

CHAPTER 11

JUDICIAL INDEPENDENCE IN THE WORLD TRADE ORGANIZATION

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This chapter examines the judiciary in the World Trade Organization (WTO) and in particular the degree of its independence. Other analysts have taken note of the separation of powers in the WTO and have discussed the interplay between its judicial and political functions.¹ Yet to my knowledge, no study has focused on judicial independence in the WTO and the strains upon it.

Chapter 11 has four parts. Part I discusses the historical origins of independent judicial review and its early application at the international level. Part II describes the WTO judiciary and examines the provisions calculated to achieve judicial independence. Part III looks at one lamentable episode in the WTO when judicial independence came under attack. Part IV concludes. This chapter will not take the time to explain why judicial independence itself is important. As the World Bank recently noted, “A judiciary independent from both government intervention and influence by the parties in a dispute provides the single greatest institutional support for the rule of law.”²

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¹ For example, see Frieder Roessler, *The Institutional Balance Between the Judicial and Political Organs of the WTO*, in *NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW. ESSAYS IN HONOUR OF JOHN H. JACKSON* 325 (Marco Bronckers & Reinhard Quick eds., 2000); Raj Bhala, *The Power of the Past: Toward De Jure Stare Decisis in WTO Adjudication (Part III of a Trilogy)*, 33 *GEORGE WASHINGTON INTERNATIONAL LAW REVIEW* 968 (2001) (discussing separation of powers); David Palmeter, *The WTO as a Legal System*, 24 *FORDHAM INTERNATIONAL LAW JOURNAL* 444, 471 (2000) (suggesting that the Appellate Body provides a separation of judicial from policymaking power). The idea that an international “Constitution” would contain a “judicial function” as well as a “legislative function” is an old one. For example, McNair discussed the judicial function in 1933. Arnold D. McNair, *International Legislation*, 19 *IOWA LAW REVIEW*, 177, 184 (1933–34). I would guess that this usage began in the 19th century.

² World Bank, *Building Institutions for Markets*, World Development Report 2002, at 129.

ORIGINS OF JUDICIAL INDEPENDENCE

Although the notion of a separation of powers in government is older,³ it was the Baron de la Brède et de Montesquieu who presented this idea with clarity in his influential *The Spirit of Laws*, published in Geneva in 1748. As Montesquieu explained: “When the legislative and executive powers are united in the same power, or in the same body of magistracy, there can be then no liberty. . . . Again, there is no liberty, if the power of judging be not separated from the legislative and executive powers.”⁴

As the American colonies spun themselves off from Great Britain, Montesquieu’s ideas flowered into a doctrine of government, and were enshrined in the U.S. Constitution.⁵ In landmark legal decisions in cases brought by individuals, the U.S. Supreme Court established its independent supervisory role by holding that it could review acts of both the national Congress and the constituent federal states to see if such acts contravene the Constitution.⁶ Judicial review for both levels was crucial. The federal design of the American system would have been a failure without central rules that were enforceable against the states. And the Congress and the President could not have been accorded so much power, and so much potential for expanding their power, without an independent court to provide a check against overreaching.

Judicial independence in the international legal order is not as clearly defined as in national legal orders. Obviously, no supranational executive or legislative branch exists from which a judicial branch could aspire to be independent. Yet judicial independence does become salient in two contexts. One is the judicial independence of a general world or regional court from interference by states. It was this context that Judge Manley O. Hudson referred when he used the term “judicial independence” in his study of “International Tribunals.”⁷ The other context is the independence of a judicial entity within an international organization.

Within international organizations, some elements of judicial review emerged as early as 1919 in the constitution of the International Labour Organization (ILO).⁸ Under the ILO provisions, the Permanent Court of

³ David P. Currie, *Separating Judicial Power*, 61 LAW AND CONTEMPORARY PROBLEMS, Summer 1998, at 7, 8 (discussing the British Act of Settlement of 1701). In 1607, in the landmark case *Prohibitions Del Roy*, Lord Coke rejected King James I’s attempt to assist the Judges in their deliberations.

⁴ MONTESQUIEU, *THE SPIRIT OF LAWS* 202 (David Wallace Carrithers ed., 1977) (Book XI, Chapter 6, Paragraphs 5, 6).

⁵ See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 152–53, 161, 453–463, 547–53 (1969).

⁶ *Marbury v. Madison*, 5 U.S. 137 (1803); *Fletcher v. Peck*, 10 U.S. 87 (1810).

⁷ MANLEY O. HUDSON, *INTERNATIONAL TRIBUNALS, PAST AND FUTURE* 20, 25 (1944).

⁸ Treaty of Versailles, 28 June 1919, Part XIII (Labour), 25 Consol. T.S. 188. While Part XIII did not use the term “constitution,” that term was being used in the ILO at least as early as 1921.

International Justice (PCIJ) was given a role of hearing particular labor-related cases. The ILO was not accorded a judicial branch within its own organization, but rather was to make use of the general court of the pro-tem international legal system.⁹

Two types of judicial review were to be available for the ILO—first, a review of the report of a Commission of Inquiry, and second, a review of a member's compliance with the ILO constitution.¹⁰ Under the Treaty, the ILO Governing Body was given the authority to ask the Secretary-General of the League of Nations to appoint a Commission of Inquiry to examine the observance of an ILO convention by a party to it.¹¹ The Governing Body was able to act on its own motion, upon a complaint by a state party to a convention, or upon a complaint by a non-governmental or governmental delegate to the ILO Conference. The Commission was directed to report its findings and could make recommendations as to steps which should be taken to meet the complaint.¹² In addition, the Commission was to indicate appropriate measures, if any, of an economic character against the defaulting government.¹³ That government then had recourse to the PCIJ to seek review of the findings and recommendations.¹⁴ The second potential PCIJ referral regarded whether an ILO member government was fulfilling its obligation to bring each new ILO convention and recommendation before the domestic authority within whose competence the matter lies.¹⁵ In the event that the member failed to take such action, any other member could refer this matter to the PCIJ. Although interesting for the precedential value to subsequent international organizations, neither type of judicial review eventuated during the life of the PCIJ.

Provision for judicial review of the acts of an international organization originated in 1921 in the Convention Instituting the Definitive Statute of the Danube.¹⁶ A “territorially interested” state was permitted to

⁹ On this issue, see, in this book, La Rosa.

¹⁰ The Treaty of Versailles also provided that questions or disputes relating to the interpretation of Part XIII or labor conventions were to be referred to the PCIJ. *Id.* art. 423. This provision probably provided context for the ILO initiative in 1921 to seek (through the League of Nations) an advisory opinion from the PCIJ about the process of nominating nongovernmental delegates to the ILO. This became the PCIJ's first opinion. Nomination of the Netherlands Workers' Delegate to the Third Session of the International Labor Conference, Advisory Opinion No. 1, 1 World Court Reports 113. In that proceeding, the PCIJ welcomed oral presentations by two states, the International Labour Office, and two international labor union federations. Manley O. Hudson, *The First Year of the Permanent Court of International Justice*, 17 AMERICAN JOURNAL OF INTERNATIONAL LAW 15, 19–20 (1923).

¹¹ Treaty of Versailles, arts. 411–412.

¹² *Id.* art. 414.

¹³ *Id.*

¹⁴ *Id.* art. 415.

¹⁵ *Id.* arts. 405, 416.

