

In the context of the GATT/WTO system, the single-package approach can help overcome potential decision-making traps due to prohibitively high adjustment costs at home. As a result of the Uruguay Round negotiations, we have witnessed the phasing out of the Multifibre Arrangement on textile and clothing, the US acceptance of a highly legalized dispute settlement system, and the renouncement of using the most aggressive forms for opening foreign markets. At the same time, leading exit voices in the US and EU have clearly shaped the outcome of the Uruguay Round negotiations.

Fourth, importing Hirschman's third element (loyalty) might lead to more attention to non-material concerns. The degree of loyalty influences actors' preferences *vis-à-vis* organizations, not least impacting on the overall balances between voice and exit. If we take the case of the EU's long-term interest in the multilateral trading regime, loyalty is part of the equation. The multilateralism-first approach advocated under Trade Commissioner Pascal Lamy does not easily read like a voice/exit story only, but as one where the EU attempts to export its own model, strives to act as a leader in multilateralism, and finds an umbrella strategy for its diverse membership. The existence of some type of loyalty to international organizations or to multilateralism makes the EU look more like a constrained superpower than the one Drezner pictures.

In any case, Drezner's book has the potential to become a classic. It has already provoked a lively debate among scholars of international relations and international political economy. His stimulating book will certainly travel well into other disciplines and wider policy communities interested in the regulation of the world economy.

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The WTO at Ten: The Contribution of the Dispute Settlement System

edited by Giorgio Sacerdoti, Alan Yanovich, and Jan Bohanes

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This edited volume collects essays, from leading WTO legal scholars, political figures, and members of the secretariat, which were prepared for the first of a series of conferences that the WTO Appellate Body organized for its tenth anniversary.¹ The book is divided in five parts which respectively address the broader WTO context (I), the relation of WTO judicialization to political governance (II), proposals for improvements to the WTO dispute settlement system (III), the contributions of the Appellate Body to the development of international trade law (IV), and the method of treaty interpretation that the Appellate Body has adopted compared to those used by other international tribunals (V).

One can, of course, read the book straight through.² Yet perhaps the best place to start is with the fascinating chapter by Professor Peter Van den Bossche entitled 'From

1 The Appellate Body organized five such meetings in the home country of five of the seven Appellate Body members, held respectively in Florence, Tokyo, Sao Paulo, Cairo, and New York City. See http://www.wto.org/english/tratop_e/dispu_e/anniversary_conferences_e.htm.

2 Part I, for example, begins with essays by two former Director-Generals, Dr Supachai Patichpakdi (2002–2005) and Ambassador Renato Ruggiero (1995–1999), and by the President of the International Trade

afterthought to centerpiece: the WTO Appellate Body and its rise to prominence in the world trading system'. As Professor Van den Bossche demonstrates, the founding members of the WTO never dreamt that they were creating such a powerful judicial body. The rise of the Appellate Body is a wonderful example of the law of unintended consequences. It is a development that is (of course) much less dramatic than that of the European Court of Justice in the EU legal order, but it is remarkable nonetheless. As Appellate Body member Georges Abi-Saab astutely observes in his fine essay near the end of the book, 'once established, institutions evolve according to their inner dynamics'. Once an institution 'perceives itself as entrusted with the exercise of the judicial function, [it] evolves according to a legal genetic code towards greater judicialization' (456). The result has been a judicialization of international trade relations. Even though most WTO Members appear to support this development, they are also surely wary of it.

Although the WTO Dispute Settlement Understanding (DSU) contains a wealth of provisions governing the panel process, the DSU only dedicates one of its 27 articles exclusively to the Appellate Body (Article 17).³ The negotiating record shows, according to Van den Bosche, that the Members decided to create the Appellate Body in response to their concern about shifting to a system of automatic adoption of panel reports.⁴ They had to address the potential, in Canada's words, of 'fundamentally flawed decisions' from these *ad hoc* panels, or in the words of the former head of the EU Legal Service, of 'serious legal errors' (292–293). To protect against this prospect, the Members agreed to create an Appellate Body to hear appeals 'limited to issues of law'. In the view of the United States, these appeals would be in 'extraordinary cases' where one of the parties questioned the panel's findings (293). The creation of the Appellate Body, in other words, was an 'afterthought'.

WTO Members showed little recognition in DSU Article 17 of the important role that the Appellate Body would play. First, Article 17 only refers to those serving on the Appellate Body as 'persons', not judges. Second, the provisions regarding these persons' qualifications are rather scanty, providing that they must be 'persons of recognized authority, with demonstrated expertise', in contrast to the requirements of the International Court of Justice that judges be 'persons of high moral character, who possess the qualifications required in their respective countries for appointment to *the highest judicial offices*' (emphasis added) (296). Third, Appellate Body members are hired on a part-time basis, with a monthly retainer, and they serve for relatively short terms (four years, renewable once).

Committee of the European Parliament, Enrique Baron Crespi, concerning the WTO in broader political context and the challenges that the organization will face, and it concludes with interesting reflections of Appellate Body member Giorgio Sacerdoti regarding the WTO legal system in political context.

³ The formal name of the DSU is the Understanding on Rules and Procedures Governing the Settlement of Disputes, but it is commonly known as the Dispute Settlement Understanding.

⁴ The DSU reversed the 'consensus rule' for the adoption of panel reports, so that, under the WTO, the adoption of panel reports can only be blocked by consensus of all WTO members, including the prevailing party. In contrast, under the GATT, panel reports were only adopted by consensus of all GATT Contracting Parties, including the losing party. As a result, panel reports are now automatically adopted unless the parties settle the dispute following the issuance to them of a confidential 'interim report'. The use of 'interim reports' creates a potential (but relatively weak) political check, subject to the prevailing party agreeing to settle the dispute before the report is adopted.

