

# The Use of Scholarship by the WTO Appellate Body

Sondre Torp Helmersen\*

## Table of Contents

A. Introduction.....	311
I. Topic and Outline.....	311
II. Methodology.....	312
III. A Definition of Scholarship.....	314
1. Introduction.....	314
2. What it May Include.....	314
3. What it May Exclude.....	316
4. Conclusion.....	317
B. The Legal Status of Scholarship in WTO Dispute Settlement.....	317
I. A Question Regulated by Law?.....	317
II. The Applicability of the Law in WTO Dispute Settlement.....	319
III. The Potential Role of Scholarship.....	321
IV. The Appellate Body Has the Final Word.....	322
C. Results.....	323
I. The Use of Scholarship Has Declined.....	323
1. Introduction.....	323
2. Fewer Cases with References.....	324
3. Changing Membership.....	325
4. More Indirect References.....	326
II. Scholarship is Used Mostly for General International Law.....	326
1. Generally.....	326
2. Interpretation and Other Treaty Law.....	327
3. State Responsibility.....	328

\* PhD Research Fellow, Department of Public and International Law, Faculty of law, University of Oslo. E-mail: s.t.helmersen@cantab.net. I thank Lorand Bartels, Geir Ulfstein, and Erlend Leonhardsen for comments on various versions of the text.

4. Burden of Proof and Other Questions of Evidence.....	330
5. Other General International Law .....	331
III. Careful Use of Scholarship .....	332
1. Introduction.....	332
2. Timid Approach.....	332
3. Well-known Authors with Government Links.....	333
4. Conventional Uses .....	335
5. Scholarship as an Aid in Deferring to Politics.....	336
D. Explaining the Results.....	337
I. Introduction.....	337
II. Less Uncertain Law.....	337
III. Specialization .....	338
IV. Criticism .....	339
V. Member Background .....	341
E. Conclusion.....	342

## Abstract

This article examines the use of scholarship by the WTO Appellate Body. While it is not possible to say definitively how the Appellate Body views the legal status of scholarship in WTO dispute settlement, its use of scholarship will in practice determine its status. The article identifies three overall trends: the Appellate Body's use of scholarship has declined, the Appellate Body uses scholarship mostly for matters of general international law (as opposed to WTO law), and the Appellate body has generally been careful in its use of scholarship. Possible explanations for these trends may include an increase in available precedents, the Appellate Body's specialized role, criticism of the Appellate Body, and its members' backgrounds.

## A. Introduction

### I. Topic and Outline

This article examines how the World Trade Organization (WTO) Appellate Body uses scholarship. The term is defined in chapter A.III below. The topic has been the subject of a short chapter in an edited volume<sup>1</sup> and brief chapters in general textbooks,<sup>2</sup> but no comprehensive study of it exists.

Scholarship seems to play an important practical role in international law generally.<sup>3</sup> This study focuses on whether, and how, this is true for the Appellate Body.

Studying the Appellate Body's use of scholarship is interesting for several reasons. Studying one aspect of the legal reasoning of a highly successful<sup>4</sup> international tribunal is interesting on an abstract level. Practically, how

<sup>1</sup> E. de Brabandere, 'La doctrine en tant que source de droit et l'OMC', in Tomkiewicz, Garcia & Pavot (eds), *Les sources et les normes dans le droit de l'OMC* (2012), 209.

<sup>2</sup> P. Van Den Bossche & W. Zdouc, *The Law and Policy of the World Trade Organization: Text Cases and Materials*, 3rd ed. (2012), 59; M. Matsushita, T. J. Schoenbaum & P. C. Mavroidis, *The World Trade Organization: Law, Practice, and Policy*, 2nd ed. (2006), 86.

<sup>3</sup> E.g. M. Wood, 'Teachings of the Most Highly Qualified Publicists (Art. 38 (1) *ICJ Statute*)', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law Vol. IX* (2012), 783, 783, para. 3 calls it 'fundamental'.

<sup>4</sup> E.g. P.-T. Stoll, 'World Trade Organization, Dispute Settlement', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law Vol. X* (2012), 968, 968, para. 1; A. C. M. de Mestral, 'Dispute Settlement Under the WTO and RTAs: An Uneasy Relationship', 16 *Journal of International Economic Law* (2013) 4, 777, 778; B. Wilson, 'Compliance by WTO Members with Adverse WTO Dispute Settlement Rulings: The Record to Date', 10 *Journal of International Economic Law* (2007) 2, 397, 399.

the Appellate Body uses scholarship is useful to anyone who studies and/or argues over WTO law. The study could also say something about the status of scholarship in international law more generally, and be a basis for comparison of other international courts and tribunals.

The use of scholarship (in international law generally and by the Appellate Body specifically) can also be studied from other perspectives. For example, the use, or non-use, of scholarship can raise issues of intellectual property. An author whose work is used by a court without acknowledgement in the resulting judicial decision could claim to be victim of plagiarism. More indirectly, a judge who goes to great length to dig up references and refers to them in a judicial decision may feel similarly if a different judge uses those references without mentioning the judicial decision. Revealing such practices would require comparisons of the contents of judicial decisions with the contents of relevant scholarship and of other judicial decisions. Determining the legality of such practices is a matter of intellectual property law. These questions will not be pursued further in the present article.

This introduction is chapter A, and explains the article's topic and outline (chapter A.I), explains my methodology (chapter A.II) and the definition of *scholarship* that was used in the study (chapter A.III). Chapter B discusses the potential legal status of scholarship in WTO dispute settlement. The results of my study are presented in chapter E. These results are that the Appellate Body's use of scholarship has been declining (chapter C.I), that the Appellate Body mostly uses scholarship for questions of general international law, as opposed to WTO law (chapter C.II), and that the Appellate Body uses scholarship in a way that avoids controversy (chapter C.III). Chapter D tries to explain why the Appellate Body uses scholarship in the ways that it does. The conclusion in chapter E includes some final thoughts on the study's limitations and significance.

## II. Methodology

I have read through all 110 Appellate Body reports that were available as of April 2014, starting with US – *Gasoline*<sup>5</sup> (1996) and ending with *Canada – Renewable Energy*<sup>6</sup> (2013). I used the English language versions of the official PDF

<sup>5</sup> Report of the Appellate Body, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 29 April 1996.

<sup>6</sup> Reports of the Appellate Body, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector* and *Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/AB/R, WT/DS426/AB/R, 6 February 2013.

document available from the WTO's website.<sup>7</sup> I counted references to scholarship manually, noting them down in a separate document for later analysis.<sup>8</sup> The results are presented in nine tables, which are referred to throughout the article and attached at the end of it.

The analysis is part quantitative and part qualitative. For the quantitative studies, I used the following approach. If a work of scholarship is referred to multiple times in one paragraph, this is counted as a single reference. If it is referred to in multiple footnotes to a single paragraph, this is also counted as a single reference. If a work is referred to in both the text of and footnotes to a single paragraph, this is counted as a single reference. For the purposes of distinguishing between references in the text and footnotes (the subject of table 4), a paragraph that has references both in the text and in footnotes is counted as a reference in the text (since references in the text are the exception in Appellate Body reports).

That different Appellate Body reports have different lengths has not been adjusted for. Each report, regardless of length, presumably raised at least one appealable legal issue where scholarship could have been referred to.

The study is limited to the Appellate Body, meaning (among other things) that it does not include WTO panels. One reason for this is that the Appellate Body is a permanent organ, and thus presumably has a more deliberate, consistent, and far-sighted approach than the temporary panels.<sup>9</sup> Another reason is that panels are expected to and do follow the practice of the Appellate Body.<sup>10</sup>

<sup>7</sup> WTO, *Appellate Body Reports* (2014), available at [https://www.wto.org/english/tratop\\_e/dispu\\_e/ab\\_reports\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/ab_reports_e.htm) (last visited 19 September 2016).

<sup>8</sup> This approach is similar to M. Peil, 'Scholarly Writings as a Source of Law: A Survey of the Use of Doctrine by the International Court of Justice', 1 *Cambridge Journal of International and Comparative Law* (2012) 3, 136, 147-148; O. K. Fauchald, 'The Legal Reasoning of ICSID Tribunals – An Empirical Analysis', 19 *European Journal of International Law* (2008) 2, 301, 302; the approach also resembles a *citations analysis* (which is an examination of how many times a specific source is referred to by subsequent sources) as explained by e.g. R. Posner, 'An Economic Analysis of the Use of Citations in the Law' 2 *American Law and Economics Review* (2000) 2, 381, 382.

<sup>9</sup> I. Van Damme, *Treaty Interpretation by the WTO Appellate Body* (2009), lxv; R. H. Steinberg, 'Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints', 98 *American Journal of International Law* (2004) 2, 247, 257.

<sup>10</sup> Van Damme, *supra* note 9, lxv.

### III. A Definition of Scholarship

#### 1. Introduction

This article studies the use of *scholarship*. This term has no legal definition in international law. I intend my term *scholarship* to be synonymous with what is also referred to as *doctrine* and *scholarly writings*, as well ‘teachings of [...] publicists’ in the International Court of Justice Statute<sup>11</sup> Article 38(1)(d).

The definition I adopt in this article is provisional (not indented as final) and instrumental (not an end in itself). In the present chapter I try to give final answers to the questions of classification that are raised by the Appellate Body’ practice, but mainly because and to the extent that this is necessary in order to conduct a precise analysis.

The core of my definition of scholarship is books and articles, purporting to answer legal questions, being used when ascertaining the content of international law. The rest of this chapter discusses what such a definition may include (chapter A.III.2), and what it may exclude (chapter A.III.3), before concluding (chapter A.III.4).

#### 2. What it May Include

My definition of *scholarship* will include texts written by bodies that are not controlled by States. The International Law Commission (ILC) is an important example (see table 6).<sup>12</sup> The ILC is a subsidiary organ of the United Nations (UN) General Assembly (UNGA),<sup>13</sup> which is composed of States. The members of the ILC are individuals. They are elected by States, but serve in

<sup>11</sup> *Statute of the International Court of Justice*, 26 June 1945, 1 UNTS 993.

<sup>12</sup> Wood, *supra* note 3, 11; A. Pellet, ‘Article 38’, in Zimmermann *et. al.* (eds), *The Statute of the International Court of Justice: A Commentary*, 2nd ed. (2012), 731, 870; I.A. Shearer, *Starke’s International Law*, 11th ed. (1994), 44-45; P. Daillier, M. Forteau & A. Pellet, *Droit international public* (2009), 434-436; C. Parry, *The Sources and Evidences of International Law* (1965), 114; M. E. Villiger, *Customary International Law and Treaties* (1985), 79; B.G. Ramcharan, *The International Law Commission: Its Approach to the Codification and Progressive Development of International Law* (1977), 24.; M. N. Shaw, *International Law*, 6th ed. (2008), 112-113 and 119-121; G. Von glahn and L. Taulbee, *Law Among Nations: An Introduction to Public International Law*, 10th ed. (2012), 65, 70 write about the ILC in separate chapters from scholarship; I. Sinclair, *The International Law Commission*, 2nd Ed. (1987), 121 seems ambivalent as to whether ILC texts are scholarship.

