# The WTO Appellate Body's First Decision

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## 1. INTRODUCTION

The General Agreement on Tariffs and Trade (GATT)[1] began more as a diplomatic forum where parties compromised disagreements than a court that settled them. The term 'conciliation' was used more frequently to describe the process than the term 'dispute settlement'. However, over nearly half a century as the focal point of international trade law and diplomacy, GATT's dispute settlement procedures moved decidedly, if not steadily, from the diplomatic to the juridical. With the adoption of the Marrakesh Agreement Establishing the World Trade Organization (WTO),[2] the juridical model clearly has prevailed.[3]

A central part of the Marrakesh Agreement is the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).[4] The new dispute settlement rules build on GATT's experience, greatly legalizing the process. The most notable change made by the DSU is its denial to the losing party of the power to block formal adoption of an adverse report by a dispute settlement panel.[5] Another notable change is

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1. GATT, 55 UNTS 194 (1948).
2. 33 ILM 112 (1994).
3. The history is recounted authoritatively and superbly in R.E. Hudec's two volumes, The GATT Legal System and World Trade Diplomacy, 2nd ed. (1990) and Enforcing International Trade Law: The Evolution of The Modern GATT Legal System (1993).
4. *Id.*, Annex II.
5. Art. 16 of the DSU reverses the prior GATT process, which required consensus in favour of adoption. An unappealed report now will be adopted unless the DSB decides by consensus not to adopt it; since the prevailing party is needed for consensus, frequent

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the establishment of an Appellate Body with the power to uphold, modify, or reverse the legal findings and conclusions reached by a panel.[6] The DSU provides that an Appellate Body report shall be adopted by the WTO's Dispute Settlement Body (DSB) and must be unconditionally accepted by the parties to the dispute, unless the DSB decides by consensus not to adopt the report within 30 days of its circulation to the members of the DSB.[7]

A tribunal with such powers is unprecedented in international organization.[8] Its establishment reflects the view of a significant majority of the members of the WTO that, as far as it went, the GATT panel process was successful, but that more of the elements of a modern legal system were needed if the process ever were to rise above a primitive level.[9] One of those elements is a mechanism to review determinations of tribunals of initial jurisdiction. The Appellate Body is the WTO's attempt to establish that review mechanism.

In *United States - Standards for Reformulated and Conventional Gasoline*,[10] the Appellate Body rendered its first decision, reversing the finding of the dispute settlement Panel on the point under appeal, but upholding its conclusion on other grounds. While this first decision of the Appellate Body raises some important questions, particularly concerning procedure and style, it also accomplished the task assigned to it by the DSU. The Appellate Body reached the correct result and, at the same time, improved on the reasoning of the panel on the substantive point subject to appeal.

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rejection is unlikely.

6. Art. 17 of the DSU establishes the Appellate Body. Its authority to uphold, modify, or reverse the legal conclusions of a panel is contained in Article 17(13).
7. The members of the DSB are, of course, the member governments of the WTO. The individuals who represent their governments on the DSB may not, however, be the same individuals who represent their governments in other WTO bodies.
8. Art. 23 of the DSU effectively provides for compulsory jurisdiction by the DSB over the members in relation to their WTO obligations. This contrasts sharply with the absence of compulsory jurisdiction in other international tribunals, including the International Court of Justice.
9. "[O]n the tree of legal evolution, GATT's adjudication machinery is still down at the level studied by legal anthropologists, right alongside dispute-resolution ceremonies practiced among primitive societies." R.E. Hudec, *Public International Economic Law: The Academy Must Invest*, 1 Minnesota Journal of Global Trade 5-6 (1992). *See also* H.L.A. Hart, The Concept of Law, Ch. X (1961).
10. Appellate Report, AB-1996-1, WT/DS2/AB.

After briefly sketching the background of the dispute which led to the appeal, this article will review the substantive and procedural conclusions of the Appellate Body report and will offer a short comment on its decisional style.

## 2. BACKGROUND

The *Gasoline* appeal grew out of the first panel report issued under the new dispute settlement rules.[11] Brazil and Venezuela had argued to the Panel that US procedures for establishing standards for imported gasoline differed from those applicable to domestic gasoline, and that those procedures treated imports less favourably than they treated like products of domestic origin, contrary to the requirements of Article III(4) of GATT 1994. The procedures at issue, the 'baseline establishment methods', were part of the '*Gasoline* Rule', an extensive regulation issued by the US Environmental Protection Agency (EPA), which became effective 1 January 1995.[12] The United States admitted the difference in treatment, but denied that it was less favourable to imports, arguing alternatively that any less favourable treatment was justified by the exceptions contained in Article XX(b), (d), or (g) of GATT 1994.

The *Gasoline* Rule implemented the Clean Air Act, which established two programmes to reduce pollution from gasoline combustion. The first, requiring use of 'reformulated gasoline' in major metropolitan areas with severe pollution problems, mandated a 15 per cent reduction in pollutants as measured against a 1990 'baseline' for each individual refiner, blender, or importer. The second was intended to prevent the 'dumping' of pollutants removed from reformulated gasoline into the remaining product, i.e., 'conventional' gasoline. It required that conventional gasoline be at least as 'clean' as it was in 1990, also as measured against the baseline applicable to each refiner, blender, or importer.[13]

The *Gasoline* Rule established three methods for determining

11. Panel Report United States - Standards for Reformulated and Conventional Gasoline, adopted 29 January 1996, WT/DS2.
12. 40 C.F.R. Part 80, paras. 80.1-80.135, 59 Fed. Reg. 7715 (16 February 1994).
13. 42 U.S.C., para. 7545(k).

individual baselines for domestic refiners, blenders, and importers. Method 1 measured all of the relevant properties of gasoline as they existed in 1990 for that particular refiner, blender, or importer. However, few, if any, firms - domestic or foreign - kept records of all of these required properties in 1990.[14] The Rule, therefore, provided alternatives, and these alternatives were the source of the discriminatory, less-favourable treatment of imports. Domestic refiners unable to establish baselines by Method 1 were required to use Methods 2 and 3 to supplement their Method 1 data, but blenders and importers unable to satisfy the Method 1 criteria were required to use a baseline contained in the Clean Air Act itself, the so-called statutory baseline.[15] No baseline was provided for foreign refiners.

