

ANNEX 1

In May 2013, the Appellate Body issued a communication addressing the development of the workload of the Appellate Body over time based on a number of different variables. This paper describes various trends that can be observed in the practice of dispute settlement. This paper was communicated to the WTO Membership, the DSB, and the Committee on Budget, Finance and Administration, in particular, and is reproduced below.

JOB/AB/1

30 May 2013

COMMUNICATION FROM THE APPELLATE BODY

THE WORKLOAD OF THE APPELLATE BODY

This note on the workload of the Appellate Body contains three parts. Part I provides a brief overview of the appellate process. Part II surveys the evolution of the size and complexity of appeals over time based on a number of variables and an analysis of various data sets. Part III looks at the recent increase in dispute settlement activity.

I. The appellate process

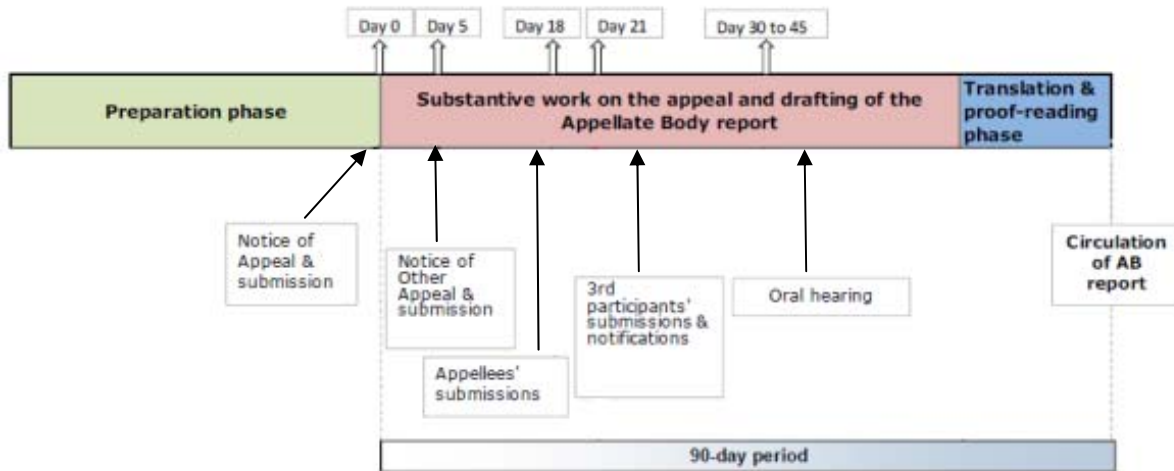
Article 17.1 of the DSU provides that the Appellate Body shall be composed of seven Members. While appeals are heard by Divisions of three, all Members read all submissions and participate in the exchange of views with the Division. Divisions are assisted by teams composed of 3-4 lawyers and support staff. At the date of writing, the Appellate Body Secretariat comprises a Director, eleven lawyer posts, an administrative assistant and three support staff posts.¹

For the Appellate Body, work on an appeal typically begins with the circulation of a panel report and ends with the circulation of the Appellate Body report in the three official languages of the WTO.² The following timeline illustrates the phases of an appeal process and indicates the timeframes set out in Articles 16.4 and 17.5 of the DSU.

¹ As of 13 May 2013.

² In accordance with the requirement in Article 17.3 of the DSU for Appellate Body Members to stay abreast of dispute settlement activities, and in an effort to organize its work efficiently and minimize delays, the Appellate Body seeks to prepare for potential appeals well in advance. This work is done even in cases where an appeal is eventually not filed. Pursuant to Article 16.4 of the DSU, a panel report must be adopted or appealed within a period of 60 days from the date of its circulation to WTO Members. In many cases there is considerable uncertainty regarding whether an appeal will be filed, regarding when, during the 60-day period it will be filed, as well as regarding the scope of the appeal.

