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Article

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The Workload of the WTO Appellate Body: Problems and Remedies

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ABSTRACT

The WTO Appellate Body has seen its workload grow significantly over the years, reflecting not only the rising number of cases handled by the WTO dispute settlement mechanism, buts also an increase in the size of the disputes, the number of issues raised on appeal, the number of participants and third participants, the total length of submissions, as well as an accumulation of jurisprudence. As a result, Appellate Body proceedings now as a rule exceed, in some cases significantly, the 90-day timeframe prescribed by the Dispute Settlement Understanding. The present article sheds new light on this controversial issue, taking as a starting point the relevant reform proposals made by WTO Members. Bringing into the discussion broader – institutional, policy and comparative – considerations, the article delves into the adequacy and sufficiency of the different alternatives for alleviating the Appellate Body's workload with a view to identifying the most opportune ways for ensuring the efficient future functioning of the WTO dispute settlement system.

I. INTRODUCTION

In 2002, one of the seven original members of the World Trade Organization (WTO) Appellate Body, James Bacchus, described the appellate process, as follows:

> . . . we cannot choose either the disputes that are appealed to us or the issues of law that are appealed to us in disputes. Unlike the United States Supreme Court, for example, we have no discretionary jurisdiction. Further, we have no power to remand a dispute to a panel for further consideration. We have no authority whatsoever to decline to hear an appeal. Moreover, we have no authority whatsoever to refrain from 'addressing' a legal issue that has been properly raised in an appeal. The WTO treaty says that we 'shall address' every legal issue raised in an appeal. So we do.
> And we do so within strict deadlines established by the treaty. Most other international tribunals have no deadlines. But no matter how complicated the

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> issues may be that are raised on appeal, generally we have no more than ninety days in which to hear and decide an appeal.[1]

And indeed, the WTO Appellate Body has seen its workload grow significantly over the years. By way of background, the Appellate Body is composed of seven Members, three of whom (a division) serve in one case.[2] Following the principle of collegiality, however, all Appellate Body Members must stay abreast of dispute settlement activities, receive all documents filed in each appeal and exchange views before the division finalizes the appellate report.[3] Moreover, the Appellate Body has an obligation to address each of the issues of law and legal interpretations raised in a particular case, and appellate proceeding should in no case exceed 90 days.[4] Divisions for each dispute are assisted by teams of three to four lawyers and support staff.[5] Work on an appeal would begin with the circulation of a panel report where an appeal is expected and end with the circulation of the Appellate Body report in the three WTO official languages.

The year 2015 witnessed the highest level of dispute settlement activity since the inception of the WTO[6] with this trend continuing in 2016 and 2017. While the growing number of disputes relating to many of the covered agreements shows that the WTO Membership has great confidence in the dispute settlement mechanism (DSM), it also means that, with current staffing levels, the system is having trouble coping with the workload.[7] Based on the number of cases currently at the panel stage and the average appeal rate of 67%, it is expected that the workload of the Appellate Body will increase significantly and remain very high in coming years. Notably, among the disputes currently or soon-to-be pending before panels are *EC and certain Member States – Large Civil Aircraft (Article 21.5 – US)*, *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, and *Australia – Tobacco Plain Packaging*, which are likely to result in very large appeals.[8]

This article puts in perspective and sheds new light on the problem with the increased workload of the WTO Appellate Body, how the workload challenges can

1 James Bacchus, 'Table Talk: Around the Table of the Appellate Body of the World Trade Organization', 35 Vanderbilt Journal of Transnational Law (2002), at 1028.

2 Article 17.1 of the Dispute Settlement Understanding (DSU).

3 Article 4 of the Appellate Body's Working Procedures for Appellate Review, WT/AB/WP/6, 16 August (2010), at 1021.

4 Article 17.5 and 17.12 of the DSU.

5 Communication from the Appellate Body, The Workload of the Appellate Body, Annex I to Appellate Body Annual Report 2013, WT/AB/20, 14 March 2014, at 32. At the time of writing, the Appellate Body Secretariat comprises the Director, 16 dispute settlement lawyers, an administrative assistant, and 5 support staff posts.

6 Not only were there more active disputes at the consultation and panel stages than ever before, but also the Appellate Body's workload was extremely high. The Appellate Body circulated 11 reports concerning seven distinct matters relating to the TBT Agreement, the Agreement on Import Licensing Procedures, the Agreement on Agriculture, the SPS Agreement, and the Anti-Dumping Agreement, also addressing matters relating to the GATT 1994 and the DSU (Appellate Body Annual Report 2015, WT/AB/26, 21 March 2016, at 6, foreword by the 2015 Chair of the Appellate Body, Peter Van den Bossche).

7 Overview of Developments in the International Trading Environment, Annual Report by the Director-General (mid-October 2014 to mid-October 2015), WT/TPR/OV/18, 17 November 2015, para 3.159.

8 Appellate Body Annual Report 2015, above n 6.

be explained and what possible solutions exist. It outlines pertinent reform proposals made by WTO Members, such as extending the timeframe for completing appellate proceedings, increasing the number of Appellate Body Members, and amending their terms of appointment, as well as other proposals which could indirectly reflect on the Appellate Body's workload, notably interim review mechanism, dissenting opinions, remand authority, etc. The article then analyses their viability and adequacy and discusses those proposals in a broader comparative context, endeavouring to map out the most opportune ways for ensuring the efficient future functioning of the system and optimization of the appellate process. The rest of the article is structured as follows. Sections II and III, respectively, set out the main reasons for the increase in the Appellate Body's workload and the proposals of WTO Members for reforms. Section IV then provides the author's reflections on those proposals and opinion as to the most opportune ways to reform and streamline the system. Section V draws final conclusions.

II. REASONS FOR INCREASED WORKLOAD AND STATISTICS

The capacity of the Appellate Body to meet its workload and the delays in appeal proceedings resulting in exceeding the 90-day deadline stipulated in the DSU are by no means a new issue. Already during the 1999 review of the DSU the constant increase in the number of appeals prompted WTO Members to propose an increase in the number of Appellate Body Members.[9] And although most of the appeals up to that moment were completed within the 90-day timeframe, that was done against a considerable turnover among lawyers at the Secretariat, with only part-time presence of the Appellate Body Members, very long working hours, and an increasing number of appeals.[10]

The 2013 Appellate Body Communication 'The Workload of the Appellate Body' explains that the main factors contributing to the Appellate Body's workload are a growth in: (i) the size of disputes appealed; (ii) the number of issues raised on appeal, including more frequent claims under Article 11 of the DSU; (iii) the number of participants and third participants in appeals; and (iv) the total length of submissions filed with the Appellate Body in an average appeal.[11]

With regard to the size of the underlying dispute, the average length of WTO panel reports that have been appealed has more than doubled since the early years of the WTO dispute settlement, reaching an average of approximately 364 pages in 2013; recent panels sometimes involve two or three complaining parties, and several third parties are now the rule; the number of claims raised per panel request has also been significant, often rising to double digits and requests for preliminary rulings have become a common feature. This increase in the workload of panels translates into an increase in the Appellate Body's workload. The factual complexity of disputes

9 See Proposal by the Kingdom of Thailand to increase the number of the Appellate Body members by at least two to four persons, keeping the odd number nature of the Appellate Body (TN/DS/W/2, 20 March 2002, para 4).

10 Debra Steger, 'The Founding of the Appellate Body', in Gabrielle Marceau (ed.), *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System* (Cambridge: Cambridge University Press 2015), at 452.

11 The Workload of the Appellate Body, above n 5.

has also grown over time, the average number of exhibits submitted by the parties to panels increasing from 62 in the early years of WTO dispute settlement to 552 in 2013.

As for factors that have a direct bearing on the amount of work at the appellate level, the average number of issues raised in each appeal has increased by more than 160% from approximately eight issues per case in the first 10 appeals between 1996 and early 1998 to more than 13 issues per case in 10 appeals adjudicated by the Appellate Body in 2011 and 2012. The number of appeals, including claims relating to the scope of original or compliance proceedings under Article 21.5 of the DSU, has also increased over time. Although the Appellate Body's jurisdiction is limited by Article 17.6 of the DSU to issues of law, the factual complexity of a dispute has nonetheless an important impact on the work involved in an appeal. In particular, the Appellate Body must familiarize itself with the panel record, and claims under Article 11 of the DSU require the Appellate Body to engage in a review of the objectivity of the panel's assessment of the facts of the case. The number of Article 11 claims has also increased over time. Furthermore, it has become common for participants or third participants in disputes to make procedural requests or seek procedural rulings during appellate proceedings.

Another issue is the number of parties and third parties in disputes which has increased since the early years of WTO dispute settlement, resulting in a greater number of submissions to be reviewed and considered by the Appellate Body. The average number of third participants in appellate proceedings has nearly tripled between 1996 and 2013. Finally, the existence of a substantial and growing body of WTO jurisprudence inevitably contributes to the total length of the participants' submissions, since WTO Members invariably rely on prior panel and Appellate Body reports in support of their arguments. In order to address these arguments, and in an effort to ensure consistency and coherence of WTO jurisprudence, panels and the Appellate Body are called upon to consider carefully prior panel and Appellate Body reports. The number of pages of submissions filed with the Appellate Body has more than doubled to an average of 450 pages per case by the end of 2012.

Finally, other non-negligible factors related to the capacity of the Appellate Body to deal with its increased workload are the budgetary situation of the WTO and the ensuing resource constraints related to the number of lawyers working at the Appellate Body Secretariat, as well as certain aspects of how the dispute settlement system was designed, such as the limited number Appellate Body Members.

Taken together the above factors have led to a significant increase in the average length of Appellate Body reports, which has more than quadrupled from the early years of WTO dispute settlement to close to 210 pages per Appellate Body report.

The Appellate Body's workload is particularly intense in situations where several appeals in different disputes are filed simultaneously or within a short period of time. When three or more appeals are pending at the same time, several of the seven Appellate Body Members will be sitting in more than one appeal, so that there can be no overlap in the scheduling of hearings and internal meetings for those appeals. A separate problem is the extent to which it is possible for an Appellate Body Member to be engaged simultaneously in deliberations, analyse voluminous

submissions and documents from the panel record, and prepare and revise drafts for multiple appeals with parallel time schedules.[12]

Panel activity has been intense in recent years and it seems that a large number of panels will continue to be active in the next years. Assuming that panel proceedings take, on average, one year from the time of establishment of the panel, that the compliance panel proceedings in the aircraft subsidy disputes will take 1.5–2 years, and that roughly two-thirds of all panel reports circulated will be appealed, the Appellate Body can expect to receive up to a dozen appeals per year. Such an increase in the number of appeals, taken together with the increased complexity and size of the average appeal, exacerbates the challenges confronting the WTO dispute settlement system.

