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CLAUS-DIETER EHLERMANN

Some Personal Experiences
as Member of the
Appellate Body of the WTO

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EUROPEAN UNIVERSITY INSTITUTE, FLORENCE
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**SOME PERSONAL EXPERIENCES AS MEMBER OF THE
APPELLATE BODY OF THE WTO**

Claus-Dieter EHLERMANN

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ABSTRACT

The paper discusses impressions and reflections of the author after six years of practical experiences as one of the first seven members of the Appellate Body (AB) of the WTO. These experiences are contrasted with analogous experiences encountered at the EU/EC level.

The first subjects relate to the composition, structure, organization and functioning of the Appellate Body and its divisions, such as the number of AB members, the length of their mandate, their personal status, the size of divisions, the selection of divisions, the exchange of views among all AB members, and the duration of the appeal procedure. Most of these issues are closely linked to the current negotiations on improvements and clarifications to the Dispute Settlement Understanding (DSU). The paper recommends maintaining the existing rules, with the one exception, namely lengthening of the mandate of AB members. The paper also shows the contribution which the organization of the AB has made to the astonishing degree of collegiality that characterises the AB. The early and clear definition of a method of interpretation, attributing major weight to the ordinary meaning of the words used in WTO Agreements, is considered in its different aspects, both for the internal functioning of the AB, for panels and for WTO Members. The recourse to customary rules of international law is welcomed, but might also present dangers if WTO Members see themselves confronted with developments that were not foreseen during the negotiations of the covered agreements.

Early appeals gave the Appellate Body the occasion to clarify important procedural issues such as the burden of proof, the standard of review and the distinction between issues of law and facts. The standard of review is of particular importance in safeguard, dumping, and subsidy cases, in which panels and the AB are asked to review the prior complex factual and legal findings of national authorities. Similarly sensitive is the determination of the meaning of municipal law.

Fact-finding is one of the weakest elements of the panel process, in spite of the broad rights of panels to ask for information, the corresponding obligation of WTO Members to provide such information, and the right of panels to draw negative inferences when information is not provided. The reasons are to be found, i. a., in the unresolved problems generated by the treatment of confidential information, which have not been satisfactorily answered in the covered agreements. The actual panel structure is not strong enough to deal with these problems. The panel structure should therefore be improved in the negotiations on improvements and clarifications to the DSU.

Issues of substantive WTO law are compared with corresponding EC law, but only *en passant*: the difficulties encountered in comparing certain substantive WTO and EC rules that deal with similar problems, but which are structured differently; the absence of a hierarchy between overlapping WTO obligations; and the surprising fact that certain WTO prohibitions are stricter than corresponding EC prohibitions.

The WTO is characterised by an imbalance between the strong (quasi-) judicial structure set up by the DSU and the weak political decision making process which is all too often blocked, between major trade rounds, by the traditional consensus rule. The work of panels and the AB would be facilitated if the political filters of the WTO, i. e., the committees established by different covered agreements, functioned better, and if the Ministerial Conference or the General Council were able to adopt interpretations and amendments, pursuant to Articles IX and X of the Marrakesh Agreement. Instead of advocating mechanisms weakening the dispute settlement process, all efforts should be concentrated on strengthening the political arm of the WTO. But the role of panels and the AB should not be reinforced either: it would therefore be unwise to attribute direct effect to WTO rules in municipal (EC) law. In view of the weakness of the political decision making process, the responsibility of the AB is enormous. It must proceed with extraordinary circumspection and care. It is therefore advisable to pursue the cautious, case-specific approach that the AB has adopted in motivating its findings and conclusions.

I. THE EXCEPTIONAL CHARACTER OF THE WTO DISPUTE SETTLEMENT SYSTEM

1. The past six years as Member of the Appellate Body of the WTO have been an extraordinary experience. Extraordinary from a professional legal point of view. But also extraordinary from a human perspective. I will always be grateful to all those who have permitted me to participate in and to share with them this truly exceptional period of development in the rule of law in the WTO.
2. I had never exercised a judicial function before my appointment as a Member of the Appellate Body. Becoming a judge is in all circumstances an interesting experience. Becoming a judge of a newly established (quasi-) judicial body which operates at world level and which is charged to review – without the possibility of further appeal – the legal findings of a lower (quasi) judicial body is simply fascinating. It is even more so when this newly established appeal “court” is at the very beginning of its work, i. e., if one participates as a judge in a judicial “green field“ operation at the highest level for the world at large.
3. The settlement of international trade disputes was of course not a total novelty in 1995. It goes back to the early years of the GATT. The seventies, eighties and early nineties had seen a remarkable development and intensification of such disputes and a progressive judicialisation of dispute settlement procedures. However, in spite of some reforms, dispute settlement under the GATT 1947 remained governed by elements of diplomacy and consensus, which allowed the Contracting Parties to block the process, thus rendering it occasionally ineffective.
4. It is well known that the Dispute Settlement Understanding (DSU) negotiated during the Uruguay Round has eliminated these elements to a very large extent. Since the entry into force of the Marrakesh Agreement, dispute settlement has become a matter of compulsory jurisdiction for all Members of the WTO. It is this compulsory character which distinguishes it from all other existing international dispute settlement systems. I have always admired the imagination, courage and skills of those who led the negotiations on the new compulsory WTO Dispute Settlement Understanding to a successful end. In particular, I would like to pay tribute to the extraordinary qualities of the personality who chaired the group which was responsible for the negotiation of the Dispute Settlement Understanding during the Uruguay Round, my former colleague Ambassador Julio Lacarte. Negotiating the Dispute Settlement Understanding under the rule of consensus seems to me even today to be close to a miracle. During my two

terms as a Member of the Appellate Body, I have always remained impressed by this achievement. It seemed to me then — and even today — to be wise not to take the existence of such a compulsory system for granted, and guaranteed forever, but to contribute through each Appellate Body report to its steady consolidation and further development.

5. The following remarks are not, and can not be, a systematic review of the Appellate Body's activities during its first years. They express personal impressions and reflections that are strongly influenced by my earlier professional experiences, i. e., experiences of a lawyer who had to interpret and apply European Community law and who followed, as an outsider, the jurisprudence of the European Court of Justice. The following account is therefore rather "impressionistic", in comparing frequently aspects of dispute settlement in the WTO with similar problems encountered in the EC context.
6. A final caveat is addressed to the many thoughtful observers of the work of the Appellate Body who have commented on its work. A more academic paper than this one should and would have referred to these comments. I have deliberately chosen not to do so. Selective references would have been unfair. Complete references would have delayed my story unreasonably. References are therefore limited to primary sources, i. e., essentially to WTO Agreements, implementing texts like the Appellate Body's Working Procedures, and Appellate Body Reports.

II. THE COMPOSITION OF THE APPELLATE BODY

7. The institutional rules for the composition of the Appellate Body are well known. The Appellate Body is composed of 7 persons, who are to be appointed by the Dispute Settlement Body (DSB) for a four-year term, reappointment being possible once.¹ According to the DSU, "the Appellate Body shall comprise persons of recognised authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government. The Appellate Body membership shall be broadly representative of the membership in the WTO"².
8. The first team of seven was composed of James Bacchus from the United States, Christopher Beeby from New Zealand, Florentino Feliciano from the Philippines, Julio Lacarte from Uruguay, Mitsuo Matsushita from Japan,

¹ Article 17 (2) DSU.

² Article 17 (3) DSU.

Said El-Naggar from Egypt and myself. Our professional backgrounds and experiences differed widely. Taken together, the group was a cocktail with ingredients from all branches of government, (the legislative, the executive and the judicial branches) international organisations (regional and world-wide), academia, private law practice, and private arbitration. Some of us – like Julio Lacarte, who incarnates the history of GATT and the WTO – were intimately familiar with the “covered agreements“ and the past. Others, like myself, had hardly any earlier GATT experience. However, the wealth of widely different professional backgrounds, experiences and sensitivities proved immediately to be extremely useful and has been – in my view – one of the strengths of the Appellate Body since its very first activities.³

9. Our rapid — and successful — start was greatly facilitated by the — initially extremely small — secretariat of the Appellate Body, headed until 2001 by its first director, Debra Steger.⁴ Debra Steger’s professionalism and dedication to the task of assisting the Appellate Body during its formative years greatly contributed to establishing the reputation and authority of the new appellate quasi-jurisdiction.
10. I will come back later to the workings of the Appellate Body and the secretariat, in particular to the question of collegiality. At this point, I would like to mention only one problem which results from the rules that govern the composition of the Appellate Body and which should be addressed during the current negotiations on improvements and clarifications to the DSU, launched after the successful ministerial meeting in Doha. The problem concerns the duration of the terms of office of members of the Appellate Body. A four-year term, which may be renewed once, does not seem to guarantee sufficiently the independence of the person appointed. This is not the place to rehearse all the arguments, which plead for a short term, which is renewable, and to weigh them against those, which plead for a longer term, which is not renewable. I am convinced that, on balance, the second option is the better one, if the personal independence of the term-holder is a matter of major concern. I would therefore plead for an extension of the actual four-year, once renewable term to a non-renewable term of eight years.

³ Today, only one of the original team of seven members continues to serve on the Appellate Body, i. e., James Bachus. Christopher Beeby (who disappeared prematurely), Mitsuo Matsushita and Said El-Naggar were replaced in 1999 by Georges Abi-Saab from Egypt, A. V. Ganesan from India and Yasuhei Taniguchi from Japan. At the end of 2001, Luiz Baptista from Brasil, John Lockhart from Australia and Giorgio Sacerdoti from Italy replaced Julio Lacarte, Florentino Feliciano and me.

⁴ Since 2001, the Appellate Body’s secretariat has been directed by Valerie Hughes.

