

ICTSD Project on Dispute Settlement



Appeal Without Remand

A Design Flaw in WTO Dispute Settlement and How to Fix it

By **Joost Pauwelyn**
Duke University



International Centre for Trade
and Sustainable Development



Issue Paper No. 1

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CONTENTS

ABBREVIATIONS AND ACRONYMS	v
FOREWORD	vii
EXECUTIVE SUMMARY	ix
1. APPELLATE REVIEW IN THE WTO: THE ORIGINS OF A DESIGN FLAW	1
2. THE ORIGINAL DILEMNA IN FIVE SCENARIOS	2
2.1 The “judicial economy with claims” scenario	2
2.2 The “judicial economy within a defence” scenario	2
2.3 The “new interpretation” scenario	6
2.4 The “reversed mandate” scenario	7
2.5 The “procedural error” scenario	8
3. THE APPELLATE BODY RESPONSE: “COMPLETING THE ANALYSIS”	9
3.1 Sufficient factual record	9
3.2 Sufficient legal connection	10
3.3 Due process concerns	10
3.4 Whether and when parties must request to “complete the analysis”	11
4. CONCERNS WHEN THE APPELLATE BODY DOES “COMPLETE THE ANALYSIS”	12
4.1 The Appellate Body exceeds its mandate	12
4.2 The parties lose their right to appeal	13
4.3 Procedural uncertainty and due process	15
5. CONCERNS WHEN THE APPELLATE BODY DECLINES TO “COMPLETE THE ANALYSIS”	16
5.1 The entire dispute remains unresolved	17
5.2 Some claims are resolved, others not	18
5.3 Not completing the analysis in Article 21.5 implementation proceedings	21
6. POTENTIAL SOLUTIONS WITHOUT AMENDING THE DSU	22
6.1 Less (or no) judicial economy by panels	22

6.2 Expand the Appellate Body mandate enabling it to more often complete the analysis	24
6.3 Use Article 21.5 as a remand procedure	25
6.4 Expedite the proceedings in re-filed cases before a second panel or arbitration pursuant to DSU Article 25	26
7. THE DETAILS OF A REMAND/REFERRAL PROCESS	28
7.1 Authorisation for the Appellate Body to engage in fact finding	28
7.2 Who triggers the remand: The Appellate Body itself, either party or one party only?	29
7.3 When should remand be triggered: Before or after adoption of the Appellate Body report?	31
7.4 How is the remand panel established and who are the remand panellists?	32
7.5 What is the mandate of the remand panel?	33
7.6 When must the remand panel complete its work?	34
7.7 What procedures for remand panels?	35
7.8 What happens after the remand panel completes its work?	36
8. GUIDELINES FOR AN ALTERNATIVE SOLUTION.	38
ANNEX 1: APPEAL AND REMAND BEFORE OTHER INTERNATIONAL COURTS AND TRIBUNALS	40
1.1 The general rule: Absence of a right to appeal	40
1.2 International Criminal Courts and Tribunals	40
1.3 Appeals before the European Court of Justice	41
1.4 The NAFTA Extraordinary Challenge Procedure	42
1.5 Remand by NAFTA Chapter 19 panels to the national investigating authority	43
1.6 The ICSID Annulment Procedure	44
1.7 Interpretation and “new facts” proceedings	45
ENDNOTES	46
REFERENCES	61

ABBREVIATIONS AND ACRONYMS

AB	Appellate Body (WTO)
ADA	Antidumping Agreement
AoA	Agreement on Agriculture
CFI	Court of First Instance
DSB	Dispute Settlement Body (WTO)
DSU	Dispute Settlement Understanding (WTO)
ECJ	European Court of Justice
EFTA	European Free Trade Association
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICSID	International Convention on the Settlement of Investment Disputes between States and Nationals of Other States
ICTR	International Criminal Tribunal for Rwanda
ICTSD	International Centre for Trade and Sustainable Development
ICTY	International Criminal Tribunal for the Former Yugoslavia
ITA	Information Technology Agreement
ITLOS	International Tribunal for the Law of the Sea
MERCOSUR	Mercado Comun del Sur
NAFTA	North American Free Trade Agreement
RTP	reasonable period of time
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT Agreement	Technical Barriers to Trade Agreement
WTO	World Trade Organization

FOREWORD

The creation of the WTO dispute settlement system has been called a major achievement by observers and its importance has been echoed from all sides of the multilateral trading system. The Dispute Settlement Understanding (DSU), the agreement that governs the WTO dispute settlement mechanism, seeks to ensure an improved prospect of compliance, given its provisions on compensation and retaliation, and thus constitutes a central element in providing security and predictability to the multilateral trade system.

With more constraining procedures, and a fast-growing jurisprudence, the dispute settlement system has, however, become significantly more legalized and consequently more complex. This, in turn, has raised the demands on the capacity of Member countries interested in engaging the system to protect or advance their trade rights and objectives. While developing countries' participation in trade disputes has increased tremendously since the time of the GATT, most disputes are still confined to a small number of 'usual suspects' - countries such as the US, the EC, Canada, Brazil, India, Mexico, Korea, Japan, Thailand and Argentina. So far, 76% of all WTO disputes have been launched among this group of Members. This begs the question of engagement of other Members, and in particular of developing countries which may be facing undue trade restrictions.

Various reasons have been propounded for this lack of active engagement for the majority of the Membership. These include, a lack of awareness of WTO rights and obligations; inadequate coordination between government and private sector; capacity constraints in monitoring export trends, identifying existence of undue trade barriers and feasibility of legal challenge; financial and human resources constraints in lodging disputes, and often a lack of political will - the 'fear factor' - i.e., that trade preferences or other forms of assistance will be withdrawn, or some form of retaliatory action will be taken, if developing countries pursue cases against certain major trading partners. While many of these constraints need to be addressed at the national level, the current review process of the DSU also offers a potential avenue to improve the functioning of the DSU. In this respect, the absence of a remand procedure has often been highlighted as one of the areas where the system could be improved.

Imagine, for instance, a poor developing country that mustered the political courage and financial resources to file a WTO complaint. While a WTO panel initially decides against it, on appeal, the Appellate Body reverses the panel ruling but, decides that it cannot come to any conclusion because of gaps in the panel's factual record. So, after on average, one and a half years of litigation, the Member country ends up with an empty bag. This scenario can, and has, played out in the WTO arguably because of a design flaw in the DSU: the Appellate Body does not have the mandate to decide on factual questions, which sometimes means it cannot complete the analysis and resolution of a case. Yet, at the same time, the Appellate Body cannot remand a case back to the original panel, which sometimes forces a complainant to re-file a case from scratch. Consequently, in a growing number of disputes the Appellate Body has left parts of cases, or, on some occasions, entire cases, unresolved. The absence of a remand procedure can force developing country complainants to go through two full proceedings before they achieve a result. Given time and resource constraints, such re-filings subsequent to the Appellate Body finding that it "cannot complete the analysis" may simply be excluded as the money and or human resources may simply not be available for a second round of consultations, panel proceedings and Appellate Body hearings.

The study examines the origins and extent of this "design flaw" and offers possible solutions to alleviate the problem, either through a formal amendment of the Dispute Settlement Understanding

(DSU) and/or practices that do not require DSU amendment. The study argues that WTO dispute settlement needs an explicit remand process because of, firstly, the increasing legal and, especially, factual complexity of trade disputes and, secondly, to save the time, resources and other costs involved in a complete re-filing of a dispute in a system without remand. Four remand (or “referral”) proposals are currently on the table of the ongoing DSU review negotiations. The study, in analyzing these, proposes to expand remand to also include cases where the Appellate Body cannot complete the analysis on grounds relating to due process. Moreover, it proposes to put the right to seek remand solely in the hands of complainants. In the author’s view, complainants are the rightful party which benefit from completing the analysis. To give defendants the right to ask for a remand risks exposing the mechanism to delaying tactics.

The study concludes with an alternative solution to address the remand problem, combining, firstly, reducing the margin for judicial economy by panels; secondly, better rules and more scope for the Appellate Body itself to complete the analysis; and thirdly, an expedited remand process bearing in mind the preferences expressed by WTO Members and the lessons learnt in domestic and international appeal and remand systems.

This paper is produced under ICTSD’s research and dialogue program on Dispute Settlement and Legal Aspects of International Trade which aims to explore realistic strategies to maximize developing countries’ capability to engage international dispute settlement systems to defend their trade interest and sustainable development objectives. The author is Joost Pauwelyn, Professor of Law at Duke University, Durham, North Carolina.

We hope you will find this study a useful contribution to the debate on whether a remand procedure should indeed be incorporated into the WTO Dispute Settlement Understanding and, if so, the form such a mechanism should take.



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EXECUTIVE SUMMARY

1. This study analyses one particular aspect of World Trade Organization (WTO) dispute settlement: When the Appellate Body reverses a panel report it cannot currently send the case back to the panel. This aspect is commonly referred to as the absence of a “remand process” in WTO dispute settlement. The study examines the origins and extent of this “design flaw” and offers solutions to alleviate the problem, either through a formal amendment of the Dispute Settlement Understanding (DSU) and/or practices that do not require DSU amendment. The study argues that WTO dispute settlement needs an explicit remand process because of (1) the increasing legal and, especially, factual complexity of trade disputes and (2) to save the time, resources and other costs involved in a complete re-filing of a dispute in a system without remand. There is no doubt that WTO Members have recognized the need for remand as a top priority. In recent reports from the Chairperson of the Special Session of the Dispute Settlement Body (DSB) on DSU reform, remand is one of only a handful of DSU review topics that continues to make the list. Yet, the devil is in the details of setting up such a remand process. This study analyses all four proposals currently on the negotiating table, highlights their respective deficiencies and concludes with a proposal of its own.

2. When the Appellate Body overrules a panel, should it decide the case for itself, or let the panel have a second go at it? After ten years of operation, resolving this apparently simple question has turned out to be difficult and controversial. At the core of this problem is the doubly limited mandate of the Appellate Body (Section I). Firstly, following the common law model of first time appeals, appellate review in the WTO is focused on law, not facts. Yet, secondly, like the civil law model of first time appeals, the Appellate Body *cannot*, after overruling a panel, remand cases back to the panel.

3. This design flaw in the DSU - picking one aspect of an appeals system (legal questions only) *without* the other (remand) - can no doubt be explained by a desire to limit the duration and complexity of WTO dispute settlement proceedings. At the same time, it often makes it impossible for the Appellate Body to either (1) decide the case for itself (as it cannot make new factual findings), or (2) let the panel have a second go at it (as it cannot remand the case back to the panel). This study (Section II) identifies five different situations where this dilemma may arise: (1) the “judicial economy with claims” scenario, (2) the “judicial economy within a defence” scenario, (3) the “new interpretation” scenario, (4) the “reversed mandate” scenario and (5) the “procedural error” scenario.

4. The Appellate Body’s response to this recurring dilemma has been to either (1) “complete the analysis” nonetheless, or (2) simply leave the dispute, or part of it, unresolved. The latter solution - leaving the dispute, or part of it, unresolved - has been resorted to in case the Appellate Body (1) does not have a sufficient factual record before it, (2) faces new legal questions not sufficiently linked to those decided by the panel, or (3) when concerns of due process arise (Section III). The former solution - commonly referred to as “completing the analysis” - has raised three main concerns (Section IV): (1) the Appellate Body is said to exceed its mandate; (2) as the Appellate Body then decides an issue for the first time, parties lose their right of appeal; (3) as parties may not know whether or when the Appellate Body will complete the analysis due process may be hindered.

5. As much as completing the analysis has raised concerns, not completing the analysis equally raises problems (Section V). Firstly, the dispute is left unresolved, leaving both the parties and private operators in a state of uncertainty. Secondly, a new panel proceeding to complete the analysis is

likely to be long and costly, and may even be pointless when temporary measures (such as trade remedies) are involved. This uncertainty, delay and need for extra human and financial resources can be particularly damaging for developing countries. As WTO remedies are prospective only (no damages are awarded for past harm), unresolved disputes and long delays risk undermining the credibility of the WTO dispute settlement system.

6. In some cases, the issue left unresolved is minor. In other cases, however, the question(s) left open are crucial (consider: *EC - Sugar*, *US - DRAMS*, *US - Zeroing (EC)*, *US - Softwood Lumber IV and EC - Customs Matters*). In yet other disputes not completing the analysis leaves the entire case unresolved, as happened in *EC - LAN Equipment*, *Canada - Dairy (Article 21.5 - I)* and *US - Softwood Lumber VI (Article 21.5)*. Indicating the seriousness of the absence of remand, even where important questions were left unanswered, complainants have, so far, never re-filed a case. The one exception is *Canada - Dairy* where re-filing was made easy as New Zealand and the United States could simply request a second implementation panel under Article 21.5 of the DSU.

7. To resolve the problem of uncompleted cases there are, logically speaking, only two possibilities: the Appellate Body could do more, or panels could do more. Obviously, these two possibilities are not mutually exclusive. Moreover, either option could be pursued without a DSU amendment (Section VI) or with a DSU amendment (Section VII).

8. On the one hand, one could expand the mandate of the Appellate Body enabling it to more often complete the analysis. *Without* DSU review, the Appellate Body could simply soften its criteria for when to complete the analysis (in particular, the excuse of insufficient legal connection could be dropped). Moreover, parties could be obliged to request a completion of the analysis in their Notice of Appeal or Other Appeal, and at the very latest in their written submissions (that is, *before* the oral hearing), so as to enable a full discussion of the matter, reduce due process concerns and enable the Appellate Body to complete the analysis more frequently. For the same reasons, when it plans to reverse, or sees a high likelihood of reversal, of panel findings, the Appellate Body could also intensify its questioning of the parties at the oral hearing and request additional submissions, even after the oral hearing. Although this may be complicated given the 90 days time limit for WTO appeals, in some cases, the Appellate Body could also issue a preliminary ruling and request an additional round of submissions on the matter to be completed. To facilitate a completion of the analysis by the Appellate Body itself, *with* DSU review, the option for the Appellate Body to engage in fact finding when it cannot complete the analysis could be included (at the request of both parties, at the request of the complainant alone, or even at the Appellate Body's own initiative). Appeals in domestic legal systems as well as international courts and tribunals (discussed in Annex 1 to this study) indicate that for an appellate court to complete the analysis, even to consider and decide on facts (sometimes new facts) is very common.

9. On the other hand, rather than the Appellate Body itself, panels could be enlisted to do more so as to enable a positive resolution of WTO disputes. *Without* DSU review, panels could exercise less judicial economy - and make, in particular, more factual findings - which, in turn, should enable the Appellate Body to complete the analysis more frequently. In addition, Article 21.5 implementation panels can, at times, be functional equivalents to remand panels, even without reviewing the DSU, albeit only if either (1) a first Article 21.5 proceeding left the case unresolved or (2) an original proceeding found at least some violations (if no violations were found in the first place, no Article 21.5 implementation panel can be requested). Moreover, the re-filing of cases from scratch before a new panel could be expedited by agreement of the parties, or on the panel's own initiative after consulting the parties. The parties could also agree that an expedited Article 25 arbitration panel completes the analysis.

10. Yet, none of these options (with the exception of giving full fact-finding powers to the Appellate Body) would resolve the problem completely. To do so, a DSU amendment is necessary. *With* DSU review, the most obvious option is to install a remand procedure (Section VII).

11. Four remand (or “referral”) proposals are currently on the table of ongoing DSU review negotiations (by the EC, Jordan, a group of six WTO Members and Korea). -Their common feature is that remanding a case to the original panel would only happen at the request of a disputing party (the Appellate Body itself would not have remand authority), and only for the reason that the factual record is not sufficient (thereby approving of the Appellate Body’s current practice of completing the analysis). This study supports both of these suggestions (although it proposes to expand remand to include also cases where the Appellate Body cannot complete the analysis on due process grounds) and would, more specifically, put remand in the hands of complainants only. In this author’s view (a view that should, for reasons of legal certainty, be confirmed in the DSU amendment) complainants are the only party to benefit from completing the analysis. To also give defendants the right to ask for a remand risks delaying tactics.

12. The core distinction between the four DSU review proposals is that Korea suggests a remand before the original Appellate Body report is adopted; the other three proposals prefer a remand *after* adoption of the original Appellate Body report. To avoid complications of having two overlapping implementation phases, this study favours Korea’s approach (remand *before* adoption). Another core distinction is that Korea would prefer the original panel to make the necessary factual findings for the Appellate Body to then complete the legal analysis. The other three proposals require the remand panel to complete the analysis on both facts and law, and do not necessarily involve the Appellate Body during remand (only in case the remand panel is appealed). To save time and to preserve the right to appeal, this study supports the latter option (full completion by the remand panel itself).

13. All four proposals are conscious of the need to expedite remand proceedings, and so is this study. If the complainant wants a completion of the analysis, remand - with, for example, a guideline of 90 days and an absolute maximum of six months - would no doubt be more expeditious than re-filing the entire case (a process that risks taking one and a half years). Moreover, if, as this study suggests, remand is in the hands of complainants only, defendants would not be able to abuse remand to prolong proceedings.

14. In ten guidelines, the study concludes with an alternative solution to address the remand problem, combining (1) less judicial economy by panels; (2) better rules and more scope for the Appellate Body itself to complete the analysis and (3) an expedited remand process bearing in mind the preferences expressed by WTO Members (especially in the four proposals now on the negotiating table) and the lessons learnt in domestic and international appeal and remand systems (discussed in Annex 1 to this study).

1. APPELLATE REVIEW IN THE WTO: THE ORIGINS OF A DESIGN FLAW

15. Newly created in 1995, the Appellate Body was established to “hear appeals from panel cases” (DSU Article 17.1). The mandate of the Appellate Body is, however, restricted in two core respects. A first restriction is that appeals are limited to “issues of law” and “legal interpretations”. Article 17.6 of the DSU provides:

“An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel”.

A second restriction relates to what the Appellate Body can do in response to an appeal. In this respect, Article 17.13 of the DSU directs as follows:

“The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel”.

Where it modifies or reverses the panel, the Appellate Body was not given the explicit power to refer or remand the case back to the panel.

16. The combination of these two restrictions on the Appellate Body’s mandate - issues of law only; no remand - has led to a recurring dilemma. On numerous occasions the Appellate Body was put in the awkward situation where it could neither:

- (1) complete the case itself (as it can only decide issues of law, not issues of fact and is limited to upholding, modifying or reversing previous panel findings), nor;
- (2) send the case back to the panel (as the Appellate Body was not given remand authority).²

Although there may be more, this dilemma arises in at least five different scenarios, each of which is discussed in Section II below.

17. The origin of this dilemma is a design flaw in the DSU. More particularly, the DSU is a mixture of different types of appeals systems - civil law systems and common law systems; first appeals³ and second appeals - and essentially picked one aspect of a particular appeals system (legal questions only) *without* the other (remand).

18. Where it exists, the possibility to appeal fulfils two broad functions, be it in domestic law or international law⁴ :

- (1) review for *correctness* of the specific lower court ruling;
- (2) review for *uniformity* among different lower courts.

It is generally accepted that in the WTO, appeals were introduced mainly to fulfil the first function of correctness⁵. In return for the automatic adoption of panel reports (that is, the move from a positive to a negative consensus rule), negotiators felt the need to introduce a control or safety valve mechanism. Put differently, knowing that parties could no longer block the adoption of panel reports, not even those that are seriously flawed, parties introduced the Appellate Body whose task it would be to weed out “bad” panels⁶. The fact that this new Appellate Body could also ensure uniformity between panels and become an engine for the further development and refinement of a WTO legal system was not generally on the mind of those who established WTO appeals⁷. On the contrary, appeals were introduced to check the WTO judiciary and reassert member state control over it- not to aggrandize or strengthen the DSU with a strong and assertive “World Trade Court”.⁸

19. Some of the original proposals for a WTO appeal would have mandated the Appellate Body to correct panel decisions that are “fundamentally flawed” (Canadian proposal⁹) or allowed parties to have panel reports “reviewed

in their entirety” (Mexican proposal¹⁰). These proposals would, in other words, not have limited the mandate of the Appellate Body to legal issues only. This type of appeal, where both the law *and* the facts can be reviewed, is the template of first time appeals in civil law systems. In France, for example, the court of appeal considers both legal and factual issues and appellate proceedings amount to a second, *de novo* trial; appeals have what is called a “devolutive effect”, that is, an appeal transfers or devolves the entire dispute from the first level court to the appeals court.¹¹ The same is true in, for example, Belgium and Germany, but also in Japan and Korea.¹² This, what one could call “second bite at the apple” appeal, where both law and facts are reviewed, implies that the core objective of an appeal is correctness, not only correctness in law (for the benefit of the legal system), but also correctness in fact (for the benefit of providing justice to the specific parties in dispute).

20. It goes without saying that in this civil law type of appeal, with a *de novo* trial over both law and fact, there is no need for a remand procedure as the court of appeal can in principle do whatever the first level court can. In most civil law systems remand from an appellate court back to the original trial court is, therefore, unknown.¹³ For the same reason, the above-referenced proposals for appellate review in the WTO did not set out, nor did they need, a remand procedure. Indeed, the Canadian proposal on a WTO appeal explicitly confirmed that the Appellate Body “could decide either to uphold the panel report or *to substitute its own decision for that of the panel*”.¹⁴

21. In the ensuing DSU negotiations, however, the United States insisted that appellate review in the WTO be limited to “extraordinary cases where a panel report contains *legal interpretations* that are questioned formally by one of the parties”.¹⁵ In other words, for the United States, appellate review should be limited to specific legal questions rather than the entire matter in dispute. As pointed out earlier, this view carried the day in what became the

DSU (Article 17.6). This US insistence on “legal interpretations only” was no doubt inspired to save time and to stay within the strict time limits which the United States government must respect under Section 301 of the US Trade Act.¹⁶ However, the United States was not alone in its desire to limit the duration and complexity of WTO dispute settlement. Many other countries, especially developing countries, were sceptical of any WTO appeal in the first place for fear that “such a procedure could complicate and prolong the dispute settlement process”.¹⁷ Another reason to, eventually, not provide for an appeal on issues of fact was likely that, at the time, General Agreement on Tariffs and Trade (GATT) disputes were not fact intensive at all, and mostly centred on a cluster of undisputed facts.¹⁸ In this context, it was often thought that factual errors would in any case be corrected by the panel itself at the interim review stage. There was hence no need to make them subject to appeal.¹⁹ Limiting WTO appeals to legal questions also implied that the main objective of appellate review was to be correctness *in law*, that is, to add a level of control over “bad” *legal* interpretations by panels; not to ensure correctness *in fact* as in providing justice in respect of the specific factual issues in dispute. In sum, to the extent that WTO dispute settlement was to resemble commercial arbitration, finality and a quick resolution of the dispute held a premium over correctness in each and every element of the panel decision.

22. Yet, in addition to saving time, avoiding further complexity, and setting the objective of correctness in law (rather than fact), an appeal focused on issues of law (not issues of fact) is also the hallmark of appellate review in most common law systems, a feature which in no small part is driven by the prevalence of jury trials in those systems. In England, for example, before the Judicature Acts of 1873 and 1875, appellate review pursuant to the common law writ of error²⁰ was limited to errors of law, and the only purpose of appellate review was to ascertain whether the judge made a mistake in a legal ruling. As one comparative law scholar points out:

“Appellate review had nothing to do with whether justice was done, that is whether the right party, as demonstrated by the evidence, won...The facts, having been presented to the jury and decided by it, were not subject to review, both because this would be a denial of the right to a jury trial and because there was no record of the evidence presented to the jury”.²¹

In such appeals, limited as they are to legal questions, “[i]f the judge made a mistake, then a new trial was necessary”.²² In other words, appeals limited to legal issues came hand in hand with a remand procedure, a procedure which in civil law systems was not needed as, in such systems, (first time) appellate courts look at both law and facts and amount to a second trial anyhow.

