

# Scope and Function of the WTO Appellate System: What Future after the Millennium Round?

*Andreas R. Ziegler*

- I. Introduction
- II. From the GATT 1947 Panels to the WTO Appellate System
  1. The WTO Dispute Settlement System
  2. The Appellate Review
  3. The Review Process
- III. Characteristics of Existing Review Mechanisms in International Law
  1. Basic Principles
  2. The International Court of Justice as a Court of Second Instance
  3. ICSID Annulment Tribunals
  4. CUSFTA and NAFTA Extraordinary Challenge Committees
- IV. The WTO Appellate Body at Work — Existing Case Law (1996, 1997, and 1998)
  1. Overview
  2. United States — Standards for Reformulated and Conventional Gasoline (22 April 1996)
  3. Japan — Taxes on Alcoholic Beverages, Complaints by the European Communities (4 October 1996)
  4. United States — Restrictions on Imports of Cotton and Man-Made Fibre Underwear (10 February 1997)
  5. Brazil — Measures Affecting Desiccated Coconut, Complaint by the Philippines (21 February 1997)
  6. United States — Measures Affecting Imports of Woven Wool Shirts and Blouses (25 April 1997)
  7. Canada — Certain Measures Concerning Periodicals (30 June 1997)
  8. European Communities — Regime for the Importation, Sale and Distribution of Bananas (9 September 1997)
  9. India — Patent Protection for Pharmaceutical and Agricultural Chemical Products (19 December 1997)

10. European Communities — Measures Affecting Livestock and Meat (Hormones) (16 January 1998)
  11. Argentina — Certain Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items (27 March 1997)
  12. European Communities — Customs Classification of Certain Computer Equipment (5 June 1998)
  13. European Communities — Measures Affecting Importation of Certain Poultry Products (13 July 1998)
  14. United States — Import Prohibition of Certain Shrimp and Shrimp Products (12 October 1998)
  15. Australia — Measures Affecting the Importation of Salmon (20 October 1998)
  16. Guatemala — Anti-Dumping Investigation Regarding Imports of Portland Cement from Mexico (2 November 1998)
- V. The Appellate Body's Role in the WTO Dispute Settlement System
1. Almost every Panel Decision Is Appealed Against
  2. Almost in every Appeal the Original Decision Is Modified
  3. Conceptual Problems and Outlook

## I. Introduction

The creation of the World Trade Organization (WTO) in 1994 led to a substantive change in the dispute settlement system formerly used under the General Agreement on Tariffs and Trade of 1947 (GATT 1947).<sup>1</sup> One of the major reforms was the introduction of a new separate standing institution, i.e. the Appellate Body, which can be seized in order to have Decisions by dispute panels reviewed. The original texts of the Agreement establishing the WTO (WTO-Agreement)<sup>2</sup> as well as the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)<sup>3</sup> left open many questions with regard to the exact

---

<sup>1</sup> General Agreement on Tariffs and Trade, concluded on 30 October 1947, reprinted in: *Basic Documents and Selected Instruments (BISD)* 1 (1952), 1 and UNTS Vol. 55 No. 814, also available on the Internet at <http://www.wto.org/wto/legal/finalact.htm>.

<sup>2</sup> Agreement Establishing the World Trade Organization, as reprinted in: GATT Secretariat (ed.), *The Results of the Uruguay Round of Multilateral Trade Negotiations — The Legal Texts*, 1994, 1 et seq. and available on the Internet at <http://www.wto.org/wto/legal/finalact.htm>.

<sup>3</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), as reprinted in: GATT Secretariat, above note 2, and *ILM* 33 (1994), 1226 et seq.

functioning, character, and scope of review to be applied by the Appellate Body in its task. The Working procedures for Appellate Review<sup>4</sup> did not fill this gap either as they mostly address practical questions with regard to the exact procedure to be followed before the Appellate Body. The same is true for the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes as adopted by the Dispute Settlement Body (DSB) on 15 November 1996.<sup>5</sup>

As with many (international) courts and tribunals it is therefore only a thorough analysis of the actual practice of the body and the comparison thereof to the work of other institutions which can lead to a proper evaluation of the role played by such an institution and the practical problems encountered therein. One of the main characteristics of any appellate or review process to be examined is the scope of review applied. It has a major influence on the role of the separate bodies within a dispute settlement system and the behaviour and expectations of the parties. After three years of proper working and the first wave of heavy criticism of the work undertaken by the WTO Appellate Body it, therefore, seems appropriate to engage in a focused exercise. This is true despite the already existing extensive general analysis of the WTO dispute settlement system.<sup>6</sup> At the same time, this text will give a comparative overview of the existing appellate bodies and procedures in international law in order to identify the specific objectives and problems arising in this field, a task which to my knowledge has so far never been undertaken in a comprehensive way.<sup>7</sup> Several WTO parties have recently announced their agenda for a possible Millennium Round that could take off after the Ministerial meeting in late 1999. Most of them

---

<sup>4</sup> As adopted by the Appellate Body itself on the basis of article 17 para.9 DSU on 15 February 1996; Working Procedures for Appellate Review (WT/AB/WP/1) of 15 February 1996, several times modified. Accessible via Internet at <http://wto.org/dispute/wpab.htm>.

<sup>5</sup> WT/DSB/RC/W/1, 15 November 1996.

<sup>6</sup> Such as undertaken in an exemplary way by E.U. Petersmann (ed.), *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement*, 1997; and E.U. Petersmann (ed.), *International Trade Law and the GATT/WTO Dispute Settlement System*, 1997.

<sup>7</sup> The work by M. W. Reisman, *Nullity and Revision — The Review and Enforcement of International Judgments and Awards*, 1971; and E. Lauterpacht, *Aspects of the Administration of International Justice*, 1991 include descriptions of existing appellate systems but are not exhaustive in view of the limited existence of such standing bodies at the time of their writing.

have included reform proposals for the WTO dispute settlement process and, in particular for the Appellate Review. This text will serve as a first, although admittedly very superficial, analysis of the current state of the Appellate Body and identify possible areas of problems.

## II. From the GATT 1947 Panels to the WTO Appellate System

### 1. The WTO Dispute Settlement System

The dispute settlement system of the WTO is basically a modified version of the preexisting mechanism under arts XXIII and XXIV GATT 1947. At the same time, these amendments have changed the character of the dispute settlement in a way that strengthens not only the enforcement capability of the Decisions as such but also the WTO legal system as a whole.<sup>8</sup> The old dispute settlement system was only very vaguely mentioned in article XXIII GATT and mostly exercised according to the practice developed over time,<sup>9</sup> until it was partly codified in the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance of the Tokyo Round.<sup>10</sup> The new dispute settlement is extensively outlined in the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). There are provisions in several of the specific WTO agreements which contain

---

<sup>8</sup> Besides the mentioned works by Petersmann, see note 6; see also M. Esser, "Die Reform des GATT und des Streitschlichtungsverfahrens in den Verhandlungen der Uruguay-Runde", *ZVglRWiss* 91 (1992), 365 et seq. and O. Fauchald, "Tvisteløsningsmekanismer i verdens handelsorganisasjon", *Retfærd – Nordisk juridisk tidsskrift* 66/67 (1994), 73 et seq.

<sup>9</sup> The old system is well commented in R. A. Brand, "Competing Philosophies of GATT Dispute Resolution in the Oilseed Case and the Draft Understanding on Dispute Settlement", *JWT* 27 (1993), 117 et seq.; R. Hudec, *The GATT Legal System and World Trade Diplomacy*, 1990; R. Hudec, *Enforcing International Trade Law – The Evolution of the Modern GATT Legal System*, 1993; E.U. Petersmann, "Violation-Complaints and Non-Violation Complaints in Public International Trade Law", *GYIL* 34 (1991), 175 et seq.; R. Plank, "An Unofficial Description of How a GATT Panel Works and Does not Work", *Swiss Review of International Competition Law* 29 (1987), 81 et seq.

