The WTO Appellate Body: What Lessons Can Be Learned?

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OUTLINE OF PRESENTATION

• Introduction
  • History
  • WTO Dispute Settlement

• WTO Appellate Review
  • Institutional Aspects
  • Appeal Procedures
  • Deliberations and Decisions

• Are There Lessons To Be Learned?
HISTORY
History: Dispute Settlement under the GATT

• GATT (WTO predecessor): not a permanent institution

• ITO Charter called for dispute settlement system but this “died” with ITO

• Two provisions in the GATT on resolving differences: Articles XXII and XXIII
History: Dispute Settlement under the GATT

- Practices developed over time – panel process started around 1955
- 1979 “Tokyo Understanding” – codified practices
- No appellate review
WTO AGREEMENTS
1995
WTO in 1995

- WTO Agreements came into force in 1995
- Appellate Body established: 1995
- Novelty of appellate review in state-to-state litigation
WTO Dispute Settlement System
What was New?

• One system for all Agreements (subsidies, goods, services, intellectual property, agriculture, etc.)
• “Automaticity” (negative consensus rule)
• Appellate level
Dispute Settlement Body

- Comprised of all WTO Members
- Oversee dispute settlement
  - Establish panels
  - Adopt panel and Appellate Body reports
  - Monitor implementation
  - Authorize retaliation
WTO DISPUTE SETTLEMENT
GUIDING PRINCIPLES
“Central element in providing security and predictability to the multilateral trading system”

“To clarify existing provisions”

“Aim”: secure a positive solution
• First objective: secure withdrawal of measures concerned

• Compensation: temporary measure pending withdrawal

• Last resort: retaliation
WHAT AND WHO?
Significant Issues at Stake

• Multi-billion dollar impact:
  o FSC: $4 billion
  o Steel: > $2 billion (EC alone)
  o Byrd: > $1.7 billion
  o GMOs $17 billion world market
    Lost sales in USA alone: $350 million / year
What are the Disputes About?

• Products / commodities / services:
  • cotton, sugar, dairy products, textiles, lumber, steel, beef hormones, automobiles, bananas, shrimp, gasoline, gambling and betting
Members Active in Dispute Settlement
(as of 31 October 2003)*

<table>
<thead>
<tr>
<th>Rank</th>
<th>Complainant</th>
<th>Respondent</th>
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<tbody>
<tr>
<td>1</td>
<td>USA</td>
<td>30</td>
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<tr>
<td>2</td>
<td>EC</td>
<td>29</td>
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<tr>
<td>3</td>
<td>Canada</td>
<td>14</td>
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<tr>
<td>4</td>
<td>Brazil</td>
<td>11</td>
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<tr>
<td>5</td>
<td>India</td>
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<td>6</td>
<td>Japan</td>
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<td>6</td>
<td>Argentina</td>
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<td>7</td>
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<td>7</td>
<td>Rep. of Korea</td>
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<td>8</td>
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<td>4</td>
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<td>9</td>
<td>Mexico</td>
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<tr>
<td>10</td>
<td>Thailand</td>
<td>4</td>
</tr>
<tr>
<td>10</td>
<td>New Zealand</td>
<td>5</td>
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* Excludes third party activity
THE WTO APPELLATE BODY
INSTITUTIONAL ASPECTS
• A standing Appellate Body shall be established by the Dispute Settlement Body (DSB)

• The Appellate Body shall hear appeals from panel cases

❖ DSU Article 17.1
What Happens Before the Appeal?

WTO Panel Process

- Confidential Consultations
- Panel procedure (written and oral phases)
- Interim Report: confidential draft to parties
- Interim Review: Option for parties to comment on Interim Report
- Final Report: to parties only (takes about 9 months)
- Circulation of Report (to all WTO Members and public)
- Adoption of Report (within 60 days) or appeal

9 months on average

2 to 3 months
Standing Appellate Body

- Composed of 7 Members
- 3 serve on each case (rotation)
- 4-year term; renewable once

- DSU Articles 17.1 and 17.2
Qualifications of Appellate Body Members

- Persons of recognized authority, with demonstrated expertise in law, international trade and subject-matter of covered agreements generally

- Broadly representative of WTO Membership (147 Members)

- Must be available at all times and on short notice

- Avoid direct or indirect conflict of interest (guidelines)

  - DSU Article 17.3
Current Composition of Appellate Body

Chairman: Georges Abi-Saab (Egypt)

Members: Luiz Olavo Baptista (Brazil)
          A.V. Ganesan (India)
          Merit E. Janow (USA)
          John Lockhart (Australia)
          Giorgio Sacerdoti (Italy)
          Yasuhei Taniguchi (Japan)
The Appellate Body Members

L to R (Back Row): Messrs. Sacerdoti, Baptista, Lockhart and Taniguchi

L to R (Front Row): Mr. Ganesan, Ms. Janow and Mr. Abi-Saab
Appellate Body Secretariat

- Administrative and legal support
- 11 lawyers and 4 support staff
- Two interns for 3-month periods

❖ DSU Article 17.7
Appellate Body Members
Part Time or Full Time?

In 2001: 231 days worked (9 appeals)

In 2003: 119 days worked (6 appeals)
• Retainer: CHF 7,000.00 per month
• Fee: CHF 600.00 per day
• *Per diem*: CHF 370.00
• Health plan: CHF 169.40 per month
• Travel: Business class air fare
• No pension plan
• Diplomatic Status
Statistics

• Number of Appellate Body Reports issued to date - 61

• 1996 - 2003: average 8 appeals per year

• Most frequent litigants: the United States, the European Communities, Canada, and Brazil

• Percentage of panel reports appealed: 68% (61 of 89 reports)
Percentage of Adopted Panel Reports Appealed
APPELLATE REVIEW

• Scope
• Mandate
• Applicable Law
Scope of Appellate Review

• Grounds for appeal?
  