11. In order to avoid misunderstandings, I would like to stress that in pleading for a longer, non-renewable term of office of eight years, I do not want to give the impression that the existing regime has affected in any way the independence of the Appellate Body or any of its individual Members. On the contrary, I share fully the view expressed by my former colleague Julio Lacarte who said at the swearing-in ceremony for new Appellate Body members on 19 December 2001: "The Appellate Body has been described as unflinching in its rulings. I believe this to be the case. We are well aware that none of our rulings is likely to be greeted with universal approval; but our function is another: to be independent, impartial and objective at all times. I believe this also to have been the case."
12. The DSU does not decide whether the members of the Appellate Body exercise a full-time or a part-time job. The language of the DSU points however in the direction of a part-time activity, as Article 17.3 requires that "all persons serving on the Appellate Body shall be available at all times and on short notice, and shall stay abreast of dispute settlement activities and other relevant activities of the WTO." When the Appellate Body was established and during its first years, the choice of the part-time option was certainly wise. The number of appeals and the amount of work resulting from these appeals did not justify a status of full-time activity. However, the situation has changed over the last years. The number of appeals has increased considerably and has probably exceeded the expectations of the negotiators of the DSU. In addition, from the very beginning, the Appellate Body has adopted working methods which require a considerably longer presence of its members in Geneva than envisaged by those who conceived the first rules of employment of Appellate Body members, who were drawing on the experience with panels and panel members.
13. From the point of view of the WTO, there are good reasons to maintain the part-time regime as long as possible, in spite of the considerable and growing inconveniences for the members of the Appellate Body. However, at a certain point in time, the increase in appeals and the resulting workload will make it simply impossible to continue with the existing system. The actual part-time regime will have to be replaced by a system of full-time employment. It is obvious that the switch will have an impact on the availability of candidates for membership of the Appellate Body. I do not believe, however, that the impact will affect the quality of such candidates, if the authority and the prestige of the Appellate Body continue to grow, and if the conditions of employment are fair, as compared with other international judicial or quasi-judicial bodies of a similar kind.

14. Another response to the challenge of a growing workload has been the suggestion to increase the number of Appellate Body members from 7 to 9, or even more. I recognise that an increase in the number of Appellate Body members might be necessary or desirable in order to reflect the growing number of Members of the WTO. I do not share, however, the view that a greater number of Appellate Body members is the best reaction to the greater number of appeals and the resulting heavier workload. I admit that in 1995, I was astonished to find myself in a small group of 7 persons, representing the overall membership of the WTO. But I have quickly learnt to appreciate the great wisdom of those who decided to limit the number of Appellate Body members to only 7. The small number has had, in my view, extremely positive effects on the intimacy and collegiality of the deliberations of the Appellate Body. What appeared, at first sight, almost as an anomaly, has proved to be a precious good. It should be maintained by all means as long as possible.

III. THE WORKING PROCEDURES

A. Procedure for Adoption

15. While the DSU contains several articles dealing with the establishment, terms of reference, composition, functions, procedures, rights and obligations of panels⁵, the same DSU devotes only one Article to the Appellate Body and appellate review.⁶ In addition, it provides that “working procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information.”⁷ The adoption of “working procedures” is thus a matter for the Appellate Body itself. The only procedural prerequisite is the consultation of the Chairman of the DSB and the Director-General, but not their approval or the approval by the DSB.
16. For somebody familiar with the EU, this procedure is simply stunning. The differences between the WTO and the EU systems are obvious. At the level of the respective treaties, the EC Treaty (including the attached Statute of the Court of Justice) is considerably more detailed than the DSU. At the level of “secondary legislation”, the EC Treaty entrusts the approval of the rules of procedure for the Court of Justice to the Council of Ministers, which

⁵ Articles 6 and following DSU.

⁶ Article 17 DSU.

⁷ Article 17 (9) DSU.

has to act unanimously still today⁸. In the WTO, by contrast, the adoption of working rules is left to the Appellate Body itself. At first sight, this choice is astounding. Its wisdom becomes, however, immediately apparent if one considers the alternatives. Is it realistic to assume that the Appellate Body would have been able to start its work with any working procedures, if their approval had been entrusted to the DSB, acting under the traditional rule of consensus? At what point in time would such consensus have been brought about? Is it totally unrealistic to assume that even today, the Appellate Body would have to operate without detailed working procedures if the approval of these working procedures had to be left to the DSB, acting according to the traditional consensus principle?

17. Developing and drafting the working procedures was the very first task of the Appellate Body when it met for the first time after the formal appointment of its members. After three weeks, this task was accomplished. The discussions and the resulting text laid the basis for a system of collegiate co-operation among all members of the Appellate Body, which is, in my view, one of its most remarkable achievements.
18. It is obvious that working procedures have to deal with technical details governing the organisation of the appeal procedure. But in the case of the Appellate Body, they also had to address a couple of rather sensitive issues, which one would have normally expected to have been the subject of provisions of the DSU agreed during the Uruguay Round. The following discussion will examine these issues in turn.

B. Divisions of Three Appellate Body Members and the Duration of the Appeal Procedure

19. According to Article 17.1 DSU, appeals from panel cases are to be decided by only three of the seven members of the Appellate Body. These three persons are to be determined by a system of rotation. "Such rotation shall be determined in the working procedures."⁹
20. Six years ago, I considered the provision to decide appeals in divisions of only three Appellate Body members to be an anomaly. According to Article 8.5 DSU, panels shall be composed of three panellists unless the parties to the dispute agree to a panel composed of five panellists. Panels can thus be larger than the Appellate Body division hearing the appeal. In normal

⁸ See Article 245 EC Treaty. Qualified majority will replace the unanimity requirement only after the entry into force of the Treaty of Nice.

⁹ Article 17 (1) last sentence DSU.

judicial procedures, the situation is the reverse. The appeal court is larger than the court of first instance.

21. Today, the “anomaly” of divisions composed of only three Appellate Body members appears to me to be one of those wise decisions of the authors of the DSU, which should be maintained by all means. There seems to be a close connection between the decision to limit divisions to three Appellate Body members and the extremely short time limits prescribed for the appeal procedure.
22. According to Article 17.5 DSU, “as a general rule, the proceedings shall not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report. [...] In no case shall the proceedings exceed 90 days.” In practice, the 90 period leaves little time for the Appellate Body itself, if one considers the time necessary for the parties (and third parties) to present their arguments in writing and at the oral hearing, i. e. before the Appellate Body can begin its deliberations, and if one deducts further the two weeks necessary for translation after the end of the process of drafting the Appellate Body report.
23. The 90 days deadline is of course highly unusual for an appeal procedure and presents obvious risks for the quality of the Appellate Body’s work. However, except in four cases (in which the parties agreed to a prolongation), the Appellate Body has been able to respect the deadline. In addition, the 90-day rule has contributed significantly to the efficiency of the appeal procedure. It has avoided the build-up of a backlog of cases. It should therefore be maintained as long as possible.
24. It is highly unlikely that the extremely short deadline of 90 days would and could have been respected if the divisions were composed of more than three Appellate Body members. The defence of the deadline of 90 days goes therefore hand in hand with the defence of the number of three for Appellate Body divisions hearing an appeal.

C. Exchange of Views

25. While decision-making by a division of three is easier than by a larger group, it also presents risks. A larger group might be wiser. A larger group might also assure greater coherence and continuity of decision-making over time than divisions of three with constantly varying membership.
26. The risk of diverging interpretations can be avoided by a procedure in which all members of a judicial body take part in the deliberations. The DSU does

not provide for such a procedure. It does not contain any reference to the Appellate Body deciding a case “*en banc*”. It follows that all appeals have to be decided by divisions of three. However, the Working Procedures clearly express the Appellate Body’s concern for collegiality. Rule 4 reads in relevant part:

Collegiality

- (1) 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.
- (2) [...]
- (3) In accordance with the objectives set out in paragraph 1, the division responsible for deciding each appeal shall exchange views with the other Members before the division finalises the appellate report for circulation to the WTO Members. [...]
- (4) Nothing in these Rules shall be interpreted as interfering with a division’s full authority and freedom to hear and decide an appeal assigned to it in accordance with paragraph 1 of Article 17 of the DSU.

27. The system of “exchange of views” among all members has proved to be of enormous benefit to the work of the Appellate Body. As intended, the exchanges have permitted divisions to draw on the individual and collective expertise of all members. In addition, they have contributed greatly to consistency and coherence of decision-making. The exchanges of views have thus contributed to “providing security and predictability to the multilateral trading system” which is, according to Article 3 (2) of the DSU, the fundamental aim of the dispute settlement system of the WTO.
28. The system of exchange of views combines the benefits of deliberations of all seven Appellate Body members with the advantages of decision-making by divisions composed of only three members. If, in certain important cases, divisions of three were to be replaced by the full Appellate Body, hearing and deciding a case *en banc*, the advantages of decision-making by a small group of three would be lost. In addition, the introduction of decision-making *en banc* would require a definition of those cases in which the full Appellate Body would have to hear and decide the case. This definition would probably contain discretionary elements that might lead, over time, to inflation in the number of cases attributed to the Appellate Body sitting *en banc*. All these considerations lead to the conclusion that the actual situation should not be changed. The introduction of a system of decision-making *en banc* is neither necessary nor desirable.

29. In addition to the system of exchange of views, other factors contribute to the collegiality among members of the Appellate Body. Some are very banal, and are related to the organisation of the Appellate Body's secretariat. Like the WTO Secretariat in general, the secretariat of the Appellate Body is small and "lean". Headed by a director, it is organised as a pool of lawyers and secretaries who serve all seven members of the Appellate Body, without being subdivided into individual members' chambers. Contrary to other judicial bodies, members of the Appellate Body therefore do not enjoy the assistance of personal secretaries and assistants. From a strictly personal point of view, this might be an inconvenience. From the point of view of the Appellate Body as a whole, this organisation is its strength, as it facilitates communication among members.

D. Selection of Members Constituting a Division

30. As mentioned earlier, Article 17.1 DSU provides that Members of the Appellate Body shall serve in rotation, and that such rotation shall be determined in the working procedures. While Article 8.3 DSU addresses expressly the problem of nationality of panellists with respect to WTO Members which are parties to the dispute¹⁰, nothing is said in Article 17 DSU for the appeal stage.
31. According to the Working Procedures "the Members of 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".
32. From an institutional point of view, the third principle. i. e., opportunity for all Members to serve regardless of national origin, is certainly the most important one. The third principle is an expression of the even more fundamental principle of equality of all members of the Appellate Body. It guarantees that all members hear and decide an equal number of appeals. That would not be the case, if national origin were of any relevance for the composition of divisions. Statistically, the USA and the EU are the most active participants in panel and Appellate Body proceedings. The members of the Appellate Body who happen to be nationals of the USA or one of the EU Member States would therefore be either privileged or disadvantaged in

¹⁰ "Citizens of Members whose governments are parties to the dispute or third parties [...] shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise". A footnote to Article 8 (3) DSU clarifies that "in the case where customs unions or common markets are parties to a dispute, this provision applies to citizens of all member countries of the customs unions or common markets."

the selection process if national origin were a positive or negative element for the composition of divisions hearing appeals in which one of these WTO Members is the appellant or appellee.