<sup>10</sup> GATT Secretariat, *The Texts of the Tokyo Round Agreements*, 1989, 200 et seq.

separate rules and amendments to this procedure, such as article 17.6 in the Uruguay Round Agreement on the Implementation of article VI of the GATT 1994 (on anti-dumping measures).<sup>11</sup>

As under the traditional GATT system, a WTO party initially has to request bilateral consultations with another WTO party if it wishes to raise issues under the dispute settlement mechanism of the WTO (article 4 DSU). Only if this request remains unanswered or after unsuccessful consultations may the complainant request the DSB of the WTO to establish a panel of experts for the settlement of the dispute (arts. 4 para.7, 6 DSU). The DSB consists of representatives of all WTO parties and is a newly created body of the Uruguay Round which administers the entire dispute settlement mechanism. The DSB can only deny the establishment of a panel if all the DSB members decide so unanimously.

As in the past, the dispute settlement panels normally consist of three trade experts (article 8 para.5 DSU) from a roster which shall establish a report concerning the matter of dispute between the parties. If this report is not unanimously rejected by the DSB within 60 days after circulation, it is considered adopted by the DSB (article 16 para.4). Under the old GATT the reports had to be unanimously adopted which lead to a situation — especially in the last years of the old GATT — where the adoption of several highly disputed panel Decisions was blocked. The new system which requires unanimity to block adoption (article 16 para.4) — *inverted consensualism* — strengthens the independent and legal character of the dispute settlement procedure.<sup>12</sup>

---

<sup>11</sup> See, for example, E.U. Petersmann, "The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System since 1948", *CML Rev.* 31 (1994) 1157 et seq., (1204).

<sup>12</sup> T. Montaña i Mora, "A GATT With Teeth: Law Wins Over politics in the Resolution of International Trade Disputes", *Colum.J.Transnat.'LL.* 31 (1993), 105 et seq.; E.U. Petersmann., "The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System Since 1948", *CML Rev.* 31 (1994), 1157 et seq.; E.U. Petersmann, "The GATT Dispute Settlement System and the Uruguay Negotiations on its Reform", in: P. Sarcevis and H. Van Houtte (eds), *Legal Issues in International Trade*, 1990, 53 et seq.

## 2. The Appellate Review

Besides the unlikely event of an unanimous blocking of the adoption of a panel report in the DSB there is now, also, under the new system a second way of preventing the automatic adoption of a panel report. The new WTO system allows the parties to appeal against a panel report and take it to a *quasi*-judicial body at second instance (arts 17– 20 DSU). The institution charged with deciding these appellate procedures is a standing Appellate Body, consisting of 7 permanent members. The members are nominated for a period of four years at a time with one possible re-election (article 17 para.2 DSU). Although the DSU itself asked for persons of recognized authority in the field of law, international trade and specialists with regard to the agreements that were to be interpreted, at least *John Jackson*, one of the leading authorities on GATT, considered that some of the appointed members were not particularly experts in GATT/WTO law and jurisprudence but he also admitted that the initial time they were given for study before their first case had worked out reasonably well.<sup>13</sup>

One of the reasons why such an appellate review is considered necessary under the new system is exactly because that it is very unlikely for a report to be blocked under the DSB with the new voting system. While the old dispute settlement system had — at least with regard to its concept — a rather diplomatic character, the new system is *quasi*-judicial and considered by many to be the most successful and reliable judicial dispute settlement system in international law in general. The lack of a filter procedure against legally badly argued or wrong panel reports,<sup>14</sup> however, has been substituted through the introduction of an appellate review which will increase legal certainty and support the development of well established WTO case law.

## 3. The Review Process

Article 17 para.6 DSU provides that only issues of law and the legal interpretation developed by a panel can be reviewed by the Appellate Body. The Appellate Body has to address all issues that are brought up

---

<sup>13</sup> J. Jackson, *The World Trading System*, 2nd edition, 1997, 127.

<sup>14</sup> There were rare examples of panel reports under the old system which were generally considered unsatisfactory, see for examples Petersmann, see note 12, 1189 et seq.

by the complaining parties before it but shall not take up any other issues on its own initiative (article 17 para.12 DSU). The DSU does not contain any clear indication as to which standard of review shall be applied by the Appellate Body when reviewing panel Decisions. The Uruguay Round Agreement on the Implementation of article VI of the GATT 1994 (on anti-dumping measures), however, contains (on a last minute initiative by the United States) a special provision that defines the standard. Article 17 para.6 of that agreement reads:

In examining the matter referred [...]:

- (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;
- (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

In this agreement the United States have imposed what is usually called in the US legal system the "*clearly erroneous test*"<sup>15</sup> which puts a high limitation on the standard of review for the panels under this particular agreement. It seems that some parties would still like to extend this limited scope of review to all dispute panels under the WTO system, an idea, however, which is highly controversial and is regularly attacked by members such as the European Union.<sup>16</sup> The discussion on the standard of review for the panels at first instance with regard to Decisions by member states is parallel to the one on the standard of review of the Appellate Body with regard to panel Decisions. The former involves,

---

<sup>15</sup> An often quoted example of this standard is the one expressed by the United States Supreme Court in *US v. Gypsum Co.*, 333 US 364, 395: "A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made."

<sup>16</sup> See EU Paper on the Proposed Changes to the WTO Dispute Settlement System, as reported in *Inside U.S. Trade*, of 30 October 1998, 12.

however, rather the issue of sovereignty of member states,<sup>17</sup> while the second has above all to do with the institutional balance of the dispute settlement system of the WTO. This article focuses on the latter.

### III. Characteristics of Existing Review Mechanisms in International Law

#### 1. Basic Principles

Every legal system that provides for some kind of a "second round" in the judicial review of legal disputes is facing the question of whether and how the second instance shall be limited in its review of the dispute that has already been adjudicated by another instance. In principle, each review system wishes to guarantee that at least the second instance is able to correct whatever mistake the first instance has committed. At the same time, a full new round at the second instance (*de novo* proceedings) makes the proceedings considerably longer and more expensive and does not necessarily improve the general quality of Decisions. It is therefore quite popular to put some limitation on the standards of review of higher courts and tribunals. In particular, courts of last instance tend sometimes even autonomously to limit their own scope of review in order to limit their work load and maintain the autonomy and credibility of lower courts.<sup>18</sup> It is quite common in civil law countries as well as in common law countries for specific courts to put a high limitation on their standard of review or the degree of scrutiny they apply.

Most civil law systems apply two basic types of appeal: the first type is quite open with regard to the reviewability of the challenged Decisions and almost always allows a continuation of the proceedings as started at the first instance. This kind of review usually takes the name of appeal, *appello* (Italian), *appell* (French), and *Appellation* or *Berufung*

---

<sup>17</sup> See the most outstanding contribution by S.P. Crowley and J.J. Jackson, "WTO Dispute Procedures, Standard of Review, and Deference to National Governments", *AJIL* 90 (1996), 193 et seq., (195); J.H. Jackson, "The Uruguay Round Results and National Sovereignty", in: J. Bhagwati and M. Hirsch (eds), *The Uruguay Round and Beyond – Essays in Honour of Arthur Dunkel*, 1998, 293 et seq.

<sup>18</sup> For an overview see, for example, R.C. von Caenegem, "History of European Civil Procedure", *International Encyclopedia of Comparative Law*, Vol. XVI, Chapter 2, 1973.

