

SYMPOSIUM: THE FIRST FIVE YEARS OF THE WTO
STAGE III: OPERATION OF THE APPELLATE SYSTEM

COMMENTARY

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COMMENTARY ON “THE APPELLATE BODY”

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I. The Appellate Body: a job well done.

As a new dispute settlement entity, the Appellate Body has proven to be remarkably successful in establishing a high level of respect for its decisions. The quality of the reasoning in the Appellate Body’s decisions is generally regarded as of high quality. This symposium reflects the fact that as a new entity, much of the assessment has focused on procedure. It is not altogether healthy to deny the Appellate Body the benefit of a systematic and rigorous examination of their determinations. Certainly the next “Review of the System” should provide that systematic and substantive analysis of developing WTO standards. The process will continue to be important, but the substantive interpretations must be brought into wider understanding in order to maintain the quality of the process and avoid the misunderstanding that naturally comes from “political” assessments.

A. Issues that may be appropriate for analysis.

It would appear that the future of the Appellate Body will have its fair share of sensitive issues that will require judgments affecting sovereignty and regulatory discretion in a mine field of important topics ranging from trade rights concerning genetically modified organisms to subsidies, from price controls to new boundaries for non-violation nullification and impairment. A system conceived in large part to remove political considerations from the resolution of disputes must necessarily tread on the most sensitive political issues. After all, it is to be expected that disputes will arise from areas of uncertainty and controversy in which were not resolvable through consultations and negotiations, and which may also involve important domestic concerns which are themselves internally controversial.

One concern may be the extent to which the Appellate Body rewrites the clear text of the agreement. For example, it has created a compulsion to provide information to the Panel, in effect, reading a “should” as a “shall” and the right to “seek” information to the right to “obtain” it at the peril of adverse inferences. Such an interpretation is of more concern because because of the expansion of the right to private counsel and the absence of explicit protections of confidential information, including business

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confidential data, which are commonly subject to protective orders and enforced by sanction. The extent to which this power of reinterpretation is used, and whether it creates controversy, may determine the scope of reexamination of the authority of the Appellate Body. It would be better for such authority to be legislated. It has been said that dispute settlement should avoid the hard cases, ones in which the negotiated obligations have ambiguity resulting from continuing differences in basic policy. This may be so, but the greatness of tribunals may also be determined in how they respond to hard cases. With the WTO, it may be that the hard cases will “make” the system, rather than “break” it.

B. Does the Appellate Body have the procedural tools to do the job?

Absent an unlikely decrease in the willingness to resort to the Appellate Body, one must ask if there are sufficient resources to do the job. Without doubt, the system seems to be pressed. The three obvious solutions: increase resources, increase the time allowed for determinations or reduce the time spent on some cases, are simply non-starters. All of the external pressure will cut against these possible solutions to the problem of an overburdened Appellate Body.

The first two solutions, above, will require a crisis to prompt further examination, and they will be difficult to accept. In the category of increasing resources, one sub-option is to convert the Appellate Body to a permanent judiciary with additional members able to serve essentially as do retired jurists in the United States. A full analysis of such a system may actually prove to have some cost saving elements, and much might be said *in theory* for a permanent judicial branch for the WTO. It would seem, however, that no consensus could evolve for eliminating the rotation of Appellate Body appointments, and it is not at all clear whether the expense per case would decrease, if at all, enough to drive such a fundamental change in the system.

One might question whether a system with wholly adequate resources might create an incentive to turn the process into something that will be more cumbersome. Lawyers are good at creating a process for solving problems, and pressing procedural issues of little or no importance to the substance of the case. It may be better to be short of resources, and be pressed to deal with substance and resolving disputes, rather than ensuring infinite resources to deal with every procedural hindrance known to the legal mind.

Increasing the time to review cases would undermine one of the greatest problems in the system--the ability to maintain violations for extended periods of time without compensation. Longer time periods would undercut support for the dispute settlement process.

The third option, reducing the time spent on some cases, may come with time. In the future, the Appellate Body might relieve its calendar and the process by refusing to spend enormous amounts of time fully relitigating cases. As determinations become accepted practice on key points of law, and in appropriate cases, the Appellate Body might consider stating that it has previously determined the basic legal issue before it, and set a very short schedule. The possibility of a remand to a panel has been suggested. It is not clear that more factual analysis would have materially altered the course of

Appellate Body jurisprudence. Further examination of the use of remand might be in order, but the case for its initiation has yet to be made. It is also likely that remand authority would increase the time to resolve a case.

II. Enforcement: should the Appellate Body discourage appeals, and enforce remedies?

A. Appeals, delays.

During the negotiation of the DSU, it was not apparent that almost every case would be appealed. With a number of new agreements presenting novel issues, appeals can be expected at least until interpretations provide well settled guidance, or until losing parties believe that they will not advance their cause by prolonging the final determination. Ultimately, the process is intended to provide leverage for compliance and a negotiated settlement on the terms of implementation. Delays are a part of the process, and remedies probably exist to the extent sovereignty will permit.

B. Sanctions, compensation.

The reasonable time for compliance appears to be settling on a maximum time of fifteen months. However, this extends the point of leverage of compensation, and may ultimately lead to increased resort to retaliation, something the DSU sought to avoid. The question is whether the political will exists for allowing withdrawal of concessions at an earlier point in time. The cases themselves may provide increased leverage, for example, if repayment of illegal export subsidies emerges from pending cases. The ability to delay implementation by forcing relitigation on replacement measures which are themselves also inconsistent with WTO obligations raises important policy issues. The Appellate Body has legislated itself authority to compel submission of information to a panel, it could do the same in other areas it judged necessary for the integrity of the process and of its authority over it. This is an area that may become appropriate for further reflection.

III. Conclusions

The Appellate Body is performing its function with a level of expertise and professionalism that is serving the WTO system very well. Critical analysis of determination will improve the process over time. The major crisis has been securing the resources to do the job. Resource demands have been met with increased financial resources for staff. It appears that the review of the functioning of the Appellate Body during the U.S. Congressional review will not generate widespread opposition to continued participation. This is no doubt due to widespread satisfaction with the system, but it also

reflects the higher level of interest in the issue of Congressional approval or disapproval of normal trade relations with China. WTO dispute settlement may be subject to more scrutiny in the consideration of renewal of fast track authority.

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