¹⁶ Convention Instituting the Definitive Statute of the Danube, 23 June 1921, 17 AJIL

challenge a decision of the International Commission of the Danube as being “ultra vires” or violative of the Convention.¹⁷ This matter was to be heard by the special jurisdiction set up for that purpose by the League of Nations. Because the Commission could take decisions by a majority vote, this provision provided protection for losing interests.¹⁸

The judicialization of trade relations began in the first multilateral treaty on trade restrictions—the Abolition Convention of 1927. It contained a general dispute procedure which provided for an optional advisory opinion by a technical body in the League of Nations and then, upon agreement, for arbitration or reference to the PCIJ.¹⁹ For disputes of a legal nature, the treaty provided for a referral to the PCIJ.²⁰ The Convention of 1927, however, did not go into force. Later efforts under the League to provide for dispute settlement in trade matters were also unsuccessful.²¹

After the war, the United Nations sponsored the effort to establish an International Trade Organization (ITO) whose Charter contained a two-level procedure for the settlement of differences. Disputes were to be referred to the ITO Executive Board for investigation and recommendation.²² A member government concerned could then ask that a review of the Executive Board’s decision be conducted by the ITO Conference (of the parties).²³ Thereafter, the member government could seek an advisory opinion by the International Court of Justice (ICJ) that was to be binding on the ITO.²⁴ The provision for recourse to the ICJ was actually broader than bilateral trade disputes considered within the ITO. Under the Charter, a member whose interests were prejudiced by *any* decision of the ITO Conference could ask the Organization to seek

Supp. 13 (1921). See generally Elihu Lauterpacht, *Judicial Review of the Acts of International Organisations*, in *INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS* 92 (Laurence Boisson de Chazournes & Philippe Sands eds., 1999).

¹⁷ Convention Instituting the Definitive Statute of the Danube, *id.*, art. 38.

¹⁸ See *id.*, at art. 35.

¹⁹ International Convention for the Abolition of Import and Export Prohibitions and Restrictions, 8 November 1927, 97 LNTS 393, art. 8 (not in force). Article 8 did not apply to the key disciplines in the treaty, but a party could choose, under Article 9, to opt in for those provisions.

²⁰ *Id.* art 8.

²¹ HUDSON, *supra* note 8, at 216–17.

²² Havana Charter for an International Trade Organization, 24 March 1948, arts. 93–94, available at <http://www.worldtradelaw.net/misc/havana.pdf>. For an excellent discussion of the negotiation of these provisions and the early steps taken to implement them, see Seymour J. Rubin, *The Judicial Review Problem in the International Trade Organization*, 63 HARVARD LAW REVIEW 78 (1949).

²³ Havana Charter for an International Trade Organization, *supra* note 22, art. 95.

²⁴ *Id.* arts. 96.2, 96.5. Article 96.5 stated that “The Organization shall consider itself bound by the opinion of the Court on any question referred by it to the Court.”

review in the ICJ.²⁵ Thus, both types of international judicial review—of acts by a party and of acts by a branch of the Organization—were to be available in the ITO. Unfortunately, the ITO treaty did not go into force, and the trading system limped along with less judicial procedures under the advent of the WTO in 1995.

THE WTO JUDICIARY AND ITS INDEPENDENCE

In comparison to the historical examples noted in Part I, the judicial function in the WTO agreement is more limited. As Giorgio Sacerdoti has pointed out, there is an important distinction between remedies against acts of organs of international organizations and procedures for the settlement of state-to-state disputes.²⁶ What the WTO has is the latter. Its *sui generis* dispute mechanism has jurisdiction only for cases about whether one WTO Member's actions violate WTO law or impair trade benefits.²⁷ Thus, the WTO Agreement provides no right of action by a Member against an administrative action by the Organization, one of its subsidiary bodies, or the Director-General.²⁸ So far, this omission has not been subject to criticism. Indeed, one commentator who recently proposed a stronger role for the WTO Appellate Body in rendering interpretations of WTO provisions made clear that "the Appellate Body would not be empowered to strike down an "unconstitutional" pronouncement" of a WTO Council.²⁹

Only the member governments of the WTO may lodge cases. Thus, many actors that might have an interest in insisting that WTO rules be honored are excluded from the WTO judicial process. For example, the WTO Agreement on Subsidies and Countervailing Measures requires that in conducting countervailing duty investigations, the national authorities are to accord industrial users and representative consumer organizations an opportunity to provide information relevant to the investigation.³⁰ Nevertheless, an industrial user or consumer group denied such an opportunity is not given any legal recourse in the WTO. Also lacking access

²⁵ Id. WILLIAM ADAMS BROWN, JR., *THE UNITED STATES AND THE RESTORATION OF WORLD TRADE* 177, 233, 401 (1950).

²⁶ Giorgio Sacerdoti, *Appeal and Judicial Review in International Arbitration and Adjudication: The Case of the WTO Appellate Body*, in *INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM* 247, 254 (Ernst-Ulrich Petersmann ed., 1997).

²⁷ Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), arts. 1.1, 3.3.

²⁸ Of course, most WTO actions are to be taken only after gaining a consensus of the Members. Marrakesh Agreement Establishing the World Trade Organization ("WTO Agreement"), art. IX:1.

²⁹ Bhala, *supra* note 1, at 968, 970.

³⁰ Agreement on Subsidies and Countervailing Measures (SCM), art. 12.10. Consumer organizations are to have that opportunity when the product is sold at the retail level.

are governments that continue to be excluded from WTO membership, such as Russia.

The WTO agreement dealing with member-to-member disputes is the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).³¹ Strictly speaking, the DSU did not create a “judicial” system. As Joseph Weiler has remarked, the WTO Appellate Body is not called a “court,” even though “[t]hat is exactly what the Appellate Body is.”³² Weiler is right to say that the WTO has a court because the function performed by panels and the Appellate Body is adjudicative.³³

Many analysts have pointed to the “judicialization” or “legalization” of WTO procedures in contrast to the less juridical procedures in the WTO’s predecessor, the General Agreement on Tariffs and Trade (GATT).³⁴ Invocation of the DSU by a Member is referred to as a “case” and as a “complaint.”³⁵ A case or complaint can allege that there is an “infringement of the obligations,” a “violation of obligations” or an impairment of benefits.³⁶ At the end of a proceeding, the panel issues a “report” (not termed a “decision”).³⁷ An appeal may be taken on “issues of law covered in the panel report and legal interpretations developed by the panel.”³⁸ Several weeks later, the Appellate Body issues its own report which may “uphold, modify or reverse the legal findings and conclusions of the panel.”³⁹ These reports may contain individual “opinions” but that must be presented anonymously.⁴⁰

³¹ The Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) is Annex 2 of the Marrakesh Agreement Establishing the World Trade Organization.

³² J.H.H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats—Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, 35 JOURNAL OF WORLD TRADE 191, 200–01 (2001).

³³ The GATT panels were often described as “arbitral.” The DSU contains a separate track for “arbitration” that is distinct from the regular panels that decide whether a party has violated WTO rules. Compare DSU art. 25 (arbitration) with arts. 6, 21.5 (panels). A failure to implement an arbitral award may be complained about via a regular WTO Panel. DSU art. 25.4.