These developments are natural. The increased use of the dispute settlement system is due to greater acquaintance and confidence in it, coupled with better technical assistance. In particular, the rapid increase of competence and specialization of the Advisory Centre for WTO Law (ACWL) has to a great extent addressed the developing countries' legal capacity problem and has given them an opportunity to make better use of the system.[13] Fundamentally, there is a process of growing refinement in the WTO dispute settlement system resulting from greater awareness of its benefits, more precedents, as well as more profound use of legal argumentation.

III. PROPOSALS FOR REFORM AND OPTIMIZATION OF APPELLATE PROCESS

Delays in the appeal process may be due to different reasons, including the substantial workload of the Appellate Body, scheduling difficulties arising from overlap in the composition of divisions hearing concurrently pending appeals, scheduling issues, such as rescheduling of oral hearings, the number and complexity of the issues raised, the shortage of staff in the Appellate Body Secretariat, etc.[14] The non-respect of the 90-day deadline has been strongly criticized by some WTO Members, stating that extension should be granted only by consent of the parties to the dispute or that more detailed reasons should be given by the Appellate Body as to the particular 'exceptional circumstances' justifying an extension.[15] In order to address the problem, more recently, the Director-General (DG) of the WTO, Roberto Azevêdo, has made several adjustments, including reallocating staff members from other divisions in the WTO to act as lead lawyers, as well as creating a number of new posts across

12 For further details on the evolution of the size and complexity of appeals over time, see ibid.

13 For an analysis of the factors affecting the participation of developing countries in the dispute settlement system, see Jan Bohanes and Fernanda Garza, 'Going Beyond Stereotypes: Participation of Developing Countries in WTO Dispute Settlement', 4(1) Trade, Law and Development (2012), at 45.

14 See, for instance, Appellate Body Reports, *Russia – Pigs*, WT/DS475/AB/R, adopted 21 March 2017, para 1.16, *EU – Biodiesel (Argentina)*, WT/DS473/AB/R, adopted 26 October 2016, para 1.11; *India – Solar Cells*, WT/DS456/AB/R, adopted 14 October 2016, para 1. 14, *US – Tuna II (Mexico) (Article 21.5)*, WT/DS381, adopted 3 December 2015, para 1.15, etc.

15 Giorgio Sacerdoti, 'The Future of the WTO Dispute Settlement System: Consolidating a Success Story', in Carlos Braga (ed.), *The Future of the Multilateral Trading System*, forthcoming.

the three dispute settlement divisions.[16] The DG has also called on WTO Members to come forward with their own proposals to streamline the processes of the Dispute Settlement Body (DSB) in a way that will be beneficial for the entire Membership.

Many of the proposals made by WTO Members in this respect would require amendments to the DSU. The DSU review negotiations, having started in 1997, have not yet been completed and some of the proposals discussed below may not even be on the current negotiating agenda. However, they reflect the WTO Members' negotiating positions, as well as their satisfaction about the functioning of the WTO dispute settlement.[17] The following subsections provide a brief overview of WTO Members' proposals impacting directly or indirectly the workload of the Appellate Body.

A. Extended timeframe for completing Appellate Body proceedings

Pursuant to Article 17.5 of the DSU, as a general rule, Appellate Body proceedings should not exceed 60 days from the submission of the notice of appeal to the circulation of the Appellate Body report. Should the Appellate Body consider that it cannot circulate its report within this timeframe, it has to inform the DSB in writing of the reasons for the delay. The proceedings should in no case exceed 90 days. Both the 60- and 90-day timeframes have proven increasingly untenable in the recent years.[18] It has thus become a matter of practice for the Chair of the Appellate Body to notify the Chair of the DSB that, for a particular case, the Appellate Body would not be able to circulate its report either within the 60-day period, or within the 90-day period pursuant to Article 17.5.[19]

Therefore, experience has shown that 90 days are insufficient for completing the appellate proceedings. While WTO Members have made proposals regarding the timeframe of proceedings, more specific suggestions are necessary, according to the prior Chair of the DSB Special Session, Ambassador Ronald Saborío Soto. In his assessment, solutions discussed involve extending this timeframe and/or agreeing on terms respectful of both parties' interests and the independence of the Appellate Body under which this timeframe could be exceeded in specific circumstances. The aim is to meet current workload challenges in a way that gives parties greater predictability while preserving the ability of the Appellate Body to produce high-quality reports.[20] Under the latest available DSU draft legal text from 2011, the Article 17.5

16 See Law 360, WTO Dispute Roundup: Chief Tackles Swollen Caseload, 26 September 2014, available at http://www.law360.com/articles/581376/wto-dispute-roundup-chief-tackles-swollen-caseload (visited 21 May 2017).

17 For more details on the stages of the negotiations process and of the major proposals received, see Thomas Zimmermann, 'WTO Dispute Settlement at Ten: Evolution, Experiences, and Evaluation', 60(I) Aussenwirtschaft – The Swiss Review of International Economic Relations (2005), at 27; Ignacio Garcia Bercero and Paolo Garzotti, 'DSU Reform: Why have Negotiations to Improve WTO Dispute Settlement Failed So Far and What are the Underlying Issues?', 6 The Journal of World Investment & Trade: Law, Economics, Politics (2005), at 847.

18 See e.g. Diagnosis of the Problems Affecting the Dispute Settlement Mechanism, Some Ideas by Mexico, TN/DS/W/90, 16 July 2007, at 16.

19 See e.g. Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, *Communication from the Appellate Body*, WT/DS381/26, 17 August 2015.

20 Special Session of the Dispute Settlement Body, Report by the Chairman, Ambassador Ronald Saborío Soto, TN/DS/27, 6 August 2015, para 3.36.

general deadline is extended to 90 days, with proceedings in no case exceeding 120 days.[21] However, in more than 20 cases already proceedings have exceeded these 120 days.[22]

B. Number of Appellate Body Members

According to Article 17.1 of the DSU the Appellate Body 'shall be composed of seven persons, three of whom shall serve on any one case'. The Members constituting a division are 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'.[23] The DSU proposals to date have focused on the total number of Appellate Body Members, rather than the number of Appellate Body Members comprising a single division.[24]

In the context of the DSU negotiations, some WTO Members, such as the European Union, Thailand, and Japan have suggested that the number of the Appellate Body Members should be increased, 'given the increase in the number of cases being appealed and the difficult nature of the legal issues that had to be resolved',[25] and so that the Appellate Body can 'prevent delay of issuance of the Appellate Body's reports while maintaining their quality'.[26] The European Union has suggested an amendment to Article 17.1 of the DSU to the effect that the Appellate Body would be composed of 'at least seven persons' and that '[t]he total number of Appellate Body members may be modified from time to time by the General Council'. Similarly, Thailand proposed increasing the number of Appellate Body Members to nine, leaving open the possibility for this number to be modified by the DSB 'as circumstances so warrant'.[27] According to Thailand, the current number of Appellate Body Members results in practice in a situation where the Appellate Body can hardly consider more than two appeals at the same time, especially when there may be a conflict of interest in an appeal.[28] Japan has agreed on the suggested mechanism for modification of the total number of Appellate Body Members, considering however that the General Council is the proper organization to decide on the matter,

21 Special Session of the Dispute Settlement Body, Report by the Chairman, Ambassador Ronald Saborío Soto, to the Trade Negotiations Committee, TN/DS/25, 21 April 2011, at A-10.

22 Including in *EC and certain Member States – Large Civil Aircraft* and *US – Large Civil Aircraft (2nd complaint)*, where the appellate proceedings took 301 and 346 days, respectively.

23 Rule 6(2) of the Working Procedures, above n 3.

24 John Lockhart and Tania Voon, 'Reviewing Appellate Body Review in the WTO Dispute Settlement System', 6 Melbourne Journal of International Law (2005), at 474.

25 Special Session of the Dispute Settlement Body of 14 October 2002, Minutes of the Meeting, TN/DS/M/5, 27 February 2003, para 13.

26 Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding, Proposal by Japan, TN/DS/W/22, 28 October 2002.

27 Proposal to Review Article 17.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Communication from Thailand, TN/DS/W/30, 22 January 2003. See also Contribution of the European Communities and its Member States to the Improvement and Clarification of the WTO Dispute Settlement Understanding, Communication from the European Communities, TN/DS/W/38, 23 January 2003.

28 Proposal to Review Article 17.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Communication from Thailand, TN/DS/W/2, 20 March 2002.

given the budgetary implications.[29] In any event, empowering the DSB or the General Council to make decision on the number of Appellate Body Members would ensure flexibility and obviate the need to amend Article 17.1, each time it were decided to adjust this number.[30] Some WTO Members, such as China and India, have disagreed with the proposals.[31] In particular, China considers that an increase in the number of Appellate Body Members may affect the principle of collegiality among them, which entails the requirement for all Appellate Body Members, notwithstanding their number, to meet in order to discuss the systemic issues arising in each appeal.[32]

C. Terms of appointment of Appellate Body Members

Pursuant to Article 17.2 of the DSU, Appellate Body Members are appointed by the DSB for a four-year term and each Member may be reappointed once. Their terms of appointment are staggered. The Appellate Body should comprise persons of recognized authority, with demonstrated expertise in law, international trade, and the subject matter of the covered agreements generally, not affiliated with any government. Also, the Appellate Body membership shall be broadly representative of membership in the WTO and Members should not participate in the consideration of any disputes that would create a direct or indirect conflict of interest.[33]

The Preparatory Committee for the WTO set out its recommendations for the selection procedure for Appellate Body Members, according to which '[t]he decision by the DSB to appoint Appellate Body members is made on the basis of a proposal formulated jointly, after appropriate consultations, by the Director-General, the Chairman of the DSB, and the Chairmen of the Goods, Services, TRIPS and General Councils'.[34] Neither the DSU, nor the 1995 DSB Decision on the Establishment of the Appellate Body (the 1995 Decision) set out the procedure to be followed by the DSB for taking such a decision. In practice, a Selection Committee composed of the persons above would conduct interviews with candidates put forward by the WTO Members and hear the views of delegations prior to making its recommendation to the DSB.[35] Normally, upon expiration of an

29 Amendment of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Proposal by Japan, TN/DS/W/32, 22 January 2003.

30 Special Session of the Dispute Settlement Body of 14 October 2002, above n 25.

31 Special Session of the Dispute Settlement Body of 28 May 2003, Minutes of the Meeting, TN/DS/M/13, 2 April 2004, para 12.

32 Special Session of the Dispute Settlement Body of 13–14 November 2003, Minutes of the Meeting, TN/DS/M/14, 20 April 2004, para 27. This principle implies in particular that, for purposes of ensuring consistency and coherence in decision-making, and in order to draw on the individual and collective expertise of the Members, the division responsible for deciding a particular appeal should exchange views with the other Appellate Body Members before the report is finalized for circulation. (Article 4.1 and 4.3 of the Appellate Body's Working Procedures, above n 3) This has been the practice of the Appellate Body Members since the establishment of the Appellate Body. It normally takes place shortly after the oral hearing and takes two to three days depending on the complexity of the dispute.

33 Article 17.3 of the DSU.

34 Establishment of the Appellate Body: Recommendations by the Preparatory Committee for the WTO approved by the Dispute Settlement Body on 10 February 1995, WT/DSB/1, 19 June 1995.