(German). Quite often this instrument even allows for a fresh determination of the merits of a case.<sup>19</sup> A more limited possibility of appeal within civil law countries is usually the one that stems from the old Roman legal institution of the "*quaerula nullitatis*" which found its way through French law into Italian and German law and from there into many modern legal systems. A common characteristic is a limited number of grounds for annulment that can be invoked before the second instance. Normally these comprise only: (a) clearly erroneous findings with regard to the facts; and (b) clearly erroneous legal findings (impairment of fundamental procedural rights or false application of the law as well as arbitrary interpretation of the law).<sup>20</sup>

While civil law countries usually have a number of different names for the actions that can be taken against a Decision that was delivered by a court of first instance, common law systems almost always refer to an "appeal" in these cases. Despite all the existing differences between common law systems and civil law systems it is astonishing to notice that there is a basic similarity with regard to the different types of appeals in the two systems. Like civil law systems, most common law systems have a more open kind of review which serves mostly the interest of reaching a better result albeit at a higher cost for the system as a whole (*correctness review*). As opposed to this, there usually exists a rather narrow review mechanism which takes into account only the need for legal certainty and guarantee of the most fundamental legal principles (*institutional review*).<sup>21</sup> Generally in cases where the institutional review is of primary importance, the standard of review with regard to the legal and factual findings of the first instance is often limited to cases where those findings are either clearly *erroneous* (*clearly erroneous test*) or where the discretion given to the first instance was abused (*abuse of discretion test*).<sup>22</sup> It is obvious that these elements are almost identical to the ones used in civil law countries in those instruments that stem from the Roman *quaerula nullitatis*.

---

<sup>19</sup> For details see P.E. Herzog and D. Karlen, "Attacks on Judicial Decisions International", *International Encyclopedia of Comparative Law*, Vol. XVI, Chapter 8, 1982.

<sup>20</sup> A historic explanation can be found in: A. Skedl, *Die Nichtigkeitsbeschwerde in ihre geschichtlichen Entwicklung*, 1886 and W. Rein, *Privatrecht und Zivilprozess der Römer*, 2nd edition 1858 (reprinted 1964).

<sup>21</sup> For details see M. B. Friedenthal et al., *Civil Procedure*, 1985.

<sup>22</sup> Friedenthal, see above, 605.

## 2. The International Court of Justice as a Court of Second Instance

In international law the institution of appeal is quite rare. This may not surprise those who know how few international tribunals, courts, and similar judicial bodies the international legal system has known until recently and that even those were sometimes quite inactive. The most famous of all courts today remains certainly the ICJ. It is less known, however, that it serves sometimes also as a court of appeal for other legal bodies. This is provided for in Arts 36 and 37 of the Statute and article 87 of the Rules of Court.<sup>23</sup> There are two main areas where the ICJ serves as a Court of Appeal: the first category comprises those cases where the ICJ serves as a court of second instance in staff cases for the United Nations<sup>24</sup> and its specialized agencies, such as the ILO and the World Bank.<sup>25</sup> The second — and for our analysis more interesting — category consists of those cases which come under Conventions or Treaties which themselves provide their parties with a right to an appeal to the ICJ against a Decision delivered by their treaty organs. This is, for example, the case for the ILO<sup>26</sup> and the ICAO.<sup>27</sup> The only case which ever arose in this category was the so-called ICAO Council Case of 1972. In this case India appealed against a Decision that had been delivered by the ICAO Council in a case involving India and Pakistan under article 84 of the Convention on International Civil Aviation.<sup>28</sup> In the absence of any procedural guidelines for cases where the ICJ acts as a court of appeal, the ICJ decided to undertake a *de novo* analysis of this particular case. The ICJ considered its own role and function in

---

<sup>23</sup> See S. Rosenne, *The World Court*, 4th edition, 1989, 102.

<sup>24</sup> There is a possibility of appeal against decision by the United Nations Administrative Tribunal.

<sup>25</sup> See, for details, C.F. Amerasinghe, *Law of the International Civil Service*, 2nd edition, 1993, 49 et seq. and P. Pescatore, "Two Tribunals and one Court — Some Current Problems of International Staff Administration in the Jurisdiction of the ILO and UN Administrative Tribunals and the International Court of Justice", in: N. Blokker and S. Muller, *Towards More Effective Supervision by International Organizations, Essays in Honour of Henry G. Schermers*, 1994, 217 et seq.

<sup>26</sup> N. Valticos, "Once More about the ILO System of Supervision: In What Respect is it Still a Model?", in: Blokker and Muller, see above, 99 et seq.

<sup>27</sup> See Rosenne, see note 23, 39–40.

<sup>28</sup> Done in Chicago on 7 December 1944.

such cases as one that was to preserve the good functioning of the international organizations concerned, in this case the ICAO.<sup>29</sup> On the occasion of one of the last revisions of the Rules of Court of the ICJ, the title of article 87 was changed from "appeals" to "special reference to the Court".<sup>30</sup>

### 3. ICSID Annulment Tribunals

A more active international appeal system exists under the World Bank's Convention on the Settlement of Investment Disputes of 1965 with the creation of the International Centre for the Settlement of Investment Disputes.<sup>31</sup> The convention provides in its article 25 for separate conciliation and arbitration procedures between private investors and host countries. In both cases a panel of five experts is chosen from a list, not unlike in the GATT/WTO framework. If a party is dissatisfied with the outcome of a binding conciliation or arbitration procedure before a panel, article 52 provides it with the opportunity to ask the Secretary-General for the annulment of the Decision of the panel.<sup>32</sup> Article 52 para.1 reads:

Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

- (a) that the Tribunal was not properly constituted;
- (b) that the Tribunal has manifestly exceeded its powers;
- (c) that there was corruption on the part of a member of the Tribunal;
- (d) that there has been a serious departure from a fundamental rule of procedure; or
- (e) that the award has failed to state the reasons on which it is based.

---

<sup>29</sup> Appeal Relating to the Jurisdiction of the ICAO Council, ICJ Reports 1972, 46 et seq., (60).

<sup>30</sup> See Rosenne, see note 23, 103.

<sup>31</sup> UNTS Vol.575 No.8359.

<sup>32</sup> See, for example, I. Seidl-Hohenveldern, "Die Aufhebung von ICSID-Schiedssprüchen", *Jahrbuch für die Praxis der Schiedsgerichtsbarkeit* III (1989), 100 et seq.

Apart from manifest procedural mistakes (wrong constitution of the panel, missing statement of reasons, serious departure from a fundamental rule of procedure) and corruption, the main reason for annulment is that the panel has exceeded its powers. This includes according to the case law also erroneous legal findings which do not even necessarily have to constitute manifest or serious failures.<sup>33</sup> This case law has been criticized by several authors who argue that erroneous legal findings (*errores in iudicando*) should not constitute a ground for annulment and that such an interpretation is incompatible with article 52 of the Convention which under article 52 para.1 lit.(d) only allows an annulment for *errores in procedendo*.<sup>34</sup> While the Conventions annulment procedure as such is not construed as an appeal, "the perception of the ICSID annulment process as shading into appeal is fuelled and justified in part by the language of Article 52.1 (e), which seemingly invites scrutiny of tribunal Decisions but also in terms of substantive correctness."<sup>35</sup> Reportedly, the Secretary-General of ICSID at one time feared that such an extension of the number of grounds for annulment might lead to more disputes in the future and thereby damage the ICSID system. "...[I]f parties, dissatisfied with an award, made it a practice to seek annulment, the effectiveness of the ICSID machinery might become questionable and both investors and Contracting Parties might be deterred from making use of ICSID arbitration."<sup>36</sup>

#### 4. CUSFTA and NAFTA Extraordinary Challenge Committees

Among the many regional integration arrangements that exist today, the one that has shaped the trade relationship between the United States and Canada first — the Canada-United States Free Trade Agreement (CUSFTA)<sup>37</sup> — and later between those two countries and Mexico — the

---

<sup>33</sup> Klöckner v. Cameroon, Decision of the ad-hoc-Committee, *ICSID Review* 1986, 90, (93).

<sup>34</sup> See Lauterpacht, see note 7, 102.

<sup>35</sup> See D. Caron, "Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction between Annulment and Appeal", *ICSID Review*, 1993, 21, (34).

<sup>36</sup> As quoted in Lauterpacht, see note 7, 103.

<sup>37</sup> As reprinted in *ILM* 27 (1988), 281 et seq.

