

**PREPARATORY COMMITTEE
FOR THE
WORLD TRADE ORGANIZATION**

RESTRICTED
PC/IPL/13
8 December 1994

(94-2711)

**SUB-COMMITTEE ON INSTITUTIONAL,
PROCEDURAL AND LEGAL MATTERS**

ESTABLISHMENT OF THE APPELLATE BODY

Recommendations by the Preparatory Committee to the WTO
approved on 6 December

1. The Dispute Settlement Understanding (DSU) provides that a standing Appellate Body shall be established by the DSB to hear appeals from panel cases on issues of law covered in the panel report and legal interpretations developed by the panel. However, the DSU does not answer all questions which must be settled before the Appellate Body can function effectively. Based on the provisions of the DSU, input from delegations, and data from the Secretariat on experience with past disputes, this note addresses these issues and makes proposals.

2. In making these proposals, it is understood that not all issues connected with the Appellate Body require decisions or recommendations at this point. Many issues, such as the size and powers of the Appellate Body, are already determined in the DSU and do not therefore require decisions. Of those issues requiring a decision, some, such as the selection of the Appellate Body members, clearly must be decided before that body can function. Others, such as matters related to the working procedures of the Appellate Body, are only to be taken after that body is established. It is not therefore necessary to tie up all loose ends at this stage.

3. Decisions taken before the entry into force of the WTO will have to be taken by the Preparatory Committee, and will technically take the form of "recommendations to the WTO".¹ Decisions taken after the entry into force of the WTO may be taken by the General Council (sitting as the DSB) or the Appellate Body itself, in consultation with the Chairman of the DSB and the Director-General.² Proposals put forward here concern the composition of the Appellate Body, including conditions of employment of its members and conflict of interest guidelines for members and supporting staff, and the type of administrative support given to it.

A. Composition of the Appellate Body

4. The DSU provides that the DSB shall appoint seven persons to serve on the Appellate Body.³ It is to be a standing body, with members serving four-year terms, except for three initial appointees determined by lot whose terms expire at the end of two years.⁴ Vacancies are to be filled as they arise and, in the case of an unfinished term, last only until the end of that term.⁵ The success of the WTO will depend greatly on the proper composition of the Appellate Body, and persons of the highest calibre should serve on it. Issues arise as to its members' expertise, representative balance, impartiality, conditions of employment, and the selection procedures to be used.

1. Expertise of persons serving on the Appellate Body

5. The DSU provides that the Appellate Body "shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally." The expertise should be of a type that allows Appellate Body members to resolve "issues of law covered in the panel report and legal interpretations developed by the panel."⁶

2. Representative balance

6. While the overriding concern is to provide highly-qualified members for the Appellate Body, the DSU also requires that the Appellate Body membership be "broadly representative" of the membership in the WTO. Therefore factors such as different geographical areas, levels of development, and legal systems shall be duly taken into account. The question of how this balance is to be achieved is best left to be worked out during the actual consultation and selection procedures.

3. Impartiality and confidentiality

7. The DSU provides that members of the Appellate Body "shall not be affiliated with any government."⁷ Members of the Appellate Body should not therefore have any attachment to a government that would compromise their independence of judgment. This requirement would not necessarily rule out persons who, although paid by a government, serve in a function rigorously and demonstrably independent from that government.

8. The DSU also provides that the members of the Appellate Body "shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest."⁸ It would appear desirable to clarify the scope of this requirement through the elaboration of high standards of conduct. Members of the Appellate Body would adhere to such standards and, in a particular case, disclose any relevant financial, business and professional interests.

9. The DSU further provides that "the proceedings of the Appellate Body shall be confidential."⁹ It would thus be desirable to elaborate rules protecting the confidentiality of the deliberations of the Appellate Body, and ensuring the non-disclosure by Appellate Body members and support staff of confidential information provided by participants in the dispute settlement process.