<sup>13</sup> ILC, *Introduction* (2014), <http://legal.un.org/ilc/ilcintro.shtml> (last visited 19 September 2016).

their individual capacity.<sup>14</sup> Thus its texts do not emanate from the States that its members represent.<sup>15</sup> ILC texts are sometimes ‘taken note of’ by the UNGA,<sup>16</sup> which at least means that the UNGA is aware of a text’s existence, and may also indicate some form of tacit endorsement. In such cases the UNGA resolution will not be scholarship, but the original ILC text will still have emanated from the ILC and retains its status as scholarship.<sup>17</sup> An ILC text will also retain its status as scholarship even when it leads to the development of a treaty.<sup>18</sup> A State’s comments on an ILC text are not scholarship, however.<sup>19</sup> The Appellate Body has referred to a text from the United Nations Commission on International Trade Law (UNCITRAL),<sup>20</sup> which is composed of States,<sup>21</sup> and thus does not produce scholarship.<sup>22</sup>

The definition includes scholarship commenting on historical law, if this is ultimately used to elucidate present law.<sup>23</sup> Also included is scholarship that

<sup>14</sup> *Ibid.*

<sup>15</sup> Villiger, *supra* note 12, 79.

<sup>16</sup> E.g. GA Res. 56/83, UN Doc A/RES/56/83, 12 December 2001, para. 3 taking note of the *ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, Yearbook of the International Law Commission (2001), Vol. II, Part Two, 26.

<sup>17</sup> *Survey of International Law in Relation to the Work of Codification of the International Law Commission: Preparatory work within the purview of Art. 18(1) of the International Law Commission—Memorandum submitted by the Secretary-General*, UN Doc A/CN.4/1/Rev.1, 10 February 1949, 16.

<sup>18</sup> Peil, *supra* note 8, 150; ILC texts preparatory to the *VCLT* were referred to in Report of the Appellate Body, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, 4 April 2012, WT/DS406/AB/R, 92, Fn. 473; Reports of the Appellate Body, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States and European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador*, 26 November 2008, WT/DS27/AB/RW/US, WT/DS27/AB/RW2/ECU, 130, Fn. 468.

<sup>19</sup> See e.g., in *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, 15 February 2002, 82, Fn. 257.

<sup>20</sup> *Canada – Renewable Energy*, *supra* note 6, 97, Fn. 495.

<sup>21</sup> UNCITRAL, *FAQ – Origin, Mandate and Composition of UNCITRAL* (2015), available at [https://www.uncitral.org/uncitral/en/about/origin\\_faq.html](https://www.uncitral.org/uncitral/en/about/origin_faq.html) (last visited 19 September 2016).

<sup>22</sup> According to Wood, *supra* note 3, 13 such intra-governmental committees “may lie somewhere between” State practice and scholarship.

<sup>23</sup> See e.g., Report of the Appellate Body, *United States – Section 211 Omnibus Appropriations Act of 1998*, 2 January 2002, WT/DS176/AB/R, 2 January 2002, 54, Fn. 122.

comments on the object and purpose of a rule, as long as this is used to ascertain the content of the rule.<sup>24</sup>

Similarly, scholarship that argues *lex ferenda* rather than *lex lata* will also be included in the definition if the scholarship is used to find the content of international law.<sup>25</sup>

The Appellate Body sometimes mentions that someone else has referred to scholarship, as opposed to referring to scholarship itself. It may mention references made by a panel, by a party to the case, or by the Appellate Body itself<sup>26</sup>. For example, in *EC – Bananas*, the Appellate Body noted that “[t]he Complaining Parties refer to” an ILC text.<sup>27</sup> This can be called *indirect* references to scholarship, as opposed to regular *direct* references. Indirect references have some significance, but presumably give less importance to scholarship than references that the Appellate Body makes on its own initiative.

Scholarship about domestic (or *national* or *municipal*) legal systems has also been referred to by the Appellate Body. Such scholarship is included in my definition when it is used to ascertain the content of international law.<sup>28</sup> Domestic scholarship and domestic law may alternatively be used as a fact, in order to determine whether a member fulfils its WTO obligations.<sup>29</sup> Facts are not covered by the definition of scholarship, as explained in the paragraph below.

### 3. What it May Exclude

In the context of adjudication, law can be distinguished from facts. Many texts that are used by adjudicators supply only facts, and do not say what the law is. The Appellate Body has referred to external documents as the basis of facts

<sup>24</sup> See e.g., Report of the Appellate Body, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, 19 December 1997, 16, para. 41, Fn. 28.

<sup>25</sup> See e.g., Report of the Appellate Body, *United States – Final Anti-dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, 30 April 2008, 67, Fn. 313.

<sup>26</sup> See e.g., Report of the Appellate Body, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, 3 December 2007, 88, Fn. 426.

<sup>27</sup> Report of the Appellate Body, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, 9 September 1997, 37, Fn. 43.

<sup>28</sup> See e.g., Report of the Appellate Body, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, 25 April 1997, 14, Fn. 16.

<sup>29</sup> See e.g., it did in Report of the Appellate Body, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/AB/R, 17 June 2011, 56, Fn. 218; *United States – Tax Treatment for “Foreign Sales Corporations”*, WT/DS108/AB/R, 24 February 2000, 9, para. 24; *US – Section 211 Appropriations Act*, *supra* note 23, 10, Fn. 37.



on many occasions. These are however, not scholarship.<sup>30</sup> Texts that supply what may be called evidence of law, such as treaty collections, reports of arbitrations without further analysis, and historical data on State practice and *opinio juris*, are not included in my definition of scholarship. This is distinct from the law regulating a tribunal's treatment of facts.<sup>31</sup>

Dictionaries are also excluded from my definition of scholarship.<sup>32</sup> They can say how words are customarily used, including words used in treaties. However dictionaries do not comment on the law as such. This is what distinguishes dictionaries from legal scholarship. My definition of scholarship will also exclude legal dictionaries, for the same reason.

Counsel pleadings are often cited in Appellate Body reports. They are, however, given on behalf of States. They will therefore not be seen as scholarship here.<sup>33</sup>

#### 4. Conclusion

Under my definition of scholarship, the Appellate Body has cited scholarship a total of 159 times, in 29 of its 110 reports. This means that 26% of reports refer to scholarship, and the total average is 1.4 references per report. Since more than half of all contain zero references, the median number of references per report is zero. These numbers are summarised in tables 1 and 2.

### B. The Legal Status of Scholarship in WTO Dispute Settlement

#### I. A Question Regulated by Law?

Law may be said to consist of legal rules that are derived from sources of law. What constitutes valid sources of law in a given legal system is itself usually governed by law. In international law the law governing the sources of law is mainly found in customary international law.

<sup>30</sup> Peil, *supra* note 8, 149-150.

<sup>31</sup> See e.g., Report of the Appellate Body, *Canada – Measures Affecting the Export of Civilian Aircraft*, 20 August 1999, WT/DS70/AB/R, 20 August 1999, 19, Fn. 55, 20, Fn. 58, Fn. 59, 57, Fn. 128.

<sup>32</sup> Brabandere, *supra* note 1, 5-6, 8 distinguishes (legal) dictionaries from scholarship, but adds that the former may nonetheless be considered scholarship; Peil, *supra* note 8, 150-151 includes some dictionaries in his study.

<sup>33</sup> Peil, *supra* note 8, 149.

This customary international law may extend to regulate the use of scholarship. If the use of scholarship is governed by such customary international law, there will be norms of customary international law saying whether, when, and how international lawyers may use scholarship when ascertaining the content of international law. These norms may oblige lawyers to use scholarship in certain ways, they may moreover prohibit certain other uses of scholarship, and they may leave yet other aspects of the use of scholarship to the individual lawyer's discretion. An alternative to the existence of such norms is that there is no regulation of the use of scholarship in international law. If there is no such regulation, lawyers will be free to (or not to) refer to scholarship when ascertaining the content of international law. They would still only be free in a legal sense, because there may still exist social and other guidelines outside international law on how international lawyers can or must use scholarship.

One indication that the use of scholarship is indeed governed by international law is that scholarship is mentioned in the *ICJ Statute* Article 38(1) (d), which qualifies scholarship as “subsidiary means for the determination of rules of [international] law” by the ICJ.<sup>34</sup> Many writers assume that the *ICJ Statute* Article 38(1) reflects customary international law.<sup>35</sup> If so, that Article 38(1)(d) mentions scholarship implies that the use of scholarship in international law is regulated by law. However answering the question conclusively would require a broader examination than what the present article attempts, covering more than just the practice of the Appellate Body. It would also be complicated by difficulty of precisely ascertaining the content of customary international law, and by the debates over the correct method for doing so.<sup>36</sup> Whether the use

<sup>34</sup> Matsushita, Schoenbaum & Mavroidis, *supra* note 2, 58-86; Fauchald, *supra* note 8, 301-302 use the term “interpretative elements”.

<sup>35</sup> E.g. H. Charlesworth, ‘Law-making and Sources’, in J. Crawford & M. Koskenniemi (eds), *The Cambridge Companion to International Law* (2012), 187, 188-189; Shaw, *supra* note 12, 70; R. Jennings & A. Watts (eds), *Oppenheim’s International Law – Volume 1: Peace, Introduction and Part 1* (1992), 24; V. D. Degan, *Sources of International Law* (1997), 5; M. Koskenniemi, ‘Introduction’, in M. Koskenniemi (ed.), *Sources of International Law* (2000), xi; R. Jennings, ‘What Is International Law and How Do We Tell It When We See It?’, in Koskenniemi, *ibid.*, 27, 60 [Jennings, What is International Law]; O. Spiermann, *International Legal Argument in the Permanent Court of International Justice: The Rise of the International Judiciary* (2005), 58; R. McCorquodale, M. Dixon & S. Williams, *Cases and Materials on International Law*, 5th ed. (2011), 18.

<sup>36</sup> Issues include what counts as evidence of State practice, who must partake in practice and how long it must last, and the nature of *opinio juris*; also discussed e.g. by the ILC in *Second Report on Identification of Customary International Law*, UN Doc. A/CN.4/672, 22 May 2014, 18-62.

of scholarship is governed by international law will therefore not be discussed further in this article. In any event the question is ultimately not relevant to the status of scholarship in WTO dispute settlement, as outlined in chapter B.IV below.

