATT 1947 relating to dispute settlement are fairly minimal. Article XXII of GATT 1947 provided for consultations between contracting parties on "any matter affecting the operation of this Agreement". Where these bilateral consultations did not lead to a satisfactory solution between the parties, there was provision for consultations to take place on a multi-lateral basis amongst the parties to GATT as a whole[6]. Article XXIII provided for the situation where consultations were unsuccessful. If any contracting party considered that it was being deprived of any benefit accruing to it under GATT 1947 or that any objective of the Agreement was being impeded, it could make written representations or proposals to the party (or parties) concerned with a view to achieving a satisfactory adjustment of the matter complained about. Where no satisfactory resolution was found to the problem within a reasonable time, the matter could be referred to the parties as a whole who were empowered to examine the matter and issue rulings and recommendations, and, where the circumstances were serious enough to justify such action, authorise retaliatory suspensions of concessions against the offending party.

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[5] For a comprehensive discussion of GATT dispute settlement procedures during this period, see RE Hudec *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (Butterworth Legal Publishers, Salem, New Hampshire, 1993). For a description of how the procedures operated in practice, see P Pescatore "The GATT Dispute Settlement Mechanism: Its Present Situation and its Prospects" (1993) 10 J Int'l Arb 27-42.

[6] The term "CONTRACTING PARTIES" is used in the GATT system to refer to the parties to the Agreement acting as a whole, GATT 1947 Article XXV:1.

GATT 1947 gave no guidance on how these provisions were to be applied in practice and accordingly procedures evolved through trial and error.[7] Clearly the prospect of that all the parties to GATT as a whole examining disputes and issuing findings was unworkable. As a result the practice emerged by the early fifties of appointing panels of individual GATT delegates to consider cases and provide reports to the GATT Council. The procedures for the establishment and operation of the panels continued to develop on an informal basis during the first few decades of GATT's operation and were codified in a separate document at the end of the Tokyo Round of negotiations in 1979.[8] In addition, the conclusion of the Tokyo Round brought into play a number of specialised "side agreements",[9] each with its own dispute settlement procedures. Further codifications of dispute settlement procedures were added in 1982, 1984 and 1989.

Panels appointed to consider disputes were made up of three (and occasionally five) individuals with expertise in GATT law and policy. They were appointed by the GATT Council on the recommendation of the Director-General. These delegates served on the panels in their individual capacities, rather than as representatives of their member countries. Initially panellists (as well as those presenting cases on behalf of the countries involved) tended to be trade diplomats rather than lawyers but the involvement of lawyers in the panel process increased considerably in the seventies and eighties as GATT became more rule-oriented. A legal office was established at the GATT Secretariat in 1983 to provide, amongst other things, legal assistance to panels.

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7 As Pescatore has observed, "[e]verything in this field had to be created *ex nihilo* by necessity and by experience. This is the weakness but is also the strength of the system, which having been created pragmatically, is very close to practical needs." See Pescatore above n 5.

8 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance and its annex, Agreed Description of Customary Practice and Understanding on Dispute Settlement. 26 BISD 210 (1980).

9 These "side agreements" are known as the MTN Codes.

Panels would request submissions from the parties to a dispute, hold at least two substantive meetings and give interested third parties the opportunity to present views. The panels would then issue reports containing their findings and recommendations which would be submitted to the GATT Council for consideration and adoption. The recommendations of panels varied according to the nature of the complaint. Typically where a complaint had been successful the recommendation would be that the offending party should bring the measures concerned into compliance with GATT obligations.

If the panel's findings and recommendations went against the defending party and the panel's report was adopted by the GATT Council, that party would have a reasonable period of time to come into compliance. What was considered a reasonable period of time varied according to the nature of the measure concerned and what actions were required to bring the measure into compliance. In addition to recommending actions to bring the measure into compliance, the party found to be acting in contravention of GATT obligations would be encouraged to enter into negotiations with the other party with a view to agreeing on temporary compensation pending full implementation of the report.

If the offending party did not bring the measures concerned into compliance within a reasonable time, the complaining party could request authorisation from the GATT Council to retaliate on a temporary basis by withdrawing concessions from the delaying party (ie taking action against that party that would otherwise be illegal under GATT).

The whole dispute settlement process was subject, as were all other major aspects of the GATT's operation, to consensus decision making. There had to be a consensus in the GATT Council at each stage of the process before it could proceed. As the defending party was in each case represented on the GATT Council, this meant that the success of the dispute settlement procedures was *entirely* dependent on the

willingness of defending party to cooperate with the process and accept the outcome of it. Defending parties who did not wish to cooperate were in a position to block or delay the process at each step, including the establishment of the panel, the decisions on the composition and terms of reference for the panel, the adoption of the panel report, and the authorisation of retaliatory action.

2 *Effectiveness of dispute settlement under the GATT*

In fact, while the success of the dispute settlement procedures varied at different periods of the GATT's operation, overall the process worked better than might have been expected. Professor Hudec, who has conducted a statistical analysis of GATT dispute settlement claims from 1948 until the beginning of 1990, concludes that at least 80% of valid complaints were dealt with successfully during this period. Professor Hudec identifies four distinct periods of GATT dispute settlement and makes the following comments about dispute settlement during these periods.[10]

> Professor Hudec describes the fifties as the period of"initial success". From 1948 to the end of 1959, 53 disputes were lodged, of which about 20 went to panel proceedings. Legal rulings at that time were often drafted with "an elusive diplomatic vagueness" but compliance with the rulings was rather high, probably because of the small size of GATT and the high degree of policy cohesion between members.

The 1960s was a low period for dispute settlement, described by Professor Hudec as "the years of decline". During this period, the two major GATT powers, the European Community and the United States took an "anti-legalism" stance and urged a negotiated and diplomatic approach to all conflict — leading to a climate where legal claims were considered "unfriendly actions". The consequence was that, having dealt with 59 claims up to mid 1963, GATT panel proceedings fell out of use completely. No formal legal claims were dealt with from mid-1963 to 1969, and only one very minor claim was made in 1969. Hudec suggests the reason for this change was the need to accommodate the changes in membership which took place in

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[10] See Hudec above n 5, 3-15 and 273-355.

the 1960s (the emergence of the European Community, the three-fold expansion of numbers, and the shift to a membership in which developing countries were in the majority). He comments:[11]

> In retrospect, the 1960s can be seen as a period when GATT more or less suspended its legal system while it tried to sort out, by negotiation, the legal and economic adjustments that were needed to accommodate its new members and its new agenda.

Hudec identifies the 1970s as the period when GATT began to rebuild its legal system (lead by the United States which had abandoned its anti-legalist stance as a result of domestic pressure for stronger enforcement of US trade rights), leading to increased dispute settlement activity. There were 32 new cases taken during the decade, with the numbers and importance of the cases increasing as the decade came to an end.

This increased dispute settlement activity continued during the 1980s in what Hudec describes as "an explosion of activity". One hundred and fifteen legal disputes were filed, of which 47 went to panels. Hudec reports, however, that the cases being taken involved increasingly difficult and sensitive issues, leading to an increased number of failures where governments blocked the creation of panels or the adoption of adverse panel reports.[12] In addition, towards the end of this decade governments made acceptance of a number of other significant panel reports conditional on the successful conclusion of various aspects of the Uruguay Round negotiations.

3 Shortfalls of dispute settlement under the GATT

By the end of the 1980s it was generally accepted that the system had a number of major shortfalls which required remedying. In 1987 one of the main commentators

[11] See Hudec above n 5, 13.

[12] In the case of disputes taken under the Subsidies Code (one of the Tokyo Round MTN Codes) the adoption of the panel report was blocked in all five of the cases brought under its provisions.

on the dispute settlement system, Professor Davey, summarised the principal complaints about the GATT dispute system as follows: (i) disuse, (ii) delays in the establishment of panels, (iii) delays in appointing panel members, (iv) delays in the completion of panels reports, (v) uncertain quality and neutrality of panellists and panel reports, (vi) the tendency of parties to block panel reports and (vii) failure of parties to implement panel reports.[13]

In addition it was felt that the system, derived as it was from a number of different overlapping agreements, was overly fragmented, leading to confusion and "forum shopping". There was also considerable concern that members (most notably the United States) were frequently resorting to unilateral action in preference to going to dispute resolution. Accordingly, a more cohesive, efficient, and authoritative process of dispute settlement was high on the agenda of reforms needed from the Uruguay Round of negotiations.[14]

B The New WTO Procedures and the Appellate Body

1 The major reforms in the Dispute Settlement Understanding

The new dispute settlement system of the WTO is, along with the establishment of the WTO itself and the integration and increased coverage of the WTO agreements, considered to be one of the greatest achievements of the Uruguay Round negotiations. The new procedures are a radical departure from the previous system

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[13] WJ Davey "Dispute Settlement in GATT" (1987) 11 Fordham J Intl L 51, 81-89.

[14] The Ministerial Declaration on the Uruguay Round of 20 September 1986 provided that:

> 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, while recognizing the contribution that would be made by more effective and enforceable GATT rules and disciplines. Negotiations shall include the development of adequate arrangements for overseeing and monitoring of the procedures that would facilitate compliance with adopted recommendations.

33 GATT/BISD 19, 25 (1987).

and have the potential to address many of the shortfalls which have been present in the system to date. The result has been described as a triumph of lawyers over diplomats[15] and is a decisive step in the direction of legalism. For the first time since its creation the multi-lateral trading system has an explicitly rule-oriented dispute settlement system, which is both comprehensive and compulsory, and the outcomes of which are legally binding on the parties to the dispute.

The new dispute settlement procedures are set out in the Dispute Settlement Understanding (the "DSU")[16] which is Annex 2 to the WTO Agreement.

The general aims of the dispute settlement system are set out in Article 3 of the DSU.. While the system contains some major innovations it also builds on existing practice and preserves a degree of continuity. This is evident from Article 3:1 which provides that:[17]

> Members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein.

Article 3:2 identifies the significance of the dispute settlement system to the WTO, stating that it is "a central element in providing security and predictability to the

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[15] See eg, MK Young "Dispute Resolution in the Uruguay Round: Lawyers Triumph over Diplomats" (1995) 29 Int'l Law 335-511. The same theme is picked up in the title of another article by M Montana I Mora "A GATT with Teeth: Law Wins over Politics in the Resolution of International Trade Disputes" (1993) 31 Colum J Transnat'l L 103-80.

[16] The full title of the Dispute Settlement Understanding (DSU) is Understanding of Rules and Procedures Governing the Settlement of Disputes. It is Annex 2 to the Agreement Establishing the World Trade Organisation, 33 ILM 1144. The DSU can be found, along with other dispute settlement provisions and texts in *The WTO Dispute Settlement Procedures: A Collection of the Legal Texts*, (World Trade Organization, Geneva, August 1995).

[17] The continuity of the GATT system as a whole is recognised in Article 16:1 of the WTO Agreement which provides that:

> Except as otherwise provided... the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947.

It would appear that as a consequence of this provision, the existing"case law" in adopted panel reports and other decisions of the CONTRACTING PARTIES will continue to be relevant to disputes under the new procedures.

multilateral trading system". This Article also makes it clear that the process is fundamentally about *legal* rights and obligations. Article 3:2 identifies that the function of the process is to "preserve the *rights and obligations* of Members under the covered agreements, and to clarify the existing provisions of those agreements *in accordance with customary rules of interpretation of public international law*" (emphasis added).[18] The legal nature of the process is also emphasised in Article 3:3 which states that the prompt settlement of disputes is "essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of members".

The DSU sets up an integrated approach to dispute settlement which was lacking under the previous system. Accordingly, the procedures contained in the DSU apply to issues arising under all of the WTO-covered agreements.[19] They are also compulsory for all WTO members. Article 23:1 provides that:

> ...when members seek redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.

The result is that there is no longer an ability to opt out of the dispute settlement process, and "forum shopping", which was identified as a problem under the previous system, should be much reduced. All WTO members are now equally committed and subject to the dispute settlement system.

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[18] The legal nature of the process is also apparent elsewhere in the DSU. Even when requesting consultations members must indicate in the written request what the legal basis of the complaint is, Article 4:4. Requests for the establishment of a panel must include a summary of the legal basis of the complaint "sufficient to present the problem clearly", Article 6:2.

[19] DSU above n 16, Article 1. The agreements covered by the DSU are listed in Appendix 1 of the DSU. Even the four "optional" plurilateral agreements are covered, but only to the extent that each party to these agreements have accepted the procedures. In addition to the general procedures set out in the DSU a number of specific agreements contained within the WTO Agreement contain supplementary provisions regarding dispute settlement, such as the Agreement on Services and the Agreement on Sanitary and Phytosanitary Measures. These "special and additional" rules are identified in Appendix 2 of the DSU.

