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DISPUTE SETTLEMENT

WORLD TRADE ORGANIZATION

3.3 Appellate Review



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NOTE

The Course on Dispute Settlement in International Trade, Investment and Intellectual Property consists of forty modules.

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WHAT YOU WILL LEARN

Module 3.2 in this Course deals with the panel process of the WTO dispute settlement system, i.e., the process of adjudication of international trade disputes by the WTO panels. This Module deals with the process of appellate review of the reports of those panels by the Appellate Body of the WTO.

The first Section of this Module concerns the establishment and composition of the Appellate Body, the appointment of the Members and the requirements concerning professional qualifications, nationality, availability and impartiality and independence. It also deals with the institutional structure of the Appellate Body, i.e., its divisions and their composition, its chairperson and its Secretariat. The second Section addresses the central issue of the scope of appellate review in WTO dispute settlement. It covers who may appeal, what can be appealed and what the mandate of the Appellate Body is. The third Section deals with some key features of Appellate Body proceedings, such as the time frame for the proceedings and their confidential nature. It also addresses the controversial issue of *amicus curiae* briefs. The fourth Section describes the various steps of the Appellate Body proceedings, from the notice of appeal to the circulation of the report. Finally, the fifth Section deals with the use made by developing country Members of the appellate review process and examines whether there are any rules providing for special and differential treatment for developing country Members in this context.

1. THE APPELLATE BODY

Objectives

On completion of this section, the reader will be able:

- **to describe the composition and institutional structure of the WTO's highest judicial organ, the Appellate Body.**
- **to list the criteria which the DSB will apply in deciding on the appointment of Appellate Body Members.**
- **to enumerate the requirements of availability, independence and impartiality which Members have to meet throughout their term in office.**
- **to discuss the role of divisions of the Appellate Body in the appellate review process.**

1.1 Establishment of the Appellate Body

Article 17.1 DSU

The Appellate Body was established in February 1995 by the WTO Dispute Settlement Body (the “DSB”) as a standing international tribunal to hear appeals from WTO panel reports.¹ The establishment of the Appellate Body was provided for in Article 17.1 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the “DSU”), which is an integral part of the 1994 *Marrakesh Agreement Establishing the World Trade Organization*.² The establishment of the Appellate Body, and with it the introduction of the possibility of appellate review of panel reports, is one of the main innovations to the old GATT dispute settlement system brought about by the Uruguay Round of Multilateral Trade Negotiations.³

1.2 Composition of the Appellate Body

Article 17.1 DSU

Article 17.1 of the DSU provides that the Appellate Body shall be composed of seven persons. These persons are commonly referred to as Members of the Appellate Body.

1.2.1 Appointment

The Appellate Body Members are appointed by the Dispute Settlement Body (the “DSB”), a political body in which all WTO Members are represented. The decision to appoint persons to the Appellate Body is taken by consensus among all WTO Members. Appellate Body Members are appointed for a term of four years which can be renewed once.

¹ Decision Establishing the Appellate Body, *Recommendations by the Preparatory Committee for the WTO approved by the Dispute Settlement Body on 10 February 1995, WT/DSB/1, dated 19 June 1995.*

² See Module 3.1.

³ Ibid.

1.2.2 Required Professional Qualifications

Article 17.3 DSU

With regard to the qualifications of the Members of the Appellate Body, Article 17.3 of the DSU provides:

The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally.

The DSU does not specifically state that Appellate Body Members must be trained as lawyers. They can be from any professional background as long as they have demonstrated expertise in law, international trade and/or the subject matter of the covered agreements generally. To date, most Appellate Body Members have been senior government officials, university professors, practising lawyers or senior judges before joining the Appellate Body. All but two Members thus far had a professional and academic background in law.

1.2.3 Broadly Representative of Membership in the WTO

Article 17.3 DSU

Article 17.3 of the DSU also provides that the Appellate Body membership shall be “broadly representative of membership in the WTO”. Reflecting this requirement, the first Appellate Body Members, appointed in 1995, were from Egypt, Japan, Germany, New Zealand, the Philippines, the United States and Uruguay. There have always been three or four nationals of developing country Members among the seven Members of the Appellate Body. The composition of the Appellate Body in 2002 is as follows:

Professor Georges Michel Abi-Saab, Egypt, appointed 2000.
Mr. James Bacchus, United States, appointed 1995.
Professor Luiz Baptista, Brazil, appointed 2001.
Mr. A V Ganesan, India, appointed 2000.
Mr. John Lockhart, Australia, appointed 2001.
Professor Giorgio Sacerdoti, Italy, appointed 2001.
Professor Yasuhei Taniguchi, Japan, appointed 2000.

1.2.4 Availability

Article 17.3 DSU

Article 17.3 of the DSU provides:

All persons serving on the Appellate Body shall be available at all times and on short notice, and shall stay abreast of dispute settlement activities and other relevant activities of the WTO.

The position of Member of the Appellate Body is, in theory, not a full-time

position. Appellate Body Members are remunerated on a part-time basis.⁴ They are commonly not resident in Geneva, where the WTO has its headquarters and where Appellate Body proceedings take place. Members travel from their respective countries of residence whenever they have to hear and decide an appeal. The part-time employment arrangement of Appellate Body Members reflects the expectation in 1995 on the part of WTO Members that the Appellate Body would not be that busy and that a full-time employment arrangement for its Members was, therefore, not justified. In recent years, however, the workload of the Appellate Body has been such that membership of the Appellate Body is a *de facto* full-time job. The demands of the job are such that it is very difficult, if not impossible, for Appellate Body Members to pursue other professional activities.

1.2.5 Impartiality and Independence

Article 17.3 DSU

Although candidates for positions on the Appellate Body are nominated by their respective governments, Appellate Body Members serve in an individual capacity and do not represent any WTO Member or geographical entity. Article 17.3 of the DSU requires of Appellate Body Members that they shall be unaffiliated with any government. Appellate Body Members are prohibited from accepting or seeking instructions from third sources in the exercise of their office. They are equally prohibited from accepting any employment or undertaking any professional activity that is inconsistent with their duties and responsibilities.

Article 17.3 of the DSU furthermore requires that:

Members shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest.

Rules of Conduct

Like panelists, Members of the Appellate Body are subject to the *Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes* (the “*Rules of Conduct*”) apply to panelists.⁵ Rule II, paragraph 1 of the *Rules of Conduct* states:

Each person covered by these Rules (as defined in paragraph 1 of Section IV below and hereinafter called “covered person”) shall be independent and impartial, shall avoid direct or indirect conflicts of interest and shall respect the confidentiality of proceedings of bodies pursuant to the dispute settlement mechanism, so that through the observance of such standards of conduct the integrity and impartiality of that mechanism are preserved. These Rules shall in no way modify the rights and obligations of Members under the DSU nor the rules and procedures therein.

⁴ The remuneration of Appellate Body Members consists of a monthly retainer plus a fee for actual days worked either in their home country or in Geneva.

⁵ WT/DSB/RC/1.

To ensure compliance with these principles, an Appellate Body Member must disclose the existence or the development of any interest, relationship or matter that he/she could reasonably be expected to know and that is likely to affect, or give rise to justifiable doubts as to his/her independence or impartiality. This disclosure obligation includes information on financial, professional and other active interests as well as considered statements of public opinion and employment or family interests.

1.3 Institutional Structure of the Appellate Body

1.3.1 Divisions of the Appellate Body

Article 17.1 DSU

Article 17.1 of the DSU provides that the Appellate Body:

... shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body.

Rule 6(1) WP

Rule 6(1) of the *Working Procedures for Appellate Review* (“*Working Procedures*” or “WP”) further provides:

In accordance with paragraph 1 of Article 17 of the DSU, a division consisting of three Members shall be established to hear and decide an appeal.

Rule 6(2) WP

The Appellate Body does not hear and decide appeals from panel reports *in plenum* but in divisions of three Members. With respect to the composition of divisions, Rule 6(2) of the *Working Procedures* provides that the Members constituting a division are to be selected

... on the basis of rotation, while taking into account the principles of random selection, unpredictability and opportunity for all Members to serve regardless of their national origin.

Unlike for panels, national origin therefore does not play a role in composing an Appellate Body division.

Rule 7 WP

The Members of a division select their Presiding Member.⁶ Pursuant to Rule 7(2) of the *Working Procedures*, the responsibilities of the Presiding Member shall include: (a) coordinating the overall conduct of the appeal proceeding; (b) chairing all oral hearings and meetings related to that appeal; and (c) coordinating the drafting of the appellate report.

Rules 3 and 4 WP

Decisions relating to an appeal are taken solely by the division assigned to that appeal.⁷ However, to ensure consistency and coherence in its case law,

⁶ Rule 7 of the *Working Procedures*.

and to draw on the individual and collective expertise of all seven Members, the division responsible for deciding an appeal exchanges views with the other Members on the issues raised by the appeal.⁸ This exchange of views, which usually takes up two to three days, is held before the division has come to any definitive views on the issues arising in the appeal.