## II. The Applicability of the Law in WTO Dispute Settlement

International law is generally seen as a single legal system,<sup>37</sup> which the WTO treaties are part of.<sup>38</sup> Thus there is no separate set of *sources of WTO law*. There are only sources of international law, among which are the WTO treaties.<sup>39</sup>

<sup>37</sup> *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, Yearbook of the International Law Commission (2006), Vol. II, Part Two, 157, para. 1; J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (2003), 9 [Pauwelyn, Conflict of Norms]; D. Palmetier, 'The WTO as a Legal System', 24 *Fordham International Law Journal* (2000) 444, 478 is undecided on whether the WTO as such should be considered a legal system; M. Payandeh, 'The Concept of International Law in the Jurisprudence of H.L.A. Hart', 21 *European Journal of International Law* (2011) 967, 995 concludes that international law should be called a legal system despite; H. L. A. Hart, *The Concept of Law*, 3rd ed. (2012), 232-327 apparently holding otherwise.

<sup>38</sup> G. Abi-Saab, 'The WTO dispute settlement and general international law', in R. Yerxa & B. Wilson (eds), *Key Issues in WTO Dispute Settlement: The First Ten Years* (2005) 7, 10; The WTO can be and has been called a "self-contained regime", see e.g. B. Simma & D. Pulkowski, 'Leges speciales and Self-Contained Regimes', in J. Crawford, A. Pellet & S. Olleson, *The Law of International Responsibility* (2010), 139, 155-158; However, the most common meaning of this term seems to be rather narrow, in that it denotes a treaty that derogates from the rules of general international law that regulate State responsibility see Simma & Pulkowski, *ibid.*, 142; Report of the Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc A/CN.4/L.682, 13 April 2006, paras 124, 128 [ILC Study Group Report]; Slightly different definitions are found e.g. in D. Regan, 'International Adjudication: A Response to Paulus—Courts, Custom, Treaties, Regimes and The WTO', in S. Besson & J. Tasioulas (eds), *The Philosophy of International Law* (2010), 225, 232; J. Crawford, 'Chance, Order, Change: The Course of International Law', 365 *Recueil des cours* (2014) 1, 1, 212.

<sup>39</sup> Pauwelyn, *Conflict of Norms*, *supra* note 37, 25-26; D. Palmetier & P. C. Mavroidis 'The WTO Legal System: Sources of Law', 92 *American Journal of International Law* (1998) 3, 398; Van Den Bossche & Zdouc, *supra* note 2, 60; J. H. Jackson, *The World Trading System* (1997), 25; D. M. McRae, 'The WTO in International Law: Tradition Continued or New Frontier?', 3 *Journal of International Economic Law* (2000), 1, 27, 28-30; J. Pauwelyn, 'Enforcement and Countermeasures in the WTO: Rules are Rules – Toward a More Collective Approach', 94 *American Journal of International Law* (2000) 2, 335, 336.

However, not all international law is necessarily applicable by WTO tribunals. Many tribunals have clauses in their constitutive document that regulate what law they may apply. WTO tribunals, however, do not have a general *applicable law clause* similar to, for example, the *ICJ Statute* Article 38(1), the *ICSID Convention*<sup>40</sup> Article 42(1), and the *UNCLOS*<sup>41</sup> Article 293(1).<sup>42</sup> The *Dispute Settlement Understanding* (DSU)<sup>43</sup> Articles 1.1, 3.2, and 19.2 make it clear that the WTO tribunals are to apply the WTO ‘covered agreements’, and not ‘add to or diminish’ their rights and obligations. Beyond this, however, the regulation of applicable law in WTO dispute settlement is unwritten.

The applicability of rules that, with the existence of a conflict rule such as the *VCLT*<sup>44</sup> Article 30 or the *UN Charter*<sup>45</sup> Article 103, could override WTO rules is debated: some hold that these are applicable,<sup>46</sup> others that they are not.<sup>47</sup> Rules that would not override WTO rules are generally seen as applicable unless

<sup>40</sup> *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 18 March 1965, 575 UNTS 159.

<sup>41</sup> *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 3.

<sup>42</sup> Van Damme, *supra* note 9, 13.

<sup>43</sup> *Understanding on Rules and Procedures Governing the Settlement of Disputes*, 15 April 1994, 1869 UNTS 401.

<sup>44</sup> *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331.

<sup>45</sup> *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

<sup>46</sup> Pauwelyn, *Conflict of Norms*, *supra* note 37, 491; J. Pauwelyn, ‘The Role of Public International Law in the WTO: How Far Can We Go?’, 95 *American Journal of International Law* (2001) 3, 535, 560-565 [Pauwelyn, ‘The Role of Public International Law in the WTO’]; E. Vranes, ‘Jurisdiction and Applicable Law in WTO Proceedings’, 48 *German Yearbook of International Law* (2005) 265, 288-289.

<sup>47</sup> J. P. Trachtman, ‘Book Review: “Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law” By J. Pauwelyn’, 99 *American Journal of International Law* (2005) 4, 855, 858; J. P. Trachtman, ‘The Domain of WTO Dispute Resolution’, 40 *Harvard International Law Journal* (1999) 2, 333, 347-348; G. Marceau, ‘A Call for Coherence in International Law: Praises for the Prohibition Against ‘Clinical Isolation’ in ‘WTO Dispute Settlement’, 33 *Journal of World Trade* (1999) 5, 87, 113; G. Marceau ‘WTO Dispute Settlement and Human Rights’, 13 *European Journal of International Law* (2002), 4, 753, 778 [Marceau, ‘Human Rights’]; Report of the Appellate Body, *Mexico – Soft Drinks*, 56, 78 may support this view; P. C. Mavroidis, ‘No Outsourcing of Law? WTO Law as Practiced by WTO Courts’, 102 *American Journal of International Law* (2008) 3, 421, 439 finds it telling that no WTO tribunal has applied such rules as defences; G. Marceau, ‘Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and other Treaties’, 35 *Journal of World Trade* (2001), 6, 1081, 1107-1108 would allow WTO tribunals to declare that a WTO rule is superseded by another rule, but no more.

they are derogated from by WTO rules.<sup>48</sup> Thus, if general international law includes norms regulating scholarship (see chapter B.I above), their applicability in the WTO dispute settlement will depend on whether the WTO has its own, *lex specialis*, regulation of scholarship.

As will be elaborated in chapter B.IV below, determining this is difficult. Such a determination will not be attempted in this article, but the uncertainty will not undermine the conclusions reached about the status of scholarship in WTO dispute settlement.

### III. The Potential Role of Scholarship

Scholarship is, like judicial decisions, generally seen as not containing rights or obligations in themselves.<sup>49</sup> It is rather seen as an aide in determining the contents of *principal* (as opposed to subsidiary) means for the ascertainment of international law, such as treaties and customary international law.<sup>50</sup> Scholarship and (especially) judicial decision can nonetheless have a notable influence on the outcome of a case,<sup>51</sup> although this will not necessarily be reflected in the text of

<sup>48</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970), Advisory Opinion, ICJ Reports 1971, 16, 47 para. 96; *Case Concerning the Factory at Chorzów*, PCIJ Series A, No. 9 (1927), Merits, 29; For the WTO, Van Damme, *supra* note 9, 16-19; ILC Study Group Report, *supra* note 38, 169; Pauwelyn, *Conflict of Norms*, *supra* note 37, 560-561.

<sup>49</sup> E.g. Peil, *supra* note 8, 137-138; G. J. H. Van Hoof, *Rethinking the Sources of International Law* (1983), 169, 176; Koskenniemi, *supra* note 35, xi11; P. Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th ed. (1997), 36; G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, 3rd ed. (1957), 26-28; G. Schwarzenberger, 'The Inductive Approach to International Law', 60 *Harvard Law Review* (1947) 4, 539, 551 [Schwarzenberger, The Inductive Approach]; G. Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law', in *F. M. van Asbeck et. al.* (eds), *Symbolae Verzijl* (1958) 153, 157; G. Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law', 92 *Recueil des Cours* (1957) 1, 97. Most international law textbooks discuss scholarship in a chapter on "The Sources of International Law" (or something similar).

<sup>50</sup> Peil, *supra* note 8, 139-142; Malanczuk, *supra* note 49, 51-52; H. Thirlway, 'The Sources of International Law', in M. D. Evans (ed.), *International Law*, 3rd ed. (2010), 95, 110; M. Dixon, *Textbook on International Law*, 7th ed. (2013), 49; Daillier, Forteau & Pellet, *supra* note 12, 853-854; M. O. Hudson, *The Permanent Court of International Justice 1920-1942* (1943), 612; M. Lachs, 'Teachings and Teaching on International Law', 151 *Hague Recueil* (1976) 3, 161, 169; S. Rosenne, *Practice and Methods of International Law* (1984), 119; S. Rosenne, *The Law and Practice of the International Court, 1920-2005: Vol. III*, 4th ed. (2006), 1551.

<sup>51</sup> Jennings, *What Is International Law*, *supra* note 35, 178.

a decision.<sup>52</sup> This article examines the Appellate Body's use of scholarship, and uses it to infer conclusions about the extent and nature of such influence by scholarship in WTO dispute settlement.

This influence on the Appellate Body's conclusions about the content of international law can have a variety of bases. It is possible, at least in theory, to distinguish between two categories: legal and non-legal influence. Scholarship has legal influence when its use is seen as regulated by law and it is seen as having a legally mandated *weight* in the outcome of legal questions. Non-legal influence is any other kind of influence that scholarship has, in practice, on how a legal question is considered and answered. Without a clear view of whether the use of scholarship by the WTO Appellate Body is regulated by law, and the nature and content of this law, it is difficult to distinguish between these forms of influence when examining the Appellate Body's practice. However, as outlined in chapter B.IV below, my examination of the Appellate Body's use of scholarship will nonetheless yield conclusions about the status of scholarship in WTO dispute settlement.

#### IV. The Appellate Body Has the Final Word

The Appellate Body does not specify whether its use of scholarship is based on any legal regulation, and if so whether this legal regulation is general or specific to the WTO. When the Appellate Body uses scholarship, it may intend one of at least four things:

1. It uses general customary law on the use of scholarship.
2. It uses *lex specialis* customary law on the use of scholarship (the Appellate Body cannot create such a *lex specialis* rule, but can act as if one exists).
3. It assumes that WTO agreements (implicitly) give it the competence to create its own law on the use of scholarship.
4. It assumes that no law regulates its use of scholarship.

