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## Reflections on Serving on the Appellate Body

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## REFLECTIONS ON SERVING ON THE APPELLATE BODY

Merit Janow<sup>†</sup>

Thank you very much. I am very pleased to be here and thank the organizers for inviting me to give a keynote address at this an extraordinary international law review conference on *WTO Law and Practice: The State of the Discipline* and to share with you some perspectives about my service on the Appellate Body of the World Trade Organization (WTO) from 2003 to 2007.

Service on the Appellate Body has been a unique experience and a special responsibility. It imbues in all of us who have been a part of this experience, be it Appellate Body members or secretariat attorneys, a sense of being part of something significant. No longer new or experimental, the Appellate Body is still quite a young institution in the world of international law and foreign relations. It is widely recognized as one of the notable innovations of the Uruguay Round of multilateral trade negotiations. The evolution and consolidation of the WTO's legal order does seem to be at a second stage in its development, quite different in some ways from the institutional challenges faced by the first membership of the Appellate Body some thirteen years ago. Before I share with you my assessment of where we are today, I will start with a few observations about where we have been.

### The GATT and WTO Approaches

At the outset of the Uruguay Round, I understand that most of the GATT Contracting Parties did not envision the establishment of a compulsory dispute settlement mechanism. Only toward the end of the Uruguay Round negotiations were the far-reaching and interrelated commitments secured under the principle of a "single undertaking," which stimulated the parties to adopt a comprehensive system of dispute settlement. What was the motivation for this hardening of the legal system? The intrinsic rationale seems to have been both economic and policy oriented: that is, to ensure that the market access commitments and other undertakings by nations would not be circumvented with impunity. A more general aim beyond settling specific disputes was to safeguard the security and predictability of the multilateral trading system, which terms came to be embedded in the Dispute Settlement Understanding itself. It was thought that legalization was needed to achieve these objectives, thereby necessitating a move away from

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a negotiated and power-based system toward a rule-based adjudicatory model. The new system introduced procedural guarantees and an implementation oversight mechanism to help insure compliance.

It is often said that constraining U.S. unilateralism was a motivating factor for other jurisdictions to agree to a binding multilateral dispute settlement mechanism. For the United States, in contrast, I believe that increasing the likelihood of effective settlement of disputes within a specified time frame was of central importance. The mechanisms for settlement of disputes under the GATT were seen as flawed and urgently needing reform.

Under the resulting rules system, decisions must be based on legal grounds and the rules are to be interpreted by means of the customary rules of interpretation of public international law. WTO law is therefore no longer a soft law system where the outcomes are subject only to further negotiated outcomes. Resolution of disputes in the shadow of the formal dispute settlement system still remains important, but if a case runs through the formalities of dispute settlement, it is WTO law and not economic or political might that drives the resolution.

Those of us who have been part of or observers of the GATT versus the WTO system cannot help but recall that the GATT panel system had a different character. The resolution of trade disputes under the GATT system reflected its diplomatic roots and for a long time (although not during the last years of its life) had more of the flavor of negotiations than the application of law to facts. The GATT mechanism also had numerous institutional and procedural weaknesses that could prove to be problematic. Professor John Jackson and others have written about these features extensively. To cite just two examples, parties could obstruct the formation of panels and a party to the dispute could oppose adoption of panel reports.

These and other architectural features of the old GATT system had consequences that were fairly profound in its operational effectiveness. Implementation was not assured except through recourse to threat of trade retaliation and authorized retaliation was extremely difficult to secure. Perhaps more importantly, rule coverage was more limited before the Uruguay Round. These limitations prompted the United States to undertake unilateral measures to secure market opening commitments deemed essential for U.S. commercial interests. Congress developed a variety of instruments to ratchet up pressure on U.S. trading partners, or in some instances the executive branch to step up its efforts to secure greater access to foreign markets. Indeed, in looking back at the 1980s and 1990s, a period when I was in the Office of the U.S. Trade Representative as a senior negotiator for Japan and China, it might be said that Congress fell in love with those tools.

Now, however, the newer, more legalistic approach introduced in the Uruguay Round is reflected in all stages of the current multilateral procedures. Ad hoc panels have been maintained, but a permanent (but not full time) appellate review body has been introduced and it has a number of features that are common to most international tribunals without the name. The Appellate Body is composed of seven members who are expected under the rules to be individuals with broad

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background in international trade law and who are appointed by the membership to serve a four-year term, renewable once. Appellate Body members are required to be independent and unaffiliated with any government and to be broadly representative of the WTO membership as a whole.

