THE POLITICS OF WTO DISPUTE SETTLEMENT

Geoffrey Garrett
Yale University

James McCall Smith
George Washington University

Paper prepared for presentation at the Annual Meeting of the American Political Science Association, Atlanta, GA, September 1-5, 1999. We thank Michael MacLeod for research assistance and Eric Reinhardt for access to a database of GATT and WTO disputes.

1. INTRODUCTION

The Uruguay Round of the General Agreement on Tariffs and Trade (GATT) extended the scope of liberalization to services, incorporated intellectual property rights, and deepened reform in agriculture. For political scientists, however, the creation of a new institutional architecture for the international trading system was perhaps the most interesting facet of the Uruguay Round. The World Trade Organization (WTO) has transformed the system for the resolution of trade disputes under GATT. In the event of alleged treaty violations, the Dispute Settlement Understanding (DSU) of the WTO gives member states the right to file complaints before *ad hoc* arbitral panels.[1] In contrast to the GATT system, defendant countries cannot block the adoption of panel rulings, which automatically assume the force of law unless WTO members unanimously agree to set them aside. Requests to impose retaliatory sanctions against defendants that have violated WTO agreements also receive automatic approval. Both reforms represent dramatic departures from the more diplomatic, voluntary traditions of GATT.[2] The WTO has also established a standing appellate tribunal of seven judges, known as the Appellate Body, and consolidated the multiple procedures of the different GATT non-tariff codes into a single, integrated dispute settlement mechanism.[3]

These reforms are designed to make dispute resolution in international trade more automatic, authoritative, and consistent — objectives that the international legal community has strongly endorsed.[4] Indeed, some observers view the WTO as embodying the triumph of law over politics in international trade [Young 1995; Montaña i Mora 1993]. Others present the WTO as the culmination of a gradual process of judicialization in the multilateral trade system [Stone Sweet 1999]. In virtue of its broad jurisdiction and

[1] The full name is the "Understanding on Rules and Procedures Governing the Settlement of Disputes" (hereinafter "DSU"). For the complete text of the DSU and other Uruguay Round agreements, see GATT Secretariat 1994.

[2] Hudec (1999) contends that an exclusive focus on institutional design may overstate the shift between the two systems, for GATT signatories had been gradually moving in the direction of a quasi-legalistic process since the early 1980s. Still, the Uruguay Round constituted a dramatic leap in that direction, given the unprecedented nature of the reforms.

[3] There are minor exceptions, as certain covered GATT agreements retain unique procedural details.

[4] American Bar Association 1994.

binding authority, the Appellate Body of the WTO would seem to be the clearest manifestation of the purported ascendance of legalism in international trade. Indeed, the Appellate Body resembles in important respects the international court most often held up as the exemplar of the triumph of legalism — the European Court of Justice (ECJ). Both are standing tribunals with the authority to issue binding rulings on national compliance with international economic agreements.[5]

As a number of largely impotent judicial institutions formed by regional trade pacts demonstrate, the mere creation of formal dispute resolution mechanisms by no means guarantees that they will be effective.[6] Whether the Appellate Body ever comes close to matching the authority of the ECJ will depend significantly on the way in which its judges behave. How the Appellate Body decides the cases it hears will shape, especially in the early years, the extent to which it gains legitimacy as the preeminent arbitrator of international trade disputes, and thereby how much influence it exerts over the structure of the international trading system.

This paper presents a framework for analyzing dispute settlement in the WTO. Our fundamental premise is that the members of the Appellate Body are forward-looking and strategic. Their objective is to increase their authority over international trade disputes, which requires that WTO member states respect the decisions of the Appellate Body. This does not imply, as pure legalism might suggest, that the Appellate Body will always rule against defendants that seem to violate WTO agreements. Rather, we argue while they are interested in developing a reputation for jurisprudential coherence and authoritative decision making, Appellate Body judges understand that it may be hard simultaneously to further both goals when rulings adversely affect defendants — the governments of sovereign states — that might choose to ignore, evade, or countermand them. Our basic approach has been applied to the behavior of judges in the United States

[5] Unlike the ECJ, however, the Appellate Body has jurisdiction over complaints only by member states, not by multilateral institutions or individuals. Moreover, given the absence of a process equivalent to the Article 177 preliminary reference procedure of the Treaty of Rome, the Appellate Body has no formal links to national judiciaries comparable to those of the ECJ [Burley and Mattli 1993].

[6] Diverse examples include the Economic Community of West African States, the Central American Common Market, and the Commonwealth of Independent States. For an analysis of dispute settlement design in regional trade agreements, see Smith 2000.

[Ferejohn and Shipan 1990], the European Union [Garrett, Kelemen, and Schulz 1998], and comparatively [Cooter and Ginsburg 1996]. To the best of our knowledge, however, this paper is the first attempt to use this type of analysis with respect to the WTO.

Like most international institutions, the WTO has no direct enforcement authority over its sovereign members. Its rulings are formally binding in international law, but the WTO has no ability directly to sanction offending states or to compel changes in domestic trade practices. The WTO can, however, authorize retaliatory sanctions by individual member states that claim to have suffered harm from the disputed policy measures. Because enforcement is decentralized and indirect, noncompliance with WTO rulings is a persistent risk. The underlying threat of a boycott by member states is even more important because governments informally retain the discretion to pursue grievances outside the WTO system.[7] We contend that WTO judges, aware of these constraints, will craft their rulings to reduce the risk of noncompliance.

The remainder of the paper is divided into five primary sections. Section 2 develops our general framework for understanding the legal politics game in the WTO and generates a set of empirically testable hypotheses. These concern the likelihood that the Appellate Body will choose not to rule against defendants in cases where there may be sound legal reason to do otherwise but where political considerations militate against this. We argue that such conciliation is more likely the less clear are legal norms that support an adverse decision, the greater are the likely domestic costs to the defendant of an adverse decision, the greater the defendant's political and economic clout in the WTO, and the more numerous and more powerful are the interested third-party governments that oppose an adverse ruling.

Section 3 discusses the salient differences between the WTO and the EU, the focus up until now of most political science research on international legal institutions. We argue that in the short run at least, the WTO — and more particularly the Appellate Body — will be considerably less constrained in its decision making than the contemporary ECJ in virtue of its brief existence and the consequent lack of relevant

[7] Under GATT, for example, signatory states referred numerous complaints to panels in the early years, but then effectively boycotted the panel system during the 1960s after newly independent developing countries joined GATT and pressed for changes by filing disputes. While 53 complaints were filed between 1948 and 1959, none was filed between October 1963 and December 1969 [Hudec 1993, Appendix].

legal precedent. But this does not mean it will always be easy for the Appellate Body to make judgments that enhance its reputation with WTO member states. Indeed, the hardest cases for the Appellate Body to decide are likely to be those in which the domestic costs of an adverse ruling are high for a defendant that is a powerful WTO member, but where influential complainants and third parties support an adverse judgment.

Section 4 describes how dispute settlement in the WTO works and summarizes all the cases that have been heard by the Appellate Body up to the present. All have involved at least one, and often more than one, of the WTO's big three members the European Union, Japan, and the United States — either as complainant, defendant, or interested third party. As a result, focusing on these cases is likely to offer an important window into the early shape of the WTO system of dispute resolution.

Section 5 examines two types of important procedural rulings by the Appellate Body. On the one hand, the Appellate Body has promoted ways for the views of interested domestic constituencies and governments to be made known before decisions to which they might object are taken. We interpret this as an attempt to reduce the likelihood that, because of incomplete information, the Appellate Body takes decisions that it would later regret. On the other hand, the Appellate Body has reduced the constraints imposed by rulings in pre-WTO disputes so as to increase its political room for maneuver. Toward the same end, it has also asserted its discretion to refrain from answering all the legal claims filed by disputing governments.

Section 6 analyses substantive decisions the Appellate Body has made. There has only been one case in which the Appellate Body has overturned a ruling of violation by an *ad hoc* panel — the clearest manifestation of what we call "conciliation" in the WTO. We document, however, numerous instances of more subtle forms of conciliation. In many of these, the Appellate Body appears to be trying to ensure that it has ample latitude to decide in favor of defendants by legitimizing provisions in WTO agreements that allow trade restrictions to be applied in particular cases. This pattern seems similar to the use the ECJ has made over the years of the tensions between Articles 30 and 36 in the Treaty of Rome to justify not making adverse decisions in cases where the political fallout of so doing might be unacceptably high.

2. A FRAMEWORK OF WTO DECISION MAKING

Our framework for analyzing the interactions between the Appellate Body and litigant governments has two elements. The first locates WTO dispute resolution in the political economy of trade. Here we follow the standard analysis of the role of international institutions in facilitating the realization of collective gains, as applied to the legal arena by Garrett and Weingast [1993]. Free trade is Pareto-improving, but domestic politics generates temptations for states to pursue protectionist policies. Repeated interaction offers a way out of protectionist equilibria, but only if would-be protectionist states have incentives to build reputations as free traders. In turn, this requires that other states can credibly threaten to retaliate against protectionism.

Judges may play a crucial role in interactions where reputation and credible commitments are central to cooperation. If judges paint scarlet letters on countries that violate the consensually established rules of the trading game, and so long as all actors in the system accept their rulings as impartial applications of the law to specific cases, free trade may emerge and be indefinitely sustained.

The second element of our model focuses on the game between the Appellate Body, defendant governments, and other WTO members, building on the work of Garrett, Kelemen, and Schulz on the ECJ [1998]. We assume that a trade dispute has already been brought to the Appellate Body for adjudication, and that there is a reasonable *prima facie* case for ruling against the defendant government.[8]

In this legal politics game, the Appellate Body moves first by ruling as to the legality of the existing national law or practice in dispute (see Figure 1). If it decides that the policy measure in question is consistent with the relevant WTO agreement, the status quo is not disturbed ("conciliation"). If, however, the Appellate Body rules against extant national practices, the defendant government chooses whether or not to abide by the ruling. The government can "acquiesce" in the WTO decision by changing national law, or it can ignore or evade the ruling. If other states support the defendant's defiance, they

[8] For cases to reach the Appellate Body, they must first proceed through a sequence of preliminary stages, including panel review. Section 4 below summarizes that process. Our model presumes that at least one of the disputing parties has appealed the panel's finding – be it positive or negative – on the issue of violation. As noted below, the vast majority of final panel reports to date have been appealed.

can choose to "restrain" the Appellate Body through concerted action (e.g., amending the relevant agreement or informally deciding to circumvent the ruling). But if the other governments support the ruling, the defendant may have to engage in isolated "defiance" of the Appellate Body.

Figure 1 about here

Three sets of conditions then influence the outcome of the WTO game: the preferences of the Appellate Body, the preferences of the defendant government, and the behavior of other WTO members with an interest in the outcome of the case.

We assume that the Appellate Body wants to expand its authority to interpret WTO agreements. The principal way to achieve this goal is to render adverse rulings against defendant governments, thereby clarifying and reinforcing legal norms. Clearly, the most favorable outcome for the Appellate Body is when it delivers an adverse judgment and the defendant accepts the ruling (AB_a). Similarly, the worst case for the Appellate Body is when it makes an adverse ruling that the defendant defies with broad support from other governments (AB_r).

The most important element of the Appellate Body's preference order, however, concerns its view of isolated defiance by a defendant. The more costly isolated non-compliance is to the Appellate Body (we will argue that this is significantly affected by the power and influence of the defendant among WTO members), the less the Appellate Body would prefer defiance to collective restraint. In the limiting case, the Appellate Body's preference order would be $AB_a > AB_c > AB_d \cong AB_r$. In contrast, if the Appellate Body believes that an act of defiance is much less threatening to its reputation — or where maintaining legal consistency is vital to its reputation — its preference order may be closer to $AB_a > AB_c \cong AB_d > AB_r$.