The Panel, agreeing with Brazil and Venezuela that this methodology treated imports less favourably than domestic gasoline and, therefore, was inconsistent with Article III(4), stated:

> since, under the baseline establishment methods, imported gasoline was effectively prevented from benefitting from as favorable sales conditions as were afforded domestic gasoline by an individual baseline tied to the producer of a product, imported gasoline was treated less favourably than domestic gasoline.[16]

The Panel also concluded that this inconsistency was not justified under paragraphs (b), (d), or (g) of Article XX. Only the Panel's conclusion that the measure was not justified under Article XX(g) was appealed by the United States.

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14. The legal and environmental relevance of some of these properties was first established by the Rule itself; some of them have no commercial significance - hence the incompleteness of records from 1990.
15. 19 C.F.R., para. 80.91. Method 2 utilizes existing 1990 data, supplemented where necessary by 1990 blendstock data (which, when its properties are known, permits a reconstruction of 1990 production properties); Method 3 utilizes post-1990 gasoline and blendstock data. *Id.* Only approximately 3% of US refiners met the statutory baseline for all parameters. *See* Panel Report US - Gasoline, *supra* note 9, para. 6.15.
16. *Id.*, para. 6.10.

## 3. SUBSTANCE

### 3.1. Overview

Article XX is composed of 10 subparagraphs, (a) through (j), and a 'chapeau' or 'preamble.' The chapeau and subparagraph (g) specify:

> [s]ubject 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 this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
> [...]
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption [...].[17]

The Panel had found that the baseline establishment methods of the *Gasoline* Rule were not a 'measure' 'relating to' an exhaustible natural resource, even though it found that clean air is an exhaustible natural resource. Its analysis was based on an earlier report from the *Herring and Salmon* Panel,[18] which had held that a trade measure had to be 'primarily aimed at' the conservation of exhaustible natural resources to be deemed 'relating to' their conservation within the meaning of Article XX(g). The United States appealed this conclusion. It agreed with the 'primarily aimed at' interpretation of 'relating to', but argued that the measure in dispute met that test.

The chapeau and subparagraph (g) were treated separately by the three members of the Appellate Body who decided the appeal.[19] Initially,

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17. Art. XX, *supra* note 1, at 262. Amended by Protocol Amending the Preamble and Parts II and III of the general Agreement on Tarifs and Trade, done at Geneva on 10 March 1955: amended Art. XX and inserted (j). *See* 278 UNTS 200 (1957).
18. Panel Report Canada - Measures Affecting Exports of Unprocessed Herring and Salmon, adopted 22 March 1988, BISD 35S/98.
19. The seven-member Appellate Body uses the term 'Division' to refer to the three-members who hear a particular appeal. The 'Division' in this case consisted of Florentino P. Feliciano, Presiding Member, Christopher Beeby, and Mitsuo Matsushita. Rule 6 of the Appellate Body's Working Procedures for Appellate Review deal with the establishment of divisions, and provides for the selection of members to a Division by rotation. The order or basis or rotation is, however, not specified in the DSU and was not disclosed by the Appellate Body, either in its Working Procedures or in its first opinion.

however, the Division considered the meaning of the term 'measures', which appears in both the chapeau and in subparagraph (g).

### 3.2. Measures

An ultimately minor, but nonetheless important, initial issue concerned the designation of the 'measures' that were involved: did the term refer to the entire *Gasoline* Rule or only to the particular provisions of the Rule that dealt with the establishment of baselines? The Panel at times had described the baseline methodology of the *Gasoline* Rule in such terms as 'the difference in treatment', 'the less favourable treatment', or 'the discrimination'. The United States objected to this terminology, and the Appellate Body agreed that those terms were legal conclusions, not designations of the measure at issue. The United States went on to argue that the entire *Gasoline* Rule itself was 'the measure'. Eventually, however, the United States agreed with Brazil and Venezuela on a third alternative, i.e., that the 'measure' was not the entire Rule, but only the Rule's baseline establishment methodology, held to be in inconsistent with Article III(4).[20] The Appellate Body concurred.[21]

### 3.3. Article XX(g)

Article XX(g) is composed of three elements. The measure in question must be one:

1. 'relating to' conservation;
2. of an exhaustible natural resource; and
3. made effective in conjunction with restrictions on domestic production or consumption.

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20. *See* Appellate Report, *supra* note 10, n. 29 and accompanying text.
21. In referring to the word 'necessary' in Art. XX(b), the former head of the GATT Legal Affairs Division, Frieder Roessler, observed: "[w]hat must be demonstrated to be necessary is merely the trade measure requiring justification under that provision". F. Roessler, *Diverging Domestic Policies and Multilateral Trade Integration*, *in* J. Bhagwati & R.E. Hudec (Eds.), 2 Fair Trade and Harmonization: Prerequisites for Free Trade? 34 (1996).

