

The Process and Procedure of Litigating at The World Trade Organization: A Review of the Work of the Appellate Body

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Introduction

During its first five years of existence -- and particularly during the past two years -- the Appellate Body has faced a growing case load and has developed case law on a wide variety of procedural and substantive issues. As time passes, the Appellate Body continues to define and redefine the meaning of the WTO agreements.

This paper identifies decisions made by the Appellate Body¹ which shed light on the process of litigating cases before panels or the Appellate Body. First, we discuss the increased workload of the Appellate Body, and both its past and potential effect on the ability of the Appellate Body to comply with the deadlines set out in the Dispute Settlement Understanding. Next, we discuss several issues that have arisen during the past two years about which practitioners must be aware, including questions regarding the protection of confidential business information and the potential consideration of amicus briefs submitted to panels and the Appellate Body. Finally, we review a number of other procedural issues on which the Appellate

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¹ Appellate Body decisions made during the first three years of WTO dispute settlement were analyzed previously in the following articles: Terence P. Steward & Mara M. Burr, *The WTO Panel Process: An Evaluation of the First Three Years*, 32 INT'L LAW. 709 (1998); Andrew W. Shoyer & Heather G. Forton, *Comments -- The WTO Panel Process: An Evaluation of the First Three Years*, 32 INT'L LAW. 737 (1998); Debra P. Steger & Susan M. Hainsworth, *World Trade Organization Dispute Settlement: The First Three Years*, 1 J. INT'L ECON. L. 199 (1998); Andrew W. Shoyer, *The First Three Years of WTO Dispute Settlement: Observations and Suggestions*, 1 J. INT'L ECON. L. 277 (1998).

Body has clarified and expanded its interpretation, including the use of expert opinions, the limitations on the discretion of panels in fact finding and judicial economy, and the consequences of the Appellate Body's absence of remand power.

1. An Increasing Workload and Its Effect on Deadlines

The increased participation in the WTO's dispute settlement system is a positive development which indicates the growing acceptance of the authority of panels and the Appellate Body to evaluate disputes and make recommendations that, upon adoption by the Dispute Settlement Body, become legally binding. This is especially significant under the WTO, since an Appellate Body decision may be struck down only by the reverse consensus of the Member governments, including the losing party.² Nevertheless, the question remains whether the Appellate Body has the resources to deal with an ever increasing work load.

The Understanding on Rules and Procedures Governing the Settlement of Disputes ("Dispute Settlement Understanding" or "DSU") sets tight deadlines before which the Appellate Body must make a decision. The "general rule" in Article 17:5 is that the Appellate Body must circulate its report within 60 days from the time a party to the dispute files its notice of appeal.³ In no case, though, may the proceedings exceed 90 days from the notice of appeal.⁴ On the other hand, the rules allow for the Appellate Body to accelerate the process even more. First, Article 17:5 provides that, in fixing its timetable, the Appellate Body must take into account the

² Understanding on Rules and Procedures Governing the Settlement of Disputes art. 14, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, LEGAL INSTRUMENTS – RESULTS OF THE URUGUAY ROUND; 33 I.L.M. 1125, 1226 (1994) ["DSU"].

³ DSU art. 17:5. Note that in adding the number of days which pass, the day from which the time period begins to run is excluded pursuant to rule 17(1) of the Working Procedures for Appellate Review. Working Procedures for Appellate Review, WT/AB/WP/3 (Feb. 28, 1997) ("Appellate Working Procedures"). The last day of the time period is included unless it falls on a WTO non-working day. See Appellate Working Procedures, rule 17(2) (referring to the Dispute Settlement Decision on "Expiration of Time-Periods in the DSU," WT/DSB/M/7 (October 27, 1995)).

⁴ DSU art. 17:5.

provisions of Article 4:9, if relevant. In turn, Article 4:9 orders the Appellate Body, in “cases of urgency,” to “make every effort to accelerate the proceedings to the greatest extent possible.” Similarly, Annex I of the Working Procedures for Appellate Review, as provided by Article 4(9) of the Agreement on Subsidies and Countervailing Duties (SCM Agreement), includes an expedited schedule for appeals related to prohibited subsidies of between 30 and 60 days.⁵

Just in the time span from 1996 to 1998, the number of appeals filed each year with the Appellate Body doubled from four to eight. As of November 15, 1999, eight appeals have already been filed, and more are undoubtedly being contemplated for this year such that 1999 will continue the trend of annually increasing caseloads.⁶ The question remains whether the Appellate Body is able to meet these deadlines in light of the increase in disputes filed in the WTO. In general, the Appellate Body has been able to meet the 90 day absolute deadline, but has failed to satisfy the “general rule” of 60 days. Some Appellate Body proceedings have surpassed 90 days. *European Communities - Measures Concerning Meat and Meat Products (EC - Hormones)*⁷ was the most extreme example at 114 days, and *Japan - Measures Affecting Agricultural Products* lasted 95 days from the time a notice of appeal was filed until the decision was released. In the first attempt to implement the expedited procedure for prohibited subsidies, the result was a mutual agreement by the parties and the Appellate Body that the 60 day absolute deadline was not feasible. Thus, in *Canada – Measures Affecting the Export of Civilian Aircraft*⁸

⁵ SCM Agreement, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, LEGAL INSTRUMENTS – RESULTS OF THE URUGUAY ROUND (1994).