³⁴ Arie Reich, *From Diplomacy to Law: The Judicialization of International Trade Relations*, 17 NORTHWESTERN JOURNAL OF INTERNATIONAL LAW & BUSINESS 775 (1997); David Palmeter & Petros C. Mavroidis, *The WTO Legal System: Sources of Law*, 92 AMERICAN JOURNAL OF INTERNATIONAL LAW 398, 405 (1998) (saying that the Appellate Body is effectively a standing judicial body); Judith Goldstein & Lisa L. Martin, *Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note*, 54 INTERNATIONAL ORGANIZATION 603 (2000). See also United States—Sections 301–310 of the Trade Act of 1974, Report of the Panel, WT/DS152/R, adopted 27 January 2000, para. 7.12 (“Our function in this case is judicial.”). In 1981, Peter Ehrenhaft observed these trends in U.S. trade law. Peter D. Ehrenhaft, *The “Judicialization” of Trade Law*, 56 NOTRE DAME LAWYER 595 (1981).

³⁵ DSU arts. 3.7, 3.8.

³⁶ Id. arts. 3.3, 3.8, 23.1.

³⁷ Id. arts. 12.7, 21.5.³⁸Id. art. 17.6.

³⁹ Id. arts. 17.5, 17.13.

⁴⁰ Id. arts. 14.3, 17.11.

The DSU panels have compulsory jurisdiction. As complainants, WTO Members agree to refrain from making a determination that a violation of the WTO agreement has occurred except through recourse to the DSU.⁴¹ As respondents, WTO Members cannot delay the initiation of a panel beyond the first meeting of the Dispute Settlement Body (DSB) at which the matter is raised.⁴²

The WTO dispute system differs from most other international organizations in that the DSB can authorize economic countermeasures against a government that fails to honor its WTO obligations.⁴³ This feature draws attention to the WTO and may lead governments to take their international obligations more seriously.

The WTO's Judicial Branch

Many commentators see a distinct separation between the judicial and political branches of the WTO. For example, Frieder Roessler explains that “the purpose of the complex institutional structure established by the WTO Agreement is to divide decision-making power between different political organs—executive, legislative, as well as judicial.”⁴⁴ José Alvarez warns that the “legalization” in the WTO “should not fool us into thinking that fundamentally political issues can simply be handed over to the WTO’s *judicial branch*.”⁴⁵ Joost Pauwelyn states that WTO panels and the Appellate Body “lead a separate existence as the judicial branch of the WTO.”⁴⁶

Although the word “judicial” is not used, the organic act establishing the WTO does establish a judicial system. It comprises the DSB, the standing Appellate Body, and appointed panels. Each unit has a distinct function. The function of the DSB is to administer the DSU rules, establish panels, adopt panel and Appellate Body reports, and maintain surveillance of governmental implementation of adopted reports.⁴⁷ The function of the standing Appellate Body is to hear appeals from panel decisions and, when needed, to recommend that the defending government bring its measure into conformity with WTO rules.⁴⁸ The “standing”

⁴¹ Id. art. 23.2(a).

⁴² Id. art. 6.1. The makeup of the DSB will be discussed below.

⁴³ DSU art. 22.6.

⁴⁴ Frieder Roessler, *Are the WTO's Judicial Organs Overburdened*, in EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM 308, 325 (Roger B. Porter, Pierre Sauvé, Arvind Subramanian & Americo Beviglia-Zampetti eds., 2001).

⁴⁵ José Alvarez, *How Not to Link: Institutional Conundrums of an Expanded Trade Regime*, 7 WIDENER LAW SYMPOSIUM JOURNAL 1, 19 (2001).

⁴⁶ Joost Pauwelyn, *The Use of Experts in WTO Dispute Settlement*, 51 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 325, 338 (2002).

⁴⁷ DSU, arts. 2.1, 6.1, 7.3, 16.4, 17.14, 21.6.

⁴⁸ Id. arts. 17.1, 19.1. Petersmann calls the Appellate Body the “principal judicial

nature of the Appellate Body shows the intention of the founding governments to establish a judicial entity. The function of WTO panels “is to assist the DSB in discharging its responsibilities . . .”⁴⁹ In particular, the panels make an objective assessment of the facts and the applicability of and conformity with WTO rules, and then may recommend that the defending government bring its measure into conformity with WTO rules.⁵⁰

The DSB consists of representatives of all WTO members.⁵¹ It is the DSB that actually makes the “decisions” in disputes by adopting panel and Appellate Body reports.⁵² Because the DSB consists of nothing more than the member governments acting collectively, one can question whether there is truly a judicial branch in the WTO. Certainly, the DSU does not direct each government’s representative on the DSB to act in any way other than in its own national interest. The status of the WTO General Council as a political/legislative body⁵³—combined with the fact that the DSB is just the General Council by another name⁵⁴—may seem to contradict the idea that the WTO treaty system provides for a distinct judicial function.

Nevertheless it does. A key procedural rule demonstrates that despite being formally subordinate to the DSB, the panels and Appellate Body do in fact have authority to adjudicate.⁵⁵ The key rule is that the DSB is

organ” of the WTO. Ernst-Ulrich Petersmann, *Dispute Settlement in International Economic Law—Lessons for Strengthening International Economic Dispute Settlement in Non-Economic Areas*, 2 JOURNAL OF INTERNATIONAL ECONOMIC LAW 189, 209 (1999). It is interesting to note that in December 2001, the swearing-in of the three new members of the Appellate Body was held in a ceremonial meeting presided over by the chair of the DSB. This contrasts with past practice when new members of the Appellate Body took their oath in the presence of the Director-General and the chairs of the WTO Councils. At the ceremony, retiring Appellate Body member Florentino Feliciano gave a brief speech in which he discussed the need for independence in WTO dispute resolution.

⁴⁹ DSU art. 11.

⁵⁰ Id. arts. 7.1, 11, 19.1.

⁵¹ WTO Agreement, arts. IV:2, IV:3.

⁵² DSU art. 20. See Hirokazu Miyano, *Diversification of International Dispute Settlement Systems—Its Implication for the Concept of Dispute and its Settlement*, 104 CHUO LAW REVIEW, Aug. 1998, at 1, 11 (noting that a WTO panel report looks like a judicial decision but is not legally binding in itself).

⁵³ WTO Agreement, arts. IV:1, IV:2.

⁵⁴ Id. art. IV:3.

⁵⁵ William J. Davey, *WTO Dispute Settlement: Segregating the Useful Political Aspects and Avoiding “Over-Legalization,”* in NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW, supra note 1, at 291, 297 (stating that the political role of the DSB does not interfere in the legal part of the dispute process); Ernst-Ulrich Petersmann, *International Trade Law and the GATT/WTO Dispute Settlement System 1948–1996: An Introduction*, in INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM, supra note 26, at 3, 64 (calling the process “quasi-judicialization”); Roessler, supra note 44, at 323 (“the involvement of the WTO’s executive branch in the dispute settlement process is a formality without any legal consequences”).

directed to adopt panel and Appellate Body reports unless there is a consensus *not* to do so.⁵⁶ This rule of negative consensus means that any report proposed for adoption by the complaining party will automatically be adopted (because the complaining party would not join a consensus against adoption). This has been demonstrated consistently in WTO practice.⁵⁷

Although the stated purpose of the DSB is to settle disputes, the role of the Appellate Body in clarifying the law can have important systemic effects. Deborah Z. Cass hypothesizes that the Appellate Body has been “instrumental in building a constitutional structure with the WTO system.”⁵⁸ Based on a review of WTO caselaw, she argues that the judicial interpretations “are changing the international trade law system and leading to a greater resemblance between it and a constitutional system.”⁵⁹ If indeed the WTO is becoming more constitution-like, then the need for judicial independence becomes even more apparent.