North American Free Trade Agreement (NAFTA)<sup>38</sup> – contain a dispute settlement mechanism that merits comparison to the WTO system. The world's most renowned regional integration system – the European Union (EU) – has an even more developed dispute settlement system with a highly sophisticated appellate system but it is close enough to a domestic judicial system to make it inappropriate for generalized comparison to international organizations.<sup>39</sup> CUSFTA and NAFTA both are relatively close in their architecture to the new WTO system and the old GATT. We will focus on the NAFTA system here as it takes up most of the interesting CUSFTA mechanisms, but will have to refer to CUSFTA case law at times. Chapter 20 NAFTA incorporates basically Chapter 18 CUSFTA, and Chapter 19 NAFTA is based on the same chapter under CUSFTA.

NAFTA contains three types of dispute settlement mechanisms: (a) Chapter 19 provides for bilateral expert panels in cases where anti-dumping duties and countervailing duties are at the origin of a dispute; (b) Chapter 20 establishes a Trilateral Free Trade Commission which can establish *ad hoc* expert panels for the general settlement of disputes; and (c) in various chapters of the agreement there exist specific provisions concerning the dispute settlement for specific areas, such as in Chapter 11B on investment disputes.

Of these three areas of dispute settlement only Chapter 19 NAFTA contains a possibility for some kind of appeal, while the general dispute settlement under Chapter 20 NAFTA and the specific chapter provisions contain only an expert panel mechanism as under the old GATT.<sup>40</sup> The characteristic element of the dispute settlement under Chapter 19 is that it establishes panels which review Decisions by domestic administrative authorities. Domestic authorities and judicial or *quasi*-judicial bodies take Decisions based on domestic law with regard to anti-dumping proceedings and the imposition of countervailing duties. These domestic Decision can then be appealed against before Chapter 19 NAFTA and CUSFTA panels; they replace the existing domestic bodies

---

<sup>38</sup> As reprinted in *ILM* 32 (1993), 296 et seq. and 605 et seq.

<sup>39</sup> For details see T. Millet, *The Court of First Instance*, 1990 and K. Brandt, "Der Europäische Gerichtshof und das Gericht erster Instanz (EuG) – Aufbau, Funktion und Befugnisse", *Juristisches Schulung* 34 (1994), 300-305.

<sup>40</sup> For details see, however, D.S. Huntington, "Settling Disputes Under the North American Free Trade Agreement", *Harv.Int'l L.J.* 34 (1993), 407 et seq.

of second or last instance (article 1904.1 CUSFTA and NAFTA). In adjudicating the cases the panels have to apply the domestic law and standards of review, exactly as a domestic body would have to apply them (e.g. article 1904.3 NAFTA). The first stage of the NAFTA and CUSFTA procedure under Chapter 19 is therefore not a review of a Decision that was taken by an international institution but an internationalized review of a domestic Decision, much like we know it in the international human rights field (European Court of Human Rights or any of the specialized UN institutions).<sup>41</sup> The Decisions presented by these panels, however, can be taken before a so-called Extraordinary Challenge Committee (arts 1904 and 1904.13 CUSFTA/NAFTA). This is a true appeal against a Decision by a multilateral panel. Under CUSFTA, of the 49 Decisions, presented by panels under Chapter 19 from January 1989 to April 1994, three were subsequently challenged before an Extraordinary Challenge Committee. This small number has most probably to do with the narrow scope of review the Extraordinary Challenge Committee has.<sup>42</sup>

The Extraordinary Challenge Committee is composed of three judges from a permanent list of ten experts. Each party to a bilateral dispute has the right to propose one candidate. The third candidate is chosen by these two, much as in a traditional arbitration procedure. The possible grounds for challenge under article 1904.13 CUSFTA are:

- (a) (i) a member of the panel was guilty of gross misconduct, bias, or a serious conflict of interest, or otherwise materially violated the rules of conduct, (ii) the panel seriously departed from a fundamental rule of procedure, or (iii) the panel manifestly exceeded its powers, authority or jurisdiction set forth in this Article; and
- (b) any of the actions set out in subparagraph (a) has materially affected the panel's Decision and threatens the integrity of the bi-national panel review process.

This very small number of grounds for review and the difficulty in proving that an error has materially affected the Decision made this re-

---

<sup>41</sup> See R.St.J. Macdonald, "Margins of Appreciation", in: R.St.J. Macdonald et al. (eds), *European System for the Protection of Human Rights*, 1993, 83 et seq.

<sup>42</sup> See Huntington, see note 40, 415 and T.M. Boddez and A.M. Rugman, "Effective Dispute Settlement: A Case Study of the Initial Panel Decisions Under Chapter 19 of the Canada-United States Free Trade Agreement", in: E.H. Fry and L.H. Radebaugh (eds), *Investment in the North American Free Trade Areas: Opportunities and Challenges*, 1991, 93 et seq.

view mechanism unattractive under CUSFTA. The United States was the plaintiff in all three cases brought before an Extraordinary Challenge Committee and expressed a desire to enable the system more generally to review and correct cases that were incorrectly decided at the first level, while Canada, on the other hand, advocated a narrow and limited review for manifest errors in order to maintain the efficiency and reliability of the system.<sup>43</sup> The three existing cases were tended to be decided according to the Canadian philosophy and kept the reviewability rather narrow. One panel eventually expressed its view that article 1904.13 “provides explicit, narrow grounds for extraordinary challenges and makes clear that an extraordinary challenge is not intended to function as a routine appeal.”<sup>44</sup> Most commentators considered that this attitude by the Extraordinary Challenge Committee itself had led to both a strengthening of the process and the authority of the panels at first instance as well as to the prevention of an excessive use of the Extraordinary Challenge Committee.<sup>45</sup>

#### IV. The WTO Appellate Body at Work — Existing Case Law (1996, 1997, and 1998)

##### 1. Overview

At least as far as the case load is concerned, the dispute settlement system of the WTO was, almost from the start, a great success. This is particularly true for the Appellate Body which after a slow beginning in 1996 with only two reports — obviously due to the fact that there had first to be cases decided by panels which could be appealed against to the Appellate Body — delivered six reports in 1997 and eight reports in 1998. Of the total of 20 reports circulated by panels in the first three

---

<sup>43</sup> See H.E. Moyer, “Chapter 19 of the NAFTA: Binational Panels as the Trade Court of Last Resort”, *Int’l Law* 27 (1993), 707 et seq., (724).

<sup>44</sup> Fresh, Chilled or Frozen Pork from Canada, Secretariat File No. EEC-91-1904-01 United States, decided on 14 June 1991, quoted in Huntington, see note 40, 437.

<sup>45</sup> G.N. Horlick and A. De Busk, “Dispute Resolution Panels of the US-Canada Free Trade Agreement: The First Two and a Half Years”, *McGill Law Journal* 36 (1992), 575 et seq., (598); J.A. McKinney, “Dispute Settlement under the US-Canada Free Trade Agreement”, *JWT* 25 (1991), 117 et seq., (125).

years, all but three Decisions were appealed against,<sup>46</sup> bearing in mind that for one Decision the period for the request of an appeal was still not completed at the time of the writing of this article.<sup>47</sup> All three panel reports presented directly to the DSB during this period as well as all the 16 joint submissions of panel reports and the subsequent Appellate Body reports were adopted by the DSB.