Rule 3(2) WP

A division shall make every effort to take its decision on the appeal by consensus. During the course of appellate proceedings, a division will meet frequently to deliberate on the issues raised in an appeal. However, if a decision cannot be reached by consensus, the Working Procedures provide that the matter at issue shall be decided by a majority vote.⁹

Article 17.11 DSU

Members of the division may express individual opinions in the Appellate Body report but they must do so anonymously.¹⁰ To date, only once - in *EC – Asbestos* - did an Appellate Body Member express an individual opinion in an Appellate Body report.¹¹

1.3.2 Chairman of the Appellate Body

Rule 5 WP

At the beginning of each year, the Members of the Appellate Body elect one of their number to be the Chairman of the Appellate Body for the coming year. The Chairman is responsible for the overall direction of the business of the Appellate Body, including the supervision of the internal functioning of the Appellate Body.

1.3.3 Appellate Body Secretariat

Article 17.7 DSU

Article 17.7 of the DSU states:

The Appellate Body shall be provided with appropriate administrative and legal support as it requires.

The Appellate Body has its own Secretariat, which is separate and independent from the WTO Secretariat¹² and made up of lawyers and a full complement of administrative and secretarial staff. In addition, as will be seen subsequently, whenever an oral hearing is held, professional court reporters are hired to produce a full transcript of the oral hearing.¹³ The Appellate Body Secretariat has its offices in the Centre William Rappard, rue de Lausanne 154, Geneva, where also all meetings of the Appellate Body and its divisions and oral hearings in appeals are also held.

⁷ Rule 3(1) of the Working Procedures

⁸ Rule 4(3) of the Working Procedures. *Each Member shall receive all documents filed in an appeal. A Member, who has a conflict of interest, shall not take part in the exchange of views.*

⁹ Rule 3(2) of the Working Procedures.

¹⁰ Article 17.11 of the DSU.

¹¹ *Appellate Body Report, European Communities - Measures Containing Asbestos and Asbestos-Containing Products* (“EC – Asbestos”), adopted 5 April 2001, paras. 149-154.

¹² Paragraph 17 of WT/DSB/1.

¹³ Article 17.7 of the DSU.

1.4 Test Your Understanding

- 1. Which criteria does the DSB use in deciding on the appointment of Members of the Appellate Body?**
- 2. Who hears and decides a specific appeal? What is the function of the “exchange of views”?**
- 3. Does nationality play a role in the composition of a division of the Appellate Body?**

2. SCOPE OF APPELLATE REVIEW

Objectives

On completion of this section the reader will be able:

- to explain the scope of appellate review in WTO dispute settlement.
- to identify who may appeal and what can be appealed.
- to distinguish between issues of law and issues of fact and to assess when a panel’s assessment of factual evidence may be subject to appellate review.
- to explain what the Appellate Body may do with a panel’s legal findings and conclusions that are appealed (i.e., uphold, modify or reverse) and,
- to appraise in which circumstances the Appellate Body may decide to “complete the legal analysis” in order to resolve the dispute between the parties.

2.1 Who may appeal?

Article 17.4 DSU

Article 17.4 of the DSU provides that only parties to the dispute may appeal a panel report. Third parties which have notified the DSB of a substantial interest in the matter at the time of the establishment of the panel, cannot appeal the panel report but may participate in the appellate review process. They may make written submissions to, and be given an opportunity to be heard by, the Appellate Body.¹⁴

It is possible for the respondent, as well as the complainant, to appeal a finding of a panel. At the appellate review stage, the parties are referred to as participants. The participant that appeals a panel report is called the appellant, while the participant responding to an appeal is called the appellee. Often, both participants appeal certain aspects of the panel’s findings. In this case, each participant is both an appellant and an appellee, as each has to respond to the other’s appeal. Third parties that choose to participate by filing a submission are referred to as third *participants*.

2.2 What can be appealed?

2.2.1 Issues of Law and Legal Interpretations

Article 17.6 DSU

Article 17.6 of the DSU provides:

An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.

¹⁴ See below, Sections 4.2.4 and 4.3.2.

As the Appellate Body stated in *EC – Hormones*:

Under Article 17.6 of the DSU, appellate review is limited to appeals on questions of law covered in a panel report and legal interpretations developed by the panel. Findings of fact, as distinguished from legal interpretations or legal conclusions, by a panel are, in principle, not subject to review by the Appellate Body.¹⁵

Thus, as a general rule, the Appellate Body does not review factual findings, that is, findings on issues of fact. Appellate review is in principle limited to legal findings, that is, findings on issues of law.

2.2.2 *Distinction between Issues of Law and Issues of Fact*

Issues of Fact

The distinction between issues of law and those of fact is one that has engaged many domestic appellate courts, and it is not surprising to find that a number of Appellate Body reports refer to this issue. In some cases, the characterization of specific panel findings as findings of fact, rather than as findings of law or legal interpretations, is fairly straightforward. In *EC – Bananas III*, for example, the Appellate Body considered that the panel’s findings regarding the nationality, ownership and control of certain companies, as well as their respective market shares, were findings of fact and, therefore, were excluded from the scope of appellate review.¹⁶ In *EC – Hormones* the Appellate Body ruled that a panel’s «determination of whether or not a certain event did occur in time and space is typically a question of fact”. The Appellate Body therefore found that the panel’s findings regarding whether or not international standards had been adopted by *Codex Alimentarius* were findings of fact and, therefore, were not subject to appellate review.¹⁷

Issues of Law

However, the question of whether a finding concerns an issue of fact or one of law is not always straightforward. There are many instances when panel findings involve both issues of fact and of law. When such findings are appealed, the task of distinguishing between fact and law can be a complex exercise. Although the Appellate Body has said that this is an exercise that must be made on a case by case basis, some general guidance as to what an appellant can challenge on appeal may be found in some of the Appellate Body reports adopted to date. Thus, the Appellate Body has said that findings involving the application of a legal rule to a specific fact or a set of facts are findings of law, and fall within the scope of appellate review. In *EC – Hormones*, the Appellate Body ruled:

¹⁵ *Appellate Body Report*, EC Measures Concerning Meat and Meat Products (Hormones) (“EC – Hormones”), WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135, para. 132.

¹⁶ *Appellate Body Report*, European Communities – Regime for the Importation, Sale and Distribution of Bananas (“EC – Bananas III”), WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591, para. 239.

¹⁷ *Appellate Body Report*, EC - Hormones, para. 132.

*...The consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision is...a legal characterization issue. It is a legal question. ...*¹⁸

2.2.3 Appeal of a Panel's Assessment of Evidence

Parties have frequently appealed a panel finding on the basis that the panel failed to consider all the evidence before it, or that the panel wrongly assessed the weight to be accorded to a particular piece of evidence. The Appellate Body has been loath to entertain such appeals, stating that this issue is a factual matter which, as a general rule, falls outside the scope of appellate review. In *Korea – Alcoholic Beverages*, the Appellate Body ruled:

*The Panel's examination and weighing of the evidence submitted fall, in principle, within the scope of the Panel's discretion as the trier of facts and, accordingly, outside the scope of appellate review. . . .We cannot second-guess the Panel in appreciating either the evidentiary value of [market] studies or the consequences, if any, of alleged defects in those studies. Similarly, it is not for us to review the relative weight ascribed to [the evidence before the panel] . . .*¹⁹

Article 11 DSU

Panels thus have wide-ranging discretion to consider and weigh the facts before them. However, such discretion is not unlimited. A panel's factual determinations must be consistent with Article 11 of the DSU. Article 11 of the DSU reads in relevant part:

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

As the Appellate Body stated in *EC – Hormones*, the issue of whether or not a panel has made an objective assessment of the facts before it, as required by Article 11 of the DSU, is a legal question which, if properly raised on appeal, would fall within the scope of appellate review.²⁰

In several appeals since, the Appellate Body has stated that it will not “interfere lightly” with the Panel’s appreciation of the evidence. It will not intervene solely because it might have reached a different factual finding from the one the panel reached. The Appellate Body ruled that it will intervene only if it was

¹⁸Ibid.

¹⁹*Appellate Body Report, Korea – Taxes on Alcoholic Beverages* (“Korea – Alcoholic Beverages”), WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, para.161.

