REVIEWING APPELLATE REVIEW IN THE
WTO DISPUTE SETTLEMENT SYSTEM*

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[As the World Trade Organization heads towards the Hong Kong Ministerial Conference in
December 2005 and the Appellate Body celebrates its 10th anniversary, it is worth reflecting on
the proposals advanced in the ongoing review of the Dispute Settlement Understanding that
relate specifically to WTO appeals. This commentary considers several key proposals that fall
within this category, concerning in particular the number and term of Appellate Body Members,
the anonymity of Appellate Body reports, the absence of interim reports at the appellate stage,
and the possibility of introducing a formal remand mechanism. These proposals raise some
issues that are common to other legal systems and for which different systems have adopted
different solutions. An examination of the various approaches in certain domestic and
international contexts may be useful in evaluating individual proposals within the WTO, while
keeping in mind the distinctive features of WTO appellate review and the broader background of
the WTO dispute settlement system.]

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I INTRODUCTION

In the 10 years since the World Trade Organization’s appellate review
mechanism was set in motion, the Appellate Body has circulated 69 reports, from
US — Gasoline¹ to US — Countervailing Duty Investigation on DRAMS.²

* The views expressed in this article are personal to the authors and do not necessarily reflect
those of the Appellate Body. The substance of this commentary was finalised in early
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¹ United States — Standards for Reformulated and Conventional Gasoline, WTO Doc
² United States — Countervailing Duty Investigation on Dynamic Random Access Memory
(Report of the Appellate Body).
Appellate Body reports are circulated within the 90 day deadline established by art 17.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (‘DSU’), in the WTO’s three official languages (English, French, and Spanish). Sixty-six developed, developing, and least-developed country WTO Members have been involved in WTO appeals as appellants, appellees, or third participants. The Appellate Body has dealt with numerous procedural issues as they have arisen; rules of procedure are found in the Working Procedures for Appellate Review (‘Working Procedures’), the fifth version of which recently came into effect.

To date, each Appellate Body Member whose first term has expired has been reappointed once, as allowed under art 17.2 of the DSU, apart from two Members who did not seek reappointment. WTO Members and the WTO Director-General have also consistently appointed current or former Appellate Body Members to act, in an individual capacity, as arbitrators in determining the

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5 One Appellate Body report was initially circulated in English only, due to extenuating circumstances, although the French and Spanish versions followed a few days later: see United States — Countervailing Measures concerning Certain Products from the European Communities, WTO Doc WT/DS212/10 (2002) (Communication from the Appellate Body).


7 Pursuant to art 17.9 of the DSU, above n 4, ‘[w]orking procedures [are] drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information’.

reasonable period of time for implementation of adverse dispute settlement rulings under art 21.3(c) of the DSU. Finally, the Director-General recently appointed Appellate Body Members as two of the three individual arbitrators in a sui generis arbitration proceeding addressing the European Communities’ tariffs on bananas.

Appellate review in the WTO is widely regarded as working well. Commentators have remarked on its effectiveness and efficiency, and have complimented its contribution to the development of international trade law. As with any dispute settlement system, however, it is useful to reflect on experience and consider possible improvements. Indeed, although WTO Members generally regard the system as functioning very well, since late 1997 they have been engaged in negotiations on improvements and clarifications of the DSU, and some proposals relate more or less specifically to the Appellate Body and appellate proceedings. The present commentary examines several of these proposals and some of the views expressed about their implications, in the light of rules and procedures governing the process in certain other national and international tribunals. It begins by addressing certain suggestions about the number and term of Appellate Body Members, and then considers some options for reform of Appellate Body reports. Finally, it outlines the possibility of introducing a remand procedure, as envisaged by some WTO Members. This commentary is not intended as an exhaustive survey of possible improvements to WTO appellate procedure. Rather, it is intended to provide a flavour of some of the enhancements that some WTO Members consider could be made to the system.