⁶ See Appendix for a breakdown of the appeals filed each year. It is organized by the date on which the notice of appeal was filed. The United States had filed an appeal of *United States – Tax Treatment for “Foreign Sales Corporations”* on October 28, 1999, but withdrew this appeal on November 2, 1999, due to “scheduling reasons.” WT/DS108/5 (Notice of Appeal); WT/DS108/6 (Withdrawal of Appeal).

⁷ AB-1997-4, WT/DS26/AB/R, WT/DS48/AB/R (16 January 1998) (Adopted 13 February 1998).

⁸ WT/DS70/AB/R (2 August 1999) (Adopted 20 August 1999) (“*Canada - Aircraft*”).

(“*Canada – Aircraft*”) and *Brazil – Export Financing Programme for Aircraft*⁹ (“*Brazil – Aircraft*”) (the “*Aircraft Cases*”), the deadline was extended to 90 days, with the ultimate process passing even this deadline at 91 days.¹⁰

Each year, the average duration from the time a notice of appeal is filed until the Appellate Body opinion is circulated has increased approximately ten percent.¹¹ For appeals filed in 1996, the average process lasted 70 days. This average increased to 78.2 days in 1997, to 83.5 days in 1998, and as of November, 1999, has reached an average of 90 days for 1999 – exactly at the absolute deadline. The attached Appendix includes a breakdown of these figures.

Currently, there are seven persons on the standing Appellate Body, three of whom serve on any one case.¹² In making decisions, though, the three Appellate Body Members who sit on each case are obligated to follow the principle of “Collegiality” by exchanging views with the other four Members before reaching a final decision.¹³ This helps to promote consistency within the Appellate Body’s jurisprudence, but clearly adds some time to the overall appellate process. The fact that Appellate Body Members are not on full-time status and must travel to Geneva for their deliberations puts additional strain on the WTO system.

Given this structure and the fact that the Appellate Body has been issuing its reports almost immediately before the deadline, or sometimes after the deadline, it is increasingly clear that something will need to change to help the Appellate Body stay within the strict deadlines set out in the DSU. The most sensible and feasible change would be to increase the size of the Appellate Body (and its Secretariat) and, thereby, enable more divisions to consider more

⁹ WT/DS46/AB/R (2 August 1999) (Adopted 20 August 1999) (“*Brazil - Aircraft*”).

¹⁰ See Working Schedules for Appeal, AB-1999-1, May 5, 1999, on file with author.

¹¹ See Appendix.

¹² DSU art. 17:1.

¹³ Appellate Working Procedures rule 4(3).

appeals. While such a change would make it somewhat more difficult to maintain collegiality, the overall effect would be an ability to make decisions more quickly.

Other alternatives to assist the Appellate Body in meeting its deadlines seem far less likely to be approved. Although increasing the deadlines appears to be an obvious remedy to the problem, this change is not likely given that Members are currently working in the DSU review to further shorten the deadlines.¹⁴ Next, while eliminating the need for collegiality would speed up the process, the benefits of consistency which comes from collegiality far outweigh the costs created by slowing down the process. Finally, another option would be to increase the time commitments of Appellate Body members by transforming the positions from part-time to full-time. Increasing the positions to full-time status might restrict the pool of candidates willing to serve, however, and might affect the qualities and background that these individuals bring to the Appellate Body.

2. Confidential Business Information in Appellate Proceedings

In the *Aircraft Cases*, the Appellate Body concluded that it was not necessary to adopt additional procedures beyond the general principles listed in the DSU to protect confidential business information.¹⁵ The Appellate Body seemed to take the high road here, by asserting principle over practical considerations. It implied that all participants to the proceedings follow such high standards of conduct that it will not be necessary to establish specific procedures to ensure that confidentiality is preserved. Whether or not parties in dispute settlement feel the same sense of security remains to be seen.

¹⁴ See *Draft DSU Text Languishes as Countries Oppose Formal Consideration*, INSIDE U.S. TRADE, November 5, 1999.

¹⁵ *Brazil - Aircraft*, paras. 119-125; *Canada - Aircraft*, paras. 141-147.

The Appellate Body relied principally on the broad provisions of Articles 17:10 and 18:2 of the DSU. Article 17:10 simply states that “the proceedings of the Appellate Body shall be confidential.” The Appellate Body then interpreted “proceedings” broadly to include, in an appellate procedure, any written submissions, legal memoranda, written responses to questions, oral statements by the participants and third participants, all information presented at the oral hearing before the Appellate Body, as well as the deliberations, exchange of views, and internal workings of the Appellate Body.¹⁶ Next, Article 18:2 contains general rules protecting the confidentiality of written submissions and information submitted to the Appellate Body or submitted to another Member with a confidential designation.¹⁷ Finally, the Appellate Body referred to paragraph VII:1 of the Rules of Conduct¹⁸, declaring, again in general terms, that the staff of the Appellate Body is also required to keep all materials confidential.¹⁹

The Appellate Body quoted language from the Panel in *Indonesia – Certain Measures Affecting the Automobile Industry* (“*Indonesia – Automobiles*”) which further demonstrates the Appellate Body’s determination to operate under the assumption that the participants in WTO disputes adhere fully to the DSU’s confidentiality provisions and, therefore, that specific rules to protect confidential business information are not required.²⁰ The *Indonesia - Automobiles* Panel stated that it “expect[ed] that all delegations will fully respect those obligations [of the DSU, including Article 18:2] and will treat these proceedings with the utmost circumspection and

¹⁶ *Brazil - Aircraft*, para. 121; *Canada - Aircraft*, para. 143.

¹⁷ *See Brazil - Aircraft*, para. 122; *Canada - Aircraft*, para. 144.