A very simple statistical analysis of the results of the appeal proceedings before the WTO Appellate Body shows that of the 16 cases analyzed for the period of 1996 to 1998, the Appellate Body in only two cases fully upheld the result and the legal reasoning of the panels. These two instances were namely the Decisions in *Brazil — Measures Affecting Desiccated Coconut*, circulated on 21 February 1997, and *United States — Measures Affecting Imports of Woven Wool Shirts and Blouses*, circulated on 25 April 1997. In all the other cases the Appellate Body has at least modified or partly reversed the panel Decisions. The degree of reversal varied from a mere correction of the legal argumentation to a substantial reversal of the findings of the panel as to whether Parties had nullified or impaired benefits accruing under the relevant WTO agreements. In one very recent case, the Appellate Body even annulled the effect of the panel Decision all together by stating that the issue had to be considered as not having been properly before a panel due to the lack of a clear statement of the claims submitted by the plaintiff. This

---

<sup>46</sup> The first case concerned: Indonesia — Certain Measures Affecting the Automobile Industry, complaint by Japan (WT/DS55), request dated 4 October 1996. The report of the panel was circulated to members on 2 July 1998. At its meeting on 23 July 1998, the DSB adopted the panel report. The second case concerned: Japan — Measures Affecting Consumer Photographic Film and Paper, complaint by the United States (WT/DS44), request dated 13 June 1996. The report of the panel was circulated to members on 31 March 1998. The panel report was adopted by the DSB on 22 April 1998. The third case concerned India — Patent Protection for Pharmaceutical and Agricultural Chemical Products, complaint by the European Communities (WT/DS79/1), request dated 28 April 1997. The report of the panel was circulated to members on 24 August 1998. At its meeting on 2 September 1998, the DSB adopted the panel Report. This last case was preceded by a similar US complaint ( India-Patent Protection for Pharmaceutical and Agricultural Products, WT/DS50, see below note 63), where the panel and Appellate Body reports were adopted on 16 January 1998.

<sup>47</sup> Japan — Measures Affecting Agricultural Products. The Panel Report was circulated on 27 October 1998.

amounts to a full annulment of the Decision of the panel.<sup>48</sup> The following is a short description of the appeals heard by the Appellate Body and shows the degree of activism and the action taken by the Appellate Body. This shall serve to illustrate the relationship between the expert panels and the Appellate Body.<sup>49</sup> The dates in brackets indicate the time of circulation of the Appellate Body reports.

## **2. United States — Standards for Reformulated and Conventional Gasoline (22 April 1996)**

A single panel considered the complaints of both Venezuela and Brazil.<sup>50</sup> The complainants alleged that a US gasoline regulation discriminated against complainants' gasoline in violation of GATT arts I and III and article 2 of the Agreement on Technical Barriers to Trade (TBT). The report of the panel found the regulation to be inconsistent with GATT article III para.4 and not to benefit from an article XX exception.<sup>51</sup> The United States appealed on 21 February 1996. On 22 April, the Appellate Body issued its report, modifying the panel report on the interpretation of GATT article XX lit.(g), but concluding that article XX lit.(g) was not applicable in this case.<sup>52</sup>

## **3. Japan — Taxes on Alcoholic Beverages, Complaints by the European Communities (4 October 1996)**

In this joint dispute settlement procedure complainants claimed that spirits exported to Japan were discriminated against under the Japanese liquor tax system which, in their view, levied a substantially lower tax

---

<sup>48</sup> Guatemala — Anti-Dumping Investigation Regarding Imports of Portland Cement from Mexico, 2 November 1998.

<sup>49</sup> The following material and short descriptions have been entirely taken from the WTO homepage.

<sup>50</sup> United States-Standards for Reformulated and Conventional Gasoline, complaints by Venezuela (WT/DS2) and Brazil (WT/DS4).

<sup>51</sup> WT/DS2/R, 29 January 1996.

<sup>52</sup> WT/DS2/AB/R. The Appellate Report, together with the panel report as modified by the Appellate Report, was adopted by the DSB on 20 May 1996.

on "shochu" than on whisky, cognac and white spirits.<sup>53</sup> A joint panel was established at the DSB meeting on 27 September 1995. The report of the panel, which found the Japanese tax system to be inconsistent with GATT article III para. 2, was circulated to members on 11 July 1996. On 8 August 1996 Japan filed an appeal. The report of the Appellate Body was circulated to members on 4 October 1996. The Appellate Body's Report affirmed the panel's conclusion that the Japanese Liquor Tax Law was inconsistent with GATT article III para.2, but pointed out several areas where the panel had erred in its legal reasoning. The Appellate Report, together with the panel report as modified by the Appellate Report, was adopted on 1 November 1996.<sup>54</sup>

#### **4. United States — Restrictions on Imports of Cotton and Man-Made Fibre Underwear (10 February 1997)**

This dispute involved United States restrictions on textile imports from Costa Rica, allegedly in violation of the Agreement on Textiles and Clothing.<sup>55</sup> The panel found that the United States restraints were not valid. The report of the panel was circulated to members on 8 November 1996. On 11 November 1996, Costa Rica notified its Decision to appeal against one aspect of the panel report. The Appellate Body upheld the appeal by Costa Rica on that particular point. The report of the Appellate Body was circulated to members on 10 February 1997. The Appellate Body's report and the panel report as modified by the Appellate report, were adopted by the DSB on 25 February 1997.<sup>56</sup>

---

<sup>53</sup> Japan — Taxes on Alcoholic Beverages, complaints by the European Communities (WT/DS8), Canada (WT/DS10) and the United States (WT/DS11).

<sup>54</sup> On 24 December 1996, the US, pursuant to article 21 para.3 lit.(c) of the DSU applied for binding arbitration to determine the reasonable period of time for implementation by Japan of the recommendations of the Appellate Body. The Arbitrator found the reasonable period for implementation of the recommendations to be 15 months. The Arbitrator's report was circulated to members on 14 February 1997.

<sup>55</sup> United States — Restrictions on Imports of Cotton and Man-Made Fibre Underwear, complaint by Costa Rica (WT/DS24).

<sup>56</sup> At the meeting of the DSB on 10 April 1997, the United States informed the meeting that the measure which had been the subject of this dispute had expired on 27 March 1997 and had not been renewed, effectively meaning

### **5. Brazil — Measures Affecting Desiccated Coconut, Complaint by the Philippines (21 February 1997)**

The Philippines claimed that the countervailing duty imposed by Brazil on the Philippine's exports of desiccated coconut was inconsistent with WTO and GATT rules.<sup>57</sup> The report of the panel concluded that the provisions of the agreements relied on by the claimant were inapplicable to the dispute.<sup>58</sup> The report was circulated to members on 17 October 1996. On 16 December 1996, the Philippines notified its Decision to appeal against certain issues of law and legal interpretations developed by the panel. The Appellate Body upheld the findings and legal interpretations of the panel. The report of the Appellate Body was circulated to members on 21 February 1997. The Appellate Body's report and the panel's report, as modified by the Appellate Body's report, were adopted by the DSB on 20 March 1997.

### **6. United States — Measures Affecting Imports of Woven Wool Shirts and Blouses (25 April 1997)**

This case concerned the transitional safeguard measure imposed by the United States.<sup>59</sup> India claimed that the safeguard measure was inconsistent with arts 2, 6 and 8 of the Agreement on Textiles and Clothing. A panel was established at the DSB meeting on 17 April 1996. The panel found that the safeguard measure imposed by the United States violated the provisions of the Agreement on Textiles and Clothing. The report of the panel was circulated to members on 6 January 1997. On 24 February 1997, India notified its intention to appeal certain issues of law and legal interpretations developed by the panel. The Appellate Body upheld the panel's Decisions on those issues of law and legal interpretations that were appealed against. The report of the Appellate Body was circulated to members on 25 April 1997. The Appellate Body report and the panel

---

that the United States had immediately complied with the recommendations of the DSB.

<sup>57</sup> Brazil — Measures Affecting Desiccated Coconut, complaint by the Philippines (WT/DS22).

<sup>58</sup> (WT/DS22/R).

<sup>59</sup> United States — Measure Affecting Imports of Woven Wool Shirts and Blouses, complaint by India (WT/DS33).

report, as upheld by the Appellate Body, were adopted by the DSB on 23 May 1997.