Turning to the preferences of defendant governments, we assume that, *ceteris paribus*, all governments want the WTO to be an effective arbitrator of international trade disputes. Governments would thus most prefer that the Appellate Body not rule against them when they are defendants, but nonetheless actively reprimand violations of

international trade rules by other governments (D_c). Adverse judgments are always costly to defendants because they harm the domestic constituents who benefit from the protectionist barriers the judgment seeks to remove. Once an adverse decision is made, however, defendants prefer the situation in which they reject the decision and win support from other governments (D_r). Generally, the least favorable outcome is isolated defiance of a ruling (D_d), which involves certain reputational costs in the international trade community. But the higher the domestic political costs of abiding by the judgment, the more likely are defendants to view defiance as not much more costly than acquiescing in the adverse decision (i.e., $D_c > D_r > D_a \cong D_d$).

Finally, the expected responses of interested third-party governments will have a significant impact on the strategic behavior of the Appellate Body and the defendant. The more numerous and more powerful are the third parties that support the aggrieved defendant, the more likely the defendant is to reject an adverse judgment, and hence the less likely that the Appellate Body would make such a decision in the first place. This statement, however, must be qualified by our arguments above about potential variations in the preference orders of the defendant and the Appellate Body.

The purpose of our theoretical framework is not to generate unique equilibrium predictions. Rather, it is to focus attention on the parameters we think are likely to be important determinants of Appellate Body behavior. In particular, we want to explore the merits of four hypotheses concerning the likelihood that the Appellate Body will conciliate with defendants.

H1: The stronger and clearer the legal rationale for making an adverse judgment, the greater the reputational costs to the Appellate Body of ignoring this rationale, and hence the less likely that it will conciliate.

H2: The greater the domestic political costs of an adverse judgment to the defendant, the less likely it will acquiesce in such a judgment, and hence the more likely that the Appellate Body will conciliate.

H3: The more powerful the defendant (i.e., the greater its economic size and political influence), the more likely that the Appellate Body will conciliate.

H4: The more numerous and more powerful the third-party governments that are likely to support the defendant, the less likely it will acquiesce in an adverse judgment, and hence the more likely that the Appellate Body will conciliate.

The benefit of focusing on the probability of conciliation is that our dependent variable is binary and involves something we can easily observe — Appellate Body decisions. Proponents of international legalism implicitly assume that defendant acquiescence rather than Appellate Body conciliation will be the norm in the new system of WTO dispute resolution. Our approach thus concentrates attention on an outcome — Appellate Body conciliation — that is clearly consistent with our theoretical framework but arguably inconsistent with that of international legalism.

We should acknowledge, however, that there are two potential limitations to our approach — the impact of incomplete information and the operationalization of conciliation. Since both issues are important, we discuss them in turn at some length. Our approach implicitly assumes complete information for all the relevant actors in the game. If, however, there is incomplete information, it could affect Appellate Body decision making and our interpretation of its behavior. Two types of cases need to be distinguished. On the one hand, under incomplete information, the Appellate Body might not conciliate in a given case, believing that the defendant would acquiesce, only to learn that it was mistaken because it incorrectly assessed the preferences of the defendant and other interested WTO members. For international legal scholars with minimal interest in the political dynamics of trade disputes, this would be a case in which the Appellate Body properly applied "the law", regardless of the consequences. It is very difficult to determine which of these two interpretations is correct without recourse to detailed case histories, and even these are unlikely to be definitive.

The converse case is that in which incomplete information could lead the Appellate Body to conciliate from a mistaken view about the likelihood of isolated defiance or collective restraint. Pure legalism, of course, would never expect conciliation, even under complete information. Thus, unlike the null case, any case that results in conciliation is more consistent with our approach than with international legalism. We cannot be sure, however, whether such conciliation was the "irrational" product of incomplete information or the appropriate strategic behavior given complete information. We have two responses to the incomplete information problem. First, we believe that the Appellate Body has strong incentives to try to improve the information available to it. In

Section 5, we evaluate a corollary hypothesis that the Appellate Body, in its procedural rulings, will seek to increase the amount and quality of information regarding the political dynamics, domestic and international, of disputes under its review. Our second response is that information problems are likely to be mitigated in Appellate Body decisions because considerable information will be revealed about defendants, complainants, and interested third parties during earlier stages of the WTO dispute resolution process.

This second point also suggests that we are likely to gain more insight into the politics of the WTO system from Appellate Body decisions than from earlier panel rulings. The reports of *ad hoc* arbitral panels may be less constrained than those of the Appellate Body by the anticipated reactions of defendants and other WTO members because panelists know that their decisions may not be final. Panelists might, for example, choose to engage in position taking — ruling against a powerful defendant even if they believe their decision may be overturned on appeal. Even if this is the case, considerable information about the preferences of defendants and third parties is likely to be revealed in the panel pleadings and in government decisions about whether or not to appeal panel rulings.

Let us now turn to the operationalization of conciliation, which is central to the empirical evaluation of our hypotheses. The fact that the WTO dispute settlement process has both a panel stage and the possibility of appeal is helpful in some cases. The clearest example of conciliation, for example, would be reversal by the Appellate Body of an *ad hoc* panel ruling of violation, where the facts and the law seem to indicate a breach of WTO rules. An Appellate Body report upholding a panel finding of no violation could also be evidence of conciliation, though this would depend on the quality of the original panel's decision, which is harder to determine without detailed case work.

But conciliation may take subtler forms as well. Indeed, legal scholars focus their studies of WTO cases not simply on the basic question of whether a violation has occurred, but on the line of legal reasoning the Appellate Body applies — and hence expects future panels to apply — to justify its decisions. After all, the legal basis of a ruling shapes the outcome not only in the dispute at hand but also in future cases, where it is likely to prove more consequential. The Appellate Body in several cases has accepted the result of a panel ruling, upholding its finding of violation, while pointedly rejecting its

rationale. As Hudec (1999, 28) notes, the Appellate Body has frequently "wielded a sharp knife when reviewing the supporting legal analysis" of panels. In our view, the Appellate Body's use of this "knife" has often constituted an indirect form of conciliation with powerful defendants, signaling future accommodation of political interests.

3. COMPARING THE WTO AND THE EU

There is no reason to believe that the general structure of the dispute resolution game should be different in the WTO than in the European Union (EU). There are, however, specific differences between the two institutions that should be taken into account.

First, with respect to the importance of legal precedent, Garrett, Kelemen, and Schulz [1998] (henceforth GKS) contend that the EU's treaty base is actually not very constraining in the case of trade because there are inherent contradictions between Articles 30 and 36 of the Treaty of Rome (following Garrett [1995]). The contemporary ECJ, however, must take into account the large body of case law it has produced since the late 1950s. Moreover, the *acquis communautaire* of the EU includes a dense thicket of secondary legislation and regulations that the ECJ must also consider. GKS argue that the clarity of these legal norms and judicial precedents varies significantly across issue areas. Thus, the reputational costs to the ECJ of conciliating are much higher in some cases than others.

We expect the Appellate Body of the WTO to be considerably less constrained than the ECJ for the foreseeable future by its treaty base and legal precedents. Like the Treaty of Rome, the core WTO agreement on market access — known as GATT 1994 — includes certain conflicting principles. The most prominent example is the list of general exceptions in Article XX covering domestic policy objectives (such as the protection of "human, animal or plant life or health") that potentially conflict with trade liberalization. Like all multilateral treaties, the WTO agreements also represent compromises among diverse nation states with conflicting objectives. On more than one occasion, the price of political compromise in the Uruguay Round has been legal ambiguity.

In terms of legal precedent, it is crucial to note that the WTO (like GATT before it) implicitly denies binding legal force to adopted rulings beyond the particular matter

and parties in dispute. The common law doctrine of *stare decisis* generally does not apply in international trade law [Bhala 1999a]. Even if judges and panelists were to abide by past rulings — establishing on their own initiative a system of *de facto* precedent, a process some legal scholars [Bhala 1999b] contend is underway — there simply is not yet a broad foundation of Appellate Body decisions on which to build.

The implications of these contrasts for decision making in the WTO are clear. In terms of H1, legal precedent will create fewer impediments to conciliation in the WTO than in the EU, giving the Appellate Body considerable discretion to accommodate political interests where necessary. Furthermore, the incentives of the Appellate Body to maximize its autonomy suggest another corollary hypothesis. The Appellate Body, in its development of legal doctrine, should seek to maintain or expand its discretion with respect to the rulings of other arbitral panels and the claims of litigant governments. We evaluate this claim in Section 5 on procedural rulings.

GKS also argue that distributive concerns tend to dominate the objective of increasing aggregate prosperity in the decisional calculus of defendant governments in Europe. The more politically salient the interests that are adversely affected by an ECJ decision, the less likely that the government will abide by it. ECJ rulings can also produce direct costs for member governments, by imposing fines or by ordering governments to compensate private actors for treaty violations. Indeed, GKS envisage some cases where isolated defiance of an adverse ruling would be a dominant strategy for defendants — because the domestic costs of acquiescence are prohibitive. Such situations in turn make it more likely that the ECJ would conciliate.

This line of argument is likely to be very significant in the WTO. We believe, however, that the impact of domestic costs on Appellate Body decision making will also be sharply affected by the economic and political clout of the defendant. Garrett [1992] argued that this is also the case in the EU, but such considerations are likely to be more salient in the WTO for two reasons. First, the Appellate Body is a fledgling institution that cannot afford to alienate any of the major players in the WTO — in particular the EU, Japan, and the United States — whose political commitments to the multilateral trade system remain contested. Second, the disparities in economic and political development among WTO member states are far greater than in the EU. Poor countries

without stable histories of democracy are numerous but nonetheless relatively minor political players in the WTO system. Until the Uruguay Round, many developing countries were to some extent free riders in GATT, enjoying preferential or nonreciprocal access by assuming only certain obligations.[9] Given the tradition of tolerating less than full compliance on their part, we should expect the Appellate Body to consider the threat of defiance less costly in cases against developing countries. The variable efficacy of the only enforcement tool in the WTO — decentralized sanctions by the complaining party — only reinforces this contrast based on the relative size and clout of defendants.

Finally, GKS argue that the reactions of other member states to ECJ cases are heavily constrained by the EU's complicated institutional environment. Governments cannot use ECJ decisions to justify retaliation against their colleagues that violate EU rules, but must instead rely on formal channels of sanctioning. Moreover, the ability of the member governments collectively to sanction the ECJ for decisions of which they disapprove is determined by EU decision-making rules. Unanimity is required for treaty revisions that formally restrict the powers of the ECJ, but this is generally not necessary for the passage of new secondary legislation designed to counteract ECJ decisions [Tsebelis and Garrett 1999].

The situation is very different in the WTO. There is no equivalent to the EU's system of qualified majority voting. Any formal responses to legal decisions designed to constrain the activism of the Appellate Body generally require consensus among WTO members.[10] This would have significant implications if unanimous treaty revisions were the only channel through which governments could collectively restrain the Appellate Body. In that event, the political constraints on Appellate Body decisions would be much weaker than for the ECJ. It must be remembered, however, that the entire WTO system

[9] Under the WTO, which members must accept as a single undertaking, developing and least developed countries continue to retain certain advantages and exemptions.

[10] The provisions on decision making in the WTO call for member states to maintain the tradition of consensus. Where consensus is impossible to reach, the treaty allows for super-majority decisions, although resort to voting has been very rare in practice. There are two channels for collective restraint by WTO members. First, they can issue binding interpretations of the Uruguay Round agreements by a three-fourths majority. Second, they can amend the agreements by unanimous consent — though certain agreements allow two-thirds majority amendments. Both options, of course, constitute high hurdles. See Articles IX and X of the Agreement Establishing the World Trade Organization [GATT Secretariat 1994].

rests on informal coordination among its member states. The WTO cannot impose direct sanctions on violators. Rather, its decisions have teeth only if complainant governments use WTO decisions to justify retaliatory trade sanctions against defendants whose practices have been judged to be illegal. More generally, we would expect that informal agreement among member governments (particularly the big three) on the legitimacy of a WTO decision would have a tremendous bearing on its effectiveness. In turn, the WTO would not want to take decisions — either in favor of defendants or against them — that would not be supported by the United States, Japan, or the EU. The more information the Appellate Body is able to generate regarding the preferences of influential member states, the more secure will be its position as an authoritative arbitrator of disputes.

