

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 — Gasoline*¹ 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 August 2005 and is based on material available to the public at that time.

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¹ *United States — Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R, AB-1996-1 (1996) (Report of the Appellate Body).

² *United States — Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WTO Doc WT/DS296/AB/R, AB-2005-4 (2005) (Report of the Appellate Body).

Appellate Body reports are circulated within the 90 day deadline³ established by art 17.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ('DSU'),⁴ in the WTO's three official languages (English, French, and Spanish).⁵ Sixty-six developed, developing, and least-developed country WTO Members have been involved in WTO appeals as appellants, appellees, or third participants.⁶ 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.⁷

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.⁸ 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

³ Where day 90 falls on a weekend or WTO holiday, Appellate Body reports are circulated on the next working day, in accordance with r 17(2) of the *Working Procedures for Appellate Review*, WTO Doc WT/AB/WP/5 (2005). Six of the 69 reports were circulated after the 90 day deadline due to extenuating circumstances: see *European Communities — Measures concerning Meat and Meat Products (Hormones)*, WTO Doc WT/DS26/AB/R, WT/DS48/AB/R, AB-1997-4 (1998) (Report of the Appellate Body) ('EC — Hormones') (114 days); *United States — Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WTO Doc WT/DS138/AB/R, AB-2000-1 (2000) (Report of the Appellate Body) (104 days); *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R, AB-2000-11 (2001) (Report of the Appellate Body) ('EC — Asbestos') (140 days); *Thailand — Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WTO Doc WT/DS122/AB/R, AB-2000-12 (2001) (Report of the Appellate Body) (140 days); *United States — Subsidies on Upland Cotton*, WTO Doc WT/DS267/AB/R, AB-2004-5 (2005) (Report of the Appellate Body) ('US — Upland Cotton') (136 days); *European Communities — Export Subsidies on Sugar*, WTO Doc WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, AB-2005-2 (2005) (Report of the Appellate Body) ('EC — Export Subsidies on Sugar') (105 days).

⁴ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), annex 2 (*Understanding on Rules and Procedures Governing the Settlement of Disputes*) 1869 UNTS 401.

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).

⁶ Fifty-three Members participated in appeals in which Appellate Body reports were circulated between 1996 and 2004: *Appellate Body — Annual Report for 2004*, WTO Doc WT/AB/3 (2005) 17-18 ('2004 Appellate Body Annual Report'). In appeals circulated so far in 2005, the additional participants are Antigua and Barbuda (appellee and other appellant) in *US — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/AB/R, AB-2005-1 (2005) (Report of the Appellate Body); Benin and Chad (third participants in *US — Upland Cotton*, above n 3); and Barbados, Fiji, Guyana, Kenya, Madagascar, Malawi, St Kitts and Nevis, Swaziland, Tanzania, and Trinidad and Tobago (third participants in *EC — Export Subsidies on Sugar*, above n 3).

⁷ Above n 3. 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'.

⁸ *2004 Appellate Body Annual Report*, above n 6, 1, 13. Although Messrs Said El-Naggar and Mitsuo Matsushita had personal reasons for not seeking reappointment, they both agreed to a short extension of their original term from 11 December 1999 to 31 March 2000: *Dispute Settlement Body — Minutes of Meeting Held in the Centre William Rappard on 27 October and 3 November 1999*, WTO Doc WT/DSB/M/70 (1999) 32-5.

reasonable period of time for implementation of adverse dispute settlement rulings under art 21.3(c) of the *DSU*.⁹ 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.¹⁰

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.¹¹ 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*,¹² 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.

⁹ Additional, up-to-date information on the Appellate Body, Appellate Body Members, and Appellate Body reports is available online at <<http://www.wto.org/appellatebody>>. Details of Appellate Body reports are contained in Appellate Body Secretariat, *WTO Appellate Body Repertory of Reports and Awards 1995–2004* (2005); *WTO Analytical Index — Guide to WTO Law and Practice* (2003).

¹⁰ *European Communities — The ACP–EC Partnership Agreement — Recourse to Arbitration pursuant to the Annex to the Decision of 14 November 2001*, WTO Doc WT/L/607/Add.12 (2005) [5] (Appointment of the Arbitrator — Communication from the Director-General). See also *European Communities — The ACP–EC Partnership Agreement — Recourse to Arbitration pursuant to the Decision of 14 November 2001*, WTO Doc WT/L/616 (2005) (Award of the Arbitrator).

¹¹ See, eg, Donald McRae, 'What is the Future of WTO Dispute Settlement?' (2004) 7 *Journal of International Economic Law* 3, 3–5, 21; Andrew Stoler, 'The WTO Dispute Settlement Process: Did the Negotiators Get What They Wanted?' (2004) 3 *World Trade Review* 99, 106–9.