Is There Judicial Independence in the WTO?

A simplistic answer to this question is that the WTO’s judicial branch lacks independence because its central organ, the DSB, is a political body composed of Member representatives, and thus is hardly independent of governments. Yet that answer is not satisfactory. One needs to assess whether panels and the Appellate Body are independent. In other words, to what extent can panels and Appellate Body operate independently of: (1) the DSB and the WTO General Council, (2) the members of the WTO, and (3) the WTO Director-General and Secretariat?⁶⁰

A review of DSU rules shows that its drafters sought to insulate the Appellate Body and the panels from governmental interference. The DSU points to “independence of the members” as one criterion for choosing panelists.⁶¹ Although the DSU does not explicitly address “judicial independence” within the WTO, it is interesting to note that several WTO agreements direct governments to provide for an independent judicial

⁵⁶ DSU arts. 16.4, 17.14. One narrow exception to negative consensus exists for certain non-violation complaints. See DSU art. 26.2.

⁵⁷ In some instances, several months after the adoption of a report, the DSB governments have acted by consensus to extend the due date for compliance. For example, this occurred in the *Foreign Sales Corporations* case.

⁵⁸ Deborah Z. Cass, *The “Constitutionalization” of International Trade Law: Judicial Norm Generation as the Engine of Constitutional Development in International Trade*, 12 EUROPEAN JOURNAL OF INTERNATIONAL LAW 39, 44 (2001).

⁵⁹ *Id.* at 52.

⁶⁰ See Robert O. Keohane, Andrew Moravcsik & Anne-Marie Slaughter, *Legalized Dispute Resolution: Interstate and Transnational*, 54 INTERNATIONAL ORGANIZATION 457, 459–60 (2000) (discussing independence of adjudicators in an international authority).

⁶¹ DSU art. 8.2. When government officials serve as panelists, they do so in their individual capacity and WTO members are directed not to give them instructions. *Id.* art. 8.9.

review of administrative proceedings.⁶² So the normative importance of judicial independence was recognized by the parties drafting the WTO. The WTO Agreement places value on the “independent exercise” of functions carried out by “officials” of the WTO and by the representatives of the Members.⁶³ This statement relates to privileges and immunities.

Unlike a basic arbitral model, litigant governments do not get to choose anyone on the panel. As prescribed by DSU rules, the panel is chosen from a roster compiled by governments.⁶⁴ In each proceeding, the panelists are nominated by the Secretariat subject to the agreement of the disputing parties. If an agreement cannot be reached, however, the Director-General will appoint the panel and can add other names. None of the panelists can be a citizen of the disputing parties, unless the parties so agree.⁶⁵

Once appointed, WTO panels have authority to obtain needed information and to determine their jurisdictional competence. Information is addressed in DSU Article 13 (Right to Seek Information) which says that “Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate.” It is interesting that this provision expresses a “right” for the tribunal itself. A recent study of the prerequisites for effective supranational adjudication notes the importance of a guaranteed capacity to generate facts that have been independently evaluated.⁶⁶ A similar point has been made by trade law scholars who underline that access to information is essential for WTO panels.⁶⁷ The question of the competence of the panel to determine its own competence is not specifically addressed in the DSU. Nevertheless, the Appellate Body has suggested that panels do have that competence.⁶⁸

⁶² GATT art. X:3(b) (requiring independent review of administrative action); Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 [hereinafter “Antidumping Agreement”], art. 13 (requiring independent judicial review); Agreement on Rules of Origin, art. 3(h), Annex II, para. 3(f); Agreement on Subsidies and Countervailing Measures, art. 23; Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 31(i)(j); Agreement on Government Procurement, art. XX:6. In addition, Article 4 of the WTO Agreement on Preshipment Inspection provides for “Independent Review Procedures” to be carried out by an independent entity at the international level.

⁶³ WTO Agreement, art. VIII:3.

⁶⁴ DSU arts. 8.

⁶⁵ Id. art. 8.3.

⁶⁶ Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 *YALE LAW JOURNAL* 273, 303 (1997).

⁶⁷ Florentino P. Feliciano & Peter L. H. Van den Bossche, *The Dispute Settlement System of the World Trade Organization: Institutions, Process and Practice*, 75 *PHILIPPINE LAW JOURNAL* 1, 30–31 (2000) (explaining that for a panel to control the process by which it informs itself of the relevant facts is “indispensably necessary”); Robert Howse, *Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence*, in *THE EU, THE WTO AND THE NAFTA* 35, 49–50 (J. H. H. Weiler ed., 2000) (suggesting that the discretion to consider amicus briefs is a judicial right).

⁶⁸ United States—Anti-Dumping Act of 1916, Report of the Appellate Body,

The DSB selects the seven-person Appellate Body.⁶⁹ Its members have a four-year term with a possibility of reappointment. They cannot be affiliated with any government. So far, no women have been appointed. In any particular proceeding, a “division” of three members is selected via a rotation system. The governments in a dispute get no role in choosing the division hearing the appeal.

DSU rules seek to attain autonomy for panels and the Appellate Body. Article 14.1 says that panel and Appellate Body deliberations shall be confidential. In addition, other DSU provisions declare that “There shall be no *ex parte* communications with the panel or Appellate Body concerning matters under consideration . . .”⁷⁰ Although the panels rely upon a secondment of staff assistance from the WTO Secretariat, the Appellate Body has its own Secretariat.⁷¹ From the time that the DSB establishes a panel to the time that the Appellate Body issues its report (or if no appeal to the time of the panel report), DSU rules do not provide any role for the DSB in the adjudicative process.

It is only *after* the reports are circulated that the DSB regains a role. Appellate Body reports are to be adopted by the DSB within 30 days and un-appealed panel reports within 60 days.⁷² The DSB deliberations are to some extent pro forma since reports are almost certain to be adopted because of the above-mentioned negative consensus rule. Nonetheless, the DSU underlines “the right of Members to express their views” on a panel or Appellate Body report.⁷³ To facilitate discourse, members having objections to a panel report are directed to circulate written reasons at least 10 days prior to the DSB meeting.⁷⁴ During the DSB debate, government delegates will sometimes criticize the substance of an Appellate Body report. For example, when debating the *Asbestos* decision, India stated that it was difficult to agree with the Appellate Body’s interpretation of the GATT’s national treatment requirement.⁷⁵

The automaticity in adoption of panel and Appellate Body reports gives these bodies independence. As Philip M. Nichols suggested in 1996,

WT/DS136/AB/R, adopted 26 Sept. 2000, para. 54 & n. 30. In an earlier ruling, the Appellate Body noted that some jurisdictional competence had been conceded by Members to the WTO. EC Measures Concerning Meat and Meat Products (Hormones), Report of the Appellate Body, WT/DS26/AB/R & WT/DS48/AB/R, adopted 13 February 1998, para. 115.

⁶⁹ DSU art. 17.

⁷⁰ DSU arts. 17.10, 18.1. These provisions may have been added in response to one or two episodes in the GATT era when a government put improper pressure on a panelist. See JOHN H. JACKSON, *RESTRUCTURING THE GATT SYSTEM* 65 (1990).

⁷¹ DSU arts. 17.7, 27.1.

⁷² *Id.* arts. 16.4, 17.14. The DSB may decide by consensus not to adopt a report. This has never happened.

⁷³ *Id.*

⁷⁴ *Id.* art. 16.2. In actual WTO practice, this rule is routinely flouted.