35 See for instance Appointment/Reappointment of Appellate Body Members: Decision Adopted by the Dispute Settlement Body on 24 May 2013, WT/DSB/60, 28 May 2013.

Appellate Body Member's first four-year term, the Chair of the DSB would consult with WTO Members on the question of reappointment. In all but several instances, should an Appellate Body Member be willing to serve a second term, the WTO Members have reappointed them.

The modalities of the appointment procedure have been the subject of debate among WTO Members in recent years and have become increasingly sensitive.[36] For instance, with regard to a recent procedure for the reappointment of Mr Bhatia and Mr Graham in 2015, the DSB Chair decided to host an informal meeting with them, in view of the request by some WTO Members to engage in discussions with the Appellate Body Members seeking reappointment.[37] Issues have also arisen in the context of certain WTO Members objecting to the reappointment of a particular Appellate Body Member, even from their own country.[38] Specifically, commentators have observed that such objections, if made without a specific explanation, may erode the confidence in the WTO decision-making system, since suspicions could arise that WTO Members are displeased with that Appellate Body Member's decisions.[39]

In the context of the DSU negotiations, a number of WTO Members, notably developing countries, have proposed modifying the term of appointment of Members of the Appellate Body to one non-renewable six-year term.[40] The objective of such proposal is 'to maintain and enhance the dignity of the high office that the Appellate Body members hold, and in order to ensure that the Appellate Body members do not have to depend upon WTO Membership for securing a second term'.[41] Ultimately, this should promote 'an atmosphere conducive for impartial and independent functioning of the Appellate Body', the independence of the Appellate Body Members seen as 'essential for the proper functioning of the dispute settlement system'.[42] In this connection, some Members have referred to views of former Appellate Body Members, according to which, on balance, an extended non-renewable term is a better option, if the personal independence of the term-holder is a matter of major concern.[43] While supporting a reform, Thailand has expressed

36 See Appellate Body Annual Report 2015, above n 6.

37 The DSB Chair set out some ground rules for the orderly conduct of the meeting, including that the meeting was not intended to replicate or repeat the extensive interviews conducted by delegations in connection with the initial appointments. Moreover, questions could not touch upon legal issues raised in currently pending disputes, on which the Appellate Body ruled during the term of the Appellate Body Member, and which were not yet addressed by the Appellate Body (Appellate Body Annual Report 2015, above n 6).

38 See Appellate Body Annual Report 2011, WT/AB/17, 13 June 2012, at 4.

39 See e.g. http://blogs.piie.com/realtime/?p=2209 (visited 21 May 2017).

40 Proposal by Cuba, Honduras, India, Jamaica, Pakistan, Malaysia, Sri Lanka, Tanzania, and Zimbabwe (TN/DS/W/18 and Add.1). See also Dispute Settlement Understanding Proposals: Legal Text, Communication from India on behalf of Cuba, Dominican Republic, Egypt, Honduras, Jamaica, and Malaysia, TN/DS/W/47, 11 February 2003.

41 Negotiations on the Dispute Settlement Understanding, Proposals on DSU by Cuba, Honduras, India, Jamaica, Malaysia, Pakistan, Sri Lanka, Tanzania, and Zimbabwe, TN/DS/W/18, 7 October 2002, at 5; TN/DS/W/18/Add.1, 9 October 2002.

42 Special Session of the Dispute Settlement Body of 14 October 2002, above n 25, at para 1. See also Special Session of the Dispute Settlement Body of 13–14 November 2003, above n 32, para 30.

43 TN/DS/W/18, 7 October 2002, at 5, referring to the views expressed by Claus-Dieter Ehlermann (Claus-Dieter Ehlermann, 'Some Personal Experiences as Member of the Appellate Body of the WTO',

preference for an automatic renewal of the initial term, thus making it a total of eight years.[44] Former Appellate Body Members have also observed, in parting remarks when leaving the Appellate Body, that a single, longer term would 'better achieve a more independent Appellate Body and a more efficient one'.[45]

Moreover, the European Union considers it desirable, as an additional improvement enabling the Appellate Body to cope with its workload, to convert the mandate of the Appellate Body Members into a full-time appointment for a given period of time.[46] In 2001 and pursuant to the 1995 Decision, a review was undertaken by the DSB to determine whether a move to full-time employment would be warranted. The DSB Chair noted that, in practice, the positions had become very close to a full-time job. In particular, time records showed that, based on an eight-hour working day, four of the Appellate Body Members in the year 2000 had worked more than 100% full time. Furthermore, differently from the option of expanding the size of the Appellate Body, no amendment to Article 17.8 of the DSU would be necessary, in order to move to full-time employment. Finally, according to a 10-year simulation, the cost of moving to salary plus pension was estimated to be budget-neutral, compared with the existing part-time remuneration package.[47]

D. Other proposals

Certain proposals made in the context of the DSU negotiations, albeit not directly concerned with the workload of the Appellate Body, could have an impact on its ability to deal promptly with the disputes before it by either enhancing its efficiency or having an adverse effect on the overall timeframe.

1. Interim review mechanism at Appellate Body level

At the panel level, Article 15.2 of the DSU provides for the issuing of an interim report to the parties, including both the descriptive sections and the panel's findings and conclusions. Parties may submit, within a certain period of time, a written

Policy Paper 02/9 published by the Robert Schuman Centre for Advanced Studies of the European University Institute in July 2002) and Florentino Feliciano (UNCTAD Workshop on Improvements and Clarifications of the DSU of the WTO, 4–5 July 2002).

The European Union has supported India's proposal, suggesting an amendment to the first sentence of Article 17.2 of the DSU, as follows: '[t]he DSB shall appoint persons to serve on the Appellate Body for a six-year term which shall be non-renewable' (Contribution of the European Communities and its Member States, above n 27).

44 Special Session of the Dispute Settlement Body of 14 October 2002, above n 25, at para 53.

45 Farewell remarks of Jennifer Hillman to the Dispute Settlement Body of the WTO, Geneva, 8 December 2011, in Appellate Body Annual Report 2011, above n 38, at 76.

46 Contribution of the European Communities and its Member States to the Improvement of the WTO Dispute Settlement Understanding, Communication from the European Communities, TN/DS/W/1, 13 March 2002.

47 See Dispute Settlement Body, 12 March 2001, Minutes of the Meeting, WT/DSB/M/101, 8 May 2001, para 119.

Even though the review occurred following the busiest year the Appellate Body has had to date (13 Notices of Appeal were filed that year and 9 the year before), WTO Members could not reach consensus either on converting the positions into full-time ones, adding additional Appellate Body Members or undertaking any other steps (Victoria Donaldson, 'The Appellate Body: Institutional and Procedural Aspects', in Patrick F. J. Macrory, Arthur E. Appleton and Michael G. Plummer (eds),*The World Trade Organization: Legal, Economic and Political Analysis* (Springer USA: Springer 2005), vol. 1 at 1289).

request for the panel to review precise aspects of the interim report prior to circulation of the final report to all WTO Members. The DSU, however, makes no provision for interim reports at the stage of appellate proceedings. The USA, together with Chile, have suggested the introduction of interim reports also at the Appellate Body stage,[48] considering that, '[i]nasmuch as there was no appeal from Appellate Body reports', 'it was particularly important that parties had an opportunity to address the reasoning in these reports and, through their comments, ensure that they were of the highest quality and credibility'. Another option proposed was 'to provide a mechanism for parties, after review of the interim report, to delete by mutual agreement findings in the report that were not necessary or helpful to resolving the dispute'.[49]

The European Union and Japan have, however, expressed concerns regarding the implications of the introduction of such a new phase for the prompt settlement of disputes. Hong Kong, China has also pointed out that 'it could be a long and difficult process for the parties concerned to agree to deleting anything from an "interim Appellate Body report", especially in cases which involved a number of co-complainants'. Other Members, such as Norway and Switzerland, have noted that interim reports have been considered unnecessary even at the panel stage, 'as they did not serve any useful purpose, other than to give an opportunity to the parties to correct factual errors of panels and not influence legal interpretations or findings' and considered that the independence and effectiveness of the Appellate Body could be compromised.[50]

2. *Dissenting opinions*

According to Article 17.11 of the DSU, individual opinions expressed by Appellate Body Members in their report should be anonymous. Thus, if a member of a division expresses a separate opinion, the identity of that member would remain confidential after the circulation of the Appellate Body report. Separate opinions, dissenting or concurring, have been given only on eight instances in Appellate Body reports to date.[51] Certain WTO Members, notably developing and least-developed countries,

48 Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding on Improving Flexibility and Member Control in WTO Dispute Settlement, Contribution by Chile and the United States, TN/DS/W/28, 23 December 2002, para 6. See also TN/DS/W/52, 14 March 2003; TN/DS/W/82, 24 October 2005; and TN/DS/W/89, 31 May 2007.

49 Special Session of the Dispute Settlement Body of 16–18 December 2002, Minutes of the Meeting, TN/DS/M/7, 26 June 2003, para 16. Other Members, such as Brazil and India, appear to support, at least partially, such proposals (ibid, paras 54 and 55, See also TN/DS/M8, 30 June 2003, para 12; TN/DS/M12, 19 January 2004, para 28).

50 Special Session of the Dispute Settlement Body of 16–18 December 2002, ibid, paras 40 and 46. Concerns have also been expressed by Ecuador, Argentina (ibid, paras 48, 51).

51 See Appellate Body Reports, *EC – Asbestos*, WT/DS135/AB/R, adopted 5 April 2001, paras 149–54 (concurring opinion); *US – Upland Cotton*, WT/DS267/AB/R, adopted 16 October 2014, paras 631–41 (dissenting opinion); *US – Zeroing (EC) (Article 21.5 – EC)*, WT/DS294/AB/R, adopted 11 June 2009, paras 259—70 (dissenting opinion); *EC and certain Member States – Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011, para 726(a), (b) and (c) (separate views from each member of the Appellate Body Division); and ibid, WT/DS350/AB/R, adopted 2 June 2009, para 1149 (dissenting opinion); *US – Continued Zeroing*, paras 304–13 (concurring opinion); *US – Washing Machines*, WT/DS464/AB/R, adopted 26 September 2016, paras 5.191–5.203 (dissenting opinion); and *India – Solar*

have proposed that each Appellate Body Member give an individual opinion, or deliver a judgment, on the issues raised in a dispute, and that the final decision be based on the majority finding. Appellate Body Members in agreement could give 'joint' opinions.[52] These Members have recognized however that this 'may mean additional resources and work for the Secretariat'.[53]

3. *Remand authority*

Article 17.6 of the DSU prescribes that an appeal 'shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel'. The Appellate Body therefore does not make its own factual findings. Should the Appellate Body reverse the panel's interpretation of a particular WTO provision and in order to provide a satisfactory resolution to the dispute in accordance with Article 3.2 and 3.3 of the DSU, it may be necessary to examine, for instance, the consistency of the respondent's measure with another provision of the covered agreements. The Appellate Body may uphold, modify, or reverse the legal findings and conclusions of the panel,[54] but cannot send back, or remand, the case to the original panel in order for it to resolve the outstanding issue. It must therefore decide on the issue itself. However, in order to do so, not only should 'the factual findings of the panel and the undisputed facts in the panel record' provide sufficient basis for the Appellate Body's analysis, but the claim should also not be of 'novel character', such that it had not been argued in sufficient detail at the panel level in the case at stake or in prior disputes.[55] Otherwise, when the Appellate Body cannot complete the analysis and decide the issue itself, the complainant may have to start all over by initiating a new dispute settlement proceeding.