In my experience, governments have been scrupulous in maintaining the independence of the Appellate Body members. In my years on the Appellate Body, I had no contact with the U.S. government and, in fact, U.S. officials would avoid even extended pleasantries at the occasional cocktail party lest even such idle conversation generate any misimpression. This is as it should be.

Cases are decided in divisions of three Members, selected randomly, and the nationality of the three is no bar to hearing a dispute involving one's own jurisdiction. The Appellate Body Members with whom I have had the honor of serving are an extraordinary group. All but one were lawyers. I have found through experience on the Appellate Body, as well as in other settings (such as corporate boards), that while one may think that a particular expertise is critical, often times a mix of expertise can be extremely important in addressing the complex problems that arise. At the WTO Appellate Body, we have been fortunate to have individuals with broad litigation or judicial experience; international law experience; administrative law experience; trade law, policy and economic knowledge; and commercial law familiarity from both civil and common law jurisdictions, among other areas of expertise. Familiarity with the negotiating history of the Uruguay Round and trade policy generally is helpful, but it is legal expertise that is the dominant need on the Appellate Body. Having at least one member of the Appellate Body with deep knowledge of economics could be extremely useful.

Appellate Body members are not mediators. We are not asked to speak to the abstract question of what is "fair" in a particular situation. Rather, our task is to interpret issues of law. There is very little by way of agreed-upon preparatory materials to rely upon. This is regrettable but it is our reality.

If the goal is to secure some consistency and predictability in legal reasoning, it seems to me that this is a lawyer's task. Legal reasoning has its own particular methodology. I say this as a professor of law to an audience of lawyers. We all know well that there can be tremendous interpretative differences on a single text even among lawyers. Yet, I am inclined to think that the margin of that difference is reduced by the operation of sound legal interpretative reasoning. Some think that notions of diplomatic bargaining or diplomacy skills offer some improved scope for resolution of cases that come before the dispute settlement system. There may be some disputes that can find a diplomatic channel for resolution or that get resolved in the shadow of dispute settlement, but once a dispute goes into a formal channel of legal review requiring legal analysis, then that analysis needs to be undertaken predominantly by those with the habits of mind and the skills that come out of legal training and experience.

Service on the Appellate Body also requires participation by individuals who can make such service their first priority. The Appellate Body has seen a pretty constant flow of cases—on average, about four to six cases a year with some significant spike years. There were some thirteen cases in year 2000 and ten in

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the year 2005. I expect that 2008 will see the largest number of appeals to date, especially when implementation arbitrations are included in the total count. With a two-thirds appeal rate, the resulting case load makes the WTO the most active international tribunal in the world. The International Court of Justice has one to three cases a year, and its entire history has produced about the same number of cases as the WTO dispute settlement system has produced in its 13-year history.

You might ask whether the permanent but not full-time status for the Appellate Body members works well enough? As you may know, until recently only one of the Appellate Body members was permanently based in Geneva. All others come to Geneva when there is an appeal. When there are more than six appeals a year—and that is not a magic number, but something like that—then the center of gravity for an Appellate Body member must shift to Geneva from their home jurisdiction. All Appellate Body members must stand ready to be available on short notice and also make service on the Appellate Body their first priority. All Appellate Body Members are expected to review all submissions in a dispute whether they are serving on the Division or not. Moreover, Appellate Body Members usually should start reading a case once a panel report has been released. Waiting for the appeal to be filed is simply too late if it is a highly complex and dense record. Some time must also be spent reading relevant treatises and articles. Thus, the time commitment associated with service on the Appellate Body is far greater than simply the hours associated with reviewing submissions once an appeal is filed. My experience is that all Appellate Body members become accustomed to canceling their other commitments. As an American based on the East Coast, I always felt my frequent trips to Geneva—perhaps more than thirty over my four years—were a breeze compared with the travels of my colleagues from Japan, China, Australia, South Africa, India, Brazil, and so on. In fact, it can be easier to get from New York to Geneva than to Chicago, which I just discovered yesterday.

In brief, I think that the permanent but part-time system for Appellate Body Members does work well if there is a modest caseload, but it still involves a major time and intellectual commitment of Appellate Body members. If the caseload increases to more than six cases on a regular basis then it makes sense to think about full-time arrangements. Importantly, making the appointment full time would also underscore the seriousness of the assignment. In my view, the WTO should strive to get the most highly qualified legal and trade experts as possible to serve on the Appellate Body and in the Appellate Body Secretariat. This also means that jurisdictions must put in the effort to generate a deep pool of qualified candidates.