33. Apparently, the solution retained in the Working Procedures corresponded to the understanding which the vast majority of WTO Members had of the meaning of the DSU. It is nevertheless astonishing that the problem of nationality of Appellate Body members with respect to the parties in an appeal was not addressed expressly by the DSU, but left to be regulated by the Working Procedures.
34. The reason for the second principle, i. e., unpredictability, is less obvious. Unpredictability is intended to prevent appellants from trying to choose and pick among individual divisions, in speculating that a division composed of certain members might improve their chances of success. The first principle, i.e. the random selection, is simply a means to assure unpredictability.
35. In the light of experience, the system of rotation established six years ago has proved to be a success. The system has achieved a fair distribution of cases among Appellate Body members, without giving rise to criticism of national bias. Though not totally unpredictable for governments at all stages, the system has at least seriously limited what might be called “division shopping.” That the system has had the disadvantage of making the personal life of members of the Appellate Body unpredictable is regrettable, but a price that had to be paid.

E. Overall Evaluation

36. According to Article 17.11 DSU, opinions expressed in the Appellate Body report by individuals serving on the Appellate Body shall be anonymous. The DSU thus allows individual opinions, provided they are expressed anonymously.
37. The Working Procedures do not elaborate on Article 17.11 DSU. Instead, Rule 3.2 of the Working Procedures states:

The Appellate Body and its divisions shall make every effort to take their decisions by consensus. Where, nevertheless, a decision cannot be arrived at by consensus, the matter at issue shall be decided by a majority vote.
38. Looking at the reports adopted by the Appellate Body during the first six years of its existence, it is apparent that the search for consensus required by Rule 3.2, first sentence, of the Working Procedure has been largely

successful. None of the reports is accompanied by a dissenting opinion. In only one case has a member of the Appellate Body expressed an anonymous concurrent opinion.¹¹ The absence of any dissenting opinion and the existence of only one concurrent opinion are of course no proof of total unanimity in all cases with respect to all arguments. But the quasi-total absence of individual opinions is nevertheless an indication of a remarkably high degree of consensus within the Appellate Body: otherwise, one would probably have seen more manifestations of individual positions.

39. The work of the Appellate Body is thus characterised by a very high degree of collegiality among its seven members, in spite of their different origins, professional and personal backgrounds and experiences. For an outsider, this collegiate cooperation might be astonishing. I am convinced – as mentioned already — that the basis for this collegiality and friendly cooperation was laid in the Working Procedures. Their contribution to the achievements of the last years should therefore not be underestimated.

IV. METHOD OF INTERPRETATION

40. Article 3.2 DSU states that the dispute settlement procedure serves to clarify the existing provisions of the covered agreements “in accordance with customary rules of interpretation of public international law.”
41. It was fortunate that early on the two first reports of the Appellate Body were used to flesh out the precise meaning of this general reference to customary rules of interpretation of public international law. It is well known that in its Report in *United States – Standards for Reformulated and Conventional Gasoline (United States – Gasoline)*, the Appellate Body stated that Article XX of the GATT 1994 had to be interpreted according to the general rule of interpretation laid down in Article 31 of the Vienna Convention on the Law of Treaties, which “has attained the status of a rule of customary or general international law.”¹² A similar statement was made in *Japan – Taxes on Alcoholic Beverages* with respect to Article 32 of the Vienna Convention.¹³ Thus, the Appellate Body has clearly laid down, from the very beginning of its work, the rules of interpretation which it would (and which panels should) follow in interpreting the covered agreements.

¹¹ Appellate Body, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products (European Communities – Asbestos)*, WT/DS135/AB/R, adopted 5 April 2001, paras. 149 – 154.

¹² Appellate Body, *United States – Standards for Reformulated Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR, 1996:I, p. 3 (16)

¹³ Appellate Body, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97 (104).

42. According to Article 31.1 of the Vienna Convention, “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.” Among these three criteria, the Appellate Body has certainly attached the greatest weight to the first, i. e., “the ordinary meaning of the terms of the treaty”. This is easily illustrated by the frequent references in Appellate Body reports to dictionaries, in particular to the Shorter Oxford Dictionary, which, in the words of certain critical observers, has become “one of the covered agreements”. The second criterion, i. e. “context” has less weight than the first, but is certainly more often used and relied upon than the third, i. e., “object and purpose”.
43. For somebody having spent most of his professional life observing the European Court of Justice in interpreting European Community law, the difference in style and methodology could hardly be more radical. I do not remember that the EC Court of Justice has ever laid down openly and clearly the rules of interpretation that it intended to follow. What I do remember is that among the interpretative criteria effectively used by the EC Court of Justice, the predominant criterion was — and probably still is — “object and purpose”. While the Appellate Body clearly privileges “literal” interpretation, the EC Court of Justice is a protagonist of “teleological” interpretation.
44. Only in one respect, the approach of the Appellate Body and that of the European Court of Justice converge. Both attribute little importance to the “preparatory work of the Treaty” (Article 32 of the Vienna Convention). However, the motives are probably not the same. For the Appellate Body, the low value of the negotiating history results from the secondary rank attributed to this criterion by the Vienna Convention, the lack of reliable records, and the ambiguities resulting from the presence of contradictory statements of the negotiating parties. For the European Court of Justice, the reasons are probably a mixture of deliberate choice and technical difficulties in determining the intentions of the authors of the text to be interpreted.
45. The immediate and open definition of the basic rules governing interpretation, and the clear option in favour of a predominantly literal approach, have had important consequences both for the internal working of the Appellate Body and for the effects of its reports on the outside world.
46. Internally, the immediate reference to Articles 31 and 32 of the Vienna Convention, and the acceptance of the prime importance of “the ordinary meaning to be given to the terms of the treaty”, have given precious

guidance to Appellate Body members working in different divisions and interpreting different provisions of different covered agreements. In other words: the very early consensus on interpretative principles has facilitated decision-making and contributed considerably to the consistency and coherence of Appellate Body reports. At the same time, this consensus has also contributed to the already mentioned high degree of collegiality and friendly cooperation among the seven Appellate Body members.

47. Even greater are the benefits of the open and transparent choice of the Appellate Body's interpretative methods on the outside world. This choice has given clear guidance to Members of the WTO and to panels. It has thus contributed to "providing security and predictability to the multilateral trading system" (Article 3.2, first sentence, DSU). The choice has been approved both by Members of the WTO and by critical observers, in particular by experts of international (trade) law. The recognition of Articles 31 and 32 of the Vienna Convention as customary international law has been accepted to be fully in conformity with the requirement that the existing provisions of the covered agreements be clarified "in accordance with customary rules of interpretations of public international law" (Article 3.2, second sentence, DSU). The heavy reliance on the "ordinary meaning to be given to the terms of the treaty" has protected the Appellate Body from criticism that its reports have added to or diminished the rights and obligations provided in the covered agreements (Article 3.2, third sentence, DSU). On a more general level, the interpretative method, established and clearly announced by the Appellate Body, has had a legitimising effect, and this from the very beginning of its activity.
48. This general appreciation should not be misunderstood: It is obvious that not everybody agrees with the Appellate Body's choices, or with the results reached. Criticism is voiced, in particular, when the Appellate Body seems to stretch or to deviate from its own interpretative methods. Nobody can, however, deny that the method of literal interpretation has limits, and that recourse to other interpretative criteria may be necessary, as is recognised by Articles 31 and 32 of the Vienna Convention.
49. That the method of literal interpretation is relatively safe, and that its results are more easily accepted than results reached by other interpretative tools, can be easily illustrated by examples of cases in which the Appellate Body felt itself confronted with a "gap", i. e., an issue which is apparently not addressed by the covered agreement, but which had to be decided nevertheless. In some cases, the results reached by the Appellate Body have been accepted without much discussion, like the technique called

“completing the analysis”.¹⁴ In at least one other case, the result has been severely criticised and is hotly debated. I am referring to the controversial issue of the admissibility of the unsolicited “*amicus curiae*” briefs in panel and Appellate Body proceedings. I will come back to this problem in another context later.¹⁵

50. The Appellate Body Report in *United States – Gasoline* does not only lay the ground for systematic recourse to the rules of interpretation set out in Articles 31 and 32 of the Vienna Convention. This – very first – Report declares also that the direction given by Article 3.2 DSU (i. e., to interpret the covered agreements “in accordance with customary rules of interpretation of public international law”) “reflects a measure of recognition that the General Agreement is not to be read in clinical isolation from public international law.”¹⁶ The significance of this statement can hardly be overestimated. It is of course the starting point and general justification for frequent references to public international law rules and principles in many Appellate Body Reports adopted since *United States – Gasoline*. So far these references have more often served to give answers to procedural questions that have arisen in dispute settlement procedures than to problems concerning the substantive rights and obligations, which Members of the WTO have under the covered agreements. The true importance of the inter-relationship between the WTO Agreements and public international law will become apparent only when more of these latter problems of substance have to be addressed. Questions related to State responsibility might be the most topical, delicate and controversial among these problems of substance.

51. The recognition that WTO law is part of public international law has been widely applauded, in particular by members of the public international law community. For somebody who is not a traditional member of that community, the enormous interest which WTO law and WTO dispute settlement procedures have generated over the last years is striking and surprising. For somebody who is used to European Community law, this phenomenon is even more fascinating, as public international law plays hardly any role in the relations among the Member States of the EC.

¹⁴ See most recently Appellate Body, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, adopted 1 February 2002, para. 343, with references to earlier cases.

¹⁵ See below paragraphs 119 and following.

