EXTENDING THE BOUNDARIES OF WTO GOVERNANCE

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Introduction

The World Trade Organization (WTO), established on 1 January, 1995, is the principal multilateral trade regime responsible for the regulation of global trade activity. As the successor organization to the General Agreement on Tariffs and Trade (GATT), its elaborated legal structure consists of rules, principles and procedures which provides a code of conduct for Members (States) participation in international economic exchanges. The achievement of trade liberalization in the areas of goods, services and intellectual property, has informed the development of a code which relies on the adoption of market principles, premised on the economic philosophy of free trade and comparative advantage. Indeed, in its functioning, the new rules-based system is primarily concerned with the balancing and assertion of rights and obligations by its Members. Employing a state-to-state framework of governance, the interpretation of its rules by the dispute mechanism seeks to ensure competitive trade opportunities, more so than the promotion of actual trade volumes. Any permitted exceptions allowing for the pursuit of policy objectives (both nationally and internationally), are therefore subject to strict interpretation.

Considered as one of the most celebrated aspects of the WTO, the creation of the Dispute Settlement Body (DSB), governed by the Dispute Settlement Understanding (DSU), is predicated on the strict application of, and adherence to the rule of law. Paradoxically, it is this celebrated formalised, legalistic approach to global economic governance which has brought into focus the seemingly conflicting objectives of achieving non-discrimination in the furtherance of trade liberalization on the one hand, and the pursuit of non-trade objectives, on the other. This includes the application of market principles, even in those disputes in which Members seek to give legal effect to international obligations as contained in democratically negotiated international legal instruments.

Thus far, the WTO's system of regulation is one in which the boundaries of governance seems firmly established, giving precedence to the achievement of economic efficiency and Member-driven. As an essentially Member-driven institution, its governance structure is therefore clearly designed to achieve the balancing of rights and obligations of its Members, with limited engagement of the system with, and participation of non-state actors. The decision as to whether to extend its boundaries to incorporate such non-state
entities possessed of legal personality, remains the subject of ongoing discussions at the level of the WTO's General Council. However, in the interim, the Appellate Body and its instruments of interpretation, appear to be the preferred medium for clarifying the nature of the relationship between the State and the individual, in an international organization such as the WTO.

This seeming conflict was clearly borne out in the Shrimp case a case which, among other factors, served to increase the attention of the WTO to non-governmental groups (NGOs) involvement. Further evidence of this were the extensive protest actions by such groups at the Seattle Ministerial Conference, 1999. The view of the WTO as a "prominent instance of growing suprastate governance in the globalizing world of the late twentieth century," has prompted various civil society groups to contend that as an alternative, the emerging structure of the WTO must be considered as part of a much broader global process, in which governance issues have assumed increased importance. Considered as part of the wider process in which there is a shift from the centrality of the nation-state as the sovereign external actor in international relations, to one of "post-sovereign governance," the WTO has therefore been the subject of increased scrutiny, challenge and criticism by civil society groups, particularly the NGOs of developed countries.

The globalization of the world economy, increased interdependence, technological developments and the accompanying global developments in communications, together with a growing consciousness of the consequences of trade law and policy formulation within the WTO, have all served to challenge the legitimacy of the institutional/constitutional framework of the WTO system. Concerns about the absence of external transparency and participation afforded civil society groups in the management of this process, particularly the social and economic impact of trade policies, continue to inform the agenda of these groups. For NGOs from the South, in particular, the exclusion/marginalisation of delegates from developing countries from key informal/green room processes of decision-making and agenda-setting at both the Singapore and Seattle conferences was most obvious. Accordingly, any proposed reforms regarding the governance structure of the WTO, must incorporate not only concerns of external transparency, but must include reference to the issue of internal transparency, in order to ensure a more equitable, participatory structure.

Overall, while it may be difficult to assume a commonality of interests and agendas of civil society groups throughout the various regions of the world, one argument remains central to their analysis. In a globalised economy, the State's involvement in, and the multilateral construction and achievement of (global) public policy, must take into account a more "fragmented and multilayered system of authority." For some, given the WTO's rather limited institutional engagement with civil society groups, there is a role for the greater involvement of the WTO Appellate Body in achieving an "international rule of law." This would ensure constitutional safeguards of human rights and democracy, and more specifically, the direct participation of citizens in ensuring the enforcement of international obligations and international guarantees of freedom and non-discrimination, as well as permitting direct access by citizens to the WTO tribunals.
Therefore, the progressive development of international trade law has been adopted as the new vehicle for the realisation of non-trade governance concerns.