The increased prominence of dispute settlement is reflected in the fact that the DSU establishes a specialist body, made up of representatives of all WTO Members called the Dispute Settlement Body ("DSB"), to administer the dispute settlement system.[20] This new body has responsibility for establishing panels, adopting panel and appellate reports, maintaining surveillance of implementation of rulings and recommendations, and authorising retaliatory measures in cases of non-implementation of recommendations.

In dramatic contrast to the previous system, the outcomes of the new dispute settlement procedures are binding on the parties and the adoption of panel reports can no longer be blocked. The previous consensus approach is turned on its head with the result that panel reports (or where the panel decision is appealed, the Appellate Body reports) must be adopted by the Dispute Settlement Body unless there is a consensus otherwise.[21] This reverse consensus approach also applies to the authorisation of retaliatory action against the losing party where that party does not bring the measures complained of into compliance within a reasonable time.[22]

The procedural aspects of the dispute settlement procedures have been greatly enhanced. The procedural improvements rely on a two-pronged approach: tight and precise time periods in which the parties must agree on steps to be taken at the various stages of the process, backed up by automatic consequences which move the process along where the parties fail to agree within the prescribed periods. The result

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[20] DSU above n 16, Article 2. This body is made up of representatives of all WTO members who choose to join.

[21] DSU above n 16, Article 16:4. Article 16:4 provides that Panel reports will be adopted within strict time frames unless a party to the dispute notifies the DSB of its intention to appeal or the DSB decides by consensus not to adopt the report. It is hard to envisage circumstances in which a panel/appellate body report would not be adopted by the DSB. A possible situation might be where subsequent events have rendered its adoption inappropriate and all GATT members agree that it should not be adopted. Possibly the use of consensus not to adopt an appellate body report might also be used where the parties reach a compromise resolution after the report is issued but before it is adopted by the GATT Council.

[22] DSU above n 16, Article 22:7.

is that the deadlines for completion of individual steps in the process are expressed as a matter of mere days (10, 20 and 30 being the most common). Further, as an additional precaution, the DSU sets out time periods within which the various major stages of the process must be completed.[23]

2 The introduction of appellate review

The DSU introduces into the dispute settlement system a process of appellate review and establishes a standing appellate tribunal called the Appellate Body to hear appeals from panel cases. The introduction of an independent standing appellate tribunal to authoritatively determine appeals on issues of law covered in a panel report and legal interpretations developed by a panel can be considered the most significant innovation in the new procedures. This change can be seen as a necessary corollary to the shift to a legally binding dispute settlement process.[24]

The establishment of the Appellate Body is provided for in Articles 17-19 of the DSU. The Appellate Body is to be made up of seven members, three of whom will sit on any one case.[25] The members of the Appellate Body are required to be individuals "of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally".[26]

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23 For example, the whole phase from the date of agreement on the composition and terms of reference of a panel to the completion of the panel report should as a general rule not exceed six months (three months in cases of urgency), and in no case should take more than nine months. See DSU above n 16, Article 12:8 and 12:9. See also Article 17:5 which sets out the overall time frame for the Appellate Body phase of the system; Article 20 which sets out the time frame for the period from the establish of a panel (either first instance or appellate) and the consideration by the DSB of the report; and Article 21:4 which sets out the time frame from establishment of the panel until the determination of a reasonable period of time for bringing the measures complained of into compliance.

24 Petersmann above n 4, 1207. If members are to be expected to comply with panel reports there needs to be the opportunity to test panel reports which are considered to be wrong. In addition, it should be noted that because panellists on first instance panels will not necessarily be legally trained, a legal review process is desirable to ensure that an authoritative body of interpretations is built up. Hopefully the fact that a decision has been subject to an independent legal review will also be helpful to governments in dealing with domestic pressures to ignore panel reports.

25 DSU above n 16, Article 17:1.

26 DSU above n 16, Article 17:3.

Membership of the Appellate Body as a whole is to be "broadly representative of membership in the WTO".

Appeals are to be limited to issues of law covered in the panel report and legal interpretations of the panel.[27] Only parties to a dispute (not third parties) may appeal against panel reports. Third parties can however make submissions to the Appellate Body and be given an opportunity to be heard.[28] The Appellate Body may uphold, modify, or reverse the legal findings and conclusions of the panel.[29] Appellate Body reports must be adopted by the DSB and *unconditionally accepted* by the parties unless the DSB decides otherwise by consensus.[30]

Like other aspects of the new system the proceedings of the Appellate Body are subject to strict time constraints. The DSU provides that as a general rule the proceedings are not to exceed 60 days from notification of the decision to appeal to the circulation of the Appellate Body's final report. If the Appellate Body is unable to comply with this time frame it must inform the DSB in writing and provide reasons and an indication of when the report will be available. Even where further time is sought there are tight limits on the time available. The DSU provides that in no case can the proceeding take longer than 90 days from start to finish.[31]

The Appellate Body is subject to the same requirements of confidentiality as other parts of the dispute settlement system.[32] Hearings of the Appellate Body are closed to all but the parties[33] and the submissions of the parties to the Appellate Body are confidential documents.[34] While parties to proceedings are not precluded from

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[27] DSU above n 16, Article 17:6.
[28] DSU above n 16, Article 17:4.
[29] DSU above n 16, Article 17:13.
[30] DSU above n 16, Article 17:14.
[31] DSU above n 16, Article 17:5.
[32] The WTO panels and the meetings of the DSB are also confidential.
[33] The DSU specifically provides that "the proceedings of the Appellate Body shall be confidential": DSU above n 16, Article 17:10.
[34] DSU above n 16, Article 18:2.

disclosing statements of their own position, they are required to make sure that in doing so they do not release material considered to be confidential by other parties to the dispute. The only requirements to release information are contained in Article 18:2. A party is required to provide a non-confidential summary of the information contained in written submission presented to the Appellate Body on the request of any other member of the DSB.

While there is no doubt that attaining agreement on far reaching reforms to the dispute settlement process was one of the great achievements of the Uruguay Round, the new procedures are still in their infancy and whether they will fulfil their promise remains to be seen. The shift from a negotiation-oriented process to a legally-oriented process requires a change in mindset from all the participants in the process if it is to work. Whether the participants in the multilateral trading system will successfully make this transition will become apparent over the next few years. The first few cases to reach the Appellate Body will be critical.

It is generally accepted that the key to the future of the WTO dispute settlement process is in the hands of the Appellate Body. The current Director-General of the WTO has described the Appellate Body as "the guardians of the WTO dispute settlement system".[35] As one observer has noted, "the whole concept [the new dispute settlement process] may well stand or fall on the skill and prestige of the first generation of members of the Appellate Body."[36] Some commentators take the point even further and consider that the performance of the Appellate Body is crucial to the success and ongoing survival of the WTO and the multilateral trading system.[37]

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[35] WTO Press Release *Information and Media Relations Division of the World Trade Organisation*, Geneva, Switzerland, 13 December 1995, no 37, Internet information site: http://www.inicc.org/wto.

[36] AF Lowenfield. "Remedies along with Rights: Institutional Reform in the New GATT" (1994) 88 AJIL 477, 485.

[37] See eg the WTO document entitled "Establishment of the Appellate Body" which contains the recommendations of the Preparatory Committee for the WTO and which states "[t]he 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." WT/DSB/1 adopted by the Dispute Settlement Body on 19 June 1995.

These predictions about the significance of the Appellate Body's role raise two questions: how well equipped is the Appellate Body to discharge its responsibilities and how should its performance be measured?

C *Assessment of the Institutional Strengths of the Appellate Body*

In attempting to assess how well equipped the Appellate Body is to discharge its responsibilities, it is interesting to compare the Appellate Body — its jurisdiction and authority, its composition and membership requirements, and its jurisprudential and procedural framework — with other international dispute settlement bodies. On the whole, such an analysis leads one to the conclusion that Appellate Body is well served by the Dispute Settlement Understanding, its founding document. While there are some areas were WTO members might have provided more guidance and direction, the Appellate Body appears to be well placed to meet the expectations held of it.

1 *Jurisdiction and authority*

One of the Appellate Body's greatest strengths is its comprehensive and compulsory jurisdiction. This has the result that all members of the WTO are equally committed to and subject to the dispute settlement process and that accordingly the Appellate Body's central role in the dispute settlement process is guaranteed.

Compulsory jurisdiction (the norm in the domestic context) is still relatively unusual in international dispute settlement. While states agree on the need for effective dispute settlement processes in a range of areas, there is a natural tension between this aim and the desire to preserve sovereignty and the ability to act unilaterally. That the WTO members were able to agree on such comprehensive binding measures is probably at least partly a reflection of the gradual evolution of dispute settlement

processes under the GATT[38] and an indication of its overall success, whatever its shortcomings.

In this respect the Appellate Body can be contrasted with other international bodies exercising a dispute settlement role, such as the International Court of Justice and the Human Rights Committee established under the International Covenant on Civil and Political Rights ("ICCPR"). Many states do not accept the compulsory jurisdiction of the ICJ, including four of the five states with permanent representation on the Court.[39] The complaints procedure established under Optional Protocol to the ICCPR is by it very title optional with the result that those countries who do accept the Optional Protocol have their compliance with the Covenant judged by members of the Human Rights Committee from states who do not. Likewise, although recourse to dispute settlement in general is compulsory under the United Nations Convention on the Law of the Sea, this was able to be achieved only at the cost of an integrated, single system. Accordingly recourse to the specialist tribunal established under the agreement, the International Tribunal on the Law of the Sea ("ITLOS"), is merely one of a number of options available to states.[40]

Another notable feature of the WTO process and the Appellate Body's jurisdiction is in the area of remedies. If the outcomes of a dispute settlement case are not complied with the aggrieved State can approach the DSB for authorisation for retaliatory measures. The fact that recourse to retaliatory measures is actually incorporated into and legitimised by the dispute settlement system is a reflection of the pragmatic nature of the WTO/GATT as a forum. While it must be acknowledged that the

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[38] For a discussion on the different attitudes to dispute settlement in the GATT and the factors that lead to the adoption of binding and compulsory dispute resolution see Young and Montana I Mora, above n 15.

[39] Merrills reports that less than a third of the members of the United Nations have made declarations accepting the compulsory jurisdiction of the Court and that many of these declarations are emasculated by reservations. JG Merrills *International Dispute Settlement* (2ed, Grotius Publications Ltd, Cambridge 1991) Chapter Six.

[40] In addition, also for sovereignty reasons, some aspects of the Law of the Sea Convention are excluded from compulsory dispute settlement. See Merrills above n 39, Chapter Eight.

impact of such retaliatory action will vary from situation to situation, the ability of the DSB to authorise such action, which would otherwise be WTO illegal, provides an additional level of response to that generally available in judicially-oriented international dispute settlement processes.[41]

2 Composition and membership requirements

It is suggested that the Appellate Body's task will be greatly facilitated by its composition and membership requirements. The small size of the Appellate Body (seven members of which three sit on a given appeal)[42] is a marked contrast to other international dispute settlement bodies.[43] It is suggested that the smaller Appellate Body is likely to have two main advantages over the larger bodies which are more common in international dispute settlement.

Firstly, its proceedings should be more efficient and effective. Larger bodies tend to be unwieldy and require lengthy periods to produce decisions.[44] Rather than improving the quality of decision the large membership tends to lend itself to a "lowest common denominator approach" with the result that decisions are not always very elucidating.[45]

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41 The DSU does not, however, go so far as to provide for the authorisation of concerted action against the offending party in the manner of the United Nations Security Council. Some commentators have suggested that this would have been desirable. See eg Young above n 15.

42 The small size of the Appellate Body is likely to be a logical development of the practice under the previous system of appointing panels of three (or occasionally five).

43 The International Court of Justice has 15 Judges, the International Tribunal on the Law of the Sea will have 21 members, and the Human Rights Committee has 18.

44 In an unpublished paper prepared for the Colloquium to celebrate the 50th anniversary of the International Court of Justice held at the High Court of Australia in Canberra on 18 May 1996, Judge Weeramantry acknowledges the length of time required for the completion of cases. He indicates that this is largely as a result of the lengthy consultation required in order to reach agreement on the text of the majority decision and of the "Note" system, whereby each judge prepares a "note" (which may be a very lengthy document indeed) setting out his or her views on the law. These notes are presented in turn by each judge to the rest so that all the issues can be fully canvassed and discussed.

45 See above n 44, 6.. Judge Weeramantry acknowledges that:

> The Judgment of the majority tends to be framed in terms of the lowest common denominator of agreement rather that an amplified legal exposition of the governing principles of law. For this reason, the judgment of the majority tends sometimes to be rendered in rather general terms. To a legal scholar,

The second advantage is that a smaller tribunal may be less susceptible to politicisation and may be more able to resist the tendency for members to be seen as representing the interests of particular states or regional groupings than a larger body.