In sum, this section suggests three key differences between the WTO and the EU that we anticipate to have an important bearing on the behavior of the Appellate Body. First, legal precedent is unlikely to be very constraining on the Appellate Body in the early years of the WTO, and hence H1 is less likely to play a major role in determining the extent of its conciliatory behavior compared with the ECJ. Second, the Appellate Body is likely to be particularly sensitive to the domestic costs of adverse rulings against powerful WTO members (H3). Finally, the Appellate Body has strong incentives to ensure that powerful WTO members with an interest in a case support its decision (H4). Among other things, these contrasts suggest that the hardest cases for the Appellate Body to navigate are those where an adverse ruling would hurt a powerful defendant, but where a powerful complainant or third party would frown upon conciliation. Our empirical analysis concentrates on these cases. Let us now turn to the details of WTO dispute resolution.

4. AN OVERVIEW OF WTO DISPUTE SETTLEMENT

The system for dispute resolution in the WTO, although distinct from that of GATT, was not created entirely anew in the Uruguay Round. Since the 1950s the process established under Article XXIII of GATT provided for review of complaints by *ad hoc* arbitral panels of trade experts.[11] Despite significant procedural shortcomings, the GATT

[11] Article XXIII does not directly establish a panel procedure, but GATT signatories came to interpret it in practice as providing for impartial third-party review of complaints.

system evolved and gained support over time from key governments, with first the United States and later the European Community frequently filing cases. By the late 1980s this essentially voluntary process was producing an array of high-quality legal rulings, along with a significant (albeit imperfect) record of government compliance [Hudec 1993].

During the Uruguay Round, negotiators ambitiously agreed to a set of institutional reforms that promised to remove the extant system's most glaring problem: namely, the consensus decision rule that conferred on defendants the right to veto the adoption of panel reports and the authorization of sanctions in the GATT Council. Under the Dispute Settlement Understanding (DSU) of the WTO, the review process is quasi-automatic from start to finish, with deadlines driving the proceedings from one stage to the next. The only way to block the adoption of a WTO ruling or the authorization of sanctions is if all government representatives present at a meeting of the Dispute Settlement Body (DSB) agree to do so. This decision rule, known as negative consensus, renders the process virtually automatic because even the government whose complaint has been ruled valid must agree to set it aside or to forgo its right to retaliate — otherwise the ruling takes effect and sanctions are authorized.

By agreeing to make the process automatic, the Uruguay Round negotiators created a different problem: the risk of poorly reasoned, factually erroneous, or contradictory panel rulings being given the force of law. To address this contingency, they established a new stage of independent appellate review, creating the seven-member Appellate Body. Negotiators also extended the DSU system to apply to all of the covered GATT agreements, integrating the various procedures of the Tokyo Round's non-tariff codes within a single institutional framework. Together these reforms transformed dispute settlement in the WTO into a legalistic and rule-oriented system, with binding decisions issued by a standing tribunal of judges and backed by the threat of retaliatory sanctions.[12]

The institutional design of the WTO represented a compromise between the United States, which had long advocated legalistic reforms, and the EU and Japan, both

---

[12] For the distinction between rule-oriented and power-oriented systems, which is also cast as the difference between legalism and pragmatism, see Jackson (1978, 98-101; and 1990, 59-61).

of which — as frequent targets of U.S. complaints — initially were reluctant to revise the consensus decision rule. In exchange for the reforms, the U.S. government agreed to accept a legal obligation to utilize the WTO system, and not to resort to its traditional mechanism of unilateral evaluations of potential violations of GATT rules.[13] A number of smaller, more trade-dependent signatories, such as Canada, Mexico, Australia, New Zealand, and Hong Kong, actively supported and facilitated the shift toward legalistic dispute settlement.[14]

Dispute settlement in the WTO moves through a series of stages. The first is a period of intergovernmental consultations, a formal request for which must be submitted in writing by a WTO member government.[15] If consultations fail to resolve the dispute within a specified period of time, the complainant can proceed directly to request the establishment of a panel.[16] The panel request must identify the challenged measures and the legal basis of the complaint, which define the panel's terms of reference. Panelists are nominated by the WTO Secretariat, which draws from a roster of eligible experts, and then approved by the disputing parties.[17] Before submitting its final report, the panel must first submit an interim report confidentially to the disputing parties, soliciting their comments. The final report is adopted by the DSB soon after its release, absent a request for appeal or the existence of a negative consensus. Appeals go to the seven-member Appellate Body, where each case is assigned to rotating divisions of three judges. The Appellate Body has the authority to uphold, modify, or reverse the legal conclusions of

[13] This obligation appears in DSU Article 23, whose heading is "Strengthening of the Multilateral System." The U.S. government did not pledge to dismantle or never to use instruments such as Section 301, which remains intact, but it does acknowledge that any unilateral measures taken against WTO members outside of the DSU process for violations of the Uruguay Round agreements would be illegal.

[14] For a detailed history of the negotiations, see Stewart 1993.

[15] As is common in international law, standing to file complaints under the DSU is restricted to sovereign member states. Private parties and the WTO Secretariat cannot initiate the DSU process.

[16] If the disputing parties voluntarily agree, the DSU also provides for good offices, conciliation, mediation, and even arbitration as alternative means of resolving conflicts. Because mutual consent is required, these options do not substitute for the panel process, which remains available by right to complainants.

[17] According to DSU Article 8 (6), governments are not to oppose the Secretariat's nominations "except for compelling reasons," but the process of panel formation has been bitterly contested, with governments often rejecting proposed panelists "on the slightest grounds" [Hudec 1999, 36]. Where the parties are unable to agree, the WTO Director-General has the authority to appoint panelists and avoid undue delays.

the panel.[18] Appellate Body rulings are final and are adopted promptly by the DSB, which gives them binding legal effect. Where a policy measure is ruled illegal, the defendant must comply with the WTO's recommendations within a reasonable period of time.[19] Otherwise the complainant can request authorization to impose sanctions. Several issues at the end of the process — such as the adequacy and timing of a proposed compliance plan or the proposed level and sectoral composition of sanctions — are themselves subject to arbitration, often by the original panel. Adopted rulings remain on the agenda of the DSB, which monitors implementation until the issue is resolved.

This new WTO system came into existence in January 1995. During its first three years of operation, governments filed an average of more than 30 distinct cases annually.[20] By one estimate, that rate represents almost a doubling of the projected volume of cases under the previous GATT system [Hudec 1999, 15-6]. Much of this increase in caseload can be attributed to disputes involving the new substantive obligations undertaken by GATT signatories in the Uruguay Round. But some of the increased activity also reflects the significant procedural reforms. In particular, complaints by developing countries have increased as sharply as complaints by developed countries, suggesting a relatively high level of confidence in the impartiality of the system.[21]

In terms of outcomes, disputants have settled a significant number of WTO complaints during consultations. In fact, a smaller proportion of complaints have led to the formation of panels under the WTO, where the right to panel review is more secure,

[18] The Appellate Body does not remand cases for reconsideration, and its review is limited to matters of law and legal interpretations by the panel, not findings of fact. See DSU Article 17 (6) and (13).

[19] What constitutes a reasonable period of time depends on the context of the dispute. Where the disputants cannot agree, the DSU proposes a general maximum of 15 months from the date of the adoption of a ruling, but arbitrators have required shorter deadlines in certain cases.

[20] This count reflects the number of challenged measures, which is a more conservative approach than simply adding the number of complaints, as several WTO members often challenge the same policy at once. The WTO registered more than 154 consultation requests during the same 1995-98 period.

[21] Hudec 1999, 23-4. Also worthy of note is the disproportionate increase in the number of cases filed by developed countries against developing country defendants. This shift is largely attributable to the extensive range of obligations assumed by developing countries in the Uruguay Round, where — in contrast to the Tokyo Round — the US, EU, Japan, and Canada agreed to bundle most of the agreements as a single undertaking, presented to developing countries on a take-it-or-leave-it basis [Steinberg 1995].

than under GATT.[22] Even among complaints that produce a panel, the disputants in several cases have reached settlements before the panel issues its final report.[23] These preliminary findings suggest that governments are successfully bargaining in the shadow of the law. Whether this is because defendants are avoiding adverse rulings or because complainants are filing weak cases is difficult to say.

In any event, among the 154 consultation requests filed between January 1995 and December 1998 (not all of which involved distinct matters), only 30 led to panel rulings by July 1999.[24] At the end of the panel process, disputing governments have consistently opted to exercise their right to appeal. Only 3 panel reports among the 20 issued by December 1998 were not referred to the Appellate Body for review.[25] Defendants have filed the majority of appeals, complainants have requested review of certain cases, and a few disputes include appeals by both parties.

Our analytical focus in this paper is the work of the Appellate Body, which remains a relatively small sample of decisions. As of August 15, 1999, the Appellate Body had issued 19 rulings. Table 1 summarizes these disputes, identifying the contending parties, the general policy measures at issue, and the legal result (i.e., whether

---

[22] Hudec [1999, 25-6] reports that in the first two years of the WTO, roughly 45 per cent of complaints led to panels, while under GATT during the 1980s about 53 per cent of cases did so. This contrast resembles the findings of Busch [1999], who reports that the 1979 GATT Improvements — which made the right to panel review more secure — did not produce an increase in the proportion of cases leading to panels.

[23] In the dispute settlement overview available on its home page, the WTO identifies cases that settle after a panel has formed but before it has issued a report as "inactive cases." Although panels may also be inactive for other reasons, at least 6 cases appear to have settled at this stage before July 30, 1999. At least another 21 complaints had produced mutually agreeable resolutions during the consultations phase. For updates see http://www.wto.org/wto/dispute/bulletin.htm.

[24] For the most recent complaints in that sample, closest to December 1998, there may not have been time for panels to issue reports by mid-1999 — and 22 other panels were active but had yet to complete their reports as of July 30, 1999.

[25] The most noteworthy example is the "Kodak-Fuji" case filed by the United States against Japan's photographic film and paper market. The panel found no violation, and the U.S. government — with little hope of reversal on appeal — opted instead to press Japan to abide by representations it made before the panel. Indonesia did not appeal a case in which a panel found its domestic automobile program to be illegal, though an arbitrator was later asked to determine the proper period for implementation. Finally, having been denied by the Appellate Body in a similar case filed by the United States (*India – Patents*), India did not appeal the panel ruling of violation in a subsequent patent protection case brought by the EC.

the panel and/or the Appellate Body issued a ruling of violation).[26] One prominent feature of Table 1 is the high proportion of cases involving the largest WTO members as defendants, which are the principal object of this study. No fewer than 10 of the 19 cases involve the United States, European Communities (EC),[27] or Japan as defendant, with five complaints filed against each other and five brought by smaller countries.

Table 1 about here

Table 1 also shows the important role played by governments that are not parties to specific WTO disputes. Third parties that declare a "substantial interest" in a matter under review enjoy the right to appear during hearings and to submit written arguments.[28] Table 1 identifies all third parties in Appellate Body rulings through August 15, 1999. The big three, and the EC and the United States in particular, have played very active roles in this capacity. In every case filed against the EC, the United States has been either a complainant or third party. Similarly, in all but two cases filed against the U.S. government — both of which were minor challenges to transitional safeguard measures on textile imports from developing countries — the EC has been either a complainant or third party. The EC has also joined or been a third party in five of the six complaints filed by the U.S. government against other members. In four of the five cases involving neither the EC nor the United States directly, both have joined as third parties. Finally, Japan has declared itself a third party only twice, but both times involved disputes between the EC and United States.

In the context of our framework, the interventions of third parties provide the Appellate Body with useful information regarding the views of interested and influential WTO members. In its early decisions, the Appellate Body has been careful to summarize

[26] It is important to note that governments can appeal panel reports in whole or in part, and the Appellate Body reviews only issues that are identified in the appeal. On occasion, therefore, the Appellate Body may not review a general finding of violation, but some other narrow aspect of the case.

[27] When discussing specific cases, as in Table 1, we follow WTO usage by referring to the European Communities (EC). Otherwise we use the conventional European Union (EU).