¹⁶ See Appellate Body, *United States – Gasoline*, op. cit. (footnote 12), p. 16.

52. The determination of the precise relevance of rules and principles of public international law for the covered agreements will obviously continue to require great care and circumspection. Critics of the new dispute settlement system argue that references to these rules and principles present considerable dangers, as they lack the certitude and precision of written provisions (though written provisions may themselves be vague and even contradictory). Critics point to Article 3.2, last sentence, DSU, according to which “recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.” These warnings are certainly justified. However, the same Article 3.2 mandates that the dispute settlement system is “to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.” Even if this express reference to customary rules of interpretation of public international law were lacking, the interpreter of the covered agreements would hardly have any other choice but to have recourse to these rules of public international law.

V. THE EARLY CLARIFICATION OF PROCEDURAL ISSUES

A. Burden of proof

53. Contrary to other branches of government, the judicial branch can not choose what issues it wants to address first and what problems it prefers to resolve later. The judicial branch has to decide claims and respond to arguments that are made before it. It is not active, but reactive.
54. The Appellate Body was lucky that it had to give answers to a series of important procedural questions at a very early stage of its existence. One of these questions was the problem of burden of proof.
55. The issue of burden of proof is not addressed in the DSU. The problem had to be resolved by recourse to general principles. It is worth recalling what the Appellate Body said and how it reasoned. The decisive passage in *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India* reads as follows:

In addressing this issue, we find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof. It is, thus, hardly surprising that various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof. Also, it is a generally accepted canon of evidence in civil law, common law and, in fact, in most jurisdictions, that the burden of proof rests upon the party, whether complaining or

defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.¹⁷

56. Questions related to the burden of proof have been raised in a great number of cases, both before the panels and, on appeal, before the Appellate Body. Their prominence in WTO dispute settlement procedures contrasts with their quasi absence in proceedings before the European Court of Justice. I have often asked myself why this is so. Until now, I have not found a satisfactory answer. Only one element explaining the different weight of issues of burden of proof in the two types of procedures has occurred to me. It seems to be easier for an international quasi-judicial body like a panel to state that a party has not *proved* its claim than to declare that the claim is not *founded*. But is this explanation sufficient? I doubt it.

B. Standard of Review

57. Another important set of procedural issues which the Appellate Body had to address relatively early and which has become more and more important during the last years concerns the standard of review. The question of the appropriate standard of review arises in two respects. One is the relationship between the panel and the national authority, which has adopted the measure that is the object of the complaint; the other is the relationship between the Appellate Body and the panel.
58. Early on in the famous hormones case, the Appellate Body had the opportunity to find that the general standard of review which panels have to apply is laid down in Article 11 DSU.¹⁸ According to Article 11 DSU:

A panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements...

59. The only exception to this rule is Article 17.6 of the Anti-Dumping Agreement. But this exception is strictly limited to the Anti-Dumping Agreement. Furthermore, there does not seem to be any notable difference between Article 11 DSU and Article 17.6 (i) of the Anti-Dumping

¹⁷ Appellate Body, United States – Measure Affecting the Imports of Woven Wool Shirts and Blouses from India, WT/DS33/AB/R, adopted 23 May 1997, DSR 1997:I, p. 323 (335).

¹⁸ Appellate Body, European Communities – Measures Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135 (para. 114 and following.).

Agreement, as interpreted by the Appellate Body in *United States – Antidumping Measures on Certain Hot-Rolled Steel Products from Japan*.¹⁹

60. In the hormones case, the Appellate Body found that:

The applicable standard is neither *de novo* review as such, nor “total deference”, but rather the “objective assessment of the facts”. Many panels have in the past refused to undertake *de novo* review, wisely, since under current practice and systems, they are in any case poorly suited to engage in such a review. On the other hand, total deference to the findings of the national authorities’, it has been well said, “could not ensure an ‘objective assessment’ as foreseen by Article 11 of the DSU”.²⁰

61. Since the hormones case, the Appellate Body has refined the standard of review for panels, in particular in a series of appeals concerning safeguard measures²¹. The actual situation has recently be summarised as follows:

Panels must examine whether the competent authority has evaluated all relevant factors; they must assess whether the competent authority has examined all pertinent facts and assessed whether an adequate explanation has been provided as to how those facts support the determination; and they must also consider whether the competent authority’s explanation addresses fully the nature and complexities of the data and responds to other plausible interpretations.²²

62. While the preceding sections have shown considerable differences between dispute settlement in Geneva and in Luxembourg, the approach with respect to the applicable standard of review seems to show remarkable similarities, at least in so far as the European Court of Justice’s attitude vis-à-vis decisions taken, in analogous situations, by the *European Commission* is concerned. Both jurisdictions recognise that administrative bodies are better placed than they themselves to establish and evaluate complex economic facts. However, both refuse to limit themselves to control the respect of

¹⁹ Appellate Body, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, paras. 55 and 56.

²⁰ Appellate Body, *European Communities – Hormones*, op. cit. (footnote 18), para. 117 referring to earlier panel reports.

²¹ See Appellate Body, *Argentina – Safeguard Measures on Imports of Footwear (Argentina – Footwear)*, WT/DS1211/AB/R, adopted 12 January 2000, para. 121; Appellate Body, *United States - Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities (United States – Wheat Gluten)*, WT/DS166/AB/R, adopted 19 January 2001, para. 55; Appellate Body, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, paras. 103 and 106.

²² Appellate Body, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, adopted 5 November 2001, paras. 73 and 78.

formal aspects of procedures. Both examine also whether the reasoning underlying a certain decision is reasonable and plausible.

63. As a matter of principle, this attitude can hardly be criticised. Difficulties and controversies will, however, arise as to how far the control of reasonableness and plausibility will be pushed in practice and in individual cases. In this respect, panels and the Appellate Body have certainly to be more reserved and restrained than an internal jurisdiction like the European Court of Justice.
64. It is not astonishing, that WTO Members who have lost cases in Geneva have criticised the Appellate Body and argued that its reports interfere unduly with the discretion that the covered agreements leave to their internal investigating authorities. This criticism has been voiced in particular by the United States whose safeguard measures have been frequently submitted to dispute settlement procedures and who have been unsuccessful in defending them.²³ During the last months, the question of standard of review has thus become one of the most controversial aspects of the Appellate Body's jurisprudence. The EC complaint against the recent US safeguard measures against imports of steel will probably give it even more importance and prominence than it has acquired until now.

C. Distinction between Issues of Law and Issues of Facts

65. According to Article 17.6 DSU, an appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel. Issues of fact are therefore reserved to panels. They are not a matter for the Appellate Body.
66. In defining the standard of review for panels, the Appellate Body has also had the occasion, in the hormones case, to define for the first time the dividing line between issues of law and issues of fact. According to the Appellate Body:

The determination of whether or not a certain event did occur in time and space is typically a question of fact... Determination of the credibility and weight properly to be ascribed to (that is, the appreciation of) a given piece of evidence is part and parcel of the fact finding process and is, in principle, left to the discretion of a panel as the trier of facts. The consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision is, however, a legal characterization issue. It

²³ See in addition to the cases mentioned in footnotes 21 and 22 Appellate Body, United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea, WT/DS202/AB/R, adopted 8 March 2002,

is a legal question. Whether or not a panel has made an objective assessment of the facts before it, as required by Article 11 of the DSU, is also a legal question, which, if properly raised on appeal, would fall within the scope of appellate review.²⁴

67. The Appellate Body Report in *Hormones* leaves no doubt that the legal qualification of a fact, i. e., the process of relating a fact to the requirements of a legal rule, is a legal issue. The control of this process is as much part of the responsibilities of the Appellate Body as the interpretation of the legal rule *in abstracto*.
68. The Appellate Body Report in *Hormones* clarifies also that the determination of the existence of a given fact as well as the determination of the weight of such a fact is, in principle, a matter for panels, and not for the Appellate Body. However, in proceeding with these determinations, a panel has to respect Article 11 DSU. According to the Appellate Body,

The deliberate disregard of or refusal to consider the evidence submitted to a panel is incompatible with a panel's duty to make an objective assessment of the facts. The wilful distortion or misrepresentation of the evidence put before a panel is similarly inconsistent with an objective assessment of the facts. "Disregard" and "distortion" and "misrepresentation" of the evidence, in their ordinary signification in judicial and quasi-judicial processes, imply not simply an error of judgement in the appreciation of evidence but rather an egregious error that calls into question the good faith of the panel.²⁵

69. Some critical observers have read this passage of the *Hormones* Report as an exhaustive interpretation of Article 11 DSU, and as a unjustified limitation to the right to argue on appeal that a panel has committed a *legal* error in determining the existence or the weight of certain facts. I have never considered this criticism to be warranted. I do not believe that the quoted passage limits the spectrum of possible violations of Article 11 DSU with respect to the determination of the existence of and weight to be attributed to a given fact or set of facts. Moreover, I am not certain that a legal error committed by a panel in this determination can only be raised with a claim that Article 11 DSU has been violated. For example, a panel commits, in my view, a legal error if, in the process of determining the existence of a fact, it violates the principles of logic. Whether this violation is made in good or bad faith is irrelevant. This legal error may be raised with a claim that the panel did not respect Article 11 DSU. In the absence of such a claim, no violation of Article 11 DSU can be found by the Appellate Body. However, the legal error may also affect the consistency of the panel's finding relating

²⁴ Appellate Body, European Communities – Hormones, op. cit. (footnote 18), para. 132.

²⁵ Appellate Body, European Communities – Hormones, op. cit. (footnote 18), para. 133.

to a substantive provision of the covered agreements, e. g. that the defendant WTO Member has, or has not, violated a provision of the GATT, the GATS, etc. Is it not enough to appeal this latter finding, without claiming simultaneously a violation of Article 11 DSU by the panel? Why is it necessary to argue a violation of Article 11, when in reality the appellant is concerned about the panel's finding with respect to a substantive provision of the covered agreements? In other words: why multiply the arguments around Article 11 DSU?