### **7. Canada — Certain Measures Concerning Periodicals (30 June 1997)**

In its request for consultations dated 11 March 1996, the United States claimed that measures prohibiting or restricting the importation into Canada of certain periodicals were in contravention of GATT article XI.<sup>60</sup> The United States further alleged that the tax treatment of so-called “split-run” periodicals and the application of favourable postage rates to certain Canadian periodicals were inconsistent with GATT article III. The DSB established a panel on 19 June 1996. The panel found the measures applied by Canada to be in violation of GATT rules. The report of the panel was circulated to members on 14 March 1997. On 29 April 1997, Canada notified its intention to appeal certain issues of law and legal interpretations developed by the panel. The Appellate Body upheld the panel’s findings and conclusions on the applicability of GATT 1994 to Part V.1 of Canada’s Excise Tax Act, but reversed the panel’s finding that Part V.1 of the Excise Tax Act was inconsistent with the first sentence of article III para.2 of GATT 1994. The Appellate Body further concluded that Part V.1 of the Excise Tax Act was inconsistent with the second sentence of article III para.2 of GATT 1994. The Appellate Body also reversed the panel’s conclusion that Canada’s “funded” postal rate scheme was justified by article III para.8 lit.(b) of GATT 1994. The report of the Appellate Body was circulated to members on 30 June 1997. At its meeting on 30 July 1997, the DSB adopted the Appellate Body report and the panel report, as modified by the Appellate Body.

### **8. European Communities — Regime for the Importation, Sale and Distribution of Bananas (9 September 1997)**

The complainants alleged that the EC’s regime for importation, sale and distribution of bananas was inconsistent with GATT arts I, II, III, X, XI and XIII as well as provisions of the Import Licensing Agreement, the

---

<sup>60</sup> Canada — Certain Measures Concerning Periodicals, complaint by the United States (WT/DS31).

Agreement on Agriculture, the Agreement on Trade Related Investment Measures (TRIMs Agreement) and the GATS.<sup>61</sup> A panel was established at the DSB meeting on 8 May 1996. The panel found that the EC's banana import regime, and the licensing procedures for the importation of bananas in this regime, were inconsistent with the GATT. The panel further found that the Lomé waiver waived the inconsistency with GATT article XIII, but not other inconsistencies arising from the licensing system. The report of the panel was circulated to members on 22 May 1997. On 11 June 1997, the European Communities notified its intention to appeal certain issues of law and legal interpretations developed by the panel. The Appellate Body mostly upheld the panel's findings, but reversed the panel's findings that the inconsistency with GATT article XIII was waived by the Lomé waiver, and that certain aspects of the licensing regime violated article X of GATT and the Import Licensing Agreement. The report of the Appellate Body was circulated to members on 9 September 1997. At its meeting on 25 September 1997, the Appellate Body and the panel report, as modified by the Appellate Body, were adopted by the DSB.<sup>62</sup>

## 9. India — Patent Protection for Pharmaceutical and Agricultural Chemical Products (19 December 1997)

This request, dated 2 July 1996, concerned the alleged absence of patent protection for pharmaceutical and agricultural chemical products in In-

---

<sup>61</sup> European Communities — Regime for the Importation, Sale and Distribution of Bananas, complaints by Ecuador, Guatemala, Honduras, Mexico and the United States (WT/DS27). The complainants in this case other than Ecuador had requested consultations with the EC on the same issue on 28 September 1995 (WT/DS16). After Ecuador's accession to the WTO, the current complainants again requested consultations with the EC on 5 February 1996.

<sup>62</sup> On 17 November 1997, the complainants requested that the "reasonable period of time" for implementation of the recommendations and rulings of the DSB be determined by binding arbitration, pursuant to article 21 para.3 lit.(c) of the DSU. The Arbitrator found the reasonable period of time for implementation to be the period from 25 September 1997 to 1 January 1999. The report of the Arbitrator was circulated to members on 7 January 1998.

dia.<sup>63</sup> Violations of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement) arts 27, 65 and 70 were claimed. The United States requested the establishment of a panel on 7 November 1996. The DSB established a panel at its meeting on 20 November 1996. The panel found that India had not complied with its obligations under article 70 para.8 lit.(a) or article 63 paras.1 and 2 of the TRIPS Agreement by failing to establish a mechanism that adequately preserved novelty and priority in respect of applications for product patents for pharmaceutical and agricultural chemical inventions, and was also not in compliance with article 70 para.9 of the TRIPS Agreement by failing to establish a system for the grant of exclusive marketing rights. The report of the panel was circulated on 5 September 1997. On 15 October 1997, India notified its intention to appeal certain issues of law and legal interpretations developed by the panel. The Appellate Body upheld, with modifications, the panel's findings on arts 70 para.8 and 70 para.9, but ruled that article 63 para.1 was not within the panel's terms of reference. The report of the Appellate Body was circulated to members on 19 December 1997. The Appellate Body report and the panel report, as modified by the Appellate Body, were adopted by the DSB on 16 January 1998.<sup>64</sup>

## 10. European Communities — Measures Affecting Livestock and Meat (Hormones) (16 January 1998)

On 25 April 1996, the United States requested the establishment of a panel in this dispute, claiming that measures taken by the EC under the Council Directive Prohibiting the Use in Livestock Farming of Certain Substances Having a Hormonal Action restricted or prohibited imports of meat and meat products from the United States, and were apparently inconsistent with GATT arts III or XI, Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) arts 2, 3 and 5, TBT Agreement article 2 and the Agreement on Agriculture article 4.<sup>65</sup> A panel was established at the DSB meeting on 20 May 1996. The

---

<sup>63</sup> India — Patent Protection for Pharmaceutical and Agricultural Chemical Products, complaint by the United States (WT/DS50).

<sup>64</sup> At the DSB meeting of 22 April 1998, the parties announced that they had agreed on an implementation period of 15 months.

<sup>65</sup> European Communities — Measures Affecting Meat and Meat Products (Hormones), complaint by the United States (WT/DS26).

panel found that the EC ban on imports of meat and meat products from cattle treated with any of six specific hormones for growth promotion purposes was inconsistent with arts 3 para.1, 5 para.1 and 5 para.5 of the SPS Agreement. The report of the panel was circulated to members on 18 August 1997. Already on 28 June 1996, Canada had also requested consultations with the EC regarding the same problem.<sup>66</sup> The Canadian claim was essentially the same as the United States claim (WT/DS26), for which a panel had been established earlier. The DSB established a second panel on 16 October 1996, which was identical in its composition to the panel established for the complaint by the United States. The findings in the second panel report were substantially equal to those in the complaint by the United States.

On 24 September 1997, the EC notified its intention to appeal certain issues of law and legal interpretations developed by the panel in both Decisions. The Appellate Body upheld the panel's finding that the EC import prohibition was inconsistent with arts 3 para.3 and 5 para.1 of the SPS Agreement, but reversed the panel's finding that the EC import prohibition was inconsistent with arts 3 para.1 and 5 para.5 of the SPS Agreement. On the general and procedural issues, the Appellate Body upheld most of the findings and conclusions of the panel, except with respect to the burden of proof in proceedings under the SPS Agreement. The report of the Appellate Body was circulated to members on 16 January 1998. The Appellate Body report and the panel report, as modified by the Appellate Body, were adopted by the DSB on 13 February 1998.<sup>67</sup>

---

<sup>66</sup> European Communities — Measures Affecting Livestock and Meat (Hormones), complaint by Canada (WT/DS48).

<sup>67</sup> On 16 April 1997, the respondent requested that the "reasonable period of time" for implementation of the recommendations and rulings of the DSB be determined by binding arbitration, pursuant to article 21 para.3 lit.(c) of the DSU. The Arbitrator found the reasonable period of time for implementation to be 15 months from the date of adoption (i.e. 15 months from 13 February 1998). The report of the Arbitrator was circulated to members on 29 May 1998.