The founding documents of international dispute bodies often encourage these developments by setting out specific requirements for geographical representation. The statute establishing the Law of the Sea Tribunal, for example, specifically requires that there be no fewer than three members from each geographical group established by the United Nations. In other bodies, such as the International Court of Justice, firm practices have evolved to ensure permanent representation from the permanent members of the Security Council and to reserve a certain number of seats to each United Nations geographical group.

The DSU does not set up any specific requirement for representation based on geographical, political, or economic considerations. The only requirement that is not related to the quality of the individual candidates is the provision that Appellate Body membership shall be "broadly representative of membership in the WTO". While it could be envisaged that such a requirement could develop into a more rigid pattern along the lines of UN bodies, the small size of the Appellate Body is likely to preclude, or a least hinder any such developments as there will not be enough positions available to support such an approach easily.

3 *Jurisprudential and procedural issues*

The DSU provides minimal guidance to the Appellate Body on jurisprudential and procedural issues and as a result the Appellate Body will need to find its own path in

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they may sometimes appear to be lacking in depth, for the circumstances prevent that full exposition of the law or facts which is possible with a small bench....

these areas.[46] Ultimately this lack of direction in the DSU may prove helpful, as the Appellate Body will be able to develop its practice in these areas in a gradual fashion in accordance with the needs of the system.

In practice the Appellate Body will have a range of jurisprudential issues to deal with including approaches to interpretation, relevance of traditional international law adjudicatory techniques, scope of appeals, appropriate grounds of appeal, burden of proof and whether and in what circumstances cases should be remitted to the panel.[47] The DSU provides only very minimal guidance and accordingly the Appellate Body will be left to grapple with these issues, either explicitly or tacitly. Given the unusual nature of appellate review in international dispute settlement processes,[48] the Appellate Body may need to rely on the practice and experience of domestic courts for precedent and guidance in this area.

In the area of procedure little direction is given beyond the provisions setting out the time frames for the various stages of the process.[49] They require that the proceedings of the Appellate Body are kept confidential,[50] that individual opinions of Appellate Body members are anonymous[51] and that there shall be no ex parte communications

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[46] Possibly this is for the best as it could be argued that it is better the Appellate Body develop these areas itself.

[47] J Waincymer "Reformulated gasoline under reformulated WTO dispute settlement procedures: pulling Pandora out of a chapeau" forthcoming in the Michigan Journal of International Law.

[48] Appellate review is rare in the international system: most international dispute settlement bodies are tribunals of first instance. Examples of international dispute settlement processes which envisage recourse to another tribunal are the procedures under the International Civil Aviation Convention and the International Air Services Transit Agreement 1944, which both provide for an appeal to an ad hoc tribunal or the International Court of Justice. Another example is the ability of the European Court of Human Rights to reconsider the conclusions of the European Commission of Human Rights. See E Lauterpacht *Aspects of the Administration of International Justice* (Grotius Publications Limited, Cambridge, 1991).

[49] DSU above n 16, Article 17:15.

[50] DSU above n 16, Article 17:10 and 18:2.

[51] DSU above n 16, Article 17:10 provides that"opinions expressed in the Appellate Body's report by individuals serving on the Appellate Body shall be anonymous". This provision helps stress the impartiality of the process and to reinforce that members serve in their capacity as individuals not as representatives of their countries of nationality. An interesting comparison can be made with the ICJ where judges are identified individually. ICJ judges are sometimes perceived as being aligned with their countries of nationality and the institution of the *ad hoc* judge can be seen to reinforce

with the Appellate Body.[52] All other aspects of procedure are left to the Appellate Body to determine in its Working Procedures.

The new time limits should mean that the process advances at what can only be considered a swift speed, even when compared with time frames for minor domestic litigation. It will be interesting to see whether in practice they are workable in view of the time for reflection and discussion which may be needed at appellate level. The effect of the provisions is that the Appellate Body will in general have no more than a couple of weeks to write its judgment even on matters involving difficult legal issues. There are also likely to be translation requirements which need to be accommodated during this period. It is hard to envisage any other appellate body, domestic or international, being subject to such strict time periods.

The confidentiality requirements are one aspect which have been and are likely to continue to be controversial. While they may have been justified in the past, the increasingly judicial nature of the process must surely bring this aspect into question. In domestic systems there is a strong presumption that judicial decision making processes — particularly if related to issues of public importance — will be conducted in public and that the pleadings will be public documents. In international law there is also a strong tradition of open hearings and availability of pleadings and other documentation.[53] It is suggested that this is an area of the DSU which may need reviewing.[54]

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this problem. The vast majority of *ad hoc* judges have found in favour of the countries that appoint them.

[52] DSU above n 16, Article 18:1.

[53] The hearings of the International Court of Justice are open to the public and the pleadings are published along with the judgments. Another example is the availability of Crown legal opinions and diplomatic correspondence in publications such as Lord McNair *International Law Opinions* (Cambridge at the University Press, 1956).

[54] A number of commentators have expressed concern at the fact that the panel and Appellate Body processes remain confidential. See eg Young n 15, 406.

So long as the process remains a closed one states in which there is a public expectation that such decisions should be made in public may have difficulty securing sufficient domestic support to implement decisions. This lack of transparency (or "secrecy" as opponents often label it) has drawn considerable adverse comment, particularly from non-government lobbies in the United States and is adding fuel to the "sovereignty" debate in the United States. Currently the United States is committed to improving transparency in this area.[55] It could be argued that WTO dispute settlement cases are likely to involve sensitive commercial information which is not suitable for public release for reasons of commercial secrecy. That may be the case, but this is no justification for the blanket confidentiality provisions which apply at present. The confidentiality of commercial information could be protected on a case by case basis by partial suppression orders on the application of the state party concerned, in a manner similar to the process which applies in domestic courts which deal with commercially sensitive information.

D *Measuring the success of the Appellate Body*

If the Appellate Body is to be successful it must meet two essential requirements. The first is a practical requirement which is likely to be a prerequisite for the Appellate Body's ongoing survival. This is that the Appellate Body must be used and must produce acceptable outcomes which are adopted by the DSB and, at least in the vast majority of cases, are accepted and implemented by the parties to the dispute. The second requirement relates to the Appellate Body's contribution to the dispute settlement system and the WTO as a whole. In order to fulfil the wider aim of forming "a central element in providing security and predicability of the multi-lateral

[55] Press Release, *USTR*, Washington, United States of America, 27 April 1995, ftp:/ftp.ustr.gove/pub/press/releases/1995/04/95-30. The Press Release was made in response to the report of the Advisory Committee on Trade Policy and Negotiations () regarding Dispute Settlement in the World Trade Organisation.

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trade system"[56] the Appellate Body must build up a coherent and authoritative body of decisions which clarify and reinforce the legal obligations in the WTO agreements, thus providing valuable guidance to members and future panels.

It is suggested that the Appellate Body's success in meeting these two key objectives will depend to a large degree on its ability to achieve and balance the following considerations:

1. The need for decisions to clearly written, well reasoned and as transparent and accessible as possible;
2. The need for decisions to contain clear statements of the applicable principles which are correct at international law and provide useful guidance to WTO members and panels;
3. The need to have regard to the principles of fairness and due process in running its proceedings;
4. The need to be judicially cautious to ensure that it does not exceed the scope of its authority and does not "add to or diminish the rights and obligations provided in the covered agreements",[57] while also ensuring that it does not duck difficult issues merely because they are controversial;
5. The need to ensure that its overall approach and interpretation of the WTO agreements is consistent and coherent, while ensuring that individual decisions are correct and appropriate in the particular circumstances; and
6. The need to scrupulously guard the Appellate Body's independent and non-political nature.

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[56] DSU above n 16, Article 3:2.

[57] DSU above n 16, Article 3:2.

III THE ESTABLISHMENT OF THE APPELLATE BODY

A The First Appellate Body

1 Selection and appointment

The DSU provides that "the DSB shall appoint persons to serve on the Appellate Body".[58] The procedure followed was that a selection committee was formed comprising the current Director-General, and the current chairs of the DSB, the Goods Council, the Services Council, the TRIPS Council and the General Council. This Selection Committee sought recommendations from member states, and a list of potential candidates was drawn up containing 32 candidates from 23 countries. From this list the Committee selected a slate of seven members which it considered best met the criteria of the DSU.

It was recognised in advance that reaching agreement on the make-up of the Appellate Body would not be easy.[59] As predicted the negotiations over the selection were protracted with considerable wrangling over the issue of geographical representation. Initially the United States and the European Union sought to argue that they should have two members each, based on their share of world trade. Others argued that this was a ridiculous position as it would leave only 3 seats for the rest of the world. Agreement on the slate was held up for much of 1995. The United States backed down first in October 1995 and the European Union indicated in November 1995 that it would accept the slate under protest, enabling the Director-General of the WTO, Mr Renato Ruggiero, to report, "finally wisdom has triumphed".[60]

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[58] DSU above n 16, Article 17:2.

[59] Montana I Mora n 15, 151.

[60] The wrangle over representation was given fairly extensive coverage in the media. See eg "Appeals Body unsettles WTO" *Financial Times* 30 August 1995; "EU objections slow selection of WTO Trade Appeals Body" *The Journal of Commerce*, Washington, 2 November 1995, 3A; and "EU threaten pact on trade disputes body" *Financial Times*, 1 November 1995.

2 The membership of the Appellate Body

The appointments to the first Appellate Body were announced by the DSB on 29 November 1995. They were:[61]

Mr James Bacchus of the United States
Mr Christopher Beeby of New Zealand
Professor Claus-Dieter Ehlermann of Germany
Dr Said El-Naggar of Egypt
Justice Florentino Feliciano of the Philippines
Mr Julio Lacarte Muro of Uruguay
Professor Mitsuo Matsushita of Japan

The Appellate Body was sworn in at a ceremony in Geneva on 13 December 1995 which was presided over by, the Director-General of the WTO. At the swearing-in ceremony Appellate Body members declared that they would perform their duties "honourably, independently, impartially and conscientiously", "avoid direct or indirect conflicts of interest" and "respect the confidentiality of the proceedings of the Appellate Body". Mr Ruggiero stressed the importance of the independence of the Appellate Body, stating:[62]

> As the highest judicial authority in the WTO dispute system, it is extremely important that the Appellate Body be a completely independent and impartial judicial body, free from all political influence. This is why you have been given an independent secretariat, separate from the Secretariat of the WTO. Maintaining and preserving your independence is absolutely fundamental to the credibility and integrity of the dispute settlement system and the WTO itself.

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61 See Appendix A of this paper for brief biographical notes which were published by the WTO at the time of the Appellate Body's appointment.
62 Above n 35.

B The Development of Rules of Procedure for the Appellate Body

1 The Appellate Body's Working Procedures

The Appellate Body's first task was to draw up its own Working Procedures so as to be ready for its first appeal. These procedures were prepared in consultation with the outgoing and incoming DSB Chairmen and the Director-General of the WTO and were presented to the Chairman of the DSB for distribution to members on 7 February 1996 along with a letter from the Chairman of the Appellate Body. The Working Procedures were adopted by the Appellate Body on 15 February 1996.

The letter from the Appellate Body to the DSB identified the central concerns which the Working Procedures were designed to address. These central concerns were:[63]

> ...the need for vigilance in protecting the basic rights of all parties in our proceedings; the need for rotation in the establishment of divisions along with the advantages of collegiality; the need for independence and impartiality in [the Appellate Body's] decision making; the need for strict adherence to the Rules of Conduct in [the Appellate Body's] endeavours; and the need for constant and conscientious compliance with both the letter and the spirit of the DSU and the other covered agreements of the World Trade Organization in all our efforts to strengthen the multi-lateral trading system.

The letter also stressed that the consultation with the Chairman of the DSU and the Director-General had been:

> ...of the utmost importance in providing us with valuable guidance and advice on the objectives, issues and specific concerns of WTO members in regard to dispute settlement in general and the appellate procedures in particular, thus allowing us to reflect them in the Working Procedures for Appellate Review.

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[63] See 35 ILM 495 for the Working Procedures for Appellate Review (WT/AB/WP/1, 15 February 1996) and the letter from the Chairman of Appellate Body to the Chairman of the Dispute Settlement Body of 7 February 1996.

The Director of the Appellate Body Secretariat has commented that "the Working Procedures are the most comprehensive detailed, and legalistic rules of procedure ever adopted in the GATT/ WTO system".[64] The Working Procedures are significant not just for the procedural rules they contain, but because they provide insights into the Appellate Body's approach to its role in the dispute settlement system. As Debra Steger has identified, an analysis of the Working Procedures demonstrates that the Appellate Body has adopted a judicial approach based on the principles of due process.[65] Particularly noteworthy are the provisions relating to collegiality, rotation of divisions and the rules of conduct for Appellate Body members.