[28] DSU, Articles 10 (2) and 17 (4). Access for third parties dates to the midterm review of the Uruguay Round, by which point Mexico and Canada had persuaded other GATT signatories to endorse such a proposal [Stewart 1993, 2745-7]. The "substantial interest" test is not a significant barrier to participation.

and respond to the arguments of governments that declare themselves as third parties. By treating these submissions with respect, the Appellate Body encourages future third-party submissions, which help it reduce the risk of making adverse rulings in cases where this may result in collective restraint by WTO members. Our approach suggests that the most valuable third parties in this regard would be the United States, the EC, and Japan. As Table 1 indicates, one or more of these trading powers has submitted legal pleadings in *every* Appellate Body proceeding, thereby offering useful political guidance either as a disputant or as a third party. Their active roles, and the Appellate Body's implicit encouragement of their counsel, are consistent with our framework's emphasis on the anticipated responses of powerful WTO member states.

A final aspect of Table 1 that requires discussion is the low rate of reversal by the Appellate Body on the basic question of violation. In only one case, *EC – Computers*, did the Appellate Body bluntly conciliate with a defendant government by overturning a panel ruling of violation. In *Guatemala – Cement*, the Appellate Body — as the third party United States urged it to do — dismissed on procedural grounds an antidumping case in which the panel had found a violation.[29] And in another case, *Brazil – Coconut*, the Appellate Body upheld a panel finding of no violation.[30]

Despite our contention that conciliatory behavior by the Appellate Body also assumes other forms, it is fair to ask why so few cases to date have resulted in rulings of no violation. Several factors seem relevant. First, a number of the early WTO cases have been examples of incontrovertible violations under the expanded commitments of the Uruguay Round — leaving the Appellate Body less room to maneuver. Complainants such as the U.S. government have sought to demonstrate the relevance of new areas agreements to their exporters, pursuing relatively easy victories like the intellectual property rights violations in *India – Patents*.[31] Second, a few cases represent extensions

---

[29] The Appellate Body thus did not rule on the substantive claims of Mexico, the complainant.

[30] *EC – Poultry* arguably belongs in this category as well. Although the Appellate Body upheld one narrow finding of violation (overturning a second), both it and the panel rejected the bulk of Brazil's allegations, such that the case is widely regarded as a victory for the EC.

[31] For evidence of the selective U.S. approach to intellectual property disputes, see Bello (1997, 358-61).

of disputes that remained unresolved under GATT. The primary example is *EC – Bananas*, where previous panels had reviewed the European import regime and found it to be inconsistent with GATT before the case was filed anew under the WTO. Though not binding, GATT panel decisions that directly pertain to the case at hand leave the Appellate Body less discretion than new complaints.

There are, however, two more important factors to consider in explaining the relatively small amount of clearly conciliatory behavior by the Appellate Body. First, the major players with a stake in making the WTO dispute settlement system work — above all the United States and the EU — have shied away from pushing cases to the Appellate Body when it is clear that the political fallout from any ruling would harm the WTO's legitimacy. For example, the U.S. government chose not to appeal the panel report rejecting its complaint against Japan's photographic film and paper market, despite pressure from Kodak to do so.[32] A ruling against Japan in this case would essentially have declared in violation of WTO rules Japan's traditional distribution networks, which are central to the Japanese economic model and way of life in the country. A similar pattern is apparent with respect to the EU's choice not to press its case against the U.S. Helms-Burton legislation, even though the legislation appears to violate WTO rules. Citing historical tensions with Cuba, the United States has defended this controversial statute on the basis of the national security exception of GATT — and has even threatened to boycott any DSU proceedings that challenge it.[33] The EU might have chosen to call this bluff, but it has thus far demurred, arguably to protect the Appellate Body from the political fallout that an adverse ruling would generate.

The second key to understanding the low rate of clear-cut conciliatory decisions by the Appellate Body is the high rate of compliance with its rulings. Among the rulings of violation made before August 1998, defendants have fully complied with WTO recommendations in 9 of the 11 cases. The exceptions are *EC – Bananas* and *EC – Beef*

[32] Instead the U.S. government pledged to monitor Japan's compliance with its claim during panel proceedings that the Japanese market is open to foreign film. See "Interagency Committee Will Test Japan Claims On Film Market," *BNA International Trade Reporter* (February 4, 1998), 178.

[33] The national security provisions are in Article XXI of GATT. For the U.S. threat, see Paul Blustein and Anne Swardson, "U.S. Vows to Boycott WTO Panel: Move Escalates Fight with European Union over Cuba Sanctions," *Washington Post* (February 21, 1997), A1.

Hormones, in both of which the United States has been authorized to suspend concessions. Among the more recent rulings in Table 1, implementation deadlines have been set and remain pending in three cases.[34] Only in *Australia – Salmon* has the period expired and the right to retaliate been requested.

Legal scholars may view this largely successful record of compliance as evidence of the autonomous power of the WTO over member states. Our interpretation, however, is different. The data are equally consistent with an argument that high rates of acquiescence reflect the fact that the Appellate Body has not confronted many disputes in which conciliation has been required. Defendant governments have accepted adverse decisions because the costs to them of acquiescence are smaller than the benefits they gain from supporting the WTO in the most transparent and significant way — by accepting adverse judgments.

Our analysis of Appellate Body behavior, however, should not be limited to this simple balance sheet. There is considerable evidence that the Appellate Body has engaged in less overt, but nonetheless strategically motivated conciliatory behavior. Section 6 discusses several significant cases against the EU and the United States in which the Appellate Body has conciliated by overturning or modifying the reasoning of panels while still upholding their verdicts of violation. Before discussing these cases, we explore a series of procedural rulings by the Appellate Body that have served to give it the kind of flexibility that is required to play the legal politics game in the ways we envisage.

5. PROCEDURAL DECISIONS OF THE APPELLATE BODY

The Appellate Body has confronted significant procedural issues during the course of its reviews of specific disputes between WTO member states. In so doing, it has rendered several decisions that are consistent with our two corollary hypotheses regarding political information and judicial discretion. To reduce the possibility of making politically unacceptable decisions on the basis of incomplete information, the

[34] In *US – Shrimp* and *Japan – Agricultural Products* the disputing parties have agreed on the appropriate implementation period, with deadlines in December 1999. In *Korea – Alcohol Taxes*, an arbitrator imposed a deadline of January 31, 2000.

Appellate Body has significantly increased the information available to it about the views of interested third-party governments and domestic constituencies in defendant countries. Moreover, in terms of discretion, the Appellate Body has increased its political room for maneuver by diminishing the importance of previous GATT rulings as legal precedents and by asserting its autonomy to render judgments independent of the claims of disputing governments.

Two Appellate Body reports stand out as serving to enrich the informational environment of its judges. First, in *US – Shrimp* the Appellate Body overturned a panel ruling that prohibited the submission of non-requested *amicus curiae* ("friend of the court") briefs by private, non-governmental associations. This case (which we discuss in more detail in Section 6) challenged a U.S. statute that prohibited the importation of shrimp harvested through methods posing risks to endangered sea turtles. It was viewed by the U.S. environmental community, which largely opposed the Uruguay Round agreements, as a crucial test case. Three environmental organizations submitted briefs directly to the panel, but it expressly refused to consider them, holding that to do so would violate the DSU.[35] The Appellate Body reversed this determination, holding that the DSU does not require the exclusion of such submissions.[36] The ruling grants panels the discretion to consider or ignore any advice submitted to them. By opening the door to a diverse array of briefs from non-governmental sources, the Appellate Body responded to concerns about the lack of transparency in WTO proceedings and provided itself with additional means to gauge the domestic political stakes of sensitive disputes.[37]

Second, in *EC – Bananas* the Appellate Body set forth an expansive definition of standing, effectively relaxing the criteria WTO member governments must meet to file

[35] The groups were the Center for Marine Conservation, the Center for International Environmental Law, and the World Wide Fund for Nature. The original panel held, "Accepting non-requested information from non-governmental sources would be, in our opinion, incompatible with the provisions of the DSU as currently applied." See *US – Shrimp*, ¶ 99.

[36] The Appellate Body held that "authority to *seek* information is not properly equated with a *prohibition* on accepting information which has been submitted without having been requested by a panel. A panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, *whether requested by a panel or not*" (emphasis in original). See *US – Shrimp*, ¶ 108.

[37] This ruling somewhat resembles the Appellate Body's decision in *EC – Bananas* to allow St. Lucia, a third party, to retain private counsel to represent its interests during oral hearings. Both decisions tend to improve the quality and diversity of views expressed during the proceedings.

complaints. EU lawyers argued that the United States had no standing to bring the complaint because it is not a banana producer, let alone an exporter. But two American multinationals, Chiquita and Dole, clearly were affected by the European regulations. Attorneys from the U.S. government contended that to impose a territorial test for standing would undermine the DSU by severely restricting the right of member governments to challenge protectionist practices. The Appellate Body sided with the United States, holding that the WTO system granted broad discretion to governments on whether to file complaints. In particular, it found that the WTO agreements suggest that member states are "expected to be largely self-regulating in deciding whether any such action would be 'fruitful.'"[38] By refusing to impose a strict "legal interest" test, the Appellate Body increased the likelihood of cases filed by multiple complainants, like *EC – Bananas*. Such cases, of course, enhance its ability to assess how the WTO community sees particular disputes.

One other aspect of recent Appellate Body rulings that deserves mention in the context of information gathering is their emphasis on thorough fact finding. The mandate of the Appellate Body under the DSU is to review questions of law, not findings of fact, which are exclusively within the domain of *ad hoc* panels.[39] Although the line between issues of law and fact can be easily blurred, the Appellate Body has taken steps to improve the quality of factual records developed at the panel stage. Panels have the authority under DSU Article 13 to request information from the disputing parties, but their ability to compel full disclosure of relevant data remains uncertain. In the recent *Canada – Aircraft* decision, the Appellate Body vigorously affirmed that panels have a broad right to request information from WTO members, which in turn have a duty to comply with such requests.[40] More important, the Appellate Body held that panels have the legal authority and discretion to draw negative inferences from the refusal of any

---

[38] *EC – Bananas*, ¶ 135.

[39] DSU, Articles 11, 12 (7), 17 (6), and 17 (13).

[40] *Canada – Aircraft*, Section VII. In support of this finding, the Appellate Body cited its similar holdings in *Argentina – Footwear*, *EC – Beef Hormones*, and *US – Shrimp*. See *Canada – Aircraft*, ¶ 184.

WTO member to disclose requested information.[41] This decision should encourage disputing governments to cooperate in the process of discovery at the panel stage, improving the factual record on which the Appellate Body must rely in reviewing issues of law. In general, the Appellate Body's emphasis on a high and consistent standard of practice has set it apart from the more "informal, *ad hoc* procedures" of GATT [Hudec 1999, 28].

Turning now to procedural rulings that have increased the Appellate Body's discretion, two cases stand out. First, in *Japan – Alcohol Taxes* the Appellate Body clarified the status of panel reports adopted under GATT, finding them not to be binding and thereby reducing the value accorded to them as precedents by the original panel. The United States and EU both claimed that the panel had erred in treating adopted panel reports from GATT 1947 as "decisions" that form an integral part of GATT 1994 and as evidence of "subsequent practice" that is relevant to the interpretation of WTO agreements. The Appellate Body agreed, holding:

> The generally accepted view under GATT 1947 was that the conclusions and recommendations in an adopted panel report bound the parties to the dispute in that particular case, but subsequent panels did not feel legally bound by the details and reasoning of a previous panel report.
>
> We do not believe that the CONTRACTING PARTIES, in deciding to adopt a panel report, intended that their decision would constitute a definitive interpretation of the relevant provisions of GATT 1947. Nor do we believe that this is contemplated under GATT 1994.[42]

The Appellate Body endorsed the panel's conclusion that unadopted panel reports from GATT have "no legal status" in the WTO system. But the more significant part of the decision was the reversal of the *ad hoc* panel's view of adopted panel reports. This ruling allows the Appellate Body to judge cases more independently of GATT practice. Among other things, *Japan – Alcohol Taxes* clearly reduces the impact of precedent on WTO decisions, and hence gives the Appellate Body additional legal cover for conciliatory behavior, should it choose to engage in it.