23. With the reforms of the Judicature Acts of 1873 and 1875, however, appeals in England were, at least formally, expanded to include a review of both law and facts, in essence a re-hearing of the case similar to appeals in civil law systems.²³ In practice, however, review by the court of appeals remained much more restrictive. In particular, in England, findings of fact will only be overturned when, made by a judge, they were “plainly wrong”²⁴ or, when made by a jury, no reasonable jury could have reached the finding of fact.²⁵ The same is true for appeals in the United States: factual determinations made by a trial judge are, on appeal, tested by a deferential “clearly erroneous” standard²⁶; factual determinations by a jury must be upheld if a reasonable jury viewing the same facts could come to the same conclusion.²⁷ In other words, unlike first time appeals in civil law systems, first time appeals in England, the United States and most common law systems do not amount to a *de novo* re-hearing of the case or a “second bite at the apple”.²⁸

24. Crucially, given the original restriction of common law writs of errors to legal questions only, and the continuing focus of appeals on the law (rather than the facts), in most common law system appeals, the procedure of remand was

maintained. In the United States, for example,

“any ... court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, *and may remand the cause* and direct entry of such appropriate judgment, decree, or order, or *require such further proceeding to be had as may be just under the circumstances*”.²⁹

In other words, as much as remand in appeals in most civil law systems is of no use and unnecessary (the appellate court re-hears the full case anyhow), remand in appeals in most common law systems is crucial as without it the dispute could, in certain cases, not be resolved (the appellate court focuses on issues of law, not fact).

25. With this comparative background in mind, it seems, therefore, that some of the original proposals for appellate review in the WTO, framed along civil law lines (a review of both law and facts, without remand) were subsequently adapted to align more closely to the common law model of appeals (a focus on law, not facts). However - and here is the crux of the matter - in the process of reframing WTO appeals along the common law model, DSU negotiators failed to insert a pivotal feature of that common law model, namely: a remand procedure.³⁰ Put differently, the DSU is, from this perspective, a mixture of appellate procedures known in civil law (no remand for first time appeals) and appellate procedures prevalent in common law systems (review of the law, not the facts). Yet, in combination, this mixture - review of legal issues only, *without* remand - is dysfunctional in a number of scenarios (discussed below in Section II).

26. Like the focus on law, not facts, the absence of a remand process in WTO appellate procedures may be explained by time constraints; an arbitration-type desire to offer finality and to avoid delays and further complexity in WTO dispute settlement; and a belief that disputes

over factual elements would be limited and in any event resolved by the panel itself in the interim review stage. Indeed, with no factual disputes in sight, and an Appellate Body that can not only uphold or reverse but also modify legal interpretations by panels³¹, why install a remand?

27. Another way to look at this DSU design flaw is that the DSU seems copied from second level appeals as they are known in both civil and common law³² - that is, recourse against a court of appeal before, for example, the Supreme Court, *Cour de Cassation* or *Bundesgerichtshof*, all of which are limited to legal questions only³³ - but failed to include an indispensable element

of such second level appeals, namely: a remand process.³⁴

28. The different scenarios where this design flaw in the DSU has proven problematic are set out in the next section (Section II). Obviously, there may be overlaps between these five scenarios and there may also be other scenarios not yet discovered. However, it is important to distinguish between these different scenarios where the problem arises so as to enable more appropriate solutions and to realize, in particular, some of the limits of some of these solutions (e.g., they may address one scenario, but not the other).

2. THE ORIGINAL DILEMMA IN FIVE SCENARIOS

2.1 The “Judicial Economy with Claims” Scenario

29. Imagine a WTO dispute with two claims of violation: Claim 1 and Claim 2. These two claims could be within the same WTO provision or article, or in different articles, even different WTO agreements altogether. Imagine further that the panel finds a violation under Claim 1 and, on that ground, considers it unnecessary to also examine Claim 2: Finding an additional violation (under Claim 2) would not add anything in terms of the implementation that is required from the defendant. Hence, the panel exercises what is called “judicial economy”.³⁵ Imagine, finally, that the Appellate Body reverses the panel and finds that there is no violation under Claim 1. What should the Appellate Body do next?

30. Because of the first restriction on WTO appeals (issues of law, not issues of fact), the Appellate Body cannot examine Claim 2 itself, for the very first time, at least not to the extent that this would involve making new factual findings. Deciding on Claim 2 itself would, arguably, also go beyond the Appellate Body’s

mandate of “upholding, modifying or reversing” legal findings and conclusions made earlier by the panel, as in our scenario there are no panel findings or conclusions on the substance of Claim 2. Yet, because of the second restriction on WTO appeals (“uphold, modify or reverse” only), the Appellate Body cannot remand the case back to the panel for the panel to examine Claim 2.

31. As a result, is the Appellate Body forced to simply find that there is no violation under Claim 1, and to stop its examination there? Put differently, if the complainant then wants a decision on Claim 2, will it have to re-file the case from scratch? Although this may be the only result warranted under the Appellate Body’s limited mandate, would this not go against the DSU’s core objectives of securing “a positive solution to a dispute” (Article 3.7) and “prompt settlement of situations” (Article 3.3)? Let us call this the “judicial economy with claims” scenario.

2.2 The “Judicial Economy within a Defence” Scenario

32. The same dilemma arises in the following, slightly different situation. Imagine a WTO complaint of, for example, violation of GATT Article III (national treatment) against which the defendant invokes a defence that is valid only if two (or more) conditions are met cumulatively. The defence under GATT Article XX offers a good example: For this defence to be valid, the defendant must prove that it meets one of the paragraphs of Article XX (say, the measure is “necessary to protect human health”), as well as the chapeau of Article XX (say, the measure is not applied in a manner which would constitute unjustifiable discrimination). Imagine further that the panel finds that the first condition of the defence (the paragraph) is not met and, given the cumulative nature of the two conditions, considers it unnecessary to also examine the second condition. In other words, the panel

exercises judicial economy within a defence³⁶: As one of the conditions for the defence is not met, the violation stands and the complainant wins. Imagine, finally, that the Appellate Body reverses the panel and finds that the first condition of the defence (the paragraph) is met. What should the Appellate Body do next?

33. Because of the first restriction (issues of law, not issues of fact), the Appellate Body cannot examine the second condition (the chapeau) itself, for the very first time, at least not to the extent that this would involve making new factual findings. Examining the second condition itself would, arguably, also go beyond the Appellate Body’s mandate of “upholding, modifying or reversing” legal findings and conclusions made earlier by the panel, as in our scenario there are no panel

findings or conclusions on the second condition. Yet, because of the second restriction (“uphold, modify or reverse” only), the Appellate Body cannot either remand the case back to the panel for the panel to examine whether the second condition (the chapeau) is fulfilled.

34. As a result, is the Appellate Body forced to leave the question of the defence open and to stop its examination there, without making any conclusion either under the defence or, for that matter, under the rule originally found to be violated (since this violation can only be confirmed once a decision is made on the defence)? Put differently, if the complainant then wants a decision, it will have to re-file the case from scratch? Although this may be the only result warranted under the Appellate Body’s limited mandate, would this not go against the DSU’s core objectives of securing “a positive solution to a dispute” (Article 3.7) and “prompt settlement of situations” (Article 3.3)? Let us call this the “judicial economy within a defence” scenario.

35. An alternative outcome that has been suggested in this scenario is for the Appellate Body to nonetheless find a violation of, in our hypothetical, GATT Article III (national treatment) on the ground that there is no valid

defence before it.³⁷ However, this would be an odd, and ultimately inappropriate, result as the defendant would have proven that the first condition of its defence (under GATT Article XX) is met and not have had the opportunity for either the panel or the Appellate Body to check the second condition of its defence. Moreover, if the Appellate would find a violation of GATT Article III in such case, to annul the finding of violation, should the defendant then re-file its own case to get a determination that the defence it wanted to rely on is actually met? If there was, indeed, a substantive finding of violation in the first proceeding, would the principle of *res judicata* (to the extent it applies in WTO dispute settlement) not prevent such re-examination? In sum, in this author’s view, where the Appellate Body cannot complete the analysis on a defence, it should not find any substantive conclusion on the specific claim at all (hence, not find a violation of, in our case, GATT Article III in the first place).³⁸ This must be distinguished from the Appellate Body substantively finding that either the defence is met (no violation), or that there is a violation because the defendant has, for example, not carried its burden of proving that the defence is valid. Note that, so far, the Appellate Body has never concluded that it cannot complete the analysis of a defence.

2.3 The “New Interpretation” Scenario

36. The same problem can manifest itself in yet a third way. Imagine a WTO dispute with one or more claims. Imagine further that the panel gives a particular interpretation to one of these claims and, on that basis, finds that the claim is founded/unfounded. Imagine, finally, that the Appellate Body modifies or reverses the panel’s interpretation and offers its own, new interpretation. Obviously, this scenario can also play out in respect of a defence (instead of a claim): The panel gives one interpretation to a defence. Yet, the Appellate Body modifies or reverses the panel and offers its own, new interpretation. In either case a new interpretation of a claim or of a defence -- what should the Appellate Body do next?

37. Because of the first restriction (issues of law, not issues of fact), the Appellate Body may not be able to itself apply the new interpretation to the facts of the case, for the very first time, at least not to the extent this would involve making new factual findings. Yet, because of the second restriction (“uphold, modify or reverse” only), the Appellate Body cannot either remand the case back to the panel for the panel to apply the Appellate Body’s new interpretation to the dispute.

38. As a result, is the Appellate Body forced to leave the question of whether the claim (or defence) is valid under the new interpretation open and to stop its examination there, without

making any conclusion?³⁹ Put differently, if the complainant then wants a decision, it will have to re-file the case from scratch? Although this may, in certain cases, be the only result warranted under the Appellate Body's limited mandate⁴⁰, would this not go against the DSU's core objectives of securing "a positive solution to a dispute" (Article 3.7) and "prompt settlement of situations" (Article 3.3)? Let us call this the "new interpretation" scenario.

39. To be sure, the potential for deadlock in this "new interpretation" scenario is more limited as compared to the other scenarios addressed so far. Indeed, unlike, for example, the North American Free Trade Agreement (NAFTA) Extraordinary Challenge Committees, which can only "vacate" or "remand" the panel decision, or the International Convention on the Settlement of Investment Disputes (ICSID) Annulment Committees, which can only "annul"

the award⁴¹ the WTO Appellate Body was given the explicit authority not only to "reverse" panel findings but also to "modify" them. As a result, when the Appellate Body reverses a panel's interpretation of a particular claim, the Appellate Body must not necessarily stop there. It can also give its own interpretation and "modify" the panel's finding accordingly. The Appellate Body has explicitly found that applying the law (or correct legal interpretation of a WTO provision) to the facts of a case is a matter of legal interpretation and, therefore, falls within the Appellate Body's mandate.⁴² It is only where such modification would require new fact finding that the Appellate Body would not be able to complete the analysis.⁴³ Note, indeed, that the Appellate Body has so far only concluded once that it cannot complete the analysis of a claim or defence as a result of a different legal interpretation given by the Appellate Body (the exception is EC - LAN Equipment).

2.4 The "Reversed Mandate" Scenario

40. The same dilemma arises where the Appellate Body modifies or reverses the panel's interpretation of its own mandate (rather than the panel's interpretation of a claim or defence, as in the "new interpretation" scenario just described). This can occur, firstly, with respect to the measure(s) at issue. The panel may find that the measure at issue is X. On appeal, however, the Appellate Body may find that it is Y. In *Australia - Salmon*, for example, the panel found that the measure at issue was an import prohibition on fresh, chilled or frozen salmon. The Appellate Body reversed this finding and concluded that the measure at issue was rather a heat treatment requirement for smoked salmon and salmon roe.

41. Secondly, the Appellate Body may reverse a panel's finding that certain measures or certain claims are outside of the panel's mandate, for example, because they were not sufficiently specified in the complainant's panel request pursuant to DSU Article 6.2. The Appellate Body may then find that these measures or claims, not addressed by the panel, do fall within the

panel's mandate. This is exactly what happened in EC - *Customs Matters*.

42. Thirdly, the panel may find that it lacks jurisdiction to examine some or all of the claims raised by the complainant, for example, because the dispute was previously brought or even decided under a regional trade agreement (as argued, unsuccessfully, by Mexico in the *Mexico - Soft Drinks* case). On appeal, the Appellate Body may reverse the panel and decide that the panel did have jurisdiction.

43. In any of these three types of situations, what should the Appellate Body do next? Here as well, the Appellate Body cannot itself examine the newly defined measure at issue or decide for itself on the measure or claim found to be within the panel's mandate, at least not to the extent this would involve making new factual findings. Doing so would, arguably, also go beyond the Appellate Body's mandate of "upholding, modifying or reversing" legal findings and conclusions made earlier by the panel, as in this scenario there are no panel findings or

conclusions on the newly defined measure at issue or the measure or claim found to be within the panel's mandate. Yet, the Appellate Body

cannot either remand the dispute back to the panel. Let us call this the "reversed mandate" scenario.

2.5 The "Procedural Error" Scenario

44. Finally, the same problem may occur where the Appellate Body finds a procedural error in the panel's conduct or analysis of the case and such error permeates the substance of the panel's conclusions. In *US - DRAMS* and *US - Softwood Lumber VI (Article 21.5)*, for example, the Appellate Body found that the panel had applied an erroneous standard of review in its examination of the US investigating authority.

What should the Appellate Body do next? The Appellate Body cannot itself re-examine the dispute in line with the correct procedures (e.g. under the correct standard of review), at least not to the extent this would involve making new factual findings. Yet, the Appellate Body cannot either remand the dispute back to the panel. Let us call this the "procedural error" scenario.

3. THE APPELLATE BODY RESPONSE: “COMPLETING THE ANALYSIS”

45. In response to the dilemma outlined in the previous section, the Appellate Body developed the technique of “completing the analysis”.⁴⁴ This technique has been referred to as “a choice of the lesser of two evils”: Leaving the dispute unresolved, to be re-filed by the complainant (against the objectives of seeking “a positive solution to a dispute” (Article 3.7) and “prompt settlement of situations” (Article 3.3)) would, in this view, be worse than the Appellate Body itself completing the analysis (even though it may, strictly speaking, not have the mandate to do so). Put differently, instead of re-filing the case from scratch the Appellate Body can then:

- (1) in the “judicial economy with claims” scenario examine itself whether an alternative claim, not earlier addressed by the panel, is valid;
- (2) in the “judicial economy within a defence” scenario examine itself whether a cumulative condition for a defence, not earlier addressed by the

panel, is also met;

- (3) in the “new interpretation” scenario apply the Appellate Body’s own, new interpretation of a claim or defence to the facts at hand;
- (4) in the “reversed mandate” scenario examine itself the newly defined measure at issue, or the measure or claim found to be within the panel’s mandate or jurisdiction; and
- (5) in the “procedural error” scenario re-consider the case itself in line with the correct procedures (e.g. under the correct standard of review).

46. At the same time, the Appellate Body has limited this “completing of the analysis” in three core respects: (1) a sufficient factual record; (2) a sufficient legal connection; and (3) due process concerns. A potential fourth limitation, that has not yet led to any problems so far, relates to whether and when the party benefiting from “completing of the analysis” must request the Appellate Body to do so.

3.1 Sufficient Factual Record

47. Firstly, and most prominently, because of its mandate limited to issues of law (not issues of fact), the Appellate Body has only completed the analysis

“to the extent possible on the basis of the factual findings of the Panel and/or of undisputed facts in the Panel record.”⁴⁵

In other words, if the panel itself did not make the factual findings needed to decide the alternative claim (the “judicial economy with claims” scenario) or the other condition(s) under a defence (the “judicial economy within a defence” scenario) or to apply the Appellate Body’s new interpretation (the “new interpretation” scenario) or the panel’s redefined mandate (the “reversed mandate” scenario) or to re-consider the case in line with

the correct procedures (the “procedural error” scenario), then the Appellate Body will only complete the analysis if the required facts are in the panel record *and* these facts are undisputed. If (1) facts are missing in the panel record; or (2) if the facts are on the record but they are disputed *and* (3) the panel did not make findings on them, the Appellate Body has traditionally *not* completed the analysis.

48. An insufficient factual record is the core and most important reason that has led the Appellate Body not to complete the analysis in certain cases. Put differently, in contrast to the expectations of DSU negotiators - who were used to GATT disputes with few or no undisputed facts⁴⁶ - it is mainly the growing complexity, in particular, the increasing factual complexity, of WTO disputes that has led to the problem of

leaving a dispute, or part thereof, unresolved. In other words, it is the factual complexity of WTO complaints that has highlighted the absence of

3.2 Sufficient Legal Connection

49. Secondly, even if the panel's *factual* record so permits, the Appellate Body may decide not to complete the analysis if the legal issues to be addressed by the Appellate Body are not sufficiently connected to the legal issues addressed by the panel. Where the legal issues to be newly addressed by the Appellate Body are "closely related", "closely linked" or "part of a logical continuum" as compared to those addressed by the panel, the Appellate Body has completed the analysis. For example, in *Canada - Periodicals*, the Appellate Body found that the alternative claim under GATT Article III:2 second sentence, not examined by the panel, was sufficiently connected to the claim that the panel did examine (but the Appellate Body overruled), namely: GATT Article III:2 first sentence. In contrast, in *EC - Asbestos*, the alternative claims under the TBT Agreement, not examined by the panel, were not found to be sufficiently connected to the claim that the panel did examine, namely: GATT Article III.⁴⁷ So far, the absence of a sufficient legal connection has, however, not in and of itself led to a refusal to complete the analysis; it has, instead, been referred to (especially in *EC - Asbestos*) as an additional reason - on top of an insufficient factual record - not to complete the analysis.

3.3 Due Process Concerns

51. Thirdly, even where the factual record as well as the legal connection is sufficient, the Appellate Body may still refuse to complete the analysis on due process grounds. The Appellate Body has, indeed, been reluctant to complete the analysis where the parties have not had an opportunity to present their arguments on the new claim, condition, interpretation or measure freshly dealt with before the Appellate Body, or where the parties have not grasped the opportunity to do so. The Appellate Body has, for example, declined to complete the analysis in

remand in the WTO, and the need to amend the DSU accordingly.

50. This second limitation on completing the analysis is particularly important for the "judicial economy with claims" scenario where alternative claims -- within the same WTO provision or article, or in different articles, even different WTO agreements altogether - reappear. If the alternative claim is not sufficiently connected to the claim that the panel did examine, the Appellate Body may not complete the analysis. In contrast, in the "judicial economy within a defence" and "new interpretation" scenarios, the new task faced by the Appellate Body, by definition, remains within the same provision or article which the panel did previously examine. The same is likely to be true in the "procedural error" scenario: re-considering the case under, for example, the correct standard of review will not normally require the Appellate Body to go beyond WTO provisions or articles considered previously by the panel. When it comes to the "reversed mandate" scenario, in contrast, the question of sufficient legal connection may arise, especially where the Appellate Body reverses a panel finding that a certain measure or claim falls outside the panel's mandate. If this measure or claim raises legal issues not sufficiently connected to legal issues that the panel did decide, the Appellate Body may refuse to complete the analysis.

the absence of "full" or "in depth" exploration of the issues at the panel or Appellate Body stage, particularly where the claim is "novel".⁴⁸ The fact that the Appellate Body must complete its task within maximum 90 days underscores the potential for such due process concerns to arise.

52. Yet, not deciding a case, or part of it, on grounds that the law was not sufficiently addressed in the parties' submissions, is unclear or novel can be criticized. The principle of *jura*

novit curiae (the judge is supposed to know the law) as well as the general tendency of legal systems to preclude rulings of *non liquet* (literally: it is not clear) direct tribunals to come to a conclusion and generally preclude them from not deciding on the ground that the law is unclear.⁴⁹ This criticism applies to both the due process and the sufficient legal connection grounds for declining to complete the analysis. As elaborated below, one way to more effectively deal with these concerns is

for the Appellate Body to sufficiently question the parties about newly arising issues, including asking for further submissions even *after* the oral hearing on questions not sufficiently addressed by the parties. Once such additional arguments gathered, the Appellate Body should be in a position to complete the analysis (either way) unless the factual record before it is insufficient, which brings us back to the first and most important reason for declining to complete the analysis: an insufficient factual record.

3.4 Whether and When Parties Must Request To “Complete the Analysis”

53. A potential fourth limitation - linked to due process concerns - that has not yet played out in practice, relates to whether and when the party benefiting from the Appellate Body completing the analysis must request the Appellate Body to do so. Must this request be explicitly set out in the Notice of Appeal (or Other Appeal) or can it be included in a submission before the Appellate Body or even be requested at the hearing?⁵⁰ Failing to request the Appellate Body to complete the analysis or doing so too late or in a manner that does not allow the opposing party or the Appellate Body itself to sufficiently respond, may lead the Appellate Body to refuse to complete the analysis.

54. With the passage of time litigating parties have become more accustomed with the practice and concerns of the Appellate Body completing, or not completing the analysis.

They have, therefore, addressed the question in their Notice of Appeal (or Other Appeal) or in their submissions more explicitly. As a result, it is also highly unlikely that, today, the Appellate Body would complete the analysis if neither of the parties requested it to do so. Especially for developing countries, which may be under time pressure or not always have adequate legal representation, it is crucial to keep this in mind: A failure to explicitly request a completion of the analysis may cost them a re-filing of the case. In this author's view, to allow a full discussion of the matter within the 90 days time-limit for an appeal, parties ought to be obliged to request a completion of the analysis in their Notice of Appeal or Other Appeal, and at the very latest in their written submissions before the hearing. A request at the oral hearing itself should be rejected as untimely, unless serious reasons are given for the delay.

4. CONCERNS WHEN THE APPELLATE BODY DOES “COMPLETE THE ANALYSIS”

55. When considering whether or not to complete the analysis, the Appellate Body is caught between a rock and a hard place. On the one hand, when it does complete the analysis, the Appellate Body risks exceeding its mandate and takes away the parties’ right to appeal (discussed in this section). Given the fluid limits on when the Appellate Body will complete the analysis, completing the analysis may also come as a surprise to the parties, raising questions of procedural uncertainty and due process. On the other hand, when the Appellate Body *declines* to complete the analysis, it leaves the dispute, or part thereof, unresolved and may force complainants who seek closure to start a new proceeding which, in turn, raises concerns of waste of both time and resources (discussed in the next section).

56. Writing in July 2006, Alan Yanovich (Counsellor at the Appellate Body Secretariat) and Tania Voon (former Legal Officer at the Appellate Body Secretariat) calculated that the Appellate Body expressly stated to be completing the analysis “in 11 of its 77 appeals”.⁵¹ At the same time, and demonstrating how often the question arises, Yanovich and Voon also point out

that “more often than not, the Appellate Body declines to complete the panel’s analysis”.⁵² Interestingly, the last case where the Appellate Body did complete the analysis was *US - Section 211 Appropriations Act (Havana Club)*, a case decided in early 2002.⁵³ Put differently, the Appellate Body has not completed the analysis in close to four years. As Yanovich and Voon put it:

“In the majority of recent cases in which the Appellate Body has considered whether to complete the analysis, it has been unable or has found it unnecessary to do so. This highlights the importance of WTO Members finding a long-term solution to disputes where the Appellate Body cannot complete the analysis”.⁵⁴

57. The remainder of this section addresses the concerns raised when the Appellate Body *does* complete the analysis (an event that has not occurred in the last four years). The next section (Section V) deals with the problems related to *not* completing the analysis, a scenario that is, as just described, clearly the recent trend.