²⁰*Appellate Body Report, EC - Hormones*, para. 132. See also *Korea – Alcoholic Beverages*, para. 162.

satisfied that the panel has exceeded the bounds of its discretion, as the trier of facts, in its appreciation of the evidence.²¹

In *EC – Hormones*, the Appellate Body stated:

Clearly, not every error in the appreciation of the evidence (although it may give rise to a question of law) may be characterized as a failure to make an objective assessment of the facts. [...] The duty to make an objective assessment of the facts is, among other things, an obligation to consider the evidence presented to a panel and to make factual findings on the basis of that evidence. The deliberate disregard of, or refusal to consider, the evidence submitted to a panel is incompatible with a panel's duty to make an objective assessment of the facts. The wilful distortion or misrepresentation of the evidence put before a panel is similarly inconsistent with an objective assessment of the facts. "Disregard" and "distortion" and "misrepresentation" of the evidence, in their ordinary signification in judicial and quasi-judicial processes, imply not simply an error of judgment in the appreciation of evidence rather an egregious error that calls into question the good faith of a panel.²²

In *US – Wheat Gluten*, the Appellate Body ruled:

We consider that the Panel's conclusion is at odds with its treatment and description of the evidence supporting that conclusion. We do not see how the Panel could conclude that the USITC Report did provide an adequate explanation of the allocation methodologies, when it is clear that the Panel itself saw such deficiencies in that Report that it placed extensive reliance on clarifications that were not contained in the USITC Report.. By reaching a conclusion regarding the USITC Report, which relied so heavily on supplementary information provided by the United States during the Panel proceedings – information not contained in the USITC Report – the Panel applied a standard of review which falls short of what is required by Article 11 of the DSU.²³

2.3 Mandate of the Appellate Body

2.3.1 Uphold, Modify or Reverse Legal Findings and Conclusions

Article 17.13 DSU

Article 17.13 of the DSU states:

²¹*Appellate Body Report, United States – Definitive Safeguard Measure on Imports of Wheat Gluten from the European Communities ("US – Wheat Gluten"), WT/DS166/AB/R, adopted 19 January 2001, para. 151. See also, e.g., in Appellate Body Report, European Communities – Trade Description of Sardines ("EC – Sardines"), WT/DS231/AB/R, adopted 23 October 2002, para. 299.*

²²*Appellate Body Report, EC – Hormones, para. 133.*

²³*Appellate Body Report, US – Wheat Gluten, paras. 161-162.*

The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel.

When the Appellate Body agrees with both the panel's reasoning and the conclusion regarding the existence of a violation or non-violation of a provision of the covered agreements, it upholds. If the Appellate Body agrees with the conclusion but not with the reasoning leading to that conclusion, it modifies. If the Appellate Body disagrees with the conclusion regarding the existence of a violation or non-violation, it reverses.

The Appellate Body has found that not every statement made by a panel when it addresses a legal issue can necessarily be characterized as a "legal finding or conclusion" which the Appellate Body may uphold, modify or reverse. When parties have challenged comments made by panels that cannot be characterized as either a "legal finding or a conclusion", the Appellate Body has found that such comments cannot be addressed on appeal. In *US – Wool Shirts and Blouses*, the Appellate Body observed with respect to one particular "finding" of the Panel that was appealed by India that:

...this statement by the Panel is purely a descriptive and gratuitous comment providing background concerning the Panel's understanding of how the TMB functions. We do not consider this comment by the Panel to be "a legal finding or conclusion" which the Appellate Body "may uphold, modify or reverse".²⁴

Whether a statement by the panel amounts to a legal finding or conclusion which can be upheld, modified or reversed will have to be determined by the Appellate Body on a case by case basis considering the statement and the context in which it is made.

2.3.2 *Absence of Remand Authority*

Many national appellate courts, and some international tribunals, are authorized, in defined circumstances, to send a case back to a court of lower instance for reconsideration. The DSU does not, however, authorize the Appellate Body to remand a case to a panel. Rather, Article 17.13 of the DSU empowers the Appellate Body only to "uphold, modify or reverse the legal findings and conclusions of the panel".

2.3.3 *Completing the Legal Analysis*

It has often been the case that a complaining party makes several claims of violation, under multiple provisions of different covered agreements, and that

²⁴*Appellate Body Report, United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India ("US – Wool Shirts and Blouses"), WT/DS33/AB/R, adopted 23 May 1997, DSR 1997:I, 323 at 338.*

the panel finds a violation in respect of one or some of these provisions. A panel may decide, for reasons of judicial economy, not to make further findings of violation. Thus, in these circumstances, if the Appellate Body reverses the panel's finding or findings of violation, the question arises: how is the Appellate Body to resolve the dispute? The clearly obvious solution would be for the Appellate Body to send the case back to the panel, and request that it examine the claims of violation that it did not address.

However, as has been clarified, this is not possible: the Appellate Body does not have remand authority. Thus, in the absence of a remand power, the Appellate Body is left with two options: to either leave the dispute unresolved, or go on to complete the legal analysis. In *Australia – Salmon* the Appellate Body noted:

*In certain appeals, when we reverse a panel's finding on a legal issue, we may examine and decide an issue that was not specifically addressed by the panel, in order to complete the legal analysis and resolve the dispute between the parties.*²⁵

In this and a number of other cases, the Appellate Body has thus “completed the legal analysis” to avoid that the dispute between the parties would remain unresolved. However, the Appellate Body has only done so in cases in which there were sufficient factual findings in the panel report or undisputed facts in the panel record to enable it to carry out the legal analysis.²⁶ In the absence of sufficient factual findings or undisputed facts, the Appellate Body declined to complete the legal analysis. The Appellate Body has also declined to complete the analysis in circumstances where a legal analysis to be completed concerned a “novel issue”. In *EC – Asbestos*, the Appellate Body found:

The need for sufficient facts is not the only limit on our ability to complete the legal analysis in any given case. In this appeal, Canada's outstanding claims were made under Articles 2.1, 2.2, 2.4 and 2.8 of the TBT Agreement. [...]
*As the Panel decided not to examine Canada's four claims under the TBT Agreement, it made no findings, at all, regarding any of these claims. Moreover, the meaning of the different obligations in the TBT Agreement has not previously been the subject of any interpretation or application by either panels or the Appellate Body. Similarly, the provisions of the Tokyo Round Agreement on Technical Barriers to Trade, which preceded the TBT Agreement and which contained obligations similar to those in the TBT Agreement, were also never the subject of even a single ruling by a panel. In light of their novel character, we consider that Canada's claims under the TBT Agreement have not been explored before us in depth. As the Panel did not address these claims, there are no “issues of law” or “legal interpretations” regarding them to be analyzed by the parties, and reviewed by us under Article 17.6 of the DSU. We also observe that the sufficiency of the facts on the record depends on the reach of the provisions of the TBT Agreement claimed to apply – a reach that has yet to be determined.*²⁷

2.4 Test Your Understanding

1. **May a third party to a dispute that is directly affected by the findings of a panel, appeal these findings to the Appellate Body?**
2. **Give some examples of findings of fact and findings of law, illustrating the difference between both types of findings. Is a finding in which a panel applies a legal rule to a specific set of facts subject to appellate review?**
3. **Can a factual finding ever be subject to appellate review?**
4. **When and why does the question arise whether the Appellate Body should “complete the legal analysis”? When will the Appellate Body decline to “complete the legal analysis”?**

²⁵ *Appellate Body Report, Australia – Measures Affecting Importation of Salmon* (“Australia – Salmon”), *WT/DS18/AB/R*, adopted 6 November 1998, para. 117.

²⁶ *Ibid.*, para. 187.

²⁷ *Appellate Body Report, EC - Asbestos*, paras 79-83.

3. GENERAL FEATURES OF APPELLATE BODY PROCEEDINGS

Objectives

On completion of this section, the reader will be able:

- to discuss the general features of the proceedings before the Appellate Body and, in particular, the time frame for and the confidential nature of these proceedings.
- to assess the controversial issue of the acceptance and consideration by the Appellate Body of *amicus curiae* briefs.

3.1 Working Procedures for Appellate Review

Article 17.9 DSU

The proceedings before the Appellate Body are governed by the rules set out in the DSU, and in particular, Article 17 thereof, and in the *Working Procedures for Appellate Review* (“*Working Procedures*” or “*WP*”). Unlike panels, the Appellate Body has detailed standard working procedures. These *Working Procedures* were, pursuant to Article 17.9 of the DSU, developed by the Appellate Body in consultation with the Chairman of the DSB and the Director-General of the WTO. The Appellate Body adopted its *Working Procedures* in February 1996, and amended them in February 1997, January 2002 and September 2002.²⁸ This latest amendment took effect on 27 September 2002 on a provisional basis, awaiting a final decision on amendment of the *Working Procedures* to be adopted in early 2003. The *Rules of Conduct*, already referred to above, are incorporated into the *Working Procedures*, and are attached as Annex 2 to the *Working Procedures*.

Rule 16(1) WP

Of particular interest in this context is Rule 16(1) of the *Working Procedures* which allows under certain circumstances an Appellate Body division to adopt appropriate procedures for a specific appeal. Rule 16(1) provides:

In the interests of fairness and orderly procedure in the conduct of an appeal, where a procedural question arises that is not covered by these Rules, a division may adopt an appropriate procedure for the purposes of that appeal only, provided that it is not inconsistent with the DSU, the other covered agreements and these Rules. Where such a procedure is adopted, the Division shall immediately notify the participants and third participants in the appeal as well as the other Members of the Appellate Body.