⁷⁵ Dispute Settlement Body, Minutes of Meeting Held in Centre William Rappard on 5 April 2001, WT/DSB/M/103, para. 47.

the requirement of a consensus to block adoption “could create a partial *de facto* independence for the panels and the Appellate Body, which no longer must worry about crafting reports that appeal to all, or even a majority, of the members.”⁷⁶ The workability of DSU rules for enabling panels and the Appellate Body to carry out their adjudicative functions independently is not being questioned today. Ironically, what is being questioned is whether the Appellate Body has grown *too independent* of WTO Members. This “problem” will be discussed in the following section.

Criticism of the WTO Judiciary

After seven years of experience with WTO dispute resolution, two lines of thoughtful criticism have emerged. One is that the panel and Appellate Body process has become too legalized and judicialized, and that the WTO should seek to regain the diplomatic ethos that existed in the GATT era.⁷⁷ The other is that the slow legislative branch of the WTO—stemming from consensus decision-making—makes it impossible to fix an Appellate Body decision that is unacceptable to WTO member governments.⁷⁸ The most obvious unacceptable decision would be one that is legally flawed. But it would also be possible for the Appellate Body to interpret and apply the WTO as the drafters intended,⁷⁹ yet still achieve a result that is politically unacceptable to the contemporary WTO membership. Every year, new members join the trading system—30 governments since the end of the Uruguay Round negotiations. Moreover, much has happened in the world economy since the WTO rules were written in the early 1990s, and governmental attitudes have evolved.

Should the Appellate Body make a mistake or reach a legally correct yet politically unacceptable conclusion, legislative mechanisms are available in the WTO Agreement to address that problem. They include

⁷⁶ Philip M. Nichols, *GATT Doctrine*, 36 VIRGINIA JOURNAL OF INTERNATIONAL LAW 379, 454 n. 429 (1996).

⁷⁷ See Weiler, *supra* note 32 (discussing this critique). In the early 1980s, Jan Tumlir wrote that the GATT system “is interpreted and developed by diplomacy, not by an independent international judiciary.” Jan Tumlir, *GATT Rules and Community Law—A Comparison of Economic and Legal Functions*, in THE EUROPEAN COMMUNITY AND GATT 1, 10 (Meinhard Hilf, Francis G. Jacobs, and Ernst-Ulrich Petersmann, eds. 1986).

⁷⁸ Konstantin J. Joergens, *True Appellate Procedure or Only a Two-Stage Process? A Comparative View of the Appellate Body under the WTO Dispute Settlement Understanding*, 30 LAW & POLICY IN INTERNATIONAL BUSINESS 193, 197, 213, 228 (1999) (noting that the WTO does not provide for an adequate legislative response as a means of reacting to Appellate Body decisions); Jeffrey Atik, *Democratizing the WTO*, 33 GEORGE WASHINGTON INTERNATIONAL LAW REVIEW 451, 454 (2001) (noting that there is no meaningful legislative check).

⁷⁹ The Appellate Body has stated that “The purpose of treaty interpretation is to establish the *common* intention of the parties to the treaty.” European Communities—Customs Classification of Certain Computer Equipment, Report of the Appellate Body, WT/DS62/AB/R, adopted 22 June 1998, para. 93.

an amendment, an interpretation, or a waiver.⁸⁰ The waiver is particularly suited to settle a dispute; for example, the WTO enacted waivers regarding bananas in 2001.⁸¹ Of course, a waiver cannot change WTO law.

Utilizing any of these legislative methods is difficult however. As Frieder Roessler incisively explains: “The fear of being bound by majority decisions adopted by the political organs of the WTO was greater than the fear of being bound by decisions adopted by its judicial organs.”⁸² The basic decision-making rule in the WTO is action through consensus.⁸³ In the absence of a consensus, however, voting can occur. Some WTO amendments would require a two-thirds vote and others unanimity.⁸⁴ For adopting interpretations and approving most waivers, a three-fourths majority of the WTO membership is needed.⁸⁵ So far, the WTO member governments have not made any amendments or issued any formal interpretations. Some waivers have been enacted, but none to revise law after an unpopular Appellate Body decision.

The difficulty of using the constitutionally provided ways to change WTO law has provoked resentment of the Appellate Body by the government delegates to the WTO. Although some of the criticism of the Appellate Body involves interpretation of substantive WTO provisions (e.g., GATT Article XX in the *Shrimp* case⁸⁶), most of the criticism is about how the Appellate Body exercises its own juridical discretion. For example, Roessler has criticized the Appellate Body for ruling that panels are competent to make determinations assigned to the WTO Committee on Balance-of-Payments Restrictions and the Committee on Regional Trade Agreements.⁸⁷

⁸⁰ See William J. Davey, *Comment, in* EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM, *supra* note 55, at 329, 331 (discussing how WTO Members can effectively change a WTO judicial decision). Note that under the WTO Agreement, art. X, amendments to the WTO have to be submitted to Member states for acceptance. Thus, the Members of the WTO acting as the Ministerial Council are not competent to amend the WTO; that has to be further effectuated by individual acceptance by Members.

⁸¹ European Communities—Transitional Regime for the EC Autonomous Tariff Rate Quotas on Imports of Bananas, WT/MIN(01)/16 (14 Nov. 2001); European Communities—the ACP-EC Partnership Agreement, WT/MIN(01)15 (14 Nov. 2001). For example, the latter decision waives the GATT’s most-favoured-nation requirement until 2007.

⁸² Roessler, *supra* note 44, at 324.

⁸³ WTO Agreement, art. IX:1, DSU, art. 2.4.

⁸⁴ WTO Agreement, art. X.

⁸⁵ WTO Agreement, arts. IX, X. As Roessler points out, these voting rules are more difficult under the WTO than they were under the GATT. Roessler, *supra* note 44, at 323–24.

⁸⁶ See, e.g., B. S. Chimni, *WTO and Environment: Legitimation of Unilateral Trade Sanctions*, 37 *ECONOMIC & POLITICAL WEEKLY* 133 (2002); Donald M. McRae, *GATT Article XX and the WTO Appellate Body*, in *NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW*, *supra* note 1, at 219.

⁸⁷ Roessler, *supra* note 1, at 345.

In essence, Roessler argues that some WTO disputes should be considered political rather than legal questions. He says:

“The adoption of the DSU led to a clear separation between the judicial and political organs determining the legality of trade measures. The now independent judicial organs should be even more cautious than the *Contracting Parties* and therefore refrain from using their interpretive power to confer decision-making authority upon themselves that the Members of the WTO have explicitly assigned to bodies composed of the Members.”⁸⁸

These objections are supported by Jagdish Bhagwati who writes that “I have some sympathy for Frieder Roessler’s view that the dispute settlement panels and the appellate court must defer somewhat more to the political process instead of making law in controversial matters.”⁸⁹ Criticism has also emerged in the U.S. Congress centered on the contention that the Appellate Body is not giving the appropriate level of deference to national government administrative decisions.⁹⁰ The frustration with the Appellate Body intensified after the failed WTO ministerial conference in Seattle because the possibilities for formal changes in WTO rules seemed more remote.

The difficulty of countermanding the Appellate Body has led to initiatives to change the expectation of automatic adoption of Appellate Body decisions. For example, Claude Barfield argues that the “WTO is overextended and in danger of losing authority and legitimacy as the arbiter of trade disputes among the world’s major trading nations.”⁹¹ Barfield sees a “constitutional flaw” in the WTO whereby the “highly judicialized dispute settlement system is stretched beyond its capacity to

⁸⁸ Id. at 344. “Contracting parties” refers to the GATT system.