4.1 The Appellate Body Exceeds its Mandate

58. Firstly, as pointed out earlier, whenever the Appellate Body examines a claim, part of a defence or new measure that the panel did not examine previously, it has been argued - most prominently by Peter Van den Bossche, former Acting Director of the Appellate Body Secretariat⁵⁵ - that the Appellate Body thereby exceeds its mandate of “upholding, modifying or reversing” legal findings or conclusions of the panel. In this view, as the panel did not make any substantive findings or conclusions on the claim, part of the defence or new measure at issue, there is nothing to “uphold, modify or reverse”. Put another way, from this perspective, the Appellate Body has the right only to “uphold, modify or reverse” panel findings or conclusions,

not to complete the analysis.⁵⁶

59. Similarly, even though the Appellate Body repeats that it will only complete the analysis when there are sufficient factual findings by the panel or undisputed facts in the panel record, it has been argued that completing the analysis has involved fact finding by the Appellate Body itself. In that sense as well, the Appellate Body has been said to exceed its mandate. According to Thailand, for example, although the Appellate Body in *US - Shrimp* found that “the record of the panel proceedings permit[s] us to undertake the completion of the analysis”, the Appellate Body itself made a number of factual findings with regard to the actual application of the

US measure at issue, not previously addressed by the panel.⁵⁷ Similarly, Vermulst, Mavroidis and Waer expressed the view that in *Canada - Periodicals* the Appellate Body engaged in an “appraisal of the facts” when ruling, for the first time, on the competitive relationship between Canadian and imported magazines under GATT Article III:2 second sentence.⁵⁸ In respect of *EC - Hormones*, Jeffrey Waincymer pointed out that the Appellate Body “made factual findings” when completing the analysis under Article 5.5 of the SPS Agreement.⁵⁹ Fernando Pierola, of the Advisory Center on WTO Law, in turn, has argued that in *US - Wheat Gluten* the Appellate Body engaged in a factual analysis of the protein content and price of wheat when it completed the analysis in that case.⁶⁰

60. When weighing the seriousness of these concerns, it is instructive to recall that in domestic law, appellate courts often do more than just “uphold, modify or reverse” the lower court’s legal findings. As noted earlier, first time appeals in most civil law countries are a *de novo* re-trial of both the law and the facts.⁶¹ If the appellate court reverses the trial court’s finding the entire case is, in principle, transferred up for a full decision at the appellate level (the “devolutive” effect of appeals). Although in most common law systems appellate courts, after reversing the original court, normally remand the case back to the original court, appellate courts in common law systems are also known to have completed the analysis themselves. Crucially, even in second appeals before, for example, the *Cour de cassation* or the Supreme Court, the court has, at times, completed the analysis. In France, for example, after the *Cour de cassation*, “*casse*” or annuls the lower court’s finding, it may resolve the case itself, without remand, if the factual record established by

the lower court so permits.⁶² Indeed, as pointed out earlier, after all, the Appellate Body’s mandate is not limited to either “uphold” or “reverse” panel findings, it can also “modify” panel findings. This power seems to derive from Canada’s original proposal for an Appellate Body - to “decide either to uphold the panel report or to substitute its own decision for that of the panel”⁶⁴ - and confers at least certain powers to the Appellate Body to complete the analysis.

61. Moreover, in other situations as well, the Appellate Body has gradually increased its mandate by closer oversight of factual findings by panels. First, as noted earlier, it did not hesitate to characterize application of legal provisions to the facts, and the factual evaluations that necessarily come with it, as a “legal question” subject to appellate review.⁶⁵ Second, through the “objective assessment” standard of DSU Article 11, the Appellate Body regularly evaluates purely factual findings by panels. Originally, in early cases such as *EC - Hormones*, the Appellate Body was willing to overturn factual panel findings only when panels “deliberately disregard”, “refuse to consider”, “distort” or “misrepresent” evidence.⁶⁶ In more recent cases, however, the Appellate Body has been willing to probe factual panel findings more deeply, whenever it is “satisfied that the panel has exceeded the bounds of its discretion, as the trier of facts, in its appreciation of the evidence”.⁶⁷ In sum, for the Appellate Body to evaluate facts to *some extent* when it completes the analysis is not novel, nor necessarily a bad thing - and must be weighed against the disadvantages of not completing the analysis at all -, especially in light of the experience of appellate review elsewhere including before other international tribunals (as discussed in Annex 1 to this Study).

4.2 The Parties Lose their Right to Appeal

62. A second objection often raised against the Appellate Body “completing the analysis” on a point not earlier addressed by the panel, is that it takes away a party’s right to appeal. David Palmeter put it as follows:

“Why is the Appellate Body’s ‘completing the analysis’ a problem? It is a problem because it is the equivalent of *de novo* review, and *de novo* decisions of the Appellate Body do not themselves benefit from appeal. They are

effectively un-reviewed and un-reviewable ...”.⁶⁸

63. Although completing the analysis no doubt leaves the parties without an appeal, the weight of this concern must, once again, be put in the perspective of appellate review elsewhere. To begin with, as Giorgio Sacerdoti, a current member of the Appellate Body, pointed out, when it comes to international law “appeal is a very rare feature in international third party dispute settlement”.⁶⁹ As noted earlier⁷⁰, the DSU negotiating history indicates that in the WTO an appeal (as of right) was included, not because of some purist ideal of correctness, or a systemic and absolute belief in a right to appeal in trade disputes, but to compensate for the automatic adoption of panel reports, as an insurance policy against “bad” panels; that is, not as “a quasi-automatic step in the dispute settlement process”⁷¹ but only to deal with “fundamental errors”⁷² in “extraordinary cases”.⁷³ Some of the proposals would even have made WTO appeals subject to approval by the General Council or prior leave from the Appellate Body itself.⁷⁴ In this context, to portray the right to appeal in the WTO as sacred and not to be taken away by any completion of the analysis by the Appellate Body is unconvincing. Indeed, that nowadays panels are appealed in around 70 per cent of cases comes as a surprise to most negotiators.⁷⁵

64. Moreover, as pointed out earlier, appellate courts in most civil law systems complete the analysis all the time (as a result of the “devolutive” effect of appeals). In those systems, as well, de novo review (of both law and facts) by the appeals court takes away the parties’ right to appeal. Similarly, as noted earlier, in many countries (including common law countries) even the highest courts may complete the analysis, leaving parties without appeal. Indeed, as illustrated in Annex 1 to this study, even in criminal disputes before, for example, the International Criminal Tribunal for the Former Yugoslavia, the Appellate Chamber regularly completes the analysis on both law and facts (such as sentencing), often for the first time, thereby equally leaving parties without an appeal.

65. More generally, the right to appeal, especially in common law systems, is relatively new and not as fundamental as it may appear at first sight. Until the 19th century, even criminal appeals were very rare in the Anglo-American world. In England, for example, the opportunity for review in every criminal case was not fully established until 1908.⁷⁶ Yet, today, the right to appeal in criminal cases is generally recognized as a human right under international law. Article 14(5) of the International Covenant on Civil and Political Rights (ICCPR), for example, provides:

“Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law”.⁷⁷

No such absolute right exists for civil proceedings, which, after all, are more akin to WTO proceedings.

66. Indeed, whereas in most civil law countries, there is a right to appeal even for civil trials all the way up to, for example, the *Cour de cassation*⁷⁸ (where no leave is required), in most common law systems the right to appeal is, in many cases, conditioned by the need to obtain leave (recall that in the WTO, appeal is as of right). In the United States, for example, although appeal to the Circuit Courts of Appeal is as of right, review by the Supreme Court is subject to a grant of *certiorari* and permitted in very few important cases only (out of more than 7,000 petitions filed every year, less than 100 are accepted).⁷⁹

67. In sum, although it is clear that no appeal is possible when the Appellate Body completes the analysis for the first time, the right of appeal, even in domestic law and international criminal proceedings, is not of such sacred nature that it must always be respected whatever the cost and consequences. Lest it be forgotten, WTO dispute settlement is quasi-judicial only, with its reliance on consultations, ad hoc panels, flexibility and the dispute settlement body to formally adopt reports. In this context, to speak of a sacred right to appeal is, at best, odd; and the objective

of correctness pursued by an appeal should, at the very least, be weighed against the objective of prompt settlement of disputes and finality, crucial as it is to any arbitration, especially for the businesses involved. In the WTO, the relative nature of the right to appeal is further illustrated by its limitation to legal questions only (unlike most first level appeals in domestic systems and unlike any appeal before international criminal courts or tribunals, discussed in Annex 1). As

pointed out earlier, this limitation underlines the relatively narrow objective of appellate review in the WTO, namely: to ensure control over legal interpretation (correctness in the law), not to provide justice to the parties on the matter in dispute (otherwise drafters would have included a right to appeal *on the facts*). That is the relatively low benchmark against which any loss of the right of appeal must be compared.

4.3 Procedural Uncertainty and Due Process

68. Thirdly, when the Appellate Body does decide to complete the analysis, it may come as a surprise to the parties. As the Appellate Body does not issue an interim report, or preliminary findings, announcing whether or not it will complete the analysis, up until the point where the final report is sent out, the parties do not know what the Appellate Body will do. When writing their submissions and making their oral pleadings, parties must therefore guess as to whether the Appellate Body will complete the analysis on a certain point and, on that basis, decide whether or not, or in what length, to address the issue. The Appellate Body can, of course, through its questions, guide parties and request additional argumentation on issues where it may want to complete the analysis. Yet, at the stage of the oral hearing Appellate Body members themselves may, in most cases, not know yet whether the analysis will, indeed, be completed.

69. This concern could, to some extent, be accommodated if the Appellate Body simply declined to complete the analysis (e.g. on due process grounds). Yet, even then, the imprecise and unpredictable nature of the three conditions set out by the Appellate Body on when it will complete the analysis - sufficient factual record, sufficient legal connection and due process - inevitably leaves a degree of procedural uncertainty. Thus, even where the Appellate Body eventually decides not to complete the analysis, the parties never know for sure before the report comes out.⁸⁰ Fernando Pierola, for example, has argued that

“this procedural uncertainty diminishes the parties’ right to defend their interests in accordance with due process ... parties to disputes ought to have an adequate opportunity to defend their positions when the Appellate Body has to complete the analysis. At present, this may not necessarily be the case in all instances”.⁸¹

5. CONCERNS WHEN THE APPELLATE BODY DECLINES TO “COMPLETE THE ANALYSIS”

70. As much as when the Appellate Body does complete the analysis, when it refuses to do so, serious problems may arise. In essence, when the Appellate Body declines to complete the analysis it thereby leaves the dispute, or part of the dispute, unresolved. In the absence of remand power, to get the open question(s) resolved the complainant is then obliged to start a new proceeding. Not completing the analysis, therefore, raises the following concerns:

- (1) For any judicial system to be unable to reach a decision on a particular question (be it a positive or negative decision or a decision to exercise judicial economy) is a failure. In the end, it amounts to a form of *non liquet* (literally: it is not clear) where the Appellate Body cannot decide because of an insufficient factual record, an insufficient legal connection or due process concerns. In most domestic legal systems, *non liquet* is prohibited as the court is obliged to offer a solution to the disputing parties.
- (2) The obligation to start a new proceeding, instead of the Appellate Body remanding the case back to the panel, will most likely lead to a waste of time. Where the challenged measure is a temporary one that is likely to expire or be subject to domestic review within a couple of years anyhow (such as an anti-dumping or countervailing duty or a safeguard or seasonal restriction), re-filing the case may even be pointless and leave the complainant with no redress at all.
- (3) The obligation to start a new proceeding, instead of the Appellate Body remanding the case back to the panel, will most likely require extra human and financial resources for renewed formal consultations, requesting a panel, writing submissions and litigating the dispute. Such waste of resources may be of particular concern to developing countries to the point where it can prevent them from re-filing the case altogether for lack of money or other resources.
- (4) Especially where the Appellate Body did not carefully specify whether, and to what extent, it left certain questions open, there remains a risk that in the new, re-filed panel proceeding, principles of *res judicata* preclude the panel and/or the Appellate Body from re-examining certain questions. Although this risk can be avoided if the Appellate Body makes it clear that it is not deciding on specific claims (rather than rejecting those claims), in some cases (such as *EC - LAN Equipment*), the Appellate Body left this question open.
- (5) Conversely, the fact that the dispute remains unresolved, at least partly (i.e., there is no *res judicata* on certain questions), leaves the parties, and their private operators, in a state of uncertainty. Especially the defendant may want to have closure and know for sure whether the complainant will re-file the case or not. As there are, in principle, no time limits within which such re-filing to complete the analysis must occur, this state of uncertainty can continue for quite some time.
- (6) As WTO remedies are, in principle, purely prospective (compensation and equivalent retaliation are triggered only after a finding of inconsistency), the extra time it takes to obtain panel and/or Appellate Body findings implies an equally long extension in the period of time the challenged measure remains in place without any compensation. Once again, for developing country complainants this extra time may be lethal, especially

where the defendant is a crucial export market such as Europe or the United States. Indeed, one or two more years of a WTO inconsistent trade restriction, with no alternative market available, may well lead to bankruptcy of the developing country producers. Prospective remedies - at best, a removal of the trade restriction within a couple of years -- would then hardly offer satisfaction to the complainant.⁸²

- (7) Taken together, the failure of a *non liquet*, waste of time and resources, state of uncertainty related to both *res judicata* and the possibility of re-filing and, in particular, the fact that the system may leave complainants with no effective redress at all, risks undermining the credibility and legitimacy of the WTO dispute

settlement mechanism. Although this may not have happened yet, if and when the Appellate Body leaves the dispute unresolved in a sufficient number of cases, of sufficient importance, this risk is bound to increase and will eventually materialize unless corrective action is taken.

71. At this juncture, it is instructive to distinguish between three types of cases where the Appellate Body may not complete the analysis: (1) cases where not completing the analysis leaves the entire dispute unresolved; (2) cases where some of the claims are resolved but for other claims the Appellate Body declines to complete the analysis; (3) cases where the Appellate Body cannot complete the analysis at the stage of implementation proceedings under DSU Article 21.5.

5.1 The Entire Dispute Remains Unresolved

72. Although it remains the exception to date, the Appellate Body's decision not to complete the analysis in original proceedings may leave the entire dispute unresolved (not completing the analysis in Article 21.5 implementation proceedings is discussed separately in section c below). So far, this situation occurred in only one case, namely *EC - LAN Equipment* where the Appellate Body reversed the panel's interpretation of the EC schedule and GATT Article II with reference to US "legitimate expectations", but then stopped short of resolving the case itself.⁸³ This meant, in practice, that the entire US complaint was rejected and the EC won the case. However, it is not difficult to imagine that this situation could happen again, especially in the "reversed mandate" and "procedural error" scenarios described earlier. If the Appellate Body finds that the measure at issue or claims validly before it are entirely different from the measure or claims examined by the panel or, even more so, where the Appellate Body reverses a panel finding of no jurisdiction or finds a procedural error that permeated the entire panel proceeding, not

completing the analysis is likely to leave the entire dispute unresolved.

73. This type of case does, of course, raise the most serious problem for complainants: If they want to obtain anything from the long panel and Appellate Body proceedings they went through so far, they will have to re-file an entirely new proceeding, including

- (1) a minimum of 60 days for formal consultations under DSU Article 4;
- (2) at least one, and potentially two, DSB meetings to get a new panel established pursuant to DSU Article 6;
- (3) a new panel selection procedure, possibly leading to three new panellists who will need to get re-acquainted with the case;
- (4) two rounds of written submissions, two oral hearings, an interim report and the time it takes to translate the final report in all three languages and to get the report on the DSB agenda for adoption (according to

www.worldtradelaw.net the average number of days between a panel's establishment and the DSB adoption of the panel report where no appeal is filed is 441.77 days);

- (5) a potential second appeal taking an extra 90 days.

In sum, where the new panel does get appealed, the Appellate Body's decision not to complete the analysis in the first proceeding may on average add 545.61 days to the complainant's case (unless a re-filed case can proceed quicker than the standard average, a possibility discussed below).⁸⁴ Put differently, the Appellate Body's decision to complete, or not to complete, the analysis can make a time - and related resource and non-implementation -- difference of one and a half years. Even though this average is based on first-time panel and Appellate Body proceedings, it may not be that much lower for re-filed cases (depending of course on the complexity of the re-filed case), as one would expect defendants in a re-filed proceeding to drag their feet and insist on compliance with each and every step provided for in normal, first-time panel proceedings.⁸⁵

74. Crucially, unlike the situation where the Appellate Body declines to complete the analysis in an Article 21.5 implementation procedure (a scenario addressed below in section c), where the analysis cannot be completed in *original* proceedings, and leaves the entire dispute

5.2 Some Claims Are Resolved, Others Not

76. Not completing the analysis may also be limited to certain aspects of the case. Depending on the importance of the issues that *were* decided -- be it by the panel or the Appellate Body itself - all of the concerns related to not completing the analysis discussed in the previous section reappear, albeit to a lesser extent.

77. In *EC - Asbestos*, for example, Canada's claims under GATT were examined and ultimately rejected. Although that part of the dispute was resolved, the Appellate Body declined, however,

unresolved, the complainant cannot invoke the expedited 90 days proceeding under DSU Article 21.5. This is so because Article 21.5 proceedings are limited to situations "[w]here there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with recommendations and rulings" by a panel and/or the Appellate Body. As, in our scenario, there are no recommendations or rulings to implement in the first place (the entire dispute remained unresolved), Article 21.5 cannot, by its very terms, be invoked by the complainant.

75. Returning, finally, to the one case so far where not completing the analysis left the entire dispute unresolved, in *EC - LAN Equipment* the US eventually never re-filed the case. This stresses the importance of the time, resource and other concerns listed earlier even as they apply to the WTO's largest and wealthiest trading partner, the United States. If even the United States decides that it is not worth to re-file the case, what would the cost-benefit analysis of a developing country have been? To be fair, one of the reasons why the United States never re-filed the LAN Equipment case was likely also that the products for which the United States was seeking better access were gradually covered by the 1996 Information Technology Agreement (ITA), to which the EC is a party, and which eventually ensured duty free access for US LAN equipment in the EC market.

to complete the analysis of Canada's claims under the Technical Barriers to Trade (TBT) Agreement. In practice, therefore, Canada lost the case on all grounds. Canada never re-filed its complaint under the TBT Agreement.

78. In contrast to *EC - Asbestos* (where eventually no violations were found), in most cases where the Appellate Body declined to complete the analysis, part of the complaint that was examined and resolved was accepted. As a result, in most cases the complainant won at

least on some claims. In most of those disputes the claims left unresolved were relatively minor or would, in any event, not have added much in terms of how the defendant should have implemented the ruling. Those cases obviously pose a lesser problem.

79. In *Australia - Salmon*, for example, the Appellate Body did find violations of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) on certain grounds, but refused to complete the analysis on others. In *Korea - Dairy Products*, the Appellate Body did find that Korea's safeguard was in violation of the Agreement on Safeguards (SG Agreement), but declined to complete the analysis under Article 5.1 of the SG Agreement and GATT Article XIX. In *Canada - Autos*, the Appellate Body, after finding violations under GATT, declined to complete the analysis under Article 3 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) and General Agreement on Trade in Services (GATS). In *Korea - Beef*, the Appellate Body found violations of GATT, but declined to complete the analysis under the Agreement on Agriculture. In *US - Hot-Rolled Steel*, the US was found to violate some provisions of the Antidumping Agreement (ADA), but the Appellate Body declined to complete the analysis in respect of others. In *US - OCTG Sunset Reviews*, the Appellate Body found violations under the ADA but declined to complete the analysis under GATT Article X:3. In *US - Cotton*, the US lost on several grounds, but the Appellate Body was unable to complete the analysis on Brazil's claim of circumvention under Article 10.1 of the Agreement on Agriculture (AoA).

80. Importantly, so far, in none of these cases did the complainant re-file a complaint to resolve the questions that were left unanswered by the Appellate Body. This may imply that re-filing was simply not worth it (the unresolved claims were not important; in which case the absence of remand was not really an issue) or, more troubling, that the complainant would have liked to re-file but did not do so because of, for example, time or resource constraints (in that

case, having a remand rather than having to re-file the entire case would have been crucial).

81. In other cases where part of the dispute was resolved and another not, the unresolved part was of crucial importance. Most dramatically, in *US - DRAMS* the panel had found violations under both the subsidy part and the injury part of Korea's complaint. Yet, the findings of violation in respect of injury were relatively minor or easy for the United States to rectify. On appeal, however, only the subsidies part was addressed and, largely because the panel had applied an erroneous standard of review, the Appellate Body completely reversed the panel, but then was unable to complete the analysis. In the end, therefore, part of Korea's complaint was resolved (namely, the relatively unimportant injury part, which Korea won), but the core of the dispute, namely the subsidy part, was left open.

82. Less dramatic, but still with serious substantive consequences, was the Appellate Body decision not to complete the analysis in *US - Zeroing (EC)*. In that case, the Appellate Body reversed a crucial panel finding that zeroing in administrative reviews is consistent with WTO rules, found that in the specific administrative reviews at issue the US *did* violate the ADA and GATT, but then declined to complete the analysis on whether the US methodology *as such* constitutes a violation. Hence, although the EC won its complaint in respect of the specific antidumping cases before the Appellate Body, the EC did not obtain a finding of violation in respect of the US methodology as such. This may, obviously, have crucial consequences for US implementation as the United States may decide to rectify the specific cases where a violation was found, but could for future cases continue to apply the same methodology, a methodology which the Appellate Body did not, as such, find to be in violation of WTO rules. The same situation occurred more recently in *EC - Customs Matters*. In that case, the Appellate Body reversed the panel's finding that the EC system of customs administration as a whole fell outside the panel's mandate. Yet, once it had decided

that the system as a whole could be looked at, the Appellate Body then concluded that it was unable to complete the analysis. The Appellate Body did confirm that the EC tariff classification of certain display monitors violates GATT Article X:3(a). However, much like in *US - Zeroing (EC)*, a finding of violation in respect of the EC system of customs administration as such would have been much broader and have farther reaching effects in terms of future implementation.

83. Another case where the unresolved part was crucial is *US - Softwood Lumber IV*. Although the Appellate Body did confirm that the US by failing to conduct a pass-through analysis in respect of logs violated both the SCM Agreement and GATT, on the more substantial and important question of benefit, and which benchmark to use under Article 14 of the SCM Agreement, the Appellate Body was unable to complete the analysis.

84. Equally, in *EC - Sugar*, complainants expressed strong disappointment when the Appellate Body declined to complete the analysis under the SCM Agreement after finding that the EC sugar regime violates the AoA.⁸⁶ In this case, an additional finding of violation under the SCM Agreement was not trivial either. As the remedies for prohibited export subsidies under Article 4.7 of the SCM Agreement are stricter than those under the AoA, such additional violation would have forced the EC to withdraw the subsidy “without delay” and within a time limit specified by the original panel. Such time limit is normally 90 days, much shorter than the reasonable period of time granted for other violations (in *EC - Sugar* this period was subsequently determined to be 12 months and 3 days). In addition, in terms of retaliation, Article 4.10 of the SCM Agreement provides for “appropriate countermeasures” instead of merely “equivalent” suspension pursuant to DSU Article 22.4.

85. Crucially, however, even in those cases where the unresolved part was substantively important, if not essential, so far, no complainant has ever re-filed a complaint. In these situations

it is difficult to argue that re-filing was simply not worth it (as here the unresolved claims *were* important). A more likely explanation is that the complainant would have wanted to re-file but did not do so because of, for example, time or resource constraints. This, of course, is troubling and a problem that could have been avoided with a remand in place.