II APPELLATE BODY MEMBERS

A Number of Appellate Body Members

Article 17.1 of the DSU provides that the Appellate Body ‘shall be composed of seven persons, three of whom shall serve on any one case’. Rule 6(2) of the Working Procedures stipulates that the ‘division’ of three hearing a given appeal is ‘selected on the basis of rotation, while taking into account the principles of random selection, unpredictability and opportunity for all Members to serve regardless of their national origin’. WTO Members’ proposals on the composition of the Appellate Body have focused on the total number of Appellate Body Members, rather than the number of Appellate Body Members comprising a division hearing an appeal. The EC has suggested that the number of Appellate Body Members be changed to ‘at least seven’,13 and Thailand has suggested changing the number to nine.14 Changes to the number of Members of the Appellate Body would require amendment of art 17.1 of the DSU; but both the EC and Thailand, as well as Japan, have suggested that such an amendment could incorporate a mechanism providing for modification to the total number of Appellate Body Members as required.15 The modification could be effected by the General Council16 or the Dispute Settlement Body (‘DSB’),17 without the need for formal amendment of the DSU.18

Other Members have expressed reservations about the proposals to enlarge the Appellate Body.19 China, for example, has suggested that an increase in their number might affect ‘collegiality’20 among the Appellate Body Members in their

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13 Contribution of the European Communities and Its Member States to the Improvement and Clarification of the WTO Dispute Settlement Understanding, WTO Doc TN/DS/W/38 (2003) [18] (Communication from the European Communities) (‘DSU Review — EC Communication’).
16 DSU Review — EC Communication, above n 13, [18]; DSU Review — Proposal by Japan, above n 15, attachment [20].
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deliberations.21 Most WTO Members have been silent on this question. We observe, in this regard, that r 4 of the Working Procedures, entitled ‘Collegiality’, refers to Appellate Body Members convening on a regular basis to discuss matters of policy, practice and procedure, as well as to divisions exchanging views with those Appellate Body Members not on a division regarding the subject matter of appeals.

The WTO Appellate Body is smaller than a number of other international courts and tribunals. For example, the International Court of Justice has 15 judges,22 the International Criminal Tribunal for the Former Yugoslavia has 16 ‘permanent’ judges,23 and the International Tribunal for the Law of the Sea (‘ITLOS’) comprises 21 independent Members.24 Like these tribunals and the Appellate Body, many courts and tribunals in domestic or regional contexts comprise an odd number of members, such as seven justices in the High Court of Australia,25 and 25 judges (one for each Member State) in the European Court of Justice.26 One reason for having an odd number of members is, presumably, to facilitate the resolution of disagreements among members. However, in the case of the WTO Appellate Body, the relevant rules and practice fortunately have operated to minimise such problems. Much like other WTO organs, the Appellate Body and Appellate Body divisions decide matters by consensus in all but the rarest circumstances.27 In addition, as mentioned above, although a division hearing an appeal is responsible for making all decisions concerning the appeal, the division is required to consult with the other Appellate Body Members before finalising its report.28 Nevertheless, the Working Procedures do provide for decisions to be made by majority vote, where necessary.29

B Term of Appointment

Appellate Body Members in the WTO are each appointed for a term of four years, with the possibility of one reappointment, as mentioned earlier.30 Appellate Body Members must not be affiliated with any government, must be broadly representative of the WTO membership, and must not be involved in

22 Statute of the International Court of Justice art 3(1).
25 Australian Constitution s 71; High Court of Australia Act 1979 (Cth) s 5.
28 Working Procedures, above n 3, r 4(3).
29 Ibid rr 3(1)–(2), 4(3).
30 DSU, above n 4, art 17.2. Pursuant to this provision, different terms applied to some original Appellate Body Members to enable the subsequent terms of Members to be staggered.
disputes that would create a direct or indirect conflict of interest.\textsuperscript{31} The \textit{Working Procedures}\textsuperscript{32} and the relevant rules of conduct\textsuperscript{33} reinforce and elaborate on these obligations. The DSB generally appoints Appellate Body Members ‘following consultations with WTO Members and on the basis of a proposal by a Selection Committee comprising the Director-General’ and the Chairpersons of several WTO bodies.\textsuperscript{34} In previous instances where an Appellate Body Member’s original four year term has expired, the Chair of the DSB has consulted with WTO Members about the possibility of reappointment under art 17.2 of the \textit{DSU}. Although reappointment is not automatic, each time an Appellate Body Member has indicated willingness to serve a second term, the WTO Members have reappointed that Member.\textsuperscript{35}