3.2 Time Frame for Appellate Body Proceedings

3.2.1 Overall Time Frame

The Appellate Body operates under very strict time frames. Pursuant to Article 17.5 of the DSU, appellate review proceedings shall, as a general rule, not exceed 60 days from the date of the filing of a notice of appeal to the date of

²⁸ *WT/AB/WP/4*, dated 24 January 2002 and *WT/AB/WP/5*, dated 19 December 2002, Annex B (for the September 2002 amendment)

the circulation of the Appellate Body report. Article 17.5 provides, furthermore, that when the Appellate Body considers that it cannot complete the appellate review proceedings and circulate its report within 60 days, it is required to inform the DSB of the reasons for the delay and give an estimate of the period within which it will circulate its report. Pursuant to Article 17.5, “in no case shall the proceedings exceed 90 days”. In most appeals thus far, the Appellate Body has circulated its report on day 90 of the appellate review process. In a few cases, in which exceptional circumstances were present, the Appellate Body has, with the agreement of the parties, circulated its reports after day 90.²⁹

3.2.2 Detailed Timetable for Appeals

Annex I WP

To ensure the smooth functioning of the appellate review process within the strict time frames mandated by the DSU, the Working *Procedures* set out time limits for the filing of the submissions. Consequently, the appellant’s submission must be filed within 10 days, the other appellant’s submission(s) within 15 days and the appellee’s and third participant’s submission(s) within 25 days from the date of the notice of appeal.³⁰ The oral hearing is usually held between days 30 and 45 of an appellate proceeding although occasionally, it has been held later.³¹

Timetable for Appeals	
Action	Day
Notice of Appeal	0
Appellant’s Submission	10
Other Appellant(s) Submission(s)	15
Appellee(s) Submission(s)	25
Third Participant(s) Submission(s)	25
Oral Hearing	30
Circulation of Appellate Body Report	60 - 90
DSB Meeting for Adoption	90 – 120

Rule 16(2) WP

Pursuant to Rule 16(2) of the Working *Procedures*, a party or a third party to the dispute may, in *exceptional circumstances*, where strict adherence to a time period set out in the Working *Procedures* would result in a manifest

²⁹ E.g., *Appellate Body Report, EC – Hormones and Appellate Body Report, EC – Asbestos*.

³⁰ Rules 21-24 of the Working *Procedures*.

³¹ Rule 27 of the Working *Procedures*. As set out in Rule 31 of the Working *Procedures*, a different, and “accelerated”, timetable applies in appeals relating to prohibited subsidies under Part II of the Agreement on Subsidies and Countervailing Measures. Article 4.9 of that Agreement states that appellate review proceedings involving such prohibited subsidies shall “in no case ...exceed 60 days”.

unfairness, request the division hearing the appeal to modify a time period set out in the *Working Procedures* for the filing of documents or the date set out in the working schedule for the oral hearing.

Thus far, there have been few cases in which the division hearing the appeal has modified a date set out in the working schedule at the request of a party or a third party. In *EC – Bananas III*, the five complainants, all but one developing country Members, jointly requested a two-day extension of time to file appellee’s submissions, as they believed that strict adherence to the deadline set out in the *Working Procedures* would result in “manifest unfairness”. They argued that extra time was needed to absorb and respond to what they termed the “extraordinarily” lengthy submission of the European Communities. The division hearing the appeal decided to grant this request for the extension despite the objection of the European Communities. In doing so, it noted:

The Division would like to take this opportunity to stress that the time limits provided for in the Working Procedures are established for the benefit of all parties and third participants involved in an appeal. All participants have a mutual interest in seeing these time limits respected. However, in view of the complexity and the number of issues raised in this particular appeal, as well as the large number of parties and third parties involved, an extension of the time limits is justified to allow the appellees and the third parties best to coordinate and articulate their positions.³²

3.3 Confidentiality of Appellate Body Proceedings

3.3.1 Scope of Confidentiality Obligations

Article 17.10 DSU

Article 17.10 of the DSU provides:

The proceedings of the Appellate Body shall be confidential. The reports of the Appellate Body shall be drafted without the presence of the parties to the dispute and in the light of the information provided and the statements made.

Article 18.2 DSU

Article 18.2 of the DSU also contains rules protecting the confidentiality of written submissions and information submitted to the Appellate Body:

Written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential. A party to a dispute shall also, upon request of a Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public.

³² Decision communicated in a letter from the Presiding Member of the division to the participants and third participants, dated 4 July 1997.

In *Canada – Aircraft*, the Appellate Body ruled:

With respect to appellate proceedings, in particular, the provisions of the DSU impose an obligation of confidentiality which applies to WTO Members generally as well as to Appellate Body Members and staff. In this respect, Article 17.10 of the DSU states, without qualification, that “[t]he proceedings of the Appellate Body shall be confidential.” [...] The word “proceeding” has been defined as follows:

In a general sense, the form and manner of conducting juridical business before a court or judicial officer. Regular and orderly progress in form of law, including all possible steps in an action from its commencement to the execution of judgment.

More broadly, the word “proceedings” has been defined as “the business transacted by a court”. In its ordinary meaning, we take “proceedings” to include, in an appellate proceeding, any written submissions, legal memoranda, written responses to questions, and oral statements by the participants and the third participants; the conduct of the oral hearing before the Appellate Body, including any transcripts or tapes of that hearing; and the deliberations, the exchange of views and internal workings of the Appellate Body.³³

In *Thailand – H-Beams*, allegations of breach of the confidentiality obligations in the DSU arose as a result of references made in an *amicus curiae* brief submitted to the Appellate Body by an industry association. Thailand alleged that this *amicus curiae* brief made direct, and accurate, references to its appellant’s submission, which was a confidential document in the appellate proceedings. In order to clarify whether or not a breach of the confidentiality obligations in the DSU had occurred, Thailand requested that the Appellate Body make inquiries, to determine how the references to its appellant’s submission came to be made in the *amicus curiae* brief. The Appellate Body addressed questions to the participants and the third participants. It reported later that it was satisfied with the responses it had received, and that, in view of the actions taken by Poland, there was no need to take further action. Poland terminated the relationship with the law firm which was thought to be at the origin of the breach of the confidentiality obligations in the DSU. The Appellate Body emphasized that the confidentiality obligations were to be taken seriously and noted:

The terms of Article 17.10 of the DSU are clear and unequivocal: “[t]he proceedings of the Appellate Body shall be confidential”. Like all obligations under the DSU, this is an obligation that all Members of the WTO, as well as the Appellate Body and its staff, must respect. WTO Members who are participants and third participants in an appeal are fully responsible under the DSU and the other covered agreements for any acts of their officials as well as their representatives, counsel or consultants.³⁴

³³ *Appellate Body Report, Canada – Measures Affecting the Export of Civilian Aircraft (“Canada – Aircraft”), WT/DS70/AB/R, adopted 20 August 1999, para. 143.*

³⁴ *Appellate Body Report, Thailand - Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel H-Beams from Poland (“Thailand – H-Beams”), WT/DS122/AB/R, adopted 5 April 2001, para. 74.*

3.3.2 *Protection of Business Confidential Information*

Trade disputes will often involve the submission to panels and the Appellate Body of sensitive business information. The issue of the protection of business confidential information arose in the *Brazil – Aircraft* and *Canada – Aircraft* disputes. In these disputes, the panels adopted, after consultation with the parties, additional procedures for the protection of information that the parties to these disputes considered to be business confidential information. In the appeal in that dispute, Canada and Brazil requested the Appellate Body to apply, *mutatis mutandis*, the special procedures adopted by the panel to protect business confidential information. The Appellate Body declined to adopt the special procedures adopted by the panel, on the grounds that the existing rules were sufficient to protect the confidentiality of business information. In *Canada – Aircraft*, the Appellate Body stated:

In our view, the provisions of Articles 17.10 and 18.2 apply to all Members of the WTO, and oblige them to maintain the confidentiality of any submissions or information submitted, or received, in an Appellate Body proceeding. Moreover, those provisions oblige Members to ensure that such confidentiality is fully respected by any person that a Member selects to act as its representative, counsel or consultant. [...]

Finally, we wish to recall that Members of the Appellate Body and its staff are covered by Article VII:1 of the Rules of Conduct, which provides:

Each covered person shall at all times maintain the confidentiality of dispute settlement deliberations and proceedings together with any information identified by a party as confidential. (emphasis added)³⁵

3.4 *Amicus Curiae Briefs*

One of the most contentious issues among WTO Members with respect to WTO dispute settlement is the issue of *amicus curiae* (friend of the court) briefs submitted to panels or to the Appellate Body by non-governmental organizations or other entities that are not a party to the dispute. As the Appellate Body has observed “neither the DSU nor the Working Procedures specifically address this issue”.

3.4.1 *Amicus Curiae Briefs Attached to a Participant’s Submission*

The question of whether the Appellate Body could accept and consider unsolicited *amicus curiae* briefs first arose in the appeal in *US – Shrimp*. In that case, the United States appended to its appellant’s submission three exhibits containing *amicus curiae* briefs. The appellees, India, Pakistan, Malaysia and Thailand objected to these briefs and requested that the Appellate Body not consider them. The Appellate Body dismissed the appellees’ objection as follows:

³⁵ *Appellate Body Report, Canada – Aircraft, paras. 145 and 146. See also Appellate Body Report, Brazil – Aircraft, paras. 123 and 124.*

We consider that the attaching of a brief or other material to the submission of either appellant or appellee, no matter how or where such material may have originated, renders that material at least prima facie an integral part of that participant's submission. . . . [A] participant filing a submission is properly regarded as assuming responsibility for the contents of that submission, including any annexes or other attachments.