2 Collegiality in decision making

WTO members have taken a particular interest in the issue of collegiality and the Appellate Body's letter notes that it was the subject of a meeting of the DSB which was convened on 1 February 1996 in accordance with the DSB Decision on "Establishment of the Appellate Body" WT/DSB/1. The letter of the Appellate Body stresses that in formulating the provisions relating to collegiality they have considered the matters raised at that meeting as well as additional written and oral comments from individual members. Reading between the lines of the Appellate Body's letter it would appear that this provision may have been the subject of some disagreement amongst members at the DSB meeting.

The issue of collegiality is dealt with in the Working Procedures under a separate heading. Rule 4(1) provides that:

> To ensure consistency and coherence in decision making, and to draw on the individual and collective expertise of the Members, the Members shall convene on a regular basis to discuss matters of policy, practice and procedure.

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[64] DP Steger "WTO Dispute Settlement: the Role of the Appellate Body" unpublished paper presented to the Conference on Dispute Resolution in the World Trade Organization held by Cameron May Conferences in Brussels, 14 June 1996, page 1.

[65] Above n 64.

In addition and more significantly, the Working Procedures provide that in accordance with the aims of consistency and coherence and the maximum use of the expertise of Members, the division responsible for deciding each appeal will "exchange views" with the rest of the Appellate Body before the report is finalised.[66] Possibly anticipating opposition to this provision, the Appellate Body states in its letter that it considers this provision is consistent with the requirement in the DSU that each case will be decided by the division selected to hear it. To avoid any doubt about this the Appellate Body has specifically added Rule 4(4) which provides that the rules on collegiality should not be interpreted as interfering with the division's authority to decide the appeal that has been assigned to it.

3 Rotation of members to sit on appeals

Linked to the provisions on collegiality are the provisions regarding rotation of divisions to hear appeals. The DSU merely provides that three members will serve on any one case and that members shall serve in rotation, specifically leaving the rotation to be determined by the Appellate Body in its working procedures.[67] The Working Procedures contain the rather cryptic formula that:[68]

> The 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.

Rule 6(3) lists in an exhaustive manner the exceptions under which a member so selected will not serve. These are limited to situations involving specific conflicts of interest, ill health or similar personal reasons, and resignation. What is significant about this is that members will serve regardless of whether or not one of the parties is

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[66] In practice this will involve all seven of the Appellate Body members meeting in Geneva during the deliberation phase on an appeal. See above n 64, 2.

[67] DSU above n 16, Article 17:2.

[68] Working Procedures above n 63, Rule 6:2.

their country of nationality.[69] The letter of the Appellate Body makes this point clear:

> The Appellate Body is of the view that to deal with the issue of nationality in any other way would be unnecessary and undesirable: unnecessary in view of the qualifications required for membership in the Appellate Body; undesirable as casting doubts on the capacity of members of the Appellate Body for independence and impartiality in decision making.

The letter also comments on the practical considerations that are relevant: "distortions" in the work of the Appellate Body which would be caused by the need for some members to frequently stand aside and potential difficulties in finding a division at all where multiple parties were involved.

4 Rules of Conduct for Appellate Body members

The Working Procedures also contain provisions regarding the conduct of Appellate Body members (Rules 8-11). It appears that it is proposed that the DSB will adopt Rules of Conduct applicable specifically to the Appellate Body, as Rule 8 provides that until this happens the *Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes*[70] will, in so far as they are applicable, apply to the Appellate Body.

It is interesting, however, to note that the Working Procedures contain some requirements relating to Rules of Conduct which are additional to those in the *Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes* contained in Annex II. These requirements relate to the procedures States most follow if they consider that there has been a material violation of the obligations of independence, impartiality or confidentiality, or the

[69] This is in contrast to the situation that applies to panels operating under the DSU. Citizens of Members whose governments are party to the dispute (or third parties) are not, as a general rule, able to serve on the panel concerned unless the parties agree otherwise. See above n 64.

[70] These Rules are attached to the Working Procedures (above n 63) as Annex II. Upon approval by the DSB of Rules of Conduct for the Appellate Body, such rules will automatically become part of the Working Procedures and will supersede Annex II.

requirements regarding avoidance of conflicts of interests on the part of the Appellate Body.

For example, Annex II provides in VII:1 that the state should submit such evidence to the Appellate Body, the Chair of the DSB or the Director-General in a written statement specifying the facts and circumstances. This should take place at the "earliest time possible" or if this is not done the statement should be accompanied by an appropriate explanation. The Working Procedures contain more detailed and specific requirements. They provide in Rule 10 that the statement by the state concerned should be "supported by affidavits made by persons having actual knowledge or a reasonable belief as to the truth of the facts stated". This information must be supplied "forthwith after the participant submitting it knew or reasonably could have known of the facts supporting it" and "in no case shall such evidence be filed after the appellate report is circulated to the WTO members".

The Appellate Body has not given any indication of its reasons for these more onerous requirements. It would appear that the Appellate Body wishes to ensure that complaints of impropriety on the part of members will only be raised by states where there is a strong evidential basis for such complaints. The requirement in the Working Procedures that a complaint be supported by affidavits of individuals with actual knowledge of the facts involved is likely to impose a discipline on states and send a message that vague unsubstantiated complaints will not suffice. These requirements may have the effect of states from attempting to manipulate outcomes by raising spurious complaints regarding Appellate Body members.

Overall the provisions in the Working Procedures amount to a very clear statement on the part of Appellate Body members of their intention to act in concert and in an impartial judicial manner. They also contain the message that the Appellate Body will brook no interference in its processes from states. It is submitted this united front being presented by the Appellate Body is to be welcomed. Coherence and

consistency are badly needed by the WTO system and if the Appellate Body is to be credible it cannot afford, as past panels have done, to offer up wildly differing views and interpretations. The provision on collegiality should help avoid this. The provisions on rotation are likely to be a crucial step in maintaining the independence of the Appellate Body. While the exact operation of the rotation system is not spelt out, one thing is clear: parties deciding whether or not to take a case on appeal will have to do without knowing the composition of the division which will hear the appeal.

IV THE APPELLATE BODY'S FIRST CASE: THE REFORMULATED GASOLINE CASE

A The Reformulated Gasoline Case

1 Background to the case: the Clean Air Act 1990 and the Gasoline Rule

The first case to reach the Appellate Body was a dispute originally taken by Venezuela and Brazil against the United States known as the *Reformulated Gasoline* case.[71]

The dispute related to the United States Clean Air Act 1990 and its implementation by the regulations elaborated by the United States Environmental Protection Agency commonly known as the Gasoline Rule.[72] The Clean Air Act established two gasoline programmes designed to improve the quality of the air in the United States

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[71] The Panel's Report and the Appellate Body's Report were both entitled *United States — Standards for Reformulated and Conventional Gasoline.* The Panel Report is WTO Document WT/DS2 of 29 January 1996 (and can also be found in 35 ILM 274) and the Appellate Body's decision is WTO Document WT/DS2/AB of 29 April 1996 adopted by the Dispute Settlement Body on 19 May 1996 (and can be found in 35 ILM 605).

[72] The regulation is formally entitled *Regulation of Fuels and Fuel Additives — Standards for Reformulated and Conventional Gasoline*, Title 40 Code of Federal Regulations Part 80, 59 Federal Regulations 7716 (16 February 1994).

by ensuring that pollution from gasoline combustion does not exceed 1990 levels and that pollutants in major pollution centres are reduced.

The Act divided the United States into two different categories. The first gasoline programme applied to those areas of the country identified as being particularly under siege from gasoline-related air pollution. They were described as the "non-attainment areas" and consisted of nine large metropolitan areas which had experienced the worst levels of summertime ozone pollution, together with any further areas which did not meet national ozone requirements and were included at the request of State Governors. The Act prohibited the sale of "conventional" gasoline in those areas and required that all gasoline sold to consumers be "reformulated". The Act set out specifications for reformulated gasoline relating to both the composition of the gasoline (the content of oxygen, benzene and heavy metals) and its performance (emissions). The application of these specifications required a comparison against 1990 baselines.

The second gasoline programme, which applied to the rest of the country, was known as the "anti-dumping rules". Conventional gasoline could be sold in these areas, but in order to ensure that the air pollution in these areas did not increase as a result of "dumping" of pollutants prohibited by the first programme there was a requirement that the gasoline sold in the rest of the country remain at least as clean as it was in 1990. This involved measuring conventional gasoline against 1990 baselines: either individual baselines relating to the particular refiner or statutory baselines representing the average United States gasoline quality in 1990.

2 *The dispute raised by Venezuela and Brazil*

The conflict with Venezuela and Brazil related to the methods of establishing baselines under the legislation. As will be apparent from the above, the

establishment of 1990 baselines were an integral element of the enforcement of the Gasoline Rule under both the reformulated gasoline programme and the conventional gasoline programme. Accordingly the Gasoline Rule contained detailed rules for the establishment of baselines. Baselines could either be individual (established by the individual refiner) or statutory (established by the EPA and intended to reflect average 1990 United States gasoline quality). The rules for the establishment of individual baselines provided three different methods of calculation. The effect of these rules was that whereas most domestic refiners, blenders and importers were able to and required to set individual baselines unless certain exceptions applied, most foreign refiners were not able to do so and were accordingly required to use the statutory baselines.[73] In addition the practical effect of the rules was that the only foreign refiners who likely to meet the requirements to be permitted to establish individual baselines were from Canada.

The dispute was initiated by Venezuela. Gasoline is of paramount importance to the Venezuelan economy and the United States was at that time by far the largest importer of Venezuelan oil. The Gasoline Rules had had a severe impact on Petroleos de Venezuela, S. A., the Venezuelan state-operated gasoline company, which had needed to make costly adjustments to its production in order to meet the statutory baseline requirements. Venezuela claimed that the Gasoline Rule and the requirements for the establishment of baselines violated GATT Article I by advantaging gasoline from certain third countries, and Article III by providing less favourable treatment to imported gasoline than to US gasoline. Venezuela also argued that the Gasoline Rule was in breach of Article 2 of the Agreement on Technical Barriers to Trade.[74] Venezuela contended that the baseline establishment rules, although purporting to be for environmental reasons, were in fact intended to distort the conditions of competition in favour of United States gasoline (and certain

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[73] Importers who were also foreign refiners were not absolutely excluded from establishing individual baselines, but in order to do so they had to meet the"75% Rule" by having imported at least 75% of the gasoline from their foreign refinery to the United States in 1990.

[74] The relevant provisions of the GATT are set out in Appendix B of this paper.

third countries) and accordingly amounted to a disguised restriction on international trade which could not attract the protection of the exceptions set out in Article XX.

Following an attempt to resolve the issue that was blocked by Congress in May 1994,[75] Venezuela turned to the dispute settlement procedures in the WTO, requesting consultations with the United States on 23 January 1995. The consultations took place on 24 February 1995 but did not result in a satisfactory resolution of the dispute. Accordingly Venezuela moved to request that the Dispute Settlement Body establish a panel to consider the matter in accordance with Article XXIII:2 of the General Agreement and Article 6 of the DSU. The Panel was established, with standard terms of reference on 10 April 1995 and it was agreed by the parties that the panel would be composed of Mr Joseph Wong (Hong Kong, Chairman), Mr Crawford Falconer (New Zealand) and Mr Kim Luotonen (Finland).

Brazil then joined the dispute. The impact of the Gasoline Rule on Brazil was that the same gasoline which it had previously exported to the United States as finished gasoline could now only be exported as unfinished blendstock, which was sold at a lower price. Brazilian refiners were not at that stage producing reformulated gasoline. Brazil requested consultations with the United States on 10 April 1995, which took place on 1 May 1995. When these consultations failed to produce results, Brazil requested that a panel be established. In accordance with the provisions in the DSU regarding multiple complaints,[76] and with the agreement of all the parties, it was decided that for practical reasons the matter should be examined by the same panel that had been established for Venezuela .

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[75] The EPA proposed in May 1994 to amend the reformulated gasoline regulation (but not the rules applying to conventional gasoline) in order to define criteria and procedures by which foreign refiners could establish individual refinery baselines in a manner similar to that required for domestic refiners, but subject to various additional strict requirements designed to ensure accuracy of the baseline, compliance with the baseline, and verification of the refinery of origin. After a public comment period, the United States Congress enacted legislation denying funding to the EPA for implementation of the proposal and it did not proceed. See Panel's Report above n 71, 5.

[76] DSU above n 16, Article 9.

3 The proceedings before the Panel

The terms of reference of the Panel were as follows:[77]

> To examine, in the light of the relevant provisions of the covered agreements cited by Venezuela... and Brazil..., the matters referred to the DSB ... and to make such rulings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.

