

---

# The WTO Appellate Body or Judicial Power Unleashed: Sketches from the Procedural Side of the Story

Hélène Ruiz Fabri\*

## Abstract

*The Appellate Body's overall judicial policy that Robert Howse analyses in his EJIL Foreword article would have been less sustainable and coherent if it were not underpinned by a distinct approach to decision making or, if you will, by a certain 'procedural sensibility'. This reaction paper contends that there existed, as a complement to, and a cornerstone of, the complex ensemble of judicial policies and decisions analysed by Howse, a procedural judicial policy that played a significant role in facing the legitimacy challenge.*

Detecting so much complexity, consistency and wisdom in the judicial policy of the World Trade Organization's (WTO) Appellate Body, as Robert Howse does in his extensive *EJIL* Foreword article 'The World Trade Organization 20 Years On: Global Governance by Judiciary', might raise some suspicion of apologia.<sup>1</sup> The Appellate Body's history indeed looks like a success story, not only for the organ that has established itself but also for a WTO under threat of a crucial disequilibrium between the big players' expectations, pushing for further liberalization and the contestation of the neo-liberal agenda already sanctified during the Uruguay Round. Of course, retrospective readings of a 20-year-long history, rising above and beyond daily business, tend to impart to it a flavour of overall coherence that was not always perceptible as the processes unfolded. Moreover, such a reading of the Appellate Body's history is not completely unprecedented, as its 'rise

\* Director, Max Planck Institute for Procedural Law, Luxembourg. Email: helene.ruizfabri@mpi.lu.

<sup>1</sup> Howse, 'The World Trade Organization 20 Years On: Global Governance by Judiciary', 27(1) *European Journal of International Law (EJIL)* (2016) 9.

to prominence', or its evolution 'from afterthought to centrepiece',<sup>2</sup> had already been diagnosed after its first decade and has seemingly not been undone in the following one.

In this regard, Howse's analysis strikingly converges with the many off-the-bench writings of successive Appellate Body members, which cannot be read as expressing no agenda. On the contrary, these writings obviously participate in a deliberate communication policy aimed at convincing the readers of the legitimacy of what has been done and indirectly of the decision makers themselves. Actually, legitimacy is key in the convergence mentioned above. In a way, Howse takes the Appellate Body members at their word but develops his analysis in a more complex perspective. For, while legitimacy has been the Appellate Body members' compass, it is a working hypothesis for Howse, who has been a *spectateur engagé* of the WTO from the very beginning. The Appellate Body's good overall performance does not make it – or make the WTO system, more generally – free of criticism; however, the fact that the author avoids taking a critical stance does not make less subtle and fascinating his account of the Appellate Body's many achievements in a difficult context characterized by a certain fixity of the applicable law (the 'covered agreements') with an organization sticking to the mantra of it being member driven and worshipping the *GATT acquis*.

The critical step taken at the outset, as the first intimation of what Howse calls the Appellate Body's declaration of independence, was the refusal to adhere to the insiders' view of the system, which later gave way to the various judicial policies that Howse identifies. And it would of course be pointless to deny that these are policies since they entail choices. Sticking to the insiders' view of the system would have been a judicial policy too. However, what strikes me the most in Howse's account is how on the whole these policies are said to be consistent with one another, making up a coherent whole, at least in the sense that 'the Appellate Body sought to discern in the corpus of WTO treaties an equilibrium between domestic regulatory autonomy and trade liberalization very much inspired by, or anchored in, the original GATT [General Agreement on Tariffs and Trade] – a respect for regulatory diversity and flexibility towards domestic policy interventions that characterized the GATT in the period when it enjoyed the greatest legitimacy or acceptance (post-war embedded liberalism)'.<sup>3</sup>

Now, the point I wish to make is that the Appellate Body's overall judicial policy would have been less sustainable and coherent if it were not underpinned by a distinct approach to decision making or, if you will, by a certain 'procedural sensibility'. In my view, there existed, as a complement to, and a cornerstone of, the complex ensemble of judicial policies and decisions analysed by Howse, a procedural judicial policy that played a significant role in facing the legitimacy challenge

<sup>2</sup> Van den Bossche, 'From Afterthought to Centrepiece: The Appellate Body and Its Rise to Prominence in the World Trading System', in G. Sacerdoti, A. Yanovich and J. Bohanes (eds), *The WTO at Ten: The Contribution of the Dispute Settlement System* (2006) 201.