Several WTO Members have suggested extending the term of appointment of Appellate Body Members to six years and, at the same time, removing the possibility of reappointment.\textsuperscript{36} One reason for doing so, according to some WTO Members, would be ‘to maintain and enhance the dignity of the high office held by Appellate Body members and to ensure that they did not have to depend on [WTO] Members to secure a second term’.\textsuperscript{37} A different approach would be to retain the current term, but to make reappointment automatic, effectively resulting in eight year terms for all Appellate Body Members.\textsuperscript{38}

WTO Appellate Body Members’ term of office is shorter than that in a number of other courts and tribunals. ICJ justices are elected to nine year terms by the United Nations General Assembly and Security Council, with the possibility of re-election.\textsuperscript{39} Similarly, Members of ITLOS are elected for nine year terms with the possibility of re-election.\textsuperscript{40} In the High Court of Australia and the Federal Court of Australia, justices are appointed until the age of 70 and ‘[s]hall not be removed except by the Governor-General in Council, on an

\textsuperscript{31} Ibid art 17.3.
\textsuperscript{32} See, eg, \textit{Working Procedures}, above n 3, rr 2(2)–(3), 11.
\textsuperscript{35} See above n 8.
\textsuperscript{37} \textit{Special Session of the Dispute Settlement Body — Minutes of Meeting Held in the Centre William Rappard on 14 October 2002}, WTO Doc TN/DS/M/5 (2003) [1] (India, speaking on behalf of Cuba, Honduras, Jamaica, Pakistan, Malaysia, Sri Lanka, Tanzania, and Zimbabwe) (‘Minutes of 14 October 2002’). See also Steger, above n 19, 41, 46.
\textsuperscript{38} \textit{Minutes of 14 October 2002}, above n 37, [53] (Thailand).
\textsuperscript{39} \textit{Statute of the ICJ} arts 4(1), 13(1).
\textsuperscript{40} \textit{ITLOS Statute}, above n 24, art 5.1.
address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity'.41

III APPELLATE BODY REPORTS

A Interim Reports

The DSU makes no provision for interim reports of the Appellate Body. Appellate Body reports are circulated on the same day to parties and WTO Members (and they become available to the public on that day). Although appellants, appellees, and third participants have the opportunity to make written submissions to the Appellate Body and to present their arguments at an oral hearing,42 no participants or third participants receive or comment on the Appellate Body report before it is circulated.

In contrast, pursuant to art 15 of the DSU, WTO panels are to provide the parties to the dispute with an interim report containing both descriptive material (regarding the facts and arguments) and the panel’s findings and conclusions. Parties have an opportunity to comment on the interim report, and the final panel report that is subsequently circulated must discuss the parties’ arguments made at this interim review stage. The final report, which is not often significantly different from the interim report, is circulated first to the parties, and later to all WTO Members (at which time it becomes public).

One proposal by Chile and the United States is to provide for an interim report at the appellate level, much like that contained in art 15 of the DSU for panels.43 The aim of this amendment would be to allow the disputing parties ‘to address the reasoning in [Appellate Body] reports and, through their comments, ensure that they were of the highest quality and credibility’.44 It would also provide the Appellate Body with ‘an opportunity to receive parties’ views on issues that had never been commented on by the parties’.45 Members such as Malaysia and Australia have supported this proposal,46 which, they contend, could ‘enhance Member control over the dispute settlement process’.47 The EC and Japan have raised the concern that an interim report at the appellate stage could extend the time required for dispute settlement proceedings.48 Thus far, this proposal does not appear to have achieved widespread acceptance among Members.49

