

# Valerie Hughes—The Light behind the Bushel of the Appellate Body of the WTO

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## A. Introduction

WALKING DOWN THE MEMORY LANE after nearly two decades, I wish to recall the immense, but inadequately recognized, contribution of Valerie Hughes in laying the foundation of the dispute settlement system in the formative years of the Appellate Body of the World Trade Organization. My association with Valerie Hughes almost coincided with my own appointment as a Member of the Appellate Body in June 2000 and her appointment as the Director of the Secretariat of the Appellate Body a few months later, and it lasted for over half of my eight-year tenure with the Appellate Body.

The Uruguay Round agreements, establishing the World Trade Organization (WTO) as an institution, marked a watershed in international economic and trade relationships due to the range of the areas and issues covered by the agreements, for example, agriculture, textiles, intellectual property rights, services, investment, trade remedy rules, and the dispute settlement mechanism. Given that coverage and given the lackadaisical dispute settlement record of the *General Agreement on Tariffs and Trade* (GATT), the developed countries, with the United States in the lead, were naturally keen to establish an effective and credible dispute resolution mechanism for the enforcement

of the obligations incorporated in the new agreements. Although apprehensive and hesitant, the developing countries (and perhaps developed countries like Japan and South Korea also to some extent) were willing to subscribe to such a legal and binding dispute resolution mechanism if it would be the sole basis for determining an alleged violation of the agreements by any Member country. Their hope and expectation were that it might put an end to the unilateral action being taken by the United States under its domestic law, such as Section 301, and that the new mechanism alone would rule upon any violation of the obligations under the *Marrakesh Agreement Establishing the World Trade Organization* (WTO Agreement). A highly legalistic and elaborate system of rules was thus put in place, including an Appellate Body, for a binding and timely resolution of disputes. The new mechanism was a complete departure from the casual diplomacy and conciliation-oriented approach of the GATT 1947 for dispute resolution.

The Appellate Body was indeed a novel and suspect creature when it came into being in 1996 and had to prove itself as an unbiased, competent, and reliable organ for resolution of trade disputes in accordance with the provisions of the Dispute Settlement Understanding (DSU), especially Article 3.2. The DSU had provided the architecture, but the Appellate Body had to establish the structure brick by brick and earn the confidence of not only the WTO Members but also the wider trade, legal, and academic community.

## B. Major Contributions of Valerie Hughes to the Evolution of WTO Law

VALERIE HUGHES ASSUMED THE LEADERSHIP of Appellate Body Secretariat at this critical juncture. Before Valerie Hughes came on the scene, the Appellate Body had held in *US—Gasoline* and *Japan—Alcoholic Beverages II* that the WTO treaty should not be read in “clinical isolation from public international law,” that the fundamental rules of treaty interpretation are codified most authoritatively and succinctly in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* (VCLT), and that these two articles of the VCLT have attained the status of “customary rules of interpretation of public international law” as envisaged by Article 3.2 of the DSU. Valerie Hughes carried forward this approach and assisted the Appellate Body in a cogent, consistent, and logical usage of these two articles of the VCLT, especially Article 31. She

was, however, wary and skeptical about the usage of Article 32 in the circumstances of the hazy negotiating history of the WTO Agreements.

Valerie Hughes clearly advocated a “textual approach” for the interpretation of the provisions of the covered agreements, mainly for the following reasons. The words of the treaty say, in their ordinary meaning, what the negotiators of the treaty agreed to. Going beyond the words ran the risk of adding to or diminishing the rights and obligations envisaged under the agreements, which is forbidden explicitly by Article 3.2 of the DSU. Valerie Hughes regularly attended the meetings of the Dispute Settlement Body when it discussed the Appellate Body reports and gave feedback to the Appellate Body Members on the concerns expressed by the WTO Members. The most common criticism from the losing party (and its supporting third parties) was that the Appellate Body had overreached and had added obligations not accepted or intended by the negotiators. The winning party (or its supporting third parties) seldom rebutted this allegation, as it may say the same thing when it loses a case.