### Unique Operational Features

Let me briefly comment on some of the more defining and unique features of the operation of the Appellate Body and its deliberative approach. For WTO aficionados, the use of the term “collegiality” has important and unusual meaning. It has been central in supporting consistency and accuracy and in contributing to the depth of legal reasoning that has been achieved by the Appellate Body

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in its rulings. Although a division of three Members hears every appeal, there is a point in the process where all Members of the Appellate Body engage in an “exchange of views.” All seven Members review all submissions by parties and third parties and at the exchange, each Appellate Body Member is expected to put forward his or her view on the case. This is a helpful intellectual process for applying seven minds to the legal problems that come before us. In evaluating the issues of the case, the Members raise and identify possible approaches and solutions, and develop an understanding where the case sits in light of possibly relevant rulings of other panels and the Appellate Body. This exchange of views reflects a deliberative process where all participants must be prepared to contribute meaningfully. Efforts are made to reach consensus on core legal points, but it is left up to the Division to take those thoughts into its own preparation and drafting of the Appellate Body report. To be clear, it is the Division that is charged with conceptualizing and ruling on the case as the three Division members see it. Nevertheless, the views of all seven members do come into the deliberative process. I share this detail with you because I think it is important to understand both the deliberative process of the Appellate Body and the operating approach that leaves Divisions in charge yet puts some intellectual parameters to the exercise of individual views. The crafting of the final opinion requires the Division to sit down for numerous days around a large round table, meticulously developing every line in an Appellate Body report. It is time consuming and intensely collaborative.

I am often asked why dissents are rare and the rules require anonymity with respect to dissenting views. Appellate Body Members have doubtless worked hard to reach consensus wherever possible. This has been an important for establishing the credibility and predictability of the fledgling system. Coming from the U.S. legal culture where dissents are common and courts have often seen dissents in one era become majority views in another, I am less uncomfortable than some may be with the notion of airing separate views on particular issues—within bounds. What is important is establishing the credibility of the entire body, not the brilliance of its individual members. Anonymity has its place because the Appellate Body operates adjacent to a highly political WTO environment. In my experience, the Appellate Body Members have been independent and rigorous thinkers. If the WTO membership were to politicize its interpretation of rulings—e.g., associating certain views on particular issues with certain individuals on the Appellate Body from particular jurisdictions—this could prove corrosive.

I have heard from some judges sitting on appellate courts in the United States and elsewhere that the WTO Appellate Body process is rather unique in the amount of discourse that regularly occurs. One eminent U.S. judge mentioned to me that in his court the judges try to avoid direct discussions with other judicial colleagues and communicate instead through written documents exchanged by clerks who shuttle between chambers. This approach was deemed necessary to reduce potential conflicts. I am happy to say that such is not our experience on the Appellate Body and I hope it never becomes a remote and arid process of intellectual exchange.

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With the benefit of hindsight, it is clear to me that the two-thirds appeal rate that is now being experienced routinely is higher than what was originally imagined by the architects of the system. Jurisdictions appear to feel it necessary to exhaust all legal remedies, particularly if the additional time involved in the appeal is limited to the ninety days provided to the Appellate Body. The high rate of appeals may also stem in part from the fact that panel reports are often modified or reversed by the Appellate Body. I am not certain that the ad hoc panel system provides a sufficient institutional guarantee of quality. Panels have a large assignment, reviewing both issues of law and fact, and often the cases are voluminous. Working part time on these panel reports over a 12 to 18 month period can be expecting a great deal of individuals who have other full time professional activities and often are not experts on the matters under review.

Appeals must be based on issues of law and the Appellate Body review cannot introduce new facts nor remand cases if certain important facts are deemed absent. The ninety-day timeline is quite strict and the record of meeting that timeline is excellent. In those ninety days, appellants, appellees, and third parties must first make their submissions, then there are oral hearings lasting one to three days, followed by an exchange of views among the Appellate Body members, and then the Division meets to prepare the report, which is released simultaneously in three languages. This is a vigorous and demanding timeline which obliges the Appellate Body to be highly disciplined and efficient.

I am often asked whether oral hearings are worthwhile. I think they are almost always useful but less important than written submissions. Hearings routinely serve to help clarify key issues. Hearings provide an opportunity for the Appellate Body members to ask questions of the parties about key issues on appeal, and the parties only make brief opening and closing statements. The bulk of the time is spent by Appellate Body Members asking detailed questions. Indeed, because the hearing is the only opportunity for the Division to ask the parties to clarify those legal issues that are central to the case and over which Appellate Body Members have long been puzzling, it is not an occasion for long speeches by the parties. Hearings offer a chance to untangle legal and factual complexity. Sometimes the oral hearings and exchanges between the parties unfold in a highly spirited and precise legal fashion. I have also seen cases where the parties are not as well prepared and “on their toes,” operating with something less than the crisp professionalism one usually sees in appellate litigation.