  • Appeals limited to “issues of law covered in the panel report and legal interpretations developed by the panel”

  • Cannot appeal factual findings
  
  • No remand authority

  DSU Article 17.6
Mandate of Appellate Body

- **Article 17.13 of DSU** – “The Appellate Body may **uphold, modify or reverse** the legal findings and conclusions of the panel”

- “Completing the analysis”
Applicable Law

- To “clarify the existing provisions” of the WTO Agreements “in accordance with customary rules of interpretation of public international law”

- Cannot add to or diminish the rights and obligations of WTO Members provided for in the covered agreements
A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
APPEAL PROCESS

- Appellate Body Members authorized to draw up working procedures

- These govern:
  - duties of Appellate Body Members
  - selection of Divisions
  - decision-making process
  - Notice of Appeal
  - submissions
  - oral hearing

- DSU Article 17.9
As a general rule, proceedings shall not exceed 60 days from the date a party notifies its decision to appeal to the date the Appellate Body circulates its report.

In NO case shall the proceedings exceed 90 days.

Official languages: English, French and Spanish.

- DSU Article 17.5
### The Appellate Review Process: Working Schedule

#### Timetable for Appeals*

<table>
<thead>
<tr>
<th>Action</th>
<th>Day</th>
</tr>
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<tbody>
<tr>
<td>Notice of Appeal</td>
<td>0</td>
</tr>
<tr>
<td>Appellant’s Submission</td>
<td>10</td>
</tr>
<tr>
<td>Other Appellant(s) Submission(s)</td>
<td>15</td>
</tr>
<tr>
<td>Appellee(s) Submission(s)</td>
<td>25</td>
</tr>
<tr>
<td>Third Participant(s) Submission(s)</td>
<td>25</td>
</tr>
<tr>
<td>Oral hearing</td>
<td>35-40</td>
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<tr>
<td>Circulation of Report</td>
<td>60-90</td>
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</table>

* Subsidies appeals: deadlines halved
Oral Hearing

- Conduct of the Oral hearing
  - Usually one full day but may extend to second or third day
  - Confidential (DSU Art. 17.10)
    Open only to participants and third participants
  - English, Spanish or French
Oral Hearing

• Representation
  • Usually government lawyers
  • Representation by private legal counsel permitted but rare
  • Advisory Centre on WTO Law: developing countries
Role of Non-State Actors?

- *Amicus curiae* briefs have been accepted by panels and the Appellate Body

- Thus far have not influenced decisions

- Highly controversial subject
APPELLATE BODY
DELIBERATIONS AND DECISIONS
Deliberations and Decisions

- 3 of 7 Appellate Body Members form a **Division** to hear each appeal

- All 7 Appellate Body Members review written submissions and transcript of hearing for every appeal: “**collegiality**”

- Appellate Body Report **signed** by 3 Members of Division
Deliberations and Decisions

- Opinions “shall be anonymous” (DSU Article 17.11)

- **Consensus** if possible, otherwise majority vote
  - never been a dissent in 61 appeals
  - one concurring statement (*EC - Asbestos*)
Appellate Body Report

- Issued on Day 90 in English, French and Spanish (missed deadline only 4 times in 61 appeals)

- Unlike panel process, issued to parties, all WTO Members and the public on same day
Adoption of Appellate Body Reports

- Appellate Body makes “findings” in Reports

- Appellate Body “recommends” that the Dispute Settlement Body request the offending party to bring its measures into conformity with its obligations in the relevant WTO Agreement(s)

- Reports shall be adopted by the DSB “and unconditionally accepted by the parties to the dispute” within 30 days following circulation

- Every Appellate Body Report has been adopted
Are Appellate Body Reports Binding?

• Yes, once adopted, but only between the parties to the appeal

• Technically not binding on other WTO Members but tend to have precedential value
THE WTO APPELLATE BODY
ARE THERE LESSONS
TO BE LEARNED?
The Appellate Body: Are There Lessons To Be Learned?

- Over time, development of body of law
- Consistency / Predictability
- Timely decisions (90 days)
- Secretariat an asset
The Appellate Body: Are there Lessons To Be Learned?

The Individuals

• Highly respected individuals with established reputations

• Generally avoided publicity ("faceless bureaucrats")

• Have never spoken publicly or written about decisions

• Nationality has never played a role

• Never a dissent
The Appellate Body: Secret to Success?

Independent, Impartial and Objective

“The Appellate Body has been described as unflinching in its rulings. I believe this to have been the case. We are well aware that none of our rulings is likely to be greeted with universal approval; but our function is another: to be independent, impartial and objective at all times. I believe this also to have been the case.”

Julio Lacarte-Muró
Farewell Address
19 December 2001
Some Complaints

• USA over dumping, subsidies, safeguards cases
  ➢ standard of review: deference to domestic authority?

• Gap-filling

• Reference to general principles of public international law (e.g. environment, State responsibility)

• Compliance record
  ➢ Quite good
  ➢ A few famous cases: *Hormones, FSC, Offset Act (Byrd)*
DSU Reform
Numerous Proposals

• Transparency
• Professionalization of panel process
• Increase number of Appellate Body Members
• Partial adoption of Appellate Body Reports
• Business confidential information
• Remand