D. Special Problem of the Determination of the Meaning of Municipal Law

70. Panels and the Appellate Body have been confronted several times with the question whether and to what extent they are entitled to determine the meaning of the law of a defendant WTO Member. The problem arises in particular when the dispute concerns the WTO-consistency of a statute or regulation *as such*, i. e., the WTO consistency of a statute or regulation, independently of any measure of implementation. That a complaint may be brought against a statute or regulation *as such* is firmly established in GATT and WTO jurisprudence. However, a statute or regulation will normally be found to be inconsistent with a covered agreement only if the statute or regulation is mandatory and not discretionary in nature.²⁶
71. In *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products (India – Patents)* the Appellate Body made it clear that panels and, in case of an appeal, the Appellate Body itself have to determine the interpretation and meaning of municipal law²⁷. The ruling in *India – Patents* has recently been confirmed in *United States – Section 211*. According to this latter report:

The municipal law of WTO Members may serve not only as evidence of facts, but also as evidence of compliance or non-compliance with international obligations. Under the DSU, a panel may examine the municipal law of a WTO Member for the purpose of determining whether that Member has complied with its obligations under the WTO Agreement. Such an assessment is a legal characterisation by a panel. And, therefore, a panel's assessment of municipal law as to its consistency with WTO obligations is subject to appellate review.²⁸

²⁶ Appellate Body, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R and WT/DS162/AB/R, adopted 20 September 2000, paras 51 and following.

²⁷ Appellate Body, *WT/DS50/AB/R*, adopted 16 January 1998, DSR 1998:I, 9, paras. 65 and following.

²⁸ Appellate Body, *WT/DS176/AB/R*, adopted 1 February 2002, para. 105

72. Like its rulings on the standard of review, the Appellate Body's position with respect to the treatment of municipal law has recently been criticised, in particular by the United States. Experience suggests that the determination of the meaning of municipal law of WTO Members can be a delicate task. The contested legislation may be new and therefore not yet applied in practice.²⁹ Or, the contested legislation may be old, but rarely used.³⁰ Municipal courts may have interpreted it in different or even contradictory ways. The determination of the meaning of such law can therefore place panels and the Appellate Body before difficult choices. Like the issues surrounding the standard of review, the assessment of municipal law may well become one of the battlefields between individual Members and the quasi-judicial bodies of the WTO.

E. Fact Finding by Panels and the Corresponding Duties of WTO Members

a) General Considerations

73. As we have seen, fact finding is a responsibility of the panels, not of the Appellate Body. It is widely held that fact finding is also the most difficult task of panels, and that it is one of the — if not *the* — weakest aspects of the panel process. Though not being in charge of this task, I have often asked myself, why this is so. Is it due to the lack or the weakness of the existing rules? Is it the result of the behaviour of Member States and the inappropriate response of panels? What should be done to improve the situation?

b) Right of Panels to Seek Information

74. Article 13 DSU gives panels broad rights to seek information and technical advice from any source. According to the Appellate Body:

“It is clear from the language of Article 13 that the discretionary authority of a panel may be exercised to request and obtain information, not just “from any individual or body” within the jurisdiction of a Member of the WTO, but also from *any Member*, including *a fortiori* a Member who is a party to a dispute before a panel. [...] It is equally important to stress that this discretionary authority to seek and obtain information is *not* made conditional [...] upon the other party to the dispute having previously established,

²⁹ Like in the India – Patents (see footnote 27) and in United States – Section 211.

³⁰ Like in United States – Anti-Dumping Act of 1916 (see footnote 26).

on a *prima facie* basis, such other party's claim or defence. Indeed, Article 13.1 imposes *no conditions* on the exercise of this discretionary authority."³¹

c) *Duty of WTO Members to Provide Information*

75. The broad rights to seek information conferred on panels by Article 13 DSU would be of little use if Members of the WTO had no legal duty to respond by providing the requested information. At first sight, Article 13 seems to limit Members' responsibilities to a *nobile officium*, as it uses the word "should" instead of "shall". The Appellate Body has however clarified that in the context and in view of the object and purpose of Article 13 DSU, "should" expresses a legal duty. The pertinent paragraphs of the Report in *Canada – Measures Affecting the Export of Civilian Aircraft (Canada – Aircraft)* read as follows:

If Members that were requested by a panel to provide information had no legal duty to "respond" by providing such information, that panel's undoubted legal "*right*" to seek information [...] would be rendered meaningless. A Member party to a dispute could, at will, thwart the panel's fact-finding powers and take control itself of the information-gathering process that Articles 12 and 13 DSU place in the hands of the panel. A Member could, in other words, prevent a panel from carrying out its task of finding the facts constituting the dispute before it and, inevitably, from going forward with the legal characterization of those facts ...

The chain of potential consequences does not stop there. To hold that a Member party to a dispute is not legally bound to comply with a panel's request for information relating to that dispute, is, in effect, to declare that Member legally free to preclude a panel from carrying out its mandate and responsibility under the DSU. So to rule would be to reduce to an illusion and a vanity the fundamental right of Members to have disputes arising between them resolved through the system and proceeding for which they bargained in concluding the DSU.³²

d) *Right of Panels to Draw Negative Inferences*

76. A Member State might violate its duty under Article 13 DSU to provide the requested information. In this case, the panel may draw negative inferences

³¹ Appellate Body, *Canada – Measures Affecting the Export of Civilian Aircraft (Canada – Aircraft)*, WT/DS70/AB/R, adopted 4 August 2000, para. 185.

³² Appellate Body, *Canada – Aircraft*, op. cit. (footnote 31), paras. 188 and 189. The interpretation of the word "should" in Article 13 DSU is one of the rare cases in which the Appellate Body, in following the methodology prescribed by Article 31 of the Vienna Convention, clearly attributes more weight to the criteria of "context" and "object and purpose" than to the "ordinary meaning of the words".

from this behaviour. Identified first in a subsidy case³³, the right to draw negative inferences has also been recognised, without further discussion, in a case concerning safeguard measures.³⁴ This latter case confirms that the drawing of (negative) inferences is an inherent and unavoidable aspect of any panel's basic task of finding and characterising the facts making up a dispute.³⁵

77. Until now, panels have not made use of their right to draw negative inferences in cases of refusal by WTO Members to provide the requested information. The hesitation of panels to use this right is understandable in disputes turning around information that is alleged to be confidential. Neither the DSU nor any other of the covered agreements seems to give a satisfactory answer to the question how to protect confidentiality, while at the same time guaranteeing equality of arms and due process.

e) *Problems Related to Confidential Information*

78. It is well known that confidential information raises a fundamental problem. On the one hand, access to and use of confidential information serve finding the truth. All regulators know that confidential information is indispensable for their task. On the other hand, confidential information is worthy of protection and should not be disclosed. However, the principles of equality of arms and due process require that the information available and used by one party has to be made accessible to the other party. According to these principles, some disclosure is unavoidable.

³³ Appellate Body, Canada – Aircraft, op. cit. (footnote 31), paras. 198-203. The recognition of the right to draw negative inferences is facilitated by the wording of the Subsidies Agreement. Annex V of this Agreement, entitled “Procedures for Developing Information Concerning Serious Prejudice”, provides in paragraphs 6 and 7 as follows:

6. *Where information is unavailable due to non-cooperation by the subsidizing and/or third country Member, the panel may complete the record as necessary relying on best Information otherwise available.*

7. *In making its determination, the panel should draw adverse inferences from instances of non-cooperation by any party involved in the information-gathering process“.*

³⁴ Appellate Body, United States – Wheat Gluten, op. cit (footnote 21). paras. 170-176.

³⁵ Appellate Body, Canada – Aircraft, op. cit (footnote 31). para. 198.

79. The protection of confidential information is one of the tenets of the covered agreements. As an example, it is useful to quote the Antidumping Agreement that is particularly detailed and precise. According to Article 6.5 of this Agreement:

Any information which is by nature confidential [...] or which is provided on a confidential basis by parties to an investigation shall [...] be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.

80. In order to respond to the due process requirement, Article 6.5.1 Antidumping Agreement obliges interested parties to furnish non-confidential summaries. This provision recognises however that, in exceptional circumstances, it is not possible to provide such a summary.
81. Article 6 tries to satisfy the requirements of due process in requiring in paragraph 2 that:

Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests...

and in paragraph 9:

The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures.

82. However, in the end, the dilemma between finding the truth, protecting confidential information and guaranteeing due process remains unresolved. Article 12.2.2 Antidumping Agreement states solomonicly:

A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain [...] all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures on the acceptance of a price undertaking, due regard being paid to the requirement for the protection of confidential information.

83. In *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, a panel has tried to deduce from Article 3.1 in conjunction with Article 17.6 that the Antidumping Agreement prohibits justifying an anti-dumping measure with evidence or reasoning that was not made available to interested parties in the final determination. The attempt has failed: the Appellate Body has reversed the

panel's finding. According to the Appellate Body, Article 3.1 permits the use of confidential information, while Article 17.6, defining the standard of review of panels with regard to national authorities, is not relevant for the treatment of confidential information.³⁶

84. The provisions of Article 12.2, 3, 4 and 8 Subsidies Agreement are identical with or, at least, similar to the already mentioned provisions of the Antidumping Agreement. The Safeguard Agreement is less detailed, but also requires the protection of confidential information. It is therefore very likely that the conclusions of the Appellate Body in *Thailand – Steel* will apply, *mutatis mutandis*, with respect to these two other agreements.
85. Confidential information is not only protected in proceedings before national authorities but also in proceedings before panels.³⁷ The conflict between finding the truth, protecting confidential information and guaranteeing due process exists thus also at the level of the WTO. There is no provision that solves it in one way or the other. Individual panels have endeavoured to find an *ad hoc* solution, in proposing, or even adopting, procedural rules that try to “marry” the protection of confidentiality with the principle of equality of arms. At least in the relations between the United States and the EC, all these attempts have failed. The EC has systematically refused to accept these procedures, arguing that they limit access to the confidential information to a too narrow circle of officials. The transmission of confidential information to the panel alone is impossible. Such transmission would be incompatible with the prohibition of *ex parte communications* between the panel (or the Appellate Body).³⁸
86. Considering the usefulness of its own Working Procedures, the Appellate Body has suggested, on several occasions, that standard rules of procedure should be adopted for panels.³⁹ As of now, such standard rules of procedure do not exist.⁴⁰ Their establishment and adoption would, indeed, be highly desirable. They would structure and regulate the panel process with more precision and in greater detail. They would better organise the fact finding

³⁶ Appellate Body, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Iron Alloy Steel and H-Beams from Poland (Thailand – H-Beams)*, WT/DS122/AB/R, adopted 5 April 2001, paras. 117 and 118

³⁷ Article 13.1, last sentence, DSU.