¹² See, eg, *Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes*, WTO Doc LT/UR/D-1/6 (1994); *Dispute Settlement Body — Minutes of Meeting Held in the Centre William Rappard on 8 December 1998*, WTO Doc WT/DSB/M/52 (1999); *Doha Ministerial Declaration*, WTO Doc WT/MIN(01)/DEC/1 (14 November 2001) [30] ('Doha Declaration'); *Special Session of the Dispute Settlement Body — Report by the Chairman, Ambassador Péter Balás, to the Trade Negotiations Committee*, WTO Doc TN/DS/9 (2003); *General Council — Minutes of Meeting Held in the Centre William Rappard on 24–25 July 2003*, WTO Doc WT/GC/M/81 (2003) [71]–[75]; *Doha Work Programme — Decision Adopted by the General Council on 1 August 2004*, WTO Doc WT/L/579 (2004) [1(f)] ('July Package'). See also Thomas Zimmermann, 'WTO Dispute Settlement at Ten: Evolution, Experiences, and Evaluation' (2005) 60 *Aussenwirtschaft* 27, 40–52.

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

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*’).

¹⁴ *Proposal to Review Article 17.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes*, WTO Doc TN/DS/W/30 (2003) (Communication from Thailand) (‘*DSU Review — Thailand Communication*’).

¹⁵ *DSU Review — EC Communication*, above n 13, [18]; *DSU Review — Thailand Communication*, above n 14, 1; *Amendment of the Understanding on Rules and Procedures Governing the Settlement of Disputes*, WTO Doc TN/DS/W/32 (2003) attachment [20] (Proposal by Japan) (‘*DSU Review — Proposal by Japan*’).

¹⁶ *DSU Review — EC Communication*, above n 13, [18]; *DSU Review — Proposal by Japan*, above n 15, attachment [20].

¹⁷ *DSU Review — Thailand Communication*, above n 14.

¹⁸ See Peter Sutherland et al, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium — Report by the Consultative Board to the Director-General Supachai Panitchpakdi* (2004) [258].

¹⁹ See, eg, *Special Session of the Dispute Settlement Body — Minutes of Meeting Held in the Centre William Rappard on 28 May 2003*, WTO Doc TN/DS/M/13 (2004) [12] (India). See also Debra Steger, ‘Improvements and Reforms of the WTO Appellate Body’ in Federico Ortino and Ernst-Ulrich Petersmann (eds), *The WTO Dispute Settlement System 1995–2003* (2004) 41, 43–5.

²⁰ See Claus-Dieter Ehlermann, ‘Reflections on the Appellate Body of the WTO’ (2003) 6 *Journal of International Economic Law* 695, 695–8; Claus-Dieter Ehlermann, ‘Six Years on the Bench of the “World Trade Court”: Some Personal Experiences as Member of the Appellate Body of the World Trade Organization’ (2002) 36 *Journal of World Trade* 605, 612–13; James Bacchus, ‘Table Talk: Around the Table of the Appellate Body of the World Trade Organization’ (2002) 35 *Vanderbilt Journal of Transnational Law* 1021, 1022–3, 1029–31, 1036–9.

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

²¹ *Special Session of the Dispute Settlement Body — Minutes of Meeting Held in the Centre William Rappard on 13–14 November 2003*, WTO Doc TN/DS/M/14 (2004) [27].

²² *Statute of the International Court of Justice* art 3(1).

²³ *Statute of the International Criminal Tribunal for the Former Yugoslavia*, adopted in Resolution 827, SC Res 827, UN SCOR, 48th sess, 3217th mtg, art 12(1), UN Doc S/RES/827 (25 May 1993).

²⁴ *Statute to the International Tribunal for the Law of the Sea*, as contained in *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3, annex VI, art 2.1 (entered into force 16 November 1994) (‘ITLOS Statute’).

²⁵ *Australian Constitution* s 71; *High Court of Australia Act 1979* (Cth) s 5.

²⁶ See *Consolidated Version of the Treaty Establishing the European Community*, [2002] OJ C 325/33, art 221.

²⁷ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3, art IX:1 (entered into force 1 January 1995). The consensus rule is modified in relation to certain decisions of the DSB: *DSU*, above n 4, arts 6.1, 16.4, 22.6.

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.³¹ The *Working Procedures*³² and the relevant rules of conduct³³ 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.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 *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.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.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’.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.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.³⁹ Similarly, Members of ITLOS are elected for nine year terms with the possibility of re-election.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

³¹ Ibid art 17.3.