⁸⁹ Jagdish Bhagwati, *After Seattle: Free Trade and the WTO*, in EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM, supra note 55, at 50, 60–61. Compare Laurence Boisson de Chazournes, *Advisory Opinions and the Furtherance of Common Interests of Humankind*, in THIS VOLUME (noting that one contribution of the judge to the development of international law is that it may reduce the undue influence of the most politically powerful states).

⁹⁰ Bipartisan Trade Promotion Authority Act of 2002, Senate Report 107–139, February 2002, at 6 (“Congress finds that WTO panels and the Appellate Body have ignored their obligation to afford an appropriate level of deference to the technical expertise, factual findings, and permissible legal interpretations of national investigating authorities” in antidumping, countervailing duty, and safeguard cases.). The Appellate Body’s decision in the *Anti-Dumping Act of 1916* case has also drawn criticism for encroaching on national antitrust authority. See, e.g., Mitsuo Matsushita & Douglas E. Rosenthal, *Was the WTO Mistaken in Ruling on Antidumping Act of 1916?*, 36 BNA International Trade Reporter 1450 (2001).

⁹¹ CLAUDE E. BARFIELD, FREE TRADE, SOVEREIGNTY, DEMOCRACY. THE FUTURE OF THE WORLD TRADE ORGANIZATION 5 (2001).

deliver decisions that WTO member states will accept as legitimate.”⁹² Barfield would correct this flaw by making it much easier for the DSB to nullify a troublesome panel or Appellate Body report. Specifically, he recommends that *one-third* of WTO members should be sufficient for setting aside such a report.⁹³

Barfield’s solution may be worse than the problem, but many analysts agree that it is now too difficult to fix a bad Appellate Body decision. Thomas Cottier was one of the earliest to sound a warning. In April 1998, he pointed out that “. . . it takes a long time to correct rulings of the Appellate Body in consensus based negotiations, which are hardly active in between rounds. As a result, the concentration of power in the Appellate Body invites political pressure and may jeopardize the independence and authority of the new institution.”⁹⁴

That treaties are often ambiguous is well known, and the WTO is no exception to that. Yet the WTO treaty is probably being interpreted today by a judicial body more frequently and intensively than any other multilateral treaty (leaving aside the two major European treaties). Some analysts argue that WTO adjudicators should exercise abstention or restraint in the face of a textual lacuna. In other words, the Appellate Body should not fill in the blanks, but instead wait for governments to do so. Yet, the DSU says nothing about abstention. Rather, it directs the Appellate Body to “address *each* of the issues raised” and states that the WTO dispute system should “*clarify* the existing provisions of those [WTO] agreements in accordance with the customary rules of interpretation of public international law.”⁹⁵ A true lacuna of law might justify a holding of “non liquet.”⁹⁶ A prominent trade practitioner in the United States, Alan Wolff, has argued that WTO panels already have the lati-

⁹² Id. at 37, 111.

⁹³ Id. at 127. Barfield would require the one-third of the membership to represent at least one-quarter of world trade.

⁹⁴ Thomas Cottier, *The WTO Dispute Settlement System: New Horizons*, 92 ASIL PROC. 86, 90 (1998).

⁹⁵ DSU arts. 3.2 (emphasis added), 17.12 (emphasis added).

⁹⁶ For a discussion of non liquet, see Daniel Bodansky, *Non Liquet and the Incompleteness of International Law*, in INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS, *supra* note 16, at 153. In the WTO context, see: Jacques H. F. Bourgeois, *WTO Dispute Settlement in the Field of Antidumping Law*, 1 JOURNAL OF INTERNATIONAL ECONOMIC LAW 259, 271–72 (1998); William J. Davey, *Has the WTO Dispute Settlement System Exceeded Its Authority?*, 4 JOURNAL OF INTERNATIONAL ECONOMIC LAW 79, 106 (2001). In the *Hot-Rolled Steel* decision, the Appellate Body detected a lacuna in Article 19.4 of the Antidumping Agreement, but stated that the appeal did not raise the issue of how the lacuna might be overcome. United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, Report of the Appellate Body, WT/DS184/AB/R, adopted 23 August 2001, paras. 125–26.

tude to declare that existing WTO rules are ambiguous or do not explicitly cover the complained of conduct.⁹⁷

One of the earliest cases where the Appellate Body was confronted with a possible gap in the law was in 1997 in the *Bananas* dispute. The tiny nation of Saint Lucia wanted to be represented by counsel from the private sector, and yet some large governments—like the United States and Mexico—sought to prevent such representation, arguing that this was inconsistent with GATT practice and that no DSU rule permitted private lawyers.⁹⁸ The Appellate Body dispatched this objection quickly, holding that “it is for a WTO Member to decide who should represent it . . .”⁹⁹ This instance of interpreting textual silence received no subsequent protest within the WTO, and much acclaim in the trade bar.¹⁰⁰ Unlike the more controversial rulings on amicus briefs that transpired in subsequent years, the support for rule-making in *Bananas* by developing countries was probably due to its perceived benefits to them.

During its consideration of the appeal in the *Asbestos* case in late 2000, the Appellate Body—recognizing that amicus briefs would be submitted in this high visibility, health-related dispute—sought to institute a procedure for considering such briefs that would provide fairness and due process both to the parties as well as to potential amici from the public or private sector.¹⁰¹ Its “communication” of the procedure drew a fusillade of complaints by governments, and led to an unprecedented special session of the WTO General Council where numerous government delegates criticized the Appellate Body in the middle of the ongoing *Asbestos* proceeding.¹⁰²

Of course, for executive or legislative officials to criticize judicial decisions (and judicial activism) is not illegitimate. Having a dialogue between branches of government is appropriate and useful.¹⁰³ But dur-

⁹⁷ Alan Wm. Wolff, *Problems with WTO Dispute Settlement*, 2 CHICAGO JOURNAL OF INTERNATIONAL LAW 417, 424 (2001).

⁹⁸ European Communities—Regime for the Importation, Sale and Distribution of Bananas, Report of the Appellate Body, WT/DS27/AB/R, adopted 25 September 1997, paras. 8–9.

⁹⁹ Id. para. 10. See Robert Howse, *The Legitimacy of the World Trade Organization*, in THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS 355, 381 (Jean-Marc Coicaud & Veijo Heiskanen eds., 2001) (noting that the Appellate Body emphasized the due process right).

¹⁰⁰ Marco C. E. J. Bronckers & John H. Jackson, *Editorial Comment: Outside Counsel in WTO Dispute Processes*, 2 JOURNAL OF INTERNATIONAL ECONOMIC LAW 156 (1999).

¹⁰¹ European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, Communication from the Appellate Body, WT/DS135/9, 8 November 2000. This Communication was posted on the WTO website on that day.

¹⁰² Geert A. Zonnekeyn, *The Appellate Body’s Communication on “Amicus Curiae” Briefs in the “Asbestos” Case. An Echternach Procession?*, 33 JOURNAL OF WORLD TRADE 553 (2001). On the issue of amicus curiae, see, in this book, Chinkin/MacKenzie.

¹⁰³ See JUDGES AND LEGISLATORS. TOWARD INSTITUTIONAL COMITY (Robert A. Katzmann ed.,

ing the pendency of a case, government officials need to be careful in the means used to influence the judicial process.