86. In *US - DRAMS*, for example, Korea did not re-file for a new panel to complete the analysis in respect of the subsidy question. Part of the explanation is likely that the US countervailing duty at issue was anyhow going to be reviewed or expire within a couple of years. Hence, what would be the use of spending the extra time and resources re-filing the case when at the end of the proceeding the challenged measure is likely to have expired, or be close to expiry, anyhow? In *US - Zeroing (EC)*, the EC, so far, did not re-file either. At the same time, it is clear that the Appellate Body’s failure to decide on the US zeroing methodology as such in administrative reviews may lead to yet another round of proceedings in the zeroing saga that could have been avoided had the Appellate Body been able to complete the analysis or been allowed to remand the case back to the panel. The *US - Softwood Lumber IV* case, in turn, was not re-filed either as the United States and Canada reached a comprehensive settlement in respect of lumber.⁸⁷ Finally, for Brazil or Thailand to re-file the SCM part of the *EC - Sugar* case in order to obtain the stricter SCM remedy would, of course, be absurd: By the time those stricter remedies would be awarded in a new proceeding, even the longer implementation period for violations under the AoA would most likely have expired. It would not seem worth it either to spend the extra time and resources on a new proceeding only to get the right to impose “appropriate countermeasures” instead of “equivalent” suspension.

87. Finally, as pointed out in the previous section (section a), where the Appellate Body is unable to complete the analysis in *original* proceedings the complainant cannot invoke the expedited 90 days proceeding under DSU

Article 21.5, at least not to ask the Article 21.5 panel to complete the analysis in respect of the original measure. As compared to situations where not completing the analysis leaves the entire case unresolved (discussed above in section a), in situations where some claims were accepted (discussed in this section), there is something to implement and, hence, at least the possibility for the complainant to challenge such implementation, or the absence thereof, before an Article 21.5 panel. However, even though the mandate of Article 21.5 panels has been interpreted rather broadly, one core requirement is that “Article 21 deals with events *subsequent* to the DSB’s adoption of

recommendations and rulings in a particular case”⁸⁸, not to finish unresolved business from the original proceeding. Put differently, “Article 21.5 proceedings involve, in principle, not the original measure, but rather a new and different measure which was not before the original panel”.⁸⁹ Still, as discussed further below, a broad interpretation of Article 21.5 could possibly permit an Article 21.5 panel to complete the analysis of an original Appellate Body report in case there is an implementing measure, different from the original measure, which copies the alleged violation in respect of which the analysis was not completed in the first proceeding.

5.3 Not Completing the Analysis in Article 21.5 Implementation Proceedings

88. The Appellate Body may also be unable to complete the analysis in Article 21.5 implementation proceedings. This happened so far in two prominent and much discussed cases, namely:

- (1) *Canada - Dairy (Article 21.5 - I)* where the Appellate Body reversed the panel’s interpretation of “payments” under Article 9 of the AoA, but then found that it was unable to complete the analysis; and
- (2) *US - Softwood Lumber VI (Article 21.5)* where the Appellate Body found that the panel applied an improper standard of review when examining a US determination of threat of injury, but was subsequently unable to complete the case itself.

Crucially, in both cases the Appellate Body’s refusal to complete the analysis led to no conclusions *at all*. In other words, the result was similar to that in *EC - LAN Equipment* (although in *EC - LAN Equipment* it was reached in original proceedings) and, in some respects, worse than the result in *US - DRAMS* (as in *US - DRAMS* there remained at least some un-appealed findings of violation by the panel).

89. Although *Canada - Dairy (Article 21.5 - I)* and *US - Softwood Lumber VI (Article 21.5)* are probably the two cases most often referred to when it comes to the absence of remand power and the problem of the Appellate Body not being able to complete the analysis, in both cases the situation is easily fixed. Indeed, unlike the previous two scenarios where the Appellate Body cannot complete the analysis in *original* proceedings (discussed in sections a and b), when the same happens in *implementation* proceedings, the easy fix is to simply request a second Article 21.5 panel. As this panel must, in principle, complete its work in 90 days⁹⁰, a second Article 21.5 panel can in effect operate as the functional equivalent of a remand procedure.⁹¹ That is exactly what New Zealand and the United States did in *Canada - Dairy*: they requested and obtained a second Article 21.5 panel to complete the Appellate Body’s analysis, a panel report which was, in turn, reviewed by the Appellate Body. In *US - Softwood Lumber VI (Article 21.5)*, no second Article 21.5 panel was requested as the United States and Canada reached a comprehensive settlement in respect of lumber.⁹²

6. POTENTIAL SOLUTIONS WITHOUT AMENDING THE DSU

90. This study has, so far, laid out (1) the original dilemma and its origins (Section I); (2) the five scenarios where the dilemma may occur (Section II); (3) the Appellate Body response of “completing the analysis” and its limits (Section III); (4) the concerns and problems raised when the Appellate Body does complete the analysis (Section IV); and (5) the concerns and problems raised when the Appellate Body is *unable* to complete the analysis (Section V).

91. With this background in mind, it is now time to consider possible improvements to the status quo. Given the comparative analysis in Section II, as well as the assessment of appeal and remand in other international courts and tribunals in Annex 1, a well-designed remand

procedure is undoubtedly the best way forward: A WTO remand process is needed (1) to address the increasing legal and, especially, factual complexity of WTO disputes, often times leading to an insufficient factual record for the Appellate Body to decide cases without making new factual findings, and (2) to save both the time, resources and costs related to a complete re-filing of the case where the Appellate Body cannot complete the analysis. However, it is equally clear that reaching consensus on a remand procedure in the DSU review process may not be possible. That is why this section examines alternative solutions that would not require a DSU amendment. The next section (Section VII) sets out the details of a possible remand/referral mechanism that would require DSU amendment.

6.1 Less (or no) Judicial Economy by Panels

92. To some extent, the exercise by panels of “judicial economy” and the Appellate Body *not* being able to complete the analysis, go hand in hand: Fewer findings by the panel, especially factual findings, make it more difficult for the Appellate Body to complete the analysis. As a result, limiting or even prohibiting judicial economy by panels could be viewed as an alternative to remand.⁹³ In this view, if only the panel would set out and settle all of the claims and facts at issue, the Appellate Body would be able to complete the analysis. Moreover, as judicial economy is only a discretionary power held by panels - there is never an *obligation* to exercise judicial economy⁹⁴ - the alternative solution of less or no judicial economy could be put in place without amending the DSU.⁹⁵

93. A number of panels have made alternative findings or rulings that were not strictly necessary.⁹⁶ This is a normal side effect of installing appellate review. The threat of appeal is an incentive for panels to reason more carefully and to offer their own alternatives for back up in case they get reversed. Such back-up findings can also shape the Appellate Body’s mind and enhance the panel’s influence on WTO

jurisprudence. At the same time, additional or alternative findings by panels can also be seen, and applauded, as a cooperative gesture by panels to resolve the Appellate Body’s remand problem.⁹⁷ In one case, the Appellate Body went as far as “chiding”⁹⁸ the panel for not providing alternative factual findings, a failure which ultimately prevented the Appellate Body from completing the analysis.⁹⁹

94. Following this approach, the Appellate Body itself can provide incentives for panels *not* to exercise judicial economy, namely: by not completing the analysis. In this view, if the Appellate Body commonly completes the analysis, why would panels make the effort of offering alternative findings? Put differently, by *not* completing the analysis, or only doing so in very limited circumstances, the Appellate Body makes it worthwhile for panels to go through alternative findings and *not* to exercise judicial economy. One way to explain the recent trend of the Appellate Body *not* completing the analysis is, therefore, that the Appellate Body tries to “incentivise” panels to make more alternative findings (it puts the ball back in the panel’s camp). Another possible explanation is,

however, that by not completing the analysis the Appellate Body wants to highlight the problem of remand and push WTO Members to agree on a remand procedure (it puts the ball in the Members' camp). In this view, if the Appellate Body were to consistently complete the analysis, what would drive WTO Members to set up a remand system?¹⁰⁰ Besides (or instead of) these strategic considerations, it may also be that the increasing complexity of WTO cases -- factual complexity as well as multiple claims and "as such" claims where an entire methodology, such as zeroing, is challenged rather than a specific instance of trade restriction -- makes completing the analysis more difficult. In addition, like judicial economy for panels, for the Appellate Body not completing the analysis can be an easy way out of deciding a sensitive question (this may especially be the case when the Appellate Body declines to complete the analysis in respect of so-called "as such" measures). Finally, when the Appellate Body decides not to complete the analysis, it may simply be because it did not have the time to do so within the 90 days timeframe.

95. At the same time, the suggestion that less, or even no, judicial economy by panels would resolve the remand question is flawed for two reasons. Firstly, it would be extremely costly (if not technically impossible) in terms of both time and resources for panels to decide on each and every aspect of all WTO complaints. As WTO rules, especially those on subsidies, dumping and health measures, became more detailed and technical, WTO disputes have become increasingly fact-intensive. Moreover, the existence of multiple, often overlapping, articles and agreements that may apply to one and the same measure, as well as the growing role of private law firms in WTO litigation, have led to an explosion in the number of claims, cumulative and/or alternative, listed in WTO complaints.¹⁰¹ No judicial economy could also be politically and institutionally costly, as panels would be forced to decide all kinds of questions not required to resolve the matter at issue. Doing so is likely to intrude unnecessarily on the sovereignty and sensitivities of WTO Members, and to establish a line of case law that may not

be fully thought through.

96. Secondly, as highlighted in the list of five scenarios developed earlier (Section II), the need and resulting inability to complete the analysis not only arises when the panel exercises judicial economy. True, judicial economy is at the origin of both the "judicial economy with claims" and the "judicial economy within a defence" scenarios. However, the "new interpretation", "reversed mandate" and "procedural error" scenarios have nothing to do with judicial economy. Put differently, even if panels were to abstain from judicial economy, these three scenarios would still arise. As a result, the remand question would not be resolved. Moreover, even in those scenarios where judicial economy does play a role the Appellate Body may be unable to complete the analysis notwithstanding a sufficient factual record before it. As pointed out in Section III, even where a panel exercised no judicial economy at all, the requirement of, in particular, due process may prevent the Appellate Body from completing the analysis and thereby leave the remand question open.

97. That said, to enable the Appellate Body to complete the analysis in as many cases as possible, at a minimum, the *Australia - Salmon* test of "false" judicial economy must be strictly enforced.¹⁰² In other words, whenever a decision on the second (or next) claim does make a difference in terms of remedies or implementation, panels cannot exercise judicial economy. If they do, they not only violate their mandate but also risk making it impossible for the Appellate Body to complete the analysis. To facilitate completion of the analysis by the Appellate Body, panels should also be encouraged to make alternative findings, especially factual findings.

98. Instead of panels making a decision on all claims and factual issues before it (less or no judicial economy), another possible way to address the Appellate Body's remand problem is to extend, or at least broadly interpret, the mandate of the Appellate Body to complete the analysis. To put it bluntly, if the Appellate

6.2 Expand the Appellate Body Mandate Enabling it to More Often Complete the Analysis

Body itself would always complete the analysis, there would be no need for a remand procedure and the remand problem would be resolved. Along those lines, and in the absence of a DSU amendment, the three limits on completing the analysis - sufficient factual record, sufficient legal connection and due process -- could then be toned down or at least be addressed in ways other than *not* completing the analysis.

99. When it comes to the first limit of a sufficient factual record, the Appellate Body could, for example, increase its control over the facts and more easily come to the conclusion that the factual record is sufficient. As discussed earlier when addressing concerns related to the Appellate Body completing the analysis (Section IV.a), in many cases where the Appellate Body has completed the analysis it did engage, at least to some extent, in an assessment of the facts. Moreover, as noted earlier, the Appellate Body's tendency has been to gradually probe factual findings by panels more deeply.¹⁰³ By stepping up its assessment of the facts, the Appellate Body could then alleviate the remand problem.

100. The counter-argument that panels are inherently more experienced or better placed to find and assess facts is unconvincing, other than with reference to the fact that panels have more time than the Appellate Body. Fact finding in the WTO remains based on the submissions of the parties (there is no discovery procedure). The qualifications required for panellists¹⁰⁴ as opposed to Appellate Body members¹⁰⁵ are not such that panels can somehow be expected to have more expertise in fact finding. In fact, the requirements are more or less the same. Indeed, as Appellate Body members are appointed for terms of 4 years, as compared to panel members who are appointed *ad hoc*, one could even argue that Appellate Body members are better placed to examine facts.¹⁰⁶ In other words, unlike where a court (or NAFTA Chapter 19 panel, see Annex 1) remands a case back to an administrative unit with far more expertise than the court (or panel)

to engage in technical fact-finding, in the WTO, the gap between panels and the Appellate Body is not that wide, if it exists at all.

101. Reducing the second and third limit of sufficient legal connection and due process, the Appellate Body could avoid situations where a "full" or "in depth" exploration of the issues is missing or where the claim is "novel", by questioning the parties on the issues it may have to or intends to complete, including sending out requests for additional arguments even after the oral hearing.¹⁰⁷ As pointed out earlier, the Appellate Body could also specify more clearly when and how parties must submit requests for the Appellate Body to complete the analysis and how and when they can submit additional arguments on the issue.¹⁰⁸ Although this may be complicated given the 90 days time-limit for WTO appeals, in some cases, the Appellate Body could even issue a preliminary ruling where it reverses the panel's findings and requests the parties to submit additional arguments on the issues to be completed. Such preliminary ruling could, at the earliest, occur right after the oral hearing (as a reversal of the panel's findings would seem to require not just written but also oral arguments).¹⁰⁹ The Appellate Body's final report could then include the full reasoning for the panel's reversal, a decision on whether the Appellate Body can complete the analysis and, as the case may be, the completion of the analysis. All of these steps should also address the concerns of due process and procedural uncertainty discussed earlier (Section IV.c).

102. Crucially, none of these steps would require a DSU amendment (including the issuance of preliminary rulings). They could be set up on a case-by-case basis under Rule 16(1) of the Working Procedures for Appellate Review, the way the Appellate Body in *EC - Asbestos* set up an *amicus curiae* procedure for that case alone. With experience in a number of cases, the Appellate Body could then move to change the Working Procedures themselves,

for application in all subsequent appeals.¹¹⁰ Importantly, pursuant to DSU Article 17.9, a change in the Working Procedures for Appellate Review can be “drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General”. Changes must, obviously, be “communicated to the Members for their information”, but unlike DSU amendments they do not require the consensus of all WTO parties. Indeed, some have gone as far as arguing that an actual remand system could be installed through a mere change in the Appellate Body Working Procedures, an event that is unlikely to occur after more than ten years of completing the analysis and leaving a large number of disputes, or parts of disputes, unresolved.¹¹¹ The major stumbling block is that - even if the Appellate Body itself would have the power to set up a remand process under its Working Procedures (pursuant to DSU Article 17.9), an issue that is far from clear - such procedure would be unworkable within the current 90 days time-limit, a time-limit that the Appellate Body cannot itself, through its Working Procedures, extend (the 90 days period is set in stone in DSU Article 17.5).

103. Yet, even with less limits on the Appellate Body mandate for completing the analysis and more questioning, additional submissions and

even preliminary rulings to avoid due process concerns, there will always be cases where the Appellate Body is absolutely unable to complete the analysis (e.g., where the factual record is glaringly insufficient or due process still prevents a completion of the analysis, for example, because of time constraints). A broader mandate for the Appellate Body may thus alleviate the remand problem, but cannot resolve it completely (unless the DSU is amended to permit the Appellate Body to engage in fact-finding, an alternative discussed in Section VII). Moreover, a broader mandate for the Appellate Body must always be weighed against the concerns discussed earlier in Section IV, in particular, the fact that parties lose their right of appeal whenever the Appellate Body completes the analysis (even though it was pointed out earlier that in domestic law and other international institutions, the right of appeal is far from absolute).

104. Finally, if recent Appellate Body trends show something, it is that the Appellate Body has over time been less inclined -- rather than more -- to complete the analysis.¹¹² In other words, the alternative of a broader mandate for the Appellate Body would seem to go against the current flow of Appellate Body jurisprudence.

6.3 Use Article 21.5 as a Remand Procedure

105. Rather than focusing on the original panel proceeding (less or no judicial economy) or the Appellate Body stage of completing the analysis (a broader mandate and more explicit rules on how and when the Appellate Body completes the analysis), a third alternative to a full remand procedure is to use the Article 21.5 implementation process as the functional equivalent of a remand. As Article 21.5 is already there to be used, such would not require a DSU amendment.

106. The limits of Article 21.5 as a process to complete the analysis in cases where the Appellate Body was unable to do so were addressed earlier in Section III above. In essence, Article 21.5 can be used to complete the analysis

where the Appellate Body failed to do so in an Article 21.5 implementation procedure. This is exactly what happened in *Canada - Dairy (Article 21.5 - II)*. Yet, Article 21.5 cannot possibly be used in a scenario, such as *EC - LAN Equipment*, where not completing the analysis leaves the entire dispute unresolved. As there is nothing to implement in such cases, there is no scope for an Article 21.5 review in the first place.

107. The situation is more complicated in cases where not completing the analysis leaves some claims unresolved, but others are granted. In this scenario there is a need for implementation and whenever no implementation occurs, or a new implementing measure is enacted, Article 21.5

can be triggered. When there is an implementing measure enacted¹¹³ and it continues to include the alleged violation on which the Appellate Body could not previously complete the analysis, it can be argued that (even) the (first) Article 21.5 panel has the right to complete the analysis.

108. Granted, in *EC – Bed Linen (Article 21.5)* the Appellate Body refused to examine “the same claim against an unchanged component of the implementation measure that was part of the original measure and that was not found to be inconsistent with WTO obligations”.¹¹⁴ Moreover, in *US – Shrimp (Article 21.5)* the Appellate Body refused to “re-examine, for WTO-consistency, ... those aspects of a new measure that were part of a previous measure that was the subject of a dispute, and were found by the Appellate Body to be *WTO-consistent* in that dispute, and that remain unchanged as part of the new measure”.¹¹⁵ However, in both of these cases the original panel had fully completed the analysis in respect of those claims and came to the substantive conclusion that the relevant component of the original measure was consistent with WTO rules.¹¹⁶ In our scenario, in contrast, the Appellate Body was unable to complete the analysis and although it did not find a violation, it was unable either to substantively conclude that the relevant component of the original measure was, indeed, WTO consistent.

109. In other words, there are grounds to distinguish a situation where the analysis could not be completed, from a situation where the panel

or Appellate Body substantively found that the measure was WTO consistent. As a result, in case the implementing measure copies or carries over the component of the original measure on which the analysis could not be completed, an Article 21.5 implementation panel could be mandated to complete the analysis *in lieu* of a remand panel.

110. Even if this interpretation of Article 21.5 were followed, it is clear that the alternative of Article 21.5 may alleviate the remand problem but cannot resolve it completely. For one thing, there remains a crucial difference between a genuine remand system and an Article 21.5 remand in that a genuine remand can occur immediately, whereas an Article 21.5 remand (assuming this is the *first* Article 21.5 proceeding) can only be requested when the implementing measure is enacted, that is, usually around or after the end of the reasonable period of time for implementation.¹¹⁷ This easily implies a time difference of six months to over a year. Moreover, where not completing the analysis leaves the entire dispute unresolved (as in *EC - LAN Equipment*) Article 21.5 is irrelevant. The same is true when some claims were granted but there is no implementing measure. If there is no implementing measure, an Article 21.5 panel can be requested but only to rule on the “disagreement as to the existence ... of measures taken to comply”, not to complete the analysis on the original measure. To do so, an implementing measure that copies the relevant component of the original measure is a minimum requirement.

6.4 Expedite the Proceedings in Re-filed Cases Before a Second Panel or Arbitration Pursuant to DSU Article 25

111. Finally, another alternative to resolve the remand problem could be to focus on the back-end process of a new, second panel that can be requested in case the Appellate Body is unable to complete the analysis. In essence, if one could shorten the timeframe of this second panel procedure, it could become the functional equivalent of a formal remand process.

112. There are two ways to expedite a re-filing. Firstly, the parties themselves could conclude

a mutual agreement that remodels the new proceeding in an effective remand process. They could do so by re-appointing the original panellists and by altering the panel’s Working Procedures set out in Appendix 3 to the DSU. Amended working procedures could, for example, limit the proceedings to one round of written briefs and one oral hearing (instead of, each time, two) as well as request the panel to conclude its work in, for example, 90 days. Although this would involve a modification of the DSU itself (not merely a change

in Appendix 3), the parties could also agree on one single DSB meeting to establish the panel (DSU Article 6.1) and do away with the interim review stage (DSU Article 15). Such bilateral agreements on procedures (including agreements to deviate from DSU provisions themselves) is, for example, the way in which the sequencing problem between Article 21.5 and Article 22.6 is now commonly resolved. If parties find common ground, the same could be done to resolve the remand question on a case-by-case basis.

113. Moreover, in case the parties feel restricted by standard panel proceedings, they can also model the remand as an arbitration under DSU Article 25. This provision offers:

“Expeditious arbitration within the WTO as an alternative means of dispute settlement ... [to resolve] certain disputes that concern issues that are clearly defined by both parties”.

Article 25 arbitration was sought, for example, in the *US - Copyright* case to set the level of monetary compensation owed by the United States to the EC. Yet, besides the requirement of mutual agreement, arbitration under DSU Article 25 offers three possible drawbacks:

- (1) unlike Article 21.5 proceedings, there is no guideline to use the panel members of the original panel (to re-appoint the original panellists requires the consent of both parties; in the absence of consent, the DSU Article 8.7 procedure where the Director General appoints panellists is not available either);
- (2) third party participation requires the consent of both parties (at the same time, the absence of third parties can be a benefit in that it can expedite the process);
- (3) Article 25 arbitration awards must be notified to the DSB, but cannot be appealed (however, normal Articles 21-22 implementation and enforcement procedures do apply).

114. In case the disputing parties cannot agree to expedite the re-filing (be it under normal panel proceedings or Article 25 arbitration), there is a second way to shorten re-filed proceedings. The absence of mutual consent is, of course, not too hard to imagine given that defendants are likely to drag their feet in a second panel proceeding and insist on all the standard rights and timeframes that come with it. At the same time, this should not necessarily be the end of the matter. Pursuant to DSU Article 12.1:

“Panels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute”.

In other words, even where the defendant does not agree to expedite the re-filing, “after consulting the parties to the dispute” the panel itself may unilaterally decide to modify the standard Working Procedures in Appendix 3. Although the panel cannot alter the provisions of the DSU itself¹¹⁸ (including, in particular the procedures set out in Article 12 and interim review provided for in Article 15), the panel could thereby limit the re-filing to, for example, one round of written briefs (and even limit the length of those submissions) and one oral hearing (instead of, each time, two). If it so wishes, nothing stops the panel either from issuing its report early as time limits for panels in the DSU are maximum, not minimum, time periods.

115. In sum, where the disputing parties are able to reach mutual agreement on setting up an expedited panel or arbitration process, the flexibility offered in the DSU can resolve the remand problem. Where no agreement can be reached, the second panel itself may find ways to unilaterally expedite its proceedings. In that event the remand problem may be alleviated, but it is unlikely to be resolved completely.

7. THE DETAILS OF A REMAND/REFERRAL PROCESS

116. The previous Section (Section VI) demonstrated that there are alternatives to a remand process that can alleviate the remand problem: less judicial economy by panels; more completing the analysis by the Appellate Body; using the Article 21.5 implementation process for remand purposes; and expedited second panel or arbitration proceedings. However, unless the disputing parties are able to reach mutual agreement on an expedited second panel or arbitration, none of these alternatives are able to resolve the remand problem completely. Since this leaves major concerns un-addressed - both when the Appellate Body completes the analysis and, even more so, in those cases where the Appellate Body is unable to complete the analysis and leaves the dispute, or part of it, unresolved - there remains a need for a remand process.