This seems possible, especially given the Appellate Body’s increased reference to, and incorporation of some of the more general tenets of international law through the process of interpretation, an approach consistent with the obligation of the dispute settlement system to “clarify the existing provisions of those agreements in accordance with the customary rules of interpretation of public international law.”

Further, such proposals seem mirrored in the recent Appellate Body’s decision to consider requests for direct NGO submissions. This refers to its reliance on the principle of procedural fairness, as applied in the recent appeal by Canada of the panel report on European Communities - Measures Affecting Asbestos and Asbestos-Containing Products. The reliance of the Appellate Body on the adoption of ‘special procedures’ provisions contained in paragraph 16 (1) of the Working procedures for Appellate Review (1997), as a justification for permitting such submissions, seems curious, and allows for the future possibility of direct submission of amicus briefs to the Appellate Body. In this appeal, the Body relies for its justification on the provisions of paragraph 16 (1) of the Working Procedures for Appellate Review (1997).

This paper will not focus so much on the merits of allowing NGO submissions, as much as some of the interpretative difficulties and issues which developing (as indeed all) WTO Members should pay attention to in the development of this area of international trade law – including issues of competence and the limits to the ‘law-creating potential’ of the Appellate Body. Referring to the salient elements of the Appellate Body’s Communication, it is contended that the increased incorporation of international law principles must apply in equal measure to any interpretation of the authority conferred by the Working Procedures. To do otherwise, would be to alter the nature of the relationship between the Appellate Body and future disputants.

The WTO and Civil Society: A Brief Reference

According to one brief historical note, the issue of external transparency received some attention when the General Agreement on Tariffs and Trade (GATT) was founded in 1948, but no specific provisions were made for engaging NGOs. It was not until the creation of the WTO in 1995 that the need for increased dialogue with non-governmental groups was firmly established. Article V:2 of the WTO Agreement expressly recognises the need for dialogue with such groups. However, unlike other more positive provisions which obligates the General Council to “make the appropriate arrangements for effective cooperation with other intergovernmental organisations”, the WTO’s engagement with NGOs is discretionary, providing in part, that “(t)he General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO.”

Such arrangements have taken the form of Guidelines for Arrangement on Relations with NGOs, 1996. This allows for the progressive development of the relationship between the WTO Secretariat and NGOs.
This emerging relationship is evidenced by the increasing presence of such groups at WTO Ministerial Conferences. There are also regular briefing sessions for NGOs on the work of WTO Committees, in addition to the establishment of working groups by the WTO Secretariat. In addition, the establishment of the WTO website has seen not only the special chat room section for NGOs, but the introduction of an electronic NGO bulletin, which provides information on the current status of activities at the WTO.¹⁶

Some civil society groups obviously favour more extensive institutional changes. As stated, this includes developing “operating procedures for Panels and the Appellate Body...to encourage the submission and consideration of legal and factual arguments from members of the public. Hence, the negotiation of an Interpretive Declaration or Amendment to Article 13 DSU, could enable panels to accept information received by them from sources other than the disputing parties.”¹⁷

However, it is the formulation of special procedures by the Dispute Settlement Body to accommodate such requests in the Asbestos dispute, and the posting of these on the NGO Bulletin section that has subjected the dispute settlement procedure to renewed scrutiny by WTO Members, particularly developing countries. In fact, in response, the Informal Group of Developing Countries (IGDC) promptly requested the convening of a special session of the General Council, held on 22 November, 2000. At that meeting strong opposition was voiced against the procedure - with the exception of the United States. Members from both developed and developing countries expressed the view, that unless the General Council and the members act to curb this ‘absolute power’ - by a majority vote if necessary - such actions will result in an erosion of Members rights, further increasing the possibility of additional obligations, independent of any process of negotiations. For developing countries in particular, this poses a threat to the legitimacy of the WTO, as referring to their own domestic situations, they argue that potentially, “the public at large in the developing countries makes it virtually impossible for their governments to enforce the WTO writ, even when faced with trade sanctions.”¹⁸