We admit, therefore, the briefs attached to the appellant's submission of the United States as part of that appellant's submission. At the same time, considering that the United States has itself accepted the briefs in a tentative and qualified manner only, we focus in the succeeding sections below on the legal arguments in the main U.S. appellant's submission.³⁶

3.4.2 Amicus Curiae Briefs Submitted Directly to the Appellate Body

In *US – Lead and Bismuth II*, the Appellate Body for the first time addressed the question whether it could accept and consider unsolicited *amicus curiae* briefs submitted directly to it. In that case, the Appellate Body received two *amicus curiae* briefs from American steel industry associations. The European Communities, the appellee, and Brazil and Mexico, the third participants, argued that the Appellate Body does not have the authority to accept or consider *amicus curiae* briefs.

In addressing this issue the Appellate Body first emphasized that individuals and organizations have no legal *right* to file briefs, and that the Appellate Body has no obligation to consider them. The Appellate Body noted:

We wish to emphasize that in the dispute settlement system of the WTO, the DSU envisages participation in panel or Appellate Body proceedings, as a matter of legal right, only by parties and third parties to a dispute. And, under the DSU, only Members of the WTO have a legal right to participate as parties or third parties in a particular dispute. . . . Individuals and organizations, which are not Members of the WTO, have no legal right to make submissions to or to be heard by the Appellate Body. The Appellate Body has no legal duty to accept or consider unsolicited amicus curiae briefs submitted by individuals or organizations, not Members of the WTO.³⁷

Having ruled that individuals or organizations did not have a right to be heard, the Appellate Body then ruled that it had the *authority* to accept and consider any information it considered pertinent and useful in deciding an appeal. The Appellate Body stated:

³⁶*Appellate Body Report*, United States – Import Prohibition of Certain Shrimp and Shrimp Products (“US – Shrimp”), *WT/DS58/AB/R*, adopted 6 November 1998, paras. 89 and 91.

³⁷*Appellate Body Report*, United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom (“US – Lead and Bismuth II”), *WT/DS138/AB/R*, adopted 7 June 2000, paras. 40-41.

....[Article 17.9 of the DSU] makes clear that the Appellate Body has broad authority to adopt procedural rules which do not conflict with any rules and procedures in the DSU or the covered agreements.³⁸ Therefore, we are of the opinion that as long as we act consistently with the provisions of the DSU and the covered agreements, we have the legal authority to decide whether or not to accept and consider any information that we believe is pertinent and useful in an appeal.³⁹

In *US – Lead and Bismuth II*, the Appellate Body did not consider the briefs submitted to it to be pertinent and useful in the appeal, and, for that reason, did not consider them.

3.4.3 Additional Procedure to Handle Amicus Curiae Briefs

In *EC – Asbestos*, the Appellate Body recognized the possibility that it might receive a large number of *amicus curiae* briefs and was therefore of the view that the fair and orderly conduct of this appeal could be facilitated by the adoption of an appropriate additional procedure pursuant to Rule 16(1) of the *Working Procedures*, to deal with any possible *amicus curiae* briefs received. Under this Additional Procedure, adopted for the purposes of the *EC – Asbestos* appeal only, persons other than the parties and third parties wishing to file a written submission were required to apply for leave to file a submission.⁴⁰ The Additional Procedure set forth criteria that such an application should meet. The Additional Procedure also set out the criteria that written submissions for which leave to file was granted should meet.

Pursuant to the Additional Procedure, the Appellate Body received 17 applications requesting leave to file a written brief in this appeal. 11 of these applications were received within the time limits specified in the Additional Procedure. The Appellate Body carefully reviewed and considered each of these applications in accordance with the Additional Procedure and, in each case, decided to deny leave to file a written brief.⁴¹

On 22 November 2000, the WTO's General Council met to discuss this Additional Procedure. The majority of the WTO Members that spoke at that meeting expressed the view that it was not acceptable for the Appellate Body to accept and consider *amicus curiae* briefs. The Appellate Body was requested to exercise "extreme caution" in the future in dealing with this issue.

3.4.4 Amicus Curiae Briefs Submitted by WTO Members

In *EC – Sardines* the Appellate Body was recently again confronted with the question whether it may accept and consider unsolicited *amicus curiae* briefs. One brief was filed by a private individual, and the other by Morocco, a WTO

³⁹ *Appellate Body Report*, *US – Lead and Bismuth II*, para. 43.

⁴⁰ For the full text of the Additional Procedure, see *Appellate Body Report*, *EC – Asbestos*, para. 52.

⁴¹ *Appellate Body Report*, *EC – Asbestos*, paras. 55-56.

Member that did not exercise its third party rights in this dispute. Peru, the complainant in this dispute, objected to the acceptance and consideration of these briefs by the Appellate Body. With respect to the brief submitted by a private individual, the Appellate Body, after referring to its case law on this matter, ruled that it has the authority to accept and consider this brief but found that the brief did not assist it in this appeal.⁴² With respect to the brief submitted by Morocco, the Appellate Body stated:

*We have been urged by the parties to this dispute not to treat Members less favourably than non-Members with regard to participation as amicus curiae. We agree. We have not. And we will not. As we have already determined that we have the authority to receive an amicus curiae brief from a private individual or an organization, a fortiori we are entitled to accept such a brief from a WTO Member, provided there is no prohibition on doing so in the DSU. We find no such prohibition.*⁴³

The Appellate Body thus found that it is entitled to accept the *amicus curiae* brief submitted by Morocco, and to consider it. The Appellate Body emphasized, however, that:

... in accepting the brief filed by Morocco in this appeal, we are not suggesting that each time a Member files such a brief we are required to accept and consider it. To the contrary, acceptance of any amicus curiae brief is a matter of discretion, which we must exercise on a case-by-case basis. We recall our statement that:

The procedural rules of WTO dispute settlement are designed to promote ... the fair, prompt and effective resolution of trade disputes.⁴⁴ Therefore, we could exercise our discretion to reject an amicus curiae brief if, by accepting it, this would interfere with the “fair, prompt and effective resolution of trade disputes.” This could arise, for example, if a WTO Member were to seek to submit an amicus curiae brief at a very late stage in the appellate proceedings, with the result that accepting the brief would impose an undue burden on other participants.⁴⁵

3.5 Test your Understanding

- 1. Where are the rules governing Appellate Body proceedings set out? In which circumstances can a division decide to deviate from these rules?**
- 2. How long will an Appellate Body proceeding last? How do the *Rules of Procedure* help the Appellate Body to remain within the overall timeframe provided in Article 17.5 of the DSU?**

⁴² Appellate Body Report, EC – Sardines, para. 160.

⁴³ Appellate Body Report, EC – Sardines, para. 164.

⁴⁴ Footnote in the quote refers to Appellate Body Report, US – FSC, para. 166.

⁴⁵ Appellate Body Report, EC – Sardines, para. 167.

- 3. How much of an Appellate Body proceeding is confidential and to whom do the obligations of confidentiality apply? Does the Appellate Body provide for specific protection for business confidential information? Why?**
- 4. May the Appellate Body accept and consider unsolicited *amicus curiae* briefs submitted to it?**

4. STEPS IN THE APPELLATE BODY PROCEEDINGS

Objectives

On completion of this section, the reader will be able:

- to outline all steps in the Appellate Body proceedings.
- to detail how Appellate Body proceedings are initiated, how written submissions to the Appellate Body are filed, how oral hearings of the Appellate Body are conducted and how the division hearing the appeal deliberates and comes to a decision on the appeal.

4.1 Initiation of Appellate Body Proceedings

4.1.1 Notice of Appeal

Article 16.4 DSU

A panel report may be appealed at any time after it is circulated to the WTO Members, and before it is adopted by the DSB.⁴⁶ The appellate process commences with the filing by an appellant of a notice of appeal.⁴⁷ In practice, a notice of appeal is often filed the day before the DSB meeting at which the report was to be on the agenda for adoption. Simultaneously with the filing of a notice of appeal, the appellant informs the DSB of its decision to appeal.

Rule 20(1) WP

Rule 20(2) (d) WP

Rule 20(2)(d) of the *Working Procedures* stipulate that a notice of appeal must include: a brief statement of the nature of the appeal, including the allegations of errors in the issues of law covered in the panel report and legal interpretations developed by the panel. The notice of appeal is filed with the Appellate Body Secretariat.

In *US - Shrimp*, the Appellate Body was called upon to determine whether the notice of appeal filed in that appeal by the United States was sufficient to meet the requirements set out in Rule 20(2)(d) of the *Working Procedures*. The appellees contended that the notice of appeal filed by the United States was vague and cursory and, therefore, was not in compliance with the requirements of Rule 20(2)(d) of the *Working Procedures*. The appellees requested that the entire appeal be dismissed on this basis. The Appellate Body rejected the request of the appellees to dismiss the appeal, and ruled that it was sufficient for the Notice of Appeal to identify adequately the findings or legal interpretations appealed. The Appellate Body held:

The Working Procedures for Appellate Review enjoin the appellant to be brief in its notice of appeal in setting out “the nature of the appeal, including the allegations of errors”. We believe that, in principle, the “nature of the appeal” and “the allegations of errors” are sufficiently set out where the notice of



⁴⁶ Article 16.4 of the DSU.

⁴⁷ Rule 20(1) of the Working Procedures.