117. There is no doubt that WTO Members have recognized the need for remand as a top priority. In recent reports from the Chairperson of the Special Session of the DSB on DSU reform, remand is one of only a handful of DSU review topics that continues to make the list.¹¹⁹ There are currently remand proposals on the table of the DSU review process by, in chronological

order of their submission:

- (1) the EC¹²⁰;
- (2) Jordan¹²¹;
- (3) Argentina, Brazil, Canada, India, New Zealand and Norway (hereafter referred to as the "G-6")¹²²; and
- (4) Korea.¹²³

This section explains these four proposals on a topic by topic basis, each time comparing the different proposals and subsequently assessing the feasibility of each of the options. As a conclusion to this study, Section VIII offers guidelines for an alternative solution.

118. Annex 1 to this study sums up the appeal and remand procedures known in other international courts and tribunals. It confirms that appeal, and an explicit remand procedure, are the exception and that most appellate tribunals, even those in criminal disputes, have a broad mandate to complete the analysis (thereby also taking away the parties' right to appeal). This section will refer to Annex 1 whenever lessons can be drawn from the experience in those other courts and tribunals.

7.1 Authorization for the Appellate Body to Engage in Fact Finding

119. Unlike the alternatives developed in the previous section, an explicit remand process requires an amendment to the DSU.¹²⁴ Other DSU amendments could be considered to address the remand problem. Most obviously, in line with the alternatives set out in Section VII.b, the mandate of the Appellate Body could be expanded to include an explicit grant of authority to complete the analysis, including an assessment of the facts (and possibly the power to consider new evidence). Although this may raise concerns of loss of the right to appeal, this study has emphasised the relative nature of the WTO right to appeal, as well as underscored that (unlike other remand situations) panellists are not inherently better qualified to assess facts than Appellate Body

members. Indeed, for the Appellate Body itself to engage in fact finding so as to complete the analysis would, no doubt, be the quickest way to resolve the dispute. The finality, time and resource gains that come with it may, therefore, outweigh any of the other concerns (such as a loss of the right to appeal), especially for developing countries.¹²⁵ As Valerie Hughes, former Director of the Appellate Body Secretariat points out, as an alternative to remand

"the Appellate Body could ask the disputing parties if one or more of them would like the Appellate Body to do the necessary fact finding itself, following a round of submissions".¹²⁶

120. Any grant of authority for the Appellate Body to engage in fact finding would, however, require a corresponding extension of the 90 days time-period. Although disputing parties could possibly by mutual agreement confer fact-finding powers to the Appellate Body and extend the 90 days period within the present system¹²⁷

such is best achieved through a formal DSU amendment. Crucially, expanding the Appellate Body mandate could complement, rather than replace, a new remand process. Yet, none of the four proposals on remand currently before the DSU review process include this option.

7.2 Who Triggers the Remand: The Appellate Body Itself, Either Party or One Party Only?

121. In domestic remand procedures (discussed in Section I above) as well as remands in other international courts or tribunals (see Annex 1), it is the appellate court itself that decides whether or not to remand to the lower court. The parties can neither trigger nor stop such remand. All four proposals on remand in the DSU review process have, however, one striking feature in common: To enhance party control over remand, it would not be the Appellate Body itself that remands the case back to the original panel. Rather, whether or not a remand takes place is left in the hands of the disputing parties. This explains why the remand debate is now commonly referred to as a WTO “referral procedure” rather than a “remand procedure”. As New Zealand explained when introducing the G-6 proposal:

“The proposal would allow any of the disputing parties to request that an issue be remanded. In that sense, the proposal differed from the procedure in most domestic jurisdictions where an issue would typically be remanded to a lower court by a higher court. The process would, under the proposed text, remain in the hands of the parties to the dispute. For that reason, the proponents deliberately used the phrase ‘referral procedure’ to capture this concept”.¹²⁸

122. Although a remand under all four proposals could, thereby, only materialize at the request of the parties, the Appellate Body itself would still play a role as the one triggering the very possibility for a remand. Indeed, for a party to obtain the right to request a remand in

the first place, a prior Appellate Body finding is needed that the analysis cannot be completed due to an insufficient factual basis in the panel record (further discussed in section e below). Crucially, this implies that all four proposals fully endorse the Appellate Body’s current practice of completing the analysis where it can. Put differently, none of these proposals suggests that there should be a remand in situations where so far the Appellate Body decided to complete the analysis itself. In all four proposals, the Appellate Body must also provide a detailed description of the types of findings that are required to complete the analysis. In sum, although the parties control remand, it is the Appellate Body itself that enables it.

123. Whereas the EC, Jordanian and G-6 proposals give the right to *either party* to request a remand¹²⁹, the Korean proposal limits this right to the party whose interests “can be ameliorated by the remand procedures”.¹³⁰ Otherwise, Korea argues, “a party could initiate a remand on the issues, on which it has no interest at all, only to harass the other party and to delay the completion of the case”.¹³¹ Hence, only the complainant can request a remand “if the scope of the tentative recommendations of the Appellate Body could be enlarged as [a] result of the referral”. In turn, the respondent and the respondent alone can request a remand “in the case where the scope of the recommendation could be reduced as result of the referral”.

124. The scenario that Korea has in mind where it is the defendant who should request a remand is what was referred to earlier as the “judicial economy within a defence” scenario:

In respect of a defence with several cumulative conditions, the panel found that one condition was not met and stopped its analysis there; on appeal, the Appellate Body reverses the panel, finds that the first condition of the defence is met, but cannot complete the analysis in respect of the remaining conditions. So far, this scenario has never materialized as each time the Appellate Body did complete the analysis. In Korea's view, however, if this scenario were to occur, the Appellate Body would have to *confirm a violation* as it cannot complete the analysis in respect of the defence.

125. As noted earlier¹³², this outcome is, however, highly debatable. If the defendant has raised a defence but the Appellate Body cannot complete the analysis on it, how could it possibly find a violation? Should it then not, as in all other cases where it cannot complete the analysis, leave the question open, that is, not come to a substantive conclusion of violation or compliance at all? Not completing the analysis in respect of a defence must be distinguished from a case where the defendant did not invoke a defence or did not discharge its burden of proving the validity of the defence. In the latter case, the Appellate Body can find a violation; not in the former. Moreover, once the Appellate Body has come to a substantive conclusion of violation in respect of a particular matter - rather than left the question open - that decision would arguably attract *res judicata* thereby disabling any subsequent remand ruling on it.

126. As a result, in all five scenarios where the Appellate Body cannot complete the analysis - including the "judicial economy within a defence" scenario and the "new interpretation" scenario as it relates to a defence - the Appellate Body simply does not decide the matter, one way or the other. Hence, no violation is found and any remand can only work in favour of the complainant.¹³³ Thus, in Korea's terms, the party whose interests "can be ameliorated by the remand procedures"¹³⁴ is, by definition, always the complaining party. If this is correct,

Korea's attempt to distinguish between remands in favour of the complainant and remands in favour of the defendant is futile.¹³⁵

127. At the same time, if remands do always work in favour of complainants (a point that should be confirmed in any DSU amendment, so as to enhance legal certainty), Korea's fear that remand could be used by defendants to "harass the other party and to delay the completion of the case" remains. Indeed, under the other three remand proposals, either the complainant or the defendant can request a remand. As a result, merely to gain time or to delay implementation, a defendant could, under these proposals, request a remand. To avoid such delaying tactics by the defendant - and still assuming that not completing the analysis necessarily leads to no substantive finding at all - the right to request a remand is then better reserved to *complainants only*. If the complainant no longer wants a completion of the analysis - for example, because it already won 4 out of 5 claims - the complainant should then have the right to block any remand.

128. Indeed, to streamline WTO remand with normal remand procedures in domestic and other international contexts (where the appellate court, not the parties, remand), though at the same time recognizing the need for party control in the WTO, the process for triggering remand could then be reversed: Why not let the Appellate Body itself decide on whether or not the case should be remanded (instead of completed by the Appellate Body itself) and have the case automatically remanded to the original panel unless the complainant blocks such remand (or part of it)? Remand triggered by the Appellate Body itself, without the need for a separate party request, would have the added benefit of saving time as there would then be no need to (1) wait for the party request; and (2) convene the DSB to establish the remand panel. Moreover, even if the complainant blocks the remand, nothing prevents it from re-filing the case under normal proceedings after adoption of the original (incomplete) report.

7.3 When Should Remand be Triggered: Before or After Adoption of the Appellate Body Report?

129. If party control is the common feature of all four proposals, the core distinction between them relates to the timing of the remand. In the proposals by the EC, Jordan and the G-6, remand can be requested by either party only after adoption of the original Appellate Body report by the DSB (for the EC and Jordan, within 10 days *after* adoption; for the G-6, within 30 days after adoption). According to New Zealand, prior adoption of the recommendations on those issues where the Appellate Body was able to complete the analysis is needed

“to ensure that the [referral] procedure was not used as a means for delaying implementation ... it would [be] desirable for the original Panel and Appellate Body reports to be adopted in order to trigger implementation obligations”.¹³⁶

130. In contrast, in Korea’s proposal the party whose interests “can be ameliorated by the remand procedures”, and that party alone, must request a remand *after* the Appellate Body issues its original report (wherein it is unable to complete the analysis) but *before* the Appellate Body report is referred to the DSB for adoption.¹³⁷ According to Korea,

“[t]he root cause of all [the] shortcomings [of the other three proposals on remand] is the establishment of a *separate* remand panel after the adoption of the original AB report. To avoid these problems, we propose integrating the remand into the original process while still maintaining member control over remand”.

For Korea, rather than facilitating implementation, remand *after* the adoption of the original Appellate Body report could hamper and complicate implementation:

“The responding party might be reluctant to start implementing the original rulings until the issue is fully clarified with the

conclusion of the remand proceedings. Potential justifications for such reluctance to implement could arise when there is a single measure with a number of claims, one of which is subject to remand ... A separate remand panel approach will surely create two separate litigation tracks for a single case - one for the original dispute and one for the remand. There may be two separate RPTs, two separate timelines for compliance proceedings under Article 21.5, potentially two sets of levels of retaliation under Article 22.6”.¹³⁸

131. Although the EC, Jordan and G-6 are right to worry about the delay in implementation that a remand may cause, this worry must be put in context. First, if, as suggested above, the complainant is in control of the remand process -- either by subjecting remand to a complainant’s explicit request, or by giving complainants the right to block Appellate Body remands - if complainants feel that the cost of delay outweighs the benefits of remand, they can simply prevent the remand. Second, Korea is right that whenever there is a remand, there will inevitably be delays even if one adopts the uncompleted Appellate Body report *before* the remand. As Korea puts it:

“where the time lag [between adoption of the original report and finalising the remand] is only 90 days, the respondents would feel strong incentive[s] not to implement non-remanded issues until the remand result be cleared ... given the temptation to avoid repetition of administrative efforts, the admonishment of domestic industry, and so on”.

Korea supports this prediction with a good example:

“For example, if an antidumping authority is requested to recalculate the dumping margin while a remand procedure is pending on the *de minimis* issue, the authority

will try to delay the recalculation for fear that the recalculation could be useless if *de minimis* will be found as result of the remand procedure”.

132. Third, as Korea points out, a bifurcated implementation of, first, findings of violation that the Appellate Body could complete and, second, findings of violation after a remand, is likely to complicate, rather than facilitate, implementation. There would then, for example, be two separate “reasonable periods of time” to implement each set of findings, even though they may relate to the very same measure.¹³⁹ In other words, the defendant’s parliament could, for example, have to review the same legislation twice or, at least, could have to start reviewing a measure based on the original findings, only to have to start the review process all over again when the remand adds findings of violations three or four months later. This would hardly be an effective use of time and resources. Such two sets of findings could also lead to separated or overlapping compliance procedures on implementing measures, compliance procedures that could then even overlap with ongoing remand procedures on the same measure. In turn, two sets of implementation periods and compliance procedures would further complicate the sequencing question between compliance and retaliation proceedings. To avoid all of these overlaps and complications - which are difficult to predict beforehand - it would be better to simply delay adoption (normally, for a couple of months only) and to combine the original findings

with the remand findings in one single set of DSB recommendations, adopted at the same time.

133. Fourth, to have the remand before adoption of the original Appellate Body report would force complainants to think twice: Is a completion of the analysis through remand worth the delay in implementation of the claims that were completed? This should prevent too many remand requests, especially by resourceful developed nations against developing country defendants for whom an additional remand process may be very costly. Finally, a remand before adoption is, without any doubt, the quickest and neatest solution for one particular type of cases, namely: cases like *EC - LAN Equipment* where no findings of violation at all were reached. In those cases of gravest concern, there is nothing to implement yet and to go through the time it takes for circulation of the original report and its adoption, before starting the remand, would be wasted, as no violations at all were found and there is nothing yet to start implementing.¹⁴⁰

134. In sum, the better option is for remand to be triggered (if the complainant so wants) *before* adoption of the original/incomplete Appellate Body report. This option of integrating the remand in one and the same proceeding is also in line with all domestic and other international remand procedures. If so, it is, however, of crucial importance to limit the actual duration of the remand process. This is what the next sections address.

7.4 How is the Remand Panel Established and Who Are the Remand Panellists?

135. Leaving aside the major difference in timing to *request* a remand (after or before the adoption of the Appellate Body report), the current remand proposals deal with the subsequent establishment and composition of the remand panel as follows.

136. In the EC and Jordanian proposals, the DSB must establish the remand panel “within five days after the request”. In the G-6 proposal,

the DSB must establish the remand panel at the first meeting at which the request appears on the DSB agenda (this could be the same DSB meeting at which the Appellate Body report is adopted). Korea’s proposal does not specify a time limit within which either the complaining or the defending party (depending on who is the “remand right holder”) must request remand (although, as noted earlier, such request must surely be made before DSB adoption). Remand

before DSB adoption, as advocated earlier, would, however, not require fresh DSB establishment of the panel, an additional time-related benefit.¹⁴¹ In none of the four proposals are consultations prior to the panel's establishment required.

137. In all four proposals, the remand panel is to consist of the members of the original panel, if and when available. If any member of the original panel is not available, the Director General of the WTO is to appoint a replacement, for the EC and G-6, "within seven days", for Jordan, "within five days", after the establishment of the panel. It goes without saying that if WTO Members could agree on a permanent panel system, remand from the Appellate Body to the original panel would be facilitated.

138. Note, however, that many remands in domestic courts and other international tribunals are actually to a *different* lower court, if only to avoid the appearance of bias. This will especially be the case if the original lower court engaged in serious misconduct or procedural errors that tainted the entire proceeding. For example, Article 83.2 of the Statute of the

International Criminal Court (ICC) permits the Appeals Chamber to order a re-trial. However, when it does so this must happen before "a different Trial Chamber". Equally, when the French *Cour de cassation* annuls a lower court's ruling and decides to send it back, it sends the case back to a *different* court of the same level as the original court or the same court but composed of *different* judges. This is the case both in criminal and civil disputes.¹⁴²

139. Obviously, the benefits of a new, unbiased set of panellists must be weighed against the cost of having to familiarize a new set of panellists with the case. At least in Article 21.5 implementation procedures, this trade-off was decided in favour of maintaining the original panellists, whenever possible. Given the same time constraints in remand procedures, appointing the original panellists also in remand proceedings would seem to be the best option. When, in exceptional circumstances, there are questions about the neutrality of the original panellists, those could be addressed under the Rules of Conduct and/or by the Director General replacing some or all of the original panellists.

7.5 What is the Mandate of the Remand Panel?

140. For the EC, a remand can be triggered whenever the panel report "does not contain *sufficient factual findings* so as to enable the Appellate Body to resolve the dispute". As pointed out earlier, however, the Appellate Body may be able to complete the analysis even without sufficient factual *findings* as long as there are sufficient undisputed facts in the panel record. Jordan's proposal is, therefore, more accurate as it refers to the absence of "sufficient factual findings or *undisputed facts on the record*". The G-6 proposal, in turn, is somewhat misleading as it refers to situations where "*the panel report* does not provide a sufficient factual basis to complete the analysis". Once again, even though the *panel report* itself may not be sufficient, the *panel record* may include undisputed facts that enable the Appellate Body to complete the analysis. If so, there should not be a right to request a remand, contrary to what the G-6 proposal may imply.

141. Section III above illustrated that the Appellate Body has also declined to complete the analysis on other grounds, namely absence of a sufficient legal connection and due process concerns. Should these be reasons that enable parties to request a remand? None of the four remand proposals provide for a remand in those situations. All of them limit remand to situations of an insufficient factual record. Does this mean that in the absence of a sufficient legal connection and/or due process concerns, the Appellate Body should simply stop its analysis? If so, the problem and concerns related to not completing the analysis continue, at least in some scenarios. As noted earlier, with sufficient questioning by the Appellate Body and additional pleadings by the parties, the excuse of an insufficient legal connection between claims that were decided by the panel, and claims to be completed by the Appellate Body, could be

dropped. If after such efforts, the Appellate Body remains unconvinced, based on the principle of *jura novit curiae* (the judge is supposed to know the law), the Appellate Body ought then decide based on its own legal analysis and, as the case may be, give the benefit of the doubt to the party not carrying the burden of proof. Moreover, with clearer rules on when and how the Appellate Body completes the analysis (discussed earlier), the number of cases where due process concerns prevent a completion of the analysis should also drastically decline. Once again, a distinction must be made between: (1) finding that there is not enough evidence or arguments for a party to have discharged its burden of proof, which is a substantive conclusion, and (2) being unable to complete the analysis at all, which implies no substantive conclusion either way. At the same time, where due process concerns nonetheless prevent the Appellate Body from completing the analysis (for example, because of time constraints), such situation as well ought to be covered by a remand (unless the parties could agree to expand the 90 days time-limit for WTO appeals). The current proposals ought to be adapted accordingly.

142. Crucially, the fact that all four proposals limit remand to cases where the factual record is insufficient for the Appellate Body to complete the analysis implies that all four proposals fully endorse the Appellate Body's current practice of completing the analysis. Put differently, none of these proposals suggest that there should be a remand in situations where so far the Appellate Body decided to complete the analysis itself. For example, in the "new interpretation scenario" (discussed in Section II), none of the proposals would stop the Appellate Body from applying its new interpretation of a legal provision to the

facts at hand. This situation is not listed as a reason for a remand. Given the discussion on completing the analysis in Section IV above, in particular the *caveats* raised regarding the concerns sometimes expressed by critics of the practice, this study supports this approach.

143. In terms of mandate, one crucial distinction between Korea's proposal and the other three proposals is that, for Korea, the mandate of a remand panel is limited to making the necessary *factual findings* for the Appellate Body to complete the analysis.¹⁴³ It is, in other words, not for the remand panel to complete the legal analysis; it is only for the Appellate Body to do so.¹⁴⁴ This limitation is further discussed, and criticized, in section h below. In the proposals by the EC, Jordan and the G-6, in contrast, the remand panel has the mandate both to make the necessary factual findings and to complete the legal analysis on the issue(s) concerned.

144. Finally, although none of the proposals address the issue, the question will arise of whether a remand panel can accept new evidence. To do so would enable a fuller examination of the issue to be completed; it may even be necessary in case there are no facts (not even disputed ones) on the record of the original panel. On the other hand, for a remand panel to be limited to the panel record of the original panel would, obviously, save time and may thereby limit the extra time needed for a remand. This is an aspect on which the Appellate Body may give directions to the remand panel. In general, however, it can be expected that parties will want to submit new evidence in a remand procedure and due process concerns militate in favour of giving them that right.

7.6 When Must the Remand Panel Complete its Work?

145. As to the actual duration of the remand examination by the panel, for the EC, the Appellate Body itself must recommend a period of time within which the remand panel is to complete its work and in no case should this period be more than 6 months. Jordan

follows this maximum time line of six months but proposes a time period of, in principle, 90 days (rather than leaving this decision to the Appellate Body). Likewise, the G-6 proposal states that "[a]s a general rule, the panel shall circulate its report within 90 days after the date

of referral of the matter to it". Korea's proposal equally refers to a period "not longer than 90 days".

146. Given the enormous differences between the five scenarios, described earlier in Section II, where the Appellate Body may be unable to complete the analysis, the time needed for a remand can vary a great deal. In some remands, especially in the "reversed mandate" and "procedural error" scenarios, the entire case may have to be re-decided. In other cases, the remand may be on a minor question that can be fixed in a couple of weeks. As a result, it is important to keep the time limits flexible, to direct remand panels to complete their work as quickly as possible given the circumstances of the case, but to include also a general guideline of, for example, 90 days (which can, in exceptional circumstances be extended).

147. In the alternative, it may be wise, as suggested in the EC (and Korean) proposal, to let the Appellate Body set or recommend a time period as, after all, the Appellate Body should have a good idea of what is needed to enable completion of the analysis. As a general matter, it may, indeed, be better for someone else, rather than the remand panel itself, to decide

on a deadline (even though, in exceptional circumstances, the remand panel could delay its report, as long as it stays within a certain absolute maximum of, say, six months as the EC suggest or, far less feasible, 90 days as Korea proposes). For example, in remands by NAFTA Chapter 19 panels to domestic investigating authorities, discussed in Annex 1, panels themselves have a duty to set a deadline for the remand determination to be completed by the investigating authority. In some cases, this deadline was as short as 10 days.

148. Whoever decides on the guideline for completion, WTO Members should, in any event, be reminded that even with the 90 days guideline for Article 21.5 implementation proceedings, according to www.worldtradelaw.net, it takes on average 229.67 days (much more than 90 days) between the establishment of an Article 21.5 panel and the adoption of its report. If the Article 21.5 panel is appealed, the average increases to 360 days. At the same time, Article 21.5 proceedings are, in most cases, about a new, implementing measure (not an issue left undecided in the original proceeding). Hence, remands should normally take less time than Article 21.5 implementation proceedings.

7.7 What Procedures for Remand Panels?

149. Turning to the actual stages in a remand panel's examination, most proposals are silent. Although Article 21.5 on implementation disputes cross-refers to "recourse to these dispute settlement procedures", only the original G-6 proposal on remand (not the amended G-6 proposal) includes a similar cross-reference. In the original G-6 proposal, "[t]he provisions of Articles 10 to 16 [of the DSU] apply to" remand procedures, that is, third party rights, ordinary panel proceedings in two rounds, the right to seek information and an interim review stage. The proposal also added, however, that "in recognition of the need for flexibility in resolving matters that are referred pursuant to [a remand], the panel may modify and simplify its working procedures, after consulting the parties to the

dispute". The other three proposals, as well as the subsequent amended G-6 proposal, do not include such cross-reference and are silent on whether all of the normal panel proceedings and stages are required in a remand. The amended G-6 proposal did, however, keep the flexibility clause ("in recognition of the need for flexibility in resolving issues that are referred pursuant to [a remand], the panel may modify and simplify its working procedures, after consulting the parties to the dispute").

150. If Article 21.5 proceedings are any indicator, the practice developed there is that third parties can participate and are heard in a special session of the panel, that only one round of submissions is normally exchanged and only

one oral hearing takes place and, finally, that an interim report is issued and the final report is circulated only after translation in all three official languages. It would be wise for a remand amendment to include at least some reference to the stages that need to be followed, albeit with an explicit grant of flexibility to the remand panel to amend any of the normal proceedings, after consultations with the parties.

151. Although it remains politically sensitive, if WTO Members are serious about expediting remand proceedings they may want to consider circulation upon completion in the original language of the report, with translation in the

other two languages after circulation. This could save months especially where, as in the Korean proposal, the result of a remand is to be sent back to the Appellate Body (not the DSB). In that case, the Appellate Body could possibly complete its part of the remand stage by the time the panel report is translated. The same could be done when it comes to initiating the remand (under a system where remand occurs before adoption of the reports), that is, the case could be sent back to the panel even before the Appellate Body report is translated into all three languages (the original Appellate Body report could then be translated while the remand panel conducts its work).

7.8 What Happens after the Remand Panel Completes its Work?

152. Once the remand panel completes its work, according to the EC, Jordanian and G-6 proposal, the report is sent to the DSB - not to the Appellate Body - for adoption.¹⁴⁵ DSB adoption of the remand panel report can, in all three proposals, be blocked by consensus, or an appeal to the Appellate Body. In all three proposals, normal appeal proceedings (pursuant to DSU Article 17) apply.