³⁸ Article 18.1 DSU.

³⁹ See Appellate Body, *Argentina – Footwear*, op. cit. (footnote 21) footnote 68 with references to earlier Appellate Body Reports.

⁴⁰ According to Article 12.1 DSU, “Panels shall follow the Working Procedures in Appendix 3 [DSU] unless the panel decides otherwise after consulting the parties to the dispute.” However, the Working Procedures laid down in Appendix 3 are rather rudimentary.

process, guaranteeing the full respect of the principle of due process. They would make sure that procedural objections are advanced by the parties, and addressed by the panel, as early as possible in the proceedings, instead of being raised and ruled upon late in the dispute settlement process. It is, however, doubtful whether the conflicts related to the treatment of confidential information can at this point be addressed satisfactorily outside the current negotiations on improvements and clarifications to the DSU. It is noteworthy that the Appellate Body has characterised the problem of confidential information as a “serious systemic issue”.⁴¹ It is in my view one of the most urgent, but also one of the most difficult problems to be solved.

VI. THE PANEL STRUCTURE

87. The preceding discussion shows that the weakness of the fact finding process at the level of panels is – at least in part – a consequence of the lack of rules for one fundamental aspect of this process, that is the treatment of confidential information. In addition, it may be the result of the behaviour of Member States and the unsatisfactory response of panels to this behaviour. Is there something else that could and should be done to improve the situation?
88. The question leads us to an even more delicate issue, i. e., the structure of the panel system.
89. The Appellate Body is a permanent institution.⁴² Its seven members are, as discussed earlier, appointed for a four-year term, which can be renewed once.
90. On the contrary, for every dispute, a panel is established *ad hoc*.⁴³ Also the panel members are designated *ad hoc*. The criteria that define the categories of eligible persons are broad and leave a wide margin of discretion. The WTO maintains a list of governmental and non-governmental individuals possessing the necessary qualifications, from which panelists may be drawn, but the list is “indicative”.⁴⁴
91. Panel members are independent. According to Article 8.2 DSU, panel members should be selected with a view to ensuring the independence of the

⁴¹ Appellate Body, United States – Wheat Gluten, op. cit. (footnote 19), para. 170.

⁴² Article 17 DSU is entitled “Appellate Review”, but has the sub-title “Standing Appellate Body”.

⁴³ Article 6 DSU.

⁴⁴ Article 8.1 – 8.4 DSU.

members. For the same reason, Article 8.3 DSU provides that citizens of Members whose governments are parties to the dispute or third parties shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise.

92. Panel members are in general highly qualified personalities. Some become panelists only once. Others serve as panelists on several occasions.
93. There can be no doubt that panelists are independent. However, the DSU contains absolutely no rules that guarantee structurally this independence.
94. Being selected as a panelist is an honour and a personal distinction. It is not astonishing that a panel member is interested in being re-appointed and in serving again as a panelist.
95. In view of the difficulties facing panels in the fact finding process, and in the light of the institutional instability of panels and their members, I do not believe that one can expect *ad hoc* appointed panel members to proceed with the same determination as members of a permanent (quasi-) judicial body, like the Appellate Body. This assumption applies in particular with respect to the delicate process of drawing negative inferences.
96. It is in my view therefore highly desirable to modify the actual panel system and to guarantee structurally the stability of panels and, thus, the independence of their members. Two avenues should be actively explored. One is the establishment of a standing panel with members appointed for a certain number of years, following the example of the Appellate Body. In order to allow for a certain specialisation, the standing panel could be composed of different sections (divisions) with expert panelists. Another, less ambitious reform would be to establish a limited list of potential panel members, which should however not be too large. Panelists would have to be chosen from that limited list. Like the solution of the problem of confidential information, the reform of the existing panel system should be undertaken in the context of the current negotiations on improvements and clarifications to the DSU.

VII. ISSUES OF SUBSTANTIVE LAW

A. General Considerations

97. As I have explained earlier, when I arrived in Geneva in 1995, I did not have an in-depth knowledge of GATT law. Discovering and exploring the world of substantive WTO law, and in particular the old GATT law, was therefore

as much a new and fascinating experience as applying for the first time the rules of a (quasi-) judicial appeal procedure.

98. In the context of this retrospective, I will limit myself to a very few systemic remarks of a general nature. I will therefore avoid any discussion of specific provisions and issues. Such a discussion would clearly go beyond the object and purpose of this paper.
99. I do not doubt that my earlier experience with EC law has assisted me in the understanding a number of issues of substantive WTO law. Particularly helpful was the familiarity with the fundamental freedoms, and more specifically the free movement of goods. Useful also was my latest Brussels experience at the Directorate General of Competition. To illustrate this point, it is sufficient to mention words like “directly competitive or substitutable”⁴⁵, which remind the competition lawyer of defining the relevant product market, in order to assess the market power of undertakings, etc.

B. Difficulties Arising from Structural Differences between WTO and EC Law

100. The prior experience with EC law is however not always of assistance. It can also contribute to difficulties of understanding and be a source of confusion, when EC law is structured differently — at least at first sight — from WTO law. Two practical examples come immediately to my mind.
101. The first example is the different structure of the fundamental prohibition guaranteeing the free movement of goods in the EC Treaty, i. e., Article 28, on the one side, and Articles III.4 and Article XI.1 GATT (1994), on the other. While I have never felt any difficulty in understanding the prohibition of fiscal discriminations in Article III.2 GATT (1994), which resembles very much Article 90 EC Treaty, I have always been profoundly intrigued by the requirement of “likeness” in Article III.4, and by the dividing line between this Article and Article XI.1. The Report in *European Communities – Asbestos* has obliged the Appellate Body to contribute to the interpretation of the first element, i.e., the requirement of “likeness”.⁴⁶ Regrettably, until now, no appeal has given the opportunity to do the same with respect to the second element, i. e., the dividing line between Article III.4 and Article XI.1.

⁴⁵ See Note Ad Article III Paragraph 2 GATT (1994).

⁴⁶ Appellate Body, *European Communities – Asbestos*, op. cit. (footnote 11), paras. 87 and following.

102. The second example of a different structure is the notion of services in the GATS and in the EC Treaty. While the notion of services in the GATS is broad, and the scope of the GATS is therefore large, the notion of services, and the corresponding fundamental freedom, in the EC Treaty is narrow, as the freedom to provide services is defined, in the EC Treaty, as a residual freedom.⁴⁷ Experts of EC law should therefore approach the GATS with particular caution and circumspection in order to avoid misunderstandings and wrong interpretations.

C. Cumulating of Substantive Obligations in WTO Law

103. While working as a lawyer in Brussels, I have always been concerned with questions of architecture between different legal rules. EC law gives rise to this type of question with respect to both competencies and procedures, as well as to substantive obligations. The questions concerning competencies and procedures are due to the multitude of and differences between legal bases for secondary legislation at the EU/EC level: What institution(s) is (are) entitled to act? According to what procedure(s)? In particular with respect to the Council, is unanimity required or is qualified majority sufficient? The questions concerning substance relate mainly to the rights and obligations of Member States: Is their activity forbidden by primary or secondary Community law? What is the relationship between total and partial prohibitions? Do they apply cumulatively? Or is one of them a *lex specialis* with respect to the other?
104. During my time in Geneva, I have not encountered the first type of questions, but, of course, I have come up against the second. From the beginning, I have been impressed by what seems to me to be a rather important difference between the two legal orders. Substantive WTO law appears to me to be less structured than EC law. The same contested measure is often examined under a series of provisions, possibly contained in different covered agreements. All these provisions and agreements seem to apply simultaneously and cumulatively. There seems to be no – or at least little – structure, and overall architecture, which would allow distinguishing between *lex generalis* and *lex specialis*. This general proposition can be illustrated by a few practical examples.

⁴⁷ See Article 49 EC Treaty, according to which “services shall be considered to be ‘services’ within the meaning of this Treaty ... insofar as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.”

105. The first example concerns the relationship between the GATT and the GATS. Neither of these agreements regulates its relationship with the other. Are all measures concerning *goods*, and falling therefore under the GATT, also potentially cases concerning *services*, and falling therefore also under the GATS, because goods have to be sold, and selling is a service falling under the GATS? Will it not be necessary to develop a dividing line between the two Agreements, in order to avoid a systematic and automatic overlap, which was hardly intended by the authors of the two texts?⁴⁸
106. The second example concerns the relationship between the GATT, the GATS and the Subsidies Agreement. Measures regulating the granting of subsidies in general or determining whether a subsidy is granted in an individual case fall under the general prohibitions of the GATT and the GATS. At the same time, they are subject to the Subsidies Agreement. Again, one may ask whether it would not be necessary (or appropriate) to determine a dividing line between these three agreements, in order to avoid a systematic overlap of the three texts.
107. A third example may be offered by the GATT and the TBT Agreement. Until now, the Appellate Body has examined the TBT Agreement only once, but only with respect to the question whether the measure at stake was susceptible or not of falling under this Agreement.⁴⁹ The relationship between the GATT and the TBT Agreement remains to be examined.⁵⁰
108. I am not sufficiently familiar with the history of WTO law to offer a considered explanation of why WTO law seems to be less structured than the corresponding EC law. The reasons may be found in the way in which

⁴⁸ The relationship between the GATT and the GATS was at issue in *Canada – Certain Measures Concerning Periodicals*, (WT/DS31/AB/R), adopted 30 July 1997, DSR 1997:I, 449 (463-465); *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, (WT/DS/27/AB/R), adopted 25 September 1997, DSR 1997:II, 591 (678-680); and *Canada – Certain Measures Affecting the Automotive Industry* (WT/DS139/AB/R and WT/DS1422/AB/R), adopted 19 June 2000 paras. 147 and following.