¹⁸ *See Working Procedures for Appellate Review*, WT/AB/WP/3, Annex II, para. VII:1.

¹⁹ *See Brazil - Aircraft*, para. 124; *Canada - Aircraft*, para. 146.

²⁰ *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R (2 July 1998) (adopted 23 July 1998) (“*Indonesia – Automobiles*”).

discretion.”²¹ The Appellate Body did not make it clear what the consequences would be if these “expectations” were not met.

3. Duty to Disclose Information to Panels

In the past two years, the Appellate Body has clarified the extent of the duty of Members to disclose information to panels, as well as the adverse consequences which may result from a failure to disclose requested information. The Appellate Body, in the *Canada - Aircraft* case, held that a party to a dispute has a legal duty to provide information requested by a panel.²² Furthermore, if a party refuses to disclose requested information, the panel has the discretion to decide whether or not to draw an adverse inference as a result.²³

The third sentence of Article 13 of the DSU states that once a panel seeks information, “[a] Member *should* respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate.” The Appellate Body, after discussing the various meanings of the word “should,” determined that it must be interpreted “in a normative, rather than a merely exhortative sense” in the context of Article 13.²⁴ In other words, Members are “under a duty and an obligation to ‘respond promptly and fully’ to requests made by panels for information under Article 13.1 of the DSU.”²⁵ Otherwise, concluded the Appellate Body, “that panel’s undoubted legal ‘right to seek’ information under the first sentence of Article 13:1 would be rendered meaningless.”²⁶ The Appellate Body then continued by stating various policy reasons to justify its conclusion that there is a duty to disclose information to a panel. It reasoned that a panel without access to facts will not be able to set out a complete report with

²¹ *Brazil - Aircraft*, para. 123; *Canada - Aircraft* at 145, citing *Indonesia – Automobiles*, paras. 5.276-5.278.

²² *Canada - Aircraft*, para. 187.

²³ *Canada - Aircraft*, para. 199.

²⁴ *Canada - Aircraft*, para. 187.

²⁵ *Canada - Aircraft*, para. 187.

principled findings and recommendations to the Dispute Settlement Body, as required by Article 12:7 of the DSU.²⁷ Finally, it held that a refusal to provide requested information would be a violation of good faith under Article 3:10 of the DSU, and Article 13:1 is just a manifestation of this good faith requirement.²⁸

According to the Appellate Body, if a Member government fails to fulfill its duty to disclose information, the panel will have the discretion to draw an adverse inference against it. Although nothing in the DSU provides specifically for *or requires* such a result, the Appellate Body found that the discretion to draw inferences is just a routine part of a panel's need to provide an "objective assessment of facts" under Article 11 of the DSU.²⁹ Hence, drawing inferences is "an inherent and unavoidable aspect of a panel's basic task of finding and characterizing the facts making up a dispute," which is to be distinguished from the procedural concept of burden of proof.³⁰ In this case, the Appellate Body did not reverse the Panel's decision not to draw an adverse inference.³¹ Presumably, the Appellate Body would not reverse such a decision – which it found to be within a panel's discretion to reach – unless the decision was manifestly unjust or otherwise in breach of the panel's role under Article 11 of the DSU.

4. Right of Panels to Seek Information

The last two years of Appellate Body decision-making supports the broad authority of panels to seek information established by Article 13 of the DSU. Article 13 reads, in pertinent part, as follows:

²⁶ *Canada - Aircraft*, para. 187.

²⁷ *Canada - Aircraft*, para. 188.

²⁸ *Canada - Aircraft*, para. 190.

²⁹ *Canada - Aircraft*, para. 198.

³⁰ *Canada - Aircraft*, para. 199.

³¹ *Canada - Aircraft*, para. 205.

1. Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. . . A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. . . .

2. Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter.

The Appellate Body has concluded from this language that panels have the discretion to seek information from any relevant source³², and that there are no conditions on the exercise of this discretionary authority.³³ Moreover, the Appellate Body has stated that a panel “is vested with ample and extensive discretionary authority to determine *when* it needs information to resolve a dispute and *what* information it needs.”³⁴ Hence, in *Canada - Aircraft*, the Appellate Body quickly concluded that there was nothing requiring that one party establish a *prima facie* case of a violation before a panel had the right to seek information about the violation.³⁵

The Appellate Body applied these fundamental principles when disputes arose over how to treat expert opinions and amicus briefs.

a. Expert Opinions

Article 13:2 of the DSU states that panels “may consult experts to obtain their opinions on certain aspects of the matter.” In the past two years, the Appellate Body has clarified the scope of this provision. In *EC - Hormones*, the Appellate Body explained that the DSU does not prevent panels from consulting with individual experts, and that it is left to the “sound

³² *Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, AB-1998-1, WT/DS56/AB/R (27 March 1998) (adopted 22 April 1998) (“*Argentina – Footwear*”), para. 84; *Canada - Aircraft*, para. 184.

³³ *Canada - Aircraft*, para. 185.

³⁴ *Canada – Aircraft*, para. 192.