4. Conditions of employment of members

10. The DSU provides that Appellate Body members "shall be available at all times and on short notice."¹⁰ The first part of this clause suggests that members of the Appellate Body have a priority working relationship with the WTO. The second part of the clause suggests that members may have other activities. The DSU also provides that all members "shall stay abreast of dispute settlement activities and other relevant activities of the WTO."¹¹

11. The contractual basis of members of the Appellate Body should reflect the overriding concern that candidates are of a high enough calibre to ensure the integrity and authority of decisions taken by the Appellate Body. The requirement that high-calibre members be available at all times could be met, on a flexible basis, by offering Appellate Body members contracts based on a monthly retainer plus a fee for actual days worked. This contractual arrangement could also lead to a wider range of candidates being available, since members could continue to pursue other activities where they were resident. This arrangement could be kept under review by the DSB, and considered at the latest at the first Ministerial Conference, to determine whether a move to full-time employment was warranted.

12. The amount of a retainer/fee package would have to be large enough to offset a member's opportunity cost of work foregone because of potential conflicts of interest, or incompatibility with sporadic trips to Geneva. This cost would also include the disruption of a member's career due to the uncertain but limited length of the Appellate Body assignment (two or four years initially, with a possibility of a one further period of four years) and the uncertainty of the total remuneration actually received. Further, the compensation should be high enough to provide an incentive for a member not to take on work which might create a conflict of interest. Accordingly, it would appear that the retainer should be set at a minimum of SF 7,000 per month, plus a fully-adequate daily fee, travel expenses and a per diem. The actual amounts should be set on the basis of further research on current rates for equivalent services under similar conditions. The contractual conditions for each member of the Appellate Body should be the same, reflecting the principle that all the members should have equal status.

5. Selection procedure

13. The DSU provides that "the DSB shall appoint persons to serve on the Appellate Body."¹² The decision by the DSB to appoint Appellate Body members could be 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. Suggestions for candidates could be forwarded by delegations to the Director-General. These suggestions could include candidates of nationalities other than that of the forwarding delegation.

B. Matters Concerning the Internal Procedures of the Appellate Body

14. The DSU provides that "working procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information."¹³ Matters such as guaranteeing the rotation required by the DSU and facilitating communications, if necessary, within the Appellate Body should form part of the working procedures. The DSB Chairman, at the appropriate time, should consult with Members in order to obtain their views on the working procedures prior to advising the Appellate Body.

C. Administrative and Legal Support

15. The DSU provides that the Appellate Body "shall be provided with appropriate administrative and legal support as it requires."¹⁴ The number of support staff needed depends on the anticipated workload of the Appellate Body. This in turn will depend largely on the number of new panel cases and the anticipated propensity to appeal panel decisions. Under the GATT, there was an average of six new panel cases per year during the past five years, with actual annual numbers fluctuating between two and ten. At one point during that period, sixteen panel cases were under way at one time. Two additional factors could also lead to much greater dispute settlement activity: the increased scope of review resulting from services and intellectual property disputes, and the increased attractiveness of a more automatic dispute settlement system.

16. Based on these factors, a reasonable level of support in the initial stages of operation of the Appellate Body would be one registrar, three professional assistants with legal training, and sufficient clerical staff. The registrar would be in charge of support to the Appellate Body, ensuring that there was a pool of appropriate legal and trade policy expertise, and administrative assistance, available to the Body and its members.

17. The Appellate Body and its support staff should be independent from the Secretariat. The support staff should be selected by the Director-General, in consultation with the Chairman of the DSB, on a competitive basis following a public advertisement. They should be employed by the WTO, on

conditions' similar to those accorded secretariat staff of similar rank, but should otherwise be administratively separate from it and answerable to the Appellate Body. Any movement of support staff from the Appellate Body to the WTO Secretariat should be on a competitive basis following a public advertisement, and not by simple administrative transfer. The Secretariat shall put aside sufficient space to house the Appellate Body.

Endnotes

1. Decision on the Establishment of the Preparatory Committee of the World Trade Organization, Article 7.
2. DSU Article 17:9.
3. DSU Article 17:1, 2
4. DSU Article 17:2, sentence 1
5. DSU Article 17:2, sentences 3, 4.
6. DSU Article 17:6
7. DSU Article 17:3, sentence 2.
8. DSU, Article 17:3, sentence 5.
9. DSU, Article 17:10, sentence 10.
10. DSU Article 17:3, sentence 2.
11. DSU 17:3, sentence 4.
12. DSU Section 17:2, sentence 1.
13. DSU, Article 17:9.
14. DSU Article 17:7.