³² See, eg, *Working Procedures*, above n 3, rr 2(2)–(3), 11.

³³ See, eg, *Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes*, WTO Doc WT/DSB/RC/1 (1996) ss II–III, VI, annex 2.

³⁴ Namely the General Council, the DSB, the Council for Trade in Goods, the Council for Trade in Services, and the Council for Trade-Related Aspects of Intellectual Property Rights: see, eg, WTO, ‘WTO Appoints New Appellate Body Member and Reappoints Three Existing Members’, WTO Doc Press/364 (Press Release, 7 November 2003); *Establishment of the Appellate Body — Recommendations by the Preparatory Committee for the WTO Approved by the Dispute Settlement Body on 10 February 1995*, WTO Doc WT/DSB/1 (1995) [13].

³⁵ See above n 8.

³⁶ See, eg, *Dispute Settlement Understanding Proposals: Legal Text*, WTO Doc TN/DS/W/47 (2003) 1 (Communication from India on behalf of Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia); *DSU Review — EC Communication*, above n 13, [19]; *Negotiations on the Dispute Settlement Understanding*, WTO Docs TN/DS/W/18 (2002) 5; TN/DS/W/18/Add.1 (2002) (Proposals on *DSU* by Cuba, Honduras, India, Jamaica, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe).

³⁷ *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.

³⁸ *Minutes of 14 October 2002*, above n 37, [53] (Thailand).

³⁹ *Statute of the ICJ* arts 4(1), 13(1).

⁴⁰ *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).

⁴⁴ *Special Session of the Dispute Settlement Body — Minutes of Meeting Held in the Centre William Rappard on 16–18 December 2002*, WTO Doc TN/DS/M/7 (2003) [16] (US).

⁴⁵ *Ibid* [61] (US).

⁴⁶ *Ibid* [41] (Malaysia).

⁴⁷ *Ibid* [43] (Australia).

⁴⁸ *Ibid* [47] (Japan); [53] (EC).

⁴⁹ See also Valerie Hughes, 'The WTO Dispute Settlement System: A Success Story' in Julio Lacarte and Jaime Granados (eds), *Inter-Governmental Trade Dispute Settlement: Multilateral and Regional Approaches* (2004) 103, 116, 129–30; Ehlermann, 'Reflections on the Appellate Body', above n 20, 707.

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*⁵⁰ allow the arbitral tribunal to impose interim measures, which may be established in the form of an interim award.⁵¹ More generally, the tribunal is entitled to make interim, interlocutory, or partial awards.⁵² After the award is issued, a party may request an interpretation or correction of the award, or an additional award.⁵³ 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.⁵⁴ 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.⁵⁵

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.⁵⁶ 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.⁵⁷

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).

⁵³ *Ibid* arts 35–7.

⁵⁴ See *Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States*, as reproduced in Permanent Court of Arbitration, *Basic Documents* (2nd ed, 2005) 39, arts 26, 32(1), 35–7.

⁵⁵ Signed 17 December 1992, Canada–Mexico–US, 32 ILM 289 (1993) art 2016 (entered into force 1 January 1994).

⁵⁶ The two exceptions are: *EC — Asbestos*, WTO Doc WT/DS135/AB/R, AB–2000–11 (2001) [149]–[154] (Report of the Appellate Body) (concurring statement by one Member of the Division); *US — Upland Cotton*, WTO Doc WT/DS267/AB/R, AB–2004–5 (2005) [631]–[641] (Report of the Appellate Body) (separate opinion by one Member of the Division). On the concurring statement in *EC — Asbestos*, see Henrik Horn and Joseph Weiler, 'EC — Asbestos: European Communities — Measures Affecting Asbestos and Asbestos-Containing Products' in Henrik Horn and Petros C Mavroidis (eds), *The WTO Case Law of 2001: The American Law Institute Reporters' Studies* (2003) 14, 14.

⁵⁷ See Mitsuo Matsushita, 'Some Thoughts on the Appellate Body' in Patrick Macrory, Arthur Appleton and Michael Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analysis* (2005) 1389, 1401; Claus-Dieter Ehlermann, 'Reflections on the Process of Clarification and Improvement of the *DSU*' in Federico Ortino and Ernst-Ulrich Petersmann (eds), *The WTO Dispute Settlement System 1995–2003* (2004) 105, 109.

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.⁵⁸ 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’.⁵⁹ In ITLOS, decisions are made by majority⁶⁰ 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’.⁶¹ In the ICJ, justices may attach individual opinions to judgments, whether or not they dissent from the majority.⁶²

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’.⁶³ 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.⁶⁴ 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.⁶⁵ 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’,⁶⁶ and if it finds a measure inconsistent with a WTO agreement it ‘shall recommend that the Member

⁵⁸ *Text for LDC Proposal on Dispute Settlement Understanding Negotiations*, WTO Doc TN/DS/W/37 (2003) [VI] (Communication from Haiti); *Text for the African Group Proposals on Dispute Settlement Understanding Negotiations*, WTO Doc TN/DS/W/42 (2003) [VI] (Communication from Kenya).