³⁵ *Canada – Aircraft*, para. 185.

discretion” of a panel whether or not to establish an expert review group.³⁶ In *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items* (“*Argentina - Footwear*”), the Appellate Body followed up by noting that just as a panel can decide *how* to seek expert advice, a panel also has the discretion to determine whether or not to seek expert advice at all, as there is no duty to consult experts.³⁷ The use of expert information by a panel, however, can not be excessive. As the Appellate Body has stated, an expert may not “make the case for a complaining party.”³⁸ A panel can not simply accept the views of an expert, but must critically assess these views and consider other data and opinions in reaching its conclusions.³⁹

b. Amicus Briefs

i. Appellate Proceedings

In *United States - Import Prohibition of Certain Shrimp and Shrimp Products* (“*US – Shrimp*”), the Appellate Body was first faced with the issue of amicus briefs. It agreed to accept the amicus briefs attached to the U.S. submission as part of its submission.⁴⁰

The United States had attached three exhibits to its submission to the Appellate Body which consisted of amicus curiae briefs from three non-governmental organizations (NGOs). In response to a question posed by the Appellate Body, the United States replied that it agreed with

³⁶ AB-1997-4, WT/DS26/AB/R, WT/DS48/AB/R (16 January 1998) (adopted 13 February 1998), paras. 147-148. The same holds true for the discretion to consult with experts under the SPS Agreement. *EC – Hormones*, paras. 147-148.

³⁷ *Argentina – Footwear*, para. 84.

³⁸ *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R (27 February 1999) (adopted 19 March 1999) (“*Japan – Agricultural Products*”), para. 130.

³⁹ *India- Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/AB/R (23 August 1999) (“*India – Quantitative Restrictions*”) (adopted 22 September 1999), para. 149.

⁴⁰ *US – Import Prohibition of Certain Shrimp and Shrimp Products*, AB-1998-4, WT/DS58/AB/R (12 October 1998) (Adopted 6 November 1998) (“*US - Shrimp*”), para. 90.

the legal arguments in the NGO's submissions only to the extent that they concurred with the U.S. arguments in the main submission.⁴¹

The views of the NGOs, according to the United States, reflected the independent views of these organizations, and the United States was not adopting these arguments in full.⁴²

The Appellate Body began its analysis by concluding that attaching a brief or other material to the submission renders that material "at least *prima facie* an integral part of that participant's submission."⁴³ While a participant may determine for itself what to include in its submission, a participant assumes responsibility for the contents of that submission, including any annexes or other attachments.⁴⁴ Thus, in this instance, where the United States stated that it agreed with the amicus briefs only to the extent they concur with the U.S. arguments, the briefs were admitted but not considered for new arguments.

The reach of this decision is unclear, given the circumstances by which the United States submitted the briefs only to the extent that it agreed with the arguments in the main brief. While the result of this qualified submission is that there was no reference to the legal arguments of the amicus briefs in the Appellate Body Report, it is unknown whether the Appellate Body actually read the amicus submissions and perhaps absorbed some of the arguments in these briefs which were not consistent with the U.S. position.

It also remains to be considered how the Appellate Body would treat an amicus brief which was not appended to a party's submission. The relevant DSU provisions seem to make it quite difficult for the Appellate Body to justify the consideration of an independently submitted amicus brief. Article 13 of the DSU, under which the Appellate Body stated that a panel could

⁴¹ *US - Shrimp*, para. 86.

⁴² *US - Shrimp*, para. 86.

⁴³ *US - Shrimp*, para. 89.

consider a free standing amicus brief, addresses only panels, not the Appellate Body.

Furthermore, Article 17 of the DSU and Rule 24 of the Appellate Working Procedures state only that “third parties” may make a submission to the Appellate Body. In turn, “third parties” are defined as Members of the WTO.⁴⁵

ii. Panel Proceedings

The submission of an amicus brief in a panel proceeding involves the flip side of the fundamental question regarding the panel’s right to seek information. The issue here is whether or not a panel may consider non-requested information submitted to it by non-parties. The Appellate Body in *US - Shrimp*, in reversing the Panel, clearly decided that the panels do have the discretion to decide whether or not to accept this non-requested information.

At the panel level in the *US - Shrimp* case, several NGOs submitted amicus briefs to the Panel for consideration. Unlike the briefs submitted to the Appellate Body, these were not attached to any Member’s brief. The Panel refused to consider these briefs, holding that only parties and third parties are allowed to submit information directly to the Panel.⁴⁶ On the other hand, the Panel did declare that the parties were free to introduce the NGO’s briefs as part of their own submissions, if they desired.⁴⁷

The Appellate Body reversed the Panel’s conclusion that a panel may not consider an independently submitted NGO brief. The Appellate Body first recalled that only Members have the *legal right* to have their submissions considered by a panel. It then explored the extent of a

⁴⁴ *US - Shrimp*, para. 89.

⁴⁵ DSU art. 10; Appellate Working Procedures, at “definitions” section.

⁴⁶ *US - Shrimp Panel Report*, WT/DS58/R (15 May 1998) (adopted as modified by the Appellate Body 6 November 1998) (“*US - Shrimp Panel*”), para. 7.8.

⁴⁷ *US - Shrimp Panel*, para. 7.8.

panel's authorization under Article 13 of the DSU to consider information from non-Members.⁴⁸ Quoting from the language of Article 13 of the DSU, the Appellate Body underscored “[t]he comprehensive nature of the authority of a panel to ‘seek’ information and technical advice from ‘any individual or body’ it may consider appropriate, or from ‘any relevant source.’”⁴⁹ It also referred to the panel's authority under Article 12:1 of the DSU to depart from the Working Procedures, as well as the declaration in Article 12:2 of the DSU that panel procedures should provide flexibility.⁵⁰ Together, the Appellate Body reasoned, the authority granted by articles 12 and 13 are indispensable to enable a panel to discharge its duty under Article 11 to make “an objective assessment of the facts.”⁵¹ Considering these conclusions, the Appellate Body held that the authority to “seek” information could not be properly defined by the panel to prohibit panels from accepting information which had not been requested.⁵²

As for concerns that panels would be deluged with too many amicus briefs, the Appellate Body responded that since a panel has discretion to decide whether or not to accept submissions, it also has the discretion to prevent itself from being deluged with information.⁵³

Finally, the Appellate Body reminded the Panel that there were more options for treating non-Member submission beyond acceptance or rejection. For example, in this case, the Panel decided it would consider the non-Member submissions which any of the parties decided to put forward as part of their own submissions. Thus, although the legal interpretation regarding the

⁴⁸ *US - Shrimp*, para. 101.