The Appellate Body's decisions are treated as *de facto* precedents by future WTO tribunals, even though there is no *de jure* rule of precedent (neither for Appellate Body, panel, nor Dispute Settlement Body decisions).<sup>53</sup>

<sup>52</sup> H. Thirlway, *The Sources of International Law* (2014), 127.

<sup>53</sup> R. Bhala, 'The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)', 14 *American University International Law Review* (1999) 4, 845, 936-941; R.

In addition to being treated as precedents, Appellate Body decisions are in practice not subject to review. The Dispute Settlement Body can by consensus decide not to adopt Appellate Body decisions (DSU Article 17.14), but this has never happened.

This means that, for practical purposes, regardless of which (if any) of the four possible intentions mentioned above the Appellate Body has adopted, it will have the final word on the status of scholarship in WTO dispute settlement. This means that the present study of the Appellate Body's use of scholarship should be sufficient to determine the status of scholarship in WTO dispute settlement, regardless of underlying uncertainties in the general international law and the Appellate Body's approach to it.

## C. Results

### I. The Use of Scholarship Has Declined

#### 1. Introduction

One general trend in the Appellate Body's use of scholarship seems to be that the importance of scholarship to the Appellate Body has been decreasing.<sup>54</sup> This is shown in several ways:

- The number of references to scholarship per year has generally decreased over time (chapter C.I.2).
- The Appellate Body members that were inclined to cite scholarship were mostly appointed in its early days, and are no longer members (chapter C.I.3).
- The relative share of indirect references (see chapter A.III.2) has generally increased over time (chapter C.I.4).

Bhala, 'The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)', 9 *Journal of Transnational Law and Policy* (1999) 1, 1; M. Crowley & R. Howse, 'US – Stainless Steel (Mexico)', 9 *World Trade Review* (2010) 1, 117, 126; Possible reasons for development of *de facto* doctrines of precedent in international tribunals are discussed by H. G. Cohen, 'Theorizing Precedent in International Law', in A. Bianchi, D. Peat & M. Windsor (eds), *Interpretation in International Law* (2015), 268.

<sup>54</sup> Matsushita, Schoenbaum & Mavroidis, *supra* note 2, 86 draw the opposite conclusion: "references [to scholarship], in the early WTO years were rare. The quantity of references has increased over the years [...]".

## 2. Fewer Cases with References

This study examines 110 Appellate Body reports, of which 29 (26%) cite scholarship. The first report was given in 1996, and new ones have been given every year since. The Appellate Body's references to scholarship are unequally distributed over its history.

As can be seen in table 1, in the four years from 1996 to 1999, at least 38% of Appellate Body reports cited scholarship. In the 14 years since, only two years (2004 and 2009) have reached at least this number. The overall trend is that gradually fewer cases have cited scholarship.

When looking at the number of references to scholarship (as opposed to the number of reports referring to scholarship), the trend is less clear (see table 2). The five cases with the highest number of references are US – *Anti – Dumping and Countervailing Duties (China)*<sup>55</sup> (31 references), EC – *Chicken Cuts*<sup>56</sup> (27 references), US – *Shrimp*<sup>57</sup> and EC – *Hormones*<sup>58</sup> (15 references each), and Japan – *Alcoholic Beverages I*<sup>59</sup> (11 references). While three of these are from the first three years of the Appellate Body's operation, the two highest on the list are newer, from 2005 and 2010 respectively.

The high number of references in EC – *Chicken Cuts*<sup>60</sup> and US – *Anti-Dumping and Countervailing Duties (China)*<sup>61</sup> naturally affects the average number of citations per report by year (table 2). The four years from 1996 to 1999 saw between 5.8 and 1.9 references to scholarship per report on average. The only later years with numbers above 1.9 are 2005 and 2010, with averages of 2.9 and 10.33 references respectively.

A general trend thus seems to be that the four first years of the Appellate Body's operation saw a more consistently high number of references to scholarship, while later years have consistently lower numbers except for two *outlier* cases.

<sup>55</sup> Report of the Appellate Body, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, 11 March 2011, WT/DS379/AB/R.

<sup>56</sup> Report of the Appellate Body, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, 12 September 2005, WT/DS269/AB/R, WT/DS286/AB/R.

<sup>57</sup> Report of the Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, 12 October 1998, WT/DS58/AB/R.

<sup>58</sup> Reports of the Appellate Body, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, 16 January 1998, WT/DS26/AB/R, WT/DS48/AB/R.

<sup>59</sup> Reports of the Appellate Body, *Japan – Taxes on Alcoholic Beverages*, 4 October 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R.

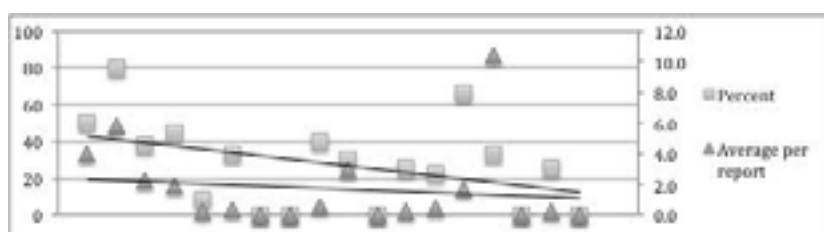
<sup>60</sup> EC – *Chicken Cuts*, *supra* note 56.

<sup>61</sup> US – *Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, *supra* note 55.



The overall conclusion is that, even though the number of references varies greatly from year to year, and the pattern is far from clear, references to scholarship seem to have become rarer over time

This can be illustrated with the following graph (with trend lines):



### 3. Changing Membership

An analysis of references by individual Appellate Body members shows a similar trend. Each Appellate Body member has referred to scholarship in between 0 and 70% of the reports they have contributed to. The average number of references per report a member has contributed to vary from 0 to 4.3 between different members. This is illustrated Table 5.

The Appellate Body has 24 current and former members.<sup>62</sup> 23 of them have contributed to at least one Appellate Body report. Those 23 were appointed in 1995 (7 members), 2000 (3 members), 2001 (3 members), 2003 (1 member), 2006 (1 member), 2007 (2 members), 2008 (2 members), 2009 (2 members), and 2011 (2 members).

Among current and former Appellate Body members, four have referred to scholarship in more than 40% of their reports, while 11 have referred to scholarship in 20% or less of their reports. Of the four members with more than 40%, three were among the seven appointed in 1995. Of the 11 members with 20% or less, none were among those seven. Thirteen Appellate Body members have an average of more than one reference to scholarship per report, while the remaining ten have less than one. Of the former thirteen, ten were appointed in 2001 or earlier, and the group includes all seven original members. Thus the ten members with less than one reference on average were all appointed in 2000 or later.

<sup>62</sup> WTO, 'Appellate Body Members' (2015), available at [https://www.wto.org/english/tratop\\_e/dispu\\_e/ab\\_members\\_descrp\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm) (last visited 19 September 2016).

The members can be divided into three chronological groups: Those appointed in 1995 (7 members), those appointed in 2001-2003 (7 members), and those appointed in 2006-2012 (9 members). As shown in table 5, the share of reports with references to scholarship dropped from 37% for the first group to 19% and 21% respectively for the last two. The average number of references per report was 2 for the first group, 0.8 for the second, and 1.7 for the third.

These findings reinforce the overall impression that the importance of scholarship in Appellate Body reports has been declining.

#### 4. More Indirect References

Of the Appellate Body's 159 references to scholarship, 58, or 36%, have been *indirect*. This is illustrated in table 3. As explained in chapter A.III.2 above, indirect references mean that the Appellate Body merely refers to the fact that someone else has referred to scholarship, rather than referring to scholarship itself. The relative share of indirect citations compared to direct citations has increased over time.

Of the 12 years after 2001, all but two (2008 and 2012) have a majority of indirect references. By contrast, in the six years prior to 2002, no year had a majority of indirect references, and four years had no indirect references. This means that indirect references have been far more prevalent in the later parts of the Appellate Body's existence.

As indirect references are presumably less significant than direct ones (see *supra* chapter A.III.2), the increasing share of indirect references to scholarship reinforces the impression of scholarship's declining importance to the Appellate Body.

## II. Scholarship is Used Mostly for General International Law

### 1. Generally

The Appellate Body can, and sometimes must, use various general rules of international law, as opposed to WTO-specific law (see *supra* chapter B.II). One trend in the Appellate Body's use of scholarship is that it mostly uses scholarship to determine this general international law.<sup>63</sup> As table 7 shows, 87% of the Appellate Body's references to scholarship have been used to answer questions of general international law, as opposed to 13% for WTO law. Moreover, the

<sup>63</sup> Brabandere, *supra* note 1, 6-8; Van Den Bossche & Zdouc, *supra* note 2, 317; Fauchald, *supra* note 8, 281.

scholarship references connected to WTO law mostly came early in the Appellate Body's existence. Fourteen of the 21 references to WTO were made in the four years prior to 2000, compared to only seven in the following 14 years.

The rest of this chapter describes the specific areas of general international law that the Appellate Body has used scholarship to elucidate.

## 2. Interpretation and Other Treaty Law

Many of the Appellate Body's references to scholarship concern treaty interpretation. Under the DSU Article 3.2, WTO agreements are to be interpreted using 'customary international law of treaty interpretation'. The Appellate Body has largely used this law,<sup>64</sup> and used scholarship when ascertaining it.<sup>65</sup> Numerically, 71 of the Appellate Body's 159 references to scholarship have concerned treaty interpretation (see table 7). This is a substantial plurality of 44.7%, nearly half of all references.

The Appellate Body has used scholarship to establish the following:

- The *VCLT* Article 31(1)<sup>66</sup> and Article 32<sup>67</sup> as customary law.
- The relationship between Article 31 and 32.<sup>68</sup>
- The scope of Article 31(1)<sup>69</sup> and Article 32<sup>70</sup>.
- The primary role of party intention.<sup>71</sup>
- That an interpretation must not render a term meaningless.<sup>72</sup>

<sup>64</sup> Van Damme, *supra* note 9, 379-383 notes that it has put particular emphasis on context and effectiveness.

<sup>65</sup> Brabandere, *supra* note 1, 8-10; Fauchald, *supra* note 8, 352 finds the same for *ICSID* tribunals between 1998 and 2006.

<sup>66</sup> *US – Gasoline*, *supra* note 5, 17, Fn. 34.

<sup>67</sup> *Japan – Alcoholic Beverages II*, *supra* note 59, 9, Fn. 17.

<sup>68</sup> Reports of the Appellate Body, *European Communities – Customs Classification of Certain Computer Equipment*, 5 June 1998, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, 31, Fn. 64, 32, Fn. 65.