The Panel had concluded that an exhaustible natural resource - clean air - was involved, but that the measure was not one 'relating to' clean air because the "baseline establishment methods at issue in this case were not primarily aimed at the conservation of natural resources."[22] The Panel, accordingly, did not reach the issue of whether the measure was "made effective in conjunction with restrictions on domestic production or consumption."[23]

### *3.3.1. 'Relating to'*

The phrase 'relating to' in Article XX(g) has been problematic for GATT for more than a decade. The *Herring and Salmon* Panel clearly struggled with this language. That Panel was faced with Canada's claim that a prohibition on exports of unprocessed herring and salmon, contrary to the requirements of Article XI, constituted an integral part of a complex system of fishery resource management, and that the prohibition, therefore, related to the conservation of those fish resources.[24] The undeniable fact was that herring and salmon are exhaustible natural resources and a measure prohibiting their export is a measure 'relating to' those resources, and arguably to their conservation. But this conclusion would have opened the door to unbridled protectionism, since almost any measure inconsistent with GATT obligations could be placed in a context in which it would 'relate to' the conservation of an exhaustible resource. The *Herring and Salmon* Panel avoided this difficulty by devising the 'primarily aimed at' test:

> [a]s the preamble of Article XX indicates, the purpose of including Article XX(g) in the General Agreement was not to widen the scope for measures serving trade policy purposes but merely to ensure that the commitments under the General Agreement do not hinder the pursuit of policies aimed at the conservation of exhaustive [sic] natural resources. The Panel concluded for these reasons that, while a trade measure did not have to be necessary or essential to the conservation of an exhaustible natural resource, it had to be primarily aimed at the conservation of an exhaustible natural resource to be considered as "relating to" conservation within the meaning of Article XX(g).[25]

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22. Panel Report US - Gasoline, *supra* note 11, para. 6.40.
23. *Id.*, para. 6.41.
24. *See* Herring and Salmon Panel Report, *supra* note 18, paras. 3.3-3.7.
25. *Id.*, para. 4.6.

The Panel was stretching the words 'relating to' as far as they would go, and perhaps farther than they would go.[26] Nevertheless, since all of the parties in *Gasoline* adopted the 'primarily aimed at' standard of *Herring and Salmon*, the Appellate Body did not address the point directly.[27] It did "note, however, 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)", perhaps suggesting that the days of the 'primarily aimed at' standard are numbered.[28]

Reversing the Panel's conclusion, the Appellate Body went on to hold that the baseline establishment rules indeed were 'primarily aimed at' the conservation of an exhaustible natural resource. This is a conclusion with which it is difficult to disagree if the premise is conceded that clean air is an exhaustible natural resource within the meaning of Article XX(g).[29]

Here, the clarification of the term 'measure' was important and helpful analytically. The Panel had asked whether the 'less favourable treatment' was 'primarily aimed at' conservation, but as the Appellate Body noted, it is not the legal conclusion of 'less favourable treatment' that is to be examined under Article XX, but the 'measure' itself, i.e., the baseline establishment rules. However discriminatory these rules were, they were aimed at conservation of clean air; indeed, that is what they were all about.

### *3.3.2. 'In conjunction with'*

After reversing the Panel on the 'relating to' point, the question for the Appellate Body was what it should do next. In most municipal legal systems, an appellate reversal would lead to a remand to the tribunal below, with instructions to proceed with consideration of the undecided

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26. The 'primarily aimed at' interpretation of 'relating to' does not, at first blush, meet the 'ordinary meaning' test of Art. 31(1) of the Vienna Convention on the Law of Treaties, but, arguably, it does so in light of the additional requirement of Art. 31 that the ordinary meaning of the terms of a treaty be interpreted in their context and in light of the treaty's 'object and purpose'. The object and purpose of the GATT is to liberalize trade, and a rigidly literal reading of "relating to" would be contrary to that goal.
27. Brazil and Venezuela adopted the standard for the obvious reason that it supported their positions; the United States did so because, as the party prevailing on the point in Herring and Salmon, it could hardly do otherwise.
28. Appellate Report, *supra* note 10, at 19 (page references are to the original version dated 29 April 1996).
29. There was, in fact, no evidentiary basis for conceding the premise. *See* Section 4.2., *infra*.

issues in light of the appellate decision. But the text of the DSU provides no explicit remand authority to the Appellate Body, and the firm time-limits that control both its proceedings and those of panels would seem to preclude any implicit authority. The procedural implications of this lack of authority will be discussed in Section 4, *infra*. The practical consequence, however, was that the Appellate Body itself moved to consider *de novo* the remaining aspects of Article XX.

The first aspect of Article XX to be considered *de novo* was whether the measure was "made effective in conjunction with restrictions on domestic production or consumption." The Appellate Body concluded that it was. This is a conclusion that is likely to provoke comment.

The 'in conjunction with restrictions' clause, the Appellate Body noted, "is appropriately read as a requirement that the measures concerned impose restrictions, not just in respect of imported gasoline but also with respect to domestic gasoline."[30] This is a "requirement of *even-handedness*", but not necessarily a requirement of identical treatment, in the view of the Appellate Body.[31] Indeed, the language of the opinion suggests it is indeed a minimal requirement, and that 'even-handedness' simply means *some* restriction on each side, however minimal:

> if *no* restrictions on domestically-produced like products are imposed at all, and all limitations are placed upon imported products *alone*, the measures cannot be accepted as primarily or even substantially designed for implementing conservationist goals. The measure simply would be naked discrimination for protecting locally-produced goods.[32]

The Appellate Body rejected any 'empirical effects' test, arguing that the legal characterization of a measure may not reasonably be made contingent upon subsequent effects. This may have been the tribunal's response to an argument put forth by Brazil, and otherwise not responded to, that the Panel had found that the measure does not necessarily restrict the level of pollutants introduced into the air from domestic gasoline, and therefore the measure does not necessarily restrict the 'consumption' of clean air by those pollutants.[33] If this was the response, it is not a satisfactory one, for

30. Appellate Report, *supra* note 10, at 20.
31. *Id.*, at 21 (emphasis in original).
32. *Id.*, (emphasis in original; footnote omitted).
33. *See* Panel Report US - Gasoline, *supra* note 11, para. 6.27, which provides examples of

the opinion seems to say that the 'made effective' requirement will be met merely by minimal restrictions on domestic production or consumption that may or may not become effective, depending upon subsequent events. This hardly seems to square with the Division's expressed requirement of 'even-handedness', nor does it seem to be an appropriate construction of a provision that is to be construed narrowly.[34] To the contrary, it is an extremely permissive construction of that provision.