⁴⁹ *US - Shrimp*, para. 104 (emphasis added). The Appellate Body also referred to its opinions in *EC-Hormones*, para. 147 (Article 13 of the DSU “enable[s] panels to seek information and advice as they deem appropriate in a particular case.”) and *Argentina – Footwear*, paras. 84-86.

⁵⁰ *US - Shrimp*, paras. 104-105.

⁵¹ *US - Shrimp*, para. 106.

⁵² *US - Shrimp*, para. 108.

⁵³ *US - Shrimp*, para. 108.

extent of a panel's discretion was erroneous, the Appellate Body concluded that the practical disposition in this way was neither legal error nor abuse of discretion.⁵⁴

5. Extent of Panel's Discretion in Fact Finding

The basis for the Appellate Body's understanding of the panel's fact finding duties comes from its reading of Article 11 of the DSU. Article 11 states, in pertinent part, as follows:

. . . [A] panel should make an objective assessment of the matter before it, including an *objective assessment of the* facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. . .⁵⁵

The Appellate Body, in *EC - Hormones*, distinguished this "objective assessment of the facts" standard of review from either *de novo* review or total deference.⁵⁶ It did not, however, fully clarify the meaning of "objective assessment of the facts" as a standard of review.

During the past few years, the Appellate Body has continued to define the appropriate level of discretion in fact-finding granted to a panel by the DSU. Again, most of this discussion turned on the meaning of "objective assessment" from Article 11. One articulation of this standard is found in *EC - Hormones*. The Appellate Body first acknowledged that every error in evaluating evidence should not be characterized as a failure to make an objective assessment of facts. It stated that determining the credibility and weight ascribed to evidence is "part and

⁵⁴ *US - Shrimp*, paras. 109-110.

⁵⁵ Emphasis added.

⁵⁶ *EC - Hormones*, para. 117. *De novo* review is defined as allowing "a panel complete freedom to come to a different view than the competent authority of the Member whose act or determination is being reviewed. A panel would have to 'verify whether the determination by the national authority was correct both factually and procedurally.'" *EC - Hormones*, para. 111. The "deference" standard is defined as one where a panel "should not seek to redo the investigation conducted by the national authority but instead [should] examine whether the 'procedure' required by the relevant WTO rules had been followed." *EC - Hormones*, para. 111.

parcel of the fact finding process and is, in principle, left to the discretion of a panel as the trier of facts.”⁵⁷ The Appellate Body went on to state the following:

The deliberate disregard of, or refusal to consider, the evidence submitted to a panel is incompatible with a panel’s duty to make an objective assessment of the facts. The wilful distortion or misrepresentation of the evidence put before a panel is similarly inconsistent with an objective assessment of facts. . . . A claim that a panel disregarded or distorted the evidence submitted to it is, in effect, a claim that the panel, to a greater or lesser degree, denied the party submitting the evidence fundamental fairness, or . . . due process of law or natural justice.⁵⁸

Hence, the Appellate Body made clear that a panel’s discretion does not go so far as to allow for distortion or deliberate disregard of evidence submitted to the panel. In *European Communities – Measures Affecting the Importation of Certain Poultry* (“*EC – Poultry*”), the Appellate Body discussed the serious nature of a charge that a panel failed to conduct an objective assessment of the facts, declaring that “[s]uch an allegation goes to the very core of the integrity of the WTO dispute process itself.”⁵⁹ The Appellate Body, in *EC – Hormones*, had stated that a contention that a panel disregarded, distorted or misrepresented evidence implies “an egregious error that calls into question the good faith of the panel.”⁶⁰ However, there has not yet been a case in which the Appellate Body has found such an “egregious” error.

⁵⁷ *EC - Hormones*, para. 132. See also *Korea - Taxes on Alcoholic Beverages*, WT/DS75/AB/R, WT/DS85/AB/R (18 January 1999) (adopted 17 February 1999), para. 161; *India - Quantitative Restrictions*, para. 143.

⁵⁸ *EC – Hormones*, para. 133. The Appellate Body ultimately decided that the panel had complied with its obligations under Article 11 of the DSU to make an objective assessment of the facts of the case. *EC – Hormones*, para. 253(e). This language is also cited with approval by the Appellate Body in *Australia-Measures Affecting the Importation of Salmon*, WT/DS18/AB/R (20 October 1998) (Adopted 6 November 1998) (“*Australia - Salmon*”), paras. 262-267, *Korea - Taxes on Alcoholic Beverages*, para. 160, and *Japan - Agricultural Products*, para. 141. In no case has the Appellate Body concluded that the panel failed to make an objective assessment of facts.

⁵⁹ *European Communities – Measures Affecting the Importation of Certain Poultry*, AB-1998-3, WT/DS69/AB/R (13 July 1998) (adopted 23 July 1998) (“*EC - Poultry*”), para. 133. See also *Australia - Salmon*, paras. 262-267 (accord with *EC - Poultry* and *EC - Hormones*).