<sup>69</sup> *EC – Chicken Cuts*, *supra* note 56, 100, Fn. 448.

<sup>70</sup> *EC – Chicken Cuts*, *supra* note 56, 27, Fn. 147, 116, Fn. 557, Fn. 558.

<sup>71</sup> *EC – Chicken Cuts*, *supra* note 56, 69, Fn. 343; The ICJ made the same point in *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, *Judgment*, ICJ Reports 2009, 213, 31, para. 58.

<sup>72</sup> *US – Gasoline*, *supra* note 5, 23, Fn. 45.

- To elaborate the role of object and purpose (see Article 31(1)),<sup>73</sup> including the object and purpose of a treaty as a whole.<sup>74</sup>
- That an interpretation should consider the treaty as a whole.<sup>75</sup>
- The concept of effectiveness.<sup>76</sup>
- The role<sup>77</sup> and meaning<sup>78</sup> of ‘subsequent practice’ (see Article 31(3)(b)).
- The role<sup>79</sup> and meaning<sup>80</sup> of ‘subsequent agreements’ (see Article 31(3) (a)).
- The meaning of ‘relevant rules of international law’ (see Article 31(3) (c)).<sup>81</sup>
- The concept of in “*dubio mitiu*”.<sup>82</sup>
- The concept of evolutive interpretation.<sup>83</sup>
- The *principle of acquiescence*.<sup>84</sup>

The Appellate Body has also used scholarship a further two times to establish other customary rules of treaty law.<sup>85</sup>

### 3. State Responsibility

The responsibility of States for internationally wrongful acts is another part of general international law that the Appellate Body has applied. The Appellate

<sup>73</sup> *Japan – Alcoholic Beverages II*, *supra* note 59, 10, Fn. 20.

<sup>74</sup> *US – Shrimp*, *supra* note 57, 42, Fn. 83.

<sup>75</sup> Report of the Appellate Body, *Japan – Measures Affecting Agricultural Products*, 22 February 1999, WT/DS76/AB/R, 26, Fn. 44.

<sup>76</sup> *Japan – Alcoholic Beverages II*, *supra* note 59, 11, Fn. 21; *US – Shrimp*, *supra* note 57, 50, Fn. 116.

<sup>77</sup> *Japan – Agricultural Products II*, *supra* note 75, 19-20, Fn. 24-26.

<sup>78</sup> *EC – Chicken Cuts*, *supra* note 56, 100, Fn. 485, Fn. 489.

<sup>79</sup> *US – Clove Cigarettes*, *supra* note 18, 92, Fn. 473.

<sup>80</sup> *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador and European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States*, *supra* note 18, 130, Fn. 468.

<sup>81</sup> *US – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, *supra* note 55, 119, Fn. 218.

<sup>82</sup> *EC – Hormones*, *supra* note 58, 64, Fn. 154.

<sup>83</sup> *US – Shrimp*, *supra* note 57, 48, Fn. 109.

<sup>84</sup> *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, 7 April 2005, WT/DS285/AB/R, 62, Fn. 255.

<sup>85</sup> *EC – Bananas*, *supra* note 27, 9, Fn. 43; Report of the Appellate Body, *Canada – Patent Term*, WT/DS170/AB/R, 18 September 2000, 22, Fn. 50 both about the VCLT Article 28.

Body has frequently referred to scholarship in this regard: 25% of the Appellate Body's references to scholarship have involved questions of responsibility. Most of the references have been to the ILC's *Responsibility of States for Internationally Wrong Acts*<sup>86</sup>. The Appellate Body can use texts such as this in at least three different ways:

- They can be used as interpretive factors when interpreting WTO agreements.
- Alternatively, they can be used more indirectly, to establish customary international law, which is then used to interpret WTO agreements.
- Finally, they can be used to establish customary international law that is applied directly in a dispute.

As will be shown below, the Appellate Body has so far only used them in the first and second way. The third approach should also be permissible to the extent it does not conflict with any existing WTO law. If at least some of the topics covered by a text are not regulated by WTO-specific law, the third approach should be permissible as well.<sup>87</sup>

The largest subgroup of references to scholarship in the field of responsibility concerns the determination of the legal status of the ILC's *Responsibility of States for Internationally Wrong Acts*. So far, this has been the subject of 22 references (13.8% of the total). All 22 references stem from *US – Anti-Dumping and Countervailing Duties (China)*,<sup>88</sup> where various parties discussed whether the articles reflected customary law, although the Appellate Body did not find it necessary to decide the question.<sup>89</sup>

Attribution of acts to WTO members is the subject of 12 references (7.5% of the total). The Appellate Body has used international law textbooks to establish the general customary international law rule that a State is responsible for the acts of its organs.<sup>90</sup> It has used the ILC's *Responsibility of States for*

<sup>86</sup> GA Res. 56/83, *supra* note 16.

<sup>87</sup> Van Damme, *supra* note 9, Fn. 16-19; ILC Study Group Report, *supra* note 38, 90, para.169; Pauwelyn, 'The Role of the WTO in Public International Law', *supra* note 46, 560-561.

<sup>88</sup> *US – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, *supra* note 55, 16-18, paras 36-39, 41, Fn. 140-146, 67, Fn. 148, 125, Fn. 236, 128, Fn. 248, 130, Fn. 257, 132, Fn. 268, 146, Fn. 306, 147, Fn. 312-313, Fn. 315-316.

<sup>89</sup> *US – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, *supra* note 55, 119 -123, paras 309-317.

<sup>90</sup> *US – Shrimp*, *supra* note 57, 71, Fn. 177.

*Internationally Wrong Acts* Article 4-8 to interpret the term public body in Article 1.1(a)(1) of the Agreement on Subsidies and Countervailing Measures<sup>91, 92</sup> and has briefly referred to parties' citations of the ILC's Responsibility of States for Internationally Wrongful Acts Article 4<sup>93</sup> and Article 8<sup>94</sup>.

Four references (2.5% of the total) have concerned what constitutes a breach of a WTO obligation. The references were all indirect, with parties citing the ILC's *Responsibility of States for Internationally Wrongful Acts* Article 2<sup>95</sup> and 13-15<sup>96</sup> to support their arguments.

A further two cases (1.3% of the total) have referred to the proportionality requirement for countermeasures found in the ILC's *Responsibility of States for Internationally Wrongful Acts* Article 51, which the Appellate Body took to reflect customary international law, which was it in turn used to interpret the *Agreement on Textiles and Clothing*<sup>97</sup> Article 6.4<sup>98</sup> and the *Agreement on Safeguards*<sup>99</sup> Article 5.1<sup>100</sup>.

#### 4. Burden of Proof and Other Questions of Evidence

The Appellate Body has also referred to scholarship when examining questions of evidence, especially those involving the burden of proof. This has been the subject of 12 references to scholarship (8% of the total). All but one

<sup>91</sup> *Agreement on Subsidies and Countervailing Measures*, 15 April 1994, 1869 UNTS 14.

<sup>92</sup> *US – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, *supra* note 55, 10, para. 22, 16, 18, para. 35, para. 40, 146, Fn. 305, Fn. 309, 147, Fn. 311, Fn. 314, Fn. 316.

<sup>93</sup> Report of the Appellate Body, *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan*, WT/DS322/AB/RW, 18 August 2009, 77, Fn. 466.

<sup>94</sup> *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea*, WT/DS296/AB/R, 27 June 2005, 23, Fn. 104, para. 69.

<sup>95</sup> *United States – Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”) – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/AB/RW, 14 May 2009, 38, Fn. 136.

<sup>96</sup> *US – Zeroing (EC) (Article 21.5 – EC)*, *supra* note 95, *Ibid*, 59, Fn. 199, para. 130; *US – Zeroing (Japan) (Article 21.5 – Japan)*, *supra* note 93, 29, para. 58, 44, Fn. 150, 113, Fn. 364.

<sup>97</sup> *Agreement on Textiles and Clothing*, 15 April 1994, 1868 UNTS 14.

<sup>98</sup> Report of the Appellate Body, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan – AB-2001-3*, WT/DS192/AB/R, 8 October 2001, 70, Fn. 90.

<sup>99</sup> *Agreement on Safeguards*, 15 April 1994, 1869 UNTS 154.

<sup>100</sup> *US – Line Pipe*, *supra* note 19, 82, para. 259, Fn. 255.

involved the general rule that the claimant has the burden of proof.<sup>101</sup> The last reference was used to establish that it was permissible to draw inferences from a party's refusal to submit evidence.<sup>102</sup>

Evidence is the only field where the Appellate Body has referred to domestic scholarship to ascertain international law (as described in chapter A.III.2). It has referred to domestic scholarship eight times.<sup>103</sup>

## 5. Other General International Law

The Appellate Body has also used scholarship when tackling certain other general international law matters, with a total of 13 references (8% of the total).

International environmental law was the subject of eight references. In *EC – Hormones*<sup>104</sup>, the Appellate Body referred to scholarship when discussing the precautionary principle, but did not conclude whether it was customary law, or whether it would have overridden the *WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)*<sup>105</sup> Article 5.1 and 5.2 if it were.<sup>106</sup> In *US – Shrimp*, an international law book was used to elaborate the general international law concept of sustainable development, as referred to in the Preamble of the *WTO Agreement*<sup>107, 108</sup>.

The other five references concerned the treatment of domestic law in international law,<sup>109</sup> the principle of good faith or *abus de droit*,<sup>110</sup> and consistency as an argument in favour of *stare decisis*.<sup>111</sup>

<sup>101</sup> *Canada – Aircraft*, *supra* note 31, 19, Fn. 55, 20, 58-59; *US – Wool Shirts and Blouses*, *supra* note 28, 14, Fn. 15-16.

<sup>102</sup> *Canada – Aircraft*, *ibid.*, 57, Fn. 128.

<sup>103</sup> All references were in *US – Wool Shirts and Blouses*, *supra* note 28, 14, Fn. 16.

<sup>104</sup> *EC – Hormones*, *supra* note 58.

<sup>105</sup> *The WTO Agreement on the Application of Sanitary and Phytosanitary Measures*, 14 April 1994, 1867 UNTS 493.

<sup>106</sup> *EC – Hormones*, *supra* note 58, 45, Fn. 92; *Palmeter & Mavroidis*, *supra* note 39, 65.

<sup>107</sup> *Agreement establishing the World Trade Organization*, 15 April 1994, 1867 UNTS 154.

<sup>108</sup> *US – Shrimp*, *supra* note 57, 48, Fn. 107.

<sup>109</sup> *India – Patents (US)*, *supra* note 24, 23, Fn. 52.

<sup>110</sup> *US – Shrimp*, *supra* note 57, 62, Fn. 156; *Brazil – Retreaded Tyres*, *supra* note 26, 97, Fn. 426.