<sup>3</sup> Howse, *supra* note 1, at 76. General Agreement on Tariffs and Trade 1994, 55 UNTS 194.

(procedure is here understood in the (broad) Luhmannian sense of the way in which decisions are made).<sup>4</sup>

Except for a few topics that proved to be highly controversial, like the admissibility of *amicus curiae* briefs, procedural issues were generally kept under the radar even when they were of utmost significance in the shaping of the decision-making process. But, even before the Appellate Body started working, the context played in favour of 'procedural independence'. The Dispute Settlement Understanding (DSU) included only one rather terse provision – Article 17 – dealing with the Appellate Body.<sup>5</sup> This means that, apart from the few procedural issues directly settled in that provision, the Appellate Body was called upon to act as a master of its own procedure: 'Working procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information' (Article 17.9).

This is by no means unique. It is actually all but unusual that international courts and tribunals are entrusted with a power of procedural self-regulation. The opposite solution is either a sign of distrust – as in the case of the International Criminal Court – or a category of special cases – like the Court of Justice of the European Union. The Uruguay Round negotiators were clearly not wary of the Appellate Body in this regard. And, yet, the latter wielded this power rather vigorously, at a time when it had already acknowledged that it would be more than a mere division within the WTO Secretariat – that is, a separate body with its own secretariat. This organic autonomy allowed for a shift – and even a radical change – not only in style but also in the working methods compared with the practice of the GATT and the WTO panels. The Appellate Body is definitely not a super-panel, and many of the moves characterized by Howse as 'the ways in which the Appellate Body declared its independence and distance from the WTO "institution"' are actually procedural.<sup>6</sup>

The draft working procedures that were submitted at the beginning of 1996 to the newly appointed Appellate Body members by its then embryonic Secretariat came out of a comparative assessment of the rules of procedure of various international and even domestic judicial fora and were reviewed and completed in a very short period of time. In several respects, these 'Working Procedures for Appellate Review' were beyond the DSU and probably ordinary expectations at the time, a tendency that intensified not only through the ongoing implementation process but also by dint of practices not governed by written rules.<sup>7</sup> The most important move is crystallized in

<sup>4</sup> As stated by N. Luhmann, '*en tant que planification de l'avenir, la procédure absorbe l'incertitude; en tant qu'histoire, elle devient un engagement*'. N. Luhmann, *La légitimation par la procédure* (2001), at 89. According to Luhmann, legitimation derives as much from the way decisions are made as from their content. Legitimation by procedure works notably because society expects the losing party to accept the verdict.

<sup>5</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) 1994, 1869 UNTS 401.

<sup>6</sup> Howse, *supra* note 1, at 31.

<sup>7</sup> Working Procedures for Appellate Review, WT/Appellate Body/WP/1, 15 February 1996 (first version); WT/Appellate Body/WP/6, 16 August 2010 (last consolidated version).

Rule 4, which states the principle of collegiality with a view to ensuring ‘consistency and coherence in decision-making’, drawing ‘on the individual and collective expertise of the Members’, and, accordingly, requires that ‘the division responsible for deciding each appeal ... exchange views with the other Members before the division finalizes the appellate report’.