---

[41] Although the original panel did not draw prejudicial conclusions from Canada's refusal to disclose certain information, the Appellate Body ruled that it could justifiably have done so. *Canada – Aircraft*, ¶ 205.

[42] *Japan – Alcohol Taxes*, Section E.

US – Shirts and Blouses is the second decision that loosened the constraints under which the Appellate Body operates. In this case, the Appellate Body applied the doctrine of judicial economy to liberate itself from having to rule on all legal issues raised by disputing governments. India filed the case to challenge certain transitional safeguard measures imposed by the United States against Indian textiles. It prevailed before the panel on the question of violation but nevertheless appealed narrow issues of law, including whether the panel had been correct to ignore several of the arguments made by the Indian government in its complaint. The Appellate Body endorsed the panel's decision, finding that nothing in the DSU requires panels to examine and review all of the legal claims made by complainants. It continued to offer its underlying view of the WTO process:

> [T]he basic aim of dispute settlement in the WTO is to settle disputes. ... Given the explicit aim of dispute settlement that permeates the *DSU*, we do not consider that Article 3.2 of the *DSU* [stating that "recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements"] is meant to encourage either panels or the Appellate Body to "make law" by clarifying existing provisions of the *WTO Agreement* outside the context of resolving a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute.[43]

This doctrine of judicial economy is essentially a "principle of self-restraint" that helps maintain the basic distinction between adjudicative and legislative functions in the WTO [Bhala 1999b, 64]. Although its legal basis is well established in common law systems, the doctrine has the corollary political advantage of allowing the Appellate Body to elide potentially sensitive issues in reaching its decisions. The concept of judicial economy extends the discretion of the Appellate Body to rule with caution and restraint where required. This trend was reinforced by the Appellate Body's holding in *EC – Beef Hormones* that panels also enjoy the discretion to develop their own legal reasoning; they need not select among arguments presented by the disputing parties.[44] In other words, panels not only can refrain from ruling on the disputants' claims, they also have the

[43] *US – Shirts and Blouses*, Section VI.

[44] *EC – Beef Hormones*, ¶ 156.

freedom to ignore the arguments set forth by the contending governments in articulating their own original view of a case.

One additional aspect of Appellate Body procedure worth noting pertains not to its rulings, but to the design of its working procedures. During the Uruguay Round, negotiators agreed to delegate to the seven members of the Appellate Body the responsibility to determine their own internal rules of procedure, in consultation with the WTO Director-General and the DSB Chairman.[45] In terms of our framework, the most significant aspect of these working procedures is their emphasis on consensus building. The Appellate Body, on its own initiative, has taken steps to facilitate its operation as a unitary actor despite DSU provisions that threaten to fragment it.

To summarize the relevant procedures, Article 17 (1) of the DSU requires that cases be assigned to three-person divisions of the Appellate Body, not to all seven members at once. There is thus a significant risk of internal conflict and strategic case assignments.[46] To mitigate such problems, the Appellate Body has identified specific means by which collegiality might be maintained. These require the judges to meet regularly as a group to discuss their work; to distribute all documents pertaining to a given appeal to the entire membership, not just to the responsible division; and, most important, to circulate draft opinions to all judges for comment and review before releasing a final report to WTO member governments.[47] The procedures also specify that the "Appellate Body and its divisions shall make every effort to take their decisions by consensus," resorting to majority votes only when necessary.[48] The stated objective is "to ensure consistency and coherence," which would naturally enhance the Appellate Body's

[45] DSU, Article 17 (9).

[46] The selection process for Appellate Body members is largely based on informal negotiations among WTO member states. Like the recent appointment of a new Director-General, which led to a protracted stalemate in 1999, the initial formation of the Appellate Body was a contentious and highly political process — only increasing the risks of internal conflict.

[47] Part I [4] of "Working Procedures for Appellate Review," WTO Document WT/AB/WP/3 (28 February 1997).

[48] Thus far no dissenting votes have been cast in Appellate Body reports, which include the names and signatures of the three members of the assigned division. The reference in the working procedures to majority votes suggests that dissents might be possible. However, Article 17 (11) of the DSU requires that "opinions expressed in the Appellate Body report by individuals serving on the Appellate Body shall be anonymous," which may or may not constitute an obstacle to such a development.

legal legitimacy. These consensus-building measures, however, also insulate the Appellate Body from political infighting, enabling it to behave — in line with our assumptions — as a strategic unitary actor.

To summarize, in its early decisions the Appellate Body has handled a number of significant procedural issues in ways that should enhance its ability to navigate the uncharted territory of WTO dispute settlement with appropriate caution and coherence. Consistent with our corollary hypotheses, it has sought to improve the quality and amount of political information available to it while at the same time increasing its judicial discretion to render decisions less constrained by prior GATT practice and litigants' claims. Moreover, in its own working procedures, the Appellate Body has aimed to reduce the likelihood of internal conflicts by prizing consensus.

6. SUBSTANTIVE DECISIONS OF THE APPELLATE BODY

This section moves on to an analysis of substantive Appellate Body decisions in cases filed against the most influential member states — namely, the big three of the United States, the EU, and Japan — where the potential costs of defiance are greatest for the fledgling WTO. Moreover, we concentrate on cases with large domestic political stakes, where we expect the specter of non-compliance to loom large over Appellate Body decision making. Using these criteria, four of the 19 Appellate Body rulings reported in Table 1 provide the best tests of our hypotheses about the WTO dispute resolution game. Assuming that legal precedent (H1) is less constraining in early Appellate Body rulings, and by concentrating only on cases with high domestic costs (H2), our analysis thus highlights what we consider to be the two central political dynamics in the emergent WTO system of dispute resolution — the power of defendants (H3) and, to a lesser extent, the views of influential third parties (H4).

The four cases all involve the EU or the United States as defendants.[49] Two cases were against economically powerful sectors in the EU, namely high technology

[49] As noted, the Appellate Body has decided ten cases filed against the EC, United States, and Japan. The six we exclude due to their relatively small domestic political stakes are *Japan – Alcohol Taxes*, *US – Underwear*, *US – Shirts and Blouses*, *EC – Bananas*, *EC – Poultry*, and *Japan – Agricultural Products*.

manufacturers (*EC – Computers*) and agriculture (*EC – Beef Hormones*). Two others have been of great concern to environmental groups in the United States (*US – Gasoline Standards*, *US – Shrimp*). Within our framework, these cases represent "most likely" candidates for conciliation, and we examine them as a plausibility probe for our approach. In all four cases, we contend that the Appellate Body has conciliated — to varying degrees and in different ways — with the defendant in question. Let us now briefly summarize the relevant aspects of each decision in turn.

A. Direct Conciliation: *EC – Computers*

The only case in which the Appellate Body has overturned a panel ruling of violation, thereby conciliating with the defendant most directly, is *EC – Computers*.[50] The U.S. government, on behalf of high-technology exporters, challenged the tariff reclassification of certain computer networking equipment by several EU members.[51] The EU had pledged in 1994 to reduce its tariffs on automatic data processing (ADP) machines, which ordinarily includes all computer equipment. Customs authorities in the EU later reclassified local area network (LAN) adapter cards and other items as telecommunications equipment, thereby increasing their tariffs — in some instances by almost double the original rates. U.S. authorities alleged that this unilateral revision of tariff schedules violated basic GATT provisions on tariff bindings.[52]

The original panel sided with the United States, finding that the U.S. government had "legitimate expectations" that the EU and its members would continue to treat networking equipment as ADP machines (i.e., computers) for tariff purposes. By altering the *status quo* and imposing tariffs on U.S. networking equipment less favorable than those implied by its original schedule and past practice, the EU was found to have violated its Uruguay Round commitments. The U.S. government hailed the panel report as a significant victory, noting in a press release that the case represented the largest ever

[50] The full name and citation: *European Communities – Customs Classification of Certain Computer Equipment*, Document WT/DS62/AB/R (5 June 1998).

[51] The United States filed parallel complaints against the United Kingdom and Ireland, which were consolidated into this case.

[52] GATT 1994, Article II (1).

filed by the United States in terms of the dollar value of trade, which amounted to more than $2.5 billion in annual sales.[53] U.S. Trade Representative Charlene Barshefsky commented, "We chose to challenge the EU's actions not only because of the high value of U.S. exports involved, but also to send a signal to our trading partners that they cannot use tariff reclassification to evade their WTO obligations."[54]

The EU appealed the decision to the Appellate Body, contending that the panel incorrectly placed the burden of clarifying tariff commitments on the importing party alone. Moreover, the EU objected to the way in which the panel relied on past customs practice as evidence of specific tariff agreements. The United States countered that the panel ruling was appropriate while noting that even if the Appellate Body were to modify the panel's reasoning, it should not reverse the basic finding of violation.[55] As a major exporter with an interest in stable tariff categories, Japan not surprisingly joined as a third party in support of the U.S. position.[56]

The Appellate Body overturned both the reasoning and the result of the original panel report, finding no violation on the part of the EU. Among its important holdings was that the panel inappropriately applied the concept of "reasonable expectations," which emerged in the context of non-violation complaints under Article XXIII:1(b) of GATT, to a case in which a concrete violation was alleged.[57] For complaints alleging specific violations of WTO commitments, the Appellate Body suggested that the terms of the agreement — not the expectations of a single party — should be determinative:

> [W]e disagree with the Panel that the maintenance of the security and predictability of tariff concessions allows the interpretation of a concession in the light of the "legitimate expectations" of exporting Members, i.e., their *subjective* views as to what the agreement reached during tariff negotiations was. The security and

---

[53] The press release estimated the annual sales of computer networking equipment in the EU to exceed $5 billion, of which U.S. firms accounted for more than half. See "USTR Barshefsky Announces U.S. Victory in WTO Dispute on U.S. High-Technology Exports," USTR Press Release 98-11 (5 February 1998).

[54] Ibid.

[55] *EC – Computers*, ¶ 34.

[56] *EC – Computers*, ¶ 54-6.

[57] *EC – Computers*, ¶ 80.

> predictability of tariff concessions would be seriously undermined if the concessions in Members' Schedules were to be interpreted on the basis of the subjective views of certain exporting Members alone.[58]

Moreover, the Appellate Body held that the panel incorrectly placed the burden of clarifying the extent of tariff concessions on the importing party, when that responsibility should properly rest with both parties:

> Tariff negotiations are a process of reciprocal demands and concessions, of "give and take". It is only normal that importing Members define their offers (and their ensuing obligations) in terms which suit their needs. On the other hand, exporting Members have to ensure that their corresponding rights are described in such a manner in the Schedules of importing Members that their export interests, as agreed in the negotiations, are guaranteed.[59]

The United States thus had a duty to confirm that the EU would treat networking equipment as computers rather than as telecommunications equipment, which it failed to do during a period of tariff schedule verification designed for that very purpose.

The U.S. government responded by expressing its disappointment,[60] but the terms of the 1997 Information Technology Agreement — which will supplant the disputed segments of the EU's schedule in January 2000, reducing its tariffs on nearly all electronic goods to zero — suggest that Washington had already learned from the episode even before the Appellate Body ruling. The new agreement specifies a "positive list" of covered goods (including networking equipment) that are subject to its terms no matter how they are classified for tariff purposes. The upcoming entry into force of this agreement reduces the cost of the WTO ruling to the United States, but the Appellate Body nevertheless has given U.S. competitors in Europe's sizable and growing network equipment sector additional time to build market share behind higher tariff walls.

The *EC – Computers* ruling encourages WTO member states to clarify their trade agreements, specifying the reciprocal commitments of each party, and not to rely on the Appellate Body to fill gaps by divining their expectations. In effect, the decision is a

---

[58] *EC – Computers*, ¶ 82.

[59] *EC – Computers*, ¶ 109.

[60] "USTR Responds to WTO Report on U.S. High-Technology Exports," USTR Press Release 98-59 (5 June 1998).

model of judicial restraint — and it was reported as such in international trade publications.[61] But this should not conceal the strategic conciliatory nature of this decision. When the Appellate Body chose for the first time to reverse a panel finding of violation, it was in a case against a powerful defendant, the EU, concerning one of the most important sectors of its regional economy.