Proposals by the European Union, Jordan, a group of six WTO Members and Korea have been discussed in the DSU review negotiations.[56] All proposals envisage remanding a case to the original panel only at the request of a disputing party (not by the Appellate Body on its own initiative), and only for the reason that the factual record is not sufficient. The core distinction between them is that Korea suggests a remand before the original Appellate Body report is adopted, whereas the other three

Cells, WT/DS456/AB/R, adopted 14 October 2016, paras 5.156–5.163 (concurring opinion). Arguably, fn 1118 to the Appellate Body Report *US – Large Civil Aircraft (2nd Complaint)*, WT/DS353, adopted 23 March 2012 can be seen as containing another separate opinion.

52 See Negotiations on the Dispute Settlement Understanding, Proposal by the African Group, TN/DS/W/15, 25 September 2002, para 1; Text for LDC Proposal on Dispute Settlement Understanding Negotiations, Communication from Haiti, TN/DS/W/37, 22 January 2003, at 2; Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, Communication from Kenya, TN/DS/W/42, 24 January 2003, at 3.

53 Negotiations on the Dispute Settlement Understanding, Proposal by the LDC Group, TN/DS/W/17, 9 October 2002, para 5.

54 Article 17.13 of the DSU.

55 Appellate Body Report, *EC – Asbestos*, above n 51, paras 78 and 82.

56 See Contribution of the European Communities and its Member States, DSB Special Session, above n 27, paras 20–21; Jordan's Further Contribution Towards the Improvement and Clarification of the Dispute Settlement Understanding, DSB Special Session, TN/DS/W/56, 19 May 2003, at 1; Textual Contribution to the Negotiations on Improvements and Clarifications of the DSU, Non-paper presented by Argentina, Brazil, Canada, India, New Zealand and Norway, DSB Special Session, JOB(04)/52, 19 May 2004; Contribution of the Republic of Korea to the Negotiations on Improvements and Clarifications of the DSU, Remand, DSB Special Session, JOB(05)/182, 15 September 2005.

proposals prefer a remand after its adoption. The European Union has suggested that the Appellate Body should explain in its report the specific insufficiencies of the factual findings. The parties to the dispute would then be able to request a remand of the matter to the original panel within 10 days from the adoption of the Appellate Body report.[57] A similar proposal has been tabled by Jordan, while observing that introducing such procedure 'would require the extension of the overall time-frames for dispute settlement'.[58] Differently, Korea would prefer the original panel to make the necessary factual findings for the Appellate Body to then complete the legal analysis.[59] Other WTO Members, such as Hong Kong, China and Brazil, have also expressed concerns that the introduction of a remand mechanism 'could add to the time-frame of the dispute settlement mechanism'.[60]

IV. REFLECTIONS

That the Appellate Body may be faced with excessive workload was probably not a concern for the Uruguay Round negotiators. Indeed, initially the Appellate Body was conceived as 'a security blanket or a "safety valve" to ensure against "bad decisions" of panels', whose reports were now to be adopted by reverse consensus, and so without a political filter.[61] Although the amount of work of the Appellate Body may have come as a surprise to many, in the first 20 years since its establishment, the Appellate Body has issued 134 reports and has developed extensive jurisprudence on both substantive and procedural issues.

As a general remark, the increased complexity of the disputes at both panel and Appellate Body level could certainly be explained with the accumulation of jurisprudence over time. Another contributing factor, however, is the fact that panels receive the cases without a prior court having looked at them. No obligation for exhaustion of local remedies exists in WTO law—the rule that 'helps to keep dockets of international courts and tribunals manageable'.[62] This is in contrast with the rules applicable to the International Court of Justice (ICJ) and the European Court of Human Rights (ECtHR), or even with the requirement to make a reference for a preliminary ruling to the Court of Justice of the European Union (ECJ).[63] In Kuijper's view, for

57 Contribution of the European Communities and its Member States, above n 27, at 5–6.

58 Jordan's Contributions towards the Improvement and Clarification of the WTO Dispute Settlement Understanding, Communication by Jordan, TN/DS/W/43, 28 January 2003, at 6. See also TN/DS/W/56, 19 May 2003.

59 Joost Pauwelyn, 'Appeal without Remand: A Design Flaw in WTO Dispute Settlement and How to Fix it', ICTSD Dispute Settlement and Legal Aspects of International Trade Issue Paper No. 1, International Centre for Trade and Sustainable Development, Geneva, Switzerland (2007), at xi.

60 Special Session of the Dispute Settlement Body of 16 April 2002, Minutes of Meeting, WTO Doc TN/DS/M/1, 12 June 2002, para 69.

61 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* (The Hague: Kluwer Law International 2004), at 42.

62 Pieter Jan Kuijper, 'The New WTO Dispute Settlement System: The Impact on the European Community', 29(6) Journal of World Trade 49 (1995), at 65. The ICJ has ruled that this is a principle of customary international law that cannot be 'tacitly dispensed with, in the absence of any words making clear an intention to do so' (*Elettronica Sicula S.p.A. (ELSI) (United States of America* v *Italy)*, ICJ Reports 1989, at 42).

63 Article 267 of the Treaty on the Functioning of the European Union. The ECJ has jurisdiction to give preliminary rulings concerning the interpretation of the EU Treaties and the validity and interpretation of

instance, it would be reasonable for the rule of exhaustion of local remedies to apply at the least in WTO domains, in which rights derived by individuals from treaties are at stake, such as anti-dumping, subsidies and countervailing measures, safeguards, and TRIPs.[64] The Anti-Dumping and the Subsidies Agreements do require WTO Members to maintain judicial, arbitral, or administrative tribunals or procedures for the purpose of the prompt review of administrative actions relating to final determinations and review of such determinations.[65] Presently, however, complainants are not required to avail themselves of such opportunities before filing a case before the WTO. For instance, in *US – Salmon*, the panel rejected a contention that an argument that was not raised before the national administrative authority could not be raised before a panel. Furthermore, typically panels have considered trade remedy cases where resort to national courts was still possible.[66] As a consequence, bringing anti-dumping and subsidies cases directly before WTO panels, without previously resorting to national administrative and/or judicial procedures, may well result in 'the WTO dispute settlement system [being] placed under such pressure by the contentious nature and the number of cases, that it may succumb'.[67] Indeed, to date the Anti-Dumping Agreement has been cited in requests for consultations on 117 instances and the Subsidies Agreement on 116 instances.[68] Multiple proceedings before domestic courts or specialized tribunals and the WTO dispute settlement system create further complications.[69]

At the same time, authors have observed that a requirement to exhaust national remedies would too often be tantamount to denying effective enforcement of WTO obligations for too long a period of time and would not seem to be an appropriate mechanism for avoiding difficult issues.[70] Arguably, the legitimization of domestic courts through the citizens of one WTO Member, as well as for reasons of separation of powers, may result in less intense scrutiny of national anti-dumping determinations, or at least creates doubts as to their impartiality in the eyes of other Members.[71] Thus, Petersmann has observed that 'international GATT dispute

acts of the EU institutions and bodies. Where such a question is raised before any court or tribunal of a Member State, that court or tribunal has *a right*, if it considers that a decision on the question is necessary to enable it to give judgment, request the ECJ to give a ruling thereon. Where such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal has *an obligation* to bring the matter before the ECJ.

64 Kuijper, above n 62, at 65.

65 Article 13 of the Anti-Dumping Agreement, and Article 23 of the Subsidies Agreement. The TRIPs agreement also contains a requirement to provide for an opportunity for review of a final administrative decision by a judicial authority, and for an appeal to higher one (Article 41(4) of the TRIPs Agreement).

66 See Thomas Cottier and Petros Mavroidis, *The Role of the Judge in International Trade Regulation: Experiences and Lessons for the WTO* (USA: University of Michigan 2003) at 66.

67 Kuijper, above n 62, at 68.

68 See https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm (visited 21 May 2017).

69 E.g. Canada's virtually simultaneous challenges in US courts, the North American Free Trade Agreement (NAFTA) tribunal and the WTO to decisions involving softwood lumber. See Joost Pauwelyn, 'Editorial Comment: Adding Sweeteners to Softwood Lumber: the WTO–NAFTA 'Spaghetti Bowl' is Cooking', 9(1) Journal of International Economic Law (2006), at 197.

70 Cottier and Mavroidis, above n 66, at 66.

71 Holger Spamann, 'Standard of Review for World Trade Organization Panels in Trade Remedy Cases – a Critical Analysis', 38(3) Journal of World Trade 509 (2004), at 549, and Ernst-Ulrich Petersmann, *The*

settlement procedures appear less "protection biased" than many domestic court proceedings over discretionary trade restrictions'.[72] A good example in this context is the shift in the practice of the EU courts on the issue of zeroing after its condemnation by the Appellate Body in *EC – Bed Linen*.

Lockhart and Voon highlight that many of the issues relating to the functioning of the Appellate Body, relating to the number of members or terms of appointment, also arise in the context of other international adjudicative bodies, such as the ICJ, the ECJ, the International Criminal Tribunal for the Former Yugoslavia (ICTY), etc. The Appellate Body, however, bears certain 'distinctive features', such as its small composition and short timeframes for circulation of reports, the principle of 'collegiality', as well as its relatively short history.[73] These features certainly have an impact on the possible solutions to the specific workload challenges that the Appellate Body is currently facing.

A. Extended timeframe for completing Appellate Body proceedings

The 90-day appeal process is remarkably fast, especially in view of the complex issues that may be raised on appeal. For comparison, the average duration of the proceedings before the ICJ is 4 years and before the ECJ is between 15 and 20 months, depending on the year and the nature of the proceedings.[74] However, analogies should factor in the fact that, on average, 700 cases are brought annually before the ECJ. An extension of the current 90-day deadline may be one of the easier solutions to address the workload of the Appellate Body. There are however arguments both for and against such a reform.

On the one hand, one or two Members have criticized the Appellate Body for not living up to the DSU-prescribed timeframe and not consulting the participants and obtaining their prior agreement on the issue.[75] Certainly, the appellate process was conceived as an accelerated procedure with respect to panels. The time limit moreover has an enormous disciplinary effect on the participants, as well as on Appellate Body Members and the Secretariat, and allows for an efficient and effective resolution of disputes. It has also been argued that some of the first appeals, such as *US – Gasoline* or *Japan –Alcoholic Beverages II*, resolved in, respectively, 68 and 57 days,[76] are not necessarily less complex than many of today's cases.[77] The issue is further linked to criticisms that the Appellate Body should exercise restraint and its reports should be shorter and more focused. On the other hand, statistics based on recent

GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement (London: Kluwer Law International 1997), at 86.

