

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

DISPUTE SETTLEMENT

WORLD TRADE ORGANIZATION

3.3 Appellate Review



UNITED NATIONS
New York and Geneva, 2003

NOTE

The Course on Dispute Settlement in International Trade, Investment and Intellectual Property consists of forty modules.

This Module has been prepared on the basis of a first draft by Ms. Petina Gappah at the request of the United Nations Conference on Trade and Development (UNCTAD). The views and opinions expressed are those of the author and not necessarily those of the United Nations, WTO, WIPO, ICSID, UNCITRAL or the Advisory Centre on WTO Law.

The designations employed and the presentation of the material do not imply an expression of any opinion whatsoever on the part of the United Nations concerning the legal status of any country, territory, city or areas or of its authorities, or concerning the delimitations of its frontiers or boundaries. In quotations from the official documents and the jurisprudence of international organizations and tribunals countries are designated as reported.

The United Nations holds copyright to this document. The course is also available in electronic format on the UNCTAD website (www.unctad.org). Copies may be downloaded free of charge on the understanding that they will be used for teaching or study and not for a commercial purpose. Appropriate acknowledgement of the source is requested.

UNCTAD/EDM/Misc.232/Add.17

Copyright © United Nations, 2003
All rights reserved

TABLE OF CONTENTS

Note	ii
What you will learn	1
1 The Appellate Body	3
1.1 Establishment of the Appellate Body	3
1.2 Composition of the Appellate Body	3
1.2.1 Appointment	3
1.2.2 Required Professional Qualifications	4
1.2.3 Broadly Representative of Membership in the WTO	4
1.2.4 Availability	4
1.2.5 Impartiality and Independence	5
1.3 Institutional Structure of the Appellate Body	6
1.3.1 Divisions of the Appellate Body	6
1.3.2 Chairman of the Appellate Body	7
1.3.3 Appellate Body Secretariat	7
1.4 Test Your Understanding	8
2 Scope of Appellate Review	9
2.1 Who may appeal?	9
2.2 What can be appealed?	9
2.2.1 Issues of Law and Legal Interpretations	9
2.2.2 Distinction Between Issues of Law and Issues of Fact	10
2.2.3 Appeal of a Panel's Assessment of Evidence	11
2.3 Mandate of the Appellate Body	12
2.3.1 Uphold, Modify or Reverse Legal Findings and Conclusions	12
2.3.2 Absence of Remand Authority	13
2.3.3 Completing the Legal Analysis	13
2.4 Test Your Understanding	15
3 General Features of Appellate Body Proceedings	17
3.1 Working Procedures for Appellate Review	17
3.2 Time Frame for Appellate Body Proceedings	17
3.2.1 Overall Time Frame	17
3.2.2 Detailed Timetable for Appeals	18
3.3 Confidentiality of Appellate Body Proceedings	19
3.3.1 Scope of Confidentiality Obligations	19
3.3.2 Protection of Business Confidential Information	21
3.4 Amicus Curiae Briefs	21
3.4.1 Amicus Curiae Briefs Attached to a Participant's Submission	21
3.4.2 Amicus Curiae Briefs Submitted Directly to the Appellate Body	22
3.4.3 Additional Procedure to Handle Amicus Curiae Briefs	23
3.4.4 Amicus Curiae Briefs Submitted by WTO Members	23
3.5 Test your Understanding	24

4	Steps in the Appellate Body Proceedings	27
4.1	<i>Initiation of Appellate Body Proceedings</i>	27
4.1.1	<i>Notice of Appeal</i>	27
4.1.2	<i>Panel Record</i>	28
4.1.3	<i>Selection of the Division</i>	28
4.1.4	<i>Working Schedule for the Appeal</i>	28
4.1.5	<i>Withdrawal of Appeal</i>	28
4.2	<i>Written Submissions</i>	29
4.2.1	<i>Appellant's Submission</i>	29
4.2.2	<i>Other Appellant's Submission</i>	30
4.2.3	<i>Appellee's Submission</i>	30
4.2.4	<i>Third Participant's Submission</i>	31
4.2.5	<i>Additional Memoranda</i>	31
4.3	<i>Oral Hearing</i>	32
4.3.1	<i>Conduct of the Oral Hearing</i>	32
4.3.2	<i>Third Party Participation in the Oral Hearing</i>	32
4.3.3	<i>Representation by Private Legal Counsel</i>	33
4.4	<i>Deliberations and Decisions</i>	33
4.4.1	<i>Deliberations of the Division</i>	33
4.4.2	<i>Ex Parte Communications</i>	33
4.4.3	<i>Exchange of Views</i>	34
4.4.4	<i>Drafting, Signing and Circulation of the Report</i>	34
4.4.5	<i>Adoption of the Report</i>	35
4.5	<i>Test Your Understanding</i>	35
5	Developing Country Members	37
5.1	<i>Use of the Appellate Review Process</i>	37
5.2	<i>Special Rules for Developing Country Members</i>	37
6	Case Studies	39
7	Further Reading	41
7.1	<i>Articles</i>	41
7.2	<i>Documents and Information</i>	41

WHAT YOU WILL LEARN

Module 3.2 in this Course deals with the panel process of the WTO dispute settlement system, i.e., the process of adjudication of international trade disputes by the WTO panels. This Module deals with the process of appellate review of the reports of those panels by the Appellate Body of the WTO.