<sup>111</sup> *US – Stainless Steel (Mexico)*, *supra* note 25, 67, Fn. 313.

### III. Careful Use of Scholarship

#### 1. Introduction

Another overall trend in the Appellate Body's use of scholarship is an apparent tendency to be careful. The following elements of this are discussed in this chapter:

- The Appellate Body uses a timid approach when referring to scholarship (chapter C.III.2).
- The Appellate Body has referred to an uncontroversial selection of scholarship (chapter C.III.3).
- The Appellate Body has used scholarship mostly for conventional tasks (chapter C.III.4).
- Rather than using scholarship as support for going beyond institutional constraints, the Appellate Body has used scholarship as a basis for deferring to such constraints (chapter C.III.5).

#### 2. Timid Approach

The Appellate Body seems to use a rather timid approach when referring to scholarship.<sup>112</sup>

Chapter C.I.4 noted how 36% of the Appellate Body's references to scholarship have been indirect, and that the number seems to have increased over time. Indirect references can be said to be less bold than direct references.

Moreover, 122 (77%) of the Appellate Body's references to scholarship are found in footnotes. Only 37 references have been in the text of a report, and 30 of those are from a single report (*US – Anti-Dumping and Countervailing Duties (China)*) References in footnotes are often supporting arguments, used (merely) to support the primary arguments made in the main text. Thus, even when references to scholarship are direct (as opposed to indirect), scholarship mostly does not seem to have been part of the Appellate Body *discussions* of relevant law, only support for its *conclusions*.

The Appellate Body also mostly refers to scholarship without referring to scholarship that opposes its conclusions, and without mentioning nuances or contrasting arguments within a given work. The Appellate Body generally

<sup>112</sup> Fauchald, *supra* note 8, 352 notes the opposite with regard to *ICSID* tribunals between 1998 and 2006, which more often than not used scholarship as “an essential interpretive argument”.



does not discuss or even highlight the scholarship's views or conclusion, its main approach is merely to attach a plain footnote with scholarship references at the end of its own conclusions. (An exception from this is its discussion of the precautionary principle in *EC – Hormones*.<sup>113</sup>)

### 3. Well-known Authors with Government Links

A further indication of the Appellate Body's careful attitude to scholarship is shown by the kinds of scholarship it refers to.

Many of the works that the Appellate Body refers to are old, well-known, and relatively uncontroversial general international law textbooks. Its most cited non-ILC work is Ian Sinclair's *Vienna Convention on the Law of Treaties*<sup>114</sup>, which has been cited 14 times.<sup>115</sup> Then comes the following:

- The 1992 edition of Oppenheim's International Law<sup>116</sup> with ten citations.<sup>117</sup>
- Mustafa Kamil Yasseen's *L'interprétation des traités d'après la Convention de Vienne sur le Droit des Traités*<sup>118</sup> with nine citations.
- Ian Brownlie's *Principles of Public International Law*<sup>119</sup> with five citations.<sup>120</sup>
- Eduardo Jiménez de Aréchaga's *International Law in the Past Third of a Century*<sup>121</sup> with four citations.
- Dominique Carreau's *Droit International*<sup>122</sup> with four citations.

<sup>113</sup> *EC – Hormones*, *supra* note 58, 45, para. 123, Fn. 92.

<sup>114</sup> Sinclair, *supra* note 12.

<sup>115</sup> *Japan – Alcoholic Beverages II*, *supra* note 59, 10, Fn. 20, 11-12, Fn. 24-26; *EC – Computer Equipment*, *supra* note 68, Fn. 65; *US – Shrimp*, *supra* note 57, 42, Fn. 83, 48, Fn. 109; *Japan – Agricultural Products II*, *supra* note 75, 26, Fn. 44; *EC – Chicken Cuts*, *supra* note 56, 7, Fn. 36, 27, Fn. 147, 29, Fn. 157, 36, Fn. 192, 100, Fn. 448, 113, Fn. 542, 114, Fn. 557-558, 119, Fn. 572.

<sup>116</sup> Jennings & Watts, *supra* note 35.

<sup>117</sup> This work ranks sixth for citations by the ICJ according to Peil, *supra* note 8, 158.

<sup>118</sup> M. K. Yasseen, 'L'interprétation des traités d'après la convention de Vienne sur le droit des traités', 151 *Recueil des Cours de l'Académie de Droit International* (1976) 3, 3.

<sup>119</sup> I. Brownlie, *Principles of Public International Law*, 4th ed. (1990), 5th ed. (1998) and 6th ed. (2003).

<sup>120</sup> These works rank ninth for citations by the ICJ according to Peil, *supra* note 8, 159.

<sup>121</sup> E. J. de Aréchaga's 'International Law in the Past Third of a Century', 159 *Recueil de Cours* (1978) 1, 1.

<sup>122</sup> D. Carreau, *Droit International*, 3rd ed. (1991), 4th ed. (1994).

- Anthony Aust's *Modern Treaty Law and Practice*<sup>123</sup> with three citations.
- Two works by John H. Jackson,<sup>124</sup> with three citations between them.
- Mojtaba Kazazi's *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals*<sup>125</sup> with three citations.

In addition, nine authors have been cited twice, and 31 authors have been cited once.

Moreover, many of the authors that have been cited the most by the Appellate Body have connections with governments. There are ten authors who have been cited more than twice. Three of them (Watts, Sinclair, and Aust) have had long careers at the United Kingdom's Foreign and Commonwealth Office. Four (Brownlie, Aréchaga, Sinclair, and Yasseen) have been members of the International Law Commission. Some, especially Brownlie, Watts, Jennings, and Kazazi have been counsel for various governments in cases before the International Court of Justice (ICJ) and elsewhere.

A large and increasing number of references to ILC texts is also noticeable in the Appellate Body's use of scholarship.<sup>126</sup> As shown in table 6, 47 (30%) of the Appellate Body's references to scholarship are to ILC text, and 41 of these have come in the nine years since 2005 (as opposed to six in the nine years before 2005). As noted in chapter A.III.2, the ILC is part of the UN and consists of experts nominated by States. While ILC texts should be considered scholarship, their drafting is more influenced by States than is the writing of the average academic text. Thus ILC texts can also be said to have connections with governments.

<sup>123</sup> A. Aust, *Modern Treaty Law and Practice* (2000).

<sup>124</sup> J. H. Jackson, *World Trade and the Law of GATT* (1969); J.H. Jackson & S.P Croley, 'WTO Dispute Panel Deference to National Government Decisions, The Mislplaced Analogy to the U.S. Chevron Standard-of-Review Doctrine', in E.-U.Petersmann (ed.), *International Trade Law and the GATT/WTO Dispute Settlement System* (1997), 185.

<sup>125</sup> M. Kazazi, *Burden of Proof and Related Issues* (1996).

<sup>126</sup> Pellet, *supra* note 12, 870 and Peil, *supra* note 8, 152 note a similar trend in the ICJ; Fauchald, *supra* note 8, 352 finds the opposite in *ICSID* tribunal decisions between 1998 and 2006.

#### 4. Conventional Uses

It is possible to classify the Appellate Body's references to scholarship according to how the scholarship was used.<sup>127</sup> As is shown in table 8, in most instances Appellate Body has used scholarship to justify either its assumption that a given rule of customary international law exists or its choice of a given interpretation of a treaty. In total, 113 references (71%) have been for the establishment of customary international law, while 18 (11%) have been for the interpretation of treaties. A further nine references to scholarship (6%) have been justifications for assuming that a given *general principle* is part of international law (as per the *ICJ Statute* Article 38(1)(c)).

This use of scholarship to directly ascertain the content of current law is a core function of scholarship in international law, as noted in chapter A.III.1. However, that chapter also noted that there are other ways of using scholarship. Using scholarship to synthesise judicial decisions has been the subject of 12 references (8%).<sup>128</sup> Other ways of using scholarship count for a further seven references (4%). Two of these were used to establish customary international law that was then used to interpret a treaty.<sup>129</sup> Two were to general background scholarship about the topic in question.<sup>130</sup> One reference concerned historical law,<sup>131</sup> one the purpose of a treaty,<sup>132</sup> and one *lex ferenda*.<sup>133</sup>

Thus most of the Appellate Body's references to scholarship have been of a conventional sort, to show the existence of a customary rule or to interpret a treaty.

Moreover, most (26 out of 28) of the references that do not fit in these conventional categories came in its early years, before 2002. This is in line with the conclusion in chapter C.I above that the significance of scholarship in WTO dispute settlement has decreased over time.

<sup>127</sup> Peil, *supra* note 8, 153-157 has a similar classification.

<sup>128</sup> *US – Wool Shirts and Blouses*, *supra* note 28, 14, Fn. 15, Fn. 16; *Canada – Aircraft*, *supra* note 31, Fn. 55, Fn. 58-59, Fn. 128.

<sup>129</sup> *US – Cotton Yarn*, *supra* note 98, Fn. 90; *US – Line Pipe*, *supra* note 19, Fn. 259.

<sup>130</sup> *India – Patents (US)*, *supra* note 24, 8, Fn. 26.

<sup>131</sup> *US – Section 211 Appropriations Act*, *supra* note 23, Fn. 122.

<sup>132</sup> *India – Patents (US)*, *supra* note 24, 9, Fn. 28.

<sup>133</sup> *US – Stainless Steel (Mexico)*, *supra* note 25, 67, Fn. 313.

## 5. Scholarship as an Aid in Deferring to Politics

While courts and tribunals are bound to follow and apply law,<sup>134</sup> they may on occasion attempt to break free from their institutional constraints by taking a flexible or progressive approach to the legal questions before them. Tribunals may use scholarship to support its reasoning in such cases. The Appellate Body has not used scholarship for such purposes; it seems rather to have done the opposite.

In *EC – Hormones*, the Appellate Body referred to scholarship to support the view that it should adopt a standard of review for the *SPS Agreement* that “reflect[s] the balance established [...] between the jurisdictional competences conceded by the Members to the WTO and the jurisdictional competences retained by the Members”, as “neither a panel nor the Appellate Body is authorized” to do otherwise.<sup>135</sup> It thus used scholarship as a basis for *deferring* to its political and institutional constraints rather than as a basis for *subverting* them.

The same case also featured the question of whether the precautionary principle was customary international law and whether the principle could override the *SPS Agreement*.<sup>136</sup> The Appellate Body used scholarship to show that the debate over the principle’s status was unresolved.<sup>137</sup> The Appellate body found that it would be “unnecessary, and probably imprudent” for it to take a stance on this “important, but abstract” question.<sup>138</sup> The Appellate Body thus used scholarship to show that it had good reason to avoid a politically charged legal question, which is another example of the Appellate Body using scholarship as a basis for not challenging the politics of the WTO.