72 Petersmann, ibid, at 86.

73 Lockhart and Voon, above n 24, at 484.

74 In 2015, the average time taken to deal with references for a preliminary ruling was 15.3 months, for direct actions 17.6 months, and for appeals 14 months (Court of Justice of the European Union, Press Release No 34/16, 18 March 2016).

75 See, e.g. WTO 2015 News Items, 26 January 2015, Dispute Settlement, Appellate Body report on Argentina's import measures adopted, available at: https://www.wto.org/english/news_e/news15_e/dsb_26jan15_e.htm.

76 Days between Notice of Appeal and Appellate Body report circulation.

77 Jasper Wauters, Partner, King & Spalding, Geneva, speaking at the 9th Annual Update on WTO Dispute Settlement, available at: http://graduateinstitute.ch/lang/en/pid/1963/_/events/ctei/2016/9th-annual-update-on-wto-dispute (visited 21 May 2017).

cases convincingly demonstrate that in practice the 90-day deadline is becoming more and more elusive.[78] Moreover, even if some recent cases are not more complex than the early ones, the expanding body of jurisprudence turns decision-making into a more intricate and time-consuming process. As to the size of the reports, more time may actually be required to produce a more concise report or a submission in an effort to extract the essence without losing the harmonious flow of logic and substance.

A starting point in this respect should be the nature of the 90-day deadline as a preclusive or simply informative time limit. It would be difficult to argue the former. While the failure to respect this timeframe may be prone to criticism, delays should not have any consequences for the legality or legitimacy of the Appellate Body reports issued. In fact, preclusive deadlines do not in principle apply to judicial rulings, be it domestic or international ones, and such interpretation would risk compromising not only the quality of the reports, but also the authority of the Appellate Body. However, the next question is then whether, as a consequence, other deadlines should also be interpreted softly, including those for filing written submissions. For instance, third participants have only three days to file their submissions and should the appellee's submission fall on a Friday, their ability to familiarize themselves with it and provide adequate comments may be compromised. At the ECJ for instance, while the time limit for lodging a response in case of an appeal against a decision of the General Court is fixed, the President would fix the date by which the reply and the rejoinder are to be produced.[79] In the case of the ICJ, the President of the Court, in consultation with the Registrar, convenes a meeting of the parties before deciding upon the deadlines and the order in which the written memorials and counter-memorials should be submitted.[80] So far the Appellate Body has proceeded by modifying the time limits for the filing of written submissions set out in the Working Procedures for Appellate Review or the date of the oral hearing set out in the case's working schedule in 'circumstances, where strict adherence to a time-period … would result in a manifest unfairness', in accordance with Rule 16 of the Working Procedures.[81]

78 See Timing of Appeal, Circulation and Adoption of Appellate Body Reports, available at: http://worldtradelaw.net/databases/abtiming.php (visited 21 May 2017).

79 Article 175 of the Rules of Procedure of the Court of Justice. The appeal and the response may be supplemented by a reply and a rejoinder only where the President, on a duly reasoned application submitted by the appellant within seven days of service of the response, considers it necessary, after hearing the Judge-Rapporteur and the Advocate General, in particular to enable the appellant to present his views on a plea of inadmissibility or on new matters relied on in the response.

80 Article 49 of the Rules of Procedure of the Court of Justice.

81 For instance, in *India – Agricultural Products*, the Division received a letter from Australia requesting, pursuant to Rule 16 of the Working Procedures (above n 3), an extension of the deadline for the filing of the third participants' submissions by two days, given that the deadlines for the appellee's and third participants' submissions left third participants with only one working day to incorporate the appellee's arguments into their own written submissions (Appellate Body Report, *India – Agricultural Products*, WT/DS430/AB/R, adopted 19 July 2016, para 1.17). In *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, WT/DS381/AB/R, adopted 3 December 2015, Mexico requested that the oral hearing not be held as scheduled because a key member of Mexico's litigation team would not be available on those dates and attending the hearing with a reduced legal team would have an impact on its ability to present adequately its

Another concern has been voiced that Appellate Body reports issued after the 90-day period cannot, in the absence of an agreement for the extension of this period by the parties, be adopted by negative consensus pursuant to Article 17.14 of the DSU. This is because, by agreeing to the extension and deeming the report to be properly issued pursuant to Article 17.5 of the DSU, the parties commit themselves to abide by the rules and procedures for adoption under Article 17.14.[82] Thus, similarly to the old GATT days, any party could block the adoption of such reports. This issue arose in relation with the adoption of the panel and Appellate Body reports in *US – Tyres (China)*, where for the first time the Appellate Body had not consulted with, or sought the agreement of, the participants upon circulating its report beyond the 90 days.[83] The USA in particular is of the view that, for reasons of transparency and due process, and given the obligatory nature of the 90-day deadline, Members had to agree to receive a report after this deadline in light of the challenges faced in a particular dispute.[84] The European Union, however, has opined that '[e]xceeding the 90-day deadline should not and could not call into question the "rules-based multilateral trading system" or, for that matter, Article 17.14 of the DSU', and that 'a high-quality Appellate Body report, albeit slightly late, contributed more to the rules-based trading system than a poor-quality report issued within 90 days'.[85] Other Members are simply concerned about the need for the Appellate Body to consult with the parties and ensure transparency on extending of timeframes to the benefit of all WTO Members, without however necessarily obtaining the parties' agreement in order to extend the timeframe of 90 days.[86]

Such divergent opinions demonstrate the sensitivity of the issue and highlight the importance of optimizing appellate proceedings. Efficiencies in the form of time-savings could be achieved by streamlining certain stages of the overall dispute settlement process. For instance, the Appellate Body changed its Working Procedures in 2010 to require concurrent filing of the appellant's submission and the notice of appeal. Various reductions in timeframes have also been proposed at earlier stages of the process, such as a shorter mandatory consultation period, the establishment of the panel at the first DSB meeting, the earlier filing of first submission by the complainant, the reduction or elimination of the interim review stage, or putting in place a system with permanent panelists. However, it remains that one of the most important aspects impacting the workload for every particular dispute is the complexity of the appeal. Also, more substantial 'savings' may actually be possible at the compliance, rather than the adjudication stage.[87]

arguments before the Appellate Body (Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para 1.14).

82 Dispute Settlement Body, 5 October 2011, Minutes of the Meeting, WT/DSB/M/304, 2 December 2011, para 13.

83 In that case it was not the USA or China, but Norway that put the report on the DSB agenda for adoption.

84 See e.g. Dispute Settlement Body, 18 June 2014, Minutes of the Meeting, WT/DSB/M/346, 28 August 2014, para 7.8.

85 Dispute Settlement Body, 23 July 2012, Minutes of the Meeting, WT/DSB/M/320, 28 September 2012, para 101.

86 Dispute Settlement Body, above n 84, para 7.9.

87 Bercero and Garzotti, above n 17, at 863–64.

Another complication is that the 90-day period actually includes the time for translating the report in the three official languages of the WTO—English, French, and Spanish. Between 20 and 30 days out of those 90 are necessary for average-length reports and even more, if the reports are longer. It is thus not surprising that recent delays can be attributed partly to lack of sufficient number of translators. In this respect, it has been suggested that reports be issued in 90 days in the language in which they were drafted (which would be mostly English, and a few in Spanish) with the translations in the other two languages to follow at a later date, but certain Members, particularly French speaking, have objected to such proposals.

In reality, strict respect of the 90-day deadline may not make much difference for the parties. In particular, the delays are considerably more important at panel level, where the circulation of reports may now take up to two years, despite the fact that under the DSU it should not exceed nine months. Nonetheless, experience demonstrates that, in the absence of some form of competition, time limits have an important disciplining effect. Abandoning the idea of any pre-defined timeframe for issuing panel and Appellate Body reports may therefore take away the pressure from the divisions' efforts to reach a consensus and is not an appropriate solution. What should be the appropriate time limit under the current realities is, however, a different question.

With the 3-months deadline becoming less and less tenable as a timeframe, even 'the 90 days' as a symbol has been discredited because of the way it has been derogated from. Taking as a benchmark the DSU-prescribed deadlines, there is a three-fold proportion between the length of panel and Appellate Body proceedings. Given the substantial delays in issuing panel reports, the Appellate Body cannot be expected to deal with an appeal of a similar size disproportionately faster. At the same time, linking the Appellate Body's to panels' timeframes does not take into consideration the fact that panelist normally have another full-time occupation, such as ambassadors or practitioners, and may not be able to devote as much time to a dispute as an Appellate Body Member, who is under an obligation to 'be available at all times and on short notice'.

Besides, extending the deadline to 120 days, for instance, may work in some cases but it is highly unlikely to be respected in disputes such as the aircraft subsidy disputes. Another possibility is to envisage a system whereby participants would agree to a fixed time limit and a default, relatively short one, would apply in the absence of such agreement. Given the importance for WTO Members to remain in control of the dispute settlement process, it would be logical for participants to try to reach such an agreement. The difficulty with this proposal is, however, that an agreement coming from the participants may not appropriately take into account scheduling difficulties arising from possible backlog of cases and shortages of staff in the Secretariat. Ultimately, whereas it is inevitable that flexibility be built into any statutory time limit, this is an important principle in the WTO dispute settlement that should not be eroded.

B. Number of Appellate Body Members

The increase in the number of Appellate Body Members appears to be one of the most common proposals to address the Appellate Body's workload. It will not only

allow for the creation of more concurrent divisions but could also bring more geographical diversity into the system. Indeed, the WTO Appellate Body is smaller than other international courts or tribunals, such as the ECJ (28 members, one national of each Member State of the European Union), the ICJ (15 judges), the ICTY (16 'permanent' judges), and the International Tribunal for the Law of the Sea (ITLOS) (21 members).[88] With the exception of the ECJ, the number of cases before the Appellate Body is also much larger compared to these jurisdictions.

It is true that the case for such a reform may not have been so obvious some 10 years ago. For a long time the Appellate Body was able to deal efficiently with its increasingly busy agenda. Therefore, it could have been argued that, despite certain 'peak load' problems (e.g. when 13 notices of appeal were received in 2000), the overall number of disputes was at the time decreasing and that the 90-day deadline had been missed in only 5 out of approximately 55 cases.[89] Moreover, back in 1995 the small number of Appellate Body Members made sense making it easier to reach consensus and effectively resulting in very few dissenting opinions. However, presently, with more than 20 panels established and so more than 60 active panelists, it appears logical that the increased number of panelists would translate into an increased number of Appellate Body Members. Moreover, big economies like China and Russia were not Members of the WTO when the number of seven was agreed upon. Coupled up with a rising amount of cases, participants, jurisprudence, and complexity of issues, it appears that the case has been made for such an increase.