This case is a classic example of tension between the United States and its major trading partner. Before the Uruguay Round, the U.S. government may very well have declared the EU in violation of its obligations and retaliated without authorization from the GATT Council. In turn, the EU would have objected to this unilateral move, and a trade skirmish may have broken out. The United States supported the WTO dispute settlement reforms to avoid such scenarios and advance the U.S. trade agenda through a multilateral process. But the Appellate Body did not rise to the occasion. Some observers fear that the ruling may invite protectionist reclassification of tariff categories by other governments,[62] but the Appellate Body proved willing to take that risk in order to avoid interjecting itself in a sensitive, high-stakes dispute between the largest WTO members.

B. Indirect Conciliation: *EC – Beef Hormones* & U.S. Environmental Cases

Conciliation by the Appellate Body can also assume more subtle forms than outright reversal of panel rulings of violation. Especially in its early years of existence, the Appellate Body is establishing significant precedents not only through its disposition of particular cases (i.e., violation or no violation), but also through the legal rationale it applies to reach that result. The legal standards and tests articulated at this early stage, in fact, will arguably prove more consequential over time than the policy recommendations issued in specific disputes. In several cases regarding sensitive domestic political issues — such as environmental, health, and safety measures — the Appellate Body has upheld the results of panel rulings while overturning, in significant ways, their legal rationale.

A prominent example of this type of indirect conciliation is the Appellate Body ruling in *EC – Beef Hormones*, a highly contentious and long-running case filed by the

[61] See "WTO Backs Off from 'Supercop' Role in Disputes over LAN Tariff Classifications," *Journal of Commerce* (22 July 1998), 11C.

[62] John Maggs, "WTO Sides with EU on Classifying Equipment," *Journal of Commerce* (5 June 1998), 3A.

United States and Canada.[63] To summarize the background, the EC imposed a ban in January 1989 on imported beef containing growth hormones widely utilized in North America. Retaliatory sanctions by the United States led to an interim agreement, but the matter remained unresolved and was later initiated as a dispute in the WTO. The Uruguay Round accord in question was the Sanitary and Phytosanitary Standards (SPS) Agreement, whose terms were negotiated in the context of this ongoing dispute. The United States alleged that the EC's sanitary measures violated WTO rules in several respects. The original panel agreed, ruling that the ban was not properly based on a scientific risk assessment or on existing international standards. Moreover, the panel held that its arbitrary levels of protection were discriminatory and constituted a disguised restriction on international trade.[64]

The EC appealed on multiple grounds, contending *inter alia* that the panel incorrectly placed the burden of proof on the party imposing the sanitary measure; that it misinterpreted Articles 3.1 and 3.3 of the SPS Agreement regarding the harmonization of international standards; that it failed to require the United States to make a *prima facie* case regarding the EC's alleged failure to conduct a risk assessment consistent with Article 5.1; and that it erred by refusing to justify the EC measures under the precautionary principle, a doctrine of customary international law that encourages governments to err on the side of protection in the face of scientific uncertainty. The United States and Canada largely endorsed the panel ruling but asked that the Appellate Body also declare the EC ban in violation of other SPS Agreement provisions. Finally, three third parties — Australia, New Zealand, and Norway — offered various minor objections, more to the reasoning of the panel ruling than to the results.[65]

---

[63] The U.S. and Canadian complaints were filed separately but reviewed by the same panel and consolidated at the appellate stage. The full case name and citation: *EC Measures Concerning Meat and Meat Products (Hormones),* WTO Document WT / DS26 / AB / R (16 January 1998).

[64] The relevant SPS Agreement provisions are Article 5.1 on risk assessment; Articles 3.1 and 3.3 on international standards; and Article 5.5 on disguised restrictions on international trade. For the text, see GATT Secretariat 1994.

[65] For summaries of the arguments of the parties, see *EC – Beef Hormones,* Section II.

The Appellate Body rejected the broadest EC claims and upheld the basic panel ruling of violation regarding Article 5.1 of the SPS Agreement.[66] This provision requires that protective measures be based on a scientific risk assessment, a test the EC failed to meet. Significantly, however, the Appellate Body reversed or modified a number of other panel findings in accordance with arguments by the EC, thereby conciliating in part with the defendant. In several respects, the reasoning it applied is dramatically more deferential to governments imposing protective measures than the original panel report, opening the door to legitimate trade restrictions based on health and safety considerations.

Let us briefly summarize the clearest instances of conciliation. First, the Appellate Body reversed the panel's assignment of the burden of proof. The panel had placed the onus on the EC to demonstrate that its protective measures qualified as exceptions if not in line with international standards. The Appellate Body, citing the framework it set forth in *US – Shirts and Blouses*, instead assigned the initial burden of proof on the United States to make a *prima facie* case of violation. By doing so, the Appellate Body aimed not to impose a penalty on governments that establish safety standards higher than international standards, holding: "[I]t is clear . . . that a decision of a Member not to conform a particular measure with an international standard does not authorize imposition of a special or generalized burden of proof . . . which may, more often than not, amount to a *penalty*."[67]

Second, the Appellate Body reversed the panel's conclusion that the EC had violated Article 3.1 of the SPS Agreement, which encourages harmonization of international standards. The panel had construed this provision as a general obligation and interpreted Article 3.3, which deals with countries that seek higher levels of protection, as a narrow exception to it. The Appellate Body instead read Article 3.3 as providing WTO member states an "autonomous right" to impose protective measures that

[66] Among the holdings adverse to the EC, the Appellate Body ruled that the panel had not failed to make an objective assessment of the facts; that it had applied the appropriate standard of review; and that the precautionary principle was embodied in the text of the SPS Agreement and cannot override its terms.

[67] *EC – Beef Hormones*, ¶ 102 (emphasis in original).

are higher than international standards. Adherence to international standards is one option, ruled the Appellate Body, but it is not the only option:

> Under Article 3.1 of the *SPS Agreement*, a Member may choose to establish an SPS measure that is based on the existing relevant international standard, guideline or recommendation. Such a measure may adopt some, not necessarily all, of the elements of the international standard. . . .
>
> Under Article 3.3 of the *SPS Agreement*, a Member may decide to set for itself a level of protection different from that implicit in the international standard, and to implement or embody that level of protection in a measure not "based on" the international standard. The Member's appropriate level of protection may be higher than that implied in the international standard. The right of a Member to determine its own appropriate level of sanitary protection is an important right.[68]

This right to establish differential standards is subject to an important limitation, however, in that member states must offer some scientific justification. But in a third example of conciliation, the Appellate Body relaxed the scientific standards that must be met, reversing the panel's strict requirements. The obligation to conduct risk assessments, according to the Appellate Body, does not "exclude *a priori*, from the scope of the risk assessment, factors which are not susceptible of quantitative analysis by the empirical or experimental laboratory methods commonly associated with the physical sciences."[69] Moreover, the Appellate Body reversed the panel's finding that member states must take the risk assessment into account when framing the measure. Instead, the Appellate Body interpreted the key phrase "based on" to require only that there be a substantive rational relationship between the measure and the scientific test.[70] This aspect of the ruling is important because the SPS Agreement applies to measures established before the Uruguay Round's entry into force.

Finally, in justifying its reading of Article 3.1 and the "based on" test, the Appellate Body invoked the interpretive principle of *in dubio mitius*, an international legal concept that is highly deferential to sovereign states. The definition cited in the ruling itself provides that, "If the meaning of a term is ambiguous, that meaning is to be

---

[68] *EC – Beef Hormones*, ¶ 171-2.

[69] *EC – Beef Hormones*, ¶ 253 (j).

[70] *EC – Beef Hormones*, ¶ 180-93.

preferred which is less onerous to the party assuming an obligation." The Appellate Body's holding on this issue merits quoting at some length, because its defense of the right to impose differential standards is the best example of conciliation in this case:

> It is clear to us that harmonization of SPS measures of Members on the basis of international standards is projected in the Agreement, as a *goal*, yet to be realized *in the future*. To read Article 3.1 as requiring Members to harmonize their SPS measures *by conforming those measures with international standards*, guidelines and recommendations, *in the here and now*, is, in effect, to vest such international standards, guidelines and recommendations (which are . . . *recommendatory* in form and nature) with *obligatory* force and effect. The Panel's interpretation of Article 3.1 would, in other words, transform those standards, guidelines and recommendations into binding *norms*. But, as already noted, the *SPS Agreement* itself sets out no indication of any intent on the part of the Members to do so. We cannot lightly assume that sovereign states intended to impose upon themselves the more onerous, rather than the less burdensome, obligation by mandating *conformity* or *compliance with* such standards, guidelines and recommendations. To sustain such an assumption and to warrant such a far-reaching interpretation, treaty language far more specific and compelling than that found in Article 3 of the *SPS Agreement* would be necessary.[71]

As in *EC – Computers*, the Appellate Body here exercised a level of restraint that it found lacking in the panel report with regard to the obligations assumed by sovereign states. The *EC – Beef Hormones* ruling also openly endorses the right of member states, subject to basic scientific tests, to impose restrictions on trade in the interest of promoting health and safety, a right the original panel report had called into question. In this respect it resembles the two decisions on U.S. environmental measures to which we now turn. In both cases, *US – Gasoline Standards* and *US – Shrimp*, the Appellate Body upheld the basic panel ruling of violation, but rejected its rationale, thereby expanding the discretion of member states to enact trade restrictions in pursuit of environmental objectives.

The apparent conflict between trade liberalization and environmental protection contributed in large part to the grassroots lobbying campaign against U.S. ratification of the Uruguay Round agreements. Environmental groups contended that unaccountable bureaucrats in Geneva would sacrifice hard-won domestic legislation in the interest of international free trade, declaring U.S. environmental laws to be inconsistent with WTO

[71] *EC – Beef Hormones*, ¶ 165 (emphasis in original).

obligations — just as GATT panels had done in the past.[72] The treaty provision that sets the basic standard for resolving conflict between trade and environmental objectives is Article XX of GATT, the relevant parts of which provide the following:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in the Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: . . .
>
> (b) necessary to protect human, animal or plant life or health; . . .
>
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption. . . .[73]

In a series of cases under GATT, panels interpreted these provisions narrowly, making the Article XX criteria "a difficult, if not impossible, burden to meet" for governments aiming to defend their domestic laws under these exceptions [Ala'i 1999, 1137]. How these standards would be interpreted under the WTO was a source of considerable anxiety among environmental groups in the United States after the Uruguay Round narrowly won approval in Congress.

The first case to reach the Appellate Body, *US – Gasoline Standards*, dealt with precisely this issue.[74] In this dispute, Brazil and Venezuela challenged regulations imposed by the U.S. Environmental Protection Agency (EPA) pursuant to the Clean Air Act of 1990. The regulations aimed to ensure that gasoline available for sale in the United States would be no dirtier than that available in 1990.[75] Toward that end, the EPA

---

[72] The most prominent example is the "tuna-dolphin" controversy engendered by the U.S. Marine Mammal Protection Act of 1972. Its enforcement led to two unadopted panel reports in the early 1990s, both of which found the U.S. legislation inconsistent with GATT. For summaries see Ala'i 1999, 1145-53.

[73] For the full text, see GATT Secretariat 1994.

[74] The full case name and citation is *United States – Standards for Reformulated and Conventional Gasoline*, WTO Document WT/DS2/AB/R (29 April 1996).