*appeal adequately identifies the findings or legal interpretations of the Panel which are being appealed as erroneous. The notice of appeal is not expected to contain the reasons why the appellant regards those findings or interpretations as erroneous. The notice of appeal is not designed to be a summary or outline of the arguments to be made by the appellant. The legal arguments in support of the allegations of error are, of course, to be set out and developed in the appellant's submission.*⁴⁸

4.1.2 Panel Record

Rule 25 WP

Pursuant to Rule 25 of the *Working Procedures*, the WTO Secretariat transmits the complete panel record to the Appellate Body Secretariat as soon as a notice of appeal is filed. The panel record includes all the written submissions made by the parties to the panel, as well as any written responses to questions, and any exhibits introduced as evidence.

4.1.3 Selection of the Division

Rule 6 WP

As soon as a notice of appeal is filed, an Appellate Body division to hear the appeal is selected through the process outlined above.⁴⁹ To avoid the possibility of conflict of interest, once a notice of appeal has been filed, each Appellate Body Member must review the factual portion of the relevant panel report and complete the disclosure form attached as Annex 3 to the *Rules of Conduct*. Once three of the Appellate Body Members have confirmed that they are on a division, the selected Members elect one of their number to be a Presiding Member for the Division. This information is then transmitted to the parties, together with a working schedule for that particular appeal.

4.1.4 Working Schedule for the Appeal

Rule 26 WP

Shortly after the commencement of the appeal, the Appellate Body Secretariat sends the parties and third parties to the dispute the working schedule for the appeal drawn up by the Division.⁵⁰ This working schedule sets out the precise dates for the filing of the submissions based on the timetable set out in the *Working Procedures*. The working schedule usually also sets out the precise date for the oral hearing.

4.1.5 Withdrawal of Appeal

Rule 30(1) WP

Rule 30(1) of the *Working Procedures* allows an appellant to withdraw its appeal at any time. Indeed, this is in line with the DSU which, in Article 3.7 unequivocally states that “[t]he aim of the dispute settlement mechanism is to secure a *positive solution* to a dispute. A solution mutually *acceptable to the parties* to a dispute and consistent with the covered agreements is clearly to be preferred.”

⁴⁸ *Appellate Body Report, US - Shrimp, para. 95.*

⁴⁹ *See above, Section 1.3.1.*

⁵⁰ *Rule 26 of the Working Procedures.*

In only a few appeals to date has Rule 30(1) been invoked. In *US – FSC*, the appellant withdrew the appeal for scheduling reasons and, a couple of weeks later, brought its appeal back to the Appellate Body.⁵¹ In *India – Measures Affecting the Automotive Sector*, India withdrew its appeal on the day before the oral hearing.⁵² On 14 March 2002, the Appellate Body received a letter from India, in which India stated that:

*Pursuant to Rule 30(1) of the Working Procedures for Appellate Review, this is to inform the Appellate Body that India is withdrawing the above-mentioned appeal; oral hearing on this is scheduled for 15 March 2002. Inconvenience caused to the Appellate Body, Secretariat, the other parties and the third participants is deeply regretted.*⁵³

As the Appellate Body stated in its very brief Report in this case, India's withdrawal of the appeal completed Appellate Body's work in this appeal.

Most recently, in *EC – Sardines*, Peru challenged the notice of appeal filed by the European Communities as insufficiently clear and specific on a number of points. In response to this challenge, the European Communities withdrew its notice of appeal, conditionally upon the right to file a new notice, and subsequently filed a new notice. Peru then challenged the right of the European Communities to withdraw a notice of appeal conditionally and to file another notice. The Appellate Body ruled:

*... we see no reason to interpret Rule 30 as granting a right to withdraw an appeal only if that withdrawal is unconditional. Rather, the correct interpretation, in our view, is that Rule 30(1) permits conditional withdrawals, unless the condition imposed undermines the "fair, prompt and effective resolution of trade disputes", or unless the Member attaching the condition is not "engag[ing] in [dispute settlement] procedures in good faith in an effort to resolve the dispute."*⁵⁴

4.2 Written Submissions

4.2.1 Appellant's Submission

Rule 21 WP

The appellant has 10 days after the notice of appeal is submitted to file its written submission.⁵⁵ This may seem like a short period of time, but one should keep in mind that the appellant was able to begin formulating its appeal as soon as it saw the panel report, an interim version of which it received

⁵¹ *Appellate Body Report*, United States – Tax Treatment for "Foreign Sales Corporations" ("US – FSC"), *WT/DS108/AB/R*, adopted 20 March 2000, para. 4.

⁵² *Appellate Body Report*, India – Measures Affecting the Automotive Sector, *WT/DS146/AB/R*, *WT/DS175/AB/R*, adopted 5 April 2002, para 15.

⁵³ *Ibid.*

⁵⁴ *Appellate Body Report*, EC – Sardines, para. 141.

⁵⁵ *Rule 21(1) of the Working Procedures.*

many months earlier.⁵⁶ The *Working Procedures* set out what an appellant’s submission is to contain.

[An appellant’s submission] shall:

(a) be dated and signed by the appellant; and

(b) set out

(i) a precise statement of the grounds for the appeal, including the specific allegations of errors in the issues of law covered in the panel report and legal interpretations developed by the panel, and the legal arguments in support thereof;

(ii) a precise statement of the provisions of the covered agreements and other legal sources relied on; and

(iii) the nature of the decision or ruling sought.⁵⁷

Like *all* the documents that are filed by a party or third party to the dispute, the appellant’s submission is to be served on each of the other parties or third parties to the dispute.⁵⁸

4.2.2 Other Appellant’s Submission

Rule 23 WP

After a panel report has been appealed by one party, any other party to the dispute may subsequently also decide to appeal the panel report.⁵⁹ This is sometimes referred to as a “cross appeal”. Usually, the grounds for the appeal of this “other appellant” will differ from the grounds of appeal of the first appellant. An “other appellant” that “cross appeals” does not need to file a notice of appeal. It need only file an “other appellant’s submission”, in which it sets out in detail the grounds for its appeal. The requirements for an other appellant’s submission are substantially the same as those for an appellant’s submission.⁶⁰ A party wishing to submit an other appellant’s submission must do so within 15 days of the filing of the notice of appeal.

4.2.3 Appellee’s Submission

Rule 22 WP

The appellee then has until the 25th day after the filing of the notice of appeal, to file its own written submission.⁶¹ Where there is a “cross-appeal”, each participant will file an appellee’s submission in response to the other participant’s appellant’s submission.⁶² The *Working Procedures* set out what an appellee’s submission is to contain.

⁵⁶ See Module 3.2 of this Handbook.

⁵⁷ Rule 21(2) of the *Working Procedures*.

⁵⁸ Rule 18(2) of the *Working Procedures*.

⁵⁹ Rule 23 (1) of the *Working Procedures*.

⁶⁰ Rule 23(2) of the *Working Procedures*.

⁶¹ Rule 22(1) of the *Working Procedures*.

⁶² Rule 23(3) of the *Working Procedures*.

[An appellee's submission shall]:

(a) be dated and signed by the appellee; and

(b) set out

(i) a precise statement of the grounds for opposing the specific allegations of errors in the issues of law covered in the panel report and legal interpretations developed by the panel raised in the appellant's submission, and the legal arguments in support thereof;

(ii) an acceptance of, or opposition to, each ground set out in the appellant's submission;

(iii) a precise statement of the provisions of the covered agreements and other legal sources relied on;

(iv) the nature of the decision or ruling sought.⁶³

4.2.4 Third Participant's Submission

Rule 24 WP

It is possible for third parties to participate in an appellate proceeding. Those parties who reserved their third party rights by notifying their interest to the DSB when the panel was established, may file a third participant's submission.⁶⁴ In this submission, a third party must state its intention to participate as a third participant in the appeal and must include the grounds and legal arguments in support of its position, within 25 days after the date of the filing of a notice of appeal.

4.2.5 Additional Memoranda

Rule 28 WP

The *Working Procedures* allow an Appellate Body division to request additional memoranda from any participant or third participant, and to specify the time periods by which such memoranda shall be received.⁶⁵

In a few appeals to date, divisions have requested additional memoranda on *preliminary issues* raised by a participant or a third participant before the oral hearing. This was the case, for example, in *EC – Bananas III* on the private legal counsel issue and in *US – Shrimp* on the *amicus curiae* briefs issue. Occasionally, the Appellate Body has also requested additional post-hearing memoranda to clarify issues that were not sufficiently addressed by the parties in their written submissions and at the oral hearing.

Divisions that requested additional memoranda to be submitted, have always given the other participants and third participants an opportunity to respond to these memoranda.⁶⁶ The time allowed for the filing of additional memoranda and responses thereto is always very short.

⁶³ *Rule 22(2) of the Working Procedures.*

⁶⁴ *Rule 24 of the Working Procedures.*

⁶⁵ *Rule 28(1) of the Working Procedures.*

⁶⁶ *Rule 28(2) of the Working Procedures.*

4.3 Oral Hearing

4.3.1 Conduct of the Oral Hearing

Rule 27 WP

After the written submissions are received, and approximately 30-45 days after receipt of the notice of appeal, the Appellate Body division hearing the appeal conducts an oral hearing.⁶⁷ The oral hearing is not open to the public. This hearing consists of brief opening statements by the participants and the third participants, followed by questions to the participants and the third participants from the Appellate Body Division hearing the appeal. The hearing is usually concluded by brief closing statements by the participants and the third participants. Unlike what happens in the panel process, the participants cannot ask questions of each other. The oral hearing usually lasts a full day. Occasionally, hearings can last longer. A transcript of the oral hearing, which is for the use of the Appellate Body only, is produced by a team of professional court reporters.