153. If, on appeal, any of the five scenarios described earlier re-occurs and the Appellate Body can, once again, not complete the analysis, a second remand is technically possible under all three proposals (EC, Jordan, G-6). This, of course, raises the spectrum of a carousel of remands, as NAFTA Chapter 19 panels (discussed in Annex 1) have witnessed. The difference with Chapter 19, however, is that in NAFTA remand is from a NAFTA panel to the investigating authority of the defendant. Hence, it can be expected that the investigating authority will be inclined to tailor its re-determination on remand in such a way as to limit adverse effects for the defendant. The same kind of tension is unlikely to arise between the WTO Appellate Body and WTO panels, both of which are third-party adjudicators, and where WTO panels, on remand, have every reason to cooperate with the Appellate Body or, at least, less reason to obstruct the Appellate Body by starting a carousel of remands.

154. Yet, the mere possibility of such “remand of a remand” is an additional reason to, at some stage, permit the Appellate Body itself to complete the analysis with additional fact finding by the Appellate Body itself, so as to conclude the proceeding once and for all (as suggested above in section a).

155. Korea’s remand proposal is dramatically different as regards the stage after the remand panel’s completion. Indeed, as pointed out earlier, whereas the other three proposals require the remand panel itself to make both the required fact findings and to complete the legal analysis on the uncompleted issues, the Korean proposal limits the task of the remand panel to making the necessary factual findings only.¹⁴⁶ Thus, whereas under the EC, Jordanian and G-6 proposal, the remand panel can be adopted by the DSB as such without any involvement of the Appellate Body, under the Korean proposal, the remand panel *must report to the Appellate Body* as it is the Appellate Body alone that is to complete the analysis. Although Korea does not specify this element, eventually, the DSB would then adopt three reports: the original panel report, the report of the remand panel and the fully completed Appellate Body report (recall that under the other three proposals, the original panel and Appellate Body reports need to be separately adopted even before a remand can be requested).

156. This aspect of the Korean proposal is flawed. First, under any remand procedure, be it in domestic courts or other international tribunals, the lower court to which the case is remanded decides on questions of both fact *and* law. In other words, it fully completes the analysis itself. Only if the parties appeal the remand court will the case reach the appellate stage for a second time (this is also what happened in the *Canada Dairy - Article 21.5- II case*). In no case is the remand court limited to making factual findings, which must then be, by necessity, reported to the appellate court for a ruling on the law. Second, and related, one of the main reasons for asking a remand panel (rather than the Appellate Body itself) to complete the analysis, is to preserve the parties' right to appeal. However, under Korea's proposal, the main reason for a remand process would not be met, as parties cannot possibly appeal any of findings on remand: The remand panel simply reports its factual findings to the Appellate Body, for the Appellate Body itself to complete the analysis for the very first time, without any possibility to appeal those findings. The only gain obtained from Korea's remand process - as opposed to letting the Appellate Body itself complete the analysis from the beginning, on both facts and law - then relates to a higher amount of trust in, or expertise of, panels to engage in fact finding. As pointed out earlier¹⁴⁷, however, given the requirements for, and backgrounds of, panellists and Appellate Body members it is hard to conclude that panels are, by definition, better placed to find facts than the Appellate Body is, all time constraints being equal. Third, Korea's requirement that the Appellate Body (not the remand panel) must, by definition, complete the legal analysis adds time to the remand process. If, under the proposal by the EC, Jordan or the G-6, the parties decide not to appeal a remand panel, the remand process can be completed in 3 to 4 months or possibly even less. Under Korea's proposal, in contrast, the fact that there must always be an appellate

stage in each and every remand adds an extra 3 months to the process.

157. Finally, Korea's proposal where remand panels must necessarily report back to the Appellate Body for the Appellate Body to complete the analysis may increase the likelihood of second or third remands ("remand of remand"). Indeed, for Korea, the remand panel must essentially gather and decide on the facts necessary for the Appellate Body to make legal conclusions. Since the panel itself must not apply the law to these facts, not having to go through the process of application, increases the likelihood of leaving certain facts undecided. In that case, Korea acknowledges that "it is possible that the AB would need an additional remand for the remand report of the panel". Yet, it then adds that "[i]f the AB still can not finish its analysis even after receiving the remand report, it has to circulate its report with uncompleted issues". Although Korea does not explicitly say so, one must assume that, for Korea, the "remand right holder" can then request a second remand. If that is not the case, the problem of remand remains unresolved. As noted earlier, it may then be wiser to, at some stage, authorize the Appellate Body itself to complete the analysis, including the necessary fact finding (see section a above).

158. In sum, although this study favours remand *before* adoption of the original reports (as in Korea's proposal), a remand panel should (in contrast to Korea's proposal) be able to complete both the factual and legal analysis itself, with the Appellate Body intervening only if there is an appeal against the remand panel. In that case, the DSB would ultimately adopt four reports at the end of the second appeal: the original panel report, the first Appellate Body report, the remand panel report and the Appellate Body report against the remand panel.

8. GUIDELINES FOR AN ALTERNATIVE SOLUTION

159. The final section of this study summarizes the suggestions made earlier in this study in the following ten guidelines for resolving the remand problem. To allow for sufficient room for WTO Members to negotiate within the parameters of these guidelines, the study prefers to offer guidelines rather than a specifically worded amendment.

- (1) **Less judicial economy by panels:** To bolster the panel's factual record and, thereby, to enable the Appellate Body to complete the analysis more often, the *Australia - Salmon* test against "false" judicial economy must be strictly enforced. In addition, panels should be encouraged to make alternative factual findings.
- (2) **Clearer rules on when and how to complete the analysis:** The current Appellate Body practice of "completing the analysis" should be confirmed (with the exceptions specified in point (3) below). Thus, in many cases, rather than a remand, the Appellate Body itself should complete the analysis. At the same time, the Appellate Body should only complete the analysis if either party so requests. Such a request should preferably be made in a Notice of Appeal or Other Appeal, and at the very latest in the parties' written submissions, before the oral hearing. At the hearing, the Appellate Body should question the parties fully on issues it may have to complete. Shortly after the oral hearing, the Appellate Body may make preliminary rulings reversing a panel's findings and/or request additional submissions to facilitate a completion of the analysis.
- (3) **An insufficient factual record should (normally) be the only excuse not to complete the analysis:** With clearer rules in place on when and how to complete the analysis, the Appellate Body should no longer decline to complete the analysis based on insufficient legal connection or (with limited exceptions) due process. The parties bear the responsibility of clarifying their positions fully. The Appellate Body must question them as required and is supposed to know the law (*jura novit curiae*). Insufficient legal connection should not be a valid reason to decline to complete the analysis. Rather, if in the end the Appellate Body remains unconvinced, the party that carries the burden of proof loses. As to due process, with clearer rules on when and how to complete the analysis due process should not normally prevent a completion of the analysis. Only in exceptional circumstances (for example, because of time constraints) should due process then prevent the Appellate Body from completing the analysis.
- (4) **Option to request the Appellate Body to do the necessary fact finding:** Where the Appellate Body warns the parties that the factual record is insufficient (in, for example, a preliminary ruling) the parties can authorize the Appellate Body to do the necessary fact finding, and extend the 90 days time-period accordingly. Alternatively, the complainant alone could be given the right to do so.¹⁴⁸ This option reoccurs in case the Appellate Body would still (or again) be unable to complete the analysis after a remand (to avoid "remand of a remand").
- (5) **The complainant decides whether or not there will be a remand:** Where in its final report the Appellate Body concludes that it still cannot complete the analysis (be it because of an

insufficient record or, in exceptional circumstances, due process concerns) - and the parties, or complainant alone (depending on the rule change under (4) above), do not authorize it to do the necessary fact finding itself - then the uncompleted matter is automatically remanded to the original panel (without DSB intervention), *unless the complainant blocks the remand*. If the complainant blocks only part of the remand, the remaining part gets remanded. Before reserving the right to a remand to complainants only (not defendants), the DSU amendment should make clear that also in the “judicial economy within a defence” scenario, a failure to complete the analysis under a defence renders the panel’s finding of violation (which triggered the invocation of that defence) without legal effect. In other words, in that scenario as well (as in all other scenarios), only the complainant stands to gain from a remand. Hence, only complainants should have the right to request or block a remand. Defendants can thereby not abuse the remand process to delay implementation.

- (6) **Choice of a second Article 21.5 panel or a complete re-filing:** When the Appellate Body cannot complete the analysis in an Article 21.5 implementation procedure the complainant has the choice to request either a second Article 21.5 panel or a remand panel. Even after first time *original* proceedings, if the complainant so wishes it can re-file the case under normal panel proceedings (or with mutual consent, Article 25 arbitration) instead of asking for a remand.
- (7) **Panel composition:** The remand panel is to consist of the original panellists unless they are unavailable or a serious question regarding their neutrality is

raised (either informally or under the Rules of Conduct) in which case the Director General can replace them.

- (8) **Time period:** The Appellate Body recommends the period within which the remand panel must complete its work, a period that can be extended by the panel only with good reasons. In any event, the remand must be completed within an absolute maximum of [6 months]. The justified concern of expediting remand procedures can also be alleviated by more fundamental changes to the DSU, in particular, a permanent panel and/or some form of retroactive remedies or provisional measures.
- (9) **Mandate:** The mandate of the remand panel is to both make the necessary factual findings and to complete the legal analysis. Remand panels should normally have the authority to accept new evidence. The remand panel should follow standard DSU procedures but can simplify them after consultation with the parties.
- (10) **Subsequent adoption or appeal:** Upon completion of its work, the remand panel is to be adopted, together with the original panel report and Appellate Body report, by the DSB, unless there is a consensus against such adoption or either party appeals the remand panel. Normal appeal procedures are to be followed. At the end of such appeal, the two original reports (panel and Appellate Body) combined with the two remand reports (panel and Appellate Body) are to be adopted at one DSB meeting. Normal implementation procedures apply.

ANNEX 1: APPEAL AND REMAND BEFORE OTHER INTERNATIONAL COURTS AND TRIBUNALS

1.1 The General Rule: Absence of a Right to Appeal

1. The possibility to appeal in international dispute settlement proceedings remains exceptional.¹⁴⁹ Most prominently, there is no appeal against:

- the International Court of Justice (or its predecessor the Permanent Court of International Justice)
- the International Tribunal on the Law of the Sea¹⁵⁰
- any of the major regional human rights courts (European Court of Human Rights, Inter-American Court of Human Rights¹⁵¹, African Court of Human and Peoples' Rights)
- with the exception of the European Court of First Instance, any of the major regional economic integration courts and tribunals (European Court of Justice, the European Free Trade Association (EFTA) Court, NAFTA Chapter 20 (trade) panels, Court of Justice of the Andean Community, the Mercado Común del Sur (MERCOSUR) Court of Justice, Court of Justice of the African Economic Community, Court of Justice of the Common Market for Eastern and Southern Africa, and the Tribunal of the Southern Africa Development Community).

Obviously, where there is no appeal, there is no need for a remand procedure.

1.2. International Criminal Courts and Tribunals

2. The only field of international law where appeal is now uniformly provided for is international criminal law.¹⁵² The right to appeal in criminal cases is generally recognized as a human right under international law. Consequently, it is only logical that all international criminal courts and tribunals (subsequent to the Nuremberg and Tokyo tribunals, which did not provide for appellate review) include the right to appeal.

3. Pursuant to the Statute of both the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), decisions by a Trial Chamber can be appealed before an Appeals Chamber. Crucially, such appeal is possible on both questions of law *and* fact.¹⁵³ The Appeals Chamber “may affirm, reverse or revise the decisions taken by the Trial Chambers”.¹⁵⁴ The option of remanding or remitting the case back to the Trial Chamber is not explicitly provided for in the Statute. However, Rule 117(C) of the Rules of Procedure and Evidence of the ICTY provides that “[i]n appropriate circumstances the Appeals Chamber may order that the accused be retried according to law”.¹⁵⁵ So far, no re-trials have been ordered.¹⁵⁶ Moreover, the fact that the Appeals Chamber can consider both law and fact makes remand less of a problem. Indeed, pursuant to Rule 115(A) of the ICTY Rules of Procedure and Evidence, the Appeals Chamber may even accept new evidence.¹⁵⁷ In most cases, therefore, the Appeals Chamber has itself completed the analysis. Although this has raised the concern of parties losing their right of appeal (similar to the concern raised against the WTO Appellate Body completing the analysis), time pressure and, in particular, the so-called “completion strategies” for both tribunals to finish their work by the end of 2010¹⁵⁸ have induced the Appeals Chambers to finish proceedings themselves, as much as they can, rather than sending cases back to the Trial Chamber. Although not explicitly provided for in the Statute or Rules, the ICTY and ICTR have, however, occasionally remanded cases back to the Trial Chamber, but only to decide on sentencing.

4. The very first case before the Appeals Chamber of the ICTY, the Tadic case, provides a good illustration. In an interlocutory appeal on jurisdiction, the Appeals Chamber reversed the Trial Chamber's ruling that it was incompetent to pronounce on a plea of illegal establishment of the Tribunal.¹⁵⁹ After this reversal, however, the Appeals Chamber completed the analysis and examined the plea of illegality itself. In the end, however, it confirmed the Trial Chamber's finding that the Tribunal did have jurisdiction. The case subsequently proceeded before the Trial Chamber which decided, first, on the merits, and, second, on sentencing. On appeal, the Appeals Chamber reversed some of the Trial Chamber's acquittals and, once again completing the analysis itself, found the accused guilty on an additional nine counts instead.¹⁶⁰ In what is a remand for all practical purposes, the Appeals Chamber then remitted the case to the Trial Chamber for sentencing.¹⁶¹ On appeal against these sentences, the Appeals Chamber reversed some of the sentences and, once more completing the analysis, set the correct sentences itself.¹⁶² It is now generally recognized that the Appeals Chamber has the competence to either pronounce sentences itself or to remit sentencing to a Trial Chamber. The decision is left to the Appeals Chamber according to the specific circumstances of each case.¹⁶³

5. Like the Statutes of the ICTY and the ICTR, the Rome Statute of the International Criminal Court (ICC) provides for an appeal on errors of both law *and* fact.¹⁶⁴ Indeed, Article 83.1 of the ICC Statute goes as far as stating that during appeals procedures, "the Appeals Chamber shall have all the powers of the Trial Chamber". Unlike the Statutes of the ICTY and the ICTR, however, the Rome Statute also provides for an explicit remand procedure either to re-try the case or to get a determination by the Trial Chamber on a specific factual issue. The latter is unknown in the ICTY/ICTR. Article 83.2 of the Rome Statute provides that, where certain appeals are granted, the ICC may:

- (a) reverse or amend the decision or sentence; or
- (b) order a new trial before a different Trial Chamber.

It then adds that:

"For these purposes, the Appeals Chamber may remand a factual issue to the original Trial Chamber for it to determine the issue and to report back accordingly, or may itself call evidence to determine the issue".

6. Quite differently from WTO appellate proceedings, Appeals Chambers of international criminal courts and tribunals can, therefore, consider both law and facts. They also have broad authority to complete the analysis themselves, even on factual questions (the Appeals Chamber of the ICTY often decides on acquittal or guilt itself, as well as on sentencing¹⁶⁵; all Appeals Chambers were given the explicit authority to call for new evidence). Yet, an Appeals Chamber also has the discretion to remit the case back to a Trial Chamber for sentencing or a complete re-trial (ICTY/ICTR/ICC), or for a determination on a specific factual issue (ICC only).

1.3 Appeals Before the European Court of Justice

7. Until 1989, the European Court of Justice (ECJ) operated as a single level judiciary for the European Communities. In 1989, the Court of First Instance (CFI) was created, not to grant a right of appeal against the increasingly important and powerful ECJ, but to lighten the case load of the ECJ. After three extensions (1993, 1994, and 2004), the CFI now has jurisdiction over, in particular, all actions brought by the Member States against the Commission, all direct actions brought by natural or legal persons against Community institutions (including, in particular, competition cases) and all actions relating to Community trade marks.

8. Decisions by the Court of First Instance can be appealed before the European Court of Justice.¹⁶⁶ As in the WTO, such appeals are limited to “points of law only”.¹⁶⁷ The Statute of the Court of Justice further narrows appeals to

“grounds of lack of competence of the Court of First Instance, a breach of procedure before it which adversely affects the interests of the appellant as well as the infringement of Community law by the Court of First Instance”.¹⁶⁸

Although there is room under the EC Treaty to make appeals subject to a leave procedure, until now, appeal to the ECJ is as of right.¹⁶⁹ Notably, an appeal before the ECJ “shall not have suspensory effect”.¹⁷⁰

9. Crucially, when the ECJ accepts the appeal it has the choice of either (1) completing the analysis itself, or (2) remanding the case back to the Court of First Instance. Article 61 of the Statute of the Court of Justice provides as follows:

“If the appeal is well founded, the Court of Justice shall quash the decision of the Court of First Instance. It may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment”.

As in the WTO, completing the analysis by the ECJ depends on whether “the state of the proceedings so permit”. As Brown and Kennedy point out, “[a] distinction may therefore be made between the Court of Justice, in its appellate capacity, acting as a Court of *révision* substituting its own judgment as the final one in the matter, or as a Court of *cassation* in which the judgment of the lower court is squashed and referred back to that Court for rehearing in the light of findings by the Court of Justice on the points of law on appeal”.¹⁷²

10. Whereas in the WTO, 70% of all panel reports are appealed¹⁷³, it is interesting to note that before the Court of First Instance this percentage is much lower. In 2005, for example, the CFI issued 272 decisions open to challenge, yet only 64 of those were appealed.¹⁷⁴ Obviously, if all decisions by the CFI were appealed, the original motive for creating the CFI in the first place - reducing the ECJ’s docket -- would be completely undermined. Equally noteworthy is that most appeals are dismissed and that where an appeal is granted, in most cases, the ECJ completes the analysis itself. Of the 50 appeals decided by the ECJ in 2005, for example, 41 were dismissed. Of the 7 cases where the Court of First Instance decision was totally or partially set aside, not a single dispute was referred back to the Court of First Instance.¹⁷⁵

1.4 The NAFTA Extraordinary Challenge Procedure

11. As pointed out earlier, unlike WTO panels, NAFTA panels are not subject to appeal. Although not technically an appeal, there is, however, a so-called “extraordinary challenge procedure” that NAFTA parties can resort to against bi-national panels under NAFTA Chapter 19. NAFTA Chapter 19 panels are set up with the specific mandate of reviewing dumping and countervailing duty matters for compliance with the domestic law of the defending government. This extraordinary challenge procedure is set out in Article 1904.13 of NAFTA and Annex 1904.13 to NAFTA. It is not a full appeal as the challenge procedure is limited to the following grounds:

- i) a member of the panel was guilty of gross misconduct, bias, or a serious conflict of interest, or otherwise materially violated the rules of conduct,

- ii) the panel seriously departed from a fundamental rule of procedure, or
- iii) the panel manifestly exceeded its powers, authority or jurisdiction set forth in this Article [Article 1904], for example by failing to apply the appropriate standard of review.¹⁷⁶

In addition, for a challenge to be granted, it must be demonstrated that any of these three actions has “materially affected the panel’s decision and threatens the integrity of the bi-national panel review process”.¹⁷⁷

12. The Extraordinary Challenge Committee, charged with this review, can consider both law *and* facts, as its task is an “examination of the legal and factual analysis underlying the findings and conclusions of the panel’s decision in order to determine whether one of the grounds set out in Article 1904(13) has been established”.¹⁷⁸ The Extraordinary Challenge Committee must decide within 90 days of its establishment.¹⁷⁹ In case the Committee finds that one of these grounds has been established, it can either

“vacate the original panel decision or remand it to the original panel for action not inconsistent with the committee’s decision”.

If the original panel decision is vacated, “a new panel [not the original panel] shall be established pursuant to Annex 1901.2”, that is, the same proceedings as for first time panels.

13. So far, the extraordinary challenge procedure was invoked in only three NAFTA Chapter 19 disputes (out of a total of 92 awards¹⁸⁰), each time at the request of the United States.¹⁸¹ In each of these reviews the challenge was denied. There is, therefore, no practice on when the Committee vacates the original panel (requiring an entirely new procedure) and when it simply remands the case back to the original panel.

1.5 Remand by NAFTA Chapter 19 Panels to the National Investigating Authority

14. It is important to distinguish remand by an Extraordinary Challenge Committee to a Chapter 19 panel (discussed in the previous section), from remand by a Chapter 19 panel back to the national investigating authority of the defending country. The latter case is very different as in that instance an international tribunal (the Chapter 19 panel) remands not to another international tribunal, but back to the defending country for implementation. Yet, since the procedure and subsequent practice may be instructive for remand in the WTO, it is nonetheless discussed in this study.

15. Article 1904.8 of NAFTA provides that Chapter 19 panels

“may uphold a final determination, or remand it for action not inconsistent with the panel’s decision”.

It adds that

“[w]here the panel remands a final determination, the panel shall establish as brief a time as is reasonable for compliance with the remand, taking into account the complexity of the factual and legal issues involved and the nature of the panel’s decision”.

16. In practice, the time period given for the investigating authority to take action on remand has been rather short. In the *Softwood Lumber (Final Affirmative Countervailing Duty Determination)*, for example, the first remand determination had to be completed within 60 days¹⁸²; the fifth (and ultimately final) remand was due in 23 days.¹⁸³

17. After the remand, the re-determination by the national authority can, once more, be reviewed by a Chapter 19 panel. In this respect, Article 1904.8 provides:

“If review of the action taken by the competent investigating authority on remand is needed, such review shall be before the same panel, which shall normally issue a final decision within 90 days of the date on which such remand action is submitted to it”.

18. Although, as pointed out earlier, NAFTA Article 1904.8 limits the authority of Chapter 19 panels to either uphold the determination or remand, in some cases panels have gone beyond a simple remand. In *Softwood Lumber (Final Affirmative Threat of Injury Determination)*, for example, the second remand decision of the panel (that is, the third time the panel looked at the same question), the panel did not content itself with a remand. In addition, the panel specifically precluded the US International Trade Commission (ITC) “from undertaking yet another analysis of the substantive issues” and instructed that the ITC determine “that the evidence on the record does not support a finding of threat of material injury”.¹⁸⁴ This made an end to a series of US re-determinations in September 2004. In terms that cannot be mistaken, the Panel explained its ruling as follows:

“The [ITC] has made it abundantly clear to this Panel that it is simply unwilling to accept this Panel’s review authority under Chapter 19 of the NAFTA and has consistently ignored the authority of this Panel in an effort to preserve its finding of threat of material injury. This conduct obviates the impartiality of the agency decision-making process, and severely undermines the entire Chapter 19 panel review process”.¹⁸⁵

1.6 The ICSID Annulment Procedure

19. Similar to the NAFTA Extraordinary Challenge Procedure, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) provides that ICSID arbitration awards are subject to review by a so-called Ad Hoc Annulment Committee. Like the NAFTA procedure, the ICSID annulment procedure is not technically an appeal as the grounds for review are limited to

- (a) that the Tribunal was not properly constituted;
- (b) that the Tribunal has manifestly exceeded its powers;
- (c) that there was corruption on the part of a member of the Tribunal;
- (d) that there has been a serious departure from a fundamental rule of procedure; or
- (e) that the award has failed to state the reasons on which it is based.¹⁸⁶

20. The *Ad Hoc* Committee has “the authority to annul the award or any part thereof”. It does not have the power to decide the case for itself, or to remand the dispute back to the original arbitration tribunal. However, Article 52.6 of ICSID does provide that

“[i]f the award is annulled the dispute shall, at *the request of either party*, be submitted to a new Tribunal constituted in accordance with Section 2 of this Chapter [that is, normal procedures for a first time arbitration]”.