Of the initial seven persons appointed to the Appellate Body, only one had significant trade law expertise. They thus collectively did not come with preconceived ideas about the former GATT system. In particular, they were independent of the WTO secretariat, which many commentators believe to wield *de facto* authority in the drafting of panel decisions because panelists serve on an *ad hoc* basis, while the WTO secretariat is present in all cases and brings an institutional memory of previous case law.

Since the WTO was created, parties have appealed panel decisions routinely (about 70% of all panel reports), and, through these appeals, the Appellate Body has been able to forge a highly sophisticated and coherent jurisprudence. Van den Bossche's article traces this shift from the creation of an appellate process as an 'afterthought' to the judicialization of the trading system with the Appellate Body as 'centerpiece'. As Appellate Body member *Abi-Saab* writes, 'the Appellate Body has, from the outset, consciously and systematically affirmed and consolidated its judicial character both in its modalities of functioning and its processes of reasoning' (456). The result has been its rise in prominence within the international trading system, and in international law and politics generally.

From this context-providing essay, one can turn to numerous fine contributions addressing the role of the Appellate Body in international trade governance, perhaps starting in Part II regarding the relation of WTO judicial to political governance. The excellent chapter by Robert Howse and Susan Esserman examines the important role that the Appellate Body has played in enhancing the legitimacy of the system, in particular by developing a jurisprudence that recognizes the balance of values at stake within a broad international legal framework, and by helping to stabilize politically delicate trade conflicts. Ernst Ulrich Petersmann pushes further in advocating for the system to shift to a more constitutionally oriented governance system, with the WTO Director-General playing a more important role in defending 'collective WTO interests' (109). These essays are followed by solid contributions from Elissa Alben and Timothy Rief (raising the challenge of the lack of 'an independent, functioning, and substantial executive or legislative branch' to counterbalance the judicial process) (124), Francesco Francioni (viewing 'the WTO as a public international law subsystem with relative autonomy') (149), Helene Ruiz Fabri, and Friedl Weiss.

Along similar lines, Gabrielle Marceau (in Part IV) stresses the importance of the Appellate Body in adding coherence to a system involving discrete agreements that collectively cover a broad range of policy. Like Howse and Esserman, Marceau highlights the Appellate Body jurisprudence's improved balance between the rights of members to adopt measures on social policy grounds and the constraints of WTO obligations. Petros Mavroidis, in his essay 'Looking for Mr and Mrs Right' applies principal-agent theory to examine both where he believes the Appellate Body has overstepped and where it has properly corrected flaws in earlier GATT law, notably with the *US-Shrimp* case. This section also includes interesting analyses of the Appellate Body's treatment of non-state actors (Brigitte Stern), of its interpretive choices of agreements that represent 'something more ... than simple contractual relations' (Donald McRae), of its revision of its Working Procedures over time (by secretariat members Victoria Donaldson and Alan Yanovich), and of its use of the concept of 'judicial economy' in dispute settlement (by Jan Bohanes and Andreas Sennekamp).

The volume also includes a number of chapters that help to place the role of law in perspective, both formally and in practice. Appellate Body member Giorgio Sacerdoti (one of the volume's editors) notes how panel and Appellate Body decisions are not officially viewed as judgments but rather as 'recommendations', and are only formally adopted by the WTO Dispute Settlement Body, a political organ consisting of all WTO members. Even though the adoption of panel and Appellate Body 'reports' may be automatic, the adoption formally remains a political decision of the WTO as an organization, which helps to legitimize the decisions (37–38). Turning to the law-in-action of implementation, WTO Deputy Director-General Alejandro Jara (former Ambassador to the WTO from Chile) points out (importantly) that even formally adopted Appellate Body reports serve primarily to help inform political settlements by the parties. As he writes, '[i]t is perfectly possible and plausible that the parties to a dispute will choose to disregard totally or partially a report' (83). In other words, it is important for us to place the impressive development of WTO 'jurisprudence' in the context of the real life diplomacy and politics of dispute resolution.

The chapters on the reform of the WTO dispute settlement system generally find, in the words of the former Director of the Appellate Body secretariat Valerie Hughes, that 'not much' needs improvement (193). Jacques Bourgeois and Dan Brinza point to some potential reforms, but all in the context of noting that the system generally is working well ('if it is not broken – improve it?') (246). Thomas Cottier stresses that 'judicial law making in procedural matters' is required 'as long as decision making in the WTO continues to operate under the consensus rule', and then makes an important suggestion, among others, that the Secretariat should have 'a voice of its own' in litigated cases so that its role is made 'more transparent' (262–263). Pieter Jan Kuijper adds an excellent overview of the interaction of the EU legal order with the WTO.

The book concludes with a series of essays by judges on the interpretive methodology applied by the international judicial body on which they serve. Georges Abi-Saab writes regarding the Appellate Body, Judge Gilbert Guillaume regarding the International Court of Justice, Judge Paolo Mengozzi regarding the Court of First Instance, Judge Allan Rosas on the European Court of Justice, and Judge Tullio Treves on the International Tribunal of the Law of the Sea. These essays respond to the following two questions: the role of 'customary rules of interpretation of public international law', and the role of 'strict constructionism' versus 'teleological interpretation'. In his captivating essay, Appellate Body member Abi-Saab contends that, although the Appellate Body spends significant time on a 'wild-word' chase to uncover the meaning of the text through references to dictionaries (suggesting a strict constructivist approach), 'in practice, however, much of the reasoning in interpretation is informed by the object and purpose, either consciously or subconsciously ... even though they may not figure explicitly' (462). In the process, the Appellate Body has become a centerpiece of the international trading system. It has, in fact, arguably played a more predominant role than any judicial body in any other multilateral organization. This edited volume helps to shed light on that achievement.

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