⁶⁰ *EC – Hormones*, para. 133. This language is also quoted with approval by the Appellate Body in *Australia – Salmon*, para. 264.

6. Burden of Proof

The Appellate Body has continued to develop its view of the burden of proof at the panel level. The general rule is that the initial burden of proof rests with the claimant. This holds true even when it requires the claimant to demonstrate the negative, such as raising a presumption that there are no relevant studies or reports supporting another party's measures.⁶¹ Once the claimant establishes a *prima facie* case of a breach of a covered agreement, the burden shifts to the defendant to refute the claimed inconsistency.⁶² In addition, a party that asserts an affirmative defense has the burden of proof to establish that defense.⁶³ Nevertheless, "the simple characterization of a provision of an agreement as an 'exception' to a specific obligation does not, in itself, determine which party has the burden of proof."⁶⁴ As for the panel's documentation of its analysis of burden of proof, the Appellate Body has ruled that a panel is not required to expressly state which party bears the burden of proof for each claim.⁶⁵

It remains to be seen whether the application of these principles represents a change from the standards under the GATT. Different interpretations of the burden of proof standards could have a dramatic effect on the success of claimants.

7. Consequences of the Appellate Body's Absence of Remand Power

The Appellate Body lacks the power to remand a case back to a panel for further deliberations, and this has continued to cause problems and inconsistencies during the past few

⁶¹ *Japan - Agricultural Products*, para. 137.

⁶² *EC - Hormones*, para. 98 (citing *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, AB-1997-1, WT/DS33/AB/R (25 April 1997) (adopted 23 May 1997) ("US – Woven Wool"), p. 14). The Appellate Body, in *EC - Hormones*, reversed a panel decision holding that the SPS Agreement provided for a different burden of proof. *EC – Hormones*, paras. 102-109.

⁶³ *Brazil - Aircraft*, para. 137 (citing *US – Woven Wool*, p. 14); *India - Quantitative Restrictions*, para. 136 (holding that once a complaining party has successfully established a *prima facie* case of inconsistency with an agreement, the responding party may either rebut the evidence or bear the burden of proof in invoking an affirmative defense.)

⁶⁴ *Brazil - Aircraft*, para. 137 (citing *EC – Hormones*, para. 104).

⁶⁵ *India - Quantitative Restrictions*, para. 137.

years. When faced with a case in which an appellate court would normally remand a case, the Appellate Body has proceeded with one of two alternatives. First, in cases where the factual record has been sufficiently developed, the Appellate Body has completed the analysis of the panel, analyzing issues which it concluded the panel had, in legal error, failed to consider. Although it is an appropriate response under the circumstances, the fundamental problem here is that this completion of analysis is not subject to further appellate review.⁶⁶ Second, when it finds a deficiency in the factual record, the Appellate Body then reverses a panel's decision and leaves an issue undecided. The parties then would need to bring the entire dispute back to the panel level to have this issue settled, starting again at the beginning of the dispute settlement process. Neither of these alternatives is totally satisfactory, and the deficiency of remand power has been called "dangerous" by at least one commentator.⁶⁷

During the past years, Members have witnessed the Appellate Body complete the analysis of panels. For example, in *EC - Hormones*, the Appellate Body disagreed with the Panel's conclusion that it was arbitrary and unjustifiable to treat foods differently based on whether or not hormones were added or were naturally-occurring.⁶⁸ Because the Panel had made this initial decision, it did not need to continue its analysis of this issue. The Appellate Body, however, after reversing this conclusion, continued by completing the analysis of the consistency of the measures under the Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement").⁶⁹ Considering the facts and expert testimony which were presented before the Panel, the Appellate Body made its final decisions. Given the lack of remand power, the

⁶⁶ See David Palmetier, *The WTO Body Needs Remand Authority*, 32(1) J. WORLD TRADE 41, 43 (February 1998).

⁶⁷ Palmetier at 41.

⁶⁸ *EC - Hormones*, para. 221.

⁶⁹ *EC-Hormones*, para. 222. SPS Agreement, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, LEGAL INSTRUMENTS – RESULTS OF THE URUGUAY ROUND (1994)

only other choice for the Appellate Body would have been to require the complaining parties to re-initiate the challenge and have a new panel decide the issues.

In *Australia - Measures Affecting the Importation of Salmon (Australia – Salmon)*, the Appellate Body, before announcing its decision to complete the analysis, stated that it was cognizant of its jurisdiction under Articles 17:6 and 17:13 of the DSU.⁷⁰ Article 17:6 provides: “An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.” Article 17:13 states: “The Appellate Body may uphold, modify or reverse the legal findings and conclusion of the panel.” Unfortunately, the Appellate Body did not analyze how it interprets these provisions so as to allow for a completion of the analysis – it simply quoted the provisions. In different contexts during the past two years, the Appellate Body has completed the analysis in a number of other cases, including *US - Shrimp*⁷¹ and *EC – Poultry*.⁷² Previously, the Appellate Body had completed the analysis in both *Canada – Certain Measures Concerning Periodicals*⁷³ and *United States – Standards for Reformulated and Conventional Gasoline*.⁷⁴

At times, the Appellate Body reverses the findings of a panel, but does not complete the analysis. This occurred at one point in *Australia - Salmon*, despite the fact that the Appellate Body had opted to complete the analysis for a different issue in that same case. The Appellate

⁷⁰ *Australia - Salmon*, para. 117.

⁷¹ *US - Shrimp*, para. 123 (“Having reversed the Panel’s legal conclusion, . . . we believe that it is our duty and our responsibility to complete the legal analysis in this case in order to determine whether Section 609 qualifies for justification under Article XX.”)