### 3.4. Chapeau

After finding that the measure met the requirements of Article XX(g), the Appellate Body moved to consider the requirements of the chapeau. It first considered the meaning of the term 'applied', went on to discuss the meaning of 'countries where the same conditions prevail', and finally, essentially as a single requirement, addressed the meaning of the terms 'arbitrary discrimination', 'unjustifiable discrimination', and 'disguised restriction' on international trade. Ultimately, the Appellate Body relied upon this single requirement - arbitrary and unjustifiable discrimination plus disguised restriction - to affirm the Panel's conclusion. This requirement thus becomes the effective part of Article XX, limiting the risk of protectionist action, otherwise justified by the Appellate Body's permissive reading of subparagraph (g).

#### *3.4.1. 'Applied'*

The chapeau of Article XX refers to measures that "are not *applied* in a manner which would constitute a means of arbitrary or unjustifiable discrimination."[35] Thus, it is not enough to show that a measure is

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situations in which pollution from domestic gasoline actually could increase under the operation of the *Gasoline* Rule.

34. "Article XX provides for an exception to obligations under the General Agreement. The long-standing practice of panels has accordingly been to interpret this provision narrowly, in a manner that preserves the basic objectives and principles of the General Agreement," Panel Report United States - Restrictions on Imports of Tuna, unadopted, circulated 16 June 1994, DS29/R, para. 5.26, citing Panel Report Canada - Administration of the Foreign Investment Review Act, adopted 7 February 1984, BISD 30S/140, at 164, para. 5.20 and Panel Report United States - Section 337 of the Tariff Act of 1930, adopted 7 November 1989, BISD 36S/345, at 393, para. 527.

35. Art. XX GATT, *supra* note 1 (emphasis added).

arbitrarily discriminatory; it must be shown to be *applied* in an arbitrarily discriminatory manner. An obvious question is, how could an arbitrarily discriminatory measure be applied in any other way? The burden of answering this question was to the party invoking Article XX. "That is, of necessity," the Appellate Body observed, "a heavier task than that involved in showing than an exception, such as Article XX(g), encompasses the measure at issue."[36]

### *3.4.2. 'Between countries'*

The Appellate Body expressed some concern about an issue that did not trouble the parties at all: Does the standard 'between countries where the same conditions prevail' apply only to exporting countries, or does it apply also to importing countries? Stated differently, is the standard an Article I 'most-favoured-nation' requirement exclusively, or is it also an Article III 'national treatment' requirement?

The United States made clear that, in its view, the standard referred both to importing and to exporting countries. While a different answer might have furthered the US argument in this case, it is an argument that would be hard to make on the language and one that, if successful, could come back to haunt the US in future cases. Oddly, the Appellate Body observed with apparent surprise that, "[a]t no point in the appeal was that assumption [of the US] challenged by Venezuela or Brazil".[37] But Venezuela and Brazil would have had no interest in challenging a US position that the standard encompasses both importing and exporting countries. If successful, such an argument would have eliminated Article III from the chapeau's strictures, and would have permitted the application of arbitrary and unjustifiable discrimination if the measures merely met the standards of XX(g) or any of the other subparagraphs of Article XX. Particularly in light of the Appellate Body's minimalist reading of subparagraph (g)'s 'in conjunction with' requirement, this position would have led not only to conclusions not welcomed by the appellees in the immediate appeal; it also would legitimize virtually any protectionist measure that could be said to 'relate to' the conservation of an exhaustible

36. *See* Appellate Report, *supra* note 10, at 23.
37. *Id.*, at 24.

natural resource. It is worth noting that John H. Jackson describes the language of the chapeau on this point as "a modified form of both the Most-Favored-Nation obligation and the national treatment obligation".[38]

### *3.4.3. 'Arbitrary or unjustifiable discrimination' and 'disguised restriction on international trade'*

The substance of the chapeau lies in its provisions referring to 'arbitrary or unjustifiable discrimination' and 'disguised restriction on international trade'. It is possible to look at each of these individually, i.e., arbitrary discrimination, unjustifiable discrimination, and disguised restriction. The Appellate Body, however, chose another approach:

> "[a]rbitrary discrimination", "unjustifiable discrimination" and "disguised restriction" on international trade may [...] be read side-by-side; they impart meaning to one another. It is clear to us that "disguised restriction" includes disguised *discrimination* in international trade. It is equally clear that *concealed* or *unannounced* restriction or discrimination in international trade does *not* exhaust the meaning of "disguised restriction". We consider that "disguised restriction", whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX. Put in a somewhat different manner, the kinds of considerations pertinent in deciding whether the application of a particular measure amounts to "arbitrary or unjustifiable discrimination", may also be taken into account in determining the presence of a "disguised restriction" on international trade. The fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX.[39]

It is difficult to disagree with this equating of arbitrary discrimination with unjustifiable discrimination, as it is difficult to imagine discrimination that is one of these but not the other.