[75] The EPA regulations cover pollutants such as sulfur, olefins, and T-90, among others. For reformulated gasoline sold in the least clean urban areas, the EPA rules also establish performance specifications and content requirements for oxygen, benzene, lead, and manganese. Bhala 1999b, 103-6.

established different methodologies for refineries to use in defining that 1990 baseline and thereby measuring their compliance. The crux of the dispute was that the EPA regulations allowed U.S. and certain foreign refineries to use individual baselines, derived from the particular circumstances of their facilities, while requiring most foreign refineries to apply a much less flexible and often less favorable statutory baseline.[76]

Brazil and Venezuela challenged the EPA regulations as a violation of the national treatment principle of GATT. The United States contended that the regulations were justifiable as exceptions under Article XX, citing paragraphs (b) on the preservation of health, (d) on the implementation of domestic laws,[77] and (g) on the conservation of exhaustible natural resources. The original panel sided with Brazil and Venezuela, declaring the U.S. measures to be inconsistent with the national treatment provisions of Article III:4, as imported gasoline suffered from sales conditions less favorable than those accorded to domestic gasoline. The panel held that the differential baseline establishment rules did not qualify under any of the Article XX exceptions, as they were not "necessary to protect human, animal or plant life or health," nor were they "necessary to secure compliance" with domestic laws consistent with GATT. Finally, the EPA regulations were not primarily "relating to" the conservation of an exhaustible natural resource, even though clean air did qualify as such a resource.[78]

The United States focused its appeal exclusively on paragraph (g) and the panel's general interpretation of Article XX, implicitly accepting the panel's findings on the other exceptions. As third participants, the EC and Norway both expressed their support for the panel's ruling on paragraph (g), having argued before the panel that exceptions to GATT

[76] Domestic refineries and foreign refineries that shipped at least 75 per cent of their gasoline to the U.S. market in 1990 had three alternative methodologies. Method 1 utilized quality data and volume records from 1990. Where that information was not available, Method 2 relied on blendstock quality data and volume records from 1990. Lacking that information, Method 3 utilized alternative sets of post-1990 data to estimate an individual baseline. Under no circumstances was the statutory baseline imposed on these refineries, provided they were operating in 1990. For most overseas refineries, however, the statutory baseline was automatically imposed whenever Method 1 data from 1990 were unavailable.

[77] Article XX (d) provides an exception for measures "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement...." GATT Secretariat 1994.

[78] *US – Gasoline Standards*, 7-8.

should be strictly interpreted.[79] The line of reasoning in the original panel report was largely "identical" to that applied in a number of earlier GATT panel reports [Ala'i 1999, 1156]. Nevertheless, the Appellate Body "departed significantly" from the panel's analysis [ibid., 1157], conciliating with the United States on a number of issues while upholding the ruling of violation.

First, the Appellate Body reversed as an "error in law" the panel's view that the EPA regulations did not fulfill the requirements of paragraph (g). Instead, it held that the regulations qualified as measures "relating to" the conservation of exhaustible natural resources. As in previous GATT rulings, the original panel interpreted the phrase "relating to" to mean "primarily aimed at," a relatively strict test. The Appellate Body left that test intact but noted, significantly, that "the phrase 'primarily aimed at' is not itself treaty language and was not designed as a simple litmus test for inclusion or exclusion from Article XX (g)."[80] In the Appellate Body's view, the baseline establishment rules were legitimately related to the objective of clean air. The Appellate Body also contradicted the panel in finding that the regulations were "made effective in conjunction with restrictions on domestic production." The original panel, again following prior GATT rulings, had interpreted "in conjunction with" as requiring an empirical effects test, such that any measure found to have differential effects on foreign and domestic producers failed to qualify. The Appellate Body found instead that Article XX (g) requires "*even-handedness*," not "identical treatment," making it easier for measures to qualify as exceptions.[81] In reversing the panel ruling on paragraph (g), the Appellate Body rejected third-party arguments by the EC and Norway.

Second, the Appellate Body reversed the panel's general interpretation of Article XX, in particular the relationship between the list of exceptions and its introductory paragraph or *chapeau*. It held that the panel incorrectly confused the question of whether a measure violated a substantive provision of GATT — in this case, Article III:4 on national treatment — with the separate question of whether that violation was justifiable

[79] *US – Gasoline Standards*, 10.

[80] *US – Gasoline Standards*, 18-19.

[81] *US – Gasoline Standards*, 20-21 (emphasis in original).

under the *chapeau* of Article XX, which prohibits measures that constitute "arbitrary or unjustifiable discrimination" or a "disguised restriction" on trade. In the process, the panel threatened to render the exceptions of Article XX completely meaningless, a result the Appellate Body clearly sought to avoid:

> The enterprise of applying Article XX would clearly be an unprofitable one if it involved no more than applying the standard used in finding that the baseline establishment rules were inconsistent with Article III:4. That would also be true if the finding were one of inconsistency with some other substantive rule of the *General Agreement*. The provisions of the chapeau cannot logically refer to the same standard(s) by which a violation of a substantive rule has been determined to have occurred. To proceed down that path would be both to empty the chapeau of its contents and to deprive the exceptions in paragraphs (a) to (j) of meaning.[82]

To give panels specific guidance, the Appellate Body defined a two-tiered test for cases involving Article XX. The first question to address is whether the disputed measure fits within the one of the exceptions listed in paragraphs (a) to (j). If it does not, the measure cannot be justified under Article XX. If it does, the second question is whether the manner in which the measure is applied meets the requirements of the *chapeau*. In this case, the panel made errors at both stages, finding the EPA regulations did not qualify under paragraph (g) and then failing to address the requirements of the *chapeau*. In the end, with clear support from the EC and Norway, the Appellate Body ruled that the U.S. measures were inconsistent with the *chapeau* because they were unjustifiably discriminatory and constituted a disguised restriction on trade.

Nevertheless, the *US – Gasoline Standards* ruling "expanded the scope" of Article XX by requiring panels to take a case-by-case approach to measures that may qualify under its exceptions [Ala'i 1999, 1160]. Each paragraph defines a separate standard, and the Appellate Body instructed panels not to expect "the same kind or degree of connection or relationship between the measure under appraisal and the state interest or policy sought to be promoted or realized."[83] As crafted, the EPA regulations did not qualify, but the Appellate Body went out of its way to signal to U.S. environmental groups that the WTO was not hostile to environmental objectives. At the end of its

[82] *US – Gasoline Standards*, 22-23.

[83] *US – Gasoline Standards*, 17-18.

findings and conclusions, the Appellate Body attached this rather extraordinary declaration, lest its ruling be misinterpreted:

> It is of some importance that the Appellate Body point out what this does *not* mean. It does not mean, or imply, that the ability of any WTO Member to take measures to control air pollution or, more generally, to protect the environment, is at issue. That would be to ignore the fact that Article XX of the *General Agreement* contains provisions designed to permit important state interests — including the protection of human health, as well as the conservation of exhaustible natural resources — to find expression. The provisions of Article XX were not changed as a result of the Uruguay Round of Multilateral Trade Negotiations. Indeed, in the preamble to the *WTO Agreement* and in the *Decision on Trade and Environment*, there is specific acknowledgement to be found about the importance of coordinating policies on trade and the environment. WTO Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement.[84]

With this statement, the Appellate Body effectively pronounced that its reading of Article XX would be more accommodating than that of previous GATT panels, whose rulings had provoked intense opposition from environmental groups in the United States and elsewhere. The new standard was soon tested in a second case, *US – Shrimp*, with nearly identical results.[85] India, Malaysia, Pakistan, and Thailand jointly filed a complaint against U.S. legislation banning imports of shrimp harvested in a manner that "may adversely affect certain sea turtles," which qualify as an endangered species under U.S. law.[86] Since 1990 all U.S. shrimp trawlers have been required to use Turtle Excluder Devices (TEDs) when working in areas inhabited by endangered sea turtles. This provision, known as Section 609, was later expanded by Congress to apply also to foreign shrimp trawlers, prompting the dispute with several Asian exporters.[87]

---

[84] *US – Gasoline Standards*, 30.

[85] The full case name and citation is *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Document WT/DS58/AB/R (12 October 1998).

[86] The relevant law is Section 609 of Public Law 101-162, with all its implementing regulations, guidelines, and judicial rulings. See Endangered Species Act of 1973, sec. 609, *16 U.S.C. secs. 1531*, 1537 (1989).

[87] The U.S. Secretary of State has the authority to grant certificates that waive certain countries from the import ban if one of two conditions is met. First, countries whose harvesting poses no threat to sea turtles qualify for exemptions. Second, countries that adopt a program similar to U.S. regulations — with comparable rates of harm to sea turtles — also receive certification.

The complainants alleged that Section 609 was an illegitimate extension of extraterritorial jurisdiction by the U.S. government that violated GATT's prohibition on quantitative restrictions. The United States contended that the regulations were not discriminatory, with identical standards for foreign and domestic shrimp trawlers, and that the program was justified as an exception under paragraphs (g) or (b) of Article XX. The original panel sided firmly with the Asian complainants, ruling that the U.S. measures, "irrespective of their environmental purpose, were clearly a threat to the multilateral trading system"[88] — especially if other countries were to adopt comparable restrictions on a unilateral basis.

As in the gasoline standards case, the Appellate Body upheld the result of this panel ruling while assertively rejecting its rationale. With support from two influential third parties, the EC and Australia, the Appellate Body chided the panel for ignoring the simple two-step test it defined in *US – Gasoline Standards*. The panel actually inverted the two steps, first reviewing whether the measure met the general criteria of the *chapeau*. Having found Section 609 to represent unjustifiable discrimination and a disguised restriction on trade, the panel never considered the specific requirements of the exceptions listed in Article XX. In response, the Appellate Body wrote:

> The sequence of steps . . . in the analysis of a claim of justification under Article XX reflects, not inadvertence or random choice, but rather the fundamental structure and logic of Article XX. The Panel appears to suggest, albeit indirectly, that following the indicated sequence of steps, or the inverse thereof, does not make any difference. To the Panel, reversing the sequence set out in *United States - Gasoline* "seems equally appropriate." We do not agree.[89]

Applying the two steps itself, the Appellate Body found the U.S. regulations to satisfy the requirements of paragraph (g). Sea turtles, it ruled, are "exhaustible natural resources," and the certification process of Section 609 — although unilateral — was properly "related to" the conservation of sea turtles. Similarly, the U.S. legislation was properly implemented "in conjunction with" restrictions on domestic shrimp trawlers.[90]

---

[88] *US – Shrimp*, ¶ 12.

[89] *US – Shrimp*, ¶ 119.

[90] *US – Shrimp*, ¶ 132-4, 141.

Turning to the *chapeau*, the Appellate Body found that Section 609 unjustifiably discriminated between countries where similar conditions prevail in two respects. First, it required other WTO members to adopt "essentially the same" regulatory program as the United States — namely, the use of TEDs — when other, more flexible approaches that accommodate the particular circumstances of different member states might prove equally effective.[91] Second, the U.S. regulations did not allow the import of shrimp harvested by commercial vessels using TEDs if the vessels in question were trawling in the waters of countries that have not been certified by the State Department.[92] This result was consistent with the stated positions of no fewer than five third parties: Australia, Ecuador, the EC, Hong Kong, and Nigeria.[93]

Despite its ruling of violation, the Appellate Body again went to some lengths to signal its future support of properly crafted environmental policies, with explicit encouragement from the EC and Australia. It clearly rejected the panel's argument that unilateral measures such as Section 609 fall outside the scope of Article XX. On the contrary, the Appellate Body noted that it expected unilateral measures to be a common theme in future Article XX cases. This passage suggests that the Appellate Body's principal concern, as in the gasoline standards case, was that the panel ruling could be read to render the exceptions of Article XX meaningless:

> In the present case, the Panel found that the United States measure at stake fell within that class of excluded measures because Section 609 conditions access to the domestic shrimp market of the United States on the adoption by exporting countries of certain conservation policies prescribed by the United States. It appears to us, however, that conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX. Paragraphs (a) to (j) comprise measures that are recognized as *exceptions to substantive obligations* established in the GATT 1994, because the domestic policies embodied in such measures have been recognized as important and legitimate in character. It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies (although covered in principle by one or another of the

[91] *US – Shrimp*, ¶ 161-4.

[92] *US – Shrimp*, ¶ 165.

[93] *US – Shrimp*, ¶ 53-78.