ASBESTOS: JUDICIAL INDEPENDENCE UNDER PRESSURE

The controversy over *amicus curiae* briefs in the WTO has received considerably scholarly attention, so only a brief summary will be given here.¹⁰⁴ In *Shrimp*, the Appellate Body ruled that a panel has authority to accept non-requested information, and is therefore not precluded from considering amicus briefs proffered to it.¹⁰⁵ In *Lead Bars*, the Appellate Body ruled that it had legal authority to decide whether to accept and consider *amicus curiae* briefs.¹⁰⁶ Both of these decisions were adopted by the DSB, although many governments criticized them during the debate. In *Asbestos*, the competent division of the Appellate Body—following a few days of consultation with other members of the Appellate Body and the parties to the dispute—promulgated a special procedure exclusively for the *Asbestos* appeal that set rules for any application for leave to file a written brief in the case.¹⁰⁷ Even as the Appellate Body was drafting and notifying these procedures, about nine private actors sent in submissions, thus confirming the Appellate Body's assumption that there would be considerable interest in offering nongovernmental views.¹⁰⁸ The announcement of the new procedure led to a furor in the WTO and a call for a meeting of the General Council.¹⁰⁹ In the days running up to the General Council meeting, the Appellate Body rejected all of the applications for leave to file an amicus brief.¹¹⁰ After the General Council meeting, the Appellate Body continued to reject all applications and to discard an

1988). See also José E. Alvarez, *Judging the Security Council*, 90 AMERICAN JOURNAL OF INTERNATIONAL LAW 1, 39 (1996) ("Judicial review is an evolutionary process, emerging from a dialogue among all international actors.").

¹⁰⁴ See e.g., Padideh Ala'i, *Judicial Lobbying at the WTO: The Debate Over the Use of Amicus Curiae Briefs and the U.S. Experience*, 24 FORDHAM INTERNATIONAL LAW JOURNAL 62 (2000); Andrea Kupfer Schneider, *Unfriendly Actions: The Amicus Brief Battle at the WTO*, 7 WIDENER LAW SYMPOSIUM JOURNAL 87 (2001).

¹⁰⁵ United States—Import Prohibitions of Certain Shrimp and Shrimp Products, Report of the Appellate Body, WT/DS58/AB/R, adopted 6 November 1998, paras. 106, 110.

¹⁰⁶ United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, Report of the Appellate Body, WT/DS138/AB/R, adopted 7 June 2000, paras. 39, 42.

¹⁰⁷ European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, Report of the Appellate Body, WT/DS135/AB/R, adopted 5 April 2000, paras. 50–51.

¹⁰⁸ Based on an interview with WTO staff.

¹⁰⁹ Daniel Pruzin, *WTO Appellate Body Under Fire for Move on Acceptance of Amicus Briefs*, BNA DAILY REPORT FOR EXECUTIVES, 27 November 2000, at A1.

¹¹⁰ Report of the Appellate Body, *supra* note 107, paras. 53, 55–56.

actual amicus brief.¹¹¹ The Appellate Body did not give any specific reason for why it denied each of the timely applications.¹¹²

The fragility of judicial independence in the WTO can be seen in the minutes of the General Council meeting convened to discuss the Appellate Body's action.¹¹³ Almost all of the government delegates who spoke criticized the Appellate Body for adopting the new procedure, causing it to be posted on the internet, and for continuing to try to open WTO dispute settlement to amicus briefs despite the clear disapproval of this course expressed by many WTO governments. The governments evinced little uneasiness about insinuating themselves into an ongoing judicial proceeding.¹¹⁴ Even the delegate from Canada, the complaining party in the dispute and an appellant, expressed concern that the Appellate Body division had chosen to adopt these new procedures.¹¹⁵

Numerous criticisms were leveled at the Appellate Body. One was the Appellate Body had no legal authority to establish a procedure for considering petitions for leave to submit an amicus brief.¹¹⁶ Only one government, the United States, countered that the Appellate Body did have such authority.¹¹⁷ Another repeated complaint was that amicus briefs were not permitted because the governments had specifically rejected that possibility during the Uruguay Round.¹¹⁸ This line of criticism shows that the real issue for many countries was not whether the public "Communication" in *Asbestos* was inadvisable; rather, it was that the *Shrimp* decision and its progeny were wrong.¹¹⁹ Governments also made the point

¹¹¹ Id. paras. 55, 57.

¹¹² Report of the Appellate Body, *supra* note 107, para. 56 (stating that the 11 timely applications were denied for failure to comply sufficiently with all the requirements set forth).

¹¹³ General Council, Minutes of Meeting Held on 22 November 2000, WT/GD/M/60.

¹¹⁴ Although the General Council chairman posited that the discussion should be about principle and not a specific case, that guidance was ignored during the meeting. See *id.* paras 1, 123. In my view, a meeting truly about principle would have been scheduled after the *Asbestos* decision was handed down.

¹¹⁵ Minutes of Meeting Held on 22 November 2000, *supra* note 113, para. 73.

¹¹⁶ *Id.* Argentina (para. 93), Egypt (para. 12), India (paras. 31, 34), Japan (para. 112), Turkey (para. 79), and Uruguay (para. 6). Egypt spoke on behalf of the Informal Group of Developing Countries.

¹¹⁷ *Id.* para. 74.

¹¹⁸ *Id.* Cuba (para. 97), Hong Kong China (para. 23), Mexico (paras. 50, 52), Pakistan (para. 65), Uruguay (para. 7).

¹¹⁹ The argument against the receivability of submissions from nongovernmental organizations could also be applied to intergovernmental organizations. The DSU has no provision that specifically permits a submission from, say, the UN Environment Programme in a trade dispute about turtles. By contrast, the Statute of the International Court of Justice (Article 34.2) states that the Court may request information from public international organizations relevant to cases before it, and shall receive such information presented by such organizations on their own initiative.

that the Appellate Body members, having expertise in law, could not possibly need input from non-government briefs.¹²⁰ The delegates probably thought they were being clever in making this point, yet it is troubling if one takes it seriously, because the governments are saying that the Appellate Body should not have control of its sources of information. Finally, another common criticism was that the Appellate Body had ignored the remonstrations of WTO Members following previous decisions that countenanced amicus briefs.¹²¹ In other words, the delegates were arguing that if governments express displeasure with a decision that they adopt, the Appellate Body should take account of these viewpoints in future adjudications.

Although prominent political scientists have suggested that the Appellate Body “is certain to take into account political constraints and potential opposition when making its final decision,”¹²² that is a different point than whether the Appellate Body has an obligation to do so.¹²³ In my view, the Appellate Body does not. Debate in the DSB would not seem to qualify as “subsequent practice” in treaty interpretation under Article 31.3(b) of the Vienna Convention on the Law of Treaties. Even assuming that it does, how is the panel and the Appellate Body to know what occurs at the DSB? The minutes of each meeting are not posted on the WTO website until about 11 months after the meeting takes place. Thus, the notion that the Appellate Body and panels are *required* to follow the mood of the DSB is problematic. Furthermore, even if the Appellate Body and panelists gain access to the DSB minutes and read them, one wonders whether it would be appropriate for the jurists to cite as legal authority a source that the general public will not be able to read.

The delegate from India made the further point that the fact that the Appellate Body had “totally ignored” the “sentiments” expressed earlier in the DSB raises doubts about the utility of the provisions in DSU that

¹²⁰ Minutes of Meeting Held on 22 November 2000, *supra* note 113, Brazil (para. 45), Egypt (para. 13), India (para. 36), Uruguay (para. 7).