The notion of disguised restriction, however, seems to suggest something different: it suggests a measure posing as something that it is not. Canada's landing requirement in *Herring and Salmon* posed as a conservation measure, at least in its *post hoc* rationalization, but plainly it

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38. J.H. Jackson, World Trade and the Law of GATT 743 (1969). He later refers to these phrases as "'softer' obligations of MFN and national treatment". *See* J.H. Jackson, The World Trading System 207 (1989).
39. Appellate Report, *supra* note 10, at 25.

was an export prohibition designed to foster the fish-processing industry in coastal communities. The argument that the prohibition was a conservation measure did not survive what Robert Hudec has described as 'the power of collective laughter'.[40] In fact, it might have been better for GATT jurisprudence if the Panel in *Herring and Salmon* had had the benefit of the Division's opinion in *Gasoline*. It might then have decided *Herring and Salmon* in the chapeau as a disguised restriction rather than in Article XX(g), which required creation of the more difficult to support 'primarily aimed at' test to avoid an extremely protectionist result. While arguably the Article XI export prohibition at issue in *Herring and Salmon* could be construed as a form of discrimination between Canada and the United States, this would be an extremely broad construction of the term, and one not likely to be consistent with its ordinary meaning.[41]

An interpretation that treats disguised restriction as separate from arbitrary or unjustifiable discrimination also seems better supported textually. The phrase is in the disjunctive ('or'), and it is set off by commas from the discrimination clause and its reference to countries where the same conditions prevail. Moreover, little seems to be gained by combining the notions of discrimination and disguised restriction. If a measure 'formally within the terms of an exception listed in Article XX' is found to be applied in an arbitrary or discriminatory manner, that is enough to disqualify it from Article XX justification. To go further and say that it is also a disguised restriction adds nothing.

## 4. PROCEDURE

The failure of the DSU to provide remand authority to the Appellate Body posed some unusual procedural problems and led to decisions that, while perhaps necessary, could burden the parties and the Appellate Body in future appeals.

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40. R.E. Hudec, *GATT Legal Restraints on the Use of Trade Measures Against Foreign Environmental Practices, in* Bhagwati & Hudec (Eds.), *supra* note 21, at 95 and 148. Hudec used the phrase in the context of Art. XXI, but it seems apt for 'disguised restriction' under Art. XX as well.

41. Pursuant to the Vienna Convention, *supra* note 26, the terms of a treaty shall be interpreted in accordance with their ordinary meaning.

The Panel decision, it will be recalled, bypassed the chapeau and turned directly to Article XX's subparagraphs.[42] In its consideration of Article XX(g), the Panel first decided that clean air is an exhaustible natural resource and then decided that the baseline-establishment methodology was not a measure 'relating to' the conservation of that air. Thus, the Panel found it unnecessary to decide whether the measure was 'made effective in conjunction with restrictions on domestic production or consumption'. It also found it unnecessary to consider the chapeau or the claims of Brazil and Venezuela under the TBT Agreement.[43]

When the Appellate Body, without remand authority, reversed the Panel on its interpretation of 'relating to', its choices were limited to telling Brazil and Venezuela to start over or deciding the necessary undecided issues itself, *de novo.* It chose to do the latter with regard to undecided Article XX issues. It could hardly have done otherwise. To send Brazil and Venezuela back to the starting line a year after they had begun the process, simply because the Panel reasonably chose not to decide all of their claims, would have been an unacceptable result in a dispute settlement process designed to expedite matters. At the same time, however, the Appellate Body declined to consider the argument of Brazil and Venezuela that the Panel's conclusion regarding clean air as an 'exhaustible' natural resource was erroneous, as well as their claims under the TBT Agreement.

### 4.1. Cross-Appeals

The Appellate Body refused to consider whether clean air is an exhaustible natural resource, and declined to hear the TBT claim, because the appellees had not cross-appealed either issue. The reasoning is somewhat puzzling, particularly as to TBT.

The Panel's conclusion that clean air is an exhaustible natural resource was not a final judgment. Rather, it was, at most, an intermediate

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42. *See* Section 3.2.2., *supra*.
43. Most of the Panel's Art. XX discussion, and most of the arguments of the parties, dealt with the 'necessity' requirement of Art. XX(b). *See* Panel Report US - Gasoline, *supra* note 11, paras. 6.21-6.29. The Panel also found that the measure was not justified by Art. XX(d). *Id.*, para. 6.33. Art. XX(g) was a decidedly minor point before the Panel and in its Report. *Id.*, paras. 6.35-6.41.

conclusion of the Panel, reached in the process of making its final judgment that the measure could not be justified by Article XX(g). Since, in fact, the Panel concluded that the measure did not 'relate to' conservation in the required way, its conclusion as to clean air really was *obiter dicta,* because it was not necessary to the decision reached.

The Appellate Body, therefore, seems to be saying that prevailing parties should cross-appeal intermediate or even unnecessary legal conclusions of Panels with which they disagree, if they wish those conclusions to be considered on appeal of the provision in which they are contained. It certainly is possible for prevailing parties to cross-appeal these questions, but if prevailing parties file protective cross-appeals from any aspect of the Panel Report with which they disagree, the burden on the other parties and on the Appellate Body will increase, perhaps greatly.

This position is even more questionable with regard to the TBT Agreement. The Panel reached no conclusions on TBT, apart from its conclusion that the Agreement did not need to be reached in light of its Article III and Article XX conclusions. The Appellate Body could have taken the same stance. Yet it declined to reach TBT, not for the understandable reason that it was unnecessary to do so, but simply because it was not cross-appealed. The unmistakable message to parties in the future, therefore, is cross-appeal all grounds left undecided by the Panel.[44]

The implication of this decision is that, had Brazil and Venezuela appealed these issues, the Appellate Body would have decided them in addition to deciding as it did under Article XX. At best, however, this would appear to be a waste of everyone's resources. At worst, it would lead to the proliferation of grounds for a result, making uncertain the legal basis of that result.