Valerie had the knowledge and the foresight to see that the WTO Agreements were consciously woven into a “single undertaking,” implying that all the agreements were integrated in a single coherent package. WTO Members, big or small, had given concessions under one or more agreements in order that they gain advantages in one or more other agreements. A textual approach would more likely ensure that this carefully crafted balance of give and take across the board is not unwittingly unravelled.

As a part of the approach to avoiding the criticism that the Appellate Body has written into the agreements new obligations not envisaged by the negotiators, Valerie Hughes was keen that the Appellate Body should say only what needed to be said minimally to resolve the dispute at hand and nothing more extravagantly. She was of the view that expansive statements of law or principles, or *obiter dicta*, not necessary or relevant to rule on the dispute, should be eschewed as they may set off unforeseen consequences in a subsequent dispute. She felt that the Appellate Body should avoid as far as possible the need to explain their earlier statements and distinguish them in a subsequent case. Ruling only on what needed to be ruled upon, and nothing more, would be a safeguard against this possibility. In this cautionary approach, she had a strident supporter in Julio Lacarte, the doyen of GATT and WTO law.

Valerie was certainly not in favour of the philosophy of “judges creating or advancing the law” in the circumstances of the WTO treaty and the mandate given to the Appellate Body. She cautioned against the inclination

of some Members of the Appellate Body to push the boundaries of the provisions of the agreements, albeit ever so slightly, to support the current thinking on economic, environmental, or other issues. She felt that any such attempt would further aggravate the criticism that the Appellate Body was overstepping its mandate and was expanding the obligations undertaken by the Member countries.

## **C. Other Contributions of Valerie Hughes to the Efficient Functioning of the Appellate Body and its Secretariat**

### **1) Issues Paper Preparation**

The Secretariat of the Appellate Body prepares an Issues Paper in every case to assist the Members of the Appellate Body in their discussions. Basically, it sets out the facts of the case, the gist of the submissions of the parties and third parties, the relevant previous reports of the Appellate Body, and the substantive issues that arise for consideration. The Issues Paper does not, however, offer any opinion or advice on those issues. Valerie Hughes paid great attention to the preparation of the Issues Paper as it was important for a proper discussion in the Exchange of Views among Appellate Body Members. She took great pains in the preparation of the Paper and guided the Secretariat staff in understanding and highlighting all the issues raised in the dispute by the parties and third parties.

### **2) Exchange of Views**

The Exchange of Views is a very important mechanism devised by the Appellate Body Members for a meaningful discussion of each and every case that comes before the Appellate Body. It takes place after the division hearing a case has completed its oral hearing. All the seven Members of the Appellate Body take part in the Exchange of Views. It ensures that the views of all the Members of the Appellate Body are brought to bear upon each and every case. Not only all the written submissions of the parties, but also the Issues Paper and the transcript of the oral hearing are made available to each Member of the Appellate Body.

Valerie Hughes invariably made a valuable contribution in the discussion of both the legal and factual issues arising in a case. She was particularly

at her forte in the examination of the legal issues, including the proper application of Articles 31 and 32 of the VCLT and in ensuring that all the legal issues raised by the parties are addressed without fail and that, moreover, a consistency was maintained with previous rulings of the Appellate Body. Given her legal acumen and her objectivity in addressing the issues involved, her views invariably carried great respect with the Appellate Body Members.

### 3) Scrutiny and Issue of the Final Report of the Appellate Body

Valerie Hughes played a crucial role in a thorough scrutiny of the final report of the Appellate Body and in ensuring that the report was issued as per the law within the prescribed time limit. Although it was the responsibility of the Division hearing a case to formulate and issue a report, Valerie Hughes used to pay meticulous attention to its proper drafting, especially from the legal angle and to ensure that it addressed all the issues involved and was internally cogent and consistent.