The dispute was the first under the new system to the panel stage. Australia, Canada, the European Communities and Norway reserved their rights to participate in the Panel proceedings as third parties, but only the European Communities and Norway presented arguments to the Panel. The Panel met with the parties from 10 to 12 July 1995 and from 13 to 15 September 1995. It met with the interested third parties on 11 July 1995. The Panel issued its interim report to the parties on 11 December 1995. Following a request from the United States, there was a further meeting with the parties on 3 January 1996. The Panel's final report was issued on 17 January 1996.[78]

4 The Panel's Report

The case before the Panel turned on the requirements in GATT 1947 (as amended) to give equal treatment and the interpretation of the exceptions contained in Article XX of GATT 1994 which provides limited scope to countries to pursue policies to protect a range of "non-trade" interests including the protection of the environment. While the Panel accepted that clean air was an exhaustible natural resource within the meaning of Article XX(g) it did not accept that the current measures were measures

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77 Panel's Report above n 71, para 1.4.

78 The Panel's Report was issued to the parties only at this stage. It was issued to WTO members shortly afterwards on 29 January 1996. The Panel's Report did not become derestricted until the Appellate Body's decision was adopted on 20 May 1996.

"relating to" the conservation of natural resources. Accordingly, the Panel found in favour of the complainants, concluding that the baseline establishment methods in the Gasoline Rule violated Article III:4 of the General Agreement in that it treated Venezuelan and Brazilian gasoline less favourably than United States gasoline and that they did not satisfy the requirements for the exceptions relating to health, conservation and enforcement measures contained in Article XX of the General Agreement. The Panel did not make any finding on the alleged violation of Article III on the basis that it was not the practice of panels to rule on measures which had not and would not become effective.[79] The complainants had also raised issues regarding the compatibility of the measures with Article 2 of the Agreement on Technical Barriers to Trade but the Panel did not find it necessary to decide this issue. The Panel recommended that the DSB request the United States to bring the measure into conformity with its obligations under the GATT.

B *The First Appeal to the Appellate Body*

1 *Scope of the appeal by the United States*

Under considerable pressure from various domestic constituencies, the United States decided to appeal and indicated this to the dispute settlement body. Its notice of appeal was filed on 21 February 1996. The appeal was limited to two issues. The United States claimed that the Panel had erred in law, firstly in holding that the baseline establishment rules are not justified under Article XX(g) and secondly, in its interpretation of Article XX as a whole. Specifically the United States challenged the finding of the Panel that the baseline establishment rules did not amount to a measure relating to the conservation of clean air with the meaning of Article XX(g). The United States argued that the Panel was incorrect in failing to proceed to consider the

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[79] No importer had in fact qualified for the benefit of the"75% Rule" before the deadline lapsed. See above n 73.

other requirements of Article XX(g) and the introductory words of Article XX (the "chapeau").

2 *Significance of the first appeal*

The *Reformulated Gasoline* case posed some real challenges to the Appellate Body and the Division chosen to sit on the case. For one thing it was the Appellate Body's first case, and as such it was bound to be in the spotlight, with the outcome eagerly awaited and the decision carefully scrutinised by a range of interested parties. The ability of the Appellate Body to produce sound and workable decisions had been identified by commentators as crucial to the success of the new WTO dispute settlement process and to the ongoing future of the WTO, and this was its first test.

The case was further complicated by the subject matter of the appeal. One the one hand the case involved a key and powerful industry group as far as Venezuela, Brazil and the United States were concerned, and accordingly it was of great significance to all the parties. On the other hand, it raised issues of the protection of the environment and the extent to which such measures were compatible with the WTO regime, and was likely to be a high profile case for that reason. "Clean air" was a subject that people were likely to find easy to relate to and environmental groups were already suspicious of the WTO and likely to be vociferous in expressing opposition to any outcome they saw as running counter to their objectives.

The pressure on the Appellate Body was increased by the fact that the case involved one of the most powerful WTO members. It was predictable given the history of dispute settlement that the first case would involve one of the big players, but it might have been easier had it been a case involving two smaller and less influential countries. Because, for the first time, the outcomes of the dispute settlement procedures were legally binding, it would be important for the credibility of the

whole system that members complied with the decisions of the panels and Appellate Body. The implications of one of the major players, such as the European Community or the United States, refusing to comply with a decision could be serious. John Jackson had suggested that a refusal by one or two of the major players to comply with the result of a dispute could lead the system to begin to "atrophy and decline".[80]

In the case of the United States these risks were amplified by the political environment within the United States and the domestic arrangements which had been necessary to secure the passage of the legislation implementing the WTO agreements.

There is a vocal domestic constituency in the United States which is opposed to the WTO. The United States Trade Representative ("USTR") is under pressure from both the left and the right. Opponents of free trade in the United States, such as arch-conservative Pat Buchanan, have pointed to the WTO dispute settlement provisions as an attack on United States sovereignty. On this issue they are joined by environmental groups (who generally find little in common with Republican right) who argue that the United States membership of the WTO will jeopardise the progressive health, safety, environmental, consumer and other social legislation people in the United States have fought long and hard for.[81]

In order to get the WTO legislation through the Senate, USTR agreed to the establishment of a standing commission of five United States judges to review WTO decisions on disputes. The task of this commission, known as the "Dole Commission" would be to review all reports of Panels or the Appellate Body which were adverse to the United States. and to report to Congress on whether the WTO had exceeded its authority in making the findings against the United States. A single

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80 Above n 8, 320.

81 N Roht-Arriaza "GATT Facts: Dispute Settlement", Hastings College of Law, University of California), http://www.emf.net/-cr/trade/WTO-disputes.

finding that the WTO had exceeded its authority or otherwise acted improperly would lead to the United States undertaking negotiations to modify the DSU. Three such findings would trigger a United States withdrawal from the WTO. At the time the United States appeal was lodged, the legislation establishing the Dole Commission had not yet been enacted, but was still in contemplation.[82] The prospect that an adverse decision to the United States would be reviewed and scrutinised in such a manner with potentially serious results for the future of the WTO must have weighed heavily on the Appellate Body.

3 The proceedings before the Appellate Body

The Division to sit on the appeal was constituted in accordance with the provisions in the *Working Rules of Procedure*. The members selected to hear the case were Florentino Feliciano of the Philippines (Chair), Christopher Beeby of New Zealand and Mitsuo Matsushita of Japan. Appellate Body members sit in their independent capacities and are required to be independent of their governments. However, given the particular tension surrounding the first case, this slate, made up of three members from countries which were distant from the dispute and without any particular interests in its subject matter, was probably fortuitous.[83] The presence of members who could have been more easily said to be in some way aligned with the parties (for example the members from the United States and Uruguay) would have been an added complicating factor that the first case could do without.

The case was disposed of swiftly with only very small slippages of deadlines by the parties and a short extension being required by the Appellate Body of the time

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[82] A bill to establish the commission was introduced to the United States Senate by Mr Dole on 4 January 1995.

[83] It is noted that there was a New Zealander, Crawford Falconer, on the Panel which heard the case. This was not unusual. As a result of the requirement that Panellists are required to be from countries not party to the dispute, New Zealanders (and Australians and Swiss) have served on a disproportionate number of panels.

allowed for it to complete its decision.[84] The Dispute Settlement Body was notified of the appeal on 21 February 1996 and a notice of appeal was filed with the Appellate Body on the same day. The United States filed its written submission on 4 March 1996 [85] and the respondents filed their submissions on 18 March 1996.[86] The submissions of the third parties, Norway and the European Communities, were also filed on 18 March 1996.[87] The complete record of the panel proceedings was transmitted to the Appellate Body in accordance with Rule 25 of the Working Procedures and oral hearings were held on 27 and 28 March 1996[88] at which oral arguments were presented by the parties and the third parties, and questions were posed by the Appellate Body. Most of these questions were answered orally but some answers were also provided in writing in accordance with Rule 28 of the Working Procedures. In addition the participants were asked to provide the Appellate Body with final written statements of their positions and these were provided.[89] The Appellate Body's decision was due to be circulated to WTO members by 22 April 1996.[90] A short extension of the time limit was sought by the Appellate Body and the report was circulated on 29 April 1996.

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[84] Owing to the requirements of the DSU all documents provided by the parties and the hearings themselves are confidential. Above n 53. Accordingly the following information about the process is drawn from page 3 of the Appellate Body's report, see above n 71, 3.

[85] Rule 21(1) of the Working Rules of Procedure requires that the appellant's written submission is filed within 10 days after the filing of the notice of appeal. In this case the due date fell on a Saturday and the United States' submission was filed on the following Monday.

[86] The Working Procedures and the Appellate Body use the term"appellee" to refer to the respondent in proceedings before the Appellate Body. Rule 22(1) of the Working Procedures requires that the appellee's written submission is filed within 25 days of the filing of the notice of appeal. In this case the due date fell on a Sunday and the respondents' submissions were filed on the Monday, see above n 63.

[87] Rule 24 of the Working Rules of Procedure provides that third parties may file written submission within 25 days after the filing of the notice of appeal, see above n 63.

[88] The oral hearing was originally scheduled for 25 March 1996 but had to be rescheduled for "exceptional and unavoidable reasons".

[89] Rule 28(1) of the Working Rules of Procedure, see above n 63.

[90] DSU above n 16, Article 17:5 provides that the Appellate Body must provide its report within 60 days of the filing of the notice of appeal. If the Appellate Body is unable to meet this deadline it must inform the DSB in writing of the reasons.

4 *The Appellate Body's decision*

The Appellate Body's decision upheld the outcome of the Panel's Report but at the same time overturned and modified a number of legal findings contained in Panel's Report.

The Panel had taken the view that clean air was a natural resource which could be depleted but had held that the baseline establishment methods were not covered by Article XX(g) because they were not *primarily aimed at* the conservation of exhaustible natural resources. The Appellate Body took a different view and found that taken as a whole the baseline establishment rules were designed to permit scrutiny and monitoring of the level of compliance of refiners, importers and blenders with the non-degradation requirements of the Gasoline Rule. This scrutiny and monitoring was required if the aim of the Gasoline Rule to stabilise and prevent further deterioration of air quality was to be achieved. Accordingly given the *substantial relationship* between the baseline establishment rules and the conservation objective, the measures could not be regarded as *merely incidental* or *inadvertently aimed at* the conservation of clean air.

Accordingly the Appellate Body continued to consider the second part of Article XX(g): whether "such measures are made effective in conjunction with restrictions on domestic production or consumption". The Panel had made no finding on this issue. The Appellate Body found that the clause amounted to a requirement of even-handedness in the imposition of restrictions but did not require identity of treatment . The Appellate Body found that the present measures affected both domestic and foreign producers (by imposing restrictions on both domestic and imported gasoline) and accordingly fell within the terms of Article XX(g). In reaching this conclusion, the Appellate Body rejected the argument of Venezuela, based on the inclusion of the words "made effective" that to meet the requirements of the clause the United States had to show that the measures had some positive effect. The Appellate Body put forward two reasons for rejecting an empirical "effects test". Firstly, determining

causation can be very difficult. Secondly, particularly in the field of conservation, it may be a very substantial period of time before the effects of a particular measure are known and to argue that a legal rule is contingent on subsequent events is not sensible. The Appellate Body made clear, however, that the rejection of an empirical "effects test" dids not mean that the likely effects of a measure are not a relevant consideration. In some cases it will be obvious that a particular measure can not possibly have any effect on conservation goals and such a measure will accordingly not be covered by XX(g).

The Appellate Body then turned to consider whether the baseline establishment rules also met the requirement of the introductory words of Article XX. The chapeau relates to the manner in which measures are applied and is, as the drafting history shows, designed to prevent abuse of the exceptions contained in the Article. It provides that the measure concerned must not amount to "arbitrary or unjustifiable discrimination" or a "disguised restriction on trade". The Appellate Body stated that it is for the party seeking the protection of the exceptions in Article XX to prove that measure does not amount to such an abuse and according to the Appellate Body this is a more onerous task than merely showing that a measure comes provisionally within one of the paragraphs of the Article. The Appellate Body considered the reason put forward by the United States for the differential treatment and held that the application of the baseline establishment rules, without exploring adequately how the individual baseline could have been applied to foreign refiners as well, amounted to "unjustifiable discrimination" and a "disguised restriction on trade in terms of the chapeau to Article XX". Accordingly the United States could not claim the benefit of the exceptions in Article XX(g).

In conclusion, the Appellate Body determined that the Panel had erred in law in two respects: in finding that the baseline establishment requirements did not fall within XX(g) and in failing to decide whether they fell within the chapeau of Article XX.[91]

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[91] Appellate Body's decision above n 71, 29.

The Appellate Body considered the second issue and held that the baseline establishment requirements failed to meet the requirements of the chapeau. Accordingly although the legal conclusions of the Panel's report are modified as a result of the Appellate Body's decision, the substantive result remains the same. Appellate Body recommended to the DSB that it request the United States to bring the baseline establishment rules into conformity with its obligations.