### 11. Argentina — Certain Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items (27 March 1997)

This request, dated 4 October 1996, concerned the imposition of specific duties on these items in excess of the bound rate and other measures by Argentina.<sup>68</sup> The United States contended that these measures violated arts II, VII, VIII and X of GATT 1994, article 2 of the TBT Agreement, article 1 to 8 of the Agreement on Implementation of article VII of GATT 1994, and article 7 of the Agreement on Textiles and Clothing. On 9 January 1997, the United States requested the establishment of a panel. At its meeting on 25 February 1997, the DSB established a panel. The panel found that the minimum specific duties imposed by Argentina on textiles and apparel were inconsistent with the requirements of article II of GATT, and that the statistical tax of three per cent *ad valorem* imposed by Argentina on imports was inconsistent with the requirements of article VIII of GATT. The report of the panel was circulated on 25 November 1997. On 21 January 1998, Argentina notified its intention to appeal certain issues of law and legal interpretations developed by the panel. The Appellate Body upheld, with some minor modification, the panel's findings and conclusions. The report of the Appellate Body was circulated to members on 27 March 1998. The Appellate Body report and the panel report, as modified by the Appellate Body, were adopted by the DSB on 22 April 1998.

### 12. European Communities — Customs Classification of Certain Computer Equipment (5 June 1998)

The complaints in this case were in respect of the reclassification by the European Communities, for tariff purposes, of certain Local Area Network (LAN) adapter equipment and personal computers with multimedia capability.<sup>69</sup> The United States alleged that these measures violated article II of GATT 1994. On 11 February 1997, the United States requested the establishment of a panel. At its meeting on 25 February 1997, the DSB established a panel. The panel found that the EC failed to

---

<sup>68</sup> Argentina — Certain Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items, complaint by the United States (WT/DS56).

<sup>69</sup> European Communities, United Kingdom, and Ireland—Customs Classification of Certain Computer Equipment, complaint by the United States (WT/DS62, 67, 68).

accord imports of LAN equipment from the United States treatment no less favourable than that provided for in the EC Schedule of commitments, thereby acting inconsistently with article II para.1 of GATT 1994. The report of the panel was circulated to members on 5 February 1998. On 24 March 1998, the EC notified its intention to appeal certain issues of law and legal interpretations developed by the panel. The Appellate Body reversed the panel's conclusion that the EC tariff treatment of LAN equipment was inconsistent with article II para.1 of GATT 1994. The report of the Appellate Body was circulated to members on 5 June 1998. At its meeting on 22 June 1998, the DSB adopted the Appellate Body report and the panel report, as modified by the Appellate Body report.

### **13. European Communities — Measures Affecting Importation of Certain Poultry Products (13 July 1998)**

This request dated 24 February 1997, was in respect of the EC regime for the importation of certain poultry products and the implementation by the EC of the Tariff Rate Quota for these products.<sup>70</sup> Brazil contended that the EC measures were inconsistent with arts X and XXVII of GATT 1994 and arts 1 and 3 of the Agreement on Import Licensing Procedures. Brazil also contended that the measures nullified or impaired benefits accruing to it directly or indirectly under GATT 1994. On 12 June 1997, Brazil requested the establishment of a panel. At its meeting on 30 July 1997, the DSB established a panel. The panel found that Brazil had not demonstrated that the EC had failed to implement and administer the tariff rate quota for poultry in line with its obligations under the cited agreements. The report of the panel was circulated to members on 12 March 1998. On 29 April 1998, Brazil notified its intention to appeal certain issues of law and legal interpretations developed by the panel. The Appellate Body upheld most of the panel's findings and conclusions, but reversed the panel's finding that the EC had acted inconsistently with article 5 para.1 lit.(b) of the Agreement on Agriculture. The Appellate Body, however, concluded that the EC had acted inconsistently with article 5 para.5 of the Agreement on Agriculture. The report of the Appellate Body was circulated to members on 13 July 1998. At its meeting on 23 July 1998, the DSB adopted the Appel-

---

<sup>70</sup> European Communities — Measures Affecting Importation of Certain Poultry Products, complaint by Brazil (WT/DS69).

late Body report and the panel report, as modified by the Appellate Body report.

#### 14. United States — Import Prohibition of Certain Shrimp and Shrimp Products (12 October 1998)

This request, dated 8 October 1996, concerned a joint complaint by India, Malaysia, Pakistan and Thailand against a ban on importation of shrimp and shrimp products from these countries imposed by the United States under Section 609 of US Public Law 101-162.<sup>71</sup> Violations of arts I, XI and XIII of GATT 1994, as well nullification and impairment of benefits, were alleged. On 9 January 1997, Malaysia and Thailand requested the establishment of a panel. On 30 January 1997, Pakistan also requested the establishment of a panel. At its meeting on 25 February 1997, the DSB established a panel.<sup>72</sup> The panel found that the import ban in shrimp and shrimp products as applied by the United States was inconsistent with article XI para.1 of GATT 1994, and could not be justified under article XX of GATT 1994. The report of the panel was circulated to members on 15 May 1998. On 13 July 1998, the United States notified its intention to appeal certain issues of law and legal interpretations developed by the panel. The Appellate Body reversed the panel's finding that the United States measure at issue was not within the scope of measures permitted under the chapeau of article XX of GATT 1994, but concluded that the United States measure, while qualifying for provisional justification under article XX lit.(g), failed to meet the requirements of the chapeau of article XX. The report of the Appellate Body was circulated to members on 12 October 1998. The DSB adopted the Appellate Body Report and the panel Report, as modified by the Appellate Body Report, on 6 November 1998. It was particularly on the occasion of the adoption of this report by the DSB

---

<sup>71</sup> United States — Import Prohibition of Certain Shrimp and Shrimp Products, complaint by India, Malaysia, Pakistan and Thailand (WT/DS58).

<sup>72</sup> On 25 February 1997, India also requested the establishment of a panel in the same matter. At its meeting on 10 April 1997, the DSB agreed to establish a panel in respect of India's request but agreed to incorporate this with the panel already established in respect of the other complainants.

that heavy criticism with regard to the role of the Appellate Body was for the first time made public.<sup>73</sup>

### 15. Australia — Measures Affecting the Importation of Salmon (20 October 1998)

This request for consultations, dated 5 October 1995, related to Australia's prohibition of imports of salmon from Canada based on a quarantine regulation.<sup>74</sup> Canada alleged that the prohibition was inconsistent with GATT arts XI and XIII, and also inconsistent with the SPS Agreement. On 7 March 1997, Canada requested the establishment of a panel. At its meeting on 10 April 1997, the DSB established a panel. The panel found that the Australian measures complained against were inconsistent with arts 2 para.2, 2 para.3, 5 para.1, 5 para.5, and 5 para.6 of the SPS Agreement, and also nullified or impaired benefits accruing to Canada under the SPS Agreement. The report of the panel was circulated to members on 12 June 1998.

On 22 July 1998, Australia notified its intention to appeal certain issues of law and legal interpretations developed by the panel. The Appellate Body reversed the panel's reasoning with respect to arts 5 para.1 and 2 para.2 of the SPS Agreement but nevertheless found that Australia had acted inconsistently with arts 5 para.1 and 2 para.2 of the SPS Agreement; broadened the panel's finding that Australia had acted inconsistently with arts 5 para.5 and 2 para.3 of the SPS Agreement; reversed the panel's finding that Australia had acted inconsistently with article 5 para.6 of the SPS Agreement but was unable to come to a conclusion whether or not Australia's measure was consistent with article 5 para.6 due to insufficient factual findings by the panel. The report of the Appellate Body was circulated to members on 20 October 1998. The DSB adopted the Appellate Body Report and the panel Report, as modified by the Appellate Body Report, on 6 November 1998.

---

<sup>73</sup> See for example the heavy criticism by India, Malaysia and Pakistan as reported in: *Neue Zürcher Zeitung*, 10 November 1998, No. 261, 23.

<sup>74</sup> Australia-Measures Affecting the Importation of Salmon, complaint by Canada (WT/DS18).