### 4) Management of the Appellate Body Secretariat

Valerie Hughes assumed charge of the Appellate Body Secretariat at a critical time and had to contend with several issues, not only in guiding the Secretariat staff in understanding the legal issues, but also in raising their morale and in their working as a cooperative team. She honed their drafting skills and infused confidence in their abilities, with the result that she could leave a well-knit unit at the time of her departure. Her legacy was carried forward by her successor Werner Zdouc, who worked with her closely in those years. The assistance provided by the Appellate Body Secretariat is vital to the functioning of the Appellate Body and the credit for building up an efficient and reliable Secretariat in the formative years of the Appellate Body must go in a large measure to Valerie Hughes.

### 5) Some Personal Reflections

The Members of the Appellate Body, including me, had a high regard for the legal knowledge, competence, and objectivity of Valerie Hughes. Her views

and opinions were therefore listened to seriously even when the Appellate Body chose, on rare occasions, to differ from them. On a personal plane, I had a warm and friendly relationship with her that is subsisting until today, benefitted as I was by both her legal skills and large-hearted nature. She knew that I was not an international legal expert, as others in the Appellate Body were, and that my strength lay in my knowledge and understanding of the way the WTO Agreements worked at the national levels. She therefore thought that I could be a good sounding board for establishing the facts of the dispute to which the WTO law was to be applied. This was perhaps because in most cases, the interpretation and application of the WTO law did not pose much of a problem, as there were enough precedents and previous rulings for guidance, but the facts to which the law was to be applied were unique to each case and were often in dispute.

In a lighter vein, I wish to add that she used to check with me whether the footnotes in the submissions of the parties and the draft Appellate Body report were correct and in order. Footnotes were galore in those days in WTO reports and the Members of the WTO used to joke that the Appellate Body had made the Concise Oxford Dictionary and footnotes as a part of the covered agreements and that more was stated or concealed in the footnotes rather than in the main body of the Appellate Body reports. I had a penchant for looking at the footnotes not only for their accuracy but also for their stating something that ought to have been stated, or not stated, in the main body of the report. For Valerie Hughes, I was the footnote Member of the Appellate Body for more reasons than one!

In an even lighter vein, I recall the BMW Roadster car in which Valerie used to come to her WTO office. Valerie is of a tiny build and she and her car were nicely made for each other. I used to joke with her that she could carry the car in her bag into her office without much of a problem instead of trying to park and locate it in the WTO premises.

I last met Valerie in Geneva in 2015 when I was in the WTO as the Chairman of a dispute settlement panel (if I may reveal, on the persuasion of Valerie) and also to attend a WTO seminar on the negotiating history of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS Agreement). It is not easy for me to forget the days we spent together at the Appellate Body and her enormous contribution to the building up of the WTO dispute settlement system as it was envisaged by the DSU.

## 6) Present Status of the WTO Dispute Settlement System

Alas, the dispute settlement system as established in those halcyon days is in tatters now. Many say that it has become a victim of its own success. Mike Moore, the then Director General of the WTO, called it the jewel in the crown of the WTO. In my eight years (2000–08) at the Appellate Body, nearly sixty-five disputes were settled by the Appellate Body within the time limit of ninety days. The rulings were by and large accepted by the trade, legal, and academic community as fair, impartial, and in accordance with the provisions of the WTO Agreements. Legalization of the obligations to be observed and judicialization of the dispute resolution mechanism found favour in international economic relations in those days. That gave birth to the WTO Agreements and the dispute resolution mechanism. But the pendulum has swung the other way now with almost all nations now wanting to reassert their national sovereignty in their trade and economic policies. The contours of international trade have also been changing dramatically with the growth in digital commerce and developments in the technological field. A time will come soon to reveal that the Uruguay Round agreements of the WTO have become outdated. Both the issues to be addressed in international trade and the skills of the judges to address them in the event of a dispute will be of a different nature. In such a situation, the resurrection of the Appellate Body of the olden days is extremely unlikely. But whatever be the new kind of dispute resolution mechanism that may be put in place, it would need experts of the calibre and commitment of Valerie Hughes.