While some delegates welcome some discussion on this issue, currently there is no consensus favouring direct involvement of NGOs in the work of the WTO – an idea which was earlier rejected at the Uruguay Round of negotiations. Especially for developing countries, the intergovernmental structure of the WTO must be maintained, stressing that as a matter of priority, the WTO membership should focus on the more substantive issues on the WTO work programme. Any process of consultations with domestic stakeholders must proceed at the national level. As stated in paragraph VI of the Guidelines, constructive consultation and cooperation with NGOs can be pursued by means of appropriate processes at the national level where lies primary responsibility for taking into account the different elements of public interest which are brought to bear on trade policy-making. This insistence on preserving the state-to-state character of trade was most recently reinforced in the following statement:

Several delegations expressed the view that a clearer distinction need to be made between enhancing public understanding of WTO activities, which they favoured, and
considering any direct participation of civil society in the work of the organization. They emphasized that efforts to improve the transparency of the WTO should not affect the intergovernmental nature of the WTO or change the existing representation system of the organization.\textsuperscript{19}

The Asbestos Dispute: A Background Note

On 23 October 2000, Canada notified the Dispute Settlement Body of its decision to appeal certain issues of law covered in the Panel report, \textit{European Communities - Measures Affecting the Prohibition of Asbestos and Asbestos Products}.\textsuperscript{20} The report, which relates to Canada's claims of certain violation in respect of measures allegedly imposed by France with respect to the prohibition of asbestos and products containing asbestos, including a ban on imports of such goods, stated the determination of the panel that Canada did not establish its respective claims. Interestingly, the Appellate Body report\textsuperscript{21} does not directly address the issue, thereby limiting any possible analysis of its legal reasonings regarding the submissions of the respective parties to the appeal. The panel's report makes reference to this issue under the broader heading of "submissions from non-governmental organizations."\textsuperscript{22}

Therein, the panel reported that it had received four \textit{amicus briefs}, two of which were adopted by the EC and incorporated as part of its own submissions, with the other two being rejected by the parties and consequently, the panel. The submissions were originally rejected by Canada on the grounds that "it was inappropriate to submit them at this stage of the proceedings" - though Canada subsequently responded to these, given their incorporation by France. While such concerns formed a negligible part of Canada's appeal submissions, the significance of this case is the apparent relate to the seeming usurpation of the exclusive authority of the Ministerial Conference and General Council on points on interpretation by the Appellate Body.

This dilemma follows from the original ruling of the Appellate Body in its \textit{Shrimps} report.\textsuperscript{23} In that dispute, the Appellant Body permitted the admission and acceptance of non-governmental submissions to the Appellate Body, but only to the extent that they were incorporated into the body of submissions by the parties to the appeal. In the face of objections from the Joint Appellees, the Appellate Body determined that

The admissibility of the briefs by certain non-governmental organizations which have been appended to the appellant's submission of the United States is a legal question raised by the appellees. This is a legal issue which does not relate to a finding of law made, or a legal interpretation developed, by the Panel in the Panel Report...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 \textit{prima facie} an integral part of that participant's submission...it is of course for the participant in an appeal to determine
for itself what to include in its submission (emphasis added).\(^3\)

The Appellate Body accepted the admissibility of the submissions, given that the United States had confirmed its agreement with certain aspects of the legal arguments contained in the attached submissions of the NGOs - though only to the extent that such arguments "concur with the US arguments set out in its main submission."\(^2\) However, in the recent appeal regarding the Asbestos case, the Appellate Body seems to have departed from its own reasoning provided in the Shrimp case. Instead, it has sought, through the legal principle of "procedural fairness," to extend the legal parameters permitting the admissibility of such submissions, thereby providing for the direct submission of such documents, seemingly independent of these forming part of the appellants or appellees "main submissions". It would appear, that in the midst of the more general concerns regarding the credibility and representation of NGOs, and in the absence of any clearly established criteria by the Ministerial Conference or the General Council for resolving such, that the Appellate Body has established itself as the arbiter of this process.

In its Communication, the Chairman of the Appellate Body stated:

I am writing to inform you that the Division hearing the above appeal has decided, in the interests and fairness and orderly procedure in the conduct of this appeal to adopt an additional procedure to deal with any written briefs received by the Appellate Body from persons other than a party or a third party to this dispute. This additional procedure has been adopted by the Division...for the purposes of this appeal only...and is not a new working procedure drawn up by the Appellate Body... (emphasis added).\(^2\)

Claiming that this 'Additional Procedure' was established "after consultations with parties and third parties to this dispute,"\(^2\) the Communication provides that "(A)ny person, whether natural or legal, other than a party to this dispute, wishing to file a written brief with the Appellate Body, must apply for the leave to file such a brief from the Appellate Body..."\(^2\) This is of significance for all Members given that in accordance with existing rules, in those instances in which such a procedure is adopted, the Appellate Body's obligation is limited to one of immediately notifying the participants and third participants in the appeal. Curiously, the Appellate Body has decided that none of the received requests for leave for submission had met the stated criteria - the reasons for which have not been made public. What follows therefore, are some of the main issues regarding this "additional procedure."