⁴⁹ Appellate Body, *European Communities – Asbestos*, op. cit. (footnote 11), paras. 59 and following.

⁵⁰ The TBT Agreement specifies in Article 1.5 that its provisions do not apply to sanitary and phytosanitary measures as defined in Annex A of the SPS Agreement. Article 2.4 of the SPS Agreement states that sanitary or phytosanitary measures which conform to the relevant provisions of the SPS Agreement shall be presumed to be in accordance with the obligations of the Members under the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX (b). These provisions prove that questions of structure between substantive rights and obligations contained in different agreements were present in the mind of at least some of the negotiators. But such provisions are less frequent than one would expect.

the WTO Agreements were negotiated and in which they are to be interpreted, according to the Vienna Convention. Perhaps it is also premature to compare the two legal orders, taking into account their different state of development, at least with respect to interpretation and clarification by their respective judicial or quasi-judicial organs. In any case, the evolution of the question of structure and architecture seems to me to be a particularly interesting aspect to observe in the future.

D. More Stringent WTO Law than EC Law Obligations

109. A final point worth mentioning is the fact that in certain respects, WTO law has been interpreted more strictly than EC law. The most obvious example is Article III.2, first sentence, GATT (1994). According to this provision, “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.” The sentence is interpreted literally: Imported products which are “like” some domestic products can not be taxed higher than these domestic products, even if they are taxed in the same way as identical other “like” domestic products. A “real world” example, which was considered by a GATT panel and by the European Court of Justice, concerned beer. Beer brewed by small breweries was taxed less than other beer. The taxation privilege was not limited to domestic beer. A GATT panel considered the tax privilege to be *per se* contrary to Article III.2, first sentence, as beer produced by breweries of whatever size is a like product⁵¹. The European Court of Justice considered a similar tax privilege to be compatible with the corresponding provision of the EC Treaty.⁵²
110. I do not want to suggest that the GATT panel was wrong, while the European Court of Justice was right. The case before the panel may very well have been a case of (*de facto*) discrimination that ought to have been found inconsistent with Article III.2, first sentence. The point that I want to make is more limited, but at the same time broader. It is more limited, as I simply want to show that there are situations in which WTO law has been interpreted more restrictively than the corresponding EC law provisions. The broader point is, I wonder whether it is plausible that WTO law is stricter than EC law. Normally, one would expect the rules governing the

⁵¹ United States – Measures Affecting Alcoholic and Malt Beverages, DS23/R, adopted 19 June 1992, 39S/206, para. 5.19.

⁵² Case 127/75, Bobie Getränkevertrieb GmbH v. Hauptzollamt Achen-Nord (1976) ECR 1079.

relations among members of the wider grouping (the WTO) to be more flexible than those that apply within the much smaller club (the EU/EC) which, in addition, pursues more ambitious goals, like the establishment of the internal market without internal frontiers. I recognise that there might be good reasons to have a stricter discipline world wide than the EU/EC internally when it comes to a particular sector, like agriculture. It is also possible that the WTO might want to maintain greater discipline than the EU/EC with respect to subsidies, taking into account the fact that the EU/EC is a club of relatively rich countries that have a certain inclination to solve economic and societal problems through subsidies. I would submit however, that, as a general rule, one would expect the law governing the relations of WTO members to be more flexible and less strict than the rules applying within the EU/EC. There must be particular reasons to arrive at the opposite results. If there are not such reasons, I would be inclined to doubt that the result is right, and that it is sustainable in the long term.

VIII. THE TENSIONS BETWEEN THE STRONG (QUASI-) JUDICIAL AND THE WEAK POLITICAL STRUCTURES

A. General Considerations

111. Since my arrival in Geneva, I have been impressed by the imbalance between the strong (quasi-) judicial structure set up by the DSU and the inefficiency of the political decision making process. While the Uruguay Round has substituted the traditional diplomatic and consensual panel system by the compulsory and quasi- automatic dispute settlement system of the DSU, the same Uruguay Round has left intact, in practice, decision making by consensus for all matters other than dispute settlement.⁵³ Political decision making by consensus is even more difficult today than before 1995, as membership of the WTO has increased and is continuing to grow.
112. Judges have to decide those cases that are brought before them. They are not allowed to refuse to solve the issues that the parties to the dispute put to them because these issues are legally or politically delicate. This task is often difficult, even if the political decision making process is well adapted and functions smoothly. The judge's job becomes much more delicate, if the political decision making process is slow or — as in the case of the WTO — practically blocked.

⁵³ See Article IX.1 of the Marrakesh Agreement Establishing the World Trade Organization according to which "the WTO shall continue the practice of decision-making by consensus followed under GATT 1947."

113. Observers of the history of the EC know that the imbalance between the political institutions (*in concreto* the Council, being unable to decide because of the unanimity principle) and the judiciary (the European Court of Justice) is dangerous. The judges in Luxembourg see themselves confronted with cases that would not have arisen if the political decision making process had worked satisfactorily. Recourse to the Court of Justice might be used, in particular by the European Commission, but also by the European Parliament, to put pressure on the Council, or on individual Member States, to bring about political decisions.
114. The institutional architecture of the WTO is different from the EU/EC. Panels and the Appellate Body can not be used by the WTO Secretariat or individual WTO Members to invigorate the political decision making process.
115. Panels and the Appellate Body may nevertheless be called upon to decide claims that raise questions that are politically delicate. Neither a panel nor the Appellate Body is entitled to refuse to rule on such claims, made by the complainant or the appellant, because the panel or the Appellate Body wants to avoid deciding a question of legal interpretation that has delicate political consequences. Such a refusal would be contrary to Article 3.2, second sentence, DSU. According to this provision the “Members recognize that the dispute settlement system serves 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 public international law”. In addition, the Appellate Body has to respect Article 17.12 DSU, which states that the “Appellate Body shall address each of the issues raised... during the appellate proceedings.”
116. Critics of the actual dispute settlement procedures, and of panels and the Appellate Body rulings, may object that in deciding difficult questions of legal interpretation, that have delicate political consequences, panels and Appellate Body reports may lead to recommendations and rulings of the DSB that add to or diminish the rights and obligations provided in the covered agreements, contrary to Article 3.2, last sentence, DSU. I do not deny that this risk exists. However, the refusal to decide on a claim, or on an issue raised in an appeal, would be, by itself, an egregious violation of Article 3.2, last sentence, DSU.

B. Unsatisfactory Functioning of Political Filters

117. Panels and the Appellate Body may be faced with complaints that would not be raised, or which would disappear, if the political filters provided by WTO Agreements would function. The committees instituted by different covered agreements could act as such filters. To take two practical examples: the case concerning *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*⁵⁴ would probably not have arisen, if the Committee on Balance-of-Payments Restrictions had taken a decision on the still existing Indian import restrictions. Similarly, in *Turkey – Restriction on Imports of Textile and Clothing Products*, the Appellate Body might not have felt obliged to comment on its responsibilities with respect to the interpretation of Article XXIV GATT (1994), if the Committee on Regional Trade Agreements had come to a conclusion on the compatibility of the customs union between the EC and Turkey⁵⁵.
118. Both cases are quoted by critics as examples of where the Appellate Body has overstepped the limits of its powers and assumed responsibilities that belong to the political organs of the WTO. I consider this criticism to be unfounded. I share the view that the political organs of the WTO might be better suited than a panel and the Appellate Body to determine whether a Member is facing a balance-of-payment crisis, or whether a regional trade agreement is compatible with Article XXIV GATT (1994). But I am also convinced that a panel and the Appellate Body can not refuse to determine whether a measure is or is not consistent with a covered agreement, because a WTO committee has been unable to reach a consensus and has thus abstained to come to a conclusion. The imbalance between the strong judicial and the weak political decision making process should not be redressed in weakening the judicial, but in strengthening the political arm of the WTO.

C. Blockage of the Process of Interpretations and Amendments

119. The dilemma created by the actual imbalance between the two branches of the arms of the WTO is illustrated even more dramatically by the differences between the Appellate Body and the majority of WTO Members concerning the status of unsolicited *amicus curiae* briefs. It is well known that, according to the Appellate Body, both panels and the Appellate Body have the authority to accept and consider unsolicited

⁵⁴ Appellate Body, WT/DS/90/AB/R, adopted 22 September 1999, paras. 80 and following.

⁵⁵ Appellate Body, WT/DS34/AB/R, adopted 19 November 1999, para. 60.

amicus curiae briefs, if they find it pertinent and useful to do so.⁵⁶ On the contrary, the vast majority of WTO Members take the view that neither panels nor the Appellate Body have this authority. They consider that the Appellate Body has wrongly interpreted the DSU, that it has violated its mandate, and that it has thereby added to or diminished the rights and obligations of WTO Members

120. I do not contest that the silence of the DSU with respect to the *amicus curiae* problem can be interpreted in different ways and that the interpretation of this agreement with respect to unsolicited *amicus curiae* briefs is therefore a difficult question. As a consequence, I can also understand the protests that the interpretation of the Appellate Body has generated. I do not believe, however, that it is appropriate to voice these protests at meetings of the Dispute Settlement Body and leave the matter there, expecting that the Appellate Body will change its position in the light of criticism of individual WTO members, even if these Members form a large majority. If Members feel that the Appellate Body has made a mistake and that it should modify its interpretation, they should use the legal forms provided for by the Marrakesh Agreement. According to Article IX.2 of this Agreement, “the Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations [...] of the Multilateral Trade Agreements. [...] The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members.” According to Article X.8 of the Marrakesh Agreement, the DSU can be amended, on a proposal from any Member, “by consensus” and “shall take effect for all Members upon approval by the Ministerial Conference”. WTO experts may argue whether amendment or interpretation is the more appropriate way to

⁵⁶ Appellate Body, United States – Import Prohibition of Certain Shrimp and Shrimp Products (United States- Shrimps), WT/DS58/AB/R, adopted 6 November 1998, paras. 99-110; Appellate Body, United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products originated in the United Kingdom, (United States - Lead and Bismuth II) WT/DS1388/AB/R, adopted 7 June 2000, paras.36-42 and following; and Appellate Body, European Communities – Asbestos, op. cit. (footnote 11), paras. 50-57.