There is also the problem of what happens to the cross-appeal if the initial appeal is dismissed or withdrawn. A cross-appeal is not a mere counter-punch, but an independent claim in its own right. If the original appeal were terminated, the cross-appellant of an intermediate or undecided

44. One option of both the Panel and the Division was to treat Art. 2 of the TBT Agreement as *lex specialis* to Art. III, which - arguably - it is, and decide on that basis. Neither Brazil nor Venezuela made such an argument, and, given the existence of GATT jurisprudence on Art. III and the uncertainty of TBT's relationship to that article, few litigants are likely to do so. If TBT is to have an impact in Art. III cases, therefore, it is likely to require an affirmative step by a panel or the Appellate Body.

issue would be in the position of challenging the grounds for the judgment in its favour, and the Appellate Body presumably would be obliged to decide the issue. It seems odd that a time-pressed tribunal would wish to encourage this activity. Alternatively, the Appellate Body could treat cross-appeals as conditional, and not decide them if the Panel's conclusions are upheld on other grounds or if the initial appeal is dismissed or withdrawn. This would avoid the decisional problems, but the practice would put the parties to a considerable amount of needless work and resource expenditure in the midst of an already highly time-constrained process.[45]

### 4.2. The chapeau and 'in conjunction with'

Neither Brazil nor Venezuela cross-appealed the undecided issues of the chapeau of Article XX or the undecided 'in conjunction with' clause of XX(g), yet the Appellate Body proceeded to consider these questions *de novo*, contrary to its position with regard to 'exhaustible natural resource' and TBT. There is logic to this position. The Appellate Body saw the United States as "having, in effect, appealed from the failure of the Panel to proceed further with its inquiry into the availability of Article XX(g) as a justification for the baseline establishment rules."[46] Therefore, in the Division's view, the undecided Article XX issues were in a different posture from the decided issues and also from TBT. These were issues on which the United States would have to prevail to qualify for Article XX justification.

Nevertheless, the Division's decision to decide the merits of the 'in conjunction with restrictions on domestic consumption or production' issue is puzzling. The United States argued that it restricts the consumption of clean air by reducing the emission of pollutants that consume it.[47] The appellants argued that pollutants do not 'consume' air as that term is

45. One option to ease the burden on the parties and the Appellate Body would be to permit a simple notice of cross-appeal, with incorporation by reference of the submissions made to the Panel. These are in the appellate record already and, in all likelihood, would contain the arguments the parties would wish to make to the Appellate Body in any cross-appeal. Litigants are likely to want a clear signal from the Appellate Body that such a procedure is acceptable before risking it, however.

46. *See* Appellate Report, *supra* note 10, at 19.

47. This was its final position. The United States first claimed that the resource conserved was gasoline; it then shifted simply to 'air', and finally to 'clean air'.

commonly understood. Rather, they contended, pollutants affect the quality of air adversely by adding undesirable elements to the air. A reduction in the quality of air, the appellants argued, is not the same as a reduction in its quantity, which is what would occur if it were consumed.[48]

Whatever the merits of these respective arguments, what is noteworthy is that the record before both the Panel and the Appellate Body contained no evidence whatsoever concerning the nature of air or of what occurs when pollutants from gasoline are emitted into air. The US provided no evidence on the point, and the Panel had not obtained expert advice.[49] With this evidentiary void, the Appellate Body either should have decided the question on the basis of the burden of proof (i.e., the US, as the body invoking Article XX, had the burden) or, alternatively, it simply should have assumed the facts *arguendo*. Either course would have been preferable to an effectively unreviewable *de novo* determination, based on a factual record that - to put it mildly - is highly inadequate.

### 4.3. Working Procedures

The Appellate Body's *Working Procedures for Appellate Review* were issued on 15 February 1996.[50] Six days later, the United States filed its notice of appeal.[51] The timetable established by the Appellate Body necessarily reflects the constraints imposed by the DSU, which call for a decision within 60 days as a 'general rule', and in no case in less than 90 days from the initiation of the appeal.[52] These limits give the Appellate Body little room to manoeuvre; nevertheless, its timetable is unnecessarily generous to appellants, and unnecessarily difficult for appellees.

The Working Procedures designate the date of the notice of appeal as 'Day Zero', and require the appellant's submission on Day 10. Submissions

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48. And, as the Panel had noted, in actual operation the *Gasoline* Rule could permit the level of pollutants to increase. *See* note 33 and accompanying text, *supra*.
49. Art. 13 of the DSU permits panels to seek expert technical and scientific advice. There is no authority in the DSU for the Appellate Body to supplement the factual record established by the Panel.
50. WT/AB/WP/1. Art. 17(9) of the DSU requires the Appellate Body to prepare working procedures in conjunction with the Chairman of the DSB and the WTO Director-General.
51. WT/DS2/6, 21 February 1996.
52. Art. 17(5) of the DSU.

by other appellants (cross-appeals) are due on Day 15, and submissions by appellees and third parties are due on Day 25. Practical consequences flow both from the decision of the Appellate Body to date everything from Day Zero, instead of allowing a fixed number of days from the previous event, and from the decision to allow the appealing party 10 days from Day Zero to file its submission.

The decision to measure each action from Day Zero can crucially shorten the time allowed for some actions. For example, if an appeal is filed - as was the *Gasoline* appeal - on a Wednesday, Day 10 falls on Saturday; the appellant's submission then becomes due on the following Monday, Day 12.[53] The appellant thus gains two days, while the appellee gains one, since, with Day Zero on Wednesday, Day 25 is Sunday, making its submission due on Monday, Day 26. More important for the cross-appeal process, appellee's cross-appeal remains due on Day 15, Thursday. Thus, the appellee's time to consider and prepare a cross-appeal after reviewing the appellant's submission is cut from five days to three, i.e., from Monday to Thursday. Even the full 15 days for filing a cross-appeal submission is extremely short, particularly when five of those days overlap with the 15 days scheduled by the Working Procedures for the appellee's response on the merits to the appellant's submission.