⁷² *EC - Poultry*, para. 156 (“In certain appeals, . . . the reversal of a panel’s finding on a legal issue may require us to make a finding on a legal issue which was not addressed by the panel.”)

⁷³ AB-1997-2, WT/DS31/AB/R (30 June 1997) (adopted 30 July 1997) (“*Canada – Periodicals*”), pp. 23-24. After reversing the panel’s finding on the issue of “like products” under the first sentence of Article III:2 of the GATT 1994, the Appellate Body then examined the consistency of the measure with the second sentence of Article III:2. *Canada - Periodicals*, pp. 23-24, cited in *US - Shrimp*, para. 123.

⁷⁴ AB-1996-1, WT/DS2/AB/R (29 April 1996) (adopted 20 May 1996) (*US – Gasoline*), p. 19. After reversing the panel’s finding on the first part of Article XX(g) of the GATT 1994, the Appellate Body then completed the analysis of the terms of Article XX(g) and its chapeau. *US – Gasoline*, p. 19, cited in *US - Shrimp*, para. 123.

Body reversed the Panel's finding that Australia had violated Article 5.6 of the SPS, but would not conclude for itself whether or not Australia violated that same article.⁷⁵ According to the Appellate Body, it was "the insufficiency of the factual findings of the Panel and of the facts that are undisputed between the parties" which prevented the Appellate Body from reaching a conclusion on that issue.⁷⁶ Again, in *EC – Customs Classification of Certain Computer Equipment*, the Appellate Body reversed the Panel's legal conclusions on one issue, but did not complete the analysis of the overall case.⁷⁷ These decisions leave the parties in a state of limbo, whereby they will have to re-initiate entirely new proceedings at the panel level to get the issues resolved.

8. Judicial Economy in Panel Decisions

In the past two years, the Appellate Body has clarified a policy regarding the judicial economy of panel decisions. The principle of judicial economy was first articulated by the Appellate Body in *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India* with the statement that "a panel need only address those claims which must be addressed in order to resolve the matter at issue."⁷⁸ This was expanded in *EC - Poultry*, when the Appellate Body stated that just as a panel may address only those claims which are necessary to resolve a dispute, "so too does a panel have the discretion to address only those *arguments* it deems necessary to resolve a particular claim."⁷⁹ After making these broad declarations, the challenge was to prevent this principle from being applied in such a way that panels began ignoring relevant arguments for the sake of an ambiguous conception of judicial economy.

⁷⁵ *Australia - Salmon*, para. 213.

⁷⁶ *Australia - Salmon*, para. 213.

⁷⁷ WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R (5 June 1998) (adopted 22 June 1998), para. 98.

⁷⁸ *United States – Woven Wool*, p. 19.

⁷⁹ *EC - Poultry*, para. 135.

The Appellate Body in *Australia - Salmon* held that the Panel had achieved a “false judicial economy” and, by doing so, had violated Articles 3:7 and 3:4 of the DSU.⁸⁰ Article 3:7 provides that “. . . [t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute.” Similarly, Article 3:4 stipulates that rulings made by the DSB shall attempt to “achiev[e] a satisfactory settlement of the matter.” The Appellate Body concluded that these articles require that panels reach a full resolution of the matter at issue:

A panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings. . .⁸¹

The problem in *Australia - Salmon* was that the Panel had examined Articles 5.5 and 5.6 of the SPS Agreement for only one category of the product in dispute, but not for the other categories in dispute.⁸² Hence, the Appellate Body concluded that the Panel created a false judicial economy.

These rulings limit the use of the judicial economy principle and provide some guidance for panels that are deciding whether or not to consider an argument or claim.

Conclusion

The Appellate Body has, over the past few years, developed the procedural rules for both panels and the Appellate Body itself. A review of the Appellate Body opinions during the past years reveals that a number of stress points in the WTO dispute settlement system. First, something must be done to adapt to the growing workload, as the established deadlines do not

⁸⁰ *Australia - Salmon*, paras. 219 - 226.

⁸¹ *Australia - Salmon*, para. 223.

⁸² *Australia - Salmon*, para. 225. The Appellate Body noted the similarity of this case with *Japan – Taxes on Alcoholic Beverages*, where it was considered legal error that the panel made no legal finding at all for certain products. *Australia - Salmon*, para. 225, citing *Japan – Taxes on Alcoholic Beverages*, AB-1996-2, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS22/AB/R, (4 October 1996) (adopted November 1, 1996), p. 26.

seem to be in line with reality. Next, the absence of remand power remains an important weakness in the system. Finally, clarifications are needed regarding the use of amicus briefs, the burden of proof, judicial economy, and other issues. Undoubtedly, as more disputes are filed and the system develops, the Appellate Body will continue to develop and clarify procedural rules. Nevertheless, WTO Members must not avoid their responsibility to take action themselves, particularly with respect to issues that the Appellate Body has sidestepped or has been powerless to change.