41 Australian Constitution s 72.
42 Working Procedures, above n 3, rr 21–2, 24, 27.
43 Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding on Improving Flexibility and Member Control in WTO Dispute Settlement, WTO Doc TN/DS/W/52 (2003) 1 (Textual Contribution by Chile and the US).
46 Ibid [41] (Malaysia).
48 Ibid [47] (Japan); [53] (EC).
Rules governing international arbitrations sometimes include provisions for interim awards or correction of awards. For example, the *Arbitration Rules of the United Nations Commission on International Trade Law* allow the arbitral tribunal to impose interim measures, which may be established in the form of an interim award. More generally, the tribunal is entitled to make interim, interlocutory, or partial awards. After the award is issued, a party may request an interpretation or correction of the award, or an additional award. The Permanent Court of Arbitration’s *Optional Rules for Arbitrating Disputes between Two States* are based on the *UNCITRAL Arbitration Rules* and contain similar provisions. Similarly, panels of the *North American Free Trade Agreement* (‘NAFTA’) generally submit an initial report to the parties, who may submit comments for the consideration of the panel before it presents its final report.

**B Anonymity**

Article 17.11 of the *DSU* provides that ‘[o]pinions expressed in the Appellate Body report by individuals serving on the Appellate Body shall be anonymous’. This requirement is similar to that for panels, as set out in art 14, which states that ‘[o]pinions expressed in the panel report by individual panelists shall be anonymous’. Appellate Body reports are signed by the three Members of the division hearing the appeal, and the identity of those Members is not made public before the report is circulated. All but two of the reports circulated to date contained a single statement reflecting the analysis and findings of the division as a whole. However, even when a Member of a division has made a separate statement, the identity of that Member is not revealed in the Appellate Body report and remains confidential after its circulation.

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50 As adopted in GA Res 31/98, UN GAOR, 31st sess, 99th plen mtg, UN Doc A/RES/31/98 (15 December 1976) (‘UNCITRAL Arbitration Rules’). The General Assembly has recommended the use of these rules ‘in the settlement of disputes arising in the context of international commercial relations’.

51 *UNCITRAL Arbitration Rules* art 26(2).

52 Ibid art 32(1).


Two groups of Members have proposed amendments to art 17.11 of the DSU such that Appellate Body Members would provide ‘separate’ opinions and findings on the issues in dispute, although Members that were ‘in agreement’ could provide ‘joint’ opinions. The decision of the Appellate Body would be that expressed in the ‘majority’ finding or opinion. The reference to a ‘majority’ opinion highlights the relationship between the current provisions on anonymity and consensus-based decision-making, as mentioned earlier.

In contrast to the practice of the Appellate Body, whereby decisions are generally made by consensus and all three Members of the division sign the report, in the International Centre for Settlement of Investment Disputes the Rules of Procedure for Arbitration Proceedings provide for the award to be ‘signed by the members of the Tribunal who voted for it’. In ITLOS, decisions are made by majority and, ‘[i]f the judgment does not represent in whole or in part the unanimous opinion of the members of the Tribunal, any member shall be entitled to deliver a separate opinion’. In the ICJ, justices may attach individual opinions to judgments, whether or not they dissent from the majority.

IV POSSIBILITY OF REMAND

The scope of appellate review in the WTO is circumscribed by the DSU. Appeals are ‘limited to issues of law covered in the panel report and legal interpretations developed by the panel’. Thus, the Appellate Body does not make findings of fact and relies on the panel’s conclusions with regard to the facts of the case. This means that if, for example, the Appellate Body reverses a panel’s interpretation of a particular WTO provision, it will be required to complete its analysis using only the facts found by the panel or contained in the panel record. It may be, however, that there are insufficient ‘factual findings by the Panel or undisputed facts in the Panel record’ to enable the Appellate Body to do so. In these circumstances, the Appellate Body may be unable to reach a conclusion as to the consistency or inconsistency with the WTO agreements of a challenged measure. The Appellate Body ‘may uphold, modify or reverse the legal findings and conclusions of the panel’, and if it finds a measure inconsistent with a WTO agreement it ‘shall recommend that the Member

60 ITLOS Statute, above n 24, art 29(1).
61 Ibid art 30(3).
62 ICJ, Rules of Court art 95(2) (adopted 14 April 1978).
63 DSU, above n 4, art 17.6.
66 DSU, above n 4, art 17.13.
concerned bring the measure into conformity with that agreement’. However, the Appellate Body has no express power of remand. Nor does the DSU otherwise provide explicitly for questions to be sent back or remanded to the original panel. On occasion, this has meant that the consistency of a challenged measure remains unknown even after an appeal is completed.