But while enlarging the Appellate Body may seem rather uncontroversial on its face, the number of Members in an increased Appellate Body is more delicate. This issue is closely linked to some features crucial to the balance in the dispute settlement system, such as the functioning of the exchange of views and the number of Appellate Body Members sitting in a particular appeal.[90] One concern is related to the importance of collegiality and whether it could be maintained in an enlarged Appellate Body. The implementation of this principle in the form of exchange of views among all Appellate Body Members for each particular case is of enormous benefit to the work of the Appellate Body. It permits divisions to draw on the individual and collective expertise of all Members by providing the advantage of a true 'cross-pollination' of the Appellate Body Members' various legal cultures,

88 See Lockhart and Voon, above n 24, at 478.

89 Steger, above n 61, at 43. Indeed, 7 Notices of Appeal were received in 2002, 6 in 2003, their number again increasing to 10 in 2004. Not so long ago, in 2013, only one Notice of Appeal was received. At the same time, however, that same year saw the largest number of panels established since 2006 (Appellate Body Annual Report 2013, WT/AB/20, 14 March 2014, at 6).

90 The increase in the number of Appellate Body Members is also linked to geopolitical considerations. Already during the first selection process the European Economic Community (EEC) representative agreed to having only one representative from Europe upon the condition to revise the number of Appellate Body Members by the next ministerial meeting (Steger, above n 10, at 449) It may be argued that an enlargement is inevitable also because of the increase in the membership of the WTO (128 original WTO Members versus 162 since 30 November 2015). The question is raised especially in the context of China's accession in 2001. Other WTO Members have also requested their 'own' permanent Appellate Body Members, similarly to the current practice of there always being one Appellate Body Member from both the EU and the USA. Such considerations and divergent interests, however, may make the reaching of an agreement on a reform unlikely in the short term.

experiences, and wisdom.[91] It also contributes greatly to the consistency and coherence of jurisprudence and consequently to 'providing security and predictability to the multilateral trading system'.[92] The exchange of views mechanism thus combines the benefits of deliberations of all Appellate Body Members with the advantages of decision-making by small divisions.

Debra Steger defends the 'unique culture and effective decision-making practice of the Appellate Body' and comments that enlarging it could put at risk its dynamic and collegial decision-making, in the process of which there has been so far no attempt to divide, even informally, like-minded Appellate Body Members into coalitions or 'camps'. Furthermore, despite the fact that Appellate Body Members are to be impartial and independent in deciding cases, there remains the concern that in an enlarged Appellate Body regional 'seats' may start developing, which may tend to 'vote' in favour of their region, instead of truly serving the Membership as a whole.[93] Ms Steger concludes that 'if there is not a very good reason to change the way the Appellate Body is working, the risk of losing some of its effectiveness, impartiality and independence, all rare and precious attributes, would appear to be too great'.

For his part, Mitsuo Matsushita considers that, with the accumulation of jurisprudence, the need to emphasize collegiality may not be as great as it was in the early days.[94] He suggests that an alternative could be to allow certain important cases involving discussions on the modification of precedents to be heard in an *en banc* session.[95] From this perspective, the risk of creating incoherence and differing strands in the case law in an enlarged Appellate Body may be overstated and creating larger and smaller chambers could serve as a viable substitute to the exchange of views. It would also ensure optimal use of the Appellate Body's resources. In fact, the practice to always rule on appeals in a division of three Appellate Body Members only has been considered an anomaly, given that in judicial procedures normally the appeal court is larger than the court of first instance. The experience of the ECJ could also serve as an example.[96]

91 Steger, above n 61, at 44.

92 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', 36 Journal of World Trade 605 (2002), at 612. See also Bacchus, above n 1, at 1039.

93 Steger, above n 61, at 44–45.

94 Mitsuo Matsushita, 'Some Thoughts on the Appellate Body', in Macrory, Appleton and Plummer, above n 47, at 1396.

95 Ibid, at 1397.

96 The ECJ consists of 28 judges, one from each EU Member State, and can sit in plenary session, as a Grand Chamber of 15 judges (including the president and vice-president, and three Presidents of Chambers of five Judges), or in chambers of three or five judges. Generally, 'the Court shall assign to the Chambers of five and of three Judges any case brought before it in so far as the difficulty or importance of the case or particular circumstances are not such as to require that it should be assigned to the Grand Chamber, unless a Member State or an institution of the European Union participating in the proceedings has requested that the case be assigned to the Grand Chamber' (Article 60(1) of the Rules of Procedure of the Court of Justice, 25 September 2012). Thus, the importance of the case, as well as the nature of the proceedings, is reflected in the choice of a Grand Chamber. This approach may, however, not be easily transposable on WTO level for a number of reasons, including the different nature of the proceedings (no private participants involved), coupled with the political sensitivity that the choice of a larger or smaller division entails.

An obstruction to creating fixed chambers may be the requirement of unpredictability of rotation of Appellate Body Members sitting in each division in the current system. At some courts, such as the ECJ, no secrecy of rotation exists and this does not seem to create tensions. Yet, there is an important difference in the number of cases handled annually by this jurisdiction, resulting in increased hazard as to the chamber that a particular case would be assigned to.[97] Unpredictability of rotation is not a concern in the case of the ICJ either, where, if a State party to a case does not have a judge of its nationality on the bench, it may choose a person to sit as an *ad hoc* judge in that specific case.[98] On the one hand, practice shows that such judges have often voted in disaccord with the submissions of their own country. Moreover, it is useful for purposes of deliberations to have a person more familiar with the views of both parties than elected judges may sometimes be. On the other hand, it has been argued that such an institution may only be justified by the novel character of the international judicial jurisdiction and should disappear as such jurisdiction became more firmly established.[99] While the implementation of such practice at Appellate Body level may alleviate the concerns stemming from the doing away with the secrecy of rotation, there may be practical difficulties in coming up with a pool of suitable candidates. It has been suggested that *ad hoc* judges could be chosen among former Appellate Body Members. That would, however, prejudice the opportunity for all WTO Members to choose a judge from their own country.

The decision of the authors of the DSU to allow for divisions of three only may also be closely related to the short time limits prescribed for the appeal process. Given the little time that is left for deliberations among division members within this 90-day timeframe, arguably the deadline would be even more difficult to respect if the divisions were composed of more than three Appellate Body Members. It thus seems that, if the 90-day deadline is extended, retaining the number of three for Appellate Body divisions hearing an appeal would ensure the continued efficiency of the appeals process. The introduction of decision-making *en banc* may also be difficult to implement in practice because it would require defining the circumstances in which a larger division, or the full Appellate Body, should hear and rule on a dispute. Such a decision is, by its nature, discretionary and could potentially lead to inflation in the number of cases decided *en banc*.[100] Independently of whether the decision about the division's size would be left to the Appellate Body, the presiding member of the division or to the participants to decide, it alone could easily take several meetings and result in an expansion of the timeframe. And while the complexity of the dispute is an objective criterion, it may be challenging to determine on a case-by-case basis. Therefore, while deciding certain disputes in larger chambers or *en banc* may ensure coherence and continuity of decision-making over time, in the absence of such procedures envisaged in the DSU, the system of exchange of views remains irreplaceable for the efficient functioning of the Appellate Body.

97 For instance, in 2015, 713 cases were brought before the ECJ and 616 were competed.

98 Article 31, paras 2 and 3 of the Statute of the Court.

99 See http://www.icj-cij.org/court/index.php?p1=1&p2=5 (visited 21 May 2017).

100 Ehlermann, above n 92, at 613.

In the author's opinion, while the exchange of views is a unique stage in the appellate process which was risky to create and difficult to implement, in practice it has worked remarkably well without leading to any deadlocks or delays in the proceedings and should not be abandoned.[101] As such, it represents a sufficient and crucial guarantee against undesirable divergences in jurisprudence. It also appears that the effective functioning of the system of collegiality, as well as the ability to reach a consensus within the divisions, would not be considerably affected if the number of Appellate Body Members would rise to nine, thus allowing for three different divisions to be formed at a time. At the end of the day, the exchange of views is about hearing different opinions and ensuring consistency of jurisprudence, not about reaching a consensus among all Appellate Body Members on each particular dispute.

One alternative to increasing the number of Appellate Body Members would be to allow them to sit in multiple appeals. While this is already the practice, it is seen as largely impractical, in view of the already *de facto* full-time engagement of Appellate Body Members, and the significant involvement required for each case, coupled with the demanding 90-day deadline. DG Azevêdo has pointed out that with continued likelihood that appeals will remain too numerous for the Appellate Body composed of seven Members to handle, and even with somewhat staggered appeal filings, the Appellate Body cannot hear more than three of the nowadays more complex appeals in parallel.[102]

Another alternative would be to introduce a reporting judge for each particular appeal. In the experience of the ECJ, the primary responsibility for decision-making lies with the Judge-Rapporteur designated by the President for each case. The Judge-Rapporteur follows closely the procedural progress of the case, draws up the preliminary report and the draft judgment, and subsequently revises to reflect the consensus of the chamber.[103] Such practice may allow for the Appellate Body Members to focus predominantly on one appeal, while providing advice and input for other concurrent appeals without full involvement in the factual and procedural aspects of these cases. At the same time, the idea of a Judge-Rapporteur comes closer to a situation of a single Appellate Body Member deciding a particular case. It would thus be logical that he or she, together with the dispute settlement lawyers associated with him or her (called law clerks or legal officers at the ICJ, and referendaires at the ECJ), be in charge of drafting the report. The Judge-Rapporteur would thus be more closely associated with the outcome in a particular dispute, which, in the context of the WTO, may raise concerns with some Members regarding Appellate Body Members' independence and impartiality. Moreover, it might require that each Appellate Body Member has his or her own legal team providing drafting assistance. Apart from the inevitable increase in the number of dispute settlement lawyers, ensuring a separate legal team for each Appellate Body Member will entail a change in the current system of the Appellate Body Secretariat. However, this system has proved successful

101 On one occasion, even a second, *ad hoc* exchange of views was organized after the regular one, in order to assist the division in breaking the deadlock and resolving the differences between its members.

102 Speech of the WTO Director-General Roberto Azevêdo, 26 September 2014.

103 Koen Lenaerts, Ignace Maselis, and Kathleen Gutman, *EU Procedural Law* (Oxford: Oxford University Press 2014), at 22–23.

and works in favour of ensuring both a consistency in the jurisprudence and more interaction between the Appellate Body Members working on the same dispute.

Finally, the Director of the Appellate Body Secretariat and the Secretariat itself have an important role in ensuring uniformity and continuity of the WTO jurisprudence over time, which they would continue to play efficiently in an enlarged Appellate Body. At the ECJ, each judge has their own separate cabinet with referendaires, who can serve as intermediaries by discussing cases via informal channels. By contrast, the 'pool system' of the Appellate Body Secretariat, which grew out of necessity due to the part-time employment of the Appellate Body Members, appears to ensure more direct consistency in the interactions between the Members and the Secretariat. Consequently, on this point and apart from increasing the number of Appellate Body Members, no further related reforms seem indispensable at the current stage.