(a) The Issue of Competence

As previously mentioned, the Appellate Body relies on Rule 16 (1) of the Working Procedures, which states - "In the interest 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." This willingness to consider the submission of NGO briefs therefore appears consistent
with its own reasoning in the US-Bismuth Carbon Steel case. Therein, on the question of whether the Appellate Body has the authority to accept amicus curiae briefs - an issue not directly provided for in the DSU and the Working Procedures - the Appellate Body reasoned that

In considering this matter, we first note that nothing in the DSU or the Working Procedures specifically provides that the Appellate Body may accept and consider submissions or briefs from sources other than the participants and third parties in an appeal. On the other hand, neither the DSU nor the Working Procedures explicitly prohibit acceptance or considerations of such briefs.

This reference to neither the expressed inclusion nor exclusion of amicus curiae briefs from the dispute settlement procedure gives rise to the interpretation that such a practice may be a possible, though not a necessary inference from the text of the DSU. The Appellate Body reasoned that it had "broad authority to adopt procedural rules which do not conflict with any rules and procedures in the DSU or the covered agreements." However, it seems to have created its own dilemma in recognizing that as currently exists, and as a matter of legal right, only parties and third parties to a dispute (as WTO Members) can participate in panel and Appellate Body proceedings, as consistent with the practices of most international tribunals. Perhaps, in part, this seeming contradiction may be explained by the fact that WTO panels in particular, do not have elaborate rules of evidence, which they too continue to develop procedurally. Only disputants and third parties have the right to present evidence. However, in the WTO, appeals are limited to "issues of law covered in the panel report and legal interpretations developed by the panel." So that, as a matter of procedure, it would appear that non-governmental organizations have no right to make submissions. This is however subject to varying interpretations.

On the right of panels to seek information or expert advice, Petersmann refers to Article 13 of the DSU which provides panels with the discretion to determine whether to seek information or expert advice at all. He concludes that "(p)anels and the Appellate Body are also entitled to accept amicus curiae submissions." Here, he relies on paragraphs 108-110 of the 1998 Appellate Body's Shrimp report, and reasons that unless they are adopted by one of the disputants, the admission of submissions from other persons is at the discretion of the panel. Even the Appellate Body itself had made it clear that in the WTO, the dispute settlement mechanism it is not available to individuals or international organizations, whether government or non-governmental. On the other hand, in the Bismuth Steel case, the Appellate Body provided an opening for such submissions by making a distinction between the terms "duty," which it submits is owed only to the WTO Members, and "authority," suggesting a measure of discretion.

The Appellate Body adds a very limited qualification to this. It provides that such submissions are possible only in those cases in which it finds it "pertinent and useful to do so," reserving unto itself an authority which may not have been contemplated by the WTO membership. Again, while it did not find it necessary to take into account the two briefs submitted to it in rendering its decision, this qualification does not negate...
the concern about the competence of the Appellate Body to adopt such sweeping procedural changes.

To elaborate, in both the Asbestos and Bismuth Steel cases, the Appellate Body claimed to have acted in accordance with the “residual” rule contained in Rule 16.1 of the Working Procedures. This implies that the Appellate Body cannot be expected to effectively discharge the functions it was clearly intended to perform unless it was regarded as being possessed of such an authority. That is, while not expressly provided in the DSU, such authority is conferred upon it by necessity, being essential to the performance of its duties, and the absence of which would otherwise render its function devoid of purpose resulting in a failure to give Article 17.9 of the DSU its “appropriate effects”. However, such concerns do not provide the Appellate Body with a carte blanche of authority and does not exempt the Appellate Body from the need to exercise some measure of judicial restraint. The reliance on “procedural fairness” must not lead to “judicial legislation”. Some measure of proportionality must be maintained.