<sup>134</sup> R. Jennings, ‘Reflections on the Subsidiary Means for the Determination of Rules of Law’, in Jennings (ed.), *Studi di diritto internazionale in onore di Gaetano Arangio-Ruiz* (2004), 319, 329-330 [Jennings, Reflections].

<sup>135</sup> *EC – Hormones*, *supra* note 58, 42, para. 115, Fn. 80.

<sup>136</sup> *EC – Hormones*, *supra* note 58, 44- 47, paras 120-125.

<sup>137</sup> *EC – Hormones*, *supra* note 58, 45, Fn. 92.

<sup>138</sup> *EC – Hormones*, *supra* note 58, 45, para. 123.

## D. Explaining the Results

### I. Introduction

This chapter will suggest some underlying explanations for the results presented in chapter E.

The ICJ generally does not refer to scholarship in its majority opinions.<sup>139</sup> Various possible explanations for this have been presented by commentators, including that variations between works and between authors, abstractness, author rivalries, geographical limitations, the difficulty of choosing works, collegiate drafting of decisions, and political contexts.<sup>140</sup> Suggested reasons for *ICSID* tribunals' more frequent use of scholarship are that there are few writers, that writers participate as arbitrators and counsel, and that many arbitrators are legal academics.<sup>141</sup>

All of these possible explanations also apply to the Appellate Body, albeit to varying degrees. However, their applicability to the Appellate Body has been relatively constant, in that the realities they describe have not changed much over time. Thus, while they could be useful in a comparison of the practice of the Appellate Body with that of another tribunal, they are not suited to explaining developments over time in the Appellate Body's practice. Other explanations are therefore needed.

### II. Less Uncertain Law

In a legal system that has some form of precedent, judicial decisions will (at least to some extent) decide legal questions that were unresolved before the decision. As the catalogue of decided cases expands, the number of unresolved legal questions may generally be presumed to decline.<sup>142</sup> There is always the

<sup>139</sup> Peil, *supra* note 8, 151.

<sup>140</sup> See variously Pellet, *supra* note 12, 869; J. Crawford, *Brownlie's Principles of Public International Law*, 8th ed. (2012), 42-43; M. Mendelson, 'The ICJ and the Sources of International Law', in V. Lowe and M. Fitzmaurice (eds), *Fifty Years of the International Court of Justice* (1996), 63, 83; Wood, *supra* note 3, 10; Rosenne, *Practice*, *supra* note 50, 119-120; Schwarzenberger, *The Inductive Approach*, *supra* note 49, 559-560; Parry, *supra* note 12, 108; Peil, *supra* note 8, 146; Charlesworth, *supra* note 35, 197.

<sup>141</sup> Fauchald, *supra* note 8, 352-353.

<sup>142</sup> Pellet, *supra* note 12, 869; Jennings & Watts, *supra* note 35, 42; Parry, *supra* note 12, 104; Jennings, *What is International Law*, *supra* note 35, 46; L. Oppenheim, 'The Science of International Law: Its Task and Method', 2 *American Journal International Law* (1908) 2, 313, 315; Schwarzenberger, *The Inductive Approach*, *supra* note 49, 560; The Privy

possibility that a given case raises more questions than it resolves, and the production of new law may outpace the output of judicial decisions. Absent this, however, the general trend should be a decline in the number of unresolved legal questions.

When precedent has decided a legal question, it is no longer necessary to try to solve it using scholarship. Thus in a case legal system with precedent, an expanding number of precedents may reduce the need to refer to scholarship.

The WTO's system of *de facto* precedent (see chapter B.IV) may therefore be one explanation why a decline in the role of scholarship is observable in the Appellate Body's practice.

### III. Specialization

The central purpose of the WTO system is to facilitate international trade,<sup>143</sup> and WTO law is usually categorised as (*international*) *trade law*. The Appellate Body is part of this system. There are at least two reasons why a *specialist* tribunal such as the Appellate Body may be less comfortable with deciding questions of general international law than would a more *generalist* tribunal: expertise and legitimacy.

Regarding expertise, the Appellate Body's members must be competent in trade law, and are usually less well versed in general international law than, for example, the more generalist international lawyers who are typically appointed

Council, *The Kronprinsessan Margareta* [1921] I. A. C. 486, 495 and H. Lauterpacht, *The Development of International Law by the International Court* (1958), 25 note the same consequence in international law from increasingly available records of State practice; Jennings, *Reflections*, *supra* note 134, 325, Thirlway; *supra* note 52, 127 and Van Hoof, *supra* note 49, 177 note that the contents of scholarship may also become part of subsequent law; Peil, *supra* note 8, 144-145 notes that this explanation is unsatisfactory with regard to the ICJ, since the *ICJ Statute* (*supra* note 11) Article 38(1)(d) does not privilege judicial decisions over scholarship, and because the absence of scholarship in ICJ decisions has not been a gradual development; Fauchald, *supra* note 8, 352 writing about *ICSID* tribunals between 1998 and 2006 suggests but apparently rejects the (opposite) possibility that more settled law leads to more references to scholarship.

<sup>143</sup> See e.g. *Agreement Establishing the World Trade Organization*, 15 April 1994, preamble para. 1, 1867 UNTS 154: "expanding the production of and trade in goods and services".

to the ICJ.<sup>144</sup> The former may thus feel a greater need to back up their conclusions with references to scholarship.<sup>145</sup>

Legitimacy in this context refers to how a tribunal is perceived by observers.<sup>146</sup> The Appellate Body's main task may be seen as deciding trade law cases, and not meddling in the development of general international law.<sup>147</sup> Showing that its application of general international law is based on sound principles, by backing them up with uncontroversial references to scholarship, may thus ward off potential criticism.

The Appellate Body's specialised nature may therefore explain why the Appellate Body mostly uses scholarship to decide general international law questions (see chapter C.II). It may also have affected its choice of an uncontroversial approach to scholarship (see chapter C.III) when dealing with such questions.

#### IV. Criticism

International and national judges as well as Appellate Body Members may be seen as actors in a political system. They may be assumed to react to incentives within the system they operate in.<sup>148</sup>

<sup>144</sup> Marceau, *Human Rights*, *supra* note 47, 765-766; J. Pauwelyn, 'How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law – Questions of Jurisdiction and Merits', 37 *Journal of World Trade* (2003) 6, 997, 1030 notes, however, that general international law experts have been appointed to the Appellate Body; P. Van den Bossche, 'From Afterthought to Centrepiece: The WTO Appellate Body and Its Rise to Prominence in the World Trading System', in G. Sacerdoti, A. Yanovich & J. Bohanes (eds), *The WTO at Ten: The Contribution of the Dispute Settlement System* (2006), 289, 301 notes that only one of the original Appellate Body members were "renowned international trade law experts".

<sup>145</sup> Crawford, *supra* note 140, 43 and makes the same point for domestic courts.

<sup>146</sup> A. Buchanan, 'The Legitimacy of International Law', in Besson & Tasioulas, *supra* note 38, 79 sees this as the "sociological" aspect of legitimacy, as opposed to the "normative", which concerns philosophical justification (rather than perceived justification).

<sup>147</sup> A. Paulus, 'International Adjudication', in Besson & Tasioulas, *supra* note 38, 207, 214-215; D. Leeborn, 'Linkages', 96 *American Journal of International Law* (2002) 5, 25-26.

<sup>148</sup> For works that assume, discuss and/or purport to show this see R. Posner, 'What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)', 3 *Supreme Court Economic Review* (1994) 1, 1; L. Epstein, W. M. Landers & R. Posner, *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice* (2005); E. Posner & F. P. de Figueiredo, 'Is the International Court of Justice Biased?', 34 *Journal of Legal Studies* (2005) 2, 599; C. Sunstein et. al., *Are Judges Political?: An Empirical Analysis of the Federal Judiciary* (2006); E. Voeten, 'The Impartiality of International Judges: Evidence from the European Court of Human Rights', 102 *American Political Science Review* (2008) 4, 417.

The role of the Appellate Body in the WTO has become increasingly controversial.<sup>149</sup> It has been accused of and criticised for *judicial activism* (i.e. deciding cases on the basis of policy rather than law) from various quarters,<sup>150</sup> even though many writers have found such accusations to be ungrounded.<sup>151</sup> Such criticism may have provided an incentive for it to moderate its decision-making, including using scholarship in an uncontroversial manner. It may also have inspired member States to elect Appellate Body members that are seen as likely to take such a moderate approach.

One particular area of criticism is the Appellate Body's approach to *amicus curiae* briefs. Many if not most WTO member States are of the view that panels and the Appellate Body should not be permitted to accept such briefs,<sup>152</sup> while WTO tribunals consider themselves free to do so. This disagreement caused a "major diplomatic row".<sup>153</sup> The Appellate Body and panels have accepted only a few *amicus curiae* briefs, and have never acknowledged any to have been useful.<sup>154</sup> The Appellate Body has nonetheless said that it will accept *amicus curiae* if they

<sup>149</sup> C.-D. Ehlermann, 'Tensions Between the Dispute Settlement Process and the Diplomatic and Treaty-Making Activities of the WTO', 1 *World Trade Review* (2002) 3, 301, 301-304.

<sup>150</sup> J. Greenwald, 'WTO Dispute Settlement: An exercise in Trade Law Legislation?', 6 *Journal of International Economic Law* (2003) 1, 113 and C. E. Barfield, 'Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization', 2 *Chicago Journal of International Law* (2001) 2, 403 criticise it; J. Ragosta, N. Joneja & M. Zeldovich, 'WTO Dispute Settlement: The System Is Flawed and Must Be Fixed', 37 *The International Lawyer* (2003) 3, 697, 749-750 and Steinberg, *supra* note 9, 247-248 note criticism.

<sup>151</sup> L. Bartels, 'The Separation of Powers in the WTO: How to Avoid Judicial Activism', 53 *International and Comparative Law Quarterly* (2004) 4, 861, 861-862; W. J. Davey, 'Has the WTO Dispute Settlement System Exceeded Its Authority? A Consideration of Deference Shown by the System to Member Government Decisions and Its Use of Issue-Avoidance Techniques', 4 *Journal of International Economic Law* (2001) 1, 79, 79-96; R. Howse, 'The Most Dangerous Branch? WTO Appellate Body Jurisprudence on the Nature and Limits of the Judicial Power', in T. Cottier & P. C. Mavroidis (eds), *The Role of the Judge in International Trade Regulation: Experience and Lessons for the WTO* (2003), 12, 35.