⁵⁹ International Centre for the Settlement of Investment Disputes, *Rules of Procedure for Arbitration Proceedings* r 47(2).

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.

⁶⁴ See Marco Bronckers and Natalie McNelis, ‘Fact and Law in Pleadings before the WTO Appellate Body’ in Friedl Weiss (ed), *Improving WTO Dispute Settlement Procedures: Issues and Lessons from the Practice of Other International Courts and Tribunals* (2000) 321, 321.

⁶⁵ *Korea — Definitive Safeguard Measure on Imports of Certain Dairy Products*, WTO Doc WT/DS98/AB/R, AB-1999-8 (1999) [92] (Report of the Appellate Body).

⁶⁶ *DSU*, above n 4, art 17.13.

concerned bring the measure into conformity with that agreement'.⁶⁷ However, the Appellate Body has no express power of remand.⁶⁸ 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.⁶⁹

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.⁷⁰ 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.⁷¹ 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.⁷² 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 distinguish[s] the WTO dispute settlement mechanism from that of other bodies and tribunals in the international arena.⁷³

Six other countries have also made an informal proposal regarding remand.⁷⁴ However, some Members have cautioned that a remand mechanism could add to the duration of dispute settlement proceedings.⁷⁵

⁶⁷ Ibid art 19.

⁶⁸ See Fernando Piérola, 'The Question of Remand Authority for the Appellate Body' in Andrew Mitchell (ed), *Challenges and Prospects for the WTO* (2005) 193; David Palmeter, 'The WTO Appellate Body Needs Remand Authority' (1998) 32 *Journal of World Trade* 41.

⁶⁹ See, eg, *United States — Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WTO Doc WT/DS244/AB/R, AB-2003-5 (2003) [138] (Report of the Appellate Body); *United States — Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, AB-2001-2 (2001) [180] (Report of the Appellate Body).

⁷⁰ *DSU Review — EC Communication*, above n 13; *Jordan's Further Contribution towards the Improvement and Clarification of the Dispute Settlement Understanding*, WTO Doc TN/DS/W/56 (2003) (Communication from Jordan) ('*DSU Review — Jordan Communication*').

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.

⁷³ *Special Session of the Dispute Settlement Body — Minutes of Meeting Held in the Centre William Rappard on 28–30 January 2003*, WTO Doc TN/DS/M/8 (2003) [6].

⁷⁴ Argentina, Brazil, Canada, India, New Zealand and Norway submitted this proposal in May 2004: 'Dispute Settlement Review Focuses on "Package Deal"' (2004) 8(41) *Bridges Weekly Trade News Digest* 8; *Special Session of the Dispute Settlement Body — Report by the Chairman, Ambassador David Spencer, to the Trade Negotiations Committee*, WTO Doc TN/DS/11 (2004) [2].

⁷⁵ See, eg, *Special Session of the Dispute Settlement Body — Minutes of Meeting Held in the Centre William Rappard on 15 July 2002*, WTO Doc TN/DS/M/3 (2002) [49] (Brazil); *Special Session of the Dispute Settlement Body — Minutes of the Meeting Held in the Centre William Rappard on 16 April 2002*, WTO Doc TN/DS/M/1 (2002) [69] (Hong Kong, China).

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,⁷⁶ 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’.⁷⁷ 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’.⁷⁸ A similar power of remittal applies to the High Court of Australia in the exercise of its appellate jurisdiction.⁷⁹

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’⁸⁰ at the Sixth Session of the Ministerial Conference of the WTO, to be held in December 2005 in Hong Kong, China.⁸¹ 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’.⁸² 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).

⁷⁷ Opened for signature 17 July 1998, 2187 UNTS 3, art 83(2) (entered into force 1 July 2002).

⁷⁸ *Federal Court of Australia Act 1976* (Cth) s 28(1)(c).

⁷⁹ *Judiciary Act 1903* (Cth) s 37.

⁸⁰ *Special Session of the Dispute Settlement Body — Report by the Chairman, Ambassador David Spencer, to the Trade Negotiations Committee*, WTO Doc TN/DS/12 (2005). See also *Special Session of the Dispute Settlement Body — Report by the Chairman, Ambassador David Spencer, to the Trade Negotiations Committee*, WTO Doc TN/DS/10 (2004).

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].