C. Terms of appointment of Appellate Body Members

Given that the Appellate Body Members should be 'broadly representative of the membership in the WTO', it is not surprising that already the first selection process took several months. At the same time, the Selection Committee that was established was successfully used again in 1999 and 2001 and the process was conducted with great efficiency, leading to the timely appointment of the new Appellate Body Members. It thus appeared that the initial difficulty of distributing the seven seats to the different regions of the world was overcome and that the Appellate Body Members' appointment could be seen as less politically charged than one could expect and as *de facto* automatic.[104] However, the selection process has increasingly politicized in recent years[105] which may lead to delays in the settlement of disputes. As for re-appointment, the recently introduced practice of the candidates meeting with the WTO Members for discussions may be seen as sensitive because of the possibility to interfere with pending cases and make re-appointment depended on the Appellate Body Members' answers.[106] At the same time, in the presence of adequate safeguards, such as those adopted by the Chair of the DSB, such practice could also promote transparency of re-appointment and facilitate its timeliness.

If the current appointment process is probably not an element that will drastically change in the foreseeable future and has more indirect impact on the length of the proceedings, the terms of appointment of the Appellate Body Members has been one of the widely discussed issues in and outside the DSU negotiations. Regarding the length of the term, it is notable that the terms of office of other international courts and tribunals is longer: the ICJ, nine years; ITLOS, nine years; and the ECJ, six years (all of these terms are renewable). A four-year term, renewable once, 'does not seem to guarantee sufficiently the independence of the appointee' and a longer single term of six or eight years is a preferable option that would ensure

104 Claus-Dieter Ehlermann, 'Experiences from the WTO Appellate Body', 38 Texas International Law Journal (2003), at 475 and fn 33, at 469.

105 Claus-Dieter Ehlermann, 'Revisiting the Appellate Body: The First Six Years', in Marceau, above n 10, at 502.

106 Sacerdoti, above n 15.

legitimacy.[107] In particular, the above-mentioned concerns related to re-appointment would be eliminated. Furthermore, such term would contribute to greater continuity within the Appellate Body, given that there is a 'learning curve' in becoming an effective Appellate Body Member and that four to six years is too short a term to benefit from the experience and knowledge gained from being 'on the job'.[108] As a consequence and going back to the problem with ensuring the proper functioning of collegiality in an enlarged Appellate Body, it appears that a longer non-renewable term may positively influence the proper functioning of this principle. Therefore, one non-renewable term of a minimum of six and up to eight years should be the favoured solution.

In a related argument, whereas Appellate Body Members are expected to work part time, their engagement is *de facto* full time. Caseload may be uneven because timeframes are tight and start to run upon notification from the WTO Member of its intention to appeal, making scheduling difficult. In the face of such uncertainty and in view of the obligation in the Working Procedures to 'be available at all times and on short notice', many Appellate Body Members find it appropriate to cease other professional activities during their term.[109] Should they choose to continue pursuing other activities, synchronizing individual agendas and disputes' timetables may become even more challenging. Arguably, in the years after 2000, i.e. after the first generation of Appellate Body Members and at the time when the Appellate Body was going through a low period, it would have been more difficult to defend full-time appointment. However, precisely in these years of low tide part-time employment was in fact particularly detrimental for the cohesion and collegiality of the Appellate Body. This was because the Members' other professional activities could be seen as creating 'distractions' away from the dispute settlement system.[110]

Concerning the specific question of pension rights, as mentioned above, it appears that moving to full-time employment would not only be beneficial but also may not be more burdensome for the budget. Although practical questions arise concerning the precise expenses that should be covered, inspiration could be drawn from other courts such as the ECJ or the ICJ.[111] For all that, the shift towards a full-time employment is too closely linked to the sensitive issue of the financial consequences that it might entail and therefore remains an unlikely reform.

It may be also interesting to explore whether an increase in the number of Appellate Body Members from seven to nine would mean that they work effectively on a part-time basis. Ultimately, given the prestigious nature of the position, it appears that the issue of full-time employment of Appellate Body Members is a less

107 Ehlermann, above n 104, at 475.

108 Steger, above n 61, at 46.

109 Ibid, at 45–46.

110 Another consideration to keep in mind is that a single and longer term coupled with full-time engagement should also not exceed a certain number of years. Thus, a single eight-year term may be considered as taking too much of the member's professional life.

111 For instance, the salaries of the judges at the ECJ are calculated at 112.5%t of the highest civil service grade (currently around €256,000 per annum). They also receive a 15% residence allowance, entertainment allowance, an initial installation payment, transitional allowance upon retiring, and family allowance. Based on final salary and depending on service, the pension cannot exceed 70%of basic salary.

urgent one, as compared to the extension of the 90-day timeframe or the increase in their number.

D. Other proposals

First, regarding the proposal for introducing an interim review mechanism at Appellate Body stage, its purpose is not to address the problem of the Appellate Body's workload. Concerns have been raised, however, that, if accepted, such an additional stage would negatively influence the overall timeframe of the appellate process. Specifically, in view of the Appellate Body's mission that is limited to addressing issues of law, a discussion with the parties on its reasoning and findings prior to issuing the report would risk affecting the independence and authority of the Appellate Body.[112]

Second, concerning the proposal that Appellate Body Members give individual opinions or judgments on the issues raised on appeal, additional time and Secretariat resources would be required in order to prepare each of them. At the same time, however, the process of reaching a decision by consensus may in certain cases require even more time if the opinions in the division are split.[113] The more troublesome aspect of this proposal relates to the issue of impartiality and independence of the Appellate Body Members. For instance, Giorgio Sacerdoti notes, in the context of re-appointment, that pressure or interference in this process would be devoid of purpose precisely because the Appellate Body 'operates by consensus' and because 'dissents are rare and anonymous and unable to shift the course of the case law'.[114] It thus appears that by installing more Membership control, the introduction of separate opinions by each Appellate Body Member could adversely affect the overall timeframe required for completing the appeal process.

Third, as for the remand authority proposal, authors are split as to whether it would have positive or negative consequences on the timeframes at Appellate Body level. On the one hand, introducing such possibility should enhance the efficiency of both panels and the Appellate Body, allowing them to focus on their proper mandate in the WTO's two-tier dispute settlement system—panels as 'finders of the facts' and the Appellate Body as a 'reviewer' of questions of law and legal interpretations. For instance, currently panels feel pressure to set out factual aspects in more detail than necessary to resolve the dispute and to address parties' arguments on an arguendo basis, in the event that the Appellate Body would reverse certain findings on appeal and would need to complete the legal analysis. On the other hand, allowing panels to reopen cases, hear new evidence and arguments, and review their original findings in light of the Appellate Body's legal guidance will inevitably increase the overall

112 Claus-Dieter Ehlermann, 'Reflections on the Appellate Body of the WTO', 6 Journal of International Economic Law 695 (2003), at 697. 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* (London: Cameron May, 2004), at 129.

113 Julio Lacarte-Muró, one of the first Appellate Body Members, recalls how on one occasion it took the division 'a whole week of going in and out of each other's offices and chatting in corridors to suddenly find the magic formula that was acceptable to all three' (Julio Lacarte-Muró, 'Launching the Appellate Body', in Marceau, above n 10, at 478).

114 Sacerdoti, above n 15.

length of the dispute settlement process.[115] But time would nevertheless be saved for those cases, which the proposal is specifically concerned with, where the Appellate Body finds itself unable to complete the legal analysis and thus resolve the dispute. Instead of starting from scratch and requesting that a new panel be established, a complainant would be able to benefit from the 'remand' panel which should in principle conduct its work within stricter time limits, as compared to the original panel. Thus, remand—with, for example, a guideline of 90 days to 6 months—would be more expeditious than refiling the entire case that might take up to one and a half years.[116] In turn, under the current situation, in the absence of sufficient time to explore complex legal issues raised in a particular appeal, and in light of considerations for parties' due process rights, the Appellate Body may find it increasingly inappropriate to complete the legal analysis.[117] Thus, in past cases, the Appellate Body has declined to complete the analysis in the absence of full exploration of the issues at the panel stage, and specifically in the presence of a 'novel' issue.[118] The strict timeframes under the DSU demonstrate the potential for such due process concerns to arise.[119]

Fourth, certain reforms in the panel process may also positively impact the workload of the Appellate Body, such as establishing a system of permanent panelists, instead of the current a*d hoc* appointment. Given certain problems in the panels' treatment of evidence or in their fact-finding function, improved consistency and quality of panel reports may translate into less work at Appellate Body level because it would be able to focus more efficiently on the legal questions at issue.[120]

E. Optimization of the appellate process

The above-discussed proposals, if agreed upon, would most probably alleviate the burden from the increasing workload of the Appellate Body. It is also true, however, that these reforms are not high on the DSU agenda and agreement among WTO Members may not emerge in the near future. It is thus important to consider how the Appellate Body's work can be optimized within the limits of the current rules. Certain substantial steps in this direction have already been made by both the WTO Director General and the Director of the Appellate Body.

As mentioned above, DG Azevêdo reallocated resources, awarded temporary contracts, and created a number of new posts in the three DSB divisions.[121] Whereas the Appellate Body started with 3 lawyers back in 1995, this number rose to 10 in 2013 and is currently up to 16 lawyers. 'Reshuffling' WTO staff also has its limits, since it would be difficult for people from other divisions to temporarily fill in posts

115 Steger, above n 61, at 47.

116 Pauwelyn, above n 59, at xi.

117 Ricardo Ramírez and Kaarlo Castren, 'Will the Increased Workload of WTO Panels and the Appellate Body Change How WTO Disputes are Adjudicated?', in Marceau, above n 10, at 620–21.

118 See Appellate Body Report, *US – Section 211 Appropriations Act*, WT/DS176/AB/R, adopted 1 February 2002, para 343, and *EC – Export Subsidies on Sugar*, WT/DS265/AB/R, adopted 19 May 2005, para 339.

119 Pauwelyn, above n 59, at 10.

120 Steger, above n 61, at 47–48.

121 See Speech of the WTO Director-General Roberto Azevêdo, 26 September 2014.

at the Appellate Body Secretariat, due to the need for specific experience. However, having more people in the Secretariat is indeed crucial for the efficient functioning of the Appellate Body. Whereas two to four people are normally necessary to form a team for a particular dispute, depending on its size and complexity, some unusually large cases are in the pipeline for appeal. Disputes such as *EC and certain Member States – Large Civil Aircraft (Article 21.5 – US)*, *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, and *Australia – Tobacco Plain Packaging*, if fully staffed, are likely to absorb most of the Appellate Body resources leaving a very limited number of lawyers available for the other pending cases. Indeed, at the time of the original proceedings in the aircraft disputes, five out of the nine lawyers were put on that case, making it extremely strenuous to manage the rest of the upcoming appeals. It is therefore necessary to have reserve teams, seconding people to other WTO divisions in case there would be periods of lower workload. Indeed, it appears that even if the workload at panel and Appellate Body level may be cyclical, it evolves with an upward trend.