The first Section of this Module concerns the establishment and composition of the Appellate Body, the appointment of the Members and the requirements concerning professional qualifications, nationality, availability and impartiality and independence. It also deals with the institutional structure of the Appellate Body, i.e., its divisions and their composition, its chairperson and its Secretariat. The second Section addresses the central issue of the scope of appellate review in WTO dispute settlement. It covers who may appeal, what can be appealed and what the mandate of the Appellate Body is. The third Section deals with some key features of Appellate Body proceedings, such as the time frame for the proceedings and their confidential nature. It also addresses the controversial issue of *amicus curiae* briefs. The fourth Section describes the various steps of the Appellate Body proceedings, from the notice of appeal to the circulation of the report. Finally, the fifth Section deals with the use made by developing country Members of the appellate review process and examines whether there are any rules providing for special and differential treatment for developing country Members in this context.

1. THE APPELLATE BODY

Objectives

On completion of this section, the reader will be able:

- to describe the composition and institutional structure of the WTO's highest judicial organ, the Appellate Body.
- to list the criteria which the DSB will apply in deciding on the appointment of Appellate Body Members.
- to enumerate the requirements of availability, independence and impartiality which Members have to meet throughout their term in office.
- to discuss the role of divisions of the Appellate Body in the appellate review process.

1.1 Establishment of the Appellate Body

Article 17.1 DSU

The Appellate Body was established in February 1995 by the WTO Dispute Settlement Body (the “DSB”) as a standing international tribunal to hear appeals from WTO panel reports.¹ The establishment of the Appellate Body was provided for in Article 17.1 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the “DSU”), which is an integral part of the 1994 *Marrakesh Agreement Establishing the World Trade Organization*.² The establishment of the Appellate Body, and with it the introduction of the possibility of appellate review of panel reports, is one of the main innovations to the old GATT dispute settlement system brought about by the Uruguay Round of Multilateral Trade Negotiations.³

1.2 Composition of the Appellate Body

Article 17.1 DSU

Article 17.1 of the DSU provides that the Appellate Body shall be composed of seven persons. These persons are commonly referred to as Members of the Appellate Body.

1.2.1 Appointment

The Appellate Body Members are appointed by the Dispute Settlement Body (the “DSB”), a political body in which all WTO Members are represented. The decision to appoint persons to the Appellate Body is taken by consensus among all WTO Members. Appellate Body Members are appointed for a term of four years which can be renewed once.

¹ Decision Establishing the Appellate Body, *Recommendations by the Preparatory Committee for the WTO approved by the Dispute Settlement Body on 10 February 1995, WT/DSB/1, dated 19 June 1995.*

² See Module 3.1.

³ Ibid.

1.2.2 Required Professional Qualifications

Article 17.3 DSU

With regard to the qualifications of the Members of the Appellate Body, Article 17.3 of the DSU provides:

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 DSU does not specifically state that Appellate Body Members must be trained as lawyers. They can be from any professional background as long as they have demonstrated expertise in law, international trade and/or the subject matter of the covered agreements generally. To date, most Appellate Body Members have been senior government officials, university professors, practising lawyers or senior judges before joining the Appellate Body. All but two Members thus far had a professional and academic background in law.

1.2.3 Broadly Representative of Membership in the WTO

Article 17.3 DSU

Article 17.3 of the DSU also provides that the Appellate Body membership shall be “broadly representative of membership in the WTO”. Reflecting this requirement, the first Appellate Body Members, appointed in 1995, were from Egypt, Japan, Germany, New Zealand, the Philippines, the United States and Uruguay. There have always been three or four nationals of developing country Members among the seven Members of the Appellate Body. The composition of the Appellate Body in 2002 is as follows:

Professor Georges Michel Abi-Saab, Egypt, appointed 2000.

Mr. James Bacchus, United States, appointed 1995.

Professor Luiz Baptista, Brazil, appointed 2001.

Mr. A V Ganesan, India, appointed 2000.

Mr. John Lockhart, Australia, appointed 2001.

Professor Giorgio Sacerdoti, Italy, appointed 2001.

预览已结束，完整报告链接和二维码如下：

https://www.yunbaogao.cn/report/index/report?reportId=5_10730