**Appendix:
Number and Duration of WTO Appeals By Year**

CASE	DATE OF NOTICE OF APPEAL	DATE OF CIRCULAR
I. 1996		
US -- Standards for Reformulated and Conventional Gasoline ⁸⁴	2/22/96	4/29/96
Japan -- Taxes on Alcoholic Beverages ⁸⁵	8/8/96	10/4/96
US -- Restrictions on Imports of Cotton and Man-Made Cotton Fibre Underwear ⁸⁶	11/11/96	2/10/97
Brazil -- Measures Affecting Desiccated Coconut ⁸⁷	12/16/96	2/21/97
II. 1997		
US -- Measures Affecting Imports of Woven Wool Shirts and Blouses from India ⁸⁸	2/24/97	4/25/97
Canada -- Certain Measures Concerning Periodicals ⁸⁹	4/29/97	6/30/97
European Communities -- Regime for the Importation, Sale and Distribution of Bananas ⁹⁰	6/11/97	9/9/97
European Communities -- Measures Concerning Meat and Meat Products (Hormones) ⁹¹	9/24/97	1/16/98
India -- Patent Protection for Pharmaceutical and Agricultural Chemical Products ⁹²	10/15/97	12/19/97

⁸³ In calculating the duration, the day from which the time period begins to run is excluded pursuant to rule 17(1) of the Working Procedures of Appellate Review. The last day of the time period is included unless it falls on a WTO non-working day. Working Procedures for Appellate Review, rule 17(2) (referring to the Dispute Settlement Decision on "Expiration of Time-Periods in the DSU," WT/DSB/M/7 (October 27, 1995)).

⁸⁴ WT/DS2/AB/R (adopted 20 May 1996).

⁸⁵ WT/DS8/AB/R, WT/DS22/AB/4 (adopted 1 November 1996).

⁸⁶ WT/DS24/AB/R (adopted 25 February 1997).

⁸⁷ WT/DS22/AB/R (adopted 20 March 1997).

⁸⁸ WT/DS33/AB/R (adopted 23 May 1997).

⁸⁹ WT/DS31/AB/R (adopted 30 July 1997).

⁹⁰ WT/DS27/AB/R (adopted 25 September 1997).

⁹¹ WT/DS26/AB/R (adopted 13 February 1998).

⁹² WT/DS50/AB/R (adopted 15 January 1998).

III. 1998		
Argentina -- Measures Affecting Imports of Footwear, Textiles, Apparel and other Items ⁹³	1/21/98	3/27/98
European Communities -- Customs Classification of Certain Computer Equipment ⁹⁴	3/24/98	6/5/98
European Communities -- Measures Affecting the Importation of Certain Poultry Products ⁹⁵	4/29/98	7/13/98
United States -- Import Prohibitions of Certain Shrimp and Shrimp Products. ⁹⁶	7/13/98	10/12/98
Australia -- Measure Affecting Importation of Salmon ⁹⁷	7/22/98	10/20/98
Guatemala -- Anti-Dumping Investigation Regarding Portland Cement From Mexico ⁹⁸	8/4/98	11/2/98
Korea -- Taxes on Alcoholic Beverages ⁹⁹	10/20/98	1/18/99
Japan -- Measures Affecting Agricultural Products ¹⁰⁰	11/24/98	2/27/99

⁹³ WT/DS56/AB/R (adopted 22 April 1998).

⁹⁴ WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R (adopted 22 June 1998).

⁹⁵ WT/DS69/AB/R (adopted 23 July 1998).

⁹⁶ WT/DS58/AB/R (adopted 6 November 1998).

⁹⁷ WT/DS18/AB/R (adopted 6 November 1998).

⁹⁸ WT/DS60/AB/R (adopted 25 November 1998).

⁹⁹ WT/DS75/AB/R, WT/DS85/AB/R (adopted 17 February 1999).

¹⁰⁰ WT/DS76/AB/R (adopted 19 March 1999).

IV. 1999 (As of November 15, 1999) ¹⁰¹		
Brazil -- Export Financing Programme for Aircraft ¹⁰²	5/3/99	8/2/99
Canada -- Measures Affecting the Export of Civilian Aircraft ¹⁰³	5/3/99	8/2/99
India -- Quantitative Restrictions on Imports of Agriculture, Textile and Industrial Products ¹⁰⁴	5/25/99	8/23/99
Canada -- Measures Affecting the Importation of Milk and Exportation of Dairy ¹⁰⁵	7/15/99	10/13/99
Turkey -- Restrictions on Imports of Textiles/Clothing ¹⁰⁶	7/26/99	10/22/99
Chile -- Taxes on Alcoholic Beverages	9/13/99	
Argentina -- Safeguard Measures on Footwear	9/15/99	
Korea -- Definitive Safeguard on Imports of Dairy Products	9/15/99	

¹⁰¹ See <http://www.wto.org/wto/dispute/distab.htm>. Note that the United States had filed an appeal of *United States – Tax Treatment for “Foreign Sales Corporations”* on October 28, 1999, but withdrew this appeal on November 2, 1999, due to “scheduling reasons.” WT/DS108/5 (Notice of Appeal); WT/DS108/6 (Withdrawal of Appeal).

¹⁰² WT/DS46/AB/R (adopted 20 August 1999). This was a prohibited subsidies case, subject to an expedited schedule requiring circulation within 60 days of the notice of appeal. See Annex I of the Working Procedures for Appellate Review, referring to Article 4(9) of the SCM agreement. See also discussion of agreement by parties and the Appellate Body to extend this deadline at Section 1.

¹⁰³ WT/DS70/AB/R (adopted 20 August 1999). This was a prohibited subsidies case, subject to an expedited schedule requiring circulation within 60 days of the notice of appeal. See Annex I of the Working Procedures for Appellate Review, referring to Article 4(9) of the SCM agreement. See also discussion of agreement by parties and the Appellate Body to extend this deadline at Section 1.

¹⁰⁴ WT/DS90/AB/R (adopted 22 September 1999).

¹⁰⁵ WT/DS103/AB/R, WT/DS113/AB/R.

¹⁰⁶ WT/DS34/AB/R.