The Appellate Body has also undertaken specific reforms with the aim of maximizing its resources. With a view to rationalizing the appellate process and reducing the span of its initial phase, the amended 2010 Appellate Body Working Procedures revised the internal processes and now require for the appellant's submission to be filed on the same day as the date of the filing of the Notice of Appeal.[122] There are in fact constant on-going efforts to optimize the working process. Furthermore, the WTO Digital Dispute Settlement Registry (DDSR) initiative is at its last stages of implementation. Essentially, the project includes a central electronic storage facility for all dispute settlement records, a research facility for WTO Members and the Secretariat, and a secure electronic registry for filing and serving dispute settlement documents online. The aim of the DDSR is to leverage more recent technological capabilities in order to increase efficiency, reduce costs including for courier services, and enhance document security.[123] As of March 2015 the Appellate Body has also adopted, on a trial basis, the practice of annexing to Appellate Body reports the executive summaries of the arguments submitted by the participants and third participants.[124] The aim is *inter alia* to redirect resources formerly used to scrutinize the arguments of the participants to other arias of appeal work.[125] The participants' executive summaries save, on average, five days in each proceeding.

In October 2015 the Appellate Body issued a Communication on Limits on the Length of Written Submissions, intending to initiate further reflection and discussion among and with WTO Members on issues that may arise in connection with the setting of limits on the length of participants' and third participants' written

122 See Working Procedures for Appellate Review, WT/AB/WP/5, 4 January 2005, and WT/AB/WP/6, 16 August 2010 (above n 3). Under the old Working Procedures, the appellant's submission had to be filed within seven days after that date.

123 Dispute Settlement Body, 25 June 2012, Minutes of Meeting, WT/DSB/M/318, para 69.

124 Communication from the Appellate Body, Executive Summaries of Written Submissions in Appellate Proceedings, WT/AB/23, 11 March 2015.

125 See Law 360, WTO Appellate Body Takes Steps To Ease Workload, 12 March 2015, available at http://www.law360.com/articles/630688/wto-appellate-body-takes-steps-to-ease-workload (visited 21 May 2017).

submissions. Discussion is on-going but such a reform would be expected to result in time-savings in resolving appeals, would allow for better management of appellate proceedings, and contribute to a more optimal use of the Appellate Body's and participants' resources.[126] At the same time, producing a shorter document might in fact entail more work, especially if it does not result in eliminating certain claims from the written submission but rather compressing the arguments. It also seems that page limits for submissions exist in practice, even if not written in formal statute. Would a system with page limits be put in place, the division should have the right to depart from the general rule, in order to ensure fair and equal treatment of cases depending on their particularities.

Finally, it is worth recalling that 'efficiency' is not measured purely in hours and days. Indeed, the question of the efficiency of the WTO Appellate Body lies at the basis of its legitimacy as a judicial institution and legitimacy may depend both on inputs (process) and on outputs (results). As noted by Joseph Weiler, the legitimacy of courts 'which is meant to transcend specific results and to enjoy long endurance will depend on both the integrity of the process but, in addition and uniquely, on the quality both substantive and communicative of [a court's] reasoning'.[127] Efficiency therefore should also mean quality and achieving the purpose of the dispute settlement, namely, to secure a positive solution to a dispute. This could mean not addressing, in Appellate Body reports, frivolous claims that do not add anything to the resolution of the problem or adopting a more pointed approach to addressing the participants' arguments. For instance, it has been suggested that the flood of claims under Article 11 of the DSU concerning a panel's obligation to 'make an objective assessment of the matter before it, including an objective assessment of the facts of the case' could be managed by the Appellate Body becoming more deferential in its review of fact finding by panels. Arguably, this is already becoming the case.[128] Under a more exacting standard, parties might be more reluctant to make tenuous claims that would be difficult to win. But efficiency could also mean devoting more time to certain stages of the process, such as conducting longer oral hearings, in order to reach a clear outcome, or taking time in order to 'make every effort' to take decisions by consensus pursuant to Rule 3 of the Working Procedures, instead of being unable 'to reach a common view on a particularly difficult issue due to lack of sufficient time for ample deliberation'.[129]

126 Limits on the Length of Written Submissions, Communication from the Appellate Body, Annex 2 to Appellate Body Annual Report 2015, above n 6. Some of the questions raised in the Communication ask whether limits on the length of written submissions may affect the number of issues and arguments raised on appeal, the focus of submissions on the key issues, their quality and clarity, and the ability of the participants to exercise their due process rights; whether such limits would likely lead to longer or shorter hearings, or whether they might lead to requests by the Appellate Body for additional written memoranda from the participants in the course of the proceedings.

127 Joseph H. H. Weiler, 'The Rule of Lawyers and the Ethos of Diplomats Reflections on the Internal and External Legitimacy of WTO Dispute Settlement', 35(2) Journal of World Trade 191 (2001), at 204.

128 Ramírez and Castren, above n 117, at 619. The authors refer, by way of example, to the Appellate Body's statement that not 'every error allegedly committed by a panel amounts to a violation of Article 11 of the DSU', but only those that are so material that, 'taken together or singly', they undermine the objectivity of the panel's assessment of the matter before it (ibid, quoting *US – Large Civil Aircraft (2nd Complaint)*, para 992).

129 Ramírez and Castren, above n 117, at 619.

In this regard, some authors consider that one simple way to reduce the workload of the Appellate Body would be issuing shorter, more concise reports. Under Article 17.12 of the DSU the Appellate Body 'shall address each of the issues raised' on appeal. Arguably, however, while close attention should be paid to the process of drafting a report, it may not be necessary to provide very detailed explanations as to the reasons for arriving at certain conclusions or for dismissing certain arguments.[130] Also, it appears that some WTO Members, especially developing ones, may not benefit from detailed explanations of the jurisprudence, as opposed to focusing on 'secur[ing] a positive solution to a dispute'. It has been pointed out recently that whereas submissions of WTO Members are sometimes too voluminous, there is also a tendency for Appellate Body reports to 'leave no stone unturned', and that, by contrast, what WTO Members are ultimately looking for is the final decision which the report itself serves as a vehicle for delivering.[131] On the other hand, the length and the complexity of Appellate Body reports often times hinges on the arguments put forward by the participants, the number and complexity of the provisions, and the growing jurisprudence. Commentators also highlight that reports have an important legitimizing function for the dispute settlement system and, by fully engaging with the parties' arguments, they become more acceptable for the WTO Members.[132]

Legitimacy of adjudicators is closely linked to legal reasoning. As Weiler puts it:

> To reject, imperiously, with no explanation . . . is indeed a privilege of emperors, not of courts. The legitimacy of courts rests in grand part on their capacity to listen to the parties, to deliberate impartially favouring neither the powerful nor the meek, to have the courage to decide and then, crucially, to motivate and explain the decisions.[133]

Therefore, legitimacy, as conditioned by the quality of decision-making, also requires, in the words of David Unterhalter, that 'those who decide the dispute have come to grips with the issues and can engage fully on these issues with the parties' and 'that the losing party comes away from the process with the conviction that its case was properly understood and considered'.[134] In comparison to the ECJ, the

130 The Appellate Body has found itself that Article 17.12 does not preclude it from exercising judicial economy. In *US – Upland Cotton* for instance, the Appellate Body considered it unnecessary to develop interpretations of certain terms for the purpose of resolving the dispute (see Appellate Body Report, *US – Upland Cotton*, WT/DS267/AB/R, adopted 16 October 2014, paras 510–11).

131 Wooyong Han, First Secretary, Mission of the Republic of Korea, speaking at the 9th Annual Update on WTO Dispute Settlement, available at http://graduateinstitute.ch/lang/en/pid/1963/_/events/ctei/2016/9th-annual-update-on-wto-dispute (visited 21 May 2017).

132 Jan Bohanes, Senior Counsel, Advisory Centre on WTO Law, speaking at the 9th Annual Update on WTO Dispute Settlement, available at: http://graduateinstitute.ch/lang/en/pid/1963/_/events/ctei/2016/9th-annual-update-on-wto-dispute (visited 21 May 2017). By contrast, Lorand Bartels (Senior Lecturer in Law, Cambridge University, speaking at the same event) observes that the ECJ deals with similar issues in a much more concise manner. It might be observed, however, that the level of integration of the EU, coupled with the ensuing authority held by its Court, result in important distinctions between the two adjudicative bodies that make comparison difficult, if not impossible.

133 Weiler, above n 127, at 204.

134 Farewell speech of Appellate Body Member David Unterhalter, 22 January 2014, available at https://www.wto.org/english/tratop_e/dispu_e/unterhalterspeech_e.htm (visited 21 May 2017).

Appellate Body addresses in more detail the parties' arguments and its reports incorporate more elaborate legal reasoning. There are undoubtedly limits to substantiating outcomes, notably in the context of *obiter dicta*. At the same time, an Appellate Body report has to reflect properly the concerns of the participants, 'in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings "in order to ensure effective resolution of disputes to the benefit of all Members"'.[135]

V. CONCLUSION

The problems arising from the Appellate Body's workload are of a systemic and structural nature and will not be easily resolved. Putting aside the merits of the various DSU reform proposals, much can be and is being done to rationalize the appellate process, so as to ensure the issuing of reports within the shortest time possible. However, the time and effort required to prepare an Appellate Body report is also a function of numerous factors, including the participants' submissions and the length and quality of the panel reports. Therefore, a multiplicity of actors can make substantial contributions to the efficiency of the appellate process. In particular, full involvement of WTO Members is required. They should exercise restraint in drafting their written submissions and reflect in them only genuine and meaningful claims, without expanding them beyond what is necessary. Full cooperation and involvement in conducting oral hearings is essential. WTO Members should also not hinder the process by other means, such as blocking re-appointment of Appellate Body Members or otherwise weakening the independence and impartiality of the Appellate Body. This is because efficiency is inextricably linked to competence and autonomous decision-making. And legitimacy requires the Appellate Body to continue finding the right equilibrium between ensuring efficient adjudication and high-quality legal reasoning in its reports. This message also resonates in the words of the 2016 Chair of the Appellate Body, Thomas Graham, when 'speaking up' before the WTO Members:

> Our constituents are you, the Members of the WTO who created the Appellate Body, framed our mandate, bring your disputes to us, have the ultimate word on acceptance of our findings, and must comply with our findings after they are authorized by the DSB. Let us see if we can work together to maintain, nurture, and preserve the trust and credibility that has been built up over the years in this dispute settlement system, which is uniquely effective, but fragile, and which cannot be taken for granted.[136]

135 Appellate Body Report, *Australia – Salmon*, WT/DS18/AB/R, adopted 18 May 2000, para 223, quoting Article 21.1 of the DSU.

136 Speaking up: the State of the Appellate Body, at: https://www.wto.org/english/news_e/news16_e/ab_22nov16_e.pdf (visited 21 May 2017).