The decisive paragraph in United States – Lead and Bismuth II, para. 39, reads as follows: In considering this matter, we first note that nothing in the DSU or in the Working Procedures specifically provides that the Appellate Body may accept and consider submissions or briefs from sources other than the participants and third participants in an appeal. On the other hand, neither the DSU nor the Working Procedures explicitly prohibit acceptance or consideration of such briefs. However, Article 17.9 of the DSU provides: [...] This provision makes clear that the Appellate Body has broad authority to adopt procedural rules which do not conflict with any rules and procedures in the DSU or the covered agreements. Therefore, we are of the opinion that as long as we act consistently with the provisions of the DSU and the covered agreements, we have the legal authority to decide whether or not to accept and consider any information that we believe is pertinent and useful in an appeal.

proceed, taking into account the decision making traditions in Geneva. However, at least among lawyers, there should be no doubt that one of these legal channels has to be used by WTO Members if they want to guide the Appellate Body in its future attitude towards the *amicus curiae* issue or any other contested problem of interpretation.

121. The tradition of decision making by consensus is obviously an enormous obstacle on the road to successful use of the formal legal channels to interpret or to amend the covered agreements. Because of my limited experience as a member of the Appellate Body – as opposed to the political decision making machinery of the WTO – I do not feel qualified to make any suggestions to facilitate or modify the habitual voting practices. I am however convinced that all efforts should be deployed in the direction of strengthening the political decision making capacity of the WTO. I am afraid that the results achieved during the Uruguay Round with respect to dispute settlement can only be sustained, in the long run, if political decision making becomes easier and a true complement to judicial decision making.

D. Urgency of Improving Political Decision Making

122. I thus share the view that the actual imbalance between the judicial and the political arms of the WTO is dangerous. But I belong to the group of those who feel that the remedy should be found in improving the political decision making capacity. On the contrary, I am firmly opposed to all proposals to turn the wheel of history back and to re-establish mechanisms which either make recourse to panels and the Appellate Body more difficult or which facilitate blocking its results. I therefore strongly disagree with recent suggestions to move the WTO dispute settlement system partially back in the direction of the original ‘diplomatic’ model for dispute settlement, and away from the judicial model introduced by the DSU. One of these suggestions is that the Director General or a special standing committee of the Dispute Settlement Body (DSB) be empowered to step in and direct the contending WTO Members to settle their differences through bilateral negotiations, mediation, or arbitration by an outside party. Another recommendation is to set up a new blocking mechanism according to which at least one-third of the members of the DSB, representing at least one-quarter of the total trade among WTO Members, could oppose a panel or Appellate Body report, so that the report would be set aside. These proposals are not only flawed from a technical point of view, but they go also in the wrong direction. Instead of targeting the weaknesses of the traditional political decision-making process, they attack the strengths of the new dispute settlement system.

123. In order to avoid any misunderstanding, I would like to underline that I am not opposed to any interpretation or amendment, decided according to Articles IX or X of the Marrakesh Agreement, tending to provide an interpretation of a provision that is different from that adopted by the Appellate Body, effectively directing how the provision should be interpreted by panels and the Appellate Body in the future. On the contrary, I would be reassured if the political arm of the WTO had the ability to so decide. Today, my position is thus fundamentally different from what it was some 10 years ago, when the European Council undertook to “correct” the jurisprudence of the European Court of Justice on certain consequences of the principle of equal pay for male and female workers through the adoption of the famous “Barber Protocol”. In those days, I felt that the action of the European Council would undermine the authority of the Court of Justice, and that the adoption of the “Barber Protocol” was therefore a mistake. Today, I consider it to be perfectly legitimate that the legislative branch clarifies a provision of a covered agreement, provided this is done in those forms that the respective “constitutive” charter prescribes. I would even go one step further and congratulate the WTO if its political organs were able to use Articles IX and X of the Marrakesh Agreement to react to an interpretation of a covered agreement, given by a panel or the Appellate Body, with which these political organs disagree. The inability of the political organs of the WTO to do so reveals not only a serious institutional weakness, but also a flaw with respect to the fundamental principle of democracy which requires that judges are subject to the law, and that the law can be changed by the legislator.

E. Dangers of Attributing Direct Effect of WTO Law

124. The actual imbalance between the strong (quasi-) judicial and the weak political structures of the WTO lead to two further observations. Both concern the (quasi-) judicial branch of the WTO.
125. As the (quasi-) judicial arm has proven already to be much stronger than the political arm of the WTO, nothing should be done which would strengthen further the role of the judiciary with respect to the role of the other two branches of government. This would however happen if WTO Members were to give WTO law “direct effect”, i. e., give private parties the right to invoke WTO law before national courts. It is obvious that recognising direct effect of international agreements results in a shift of power between constitutional institutions: the position of the government and the parliament is weakened, and that of the courts strengthened. Supporters of direct effect and promoters of civil society favour such an

effect because they want to discipline the omnipotence and arbitrariness of government and parliament. Were the shift in weight confined to the domestic level, I could leave it at this conclusion. But the weights will shift at the level of the international organisation as well.

126. Why? A Member whose courts grant direct effect is likely to become an aggressive partner in the context of WTO dispute settlement, if it wishes to uphold the balance of rights and duties between itself and its treaty partners. The shift in the balance results from the private actions against violations of WTO law to which the Member recognising direct effect will be exposed domestically, while there are no comparable court actions in the partner countries. A Member keen to maintain the balance of rights and obligations will be compelled by economic and political considerations to defend the interests of its exporters and investors before the panels and the Appellate Body. It will enforce rights in WTO dispute settlement procedures that it would either not have defended at all in “judicial” form, or, at least, not at the time chosen, if WTO law had no direct effect in its home territory.
127. The greater number of the probably increasingly complex complaints will lead to a further strengthening of panels and the Appellate Body in comparison with the political bodies of the WTO. For the reasons exposed earlier, I do not believe that it is wise to do so. I am therefore opposed to granting direct effect to WTO law. Recognition of direct effect would harm, instead of help, the WTO!

F. Responsibility of the Appellate Body: Principled or Case Specific Reasoning?

128. My second observation concerns the responsibility of the Appellate Body. As a quasi - court of appeal and of last resort, its responsibility would be in any case enormous. However, its responsibility is even greater than that of a normal court of last instance. The additional responsibility results from the just discussed weakness of the political arm of the WTO. Because of the traditional decision making pattern, the Appellate Body can hardly expect direction by a Ministerial Conference or the General Council, acting, between major trade rounds, according to Articles IX or X of the Marrakesh Agreement.
129. The Appellate Body has therefore to proceed with extraordinary circumspection and care. This general guideline does not apply only to the final results that the Appellate Body will reach, but also to every step that it makes on the road towards these results. It is therefore not surprising that

the reasons set out in Appellate Body reports avoid sweeping statements, and are closely linked to the particular facts and circumstances of the case to be decided. From the point of view of the “security and predictability of the multilateral trading system”⁵⁷, this cautious attitude might be regretted. It could well be argued that security and predictability would be better served by broad statements of principle that allow WTO Members to orient their activities in the future. The relatively narrow findings of the Appellate Body might even be criticised as not fully compatible with the overall mandate of the dispute settlement system to “clarify the existing provisions” of the covered agreements⁵⁸

130. A more principled, less case specific approach would certainly carry the risk that the Appellate Body would have to correct its reasoning in future appeals. I recognise that, to a certain degree, this process of refining and adapting existing administrative practice and jurisprudence to new situations is inherent in the application of general rules by administrators and judges, and therefore unavoidable. I do not believe however that the Appellate Body should increase the likelihood of being obliged to correct the reasoning set out in one of its earlier reports. Such corrections would do even greater harm to the “security and predictability of the multilateral trading system” than the questions that the Appellate Body leaves open today in following its rather narrow, case specific approach. In addition, such corrections would probably be detrimental to the credibility of the Appellate Body and thus affect its legitimacy.
131. The same kind of considerations apply, in my view, to the suggestion that the Appellate Body should explain in greater detail how and why it reached a certain solution, in discussing more openly the arguments that plead for and against the result. I recognise that there are courts that follow a more analytical approach in motivating their decisions. However, there are also highly regarded courts of last instance that give fewer reasons for their decisions. The European Court of Justice is but one of them. Compared with these latter jurisdictions, the Appellate Body is surprisingly meticulous and transparent. Going further would entail, in my view, the same risk as the one described earlier. The Appellate Body might make statements that are appropriate in the case in which they are made, but not in the context of another case. In other words, the reasoning might contain *obiter dicta*, which risks being too broad and being misunderstood, so that it may have to be corrected in the future. The actual “style of motivation” is thus a compromise that I consider to be absolutely justified.

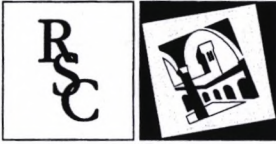
⁵⁷ Article 3.2, first sentence, DSU.

⁵⁸ Article 3.2, second sentence, DSU.

IX CONCLUSIONS

132. During the very first years of its existence, the new dispute settlement system has often been called the “crown jewel” of the WTO. I have always considered this characterisation with scepticism. It seemed to me to be typical for a period of euphoria, a sort of honeymoon, which would not last very long. The initial enthusiasm has indeed been replaced by a more sober analysis of the situation. Beginning with the controversy generated by the *amicus curiae* rulings, reports of the Appellate Body have increasingly been criticised. I have mentioned some of these criticisms, like the protests directed against the Appellate Body’s findings with respect to the standard of review and the determination of the meaning of national law. Some have called the situation created by the *amicus curiae* conflict an “institutional crisis”. In my view, this is as much an overstatement as the earlier manifestations of unlimited joy and satisfaction.
133. In conclusion, I would like to repeat what I have said at the beginning of this paper: The dispute settlement system negotiated during the Uruguay Round seems to me still today an extraordinary achievement that comes close to a miracle. It seems to me to be wise not to take its existence for granted, and to be guaranteed forever, but to contribute to its consolidation and further development in pursuing with circumspection and caution, but also with courage and in total independence, the road which has been taken, and which has proved so far to be a notable success.

Claus-Dieter Ehlermann, European University Institute
Claus.Ehlermann@iue.it



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