In practice, this is likely to mean that prevailing parties must operate on the assumption that the Report will be appealed and begin their review and preparation for cross-appeals when the Report is issued, rather than begin only if the losing party appeals. At a minimum, this will require unnecessary expenditure of resources by prevailing parties to protect themselves. It is also likely to lead to cross-appeals that are all encompassing rather than narrowly drawn, since the initial effort will be all encompassing and an investment in preparation, once made, is unlikely to be wasted.

To a large extent, this may be unavoidable, given the time constraints imposed on the process, but there is room for improvement. With limits so tight, timing becomes a tactical weapon of great potential value. Fairness dictates that the Appellate Body should minimize the value of this weapon

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53. *See* Dispute Settlement Body, Expiration of Time-Periods in the DSU, Proposal by the Chairman, WT/DSB/W/10, 20 July 1995. If Monday is a holiday, timing could become even more skewed.

as much as possible. A requirement that the appellants' submissions on the merits accompany their notice of appeal would be a step in the right direction. It would treat the parties with a greater degree of procedural equality than does the present timetable, without reducing the time available to the Appellate Body for its deliberations.

Losing parties will always have a panel report for more than 20 days prior to the last possible date for appeal. An appeal must be noticed prior to adoption of a report, but the DSU provides that a report shall not be considered for adoption until at least 20 days after circulation to the Members.[54] In addition, the DSU's Working Procedures for the panel process require issuance of the final report to the parties prior to circulation to the members and contemplates that this will occur three weeks prior to circulation.[55] The DSU Working Procedures further provide for circulation of an interim report, containing the Panel's findings and conclusions, prior to issuance of the final report to the parties.[56] The reality, therefore, is that losing parties have several weeks notice of the contents of the report before an appeal must be noticed.

In *Gasoline*, for example, the interim report was issued to the parties on 11 December 1995. The final report was given to them on 17 January 1996 and was circulated to the Members on 29 January 1996.[57] Since the report was not eligible for adoption at the next meeting of the DSB on 31 January,[58] the US began the appellate process by filing a notice of appeal immediately prior to the next DSB meeting on Wednesday, 21 February. In conformity with the Working Procedures published less than a week earlier on 15 February, the US filed its submission 12 days later, on Monday, 4 March.

In this first appeal, therefore, the appellant's submission was due 23 days from circulation of the report to the members, 35 days from issuance of the report to the parties, and 72 days from submission of the interim report to the parties.[59] In marked contrast, the appellees' cross-appeal

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54. Art. 16(1) of the DSU.
55. DSU, App. 3, 12(g)-(k).
56. *Id.*
57. *See* Panel Report US - Gasoline, *supra* note 11, paras. 1.9 and 1.10.
58. WTO Focus, No. 7, at 20 (Dec. 1995); *US Appeals Gasoline Report*, WTO Focus, No. 8, at 1 (Jan.-Feb. 1996).
59. 29 January, 17 January, and 11 December to 21 February, respectively. Holidays no doubt

submissions were due, as noted, 15 days after the notice of appeal and only three days after the appellees were served with the appellant's arguments. More important, the appellees' submissions on the merits of the appeal were due on 18 March, only 14 days after they received the text of the arguments to which they were required to respond.[60]

It is probable that this unbalanced timetable was dictated by the exigencies of the moment. Delay in appointing the members of the Appellate Body delayed the entire process, and, as a consequence, the 21 February deadline for appeal of this first case was fast approaching when the Working Procedures were issued on 15 February. To have required an appellant to submit its brief on the merits in only six days would have been highly unreasonable. Allowing an additional 10 days in these circumstances probably was unavoidable.

But whatever the reason, this imbalance in time allocation between appellants and appellees is now unnecessary and should be remedied by the Appellate Body, preferably by requiring that appellants file their submissions with their notice of appeal.[61] In doing so, the Appellate Body is likely to receive the support of the DSB, since no member of the WTO has reason to support rules that favour appellants rather than appellees; today's appellant is tomorrow's appellee.

## 5. STYLE

Readers of panel reports will be struck immediately by the difference in style adopted by the Appellate Body. Gone are the lengthy paragraphs summarizing the arguments of the parties. Instead, the Appellate Body, in

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contributed to the 72-day time lapse between the interim report and circulation of the final report to the members, but holidays would not relax the deadlines that apply to either the Panel or the appellate process. Pity the parties having to cope with an early to mid-December notice of appeal.

60. When time limits are this short, each day takes on greater importance and, in reality, appellees had even less time, since submissions typically are made at the close of business and preparation and copying of a lengthy submission can take the better part of a day. Effectively, a day is lost at each end. The need to coordinate arguments and positions between national capitals and Geneva missions can add to the complexity.

61. Notice of appeal is filed both with the DSB and with the Appellate Body. *See* Art. 16(4) of the DSB, Working Procedure Rule 20(1). Submissions are made only to the Appellate Body. *See* Working Procedure Rule 21.

a style more characteristic of an appellate court, stated and summarized the arguments of the parties that it thought were relevant to the issues it considered and dropped any reference to the remainder.