¹²¹ *Id.* Egypt (para. 16), India (paras. 31–32, 39), Mexico (para. 50).

¹²² Robert O. Keohane & Joseph S. Nye, Jr., *The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy*, in EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM, *supra* note 55, at 264, 275.

¹²³ The only statement by the Appellate Body on this general issue occurred in the India *Quantitative Restrictions* case. The Appellate Body noted that in considering the justification of a balance-of-payment restriction, “panels should take into account the deliberations and conclusions of the BOP [Balance-of-Payments] Committee, as did the panel in *Korea—Beef*.” India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products, Report of the Appellate Body, WT/DS90/AB/R, adopted 22 September 1999, para. 103. It is unclear whether the Appellate Body would apply the same principle to all WTO Committees and bodies.

provide for Members to express their views on an Appellate Body report.¹²⁴ According to India, “these provisions provided for communication channels between the membership and the judicial organs of the WTO and were meant to serve a purpose.”¹²⁵ Perhaps the Indian delegate is right about the intentions of the drafters. Yet it could also be that with attendance at the DSB limited to Member delegates and WTO staff, the expression of Member views about adopted reports is meant solely for their own edification.

While the numerous statements to impugn the Appellate Body are troubling, far more troubling were the efforts of the governments to use the General Council meeting to interfere with the Appellate Body’s ongoing handling of the *Asbestos* appeal. For example, Egypt (speaking for a larger group of developing countries) urged that the action of the Appellate Body “be resented and reversed.”¹²⁶ Colombia (on behalf of Andean nations) declared that “the procedure adopted by the Appellate Body had to be abolished. . . .”¹²⁷ Singapore (on behalf of ASEAN nations) suggested that because the “procedure was contrary to the *prevailing sentiment* of the majority of Members, the Appellate Body should withdraw it.”¹²⁸ Pakistan urged the General Council to “invite the Appellate Body to withdraw the invitation for *amicus curiae* briefs in response to the wishes of the majority of the membership.”¹²⁹ Cuba proposed that the Appellate Body be invited to “reconsider its decision and refrain from applying it until the General Council reached an agreement on this [amicus] issue.”¹³⁰ Tanzania said that the Appellate Body should “withdraw its action.”¹³¹

In the end, the General Council did not make a decision because it lacked a consensus to do so.¹³² Nevertheless, the chairman of the Council stated that he would communicate the points raised at the meeting directly to the Appellate Body.¹³³ As noted above, the Appellate Body had already rejected *all* of the amicus petitions in the run-up to the General Council meeting. As one delegate told *Inside U.S. Trade*, “the Appellate Body seemed to hear the message.”¹³⁴

¹²⁴ Minutes of Meeting Held on 22 November 2000, *supra* note 113, para. 39; DSU arts. 16.3, 16.4, 17.14.

¹²⁵ Minutes of Meeting Held on 22 November 2000, *supra* note 113, para. 39.

¹²⁶ *Id.* para. 21.

¹²⁷ *Id.* para. 55.

¹²⁸ *Id.* para. 60 (emphasis added).

¹²⁹ *Id.* para. 66. One commentator has reported that outside of the General Council, Pakistan’s delegate had called for the resignation of the Chairman of the Appellate Body. Ala’i, *supra* note 104, at 65.

¹³⁰ Minutes of Meeting Held on 22 November 2000, *supra* note 113, para. 97.

¹³¹ *Id.* para. 109.

¹³² Note, however, the possibility for majority voting by the General Council. WTO Agreement, art. IX:1 (last sentence).

¹³³ Minutes of Meeting Held on 22 November 2000, *supra* note 113, para. 131.

¹³⁴ *WTO Members Warn Appellate Body on Amicus Procedures*, *INSIDE U.S. TRADE*, 1 December 2000, at 4.

CONCLUSION

What does the *Asbestos* episode show about judicial independence in the WTO? It demonstrates imperfections. The criticism at the General Council meeting amounted to a double-barreled attack on the Appellate Body: First, that the Appellate Body should not make legal decisions without reference to the political sentiment of governments. Second, that the Appellate Body (and perhaps also the panels) are without authority to utilize information in amicus briefs. That said, one needs to be careful about over-generalizing from this one disappointing episode. Nothing like that happened before *Asbestos*, or since then. The governments have typically been respectful of the Appellate Body. Every Appellate Body report has been adopted, and to my knowledge, no government has called for the DSB to decline to adopt a report.

The amicus episode also shows that one cannot appraise independence of a judicial branch without regard to the situation in the other branches. What drove the censure-like proceeding in *Asbestos* was not just opposition to the Appellate Body's holding on public access. It was also the frustration in the General Council that the WTO's decision-making rules made it impractical to correct or overturn what the Appellate Body was doing. When legislative robustness is lacking, untoward extra-legal pressure on the judiciary may be inevitable. Recall in this context Cottier's warning that the imbalance in the WTO "may jeopardize the independence and authority" of the Appellate Body.¹³⁵

The text of the WTO treaty goes much further in the direction of legalization of trade relations than existed in the GATT system. "Ultimately, however, the vitality of a system of international law that derives, in whole or in part, from the articulation of the law by judges and arbitrators must rest with the confidence of states."¹³⁶ That political fact complicates the role of the WTO judge and may give him less freedom to issue an unpopular opinion than a national judge enjoys. The problem is not the robust exercise of the judicial function by the Appellate Body. Rather, the problem is that the WTO legislative function remains too cumbersome and inefficient. The adoption of the Doha Declarations may be an important step toward reinforcing the legislative power.¹³⁷

The WTO should also consider ways to strengthen its judicial system. Joseph Weiler has suggested that the Appellate Body should "socialize, institutionalize and valorize" the panels and their work, and make

¹³⁵ Cottier, *supra* note 94.

¹³⁶ Patrick M. Norton, *A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation*, 85 AMERICAN JOURNAL OF INTERNATIONAL LAW 474, 505 (1991).

¹³⁷ Steve Charnovitz, *The Legal Status of the Doha Declaration*, 5 JOURNAL OF INTERNATIONAL ECONOMIC LAW 207 (2002).

WTO panelists “feel part of the judicial branch” of the Organization.¹³⁸ In making this recommendation, Weiler notes the way that the European Court of Justice sought to instill in national judges a relationship of partnership in ensuring the rule of law. Weiler leaves the discussion there, but one could extend the lesson he sees further. In my view, the WTO should authorize the Appellate Body to commence a program for developing a closer relationship with national judges. For example, a judicial conference might be held every year or two to discuss interstitial issues of WTO law and national law.

This chapter looks at whether judicial independence exists in the WTO. Recognizing that “[a] constitution is a continuing process, not a single event,”¹³⁹ I have examined both the WTO provisions and how they are being implemented. This review demonstrates a plentitude of judicial independence that flows from various DSU rules. The DSU provision giving a panel the right to seek information is an enabler of independence. The provision for automatic adoption of panel reports (unless a reverse consensus exists) was untested when it was written into the DSU. Yet so far that provision has succeeded in solidifying the WTO judiciary. Notwithstanding its various imperfections such as the *Asbestos* episode, the WTO sets a high bar for other international organizations that seek to instill judicial independence.

¹³⁸ Weiler, *supra* note 32, at 207.

¹³⁹ W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AMERICAN JOURNAL OF INTERNATIONAL LAW 83, 96 (1993).