Indeed, the International Court of Justice (ICJ) has shown itself aware of this necessity. It states that it was “the duty of the Court to interpret (the) Treaties, not to revise them.” The ICJ went on to state:

The principle of interpretation expressed in the maxim int res magis valeat quam pereat, often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes in the Peace Treaties ... meaning which, as stated above, would be contrary to their letter and spirit (emphasis added).37

Indeed, one prominent international law jurist has also cautioned against the possibility of a purely teleological method of interpretation.38

(b) The Legal Status of ‘Rules of Procedure’

As regards the use of rules of procedure of an international organization as a basis for interpreting its constitutive instrument, technically these cannot be contrary to existing law, but must complement it. Here, the reasoning “that the rules of procedure of an international organization cannot be employed to contravene or enlarge the constitutive instrument under which they are made, and must themselves be consistent with it,” seems applicable. Equally, such rules should not be used to interpret the constitutive instruments (in this case, the DSU), as these are themselves “dependent and consequential on them.” The correctness of, and any final interpretation of the relevant instrument - the DSU - must be determined by the Ministerial Conference.40 To adopt the present interpretation of the Rules as put forward by the Appellate Body, in the light of strong opposition to it, is to suggest that such an interpretation is of evidential value in future disputes regarding its correctness. It may even be illustrative of an emerging subsequent practice with legal implications for the wider membership. This is to be guarded against.

Further, the Appellate Body rules of procedure cannot be used to amend the WTO provisions regarding its relationship with NGOs, the nature and extent of which is clearly provided for in the WTO Agreement.41 Also, the DSU establishes that
any interpretation may not add to or diminish rights and obligations of members. Any elaboration of rights, obligations and procedures when not expressly provided for in the treaty, but which are inferred by interpretation, must be a necessary consequence of the terms used. The language of the instrument must itself provide a possible basis for any such inference, as it is not sufficient to simply state that the adopted interpretation is not inconsistent with any existing provision. Based on this reasoning, the Appellate Body's obligation to "secure a positive solution" to a dispute as the basis for any additional procedures permitting NGO submissions, as provided in Article 3:7 of the DSU, seems questionable. Reliance on procedural fairness, simply by way of interpretation does not justify any international tribunal "exceeding its judicial function on the pretext of remedying in default for the occurrence of which the Treaties have made no provision."

The Rules of Procedure were adopted only as a basis of authority enabling the Appellate Body to address certain procedural issues which were not covered by the particular provisions of the DSU. It must be invoked only to meet a possible procedural lacunae. Direct submissions by NGOs constitute more than this - it is a substantive issue which affects the rights and obligations of WTO Members. Rule 16 (1) does not empower the Appellate Body to disregard the specific provisions of the DSU. While the Working Procedures are a source of residuary authority which can be drawn upon to meet situations which are not covered by the more detailed provisions of the DSU, the test is whether such an interpretation is necessary to give legal effect to the objectives of the respective Agreement which is the subject of the appeal.

(c) The Relevance of Judicial Precedent

Admittedly, the WTO does not recognise the principle of "judicial precedent." As such, no dispute body is obliged to adopt particular legal interpretations simply because they have been advanced by the Appellate Body or panels in previous cases. Only parties to dispute are bound by the adopted rulings and recommendations. However, it seems a reasonable assertion that the rulings and recommendations of the Appellate Body will be accorded more respect than those of panels, and may even be considered as authoritative, notwithstanding the quality of its reasonings. The enunciation that "the following additional procedure (is) for the purposes of this appeal only" does not derogate from the authoritative nature of such rulings, nor from the role of consensus of the wider Membership concerning such a novel procedure.

This brings into focus the issue of where authority lies concerning the adoption of final, authoritative interpretations having general application, binding on all Members. The WTO Agreement provides that the Ministerial Conference and General Council are given exclusive authority to render (binding) interpretations. That is, definitive interpretations are provided for in Article IX:2 of the WTO Agreement, by which: "The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements" - taken by a three-fourths majority of the Members. The Appellate Body has itself attested to this in Sec. E of its Japan-Taxes on Alcoholic Beverages (1996). As stated, "(t)he fact that
such an “exclusive authority” in interpreting the treaty has been established so specifically in the WTO Agreement is reason enough to conclude that such authority does not exist by implication or by inadvertence elsewhere.” Its present actions seem to contradict this statement.