Chart 1 - Phases of the appellate process



II. Evolution of the size and complexity of appeals over time

In order to assess the evolution of the size and complexity of appeals over time, we consider, as a first step, the size of the underlying dispute. We do this by surveying the length of each panel report subject to appeal as well as the size of the factual (panel) record in each case (as evidenced by the number of exhibits submitted to the panel).³ As a second step, we consider factors having a direct bearing on the size and complexity of the appellate proceeding: (i) the number of issues raised on appeal, including claims under Article 11 of the DSU and procedural issues; (ii) the number of pages of submissions to the Appellate Body per appeal; and (iii) the number of third participants in appeals.⁴

Starting with factors relating to the size of the underlying dispute, we note that the average length of WTO panel reports that have been appealed has more than doubled since the early years of WTO dispute settlement to an average of approximately 364 pages.⁵ Moreover, some panels in recent years have involved two or three complaining parties, and all disputes have involved several third parties.⁶ This multiplies the number of written and oral submissions as well as exhibits to be considered. In addition, the number of claims raised per panel request has been significant, often rising to double digits. Requests for preliminary rulings have also become a common feature of panel work.⁷ This increase in the workload of panels translates into an increase in the Appellate Body's workload given that all panel reports, as well as relevant parts of the panel record, must be thoroughly read by Appellate Body Members and lawyers of the Appellate Body Secretariat, in order to prepare for an upcoming appeal as well as potential appeals.

³ We use these metrics to provide a rough measure of the size of the underlying dispute while recognizing that not all issues before a panel will be appealed.

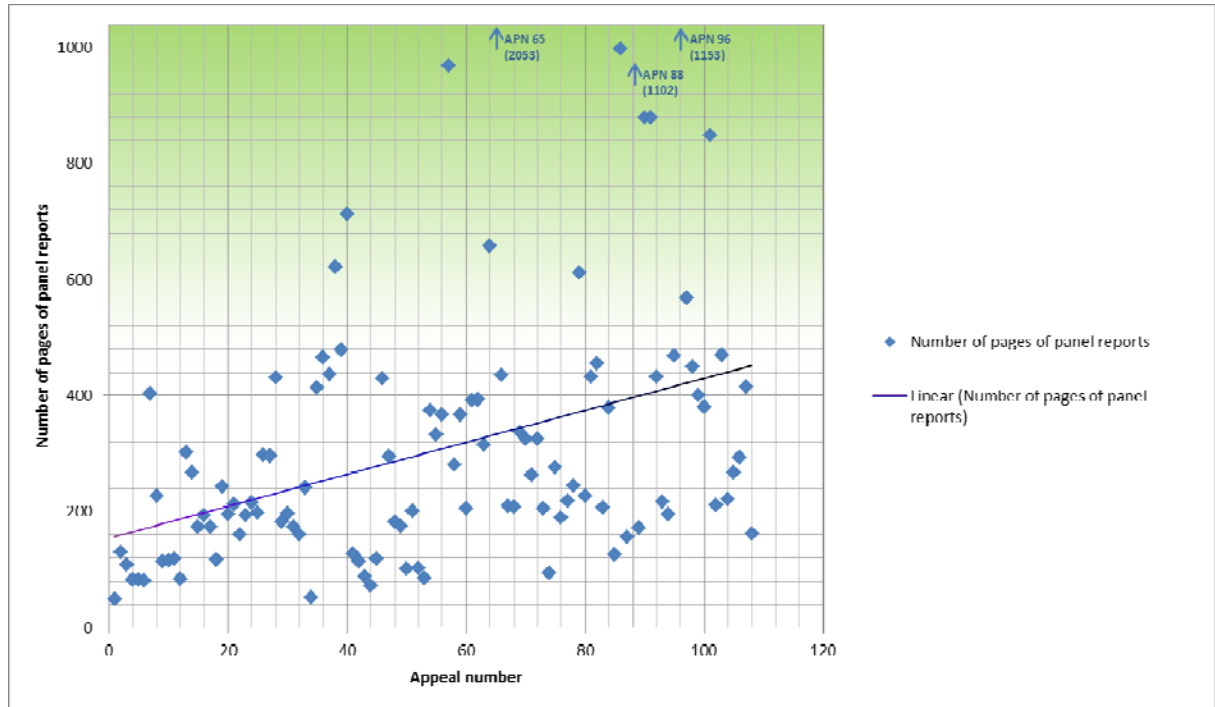
⁴ To the extent possible, we have charted the evolution of each indicator from the time of the first appeal in 1996 to the last appeal completed in 2012 (Appeal Number 108).