> exceptions) prescribed by the importing country, renders a measure *a priori* incapable of justification under Article XX. Such an interpretation renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply.[94]

If the Appellate Body had instead interpreted the specific exceptions of Article XX in a manner that left them "inutile," the result may or may not have been "abhorrent" to basic principles of treaty interpretation. After all, a series of GATT and WTO panels *did just that* over the years, presumably with some legal basis. What seems clear, however, is that such a result would have been *politically* abhorrent to influential environmental groups in the United States and elsewhere. The opposition of these groups, if intensified, would call into question the legitimacy of the Appellate Body and the WTO system. As in the gasoline standards case, the Appellate Body offered a sign of its willingness to accommodate environmentalists in a none too subtle coda to this ruling:

> In reaching these conclusions, we wish to underscore what we have *not* decided in this appeal. We have *not* decided that the protection and preservation of the environment is of no significance to the Members of the WTO. Clearly, it is. We have *not* decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should. And we have *not* decided that sovereign states should not act together bilaterally, plurilaterally or multilaterally, either within the WTO or in other international fora, to protect endangered species or to otherwise protect the environment. Clearly, they should and do.[95]

To summarize the evidence of indirect conciliation, these three remarkably similar decisions by the Appellate Body seem to establish a common pattern. All three disputes involve domestic regulatory regimes designed to safeguard health or the environment in the United States or the EU, where public anxiety about the impact of free trade on such standards is acute. In all three cases, the Appellate Body upheld the panel ruling of violation while sternly rejecting the legal rationale. In its place the Appellate Body offered less strict standards and conciliatory words regarding the legal viability of properly crafted health, safety, and environmental measures that restrict free trade. In the words of one legal scholar, the Appellate Body rulings in *US – Gasoline Standards* and

[94] *US – Shrimp*, ¶ 121 (emphasis in original).

[95] *US – Shrimp*, ¶ 185 (emphasis in original).

US – Shrimp suggest that environmentalists may have lost the battle, but "the prospects look good for winning the war" [Ala'i 1999, 1171].[96]

7. CONCLUSION

The WTO system of dispute resolution represents a quantum leap in the judicialization of international trade. Under the previous GATT regime, discerning violations and justifying retaliatory sanctions were often matters for national — not international — authorities to decide. The GATT panel system failed, resulting in deadlock, in numerous cases where powerful GATT signatories had fundamental differences over what constituted legal behavior. The EU, Japan, and the United States clashed in celebrated battles over free trade, fair trade, and the criteria to apply in determining whether national regulatory regimes constitute illegitimate non-tariff barriers.

All of this formally changed with the completion of the Uruguay Round and the establishment of the WTO's dispute resolution procedure, creating the Appellate Body as the high court of international trade. In time, the Appellate Body may come to act as legal scholars hope it will — impartially and authoritatively applying the law against sovereign states that accept its rulings as binding. But in the short term, we believe it more likely that Appellate Body decision making will be strategic and often political. Specifically, we expect the Appellate Body to be reluctant to make strong and unequivocal adverse rulings against powerful WTO members on issues of considerable domestic political salience.

This paper has proposed a general framework for thinking about the politics of dispute resolution in the WTO that generates a specific set of hypotheses about the conditions under which the Appellate Body will "conciliate" with defendants. We have then tested the hypothesis most germane in the current period — that the likelihood of conciliation increases where the defendant is politically powerful — against the extant set of Appellate Body decisions. The evidence is at least partially consistent with our expectations. There is one clear case in which the Appellate Body reversed an earlier *ad hoc* panel ruling of violation because it seems that the defendant — the EU — would

[96] For a similar view of these cases in contrast to previous GATT rulings, see Kelemen 1999.

have incurred considerable costs in a large and growing sector of its economy. To support the panel ruling in this case would have risked a damaging face-off between the Appellate Body and the EU, and the former chose to obviate this possibility.

We have also found considerable evidence of subtler and arguably more significant forms of conciliation. In particular, the Appellate Body has been keen to defend the ability of sovereign states to impose regulations that restrict trade, especially where the measures are designed to impose higher environmental, health, or safety standards than is the international norm (or than exist in the complainant country). This seems very sensible decision making on the part of the Appellate Body. It simply cannot risk taking strong free trade stances in cases where domestic political factors make acceptance of such rulings untenable.

We by no means view our paper as the last word on the politics of dispute resolution in the WTO. Far from it. We have tried, however, to propose a way of thinking about the behavior of the Appellate Body that may shed light on factors that influence its decision making — beyond the strictly legal considerations so prominent in international law journals. We do not dispute that the nascent WTO is potentially a very important multilateral institution for the resolution of disputes. But ensuring that it cements this role is likely to require considerable strategic acuity on the part of its Appellate Body.

BIBLIOGRAPHY

Ala'i, Padideh. 1999. Free Trade or Sustainable Development? An Analysis of the WTO Appellate Body's Shift to a More Balanced Approach to Trade Liberalization. *American University International Law Review* 14:1129-71.

American Bar Association. 1994. Uruguay Round. *International Lawyer* 28 (2):565-72.

Bello, Judith H. 1997. Some Practical Observations About WTO Settlement of Intellectual Property Disputes. *Virginia Journal of International Law* 37 (Winter):357-67.

Bhala, Raj. 1999a. The Myth about *Stare Decisis* and International Trade Law. *American University International Law Review* 14:845.

_____. 1999b. The Precedent Setters: *De Facto Stare Decisis* in WTO Adjudication. *Florida State University Journal of Transnational Law and Policy* 1 (forthcoming).

Burley, Anne-Marie, and Walter Mattli. 1993. Europe Before the Court: A Political Theory of Legal Integration. *International Organization* 47 (Winter):41-76.

Busch, Marc L. 1999. Democracy, Consultation, and the Paneling of Disputes Under GATT 1947. Paper presented at the Annual Meeting of the American Political Science Association, Atlanta, Georgia (September).

Cooter, Robert D., and Tom Ginsburg. 1996. Comparative Judicial Discretion. *International Review of Law and Economics* 16:295-313.

Ferejohn, John, and Charles Shipan. 1990. Congressional Influence on Bureaucracy. *Journal of Law, Economics and Organization* 6:1-20.

Garrett, Geoffrey. 1992. International Cooperation and Institutional Choice: The European Community's Internal Market. *International Organization* 46:533-560.

_____. 1995. The Politics of Legal Integration in the European Union. *International Organization* 49:171-81.

Garrett, Geoffrey, R. Daniel Kelemen, and Heiner Schulz. 1998. The European Court of Justice, National Governments, and Legal Integration in the European Union. *International Organization* 52 (1):149-76.

Garrett, Geoffrey, and Barry R. Weingast. 1993. Ideas, Interests and Institutions: Constructing the European Community's Internal Market. In *Ideas and Foreign*

Policy, edited by Judith Goldstein and Robert O. Keohane. Ithaca: Cornell University Press.

GATT Secretariat. 1994. *The Results of the Uruguay Round Trade Negotiations: The Legal Texts*, reprinted in 33 *International Legal Materials* 1140 (1994).

Hudec, Robert E. 1993. *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System*. Salem, New Hampshire: Butterworth.

_____. 1999. The New WTO Dispute Settlement Procedure: An Overview of the First Three Years. *Minnesota Journal of Global Trade* 8 (Winter):1-53.

Jackson, John H. 1978. The Crumbling Institutions of the Liberal Trade System. *Journal of World Trade Law* 12:93-106.

_____. 1990. *Restructuring the GATT System*. New York: Council on Foreign Relations.

Kelemen, R. Daniel. 1999. The Limits of Judicial Power: Trade-Environment Disputes in the EU, NAFTA, and GATT/WTO. Paper presented at the Annual Meeting of the International Studies Association, Washington, D.C. (February).

Montaña i Mora, Miquel. 1993. A GATT with Teeth: Law Wins over Politics in the Resolution of International Trade Disputes. *Columbia Journal of Transnational Law* 31 (1):103-80.

Smith, James McCall. 2000. The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts. *International Organization* (forthcoming).

Steinberg, Richard H. 1995. Consensus Decision-Making at the GATT and WTO: Linkage and Law in a Neorealist Model of Institutions. Berkeley Roundtable on the International Economy Working Paper 72 (January).

Stewart, Terence P. (Ed.) 1993. *The GATT Uruguay Round: A Negotiating History (1986-1992), Volume II -- Commentary*. Boston: Kluwer.

Stone Sweet, Alec. 1999. Judicialization and the Construction of Governance. *Comparative Political Studies* 32 (2):147-84.

Tsebelis, George, and Geoffrey Garrett. 1999. The Institutional Determinants of Supranationalism in the European Union. Manuscript. UCLA.

Young, Michael K. 1995. Dispute Resolution in the Uruguay Round: Lawyers Triumph over Diplomats. *International Lawyer* 29 (5):389-409.

Table 1. WTO Appellate Body Reports (1 January 1995 - 15 August 1999)

CASE NAME	DATE [a]	DEFENDANT and ISSUE [b]	COMPLAINANTS	THIRD PARTIES	PANEL	APPELLATE BODY
US – Gasoline Standards	4-29-96	US – Standards for Reformulated and Conventional Gasoline	Venezuela, Brazil	EC, Norway	violation	upheld, but on modified basis
Japan – Alcohol Taxes	10-4-96	Japan – Taxes on Alcoholic Beverages	EC, US, Canada	none	violation	upheld
US – Underwear	2-10-97	US – Restrictions on Imports of Cotton and Man-made Fibre Underwear	Costa Rica	India	violation	upheld, accepting narrow appeal by complainant on retroactivity
Brazil – Coconut	2-21-97	Brazil – Measures Affecting Desiccated Coconut	Philippines	EC, US	no violation	upheld
US – Shirts and Blouses	4-25-97	US – Measure Affecting Imports of Woven Wool Shirts and Blouses from India	India	none	violation	upheld, rejecting narrow appeal by complainant
Canada – Periodicals	6-30-97	Canada – Certain Measures Concerning Periodicals	US	none	violation	upheld
EC – Bananas	9-9-97	EC – Regime for the Importation, Sale and Distribution of Bananas	US, Ecuador, Honduras, Guatemala, Mexico	Japan, Venezuela, Ghana & 14 others	violation	upheld, but on modified basis
India – Patents	12-19-97	India – Patent Protection for Pharmaceutical and Agricultural Chemical Products	US	EC	violation	upheld
EC – Beef Hormones	1-16-98	EC – Measures Concerning Meat and Meat Products (Hormones)	US, Canada	Australia, Norway, New Zealand	violation	upheld, but on modified basis
Argentina – Footwear	3-27-98	Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel & other Items	US	EC	violation	upheld
EC – Computers	6-5-98	EC – Customs Classification of Certain Computer Equipment	US	Japan	violation	reversed, finding no violation
EC – Poultry	7-13-98	EC – Measures Affecting the Importation of Certain Poultry Products	Brazil	US, Thailand	violation	upheld in part [c]
US – Shrimp	10-12-98	US – Import Prohibition of Certain Shrimp and Shrimp Products	India, Malaysia, Pakistan, Thailand	EC, Nigeria, Ecuador, Australia, Hong Kong	violation	upheld, but on modified basis
Australia – Salmon	10-20-98	Australia – Measures Affecting Importation of Salmon	Canada	EC, US, India, Norway	violation	upheld, but on modified basis
Guatemala – Cement	11-2-98	Guatemala – Anti-dumping Investigation Regarding Portland Cement from Mexico	Mexico	US	violation	dismissed, as the matter was not properly before the panel
Korea – Alcohol Taxes	1-18-99	Korea – Taxes on Alcoholic Beverages	US, EC	Mexico	violation	upheld
Japan – Agricultural Products	2-22-99	Japan – Measures Affecting Agricultural Products	US	EC, Brazil	violation	upheld
Brazil – Aircraft	8-2-99	Brazil – Export Financing Programme for Aircraft	Canada	EC, US	violation	upheld
Canada – Aircraft	8-2-99	Canada – Measures Affecting the Export of Civilian Aircraft	Brazil	EC, US	violation	upheld

[a] Date on which the Appellate Body report was issued, not adopted.

[b] The formal WTO name for each case.

[c] Both decisions rejected the bulk of Brazil's allegations, but the Appellate Body upheld one narrow finding of violation regarding the EC's use of representative prices in calculating additional safeguard duties. It reversed another narrow panel finding of violation by the EC regarding the trigger price for safeguards.

SOURCE: Panel and Appellate Body reports are available online at http://www.wto.org/wto/dispute/distab.htm.