One day perhaps I will write an essay on the five yeses and four noes of Appellate practice before the WTO. I will share with you that the most effective oral advocates that came before me were those parties who were able to work with their statements and their theory of the case yet also prepare a narrative that illuminated the operation of the covered agreement in question. Sometimes advocates simply reiterate what is in their written submission. Having read the panel reports, the submissions of the parties, and the opening statements, the Division hearing the case is familiar with the record. Simply reiterating what is in the submission is necessary to a point and is a low-risk strategy, but it is often less than illuminating to the Division. I always appreciate it when a party also takes on the other side’s core arguments directly and attempts to address those

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arguments head-on because this is a task required of the Appellate Body Members in their evaluation of the case.

### **The Political/Judicial Balance**

The WTO has compulsory jurisdiction over WTO-covered matters and WTO members are bound by the Dispute Settlement Understanding and subject to those procedures. Members cannot bypass the system and resort to other forums for purposes of adjudicating WTO law. Nor can WTO members assess unilaterally whether other members have infringed their obligations under the WTO and then take unilateral action on a WTO-covered matter. These are hard law constraints.

The strengthening of the judicial arm of the WTO that came with the introduction of the DSU has been accompanied—some have used the term “balanced”—by a specific role for the political bodies such as the Dispute Settlement Body (DSB). Decisions by panels and the Appellate Body are not self-executing as reports must be adopted by the DSB. Under the current rules, rejection by all of the members of the DSB would be necessary to prevent adoption, and such a rejection has never occurred. My Appellate Body colleague Giorgio Sacerdoti has argued that the strength of the system lies in the DSB’s approval of Appellate Body reports because the duty to comply with these decisions derives from an act of the political body. The judicial arm is also not left with the task of managing compliance. The political body requires implementation, and it is charged with authorizing retaliation as the ultimate sanction if the losing party does not comply and the dispute is not resolved. Putting the weight of the entire membership behind any decision of this kind may help to induce implementation.

### **Where Are We Today?**

It is already apparent that we are at the second stage in the life of the Appellate Body. More parties are using the system and are doing so in a manner that is more litigious in nature than in the past. One sees more procedural and jurisdictional challenges, although these are slimmed down from those customarily part of litigation in the United States and elsewhere. There is a growing professionalization of the trade bar. Outside counsel are increasingly accompanying parties to appeals and a small but expert WTO trade bar has developed in major capitals and in Geneva. Increased use is being made of so-called 21.5 challenges, which are implementation challenges. There is some increased use of expert and technical submissions. I would expect these trends to continue.

When stepping back and evaluating that which has been created, I would conclude that the system is in fact a judicial and legal one. The quasi-diplomatic instrument has been replaced by a largely judicial mechanism. As an academic, I live in a world where praise of the Appellate Body is rare and criticism is the academic succor. Some argue that the rule architecture is too tight—even though others contend that it is still too loose and insufficiently comprehensive. Some argue that economic sovereignty has been affected beyond that envisioned by the crafters of the Uruguay Round Agreements. I have heard it argued that this

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amounts to a curtailment of economic freedom at the national level. The United States and several other jurisdictions have periodically taken issue with some aspect of a panel or Appellate Body ruling and argued that it was over reaching or just plain wrong. A proper treatment of these critical perspectives does need attention by scholars and practitioners.

Nevertheless, suffice it to say that in my view there has been an under appreciation in the wider community of the judicial nature of the system that has been created and the overall benefits that this brings to the global trading system. Sometimes parties express surprise that terms used in the domestic law context do not produce identical outcomes in the international law context and when subject to the Vienna Convention. Differences between civil and common law approaches are partial explanations and, in my view, those differences in approach can prove meaningful. Terms used in one legal culture undergo some adjustments in another.

Those who argue that judges at the international level are more constrained or should see themselves as having a more limited mandate than judges at the domestic level are, in my view, correct. The perceived need for strict adherence to treaty text and the heavy reliance on dictionaries that occurred in the early years of the Appellate Body come out of this recognition. Despite the cautious approach undertaken by the Appellate Body as a general mindset, criticism of Appellate Body rulings often lands on the assertion that there has been “over reaching” or gap filling. This suggests that there needs to be more discourse on the nature of the WTO legal regime that has been established and the proper locus of the dividing line between legitimate interpretation of ambiguous treaty text and impermissible over reaching.