The Appellate Body concluded its decision by stressing that the decision should not be taken to imply that the ability of any WTO member to take measures to protect the environment was in question:[92]

> It is of some importance that the Appellate Body point out what this [the finding that the discrimination inherent in the baseline establishment rules can not be justified under the exceptions in Article XX] does *not* mean. It does not mean, or imply, that the ability of any WTO member to take measures to control air pollution or, more generally, to protect the environment is at issue. That would be to ignore the fact that Article XX of the *General Agreement* contains provisions designed to permit important state interests — including the protection of human health, as well as the conservation of exhaustible natural resources- to find expression. The provisions of Article XX were not changed as a result of the Uruguay Round of Multilateral Trade Negotiations. Indeed, in the preamble to the *WTO Agreement* and in the *Decision on Trade and Environment*, there is specific acknowledgment to be found about the importance of coordinating policies on trade and the environment. WTO Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement. So far as concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the *General Agreement* and the other covered agreements.

[92] Above n 91.

C The Aftermath of the Decision

1 United States Government response

The United States expressed disappointment with the decision but also welcomed the reversal of the Panel's legal findings. In a press release issued the same day as the Appellate Body's decision acting United States Trade Representative Charnel Barshefsky said: [93]

> While we are disappointed that the practical result of this case remains unchanged, we are gratified that the Appellate Body has reversed an error that, if followed by future panels. would have inappropriately limited this important exception.

As was to be expected, United States official comment tried to limit damage by focussing on this aspect of the report, with Barshefsky emphasising: "In accepting our arguments, the Appellate Body has preserved the balance in the WTO agreements that maintains the freedom of its members to protect the environment and conserve natural resources."[94]

In keeping with previous public comment directed predominantly at the domestic audience,[95] Ambassador Barshefsky stressed that it was for the United States to determine how it would respond to the Appellate Body's decision, stating that consultation would take place with Congress and interested members of the public and all options for responding to the decision would be considered.

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93 Press Release *USTR*, Washington, United States, 29 April 1996, ftp://ftp.ustr.gov/pub/press/releases/1996/04/96-38.

94 Above n 93.

95 Ambassador Kantor said in a statement issued shortly after the Panel's Report in the Gasoline Case:

> ...WTO panel reports have no force under US law. In particular federal agencies are not bound by any finding or recommendations included in WTO panel reports.... The rules of the WTO leave to the discretion of the United States and state and local governments whether to make any change in federal, state or local laws or regulations, and the manner in which any change may be implemented.

Press Release *USTR*, Washington, United States, ftp://ftp.ustr.gov/pub/press/releases/1996/01/96-05.

The Appellate Body's decision and the Panel's Report as modified by the Appellate Body were adopted by consensus[96] by the DSB at its meeting on 20 May 1996 in accordance with the provisions of the DSU. At this stage both documents were derestricted and became officially available to the public. At that meeting Venezuelan envoy told the DSB that Washington had an important responsibility to reinforce the credibility of the WTO and the dispute settlement procedure by acting quickly.[97] Under the DSU the United States was required to notify the DSB by 19 June 1996 of whether it intended to comply with the Appellate Body's decision.[98]

At the 19 June 1996 meeting, following lengthy consultation with Congress, the United States announced that it intended to meet its obligations with respect to the findings and recommendations of the Appellate Body. The DSB was informed that an open process had been commenced to examine options for compliance. The Environmental Protection Agency would issue a notice offering all interested parties the opportunity to have input into this process. The United States indicated that it would be entering into discussions with Venezuela and Brazil about the time frame for implementation. It stressed that a reasonable period of time would be required for this. The United States also reiterated its commitment to improving the transparency of the dispute settlement process, noting that the critical importance of this had been highlighted by public interest in the case. Venezuelan trade representatives indicated that they were pleased with the decision to accept the ruling, but indicated that they would have preferred more precision on the timing.[99]

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[96] It is interesting that while the report was adopted by consensus, certain delegations appear to have made statements reflecting reservations about certain aspects of the report. Japan was reported to have made a statement to the DSB that the fact that it had not objected to the report's adoption did not mean it agreed with everything in it. Japan reserved its rights on the interpretation put on Art. XX. Other delegations are also reported to have expressed reservations. South North Development Monitor 22 May 1996, fifteenth year, 3762 (published by Third World Network).

[97] Reuters report 20 May 1996.

[98] DSU above n 16, Article 21:3.

[99] Reuters report 19 June 1996.

2 *Response of United States domestic lobby groups*

As was to be expected the Appellate Body's decision and the decision of the United States to implement it drew some flak from United States environmental lobby groups. Public Citizen's Global Trade Watch slated the decision, claiming that it was a real life example of "the WTO's threat to environmental and health protection, democratic policy-making and national sovereignty"[100] Only five days after the decision condemning the decision and criticising the Appellate Body and the WTO as a whole, claiming that:[101]

> Thanks to the WTO ruling, economic nationalists now have evidence that the organisation is not mainly a legal institution, where impartial judges decide case solely on their merits — and where the generally free trading United States ultimately will win much more often than it loses. Rather, the WTO is emerging as largely a political body— and one whose members are determined to keep the American economy much wider open to their exports than their economies are to US products.... Environmental and consumer advocates, meanwhile, now have equally concrete evidence of the WTO's ability to invade domestic tax, procurement, health, food, product safety and anti-pollution policies with decisions made in secret, undemocratically and under the substantive rule of "trade *uber alles*".

However the indications at present are that the United States Trade Representative's office, while in a difficult position, will manage to ride out this storm and is committed to finding solutions which allow it to implement the ruling. Currently at least it would seem that USTR has the support of Congress. We can presume in implementing the Appellate Body's decision, every effort will be made to do this without compromising the environmental objectives of the Clean Air Act, even if this is costly to achieve. As the Appellate Body's decision makes clear this should be possible.

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[100] Reported in *South-North Development Monitor*, 21 May 1996, fifteenth year, 3761 (published by Third World Network in Cooperation with Inter Press Service and South Centre).

[101] A Tonelson and L Wallach "We told you so: The WTO's First Trade Decision Vindicates the Warnings of Critics" *The Washington Post* 5 May 1996.

The path is smoother for the fact that the Dole Commission,[102] which would have been another obstacle for USTR to deal with, shows no signs at present of coming to life. Latest indications are that the bill to introduce this commission, which failed to get through the Senate last year, is unlikely to come up again this year.

In addition, the United States continues to be vigorous in taking on WTO disputes and is likely therefore to be able to notch up a few wins in the near future which should assist it in withstanding domestic pressures.[103]

D *Comment on the Appellate Body's First Decision*[104]

1 *Style and form of decision*

The decision provides considerable insight into the approach of the Appellate Body members and their views on their role. It appears from the first decision that the Appellate Body members are united in their conviction that they are a judicial body which needs to operate in a judicial fashion.

The Appellate Body's decision is set out and presented in a very judicial manner. It is signed off by the three members of the Division in the manner of a court judgment.[105] The decision follows the logical and orderly structure that is usual in

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[102] See above n 82.

[103] As at April of this year the United States was pursuing disputes against a range of WTO members including the European Union, Canada, Korea, Australia, Japan, and Hungary. See WTO Focus, WTO, Geneva, May 1996, 10.

[104] To date there appears to be little published commentary on the case. See C Mass "Should the WTO Expand GATT Article XX: An analysis of *United States - Standards for Reformulated and Conventional Gasoline*" (1996) 5 Minn J Global Trade 415-439(regarding the panel's decision only); P Pescatore "WTO Dispute Settlement Now Functional: First Decision on Appeal" Neue Zurcher Zeitung, International Edition, 2 July 1996, No 151; J Waincymer"*Reformulated gasoline* under reformulated WTO dispute settlement procedures: pulling Pandora out of a chapeau?" forthcoming in the Michigan Journal of International Law.

[105] This is a contrast to Panel Reports which are not signed by the members of the Panel. Presumably, however, the Appellate Body will only be able to follow this approach when the decision is unanimous as in cases where there are dissenting opinions the practice of signing off the decision would contravene the requirements of anonymity. See above n 51.

appellate judgments, clearly separating procedural issues from substantive ones, clearly identifying what is at issue, and making clear findings on each point, which are accompanied by full explanations of the reasoning behind the findings. This approach is likely to provide a useful model for future appellate body reports, and should also provide guidance for panels, whose reports have often in the past been dense and hard to follow.

The decision commences with a summary of the procedural aspects and comments with approval that all the participants and the third parties have responded positively and punctually to the questions put by the Appellate Body. The Appellate Body next provides a summary of the facts relevant to the appeal, referring back to the more complete account in the Panel's Report. Then, appropriately, the Appellate Body sets out a summary of *all* the legal conclusions made by the Panel, not just the overall conclusions set out in the final two paragraphs of the Panel's Report, but also all the findings made on route to its overall conclusion. The decision next clarifies the issues that are under appeal making it clear that the majority of the findings of the Panel have not been appealed against by specifically listing them. A summary of the arguments of the parties and the third parties follows. The Appellate Body's ruling on a preliminary issue is set out next. The report then considers the legal issues raised by the appeal, each in turn, making clear in each instance the factors which are being taken into account and the reasoning behind the findings made. The Appellate Body's findings and conclusions are set out in the final section of the decision.

2 *Regard for due process*

The Appellate Body has demonstrated in its decision that it intends to take a firm and judicial approach to its own working procedures and that every attempt will be made to ensure due process is followed.

In the hearing the United States raised objections to the fact that Venezuela and Brazil had made arguments about issues that were not within the ambit of the appeal. In particular Venezuela and Brazil appeared to wish to relitigate whether clean air was an exhaustible natural resource within the meaning of Article XX(g) of the General Agreement and whether the baseline establishment rules were consistent with the Technical Barriers to Trade Agreement. Venezuela and Brazil, in response to questions posed by the Appellate Body about the appropriateness of this action, acknowledged that the findings on these matters had not been appealed but argued that it was within the scope of the authority of the Appellate Body to address the results of the Panel's examination of these issues. The United States argued that for the Appellate Body to take up these issues would not be consistent with the principles of fairness and would encourage a disregard for the Working Procedures.

The Appellate Body held that the issues were not properly the subject of the appeal and that their examination was not required in order to answer the question raised by the United States' appeal. The Appellate Body noted that Venezuela and Brazil had had the opportunity to appeal the issues[106] but had not done so. If they had so appealed then the Appellate Body would have been able to deal with both appeals in the same appellate proceeding. The Appellate Body expressed reluctance to depart from their Working Procedures, particularly in cases where there was no compelling reason grounded on fundamental fairness or *force majeure*.

It is submitted that the Appellate Body's approach here is the correct one both in terms of the framework of the DSU and in terms of the political realities of the situation. Strict standards of procedural fairness are necessary in a compulsory and binding dispute settlement process. It is essential that the parties know at all times exactly what issues they are facing and that they are given a full opportunity to address all points at issue. There is also likely to be little tolerance amongst member states for an activist Appellate Body which takes control of the issues into its own

[106] Working Rules of Procedure, Rule 23(1) and 23(4) above n 63.

hands. Any such action is likely to lead to claims that the Appellate Body is overstepping its authority and will damage the credibility of the dispute settlement process.

The approach of the Appellate Body on this issue is also consistent with the move away from the negotiation model of dispute settlement to a more judicial process. The Appellate Body should not be seen as a free-for-all where the parties can attempt to negotiate any result they wish and re-litigate issues which have already been resolved. Clearly it will be necessary in future for appellants to frame their notices of appeal carefully and for respondents to look very closely at Panel reports to establish whether there are any issues that they need to cross-appeal if they wish to reserve their position on those issues.

3 Role of public international law in WTO dispute settlement

One of the strongest messages to come out of the decision relates to the interpretation of the WTO agreements and the role of customary international law in this process.

Traditionally the GATT has operated as something of a frontier land as far as international law is concerned.[107] There has been a tendency over the years for the covered agreements to be seen as having an existence separate from and different to other international treaties and the obligations contained in the agreements as being of a different character than other legally binding obligations. Accordingly the view of some old GATT hands, at least, has been that the covered agreements are not susceptible to ordinary legal analysis and interpretation in the same manner as other international legal documents. The same view has traditionally been applied to GATT dispute settlement. Dispute panels, often comprised of non-lawyers, have dispensed a rough and ready form of adjudication, issuing reports of variable quality

[107] This is in spite of the fact that it has always been accepted that the GATT and other related agreements are treaty-status documents and they have been registered accordingly with the United Nations in compliance with the Article 102 of the Charter of the United Nations.

and legal reasoning. This separation of GATT law from the rest of international law has been heightened by the fact that public international lawyers have tended to pay little attention to GATT law and legal developments, possibly considering it to be too "unruly" or disordered to justify a place amongst public international law.[108] Those lawyers who have been involved in the GATT either as representatives of governments in Geneva or as academic commentators have tended specialise in this area and, as a result, have stood somewhat apart from the practice of general public international law.