The change is illustrated in the treatment of TBT arguments by the two tribunals. For different procedural reasons, neither reached the merits of TBT, but the Panel spent several pages and 11 paragraphs simply recounting the substantive arguments of the parties on an issue it never reached.[62] This is in keeping with long-standing GATT practice. The Appellate Body, in contrast, did not describe the TBT arguments of the parties at all. For the most part, this is a welcome change, both because it makes the reports more readable and because, by focusing on the Appellate Body's own statement of the arguments, the practice tends to make the tribunal's reasoning more comprehensible to the reader. The downside, of course, is that arguments may be misstated, overlooked, or even ignored and, in a system of single opinions without dissent, readers may never even know they were made.[63]

In other ways, too, the first opinion takes on the characteristics of a high court opinion. At the outset, it refers to the members hearing the appeal by last name only, and, at its conclusion, the opinion is signed by each of the three members, a judicial flourish absent from panel reports.[64] On occasion, the opinion unfortunately takes on an unnecessarily haughty tone, suggesting, for example, that the Panel's terminology "did not serve the cause of clarity in analysis" or that "there is a certain amount of opaqueness" in its reasoning.[65]

On a more substantive point, there is the question of how many issues to decide. The 'normal practice' of GATT panels, Robert Hudec has written, has been to decline to decide issues that did not have to be decided.[66] The Appellate Body may not continue this practice, if its

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62. *See* Panel Report US - Gasoline, *supra* note 11, paras. 3.73-3.84.
63. *See, e.g.,* note 33 and accompanying text, *supra*. Art. 17(11) of the DSU provides that "[o]pinions expressed in the Appellate Body report by individuals serving on the Appellate Body shall be anonymous." This would seem to contemplate a single opinion without dissent, although the language could be interpreted as permitting dissents without disclosure of the dissenter's identity.
64. The practice of signatures may further limit the possibility of anonymous dissent. *See* note 63, *supra*.
65. Appellate Report, *supra* note 10, at 14 and 15, respectively.
66. *See* Hudec, *supra* note 3, at 262. He notes that on occasion, panels have departed from this

decision on Article XX(g)'s 'in conjunction with' issue is any indication. This would be unfortunate. Courts are seldom wise in deciding more than they have to decide. The GATT's normal practice is a sound practice. The Appellate Body would do well to follow it.

## 6. CONCLUSION

An Appellate Body without remand authority is an unusual institution. It is unusual, for example, for an appellate tribunal to hold, as the Appellate Body held, that the Panel "erred in law in failing to decide" whether the measure "fell within the ambit of the chapeau."[67] Typically, lower courts do not decide issues unnecessary to their judgment and, if reversed, reconsider the undecided issues on remand. There is no question of legal error in failing to reach an issue in these circumstances. The error is elsewhere. The Appellate Body saw this conclusion as necessary, however, if, after reversing the Panel on 'relating to', it was itself to reach the chapeau *de novo*.

While *de novo* review by the Appellate Body is a necessary consequence of the lack of remand authority, it is an unfortunate necessity. One of the virtues of appellate review is that it provides a second, more focused look at the issues by a different tribunal. Appellate judges are not necessarily wiser than those who decide as an initial matter, but they do so later, and they have the benefit of reviewing the initial effort at decision, and learning from whatever mistakes might have been made.[68] The present DSU rules deny the WTO the benefit of this 'second look' in its dispute resolution system. The Appellate Body's *de novo* findings and conclusions of necessity are unreviewed findings and conclusions that will

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practice when some purpose was served by a broader ruling, citing, Panel Report Japan - Restrictions on Imports of Certain Agricultural Products, BISD 35S/163; Panel Report United States - Customs User Fee, BISD 35S/245; and Panel Report United States - Section 337 of the Tariff Act of 1930, BISD 36S/345.

67. Appellate Report, *supra* note 10, at 29.

68. The words of former US Supreme Court Associate Justice Robert H. Jackson are appropriate: "Whenever decisions of one court are reviewed by another, a percentage of them are reversed. That reflects a difference in outlook normally found between personnel comprising different courts. However, reversal by a higher court is not proof that justice is thereby better done [...]. We are not final because we are infallible, but we are infallible only because we are final." Brown *v.* Allen, 344 U.S. 443, 540 (1953) (concurring).

be adopted automatically, except in the unlikely event that a consensus decides to the contrary.[69] This is a clear defect in the system; one that would be remedied by remand authority. It is also a reason why the Appellate Body should exercise 'judicial restraint' and not decide any more than it has to decide.

Also noteworthy was the increased role of public international law in the opinion. Article 3(2) of the DSU requires that the WTO agreements be interpreted in accordance with customary rules of interpretation of public international law, and the opinion explicitly did this, noting that Article 31 of the Vienna Convention has attained the status of a rule or customary international law.[70] Beyond this, however, the Appellate Body went on to state that Article 3(2) of the DSU "reflects a measure of recognition that the *General Agreement* is not to be read in clinical isolation from public international law."[71] In fact, the opinion cites public international law authorities on at least four occasions.[72]

The Appellate Body - indeed, the entire DSU - is experimental. It is slated to be reviewed by the Ministerial Conference within four years of its January 1995 entry into force, and the Conference subsequently will decide whether to continue, modify or terminate it.[73] On the bases of both the first panel report and the first appellate report, the Ministers clearly should continue the DSU, with a modification to permit remand, if such a modification cannot be done sooner. While the Panel's reasoning was reversed on one point, it is important to recall that on the major issues argued by the parties, i.e., Articles III(4) and XX(b), there was no challenge to the Panel's conclusions, and that, in the final analysis, its ultimate conclusion was affirmed: the inconsistency with Article III(4) was not justified by Article XX.

And while it is possible to criticize aspects of the appellate opinion, as this article has done, it is always possible to criticize legal opinions dealing with complex and controversial matters, particularly when, as here,

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69. Art. 17(14) of the DSU.
70. *See* Appellate Report, *supra* note 10, at 17.
71. *Id.*
72. *See, e.g., id.*, nn. 35, 36, 47, and 48.
73. Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes, reproduced *in* The Results of the Uruguay Round of Multilateral Trade Negotiations, The Legal Texts, at 465 (1995).

they are produced under severe time constraints. The important fact is that both opinions reached conclusions the Parties could accept for reasons they could accept, albeit with an occasional quibble. This is the ultimate test for the institutions of any legal system, and, in meeting that test, both the Panel and the Appellate Body have taken the GATT/WTO legal system a significant step upward from the primitive.