In other words, although there is no remand by the *Ad Hoc* Committee back to the original arbitration tribunal, ICSID explicitly confirms that, at the request of either party, a new arbitration tribunal (not the same as the original one) shall be established. In case the *Ad Hoc* Committee annuls only part of the original award, the annulled part can be made subject to a new arbitration. The part that was not annulled becomes *res judicata*.¹⁸⁷

21. Recourse to the ICSID annulment procedure has been relatively rare. Since its creation in 1965, the ICSID website reports, at the end of 2006, to have concluded 115 cases.¹⁸⁸ Of these 115 disputes, only 7 included a challenge before an *Ad Hoc* annulment committee (in two cases, *Klockner* and *Amco Asia*, also the second tribunal was challenged for annulment). Most annulment proceedings led to at least a partial annulment of the award and, in almost all cases where annulment occurred, the dispute was re-filed (in contrast to WTO dispute settlement where so far no case has been re-filed). More recently, however, with the boom in ICSID cases -- in its first 30 years, from 1965 to 1995, on average, one ICSID case per year was filed; since 1995, however, on average 30 cases per year were filed - annulment procedures have been initiated more frequently (in the majority of pending cases where a decision on the merits was issued, annulment procedures have been filed).¹⁸⁹

22. In recent years, several calls for the establishment of a genuine appellate review system for investment disputes have been launched. The United States, in particular, is pushing for appellate review in the investment chapters of its recently concluded free trade agreements. No such appellate review for investment disputes has, however, been set up to date. Detractors of the idea most often refer to the need to keep arbitration procedures short and a business-minded preference for finality over endless review and legal correctness, inherent in the very notion of arbitration (as opposed to a full-fledged court system).¹⁹⁰ In 2005, ICSID reported that "it has appeared that there was general agreement that, if international appellate procedures were to be introduced for investment treaty arbitrations, this might best be done through a single ICSID mechanism rather than by different mechanisms established under each treaty concerned, and that *it would be premature to attempt to establish such an ICSID mechanism at this stage*".¹⁹¹

1.7 Interpretation and "New Facts" Proceedings

23. Finally, one other form of review that may be instructive for a WTO remand system is the proceeding commonly provided by international courts and tribunals where parties can seek either an interpretation of an earlier decision, or a revision of an earlier decision based on new facts. Although the WTO does not provide for either form of review, the ICJ Statute provides for both options (in respectively, Articles 60 and 61). So does ICSID (in, respectively, Articles 50 and 51). The ICTY, ICTR and ICC provide only for so-called review proceedings based on new facts (in, respectively, Articles 26, 25 and 84 of their Statutes). Obviously, unlike an appeal, such interpretation and revision proceedings are conducted by the same organ that issued the original ruling.

24. Interestingly, in the ICC, a request for revision of conviction or sentence must be submitted directly before the Appeals Chamber. If the Appeals Chamber

"determines that the application is meritorious, it may, as appropriate:

- (a) reconvene the original Trial Chamber;
- (b) constitute a new Trial Chamber; or
- (c) retain jurisdiction over the matter,

with a view to, after hearing the parties in the manner set forth in the Rules of Procedure and Evidence, arriving at a determination on whether the judgement should be revised".¹⁹²

ENDNOTES

- 1 For an argument that remand is inherent in the Appellate Body's appellate jurisdiction, see Bourgeois, J. (2001). "Some Reflections on the WTO Dispute Settlement System from a Practitioner's Perspective", *Journal of International Economic Law*, 4: 145, 152. Yet, so far the Appellate Body has never remanded a case back to a panel.
- 2 When this study refers to "appeals" or "appellate systems" in domestic law, it refers (unless otherwise specified) to first time appeals, that is, from original trial courts to an appellate court; not second appeals or recourse against a court of appeal before, for example, the Supreme Court, *Cour de Cassation* or *Bundesgerichtshof*.
- 3 Carrington, P.D., Meador, D. J., Rosenberg, M. (1976). *Justice on Appeal*. West Publishing Company, St. Paul, Minnesota: 2. See also Joergens, K. (1998-99). "True Appellate Procedures or Only a Two-Stage Process? A Comparative View of the Appellate Body under the WTO Dispute Settlement Understanding", *Law & Policy in International Business*, 30: 193.
- 4 See Van den Bossche, P. (2006). "From Afterthought to Centerpiece: The WTO Appellate Body and its Rise to Prominence in the World Trading System" in *The WTO at Ten: The Contribution of the Dispute Settlement System*. Sacerdoti, G., Yanovich, A., Bahones, J. (eds): 289, 292.
- 5 Mexico's July 1990 proposal to the Negotiating Group on Dispute Settlement (MTN.GNG/NG13/W/42, 12 July 1990, at 3) made exactly this point: "The purpose of establishing an appellate body is to compensate for the virtually automatic adoption of panel reports, by allowing parties to a dispute the opportunity to have reports reviewed in their entirety by a body specialized in GATT matters: in other words, by a body whose membership and permanent nature ensure that the final conclusions and recommendations are free from any doubt or error of interpretation concerning GATT rules and disciplines".
- 6 Indeed, originally, one alternative to a full appeals process was to have an interim review stage by the original panel itself on both facts and legal findings (under the old GATT mechanism only the factual part of the panel report could be reviewed). This would give parties an opportunity to comment on the panel's interim factual and legal findings and an opportunity for the panel to correct its mistakes (Stewart, T. (1993). *The GATT Uruguay Round: A Negotiating History*. Kluwer, Deventer, Boston: 2767). Obviously, a second opinion of the same panel, though aimed at "correctness", could not possibly achieve the other objective of "uniformity" between different panels. Eventually, both such interim review (Article 15) and an appeal (Article 17) were included in the DSU.
- 7 The term used by former Appellate Body member Claus-Dieter Ehlermann in "Six Years on the Bench of the 'World Trade Court': Some Personal Experiences as a Member of the Appellate Body of the WTO" (2002). *Journal of World Trade*, 36: 605. [Please check with author that re-write of Vol. + pages = accurate.]
- 8 Communication from Canada to the Negotiating Group on Dispute Settlement, MTN.GNG/NG13/W/41, 28 June 1990, at 4.
- 9 Quoted *supra* note 5.
- 10 Perrot, R. (2004). *Institutions Judiciaires*. Montchrestien, Paris: 499. Second appeals before, in France, the *Cour de Cassation* are different and limited to questions of law. See Article 604 NCPC: "le pourvoi en cassation tend à faire censurer par la Court de cassation la non-conformité du jugement qu'il attaque aux

regles du droit". See also Chartier, Y. (1999). *La Cour de cassation*. Dalloz, Paris: 53 ff. The same is true for second appeals in most legal systems, both those of the civil law and the common law.

- 11 See Platto, C. (ed.), (1992). *Civil Appeal Procedures Worldwide*. Graham & Trotman, London, Boston: 135, 173, 42 and 52. See also Grubbs, S.R. (ed.), (2003). *International Civil Procedure*. Kluwer Law International, The Hague, New York.
- 12 Remand from the third level of, for example, the *Cour de cassation*, to the second level of the courts of appeal is, however, common, also in civil law systems. See Chartier, *supra* note 10 at 55. As the second appeal in most systems is limited to questions of law, remand then becomes necessary.
- 13 Communication from Canada, *supra* note 8 at 4, emphasis added.
- 14 Communication from the United States, Negotiating Group on Dispute Settlement, MTN.GNG/NG13/W/40, 6 April 1990, at 5, emphasis added. See also, but less explicitly, Statement by the Spokesman of the European Community, Negotiating Group on Dispute Settlement, MTN.GNG/NG13/W/39, 5 April 1990, at 2: "If one of the parties to the dispute felt that the *legal considerations* which led the panel to conclude that a violation of undertakings had taken place were erroneous or incomplete, it would have the option of taking its case to an appeals body, which would accept or reject the appeal depending on its assessment of its validity" (emphasis added).
- 15 Pursuant to Section 2414(a)(2)(A), the US Trade Representative must take action, including possible trade sanctions, no later than 18 months after the date he or she initiated the investigation, a date which coincides with the formal request for WTO consultations. Another reason why the United States allegedly insisted on limiting appellate review to legal questions had to do with trade remedy cases. For fear that panels and the Appellate Body would conduct a *de novo* review of investigating authorities and thereby be too invasive into the factual record before those authorities, the United States wanted WTO appeals to stay away from factual analysis (Interview with Jane Bradley, US negotiator of the DSU, 26 February 2007).
- 16 Meeting of 5 April 1990, Negotiating Group on Dispute Settlement, Note by the Secretariat, 28 May 1990, MTN.GNG/NG13/19, at 4.
- 17 See Pauwelyn, J. (1998). "Evidence, Proof and Persuasion in WTO Dispute Settlement, Who Bears the Burden?", *Journal of International Economic Law*, 1: 227.
- 18 DSU negotiations indicate that negotiators considered that mistakes in a panel's *factual* assessment would be corrected by the panel itself either in response to the parties' comments on the descriptive (that is, factual and argument) sections of the panel's draft report (pursuant to DSU Article 15.1) or in response to the parties' comments on the panel's interim report (including both the descriptive sections and the panel's findings and conclusions) (pursuant to DSU Article 15.2). See Communication from Canada, *supra* note 8 at 2 and Communication from the United States, *supra* note 14 at 5 ("If one of the parties believes that the panel made an error on the factual portion of the panel report, that error usually is corrected before the final report is issued").
- 19 To be distinguished from the equity appeal, see Martineau, *infra* note 20, at 5.
- 20 Martineau, R. (1990). *Appellate Justice in England and the United States: A Comparative Analysis*. W.S. Hein, Buffalo, N.Y.: 6.

- 21 *Ibid.*
- 22 Martineau, *supra* note 16, at 7.
- 23 Platto, *supra* note 9 at 150.
- 24 Martineau, *supra* note 16, at 8.
- 25 Rule 52 FRCP: “Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses” (quoted in Platto, *supra* note 9 at 332).
- 26 Martineau, *supra* note 16, at 36. See also Platto, *supra* note 9 at 332 (“The Appeals Court has very limited authority to review findings of fact, but has broad authority to review procedural rulings and conclusions of law”).
- 27 See Platto, *supra* note 9 at 143 quoting Lord Donaldson, then Master of the Rolls.
- 28 United States Code Annotated 2106 (1994).
- 29 Jane Bradley (US negotiator of the DSU) revealed that at some point in the negotiations a remand process was drafted, but ultimately not even put on the negotiating table as it would, for timing reasons under Section 301 of the US Trade Act, be a non-starter (Interview, 26 February 2007).
- 30 See *infra* paragraph 39 for the importance of this power to “modify” panel findings (DSU Article 17.13). This power seems to derive directly from Canada’s original proposal where the Appellate Body could “decide either to uphold the panel report or to substitute its own decision for that of the panel”, see *supra* note 13.
- 31 On the distinction between first and second appeals, see *supra* note 2. One particular element in support of the fact that DSU negotiators may have had second level appeals in mind is that they clearly thought that WTO appeals would be limited to “extraordinary cases, rather than affording an automatic opportunity to delay the dispute settlement process” (Communication from the United States, *supra* note 14 at 6, referring even to the option of making WTO appeals subject to Council approval, at 5) and “not be used as just another procedure in dispute settlement” (Communication from Mexico, *supra* note 5 at 3). See also Communication from Canada *supra* note 8 at 4 (“the intent would not be to have appellate review become a quasi-automatic step” and making appellate review subject to a prior Appellate Body decision that “the case merited an appellate review”).
- 32 That second appeals are limited to legal questions, also in civil law systems, see *supra* note 10.
- 33 That second appeals include a remand, also in civil law systems, see *supra* note 12.
- 34 This scenario also covers cases where the panel exercised so-called “false” judicial economy, that is, the panel failed to examine certain products or failed to address a claim that it should have examined (as in *Australia - Salmon* or in *EC - Sugar*). See Bohanes, J. and Sennekamp, A. (2006). “Reflections on the Concept of ‘Judicial Economy’ in WTO Dispute Settlement” in *The WTO at Ten: The Contribution of the Dispute Settlement System*. Sacerdoti, G., Yanovich, A., Bahones, J. (eds): 424.

- 35 This scenario also covers cases where the panel exercised so-called “false” judicial economy, that is, the panel finds a violation but failed to examine a certain defense or erroneously refused to rule on it (e.g. because it was, according to the panel, raised too late).
- 36 See Korea remand proposal, *infra* note 122 and Pierola, F. (2005). “The Question of Remand Authority for the Appellate Body” in *Challenges and Prospects for the WTO*. Mitchell, A..D. (ed.): pp. 193-215 at 207 (“If for any reason the Appellate Body cannot complete the analysis of a defense that may justify the WTO-inconsistency of the respondent’s measure, the respondent would find itself in the curious situation in which it would have to implement recommendations and rulings regarding a measure for which it considers it has a defense”).
- 37 This outcome may be more difficult in case the panel finding of violation of the basic rule (say, GATT Article III on national treatment) was not even appealed and, for example, only the exception under GATT Article XX was appealed. However, even in that scenario, in case the Appellate Body cannot come to a substantive conclusion under GATT Article XX, it should also declare any finding of violation of GATT Article III as without legal effect, since that finding of violation by the panel was conditioned on the fact that the exception in GATT Article XX was, in the view of the panel, not met.
- 38 See *supra* text at note 36, for the argument of why not being able to come to any substantive conclusion implies not finding a violation (even where the Appellate Body cannot complete the analysis of a defence).
- 39 If the new interpretation is one of a defense, see the possible alternative discussed *supra*, note 36.
- 40 Both of these proceedings are discussed in Annex 1 to this study.
- 41 See *EC - Hormones*, para. 132 (“consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision is ... a legal characterization issue. It is a legal question”). See Voon, T. and Yanovich, A. (2006). “The Facts Aside: The Limitation of WTO Appeals to Issues of Law”, *Journal of World Trade* 40: 239, at 245.
- 42 This point was flagged to the author by Debra Steger (email exchange of 18 January 2007). Ms. Steger, the Canadian negotiator of the DSU, would go even further and argues that the Appellate Body’s power to “modify” panel findings amounts to a broad-based grant of authority for the Appellate Body to complete the analysis in most cases. That this was most probably the intention of the Canadian proposal on an Appellate Body in the DSU negotiations, see *supra* note 30.
- 43 See Yanovich, A. and Voon, T. (2006). “Completing the Analysis in WTO Appeals: The Practice and Its Limitation”, *Journal of International Economic Law*, 9: 933.
- 44 *Australia - Salmon*, para. 118.
- 45 See *supra* paragraph 21.
- 46 In *EC - Asbestos*, the Appellate Body went as far as stating that no “issues of law” or “legal interpretations” by the panel under the TBT Agreement exist for it to review pursuant to DSU Article 17.6 (para. 82). However, in the “judicial economy with claims” scenario, by definition, there are no panel interpretations or findings under the alternative claim as the panel exercised judicial economy in respect of that claim. Thus, if this were, in and of itself, a sufficient ground not to complete the analysis, then in all “judicial

economy with claims” scenarios, the Appellate Body should refuse to complete the analysis. Appellate Body case law demonstrates, however, that this is not the case as on numerous occasions the Appellate Body has itself examined alternative claims not previously addressed by the panel.

- 47 See Voon and Yanovich, *supra* note 43.
- 48 For a discussion in the context of the Appellate Body’s refusal to complete the analysis in *EC - Asbestos*, see Pauwelyn, J. (2002). “Cross-Agreement Complaints before the Appellate Body: A Case Study of the *EC - Asbestos* Dispute”, *World Trade Review* 1: 63-87. See also the four remand proposals currently on the DSU review table, none of which provides for remand in case of insufficient legal connection or, for that matter, due process concerns (discussed below in Section VII).
- 49 In *Canada - Wheat Exports and Grain Imports*, Canada stated that it would “welcome guidance from the Appellate Body as to whether a conditional request to complete the analysis of a particular issue should be raised in an appellee’s submission ... or in an other appellant’s submission” (at para. 162). Although the Appellate Body declined to provide such guidance, it did add that this question could be addressed “in the context of future revision” of the Working Procedures for Appellate Review (at note 190).
- 50 Yanovich and Voon, *supra* note 43 at 5.
- 51 Yanovich and Voon, *supra* note 43 at 2.
- 52 For speculation on why this could be the case, see paragraph 94 below.
- 53 Yanovich and Voon, *supra* note 43 at 16.
- 54 Van den Bossche, *supra* note 4 at 319.
- 55 For a different analysis - centred on the Appellate Body’s apparently broad power to “modify” panel findings - see paragraph 39 above.
- 56 DSB, Minutes of meeting held on 6 November 1998, WT/DSB/M/50, 2 (Thailand). In support: Appleton, A. (1999). “Shrimp/Turtle: Untangling the Nets”, *Journal of International Economic Law* : 477, 479 and Pierola, *supra* note 36 at 204.
- 57 Vermulst, E., Mavroidis, P. and Waer, P. (1999). “The Functioning of the Appellate Body after Four Years: Towards Rule Integrity”, *Journal of World Trade*, 32 (2): 1, at 7. [Please check with author that re-write of Vol. + pages = accurate.]
- 58 Waincymer, J. (2002). *WTO Litigation: Procedural Aspects of Formal Dispute Settlement*. Cameron May, London: 745. [Please check with author that re-write = accurate.]
- 59 Pierola, *supra* note 36 at 204 (referring to *US - Wheat Gluten*, para. 59, where the Appellate Body examined whether the US authorities had considered the protein content of wheat as a relevant factor for the assessment of domestic consumption, and the price of wheat gluten for the determination of injury).
- 60 See *supra* paragraph 19.

- 61 Article 131-5 COJ: “[La Cour de cassation] peut aussi, en cassant sans renvoi, mettre fin au litige lorsque les faits, tels qu’ils ont été souverainement constatés et appréciés par les juges du fond, lui permettent d’appliquer la règle de droit appropriée”. See also Chartier, *supra* note 10 at p. 92-93, pointing out that this rarely happens.
- 62 See *supra* paragraph 39.
- 63 See *supra* note 13.
- 64 See *supra* note 41.
- 65 *EC - Hormones*, para. 133.
- 66 *US - Wheat Gluten*, para. 151.
- 67 Palmeter, D. (1998). “The WTO Appellate Body Needs Remand Authority”, *Journal of World Trade*, 32: 41, 43.
- 68 Sacerdoti, G. (date?). “Appeal and Judicial Review in International Arbitration and Adjudication: The Case of the WTO Appellate Review” in *International Trade Law and the GATT/WTO Dispute Settlement System*. Petersmann, E.-U. (ed.), Kluwer Law International, London, Boston: 247 at 247.
- 69 See *supra* paragraph 18.
- 70 Communication from Canada, *supra* note 8 at 4.
- 71 *Ibid.*
- 72 Communication from the United States, *supra* note 14 at 5.
- 73 See *supra* note 31.
- 74 Email from Debra Steger, 18 January 2007.
- 75 Carrington et al., *supra* note 3 at 56.
- 76 See also Article 8(2)(h) of the American Convention on Human Rights, Article 2 of Protocol 7 to the European Convention on Human Rights and Article 7(a) of the African Charter on Human and People’s Rights.
- 77 See Platto, *supra* note 11 at 164.
- 78 Platto, *supra* note 11 at 333 (numbers updated with reference to the US Supreme Court website at <http://www.supremecourtus.gov/about/justicecaseload.pdf>).
- 79 Peter Lichtenbaum goes further and argues that the Appellate Body has been inconsistent in its decision on when to complete the analysis (Lichtenbaum, P. (1998). “Procedural Issues in WTO Dispute Resolution”, *Michigan Journal of International Law*, 19: 1195, at 1270).
- 80 Pierola, *supra* note 36 at 206 and 209.

- 81 This problem could, of course, be resolved with an amendment in the WTO remedy scheme (rather than by installing a remand process). See, for example, Pierola *supra* note 36. Yet, such amendment is highly unlikely any time soon. Hence, it makes sense to focus on alleviating the symptoms (with a remand) rather than to search, at this stage, for a cure to the disease itself (some form of retroactive remedies or provisional measures).
- 82 *EC - LAN Equipment*, paras. 98 and 111. Note, however, that in this case the Appellate Body never referred to completing or not completing the analysis. It simply reversed all panel findings of violation and stopped there, without detailing its own interpretation of the EC schedule, let alone applying that interpretation to the facts at hand.
- 83 According to www.worldtradelaw.net, 545.61 days is the average number of days it takes between panel establishment and adoption of the reports in cases with an appeal.
- 84 But see Section VII.d below on how re-filed proceedings might be expedited.
- 85 See DSB, Minutes of meeting held on 19 May 2004, WT/DSB/M/189, paras 65 (Brazil), 67 (Thailand), 77 (India).
- 86 See Notification of Mutually Agreed Solution, WT/DS247/2, 16 November 2006.
- 87 Appellate Body Report on *US - Softwood Lumber IV (Article 21.5)*, WT/DS257/AB/RW, para. 70, emphasis in the original.
- 88 Appellate Body Report on *Canada - Aircraft (Article 21.5 - Brazil)*, para. 41. See also Appellate Body Report on *EC - Bed Linen (Article 21.5 - India)*, para. 78: "if a claim challenges a measure which is not a 'measure taken to comply', that claim cannot properly be raised in Article 21.5 proceedings".
- 89 Note, however, that according to www.worldtradelaw.net it takes on average 229.67 days between the establishment of an Article 21.5 panel and the adoption of its report. If the Article 21.5 is appealed, the average increases to 360 days.
- 90 Note, however, that Article 21.5 implementation proceedings are separate from original proceedings: They are about a new (implementing) measure (or the absence thereof) and have a new factual and legal record. A remand procedure, in contrast, would, normally, take place within the original proceeding, examine the same (original) measure and be based on the same factual record (potentially to be expanded by the remand panel).
- 91 See Notification of Mutually Agreed Solution, WT/DS247/2, 16 November 2006.
- 92 See, for example, Pierola, *supra* note 36 at 214.
- 93 Bohanes and Sennekamp, *supra* note 34 at 436 ("panels are entitled, but not required, to exercise judicial economy").
- 94 The WTO Secretariat staffing WTO panels could, for example, insist on less or no judicial economy. Yet, as much as there is no obligation to exercise judicial economy, without a DSU amendment to the contrary, there is, of course, nothing either that could stop panels from exercising judicial economy, even against the advice of the WTO staffer assigned to the case.

- 95 See Voon and Yanovich, *supra* note 43, at 16, referring to US - Cotton and US - Gambling.
- 96 Bohanes and Sennekamp, *supra* note 34 at 442.
- 97 The word used by Voon and Yanovich, *supra* note 43.
- 98 *US - Softwood Lumber IV*, para. 118: "panels sometimes make alternative factual findings that serve to assist the Appellate Body in completing the legal analysis should it disagree with legal interpretations developed by the panel, but this is not the case in the panel report before us".
- 99 In support, see Voon and Yanovich, quoted *supra* note 53.
- 100 In support: Bohanes and Sennekamp, *supra* note 34 at 441-2.
- 101 *Australia - Salmon*, para. 223: "To provide only a partial resolution of the matter at issue would be false judicial economy. A panel has to address those claims on which a finding is necessary 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'".
- 102 See text *supra* at notes 41, 65 and 66.
- 103 DSU Article 8.1 on panellists refers to "well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member".
- 104 DSU Article 17.3 on Appellate Body members refers to "persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally".
- 105 For example, Appellate Body members, and the staff supporting them, successfully engaged in fact-finding in the two *ACP-EC Partnership Agreement Arbitration («Banana Tariffs Arbitration»)* case (WT/L/616).
- 106 According to Debra Steger, the Appellate Body has done so in the past (email, 17 January 2007).
- 107 See *supra* paragraph 54.
- 108 Such preliminary ruling could also be made part of an interim review stage that, for example, Chile and the United States have proposed to add to WTO appellate review. See *Contribution by Chile and the United States*, DSB Special Session, TN/DS/W/28, 23 December 2002, p. 2, para. 6. See also United States statement at the DSB Special Session: "[Korea's remand] proposal also showed yet another way in which an interim report at the Appellate Body stage could be useful" (Minutes of Meeting of 22 September 2005, TN/DS/M/28, 28 October 2005, para. 4).
- 109 In *Canada - Wheat Exports and Grain Imports*, at note 190, the Appellate Body itself stated that the question of when and how a completion of the analysis ought to be requested could be addressed "in the context of future revision" of the Working Procedures for Appellate Review.