The DSU appears to resolve this issue in its statement of the purpose of the dispute settlement process. It states that the function of the process is to "preserve the rights and obligations of Members under the covered agreements *in accordance with customary rules of interpretation of public international law*"[109] (emphasis added). In their first decision the Appellate Body have chosen to reinforce this aspect of the new disputes system. The decision devotes considerable time to discussion of what it means to interpret the agreements in accordance with customary international law principles and the Appellate Body makes what is likely to be an enduring and much quoted statement on this subject:[110]

> ...the General Agreement is not to be read in clinical isolation from public international law.

There has been a tendency in past panel reports for participants and panellists to pay lip service to treaty interpretation rules such as those contained in the Vienna Convention on the Law of Treaties[111] citing them to support propositions with little regard for what the principles actually mean. It is possibly partly to combat this

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[108] It is interesting to note that Merrills makes no mention of GATT Dispute Settlement in his book *International Dispute Settlement,* see above n 39. Professor Lauterpacht makes only a brief reference to it in his book *Aspects of the Administration of International Justice,* see above n48. Possibly this will change as result of heightened awareness of WTO Dispute Settlement following the Uruguay Round and the establishment of the WTO.

[109] DSU above n 16, Article 3.

[110] Appellate Body's decision above n 71, 17.

[111] (1969) 8 ILM 1969.

tendency that the Appellate Body has chosen to focus on this issue in its decision.[112] The Appellate Body notes that in applying Article XX(g) to the baseline establishment rules the Panel has overlooked a fundamental principle of treaty interpretation, the "General rule of interpretation" contained in the Vienna Convention that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". Over the course of the next page and a half the Appellate Body continues to give a step by step demonstration of what it means to apply the General rule of interpretation to the given situations. The Appellate Body's view of the correct approach is summed up in the following statement:[113]

> The relationship between the affirmative commitments set out in, eg., 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.

This statement and the discussion on how the general principle should be applied is likely to be of considerable assistance to future panels. Not only is it a useful step-by-step demonstration of treaty interpretation but it is also a good example of the degree of transparency of reasoning required in a good decision. Further guidance is provided on treaty interpretation later in the decision under the discussion of the meaning of the chapeau of Article XX. The Appellate Body's decision states that:

> One of the corollaries of the "general rule of interpretation" in the Vienna Convention is that interpretation must give meaning and effect to all the terms of a treaty. 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".

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[112] Jeffrey Waincymer also emphasises this aspect of the Appellate Body's decision and goes on to consider what are the implications of the Appellate Body's adoption of this approach, above n 104.

[113] Appellate Body's decision above n71, 18.

The decision also contains an interesting reminder on the relationship between domestic and international law.[114] In response to United States arguments regarding the impracticability of entering into co-operative arrangements with Venezuela and Brazil, the Appellate Body acknowledges that had the United States done so Congress might have intervened by denying funding, but states that this is beside the point as the United States carries responsibility for the actions of both the executive and legislative arms of government.

4 Development of useful precedent

While there is no system of stare decisis in a formal sense, the capacity of the Appellate Body to provide guidance to future panels and WTO members on the legal interpretation of the covered agreements is one of the important aspects of its role. It is to be expected that future parties involved in cases before panels will study previous Appellate Body decisions closely and mine them for relevant precedent and principles of interpretation. One of the predicted benefits of appellate review was that it would have the potential to build up an authoritative body of precedent which would add a discipline and rigour to the system as a whole. The Appellate Body's first decision provides a good example of this principle in action. In this regard, it is interesting to note that while the overall outcome of the case has not changed as a result of the appeal, the Appellate Body has refined and clarified the interpretation of the applicable legal obligations. In doing so the Appellate Body has achieved one of the classic functions of an appellate court and has demonstrated the usefulness to the WTO disputes settlement system of having an appellate tier.

The Appellate Body has been fairly blunt in its criticism of the Panel's reasoning on certain issues. It quotes a fairly lengthy passage of the Panel report relating to the interpretation of part of Article XX and states that the Panel's reasoning in this part

[114] Appellate Body's decision above n 71, 28.

of the Panel report is hard to follow and contains "a certain amount of opaqueness". The Appellate Body then analyses the reasoning of the Panel in detail and identifies where it went wrong. Pierre Pescatore has suggested that in doing so the Appellate Body has been too harsh on the Panel and should refrain from using too lightly the "heavy weapon of 'error in law'".[115] It is submitted, however, that this firm approach is to be welcomed, particularly in view of the variable quality of past panel reports and the tendencies of some past panels to dance around the issues. Further, it must be acknowledged that the nature of the dispute settlement process has changed and "error of law" is, in fact, the Appellate Body's only appropriate weapon.[116]

As far as the interpretation of substantive WTO obligations is concerned, the decision has provided clarification on a very important area of the law: Article XX of the General Agreement. Specifically, the Appellate Body has provided guidance on how the chapeau of Article XX is to be applied. Article XX represents the interface between WTO law and other "non-trade issues" such as protection of the environment, health standards, the condemnation of forced labour, and customs enforcement. These issues are important and controversial ones and the provisions in the GATT are vague. Accordingly guidance on the interpretation of the chapeau is much needed.

The discussion on the chapeau of Article XX includes a clear statement on where the burden of proof falls. The state seeking the benefit of the exemptions has the burden to demonstrate that the exception applies.[117]

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[115] Pescatore comments: "It may be asked whether it was advisable to address to the first instance Panel the reproach of having "erred in law," where in fact there has been no more than a purely political shift of emphasis in the AB's own argument. Who will in future seek participation in a panel if he must count with the risk of being rebuked in this way?" Pescatore above n 104.

[116] The Appellate Body is able to "uphold, modify or reverse the *legal* findings and conclusions of the panel" (DSU above n 16, Article 17:13, emphasis added) and appeals are to "limited to *issues of law* covered in the panel report and *legal interpretations* developed by the panel" (DSU above nl6, Article 17:6, emphasis added).

[117] Having made this clear statement about where the burden of proof falls, the Appellate Body did not, however, appear to apply it. Instead of considering the evidence and concluding that the United States had not discharged its burden, which should have been sufficient for the purposes of the Appellate Body's inquiry, the Appellate Body went further and found that the baseline

The decision is also significant for the clarification it provides on Article XX(g), the part of Article XX that relates specifically to environmental measures. The Appellate Body has indicated that in interpreting the all-important phrase "relating to the conservation of the exhaustible natural resources" a balance must be struck between ,on the one hand, subverting the purpose and object of the affirmative commitments of the Agreement[118] by giving it too expansive a meaning, and emasculating the policies and interests embodied in Article X, on the other. In addition, while not totally dismissing the use of "primarily aimed at" as a synonym for the words "related to" in Article XX(g),[119] the Appellate Body expresses caution about the use of this test.

The elaboration of the meaning of the phrase in Article XX(g) "if such measures made effective in conjunction with" and the reversal of the finding that the Gasoline Rule did not come within this is another useful aspect of the decision. Arguably the hurdle left by the Panel in this respect was too hard to get over. Likewise the well-reasoned rejection of an empirical "effects test", whereby States must prove that measures taken in pursuit of conservation objectives actually have some positive effect, is to be welcomed, especially by those concerned that the WTO does not provide adequate coverage for such measures. The interpretation adopted by the Appellate Body in this respect means that countries will not be precluded from taking a precautionary approach to environmental protection, provided they do so in a non-discriminatory manner, and is accordingly in line with international environmental legal principles in this area.

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establishment rules constituted "unjustifiable discrimination" and a "disguised restriction on international trade". On the Appellate Body's own reasoning it should have been sufficient to make a finding that the United States had not discharged its burden of proving that the measures came within the exception.

[118] In this case Article II:4 which requires treatment for foreign products that is no less favourable than those applicable to domestic products.

[119] Because the parties all accepted this approach.

Another point of interest is the citation by the Appellate Body of unadopted panel reports.[120] If the Appellate Body continues to use this approach it will, in effect, be able to "rescue" panel decisions which contain useful precedent but which have been languishing unadopted for reasons not connected with the soundness of the legal reasoning contained in them. This should assist the development of a coherent body of jurisprudence, which in turn should assist parties in clarifying the extent of their commitments, thus providing greater certainty.

While the decision is first and foremost a judicial decision which focuses on the legal issues under appeal, there are suggestions that the Appellate Body is well aware of the political sensitivities of the issues raised and of the fact that they have an audience much wider that the parties to the dispute or WTO members alone. This is clear from the final paragraph of the decision where the Appellate Body emphasises that the decision does not amount to a fetter on the rights of WTO members to take action to protect the environment.

This particular statement is a useful and appropriate statement for the Appellate Body to make. It adds to the clarity and accessibility of the decision especially for those who are not familiar with the terrain covered by it. In addition, it is submitted that the Appellate Body has a justifiable role in protecting the integrity and credibility of the WTO framework as a whole and the covered agreements, and that such statements are likely to further this aim.

Given the controversial and sensitive nature of the issues likely to face the Appellate Body in the years to come the making of such statements, appropriately cast to avoid any justified allegations of interference in political processes, are likely to be needed. Indeed it is possible to envisage that once the new dispute settlement process has bedded down the Appellate Body might from time to time go further and make recommendations to WTO members as a whole regarding certain aspects of the

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[120] See Appellate Body's decision, n 71, 13 fn 28, and 18 fn 37.

covered agreements which are inadequate and needing reform, in the same way that domestic courts will occasionally identify areas of law requiring reform. It should be possible for the Appellate Body to contribute constructively to the ongoing debate regarding future reforms and directions without overstepping its boundaries, leading to a dynamic dialogue between the Appellate Body and the WTO members which should enrich the quality and workability of the WTO agreements.[121] In the current climate, however, where the WTO members are very sensitive about the Appellate Body overstepping its brief, such statements are not likely to be well received.

V CONCLUSION

The Appellate Body appears to have a strong concept of its own role and has adopted Rules of Procedure which should facilitate the development of a coherent body of decisions and the maintenance of the its independent and judicial nature. There is a definite willingness amongst States to use the procedures and cases are being taken by an increasing range of member countries, including developing countries. Currently there are over 30 active disputes in progress.[122]

Current indications are that the losing party in the Appellate Body's first case, the United States, has accepted the decision and plans to comply with it. Negotiations are now under way with Venezuela and Brazil on the details and time frame for

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[121] Waincymer also appears to envisage such a role for the Appellate Body:

> "...any legal system has to be accepted as having a dynamic and evolutionary existence. This if WTO Members are unhappy at any decisions that make too much out of differences [of terminology in different parts of the covered agreements], they can seek to ensure that draft agreements are more carefully vetted to ensure that only intended differences remain."

Waincymer also suggests that the WTO Legal Secretariat should have an expanded reform and drafting assistance role to address some of the problems with the agreements. Waincymer above n 104.

[122] The July/August issue of WTO Focus reports that there are six active panels, one request for a panel, and some 25 trade disputes under bilateral consultations under way at present. See WTO Focus, WTO, Geneva, July/August 1996, 2.

compliance. This acceptance and compliance is the most important measure of the Appellate Body's success.

The decision itself is clearly written, well-reasoned and contains useful statements of principle and interpretation. The Clean Air Act and its application to gasoline from Venezuela and Brazil have been found to be out-of-line. However, while the Appellate Body has endorsed the outcome of the Panel's Report, the Appellate Body seems, at the same time, to have struck a more appropriate balance between the obligations of free trade and equitable treatment, on the one hand, and the right of States to adopt measures to protect exhaustible natural resources on the other.

Furthermore, in emphasising and elaborating on the principles of interpretation to be applied to the WTO agreements, the Appellate Body has done the whole system a service. The Appellate Body has brought the GATT out from the shadows and exposed it to the scrutiny of public international law principles of interpretation, demonstrating clearly that the WTO agreements are part of mainstream public international law. In the words of the Appellate Body: "the General Agreement [on Tariffs and Trade] is not be read in clinical isolation from public international law".

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WORLD
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Press Release

WTO/3/2

APPENDIX A

PRESS/32
29 November 1995

WTO ANNOUNCES APPOINTMENTS TO APPELLATE BODY

The WTO Dispute Settlement Body today (29 November) announced the following appointments to the Appellate Body:

Mr James Bacchus of the United States
Mr Christopher Beeby of New Zealand
Professor Claus-Dieter Ehlermann of Germany
Dr Said El-Naggar of Egypt
Justice Florentino Feliciano of the Philippines
Mr Julio Lacarte Muro of Uruguay
Professor Mitsuo Matsushita of Japan

The appointments, which will take effect in mid-December, were made according to the Dispute Settlement Understanding (DSU) which stipulates that the Appellate Body should comprise seven persons of recognized authority with demonstrated expertise in law, international trade and the subject matter of the WTO agreements generally. The DSU also requires that the Appellate Body be broadly representative of the WTO membership

The selection was made from a list of 32 candidates from 23 countries, and was based on a proposal formulated jointly, after appropriate consultations, by the Director-General, and the Chairmen of the Dispute Settlement Body, the Goods Council, the Services Council, the TRIPS Council and the General Council.