4.3.2 Third Party Participation in the Oral Hearing

Before the amendment of Rules 24 and 27 of the *Working Procedures*, which provisionally took effect on 27 September 2002, only third parties that had submitted a third participant's submission could participate in the oral hearing. However, over the years a practice had developed under which the Appellate Body would allow third parties that had not filed a third participant's submission to attend the oral hearing as a "passive observer".⁶⁸

Rules 24 & 27 WP

Under the currently applicable provisional rules, the rights of third parties to participate in the oral hearing have been significantly extended. Rule 24 (2) and (4) of the *Working Procedures* provide:

- (2) *A third party not filing such written submission shall, within the same period of 25 days, notify the Secretariat in writing if it intends to appear at the oral hearing, and, if so, whether it intends to make an oral statement.*
- (4) *Any third party that has neither filed a written submission in accordance with paragraph (1), nor notified the Secretariat in accordance with paragraph (2), may, at the discretion of the division hearing the appeal, make an oral statement at the oral hearing, respond to questions posed by the division, and comment on responses given by others.*

Rule 27 of the *Working Procedures* provides:

Any third participant that has filed a submission pursuant to Rule 24(1) or has notified the Secretariat pursuant to Rule 24(2) that it intends to appear at the oral hearing may appear to make oral arguments or presentations at the oral hearing.

⁶⁷Rule 27(1) of the *Working Procedures*.

⁶⁸E.g., *Appellate Body Report, Argentina – Safeguard Measure on Imports of Footwear, WT/DS121/AB/R, adopted 12 January 2000, para. 7.*

These Rules will again be amended in February 2003.

4.3.3 Representation by Private Legal Counsel

In the appeal in EC – *Bananas III*, the question arose as to whether a WTO Member could be represented by private legal counsel, who were not government employees, at the oral hearing of the Appellate Body. The Appellate Body ruled that private legal counsel could participate in proceedings before the Appellate Body as part of the delegations of the participants or the third participants. The Appellate Body noted:

*... we can find nothing in the Marrakesh Agreement Establishing the World Trade Organization. . . , the DSU or the Working Procedures, nor in customary international law or the prevailing practice of international tribunals, which prevents a WTO Member from determining the composition of its delegation in Appellate Body proceedings. ...*⁶⁹

The Appellate Body furthermore noted that such representation may well be a matter of particular significance to many developing countries, who are often lacking in technical resources, to enable them to participate fully, and successfully, in Appellate Body proceedings.⁷⁰ In recent years it has become common for private legal counsel to be part of the delegation of a participant at the oral hearing of the Appellate Body and to speak for the participant at the hearing.

4.4 Deliberations and Decisions

4.4.1 Deliberations of the Division

Throughout the appellate review process, both before and after the oral hearing, the Appellate Body division hearing the appeal meets to discuss all the participants' written submissions, and to deliberate on the issues raised in an appeal. In its deliberations before the oral hearing, the division also prepares questions to put to the participants at the oral hearing. Only Members of the division, and selected staff of the Appellate Body Secretariat, attend the deliberations, which are confidential.

4.4.2 Ex Parte Communications

Article 18.1 DSU

Participants in an appeal are prohibited from having *ex parte* communications with the Appellate Body. Article 18.1 of the DSU states:

There shall be no ex parte communications with the panel or Appellate Body concerning matters under consideration by the panel or Appellate Body.

⁶⁹ Appellate Body Report, EC – *Bananas III*, para. 10.

⁷⁰ *Ibid.*, para. 12.

This prohibition encompasses meetings by a Member or Members of a division with one participant or third participant in the absence of other participants or third participants, discussions with participants or third participants by a Member of the Division in the absence of all Members of the Division, and any discussion of the subject matter of the appeal between an Appellate Body Member not assigned to a division and the participants or third participants to an appeal.

4.4.3 Exchange of Views

Rule 4 WP

After the oral hearing and before the drafting of the report, Members of the division exchange views on all issues raised in the appeal with their colleagues who are not on the Division.⁷¹ The exchange of views puts in practice the principle of collegiality set forth in the *Working Procedures*.⁷² Rule 4(3) of the *Working Procedures* states:

In accordance with the objectives set out in paragraph 1, the division responsible for deciding each appeal shall exchange views with the other Members before the division finalizes the appellate report for circulation to the WTO Members.

The Presiding Member of the division chairs the meeting, introduces the issues arising in the appeal and informs Members of the provisional views of the Members of the division. All Appellate Body Members are then given the opportunity to contribute to the discussion on these issues. Depending, among other things, on the complexity of the issues under discussion, this exchange of views usually takes place over two days. The fact that Members of the Appellate Body exchange views does not mean that decisions are taken by all seven members: the Appellate Body does not sit in plenum, there is no “full bench” that sits to hear appeals. The Members of the division hearing the appeal are the Members who make the final decisions on the issues of law and legal reasoning appealed. Rule 4(4) of the *Working Procedures* provide:

Nothing in these Rules shall be interpreted as interfering with a division’s full authority and freedom to hear and decide an appeal assigned to it in accordance with paragraph 1 of Article 17 of the DSU.

4.4.4 Drafting, Signing and Circulation of the Report

After the exchange of views the division completes its deliberations. The Presiding Member of the division coordinates the drafting of the Appellate Body report.⁷³ The report is drafted without the presence of the participants in the appeal.⁷⁴

⁷¹By the time of the exchange of views, all Members of the Appellate Body will have received and read copies of the documents filed in an appeal.

⁷²Rule 4 of the *Working Procedures*.

⁷³Rule 7(2) of the *Working Procedures*.

⁷⁴Article 17.10 of the DSU.

On the front cover of an Appellate Body report, the title of the dispute is identified, as is the reference number with the tag AB/R. An Appellate Report consists of two main sections, colloquially referred to as the “descriptive part” and the “findings section”. The descriptive part of the report identifies the participants and third participants, as well as the Members of the division. In this section, the Appellate Body will also provide a brief history of the dispute, including details of all the procedural steps taken in the appeal. There will also be a summary of all the main arguments made by the participants and third participants. In the findings section of the report, the Appellate Body makes its detailed and reasoned findings. In the final paragraphs of the report, the Appellate Body will uphold, modify or reverse the legal findings and conclusions of the Panel, and if necessary, will make a recommendation to the DSB.

Once finalized, the report is signed by the Members of the division, and then translated into French and Spanish, the other two official languages of the WTO. As explained above, Appellate Body reports must be circulated to WTO Members in all three official languages within 90 days of the notice of appeal. An Appellate Body report is made public at the same time that it is circulated to WTO Members. It is posted on the WTO website the same day. Additionally, Appellate Body reports are reproduced in the *Dispute Settlement Reports*, the DSR, published by Cambridge University Press.

4.4.5 Adoption of the Report

Article 17.14 DSU

The Appellate Body report, along with the panel report, is put on the DSB agenda at a meeting within 30 days after circulation of the Appellate Body report.⁷⁵ Unless there is a consensus against adoption, the DSB automatically adopts both reports. The panel report is adopted as upheld, modified or reversed by the Appellate Body: it is to be read in conjunction with the Appellate Body report. Article 17.14 of the DSU provides WTO Members the right “to express their views on an Appellate Body report.” Indeed, WTO Members, and not just the participants, often take full advantage of this opportunity to comment extensively on Appellate Body reports at DSB meetings, and especially on those portions of the report which they do not agree with.

4.5 Test Your Understanding

- 1. Briefly describe the various steps in the Appellate Body proceedings.**
- 2. When may a notice of appeal be filed? What are the requirements for a notice of appeal? Does an “other appellant” within the meaning of Rule 23 of the *Working Procedures* have to file a notice of appeal? Can an appeal be withdrawn and if so, when?**
- 3. What are the requirements for an appellant’s submission and for an appellee’s submission?**

⁷⁵Article 17.14 of the DSU.

- 4. How is the oral hearing in an appeal conducted? How is the exchange of views conducted?**
- 5. Can private legal counsel and WTO Members that did not reserve their third party rights participate in the oral hearing of the Appellate Body?**
- 6. When is an Appellate Body report made available to WTO Members that are not involved in the dispute? When is the report made public?**

5. DEVELOPING COUNTRY MEMBERS

Objectives

On completion of this section, the reader will be able:

- **to appraise the use made by developing country Members of the appellate review process and,**
- **to discuss the special and differential treatment provisions relating to the appellate review process applicable to developing country Members.**

5.1 Use of the Appellate Review Process

In its first eight years, the Appellate Body has considered and decided over 50 appeals. The statistics on the use of the appellate review mechanism, and the dispute settlement system more generally, suggest that both developing and developed country Members have found that the WTO dispute settlement system achieves results, and have confidence in its functioning.

Among the developing country Members, India and Brazil have been the most frequent users of the appellate review process but other developing country Members have also made use of the process.