- 110 See *Bourgeois*, *supra* note 1.
- 111 See *supra* paragraph 56 and for reasons explaining this trend see paragraph 94.
- 112 *Canada - Aircraft (Article 21.5 - Brazil)*, para. 36, requires the following: “In principle, a measure which has been ‘taken to comply with the recommendations and rulings’ of the DSB will not be the same measure as the measure which was the subject of the original dispute, so that, in principle, there would be two separate and distinct measures: the original measure which *gave rise* to the recommendations and rulings of the DSB, and the “measures taken to comply” which are - or should be - adopted *to implement* those recommendations and rulings.
- 113 *EC – Bed Linen (Article 21.5)*, para. 89.
- 114 *US – Shrimp (Article 21.5)*, para. 89.
- 115 In *US - Countervailing Measures on Certain EC Products (Article 21.5 - EC)*, at paras. 7.73-7.76, the panel declined to examine “new claims where the measure taken to comply is unchanged from the original measure and thus allegedly inconsistent with WTO obligations in ways *identical to (not different from)* the original measure”. For a similar reasoning, *obiter dictum*, see the panel in *Chile - Price Band System (Article 21.5 - Argentina)*, at para. 7.141 (finding that an Article 21.5 panel can only consider a claim when “the claim does not relate to aspects of the original measure that remain unchanged in the new measure and were not challenged in the original proceedings or, if challenged, were addressed in those proceedings and not found to be WTO-inconsistent”). However, in both of these cases the claims found to be outside Article 21.5 were new, that is, were not even raised in the original proceeding. For present purposes, the Article 21.5 panel would only complete the analysis over claims that were raised, but not substantively addressed, by the original panel.
- 116 For other differences between a remand and an Article 21.5 implementation proceeding, see *supra* note 90.
- 117 See Appendix 3 to the DSU, paragraph 1.
- 118 See, most recently, Special Session of the DSB, Report by the Chairman to the Trade Negotiations Committee, TN/DS/17, 27 July 2006.
- 119 *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*, DSB Special Session, TN/DS/W/38, 23 January 2003, paras. 20- 21.
- 120 *Jordan’s Further Contribution Towards the Improvement and Clarification of the Dispute Settlement Understanding*, DSB Special Session, TN/DS/W/56, 19 May 2003, p. 1.
- 121 *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. This original proposal was amended in an informal submission by the G-6 group to the DSB Special Session on 22 May 2006 (see Report by the Chairman, *supra* note 118). Whenever this study refers to the G-6 proposal, it refers to the amended G-6 proposal, unless otherwise specified.
- 122 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. Korea supplemented its proposal with an

informal *Explanatory Note on the Remand Proposal of Korea*, submitted to the DSB Special Session of 24 October 2005 (see Minutes of Meeting, DSB Special Session of 24 October 2005, TN/DS/M/29, 20 January 2006, at para. 7). Whenever this study refers to the G-6 proposal, it refers to the amended G-6 proposal, unless otherwise specified.

- 123 But see *supra* note 1 for an argument that remand is part of the inherent powers of the Appellate Body and *supra* paragraph 102 for a discussion of a remand process through amended Appellate Body Working procedures.
- 124 More “completing of the analysis” by the Appellate Body could, as pointed out earlier, result in less findings by the panel (more judicial economy): If panels know that the Appellate Body will deal with it, they may spare the effort to engage in alternative findings. Yet, panels, especially if they were to become permanent, could also react differently: Seeing how the Appellate Body completes the analysis more often, thereby attracting more power to it, panels could counter by making more findings in an effort to re-assert their authority and relevance.
- 125 Hughes, V. (2006). “The WTO Dispute Settlement System - From Initiating Proceedings to Ensuring Implementation: What Needs Improvement? ”, in *The WTO at Ten: The Contribution of the Dispute Settlement System*. Sacerdoti, G., Yanovich, A., Bohanes, J. (eds), *supra* note 4, 193, at 225.
- 126 By mutual agreement, parties have, for example, reneged on their right to appeal (agreement between the United States and Australia in the *Australia - Leather dispute*) and overruled the confidentiality of panel hearings (open hearings were held in the *United States - Hormone Suspension case*). Bilateral agreements also commonly settle the sequencing problem between DSU Article 21.5 and Article 22.6.
- 127 Minutes of Meeting, DSB Special Session of 22 October 2004, TN/DS/M/20, 26 May 2005, at para. 11.
- 128 Note, however, that the EC proposal states that “*the parties* can request the remand”. Although this could be read as requiring an agreement by both parties to ask for a remand, it is more likely to mean that either party, on its own, can request a remand. In any event, this should be made clearer in any eventual amendment. Recall that if both parties can agree on a remand, there is no need for an explicit remand process, as the parties can then expedite normal panel proceedings or use Article 25 arbitration.
- 129 Korea proposal, p. 4.
- 130 Korean proposal, p. 4.
- 131 See *supra* paragraph 35.
- 132 For the defendant, the best outcome in a remand is the status quo, that is, a finding of no violation.
- 133 Korea proposal, p. 4.
- 134 Assuming that Korea is right and that in some scenarios the defendant stands to gain from a remand (i.e. in the “judicial economy within a defence” scenario the Appellate Body would find a violation), some WTO Members have also questioned whether “the remand right holder” can, in all cases, be identified as clearly as Korea suggests. See Korea explanatory note, p. 1. Other Members added that for the Appellate Body to decide on who is the “remand right holder” would encroach on member control over the remand process. *Ibid.*, p. 2.

- 135 *Ibid.*
- 136 Korea's proposal does not specify a time limit within which a request for remand must be submitted.
- 137 Korea proposal, p. 2-3.
- 138 See Hughes, *supra* note 125 at 224 ("I am not certain how implementation might be affected if the decision on one aspect of the measure is delayed, perhaps for several months. The reasonable period of time to comply with a decision may be difficult to determine when a remand procedure on a related issue is ongoing").
- 139 Another concern, related to the possibility to settle cases before the Appellate Body, was raised by Valerie Hughes, former Director of the Appellate Body Secretariat, *supra* note 138:
 "In my view, the DSU would be improved with the addition of a remand procedure ... [However] I have some questions about the requirement for adoption of the relevant Appellate Body report prior to the remand being pursued before the original panel ... the remand may well have an impact on other issues involved in the case; if so, it may be possible to resolve the entire dispute through a mutually agreed solution. This would be pre-empted if such matters were already included in an adopted panel or Appellate Body report".
 To address this concern, remand would then not only need to happen before DSB adoption, but preferably also before making even the original Appellate Body report available to the public.
- 140 As Korea submits (Korea, Explanatory note, p. 5): "There is no clear provision stipulating the exact time when the original panel is dissolved. Taking into consideration Article 11 which defines that the function of a panel is to assist the DSB in discharging its responsibilities under the DSU and the covered agreements, it could be presumed that the original panel theoretically exists until the DSB discharges its responsibilities, which is done through making recommendations or giving rulings with the adoption of the AB or panel report. In accordance with the Rules of Conduct (WT/DS/RC/1) VI, Article 4(a), all panellists shall complete the disclosure form in Annex 3. The disclosure form makes it clear that the panellists have a duty to disclose any information likely to affect their independence or impartiality *until such time as the DSB makes a decision on the adoption of a report* to the proceeding. This language sheds some light on the time period in which the original panel can be presumed to exist".
- 141 Chartier, *supra* note 10 at 92.
- 142 Korean proposal, p. 4: "Upon proper request ... the Appellate Body requests the original panel to make further *factual findings and to report back* within a period set by the Appellate Body ..." (emphasis added). However, in Korea's Explanatory note, at p. 3, Korea seems to imply that remand panels can make legal findings also: "The panel at the remand stage should make a legal judgment, as it did at the initial stage, based on the new facts with the application of the AB's legal standard". Korea then adds, however, that "[t]his [remand panel] judgment will be reported to the AB for its final decision".
- 143 Korean proposal, p. 4: "Having received the report by the panel on the remand issues, the Appellate Body will complete the analysis on the issues and circulate its report. Adoption and implementation will then follow the normal DSU procedures" (emphasis added). See *supra* note 145 for a further specification in Korea's Explanatory note.
- 144 For the EC and Jordan, DSB adoption must occur within 10 days after a request for adoption. For the G-6, adoption of remand panels follows the normal Article 16 proceedings, that is, a minimum of 20 days must lapse between circulation and DSB adoption of the report.

- 145 See *supra* notes 142 and 1243.
- 146 See *supra* paragraph 100.
- 147 As the complainant is the only party that stands to gain from completing the analysis (at best, the defendant can win the case and confirm the *status quo*), the defendant is likely to block authorization for the Appellate Body to complete the analysis. If the complainant alone is given this right, the defendant does, however, lose its right to appeal in case the Appellate Body finds a violation. That is the trade-off to be made by DSU negotiators.
- 148 See Sacerdoti *supra* note 68 and Joergens *supra* note 1. For an overview, see Lauterpacht, E. (1991). *Aspects of the Administration of International Justice*, Grotius, Cambridge, Chapter VI on Appeals at 99-116.
- 149 One International Tribunal for the Law of the Sea (ITLOS) interaction that may appear like a review or appeal (although it is not technically) is when ITLOS decides on provisional measures and a subsequent arbitration tribunal decides on the merits of the same dispute. There may then be situations where ITLOS confirms jurisdiction and orders provisional measures, but the arbitration tribunal declines jurisdiction or finds differently on the merits. See, for example, *The Southern Bluefin Tuna Case*.
- 150 Between 1959 and 1998, the European Commission on Human Rights preceded most proceedings before the European Court of Human Rights. However, even then the Court was not set up as an appeal against the Commission. Rather, the Commission operated as a filter to limit the case load of the Court. A similar procedure continues to apply under the Inter-American Convention on Human Rights. Note, however, that under Article 43 of the European Convention any party to a case decided by a seven judge Chamber may “in exceptional cases, request that the case be referred to the Grand Chamber”, of 17 judges; “A panel of five judges of the Grand Chamber shall accept the request if the case raises a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance” (Article 43.2); “If the panel accepts the request, the Grand Chamber shall decide the case by means of a judgment” (Article 43.3).
- 151 See *supra* note 76.
- 152 Article 25.1 of the Statute of the Yugoslavia Tribunal and Article 24.1 of the Statute of the Rwanda Tribunal both provide: “The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds: (a) An error on a question of law invalidating the decision; or (b) An error of fact which has occasioned a miscarriage of justice”.
- 153 Article 25.2 of the Statute of the Yugoslavia Tribunal and Article 24.2 of the Statute of the Rwanda Tribunal.
- 154 Available at <http://www.un.org/icty/legaldoc-e/basic/rpe/IT032Rev38e.pdf>. See also Rule 118(C) of the ICTR Rules of Procedure and Evidence available at <http://69.94.11.53/ENGLISH/rules/101106/rop101106.pdf>.
- 155 Email exchange with Cesare Romano and John Cerone, November 27, 2006.
- 156 Rule 115(A) states: “A party may apply by motion to present additional evidence before the Appeals Chamber”. See also Rule 115(A) of the ICTR Rules of Procedure and Evidence.

- 157 For a discussion, see Mundis, D.A. (2005). “The Judicial Effects of the ‘Completion Strategies’ on the Ad Hoc International Criminal Tribunals”, *American Journal of International Law*, 99: 142.
- 158 *Prosecutor v. Tadic*, Case No.: IT-94-1-A, Appeals Chamber, Decision on the defence motion for interlocutory appeal on jurisdiction, 2 October 1995, available at <http://www.un.org/icty/tadic/appeal/decision-e/51002.htm>.
- 159 *Prosecutor v. Tadic*, Case No.: IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999, available at <http://www.un.org/icty/tadic/appeal/judgement/index.htm>.
- 160 *Prosecutor v. Tadic*, Case No.: IT-94-1-A, Order Remitting Sentencing to a Trial Chamber, 10 September 1999.
- 161 *Prosecutor v. Tadic*, Case No.: IT-94-1-A, Appeals Chamber, Judgment in Sentencing Appeal, 26 January 2000, available at http://www.un.org/icty/tadic/appeal/judgement/index_2.htm.
- 162 See, for example, *Prosecutor v. Tadic*, Case No.: IT-94-1-A, Order Remitting Sentencing to a Trial Chamber, 10 September 1999.
- 163 Article 81 of the ICC Statute.
- 164 Article 83.3 of the ICC Statute explicitly provides that the Appeals Chamber can, itself, decide on sentencing: “If in an appeal against sentence the Appeals Chamber finds that the sentence is disproportionate to the crime, it may vary the sentence in accordance with Part 7”.
- 165 Article 225(1) of the Treaty establishing the European Community provides: “Decisions given by the Court of First Instance ... may be subject to a right of appeal to the Court of Justice on points of law only, under the conditions and within the limits laid down by the Statute”.
- 166 See Article 225(1) of the EC Treaty and Article 58 of the Statute of the Court of Justice. However, like the WTO Appellate Body, the European Court of Justice (ECJ) has reviewed matters of fact to examine whether the Court of First Instance’s legal characterization of the facts as it found them was proper. See, for example, Case C-220/91P *Commission v. Stahlwerke Peine-Salzgitter*, 1993 E.C.R. I 2393, 2395 [1993].
- 167 Article 58 of the Statute of the Court of Justice.
- 168 The reference in Article 225(1) of the EC Treaty to “may be subject to a right of appeal” and “conditions” and “limits laid down by the Statute” leaves the door open for a filtering system where appeals could be made subject to leave by the ECJ. For a discussion on such leave procedure see Arnall, A. (2006). *The European Union and Its Court of Justice* (2nd ed.), Oxford University Press, Oxford, New York:152-153 (noting that “although a system for filtering appeals is familiar to lawyers trained in the common law and Nordic legal traditions, it is less readily accepted in civil law countries, where the right of appeal is traditionally considered a subjective prerogative of the parties”).
- 169 Article 58 of the Statute of the Court of Justice.
- 170 Article 61 continues as follows: “Where a case is referred back to the Court of First Instance, that Court shall be bound by the decision of *the Court of Justice on points of law*”.

- 171 Brown, L. N. and Kennedy, T. (2000). *The Court of Justice of the European Communities*, Sweet & Maxwell, London: 94-95.
- 172 See www.worldtradelaw.net.
- 173 See 2005 Statistics of judicial activity of the Court of First Instance, available at <http://curia.europa.eu/en/instit/presentationfr/rapport/stat/st05tr.pdf>, at p. 230.
- 174 See 2005 Statistics of judicial activity of the Court of First Instance, available at <http://curia.europa.eu/en/instit/presentationfr/rapport/stat/st05tr.pdf>, at p. 231. The remaining two appeals are classified as "removal from the register/no need to adjudicate". In 2004, 15 of 94 appeals were granted, the ECJ finalized the analysis itself and referred one case back to the Court of First Instance. See 2004 Statistics of judicial activity of the Court of First Instance, available at <http://curia.europa.eu/en/instit/presentationfr/rapport/stat/st04tr.pdf> at p. 203.
- 175 Article 1903.13(a) of NAFTA.
- 176 Article 1903.13(b) of NAFTA.
- 177 Annex 1903.13, paragraph 3, to NAFTA.
- 178 Annex 1903.13, paragraph 2, to NAFTA.
- 179 18 awards with Canada as defendant; 14 awards with Mexico as defendant; and 60 awards with the United States as defendant (note that one dispute may give rise to several awards). See http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=76.
- 180 See http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=796 (Cement from Mexico, 2003; Magnesium from Canada, 2004; and Softwood Lumber from Canada, 2005).
- 181 *In the Matter of Certain Softwood Lumber Products from Canada, Final Affirmative Countervailing Duty Determination*, File USA-CDA-2002-1904-03, Decision of the Panel, August 13, 2003.
- 182 *In the Matter of Certain Softwood Lumber Products from Canada, Final Affirmative Countervailing Duty Determination*, File USA-CDA-2002-1904-03, Decision of the Panel on the Fourth Remand Determination, October 5, 2005.
- 183 *In the Matter of Certain Softwood Lumber Products from Canada, Final Affirmative Threat of Injury Determination*, Secretariat File No. USA-CDA-2002-1904-07, Second Remand Decision of the Panel, 31 August 2004, at 4 and 7 (upheld by the Opinion and Order of the Extraordinary Challenge Committee, *In the Matter of Certain Softwood Lumber Products from Canada*, Secretariat File No. ECC-2004-1904-01USA, 10 August 2005).
- 184 *Ibid.*, p. 3. As one concurring panellist put it (at p. 8 and 12): "Due process is not endless process ... for the Panel to postpone finality by issuing yet another open-ended remand instruction to the Commission would be to allow the Chapter 19 process to become a mockery and an exercise in futility".
- 185 ICSID Article 52.

- 186 See *Amco Asia v. Republic of Indonesia*, Award (by the second tribunal) of 10 May 1988, 3 *ICSID Review* 166 (1988).
- 187 See <http://www.worldbank.org/icsid/cases/conclude.htm>.
- 188 See <http://www.worldbank.org/icsid/cases/pending.htm> (as of November 2006, 102 cases are pending; of the first 18 listed, six of the seven disputes where a decision on the merits was issued were challenged in an annulment procedure; in the seventh dispute, the deadline for a challenge has not expired yet).
- 189 See, for example, Feldman, M. (1987). "The Annulment Proceedings and the Finality of ICSID Arbitral Awards", *ICSID Review - Foreign Investment Law Journal*, 2: 85, 103 ("In a judicial system, the 'bad' law made in 'hard' cases can be controlled by the courts of appeal. Comparable control cannot be exercised in an arbitration system without the control becoming more damaging to the system than the decision which provoke the control"). [ask author to check rewrite of reference.]
- 190 *News from ICSID*, Vol. 22, No.1, 2005, available at http://www.worldbank.org/icsid/news/news_22-1.pdf, at p. 11.
- 191 ICC Statute, Article 84.

REFERENCES

- Bohanes, J. and Sennekamp, A. (2006). "Reflections on the Concept of 'Judicial Economy' in WTO Dispute Settlement" in *The WTO at Ten: The Contribution of the Dispute Settlement System*. Sacerdoti, G., Yanovich, A., Bohanes, J. (eds).
- Bourgeois, J. (2001). "Some Reflections on the WTO Dispute Settlement System from a Practitioner's Perspective", *Journal of International Economic Law*, 4.
- Carrington, P.D., Meador, D. J., Rosenberg, M. (1976). *Justice on Appeal*. West Publishing Company, St. Paul, Minnesota.
- Ehlermann, C.-D. (2002). "Six Years on the Bench of the 'World Trade Court': Some Personal Experiences as a Member of the Appellate Body of the WTO", *Journal of World Trade*.
- Feldman, M. (1987). "The Annulment Proceedings and the Finality of ICSID Arbitral Awards", *ICSID Review - Foreign Investment Law Journal*, 2.
- Grubbs, S.R. (ed.), (2003). *International Civil Procedure*.
- Hughes, V. (2006). "The WTO Dispute Settlement System - From Initiating Proceedings to Ensuring Implementation: What Needs Improvement? ", in *The WTO at Ten: The Contribution of the Dispute Settlement System*. Sacerdoti, G., Yanovich, A., Bohanes, J. (eds).
- Joergens, K. (1998-99). "True Appellate Procedures or Only a Two-Stage Process? A Comparative View of the Appellate Body under the WTO Dispute Settlement Understanding", *Law & Policy in International Business*, 30.
- Lauterpacht, B. (1991). *Aspects of the Administration of International Justice*.
- Lichtenbaum, P. (1998). "Procedural Issues in WTO Dispute Resolution", *Michigan Journal of International Law*, 19.
- Martineau, R. (1990). *Appellate Justice in England and the United States: A Comparative Analysis*.
- Palmeter, D. (1998). "The WTO Appellate Body Needs Remand Authority", *Journal of World Trade*, 32.
- Pauwelyn, J. (1998). "Evidence, Proof and Persuasion in WTO Dispute Settlement, Who Bears the Burden? ", *Journal of International Economic Law*, 1.
- Pauwelyn, J. (2002). "Cross-Agreement Complaints before the Appellate Body: A Case Study of the EC - Asbestos Dispute", *World Trade Review*, 1.
- Pierola, F. (2005). "The Question of Remand Authority for the Appellate Body" in *Challenges and Prospects for the WTO*. Mitchell, A.D. (ed.).
- Mundis, D.A. (2005). "The Judicial Effects of the 'Completion Strategies' on the Ad Hoc International Criminal Tribunals", *American Journal of International Law*, 99: 142.
- Perrot, R. (2004). *Institutions Judiciaires*.

Platto, C. (ed.), (1992). *Civil Appeal Procedures Worldwide*.

Prosecutor v. Tadic (2000) Case No.: IT-94-1-A, Appeals Chamber, Decision on the defence motion for interlocutory appeal on jurisdiction, 2 October 1995. Available at <http://www.un.org/icty/tadic/appeal/decision-e/51002.htm>.

Prosecutor v. Tadic (2000) Case No.: IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999. Available at <http://www.un.org/icty/tadic/appeal/judgement/index.htm>.

Prosecutor v. Tadic (2000) Case No.: IT-94-1-A, Appeals Chamber, Judgment in Sentencing Appeal, 26 January 2000. Available at http://www.un.org/icty/tadic/appeal/judgement/index_2.htm.

Sacerdoti, G. "Appeal and Judicial Review in International Arbitration and Adjudication: The Case of the WTO Appellate Review" in *International Trade Law and the GATT/WTO Dispute Settlement System*. Petersmann, E.-U. (ed.).

Statistics of judicial activity of the Court of First Instance (2005). Available at <http://curia.europa.eu/en/instit/presentationfr/rapport/stat/st05tr.pdf>, at p. 230.

Statistics of judicial activity of the Court of First Instance (2004). Available at <http://curia.europa.eu/en/instit/presentationfr/rapport/stat/st04tr.pdf> at p. 203.

Stewart, T. (1986-1992). *The GATT Uruguay Round: A Negotiating History*.

United Nations (2006), ICTR Rules of Procedure and Evidence. Available at <http://www.un.org/icty/legaldoc-e/basic/rpe/IT032Rev38e.pdf>.

Van den Bossche, P. (2006). "From Afterthought to Centerpiece: The WTO Appellate Body and its Rise to Prominence in the World Trading System" in *The WTO at Ten: The Contribution of the Dispute Settlement System*. Sacerdoti, G., Yanovich, A., Bohanes, J. (eds).

Vermulst, E., Mavroidis, P. and Waer, P. (1999). "The Functioning of the Appellate Body after Four Years: Towards Rule Integrity", *Journal of World Trade*, 32 (2).

Voon, T. and Yanovich, A. (2006). "The Facts Aside: The Limitation of WTO Appeals to Issues of Law", *Journal of World Trade*, 40.

Waincymer, J. (2002). *WTO Litigation: Procedural Aspects of Formal Dispute Settlement*. Cameron May, London.

Yanovich, A. and Voon, T. (2006). "Completing the Analysis in WTO Appeals: The Practice and Its Limitation", *Journal of International Economic Law*, 9.

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