According to Debra Steger, the requirement of collegiality for Appellate Body reports was first expressed by the European Union (EU) to assuage its dissatisfaction caused by the exclusion, then understood as temporary, of a second European ‘seat’ within the Appellate Body.<sup>8</sup> Apparently, the Appellate Body took the EU’s fears very seriously. The systematic exchanges of views among the members have since the very beginning, in every single case, played a crucial role in the development of the case law. According to the writings of many of them, these exchanges are a demanding exercise for which one has to prepare with the utmost care, going through all of the materials of the case. To this, one should add the importance of the requirement, set out in Rule 3.2, that every effort is made to take the decisions by consensus. Indeed, Appellate Body members strive towards consensus as much as possible, especially when a procedural decision has to be made, officially because the same issue may well arise in subsequent cases. As reported by Steger, ‘[i]n most of the early cases, on issues such as burden of proof, standing, representation by private counsel, standard of review and *amicus curiae* submissions, they deliberated until all seven members agreed on the result’.<sup>9</sup>

It is easy to see why consensus has emerged as a leading principle in the determination of the Appellate Body’s judicial policy in matters of procedure. Such policy actually undergirds all of the others and contributes to their acceptability. But there is more. Judicial consensus is not the same as political consensus. The two come with different preconditions and constraints. A judicial body in charge of a case cannot decide not to decide, including when it has to lay down procedural rules. In many cases, gap filling may not be a matter of choice, as opposed to the way in which the gap is to be filled (accepting or not *amicus* briefs, for example). There is therefore a latent tension between the necessity to come up with a decision and the internal diversity of the Appellate Body’s membership, which, as in the case of other international courts, has to be ‘broadly representative of membership in the WTO’.<sup>10</sup>

As loose as this pluralistic requirement might be, it undoubtedly paves the way for a certain degree of confrontation between different legal cultures and schools, not to mention the diversity of professional backgrounds, which cannot be overcome by mere assertions about the superiority of this or that system. In a way, international judges have to become comparatists, who are continuously involved in the practice of legal pluralism but no less aware of the specificity of the international setting in which they operate. Reaching for judicial consensus implies not only bargaining in the shadow of power asymmetries and different degrees of personal influence but also understanding. This strong option for consensus embedded in collegiality has

<sup>8</sup> D. Steger, ‘The Founding of the Appellate Body’, in G. Marceau (ed.), *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System* (2015) 447, at 449.

<sup>9</sup> Steger, *supra* note 8, at 457–458.

<sup>10</sup> DSU, *supra* note 5, Art. 17.3.

also entailed the marginalization of separate opinions, even though the DSU itself allows for them under the seal of anonymity. Indeed, from the outset, there has been a firm common understanding that such opinions should be avoided. The fact that they go on working as a safety valve is an incentive to mitigate positions for the sake of consensus.

But there is even more. The spirit of collegiality has pervaded the whole proceedings. Contrary to the panel practice and what was initially envisaged, the Appellate Body members have been spending a lot of time in Geneva, even though they are not statutorily permanent. This was due not only to the rapid increase of the case load but also to the fact that the constant availability required by the DSU was translated in the working procedures into a commitment to give priority to the work of the members of the Appellate Body over any other activity, a commitment that has been taken no less seriously than the principle of collegiality. The members of the division in charge of a case do not meet only at the time of the hearings but also beforehand, to discuss the case and draft questions to the parties, and afterwards, to deliberate, including exchanges of views, to supervise and to contribute to the writing of the report. In other words, they meet, they talk and they come to know each other, and, as Steger puts it, they 'develop a close bond', which ultimately lies at the basis of a kind of institutional patriotism or at least a certain *esprit de corps*.<sup>11</sup> The training sessions that the acting members hold in form of retreats with incoming members cannot but support this process, which has developed as a counterpart to the distance from the WTO institution. This can also explain why former panel members who have tried to contradict the Appellate Body have seemingly changed their minds upon becoming members of the latter, although this is probably also an effect of two different institutional logics being at work.