## 16. Guatemala – Anti-Dumping Investigation Regarding Imports of Portland Cement from Mexico (2 November 1998)

This request, dated 15 October 1996 was in respect of an anti-dumping investigation commenced by Guatemala with regard to imports of Portland cement from Mexico. Mexico alleged that this investigation was in violation of Guatemala's obligations under arts 2, 3, 5 and 7 para.1 of the Anti-Dumping Agreement.<sup>75</sup> On 4 February 1997, Mexico requested the establishment of a panel. At its meeting on 20 March 1997, the DSB established a panel. The panel found that Guatemala had failed to comply with the requirements of article 5 para.3 of the Anti-Dumping Agreement by initiating the investigation on the basis of evidence of dumping, injury and causal link that was not "sufficient" as a justification for initiation. The report of the panel was circulated to members on 19 June 1998. On 4 August 1998, Guatemala notified its intention to appeal certain issues of law and legal interpretations developed by the panel. The Appellate Body reversed the panel's finding that the dispute was properly before the panel, on the ground that Mexico did not comply with article 6 para.2 of the DSU in its request for a panel since it did not identify the measure it was complaining against. Having found that the dispute was not properly before the panel, the Appellate Body could not make any conclusions on the findings by the panel on the substantive issues that were also the subject of the appeal. The Appellate Body stressed that its Decision was without prejudice to Mexico's right to pursue fresh dispute settlement proceedings on this matter. The report of the Appellate Body was circulated to members on 2 November 1998. At the DSB meeting on 25 November 1998, the DSB adopted the Appellate Body Report and the panel Report, as reversed by the Appellate Body Report.

## V. The Appellate Body's Role in the WTO Dispute Settlement System

### 1. Almost every Panel Decision Is Appealed Against

Unfortunately, this contribution is too limited in scope to give a detailed account of the exact differences between the panel reports and the

---

<sup>75</sup> Guatemala-Anti-Dumping Investigation Regarding Imports of Portland Cement from Mexico, complaint by Mexico (WT/DS60).

reports circulated by the Appellate Body. There are two elements which are immediately clear, and which are presumably linked to each other to some extent. Of the first 19 decisions delivered by dispute settlement panels all but three were appealed against. Of the three cases not appealed one involved the United States – a party that has otherwise appealed all the panel Decisions which were not favourable to its own view. The one case not appealed by the United States was the so called *Fuji/Kodak-Case*<sup>76</sup> in which the legal argumentation used by the United States had been considered quite weak under the existing rules from the beginning and where some commentators argued that it was in the interest of the United States to demonstrate the inefficiency of the existing rules. On the whole, one can therefore say that parties usually almost automatically appeal against panel Decisions which are not favourable to their view. It is not surprising to conclude that this must eventually lead to a heavy workload for the Appellate Body, just as had once been stated with regard to the ICSID review process by its Secretary-General.<sup>77</sup>

## 2. Almost in every Appeal the Original Decision Is Modified

With regard to the attitude taken by the Appellate Body towards the panels, the mere numbers show, that the Appellate Body has virtually modified all the Decisions of the first instance. As shown above in a comparative analysis of existing appeal mechanisms, this is an outcome which would surprise both in most domestic systems and also under the few existing international mechanisms. Not every system is so narrow as to would only allow for a reversal of clearly erroneous cases, but most systems would aim at preserving a certain credibility of the Decision at the first instance and provide incentives to prevent an appeal at any cost. Admittedly, the Appellate Body has in many cases upheld the result of the question of whether a party had nullified or impaired benefits accruing under an agreement, but the Appellate Body at the same time was not timid at all to impose its own view of certain questions of interpretation where the panels' views were certainly not fully erroneous. It seems that the Appellate Body perceives its main task very much as to establish a clear authoritative interpretation of the entire set of rules under the existing WTO Agreements and to reach a high stan-

---

<sup>76</sup> See note 46.

<sup>77</sup> See above the remarks in Section 3.

dard of legal argumentation, in many cases based on general international law.<sup>78</sup>

Following the highly disputed reversal of the panel findings in the "Shrimp/Turtle Case"<sup>79</sup> the complainants and several third parties, such as Thailand, Malaysia, India, the Philippines and Pakistan argued that the Appellate Body was acting too much like a tribunal of last instance or even a Constitutional Court — a task that was lying clearly outside its vocation and consisted an abuse of the power it had been given by the founding members of the WTO. Furthermore, there have been critical voices which consider the Appellate Body as leaning towards "judicial activism" and going too far in its own interpretations whereas the panels are generally more moderate in their legal interpretations.<sup>80</sup>

### 3. Conceptual Problems and Outlook

The WTO Appellate Body certainly has a difficult task. In comparison with the other existing appellate review systems in international law it is unique with regard to the regular use made of it and the sophistication of its jurisprudence. It is a standing judicial body that certainly has a vocation and a real chance to maintain the credibility and reliability of the WTO dispute settlement system. This may make it necessary to repeal or modify the Decisions handed down by expert panels if their content would otherwise put at risk the credibility and reliability of the WTO dispute settlement mechanism as a whole. The question of how perfect the legal reasoning of the panels reviewed has to be and whether the Appellate Body is doing the right thing by modifying almost the entire body of Decision as rendered at the first instance is a different one. Currently the strong activism by the Appellate Body puts at risk the panel system whose authority has probably never been as weak as today. The current situation seems difficult to maintain.

There are two explanations for the current situation where almost every panel Decision is appealed against by the parties and subsequently almost certainly modified by the Appellate Body. One explanation

---

<sup>78</sup> Which of course is laudable from a purely legal point of view; see for example D. Palmeter and P. Mavroidis, "The WTO Legal System: Sources of Law", *AJIL* 92 (1998), 39 et seq., (406 et seq.).

<sup>79</sup> See note 71.

<sup>80</sup> See the discussion within the DSB as reported, for example, in: *Inside U.S. Trade* of 13 November 1998, 7.

could be that the panel Decisions are generally of bad quality and almost always erroneous. If this were true, one could only congratulate the Appellate Body for its activity and the degree to which it has been able to prevent the adoption of legally erroneous Decisions by the DSB. At the same time this implies, however, that the Decisions at first instance would be almost useless and that the panel review system would definitely have to be revised in the near future. It also casts a strange light on the panel system under the old GATT where the vast majority of the panel Decisions were adopted by the Parties without major criticism. Has the quality of the Decisions changed so much or was the old system blind?

An alternative explanation for the high number of challenged and modified Decisions is that the new system has put enormous political pressure on the parties to seek an appeal if they lose at the first instance. There have been fears since the introduction of the Appellate Body that this could happen. One remedy suggested to prevent this was that the Appellate Body should be cautious not to undermine the authority of the panels and apply a rather narrow standard of review with regard to the Decisions challenged. From the number of modified reports one must assume that the Appellate Body has chosen to be active and take its task seriously. This, however, has led to a situation where an appeal is politically very attractive for the appellees, as it will almost always achieve some modification of the legal findings of the first instance, even if this does not change the substantial outcome of a claim as such. Politically, both parties become winners at the second instance if a panel Decision is later modified by the Appellate Body. This is, however, detrimental for the authority of the panels and the panelists who are no longer present in the appellate review. The European Union recently suggested that WTO members establish a permanent body of qualified individuals to serve on dispute settlement panels in order to achieve more consistency between rulings than current panels.<sup>81</sup>

The high number of modified Decisions has certainly strengthened the incentive to appeal under the WTO appellate system. At the same time the Decision in the *Shrimp/Turtle-Case*,<sup>82</sup> despite the fact that it was welcomed by many developed countries due to its ecological considerations, may prove to lead to a weakening of the authority of the Appellate Body in the eyes of developing countries. It seems clear that

---

<sup>81</sup> See EU paper presented on 19 October 1998, reported in: *Inside U.S. Trade* of 30 October 1998, 12.

<sup>82</sup> See note 71.

the current policy of the Appellate Body puts the panel system under great pressure for reform in the next round of multilateral negotiations which may start in autumn 1999. But it is also not impossible that the standard of review of the Appellate Body itself will be the object of intensive discussions.