The EC and Jordan have made separate but similar proposals to introduce the possibility of remand into the dispute settlement system in cases where the Appellate Body is unable to resolve the dispute for reasons such as those just outlined. Both proposals would require the Appellate Body to explain the additional facts required and to set out the necessary findings of law or other directions to enable the panel to review the matter. Under these proposals, following adoption of the Appellate Body report by the DSB, the parties would have a limited period in which they could request that the particular issue be remanded to the original panel. According to Jordan:

Granting the Appellate Body the power to remand findings or conclusions of facts to the panel [is] necessary to ensure the efficacy of the two-tier system of dispute settlement, thus preserving one of the main principles that distinguishes the WTO dispute settlement mechanism from that of other bodies and tribunals in the international arena.

Six other countries have also made an informal proposal regarding remand. However, some Members have cautioned that a remand mechanism could add to the duration of dispute settlement proceedings.

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67 Ibid art 19.


71 DSU Review — EC Communication, above n 13, [20]–[21]; DSU Review — Jordan Communication, above n 70, 1.

72 DSU Review — EC Communication, above n 13, [21]; DSU Review — Jordan Communication, above n 70, 1.


Remand authority is rare, but not unknown, in international fora. For example, Chapter 19 of the NAFTA, dealing with anti-dumping and countervailing duty matters, provides such a mechanism, and the Rome Statute of the International Criminal Court allows the Appeals Chamber to ‘remand a factual issue to the original Trial Chamber for it to determine the issue and to report back accordingly’. In the exercise of its appellate jurisdiction, the Federal Court of Australia may ‘remit the proceeding to the court from which the appeal was brought for further hearing and determination, subject to such directions as the Court thinks fit’. A similar power of remittal applies to the High Court of Australia in the exercise of its appellate jurisdiction.

V CONCLUSION

As highlighted in this commentary, many procedural issues arising in connection with WTO appeals also arise in other jurisdictions. But the Appellate Body has several distinctive features, including the time within which it circulates its reports (90 days), the requirement of ‘collegiality’ in its deliberations, its small composition, and its relatively short history. These features have not prevented the Appellate Body from attaining broad-based support and respectability, or from circulating 68 reports in its first 10 years.

This brief commentary has outlined a few of the proposals made by WTO Members for improvement or clarification of the DSU in connection with appeals. It remains to be seen whether any of these proposals eventually will be agreed upon by WTO Members, leading to a revision of the DSU. Members have, of course, made many more proposals for improving the dispute settlement system of the WTO in general. At present, no formal deadline applies to the negotiations on reform of the DSU, although Members are working ‘with a view to presenting the results to Ministers’ at the Sixth Session of the Ministerial Conference of the WTO, to be held in December 2005 in Hong Kong, China. Perhaps the DSU negotiations will conclude alongside the other matters being discussed in the current Doha Round of trade negotiations, although not necessarily as part of the ‘single undertaking’. In any case, the positive and creative attitude with which Members have approached the task of reviewing the WTO dispute settlement system does not detract from the success achieved by the system since its establishment in 1995. Indeed, it reinforces it.

76 NAFTA, above n 55, art 19.04(8).
78 Federal Court of Australia Act 1976 (Cth) s 28(1)(c).
79 Judiciary Act 1903 (Cth) s 37.
81 See July Package, above n 12.
82 See Trade Negotiations Committee — Report by the Chairman of the Trade Negotiations Committee to the General Council, WTO Doc TN/C/5 (2005); Doha Declaration, above n 12, [47].