Moreover, an important way in which developing country Members have familiarized themselves with the appellate review process is by participating as third participants. Developing country Members which have been third parties are likely to have found that their knowledge of the functioning of the dispute settlement system has been considerably enhanced by such participation. As one former Appellate Body Member has advised, developing countries should not hesitate to take up this role in appropriate conditions, because their familiarity with the inner workings of the system will stand them in good stead.⁷⁶

5.2 Special Rules for Developing Country Members

Rule 16 WP

Various provisions in the DSU require special attention to be paid to the interests and needs of developing country Members at different stages in WTO dispute settlement proceedings.⁷⁷ None of these provisions specifically concerns the Appellate Body proceedings. However, above, Rule 16(1) of the Working Procedures allows any participant to request the division hearing the appeal to adopt, in the interests of fairness and orderly procedure in the conduct of an appeal, an appropriate procedure for the purposes of that appeal.⁷⁸

⁷⁶See *Lacarte-Muro, JandGappah, P, "Developing Countries and the WTO Legal and Dispute Settlement System: A View From the Bench"*, *Journal of International Economic Law*, 2000, 395, 397.

⁷⁷See also Articles 3.12, 4.10, 8.10, 12.10 and 12.11 of the DSU. For a more detailed discussion on special rules applicable to developing country Members in WTO dispute settlement proceedings, we refer to Modules 3.1 and 3.2.

⁷⁸ See above, Section 3.1 of this Module.

Furthermore, any participant may, pursuant to Rule 16(2), request a division to modify a time period set out in the *Working Procedures* or the date for the oral hearing if that period or date would result in “manifest unfairness”.⁷⁹ Where a developing country Member participating in Appellate Body proceedings makes a specific representation and pleads special circumstances, the division hearing the appeal will consider such request and, where appropriate, adopt a suitable procedure or adjust a time period or date. However, the Appellate Body can only act on a specific request when it has received such a request.

Thus, in *EC – Bananas III*, for instance, Jamaica, a third participant in that appeal, asked the Appellate Body, under Rule 16(2) of the *Working Procedures*, to postpone the date of the oral hearing. The Appellate Body considered but declined this request, on the grounds that it was not persuaded that there were exceptional circumstances resulting in manifest unfairness to either Jamaica or any other participant. In the same appeal, the Appellate Body, at the request of Saint Lucia, ruled that private legal counsel who were not government employees could participate in proceedings before the Appellate Body as part of the delegations of the participants or the third participants.⁸⁰ The Appellate Body noted in this respect that representation by counsel of a government’s own choice may well be a matter of particular significance – *especially for developing country Members* – to enable them to participate fully in dispute settlement proceedings.

Effective legal assistance to developing country Members in dispute settlement proceedings in general, and Appellate Body proceedings in particular, is given by the newly established, Geneva-based Advisory Centre on WTO Law. In the summer of 2001, the Advisory Centre assisted for the first time a WTO developing country Member in a dispute settlement procedure when it assisted Pakistan in the Appellate Body proceedings in *United States – Cotton Yarn*. Module 3.1 provides more information on the Advisory Centre on WTO Law and the UNCTAD project *International Lawyers for Multilateral Trade Cooperation (“ILMTC”)*. Under this project law firms and independent legal practitioners have committed themselves to provide a certain amount of free legal advice to least-developed countries on issues relating to international economic dispute settlement, including WTO dispute settlement.

⁷⁹ See above, Section 3.2.2 of this Module.

⁸⁰ Appellate Body Report, *EC – Bananas III*, para 10.

6. CASE STUDIES

1. The Panel report in the dispute *Concordia – Measures Affecting Agricultural Products*, complaint by Victoria, has been circulated. Concordia, the respondent in the proceedings before the Panel, has filed a notice of appeal with the Appellate Body. Concordia imposed certain quarantine and testing requirements upon all imported fruit. These restrictions were imposed to ensure that no fruit entering Concordia contains the anitep fly, which is known to multiply rapidly and to destroy fruit trees. Based on the scientific evidence before it, the Panel found that the anitep fly has been extinct for more than 150 years. Concordia appeals this finding. Concordia also submits that “the Panel exhibited bias in its assessment of the evidence”. Concordia is of the view that the Panel erred in failing to consider certain evidence brought forward by Concordia. In fact, Concordia is of the view that “the Panel relied on the statement of one expert, and one expert only”, and ignored all the other evidence submitted by Concordia. Moreover, Concordia believes that the Panel erred in failing to consider some of the arguments advanced by Concordia. Finally, Concordia disputes the Panel finding under Article 5.1 of the SPS *Agreement* that the quarantine and testing requirements at issue are not based on a risk assessment. Concordia believes that the Panel erred in its application of the requirements of Article 5.1 to the facts before it. The Kingdom of Victoria, the complainant, is of the view that Concordia’s appeal “is completely baseless and should not be entertained by the Appellate Body”. You are a legal officer in the Appellate Body Secretariat, and have been asked to advise the Appellate Body with respect to the admissibility of Concordia’s appeal.
2. In the same dispute, an *amicus curiae* brief has been submitted by the Action Group for the Restitution of Respectable Values (AGRRV). The Kingdom of Victoria requests the division hearing the appeal to ignore the AGRRV brief. Concordia does not object to the brief, and insists on having a preliminary oral hearing at which it can present its arguments in support of the brief. The Kingdom of Victoria opposes a preliminary hearing, and insists that it has a right to make an additional written submission on this issue. You are the Presiding Member of the Appellate Body division hearing the appeal. How would you handle this issue?
3. Meanwhile the Republic of Micronesia, a third party in the dispute before the panel, files a notice of appeal with the Appellate Body Secretariat. Further, Indigo State, which has been a WTO Member for just under six months, and did not have the opportunity to participate in the panel proceedings, decides that it would like to participate in the appellate proceedings. How should the Appellate Body division in this appeal react?
4. The Kingdom of Victoria objects to your sitting on the division on the basis that you, the Presiding Member of the division, are a national of Concordia. Moreover, it has become known to Victoria that you have a daughter who is married to the owner of Concordia’s largest fruit company. Victoria objects to

your sitting on the division hearing the appeal on this basis as well. Can you sit on this division?

5. Concordia has filed its appellant's submission. The Kingdom of Victoria, which has a policy of publishing all its submissions on the internet, decides to publish Concordia's appellant's submission as well. Is this a problem?
6. In its request for the establishment of a panel, the Kingdom of Victoria had claimed that the quarantine and testing requirements at issue were inconsistent with Articles 5.1, 5.5 and 5.6 of the *SPS Agreement*. After having found that the SPS measures at issue were inconsistent with Article 5.1, the Panel exercised judicial economy and did not make findings on the consistency with Articles 5.5 and 5.6. In its appellee's submission, the Kingdom of Victoria invites the Appellate Body – in case it were to reverse the Panel's finding on Article 5.1 - to complete the legal analysis and examine whether the SPS measures at issue are consistent with Articles 5.5 and 5.6. Can the Appellate Body do so?
7. Nicolasia, which intends to submit a third participant's submission, is a developing country that has no experience in preparing submissions and in arguing cases before the Appellate Body. Dr. F. Tungamirai Tanganai, the First Secretary at the Permanent Mission of Nicolasia in Geneva, telephones the Chairman of the Appellate Body, who is not a Member of the Appellate Division hearing the appeal to seek assistance in arguing Micronesia's case.
How will the Chairman react? What options exist for a developing country such as Nicolasia to enable it to participate effectively in the Appellate Body proceedings?

7. FURTHER READING

7.1 Articles

- **Bronckers, M. and McNelis, N.**, “Fact and Law in Pleadings Before the WTO Appellate Body”, *International Trade Law and Regulation*, 1999, 118-123.
- **Lacarte-Muro, J. and Gappah, P.**, “Developing Countries and the WTO Legal and Dispute Settlement System: A View From the Bench”, *Journal of International Economic Law*, 2000, 395-402.
- **Lugard, M.**, “Scope of Appellate Review: Objective Assessment of the Facts and Issues of Law”, *Journal of International Economic Law*, 1998, 323-327.
- **McRae, D. M.**, “The Emerging Appellate Jurisdiction in International Trade Law”, in Cameron J. and Campbell K. (eds.), *Dispute Settlement in the WTO* (Cameron May, 1998), 98-110.
- **Rangaswami, V.**, “Operation of the Appellate Process and Functions, Including the Appellate Body”, *Law and Policy in International Business*, 2000, 701-704.
- **Shoyer, A W. and Solovy, E M.**, “The Process and Procedure of Litigating at the World Trade Organization : A Review of the Work of the Appellate Body”, *Law and Policy in International Business*, 2000, 677-696.
- **Van den Bossche P.**, “Appellate Review in WTO Dispute Settlement”, in Weiss, F. (ed.), *Improving WTO Dispute Settlement Procedures: Issues and Lessons from the Practice of Other International Courts and Tribunals* (Cameron May, 2000), 305-319.

7.2 Documents and Information

For information on WTO activities, see www.wto.org. Official WTO documents can be obtained by searching on the WTO’s online document database, available at: <http://docsonline.wto.org>. A very useful website on WTO dispute settlement is www.worldtradelaw.net.