<sup>152</sup> WTO, 'Participation in dispute settlement proceedings' (2015), available at [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_settlement\\_cbt\\_e/c9s3p1\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c9s3p1_e.htm) (last visited 19 September 2016) [WTO, Participation]; WTO General Council, *Minutes of Meeting on 22 November 2000*, WT/GC/M/60, 23 January 2001; Dispute Settlement Body, *Minutes of Meeting on 6 November 1998*, WT/DSB/M/50, 14 December 1998.

<sup>153</sup> Ehlerman, *supra* note 149, 303.

<sup>154</sup> WTO, 'Participation', *supra* 152; J. Durling & D. Hardin, 'Amicus Curiae Participation in WTO Dispute Settlement: Reflections on the Past Decade', in R. Yerxa and B. Wilson (eds), *Key Issues in WTO Dispute Settlement: The First Ten Years* (2005) 221, 224-225.



are included in a party's submission, if the party takes responsibility for the brief's content.<sup>155</sup> One interpretation of this is that the Appellate Body allows the views of outsiders only if filtered through member States. A parallel with regards to scholarship may be the Appellate Body's references to the ILC and authors with government links (see chapter C.III.3). The point is not that the writers in question are not objective, only that referring to them may be seen as more acceptable by member States. The timing of the *amicus curiae* controversy is also notable. It occurred in 1999-2000,<sup>156</sup> and has been said to mark a "watershed in the history of the WTO".<sup>157</sup> This is also when several aspects of the Appellate Body's use of scholarship changed. As shown in chapter C.I, the use of scholarship has generally declined since 2000. Indirect references became more frequent (chapter C.I.4) around the same time. Most references to ILC texts have come after 2000 (chapter C.III.3). As shown in the chapter C.I.3, the Appellate Body members appointed immediately after the debacle (i.e. between 2001 and 2003) have fewer references to scholarship in their reports than both those appointed earlier and those appointed later. Unconventional references to scholarship virtually disappeared after 2001 (chapter C.III.4).

## V. Member Background

It is also possible to examine variances between members based on their background. Table 9 presents data across three variables:

- The wealth of the member's home country (with OECD membership as a proxy).
- The member's professional background (distinguishing between former academics and former diplomats).
- The legal system of the country where the member studied law (common law, civil law, or a combination of both).

There are no significant differences between members based on home country wealth or legal education. Some discrepancy is evident between members who were diplomats before joining the Appellate Body and those who were academics. One might imagine that academics would be more open to citing their former colleagues than would diplomats, who could be assumed

<sup>155</sup> *US – Shrimp*, *supra* note 57, 31, paras 89, 91; Durling & Hardin, *supra* note 154, 226.

<sup>156</sup> WTO, 'Participation', *supra* note 152; Durling & Hardin, *supra* note 154, 223-224, 226.

<sup>157</sup> Bartels, *supra* note 151, 861.

to show more loyalty to the interests their home country and its partners than to the writings of independent academics. The numbers tell the opposite story, however: Former diplomats have referred to scholarship in 32% of reports, academics in only 20%. The diplomats have an average of 1.6 references per report, against the academics' 1.

## E. Conclusion

This study has shown that under its definition of scholarship, the Appellate Body has used scholarship gradually less, mostly to answer questions of general international law, and with an uncontroversial approach. Possible explanations for these trends include an increasing body of precedent in the WTO, the Appellate Body's Specialization, external criticism, and, to a lesser extent, Appellate Body members' backgrounds.

The study has inherent methodological limitations, in at least two respects.

The first is *internal*: The study does not reveal what Appellate Body members actually think about scholarship. It does not show what scholarship Appellate Body members have read and been influenced by, nor what scholarship counsel have (and have not) cited in Appellate Body proceedings.

The other respect is *external*, in the sense that the study does not say anything conclusive about the status of scholarship in international law generally, or about how the Appellate Body relates to this.

In both respects, however, the study still has some significance.

First, it shows how the Appellate Body has actually used scholarship, through three broad trends. Thus anyone making a legal argument directed at the Appellate Body should not expect too much to be gained from citing scholarship. They will probably be comparatively better off with citing scholarship concerning general international law, and *safe* scholarship such as ILC reports and classic textbooks.

In the *external* respect, the Appellate Body's reports can be counted as *judicial decisions*, which are *subsidiary means* for the ascertainment of international law. Thus a study of the status of scholarship in international law generally may incorporate the Appellate Body's use of scholarship.

Table 1: Reports per year

Year	With scholarship	Total	With scholarship, %
1996	2	4	50
1997	4	5	80
1998	3	8	38
1999	4	9	44
2000	1	12	8
2001	3	9	33
2002	0	7	0
2003	0	6	0
2004	2	5	40
2005	3	10	30
2006	0	5	0
2007	1	4	25
2008	2	9	22
2009	2	3	67
2010	1	3	33
2011	0	6	0
2012	1	4	25
2013	0	1	0
Total	29	110	26

Table 2: References per year

Year	References	Average per report
1996	16	4.0
1997	29	5.8
1998	18	2.3
1999	17	1.9
2000	2	0.2
2001	3	0.3
2002	0	0.0
2003	0	0.0
2004	3	0.6
2005	29	2.9
2006	0	0.0
2007	1	0.3
2008	4	0.4
2009	5	1.7
2010	31	10.3
2011	0	0.0
2012	1	0.3
2013	0	0.0
Total	159	1.4

Table 3: Direct and indirect

Year	Direct	Indirect	Indirect, %
1996	16	0	0
1997	28	1	3
1998	18	0	0
1999	11	6	35
2000	2	0	0
2001	3	0	0
2004	1	2	67
2005	10	19	66
2007	0	1	100
2008	4	0	0
2009	0	5	100
2010	7	24	77
2012	1	0	0
Total	101	58	36

Table 4: Text and footnotes

Year	Text	Footnotes	Text, %
1996	0	16	0
1997	0	29	0
1998	0	18	0
1999	2	15	12
2000	0	2	0
2001	1	2	33
2004	0	3	0
2005	1	28	3
2007	0	1	0
2008	0	4	0
2009	3	2	60
2010	30	1	97
2012	0	1	0
Total	37	122	77

Table 5: References per member

Member	Tenure	Reports	Reports with references	References	Reports with references, %	Avg. references per report
Beeby	1995-2000	10	7	29	70	2.9
El-Naggar	1995-2000	12	5	23	42	1.9
Matsushita	1995-2000	13	5	36	38	2.8
Ehlermann	1995-2001	21	5	27	24	1.3
Feliciano	1995-2001	21	6	49	29	2.3
Lacarte-Muró	1995-2001	22	7	34	32	1.5
Bacchus	1995-2003	27	12	52	44	1.9
Taniguchi	2000-2007	22	3	3	14	0.1
Ganesan	2000-2008	24	4	33	17	1.4
Abi-Saab	2000-2008	27	7	8	26	0.3
Lockhart	2001-2006	11	2	2	18	0.2
Baptista	2001-2009	20	4	31	20	1.6
Sacerdoti	2001-2009	23	5	36	22	1.6
Janow	2003-2007	10	1	1	10	0.1
Unterhalter	2006-2013	13	1	1	8	0.1
Bautista	2007-2011	9	4	39	44	4.3
Hillman	2007-2011	10	1	2	10	0.2
Oshima	2008-2012	8	3	4	38	0.5
Zhang	2008-2016	7	1	3	14	0.4
Bossche	2009-2017	8	2	32	25	4.0
Ramírez-Hernández	2009-2017	8	2	32	25	4.0
Bhatia	2011-2015	3	0	0	0	0.0
Graham	2011-2015	1	0	0	0	0.0
Chang	2012-2016	0	0	0	n/a	n/a
	All 1995	126	47	250	37	2.0
	All 2000-2003	137	26	114	19	0.8
	All 2006-2011	67	14	113	21	1.7

Table 6: ILC works

Year	ILC works	% of total
1996	3	19
1997	1	3
1998	0	0
1999	0	0
2000	0	0
2001	2	67
2004	0	0
2005	4	14
2007	0	0
2008	1	25
2009	5	100
2010	30	97
2012	1	100
Total	47	30



Table 7: Questions answered

Topic		Total	Total, %		
Gen. int'l law	Treaty law	73	138	46	87
	Responsibility	40		25	
	Evidence	12		8	
	Other	13		8	
WTO law	GATT	11	21	7	13
	Other	10		6	

Table 8: Ways used

Year	Customary law	Interpret treaty	General principles	Judicial decisions	Other
1996	16				
1997	9	2	6	9	3
1998	14	2	2		
1999	6	8		3	
2000	1	1			
2001					3
2004		3			
2005	29				
2007			1		
2008	1	2			1
2009	5				
2010	31				
2012	1				
Total	113	18	9	12	7
Total %	71	11	6	8	4

Table 9: Members' backgrounds

	Country	Background	Education	Avg. per report	Reports with scholarship, %
Bhatia	India	Diplomat	India/UK	0	0
Bossche	Belgium	Academic	EU/US	4	25
Chang	Korea	Academic	Korea/US	n/a	n/a
Graham	US	Lawyer	US	0	0
Ramirez-Hernandez	Mexico	Lawyer	Mexico/US	4	25
Unterhalter	South Africa	Academic	South Africa/UK	0.1	8
Zhang	China	Academic	China/US	0.4	14
Abi-Saab	Egypt	Academic	Egypt/US/UK/EU	0.3	26
Bacchus	US	Diplomat	US	1.9	44
Baptista	Brazil	Int'l bureaucrat	Brazil/US/EU	1.6	20
Bautista	Philippines	Diplomat	Philippines/US	4.3	44
Beeby	New Zealand	Diplomat	New Zealand/UK	2.9	70
Ehlermann	Germany	Diplomat	EU	1.3	24
El-Naggar	Egypt	Int'l bureaucrat	Egypt/UK	1.9	42
Feliciano	Philippines	Judge	Philippines/US	2.3	29
Ganesan	India	Diplomat	India	1.4	17
Hillman	US	Diplomat	US	0.2	10
Janow	US	Academic	US	0.1	10
Lockhart	Australia	Int'l bureaucrat	Australia	0.2	18
Matsushita	Japan	Academic	Japan/US	2.8	38
Lacarte-Muró	Uruguay	Diplomat	?	1.5	32
Oshima	Japan	Diplomat	Japan	0.5	38
Sacerdoti	Italy	Academic	Italy/US	1.6	22
Taniguchi	Japan	Academic	Japan/US	0.1	14
	OECD			1.5	28
	Non-OECD			1.4	25
		Diplomats		1.6	32
		Academics		1.0	20
			Common law	1.4	28
			Civil law	1.1	28
			Mixed	1.5	24