The fact that the Appellate Body's mission is limited to questions of law entails a focus on interpretation, and the very nature of this task contributes to how the Appellate Body has chosen to approach the debates with the parties. Quite beyond the traditional due process rights guaranteed by every court, including GATT/WTO panels, three choices that have been made by the Appellate Body, resulting in three distinct procedural practices, are indeed revealing. One is the conception of the hearings, which could not be confined to a formalistic exercise if they were to allow to frame adequately the uncertainty about which the judge has to decide in a context of extreme time constraint. This sheds light on the decision to devote as much time as possible to questioning the parties while asking for immediate answers. No doubt, this practice puts the parties under stress, but it has also strengthened the authority of the judges while making the hearings more interesting and conducive to solidly grounded decisions (unless the Appellate Body members lose control of the process and let it become overwhelming for the parties). In addition, third parties are involved in the questioning from the bench, and this increases the intensity of their participation, which brings me to the second procedure worthy of note.

From the very beginning, the Appellate Body has taken great care of third parties. Besides the issue of *amicus curiae* briefs, which has already been widely commented

<sup>11</sup> Steger, *supra* note 8, at 454.

upon, the Appellate Body has seen to it that the confidentiality of proceedings does not stand in the way of WTO members wishing to be informed about the development and outcome of other members' disputes. Since the acquisition of third party status allows the confidentiality veil to be pierced, the Appellate Body has constructed it broadly. In order to incentivize participation even by those members that may not have a particular interpretative point of view to share – officially for pedagogical reasons, taking part in proceedings and attending hearings is a kind of continuing education process, especially for developing countries whose participation rate has been very low since the beginning – the Appellate Body has broadened the range of participation rights to include passive observers.

In spite of this effort, the openness resulting from third parties' participation remains rather limited. Except for a few cases that have attracted a lot of attention, most of the time third parties are not numerous and certainly not representative of a membership whose great majority remains dimly aware of the ongoing cases. This is where the third momentous choice – the opening of the hearings to the public – comes in and takes up a symbolical dimension. It took a decade before the Appellate Body felt able to take this step and find a procedural way to sell it as legal despite the explicit wording of the DSU: 'The proceedings of the Appellate Body shall be confidential' (Article 17.10). In fact, the opening of the hearings through video conferencing was premised on an agreement between the parties, leaving third parties free to ask that their oral participation be blacked out (which has already happened). Although this consensual legal basis looks rather weak, opposing such a practice as a point of principle would be going against the spirit of the times, and this has protected the Appellate Body's choice. As a result of this policy, the hearings have been opened to the public in all of the major cases of the last decade. But the full meaning of this choice cannot be grasped unless it is considered in conjunction with the other two choices mentioned above. Taken together, the three of them are signs that the proceedings, especially at the appeals stage, where the correct interpretation and application of the law is at stake, are not conceived as belonging to the disputing parties. The procedural setting is itself constitutive of a public interest dimension involving not only the WTO membership in its entirety but also the broader public – that is, all of the subjects having a stake in the correct interpretation and application of WTO law understood as a common normative endowment.

At the end of the day, what seems to me most fascinating is how much was achieved in a relatively short period of time – this rise of a fully-fledged judicial power – all the more so if one recalls how long it took in the pre-WTO era to merely acknowledge that there existed a significant legal dimension to the workings of the GATT.<sup>12</sup> Time is indeed of the essence, also because the time constraints imposed on the Appellate Body have undoubtedly facilitated its leaning in some of the procedural choices. Thus, its members could be more tempted to make opinions if they had more time for it, although it is not the only factor. Today, as the complexity of the cases and the workload increase, it is all but certain that the Appellate Body will be able to hold on to its

<sup>12</sup> Marceau, *supra* note 8.

procedural policy, especially in the long run. These are difficult times for international courts and tribunals. It is then to be hoped that the procedural law that the Appellate Body has patiently and deftly crafted during the last 20 years will be allowed to stand as a reference point in the field of international litigation.