(d) Locus Standi

One common jurisdictional principle that has found little place in WTO law is that of legal ‘interest’ or ‘standing’ (locus standi). The Appellate Body has reasoned that subject to international law, this issue is to be addressed by the provisions of the treaty establishing the relevant dispute settlement mechanism. Neither the DSU nor the WTO Agreement provides for such a requirement. Significantly, the Appellate Body was careful not to limit applications to those groups with legal interests, and instead adopted the much broader reference in paragraph 3 (d) of the need for applicants to “specify the nature of the interest the applicant has in this appeal” - which can be broadly interpreted to mean legal, political, social or economic interests. Also, paragraph 3 (f) requires the indication of the “way in which the applicant will make a contribution to the resolution of this dispute that is not likely to be repetitive of what has been already submitted by a party or third party to this dispute.” The Appellate Body appears to call into question its own legal competence.

Conclusion

The rules of procedure should not be used to incorporate substantive amendments to the WTO decision-making structure, but must itself be subject to the tenets of international law. Such action on the part of the Appellate Body (and as sanctioned by the WTO Secretariat) seems to preclude existing ongoing Member discussions on external transparency issues, in which delegates to the General Council have, at special session.

Though broad in its language, Rule 16 (1) cannot be considered as giving the Appellate Body an unbridled discretion in the resolution of disputes. It must not be a substitute for reference to the more detailed specific provisions of the DSU and the WTO Agreement. Members may wish to stress this limitation more precisely as part of the future constitutional development of the WTO, perhaps adopting an interpretation of this provision. However, on the assumption that such flexibility is necessary, it must be in accordance with the purposes and principles of the organization. However, this is not to ignore or isolate the contribution of NGOs, as a source of information or technical expertise.

It does not follow from the absence of provisions relating to NGO’s submissions, that the Ministerial Conference is barred from providing for their participation where it considers such participant useful. Indeed, it is obvious that under contemporary conditions of economic interdependence, and their attendant consequences for individuals or specific groups, it may be considered inimical to the objects of the WTO to exclude non-Member participants from WTO discussions. It may be best to admit NGOs in a consultative, evidential capacity on conditions to be determined by the Ministerial Conference/General Council, without the conferment of rights.
Endnotes

1The General Agreement of Tariffs and Trade (GATT), General Agreement on Services (GATS) and the Agreement on Trade - Related Aspects of Intellectual Property Rights (TRIPS), respectively.


5For example, Caribbean Policy Development Centre/Caribbean Reference Group’s November 2000 publication - Reforming the World Trade Organisation: A Perspective of Caribbean Non Governmental Organisations and Civil Society on the Governance of World Trade Negotiations - on file with author.


8Ibid.: 81.

9As at 15 January, 2001, 220 complaints have (since 1995) been notified to the WTO, with 17 active cases, 43 Appellate and Panel reports adopted and 36 ‘settled or inactive’ cases - Overview of the State-of-Play of WTO Disputes, 15 January 2001.

10Article 3:2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes. The Appellate Body has been particularly instrumental in incorporating the provisions of Articles 31 and 32 of the Vienna Convention on the Law of Treaties as part of the emerging WTO jurisprudence.

Hereinafter - *Working Procedures* - (www.wto.org/english/tratop_e/dispu_e/ab3_e.htm.)

European Communities - Measures Affecting Asbestos and Asbestos-Containing Products, *Communication from the Appellate Body*, WT/DS135/9, dated 8 November 2000 - hereinafter *Communication*.


Ibid.


*Supra*, note 14.


*Ibid*, para. 90.

*Communication*, introductory note.

A claim which has been refuted by some delegates, stating that while a response to the opposed concerns of the General Council - as provided by the Secretariat - was silent on the issue of consultation, it became clear that the parties to the dispute, especially Canada and the EU did not want this procedure, with Brazil actually opposing it, and the US supporting it. The
note from the Secretariat, and the speeches therein therefore suggest one of a “misleading impression,” even though it was admitted that one possible defense of the Appellate Body to this allegation may be a distinction between “consultation” and “concurrence” - Third World Economics, supra note 17: 4.

38 Communication, para. 2.


40 Ibid, under the heading Preliminary Procedural Matter.

41 Dispute Settlement Understanding, Article 17.6.

42 See also, Edmund McGovern, International Trade Regulation, 2.23-53, Globefield Press.

43 Ernst Ulrich Petersmann, supra note 5: 214.


45 Shrimp, footnote 21, para. 101.

46 Bismuth, supra note 27.

47 ICJ - Peace Treaties (Merits) 1950: 229.

48 G. Fitzmaurice, British Yearbook of International Law, 1950: 18

49 Ibid: 22

50 Ibid.

51 Ibid.