Note to editors:

The Appellate Body will hear appeals from dispute panel cases on issues of law covered in the panel report and legal interpretations developed by the panel. Three members of the Body will hear and determine any one appellate case. They can uphold, modify or reverse the legal findings and conclusions of the panel. Thirty days after it is issued, the Appellate Body's report will be adopted by the Dispute Settlement Body, and unconditionally accepted by the parties to the dispute, unless there is a consensus against its adoption.

95-3856

MORE

MEMBERS OF THE APPELLATE BODY
BIOGRAPHICAL NOTES:

JAMES BACCHUS

James Bacchus of the United States, born 1949, is an attorney who has been closely involved with international trade matters in both his public and professional careers for more than twenty years.

During his tenure in the US Congress, where he served two terms of office in the House of Representatives from 1991-1994, he was appointed to the ad hoc Trade Policy Coordinating Committee. From 1979-1981, he had served as Special Assistant to the United States Trade Representative Reubin Askew.

Since leaving Congress in January 1995, Mr Bacchus has returned to the Florida-based private law firm of Greenberg Traurig where he began his legal career before he joined the USTR in 1979. He has practised widely in the areas of corporate banking and international law.

Mr Bacchus' educational distinctions include Bachelor of Arts with High Honours in History, Vanderbilt University, 1971; Master of Arts in History, Yale University, 1973 and Woodrow Wilson Fellow; and Juris Doctor, Florida State University College of Law, 1978. He has been the Thomas P. Johnson Distinguished Visiting Scholar at Rollins College in Florida, and remains an Adjunct Professor in the Department of Politics at Rollins, where he teaches political philosophy and public policy on a variety of issues including international trade.

CHRISTOPHER BEEBY

Christopher Beeby of New Zealand, born 1935, has been a career diplomat for more than thirty years, specialising in legal and economic affairs. He retired from government service in mid-1995.

Having gained his law degrees from Victoria University of Wellington and the London School of Economics, Mr Beeby joined the legal division of the Department of Foreign Affairs in 1963, where he worked as the legal adviser to his government's delegation that negotiated the New Zealand-Australia Free Trade Agreement. In 1969 he became divisional head. In 1976 he was appointed head of the economic division and held that position until he was posted abroad as the ambassador to Iran and Pakistan from 1978-80. Upon returning to Wellington, he served first as Assistant Secretary and then, from 1985, as Deputy Secretary supervising, among other things, the legal and economic divisions. In 1992, he became New Zealand's Ambassador to France and Algeria, and Permanent Representative to the OECD.

Throughout his long public career, Mr Beeby has gathered extensive expertise and experience in international law, dealing closely with trade, the GATT and the Uruguay Round instruments, and the construction and application of dispute settlement mechanisms in several different contexts.

CLAUS-DIETER EHLERMANN

Professor Claus-Dieter Ehlermann of Germany, born 1931, is an internationally-recognized authority on international economic law who currently holds the Chair of Economic Law at the European University Institute in Florence and is Honorary Professor at the University of Hamburg. In May 1995, after more than 34 years of service for the European Commission, he retired from his post of Director-General of the Directorate General for Competition to the Commission.

In 1961 Professor Ehlermann joined the Legal Service of the European Commission and rose to become its head in 1977. He served as Director-General of the Legal Service for ten years until 1987 when he was appointed spokesman of the Commission and special adviser of the President on institutional questions. In 1990 he became Director-General of the Directorate-General for Competition, bringing him into close contact with competition authorities in the United States (within the framework of the bilateral US-EU Cooperation Agreement negotiated in 1990/91) and in Japan, Australia and New Zealand. He also assisted the fledgling competition authorities in the transition economies of Central and Eastern Europe.

Since 1972, Professor Ehlermann has also pursued an academic career, teaching Community Law in Bruges, Brussels, Hamburg, and, since May 1995, in Florence. He has written more than 160 publications which, since 1991, have dealt primarily with competition law and policy, industrial policy and international cooperation. He also serves as a member on several academic advisory bodies, in particular with respect to law reviews.

SAID EL-NAGGAR

Dr Said El-Naggar of Egypt, born in 1920, is Professor Emeritus of Economics at Cairo University and has combined his academic expertise with public service for more than thirty years.

After a teaching career at Cairo University Dr El-Naggar joined the United Nations Conference on Trade and Development (UNCTAD) in 1965 as Deputy Director of the Research Division, a post he held for six years until he was appointed Director of the United Nations Economic and Social Office in Beirut, Lebanon. From 1976 to 1984, he served as Executive Director of the World Bank representing the Arab Countries, before returning to Cairo University as Professor Emeritus. Since 1991, he has also been President of the New Civic Forum, an NGO dedicated to economic, political and social liberalization in Egypt.

Dr El-Naggar graduated from the Faculty of Law at Cairo University in 1942 and completed graduate studies in economics at London University where he obtained a masters degree in 1948 and doctorate in 1951. He has also been a research fellow at the University of Michigan, Ann Arbor, Michigan, and a visiting professor at Princeton University, New Jersey. He is the author of several books and papers on international trade and finance, economic development, and the Egyptian economy.

MORE

FLORENTINO FELICIANO

Mr. Justice Florentino Feliciano of the Philippines, born 1928, is Senior Associate Justice of the Supreme Court of the Philippines and Vice-Chairman of the Academic Council of the Institute of International Business Law and Practice of the International Chamber of Commerce in Paris.

Before joining the Judiciary in 1986, Mr Feliciano had been a Member since 1962 of the law firm Sycip, Salazar, Feliciano and Hernandez, where he was extremely involved in trade and corporate law cases and transactions concerning anti-dumping, intellectual property rights, banking and insurance services, shipping and telecommunications.

Mr Feliciano also has extensive experience as an arbitrator in international investment and commercial disputes at the International Centre for Settlement of Investment Disputes in Washington, and at the ICC in Paris. He has been on the Arbitrators Panel of the American Arbitration Association in New York and was also a Member of the Asian Development Bank Administrative Tribunal.

Having been graduated in law from the University of the Philippines, Mr Feliciano went on to earn his Masters and Doctorate Degrees in law from Yale University. He taught in the Faculty of Law of the University of the Philippines and of Yale University. A Member of Institut de Droit International, he has lectured at the Hague Academy of International Law. He has written and published on various aspects of international business law and public international law.

JULIO LACARTE MURO

Mr Julio Lacarte Muro of Uruguay, born 1918, was a career diplomat who has been involved with the GATT/WTO trading system since its creation almost fifty years ago and has participated in all eight rounds of multilateral trade negotiations under the GATT.

Mr Lacarte served as the Deputy Executive Secretary of the GATT in 1947-48. He returned to the GATT as Uruguay's Permanent Representative in 1961-66 and 1982-92, during which periods he served as Chairman of the Council, the Contracting Parties, several dispute settlement panels, and the Uruguay Round negotiating groups on dispute settlement and institutional questions. Mr Lacarte has also served as the Deputy Director of the International Trade and Balance-of-Payments Division of the United Nations and as the Director of Economic Cooperation among Developing Countries of UNCTAD. He has also been Uruguay's Ambassador to several countries, including the European Communities, India, Japan, the United States and Thailand.

In his academic career, Mr Lacarte has been a professor at the International Association of Comparative Law and at the University of Comparative Law at Strasbourg University. He has written several publications, including a recently-published book covering all the subject matter of the Uruguay Round from its inception to the Marrakesh Final Act.

MITSUO MATSUSHITA

Professor Mitsuo Matsushita of Japan, born 1933, is Professor of Law at Seikei University and Professor Emeritus at Tokyo University.

Having gained his degrees from Tulane University, USA, and Tokyo University, Professor Matsushita went on to become widely acknowledged as one of the most authoritative Japanese scholars in the field of international economic law. In his academic career he has held professorships at many universities including Harvard, Georgetown, Michigan, Columbia, and at the College of Europe in Bruges, Belgium. He has written many publications on various aspects of international trade and competition and investment law.

In his public career, Professor Matsushita has been attached to the Ministry of Finance and the Ministry of International Trade and Industry as a member of various councils dealing with telecommunications, customs and tariffs, export and import transactions, and industrial property . He has also served as a member of the Special Grievance Resolution Council attached to the Office of Trade and Investment Ombudsman.

END

APPENDIX B

ARTICLE I
GENERAL MOST-FAVOURED-NATION TREATMENT

1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

2. The provisions of paragraph 1 of this Article shall not require the elimination of any preferences in respect of import duties or charges which do not exceed the levels provided for in paragraph 4 of this Article and which fall within the following descriptions:

(a) Preferences in force exclusively between two or more of the territories listed in Annex A, subject to the conditions set forth therein;

(b) Preferences in force exclusively between two or more territories which on 1 July 1939, where connected by common sovereignty or relations of protection or suzerainty and which are listed in Annexes B, C and D, subject to the conditions set forth therein;

(c) Preferences in force exclusively between the United States of America and the Republic of Cuba;

(d) Preferences in force exclusively between neighbouring countries listed in Annexes E and F.

3. The provisions of paragraph 1 shall not apply to preferences between the countries formerly a part of the Ottoman Empire and detached from it on 24 July 1923, provided such preferences are approved under paragraph 5 of Article XXV, which shall be applied in this respect in the light of paragraph 1 of Article XXIX.

4. The margin of preference* on any product in respect of which a preference is permitted under paragraph 2 of this Article but is not specifically set forth as a maximum margin of preference in the appropriate Schedule annexed to this Agreement shall not exceed:

(a) in respect of duties or charges on any product described in such Schedule, the difference between the most-favoured-nation and preferential rates provided for therein; if no preferential rate is provided for, the preferential rate shall for the purposes of this paragraph be taken to be that in force on 10 April 1947, and, if no most-favoured-nation rate is provided for, the margin shall not exceed the difference between the most-favoured-nation and preferential rates existing on 10 April 1947;

(b) in respect of duties or charges on any product not described in the appropriate Schedule, the difference between the most-favoured-nation and preferential rates existing on 10 April 1947.

In the case of the contracting parties named in Annex G, the date of 10 April 1947, referred to in sub-paragraphs (a) and (b) of this paragraph shall be replaced by the respective dates set forth in that Annex.

ARTICLE III*
NATIONAL TREATMENT ON INTERNAL TAXATION AND REGULATION

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.*

2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.*

3. With respect to any existing internal tax which is inconsistent with the provisions of paragraph 2, but which is specifically authorized under a trade agreement, in force on 10 April 1947, in which the import duty on the taxed product is bound against increase, the contracting party imposing the tax shall be free to postpone the application of the provisions of paragraph 2 to such tax until such time as it can obtain release from the obligations of such trade agreement in order to permit the increase of such duty to the extent necessary to compensate for the elimination of the protective element of the tax.

4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

5. No contracting party shall establish or maintain any internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions which requires, directly or indirectly, that any specified amount or proportion of any product which is the subject of the regulation must be supplied from domestic sources. Moreover, no contracting party shall otherwise apply internal quantitative regulations in a manner contrary to the principles set forth in paragraph 1.*

6. The provisions of paragraph 5 shall not apply to any internal quantitative regulation in force in the territory of any contracting party on 1 July 1939, 10 April 1947, or 24 March 1948, at the option of that contracting party; *Provided* that any such

regulation which is contrary to the provisions of paragraph 5 shall not be modified to the detriment of imports and shall be treated as a customs duty for the purpose of negotiation.

7. No internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions shall be applied in such a manner as to allocate any such amount or proportion among external sources of supply.

8. (a) The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.

(b) The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products.

9. The contracting parties recognize that internal maximum price control measures, even though conforming to the other provisions of this Article, can have effects prejudicial to the interests of contracting parties supplying imported products. Accordingly, contracting parties applying such measures shall take account of the interests of exporting contracting parties with a view to avoiding to the fullest practicable extent such prejudicial effects.

10. The provisions of this Article shall not prevent any contracting party from establishing or maintaining internal quantitative regulations relating to exposed cinematograph films and meeting the requirements of Article IV.

Article XX
GENERAL EXCEPTIONS

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(a) necessary to protect public morals;

(b) necessary to protect human, animal or plant life or health;

(c) relating to the importation or exportation of gold or silver;

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;

(e) relating to the products of prison labour;

(f) imposed for the protection of national treasures of artistic, historic or archaeological value;

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

(h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;*

(i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; *Provided* that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;

(j) essential to the acquisition or distribution of products in general or local short supply; *Provided* that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of this Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this sub-paragraph not later than 30 June 1960.

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