I am not one who starts from the assumption that the world needs more global rules—indeed, in many areas of economic globalization I believe that the challenge is to secure and maintain improved cooperation and coordination not global rules. In the area of international trade rules, however, the loss-of-sovereignty argument fails to appreciate the realities of the global economy and the attributes of trade. The array of economic activity that is global or cross border in nature has increased so much that national measures are often insufficient to deal with the problems or the opportunities created by markets. This must have been the profound recognition of many of the world’s leaders that led to the establishment of the WTO. There is no constructive way to turn the clock back. A reduction in global oversight of national measures in the trade area would occur only under very dark global economic circumstances. Protectionism and economic nationalism are much more likely to surface during a period of global economic strain than in periods of healthy economic growth. There is room even within WTO consistent measures for nations to introduce new tariffs that are above applied rates and below high bound rates and step up contingent protection. It is essential as we now enter a period of global slowdown that nations preserve what has been achieved and build upon its strengths.

### Assessing Performance

As an overall assessment, I would say that the system is not perfect but in this unruly and dangerous world in which we operate it is a good example of working multilateralism and it stands out as a new and important chapter in the evolution of international justice. The system is being used not only by major trading nations, notably, the United States and the European Communities, but increasingly by smaller and developing countries. Since 1995, more than 380 disputes resulting in formal consultations have been filed, there have been 123 panel reports circulated, and the Appellate Body is now on its 85th appeal. Small economies can challenge measures by big economies, and we have seen such challenges repeatedly. A high percentage of cases involve the DSU and GATT provisions but other covered agreements that have seen significant litigation are trade remedies and subsidies. Some cases are highly fact intensive; other cases are conceptual. The matters under litigation often involve billions of dollars and can raise serious questions about health, the environment, and other systemic matters. The record of compliance is quite good. I have not undertaken an independent analysis of compliance, but studies seem to show that approximately 85 percent of cases do produce compliance by the losing party. It is my intuition that compliance is not secured because of threat of economic sanction—instead it derives more from the reputational consequences of noncompliance.

An ongoing discussion is under way at the WTO about further reforms to the dispute settlement system. Many of the suggestions are quite technical. A few are systemic in nature. Overall, I do not think that major transformative reforms are needed, and the absence of major reform proposals suggests a certain satisfaction with the status quo.

Some of the more systemic proposals that are under discussion have emanated from the United States and the European Communities—a fact worth noting and taking seriously. If I understand the U.S. proposal correctly, it appears to be seeking more member control and flexibility in dispute settlement—which means the ability to exercise greater control by the parties of the resulting panel and Appellate Body reports. The United States is also urging the WTO membership to discuss and come up with shared understandings about key concepts such as the role of international law among other issues. Recently, the United States has proposed making the Appellate Body a full time assignment, expanding the Appellate Body Secretariat to provide law clerks for individual Appellate Body Members and requiring the Appellate Body Members to undertake some form of continuing education while in office.

The European Community for its part has suggested a number of steps that speak to further legalization of the process, for example, by calling for permanent panelists. Until this latest proposal by the United States, the U.S. and EU proposals appeared to be pulling in slightly opposite directions with the United States edging away from the further judicialization of dispute settlement and the EU seeming to embrace more if it.

My hope is that a wider community of experts, practitioners, and policy makers around the world will become familiar with the operation of the WTO and its

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dispute settlement system. Currently, only a small group of officials are truly familiar with the jurisprudence and the operating environment of the WTO and the dispute settlement system. I recall when I was a young law student attending a lecture by the eminent jurist Herbert Weschler and he said to us that if we really wanted to understand the U.S. Supreme Court we should read all the cases! This was a dispiriting admonition given the Court's long history. I now find myself thinking of Professor Weschler: if one wants to understand and evaluate the evolving jurisprudence of the WTO it is important to read most of the cases and certainly not just those involving one's own jurisdiction.

Let me close with a reflection I shared with the WTO membership upon my departure: namely, that I left the Appellate Body with greater confidence than when I entered that it is capable of handling complex and delicate issues. There is always a worry that cases will arise that are too complex, or too political, or that if trade talks falter it will appear that only dispute settlement is working. Nevertheless, such worries aside, we have already seen that the system can handle and review complex and delicate disputes in a professional fashion. On balance, I think it fair to say that over these last thirteen years the system has shown itself capable of serving the diverse membership that makes up the WTO.