⁵ For the ten most recent panel reports appealed by the end of 2012.

⁶ High numbers of third parties in proceedings were the exception in the early years of WTO dispute settlement, and only very rarely did early disputes involve *more* than five Members as third parties. In contrast, over the last five years, only four proceedings have had five or *fewer* third parties. The average number of third parties in currently active panels is 10.

⁷ A total of sixteen panel reports containing preliminary rulings were circulated in the period between 2010 and 2012.

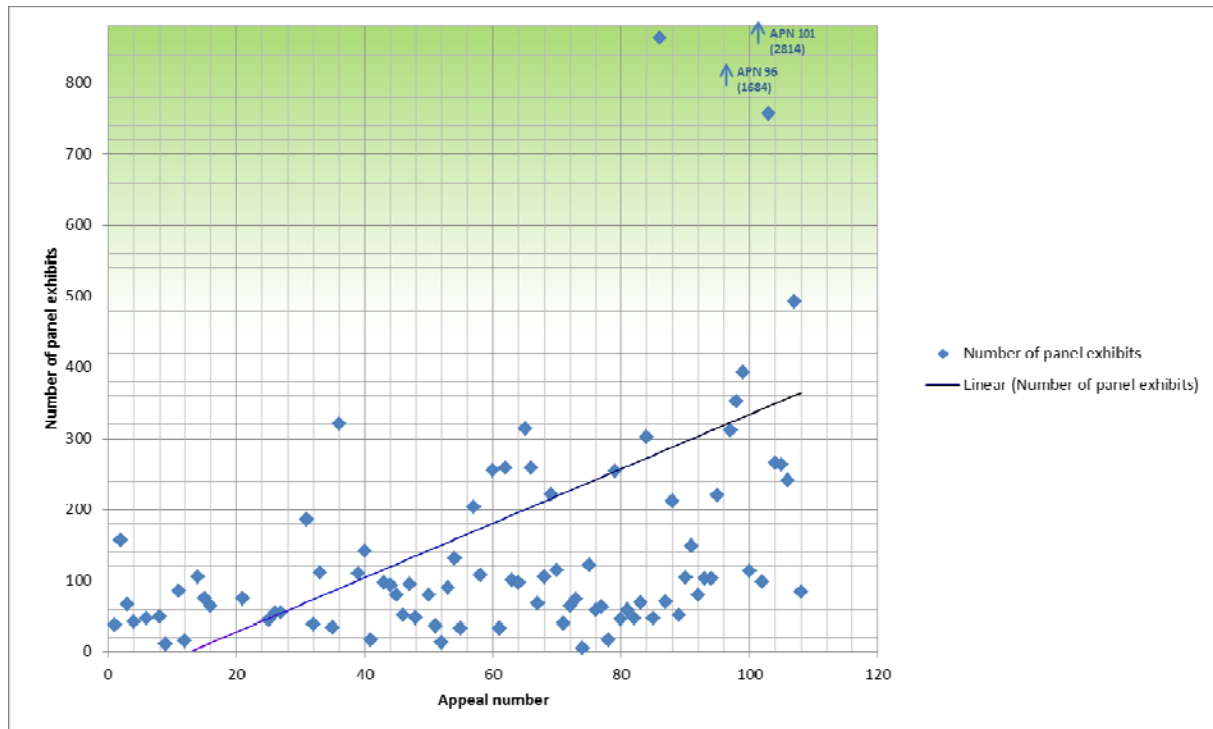
Chart 2 - The number of pages in panel reports appealed



The factual complexity of disputes before panels and the Appellate Body has also grown over time. The following chart demonstrates how the average number of exhibits submitted by the parties to panels has increased from 62 in the early years of WTO dispute settlement to 552 today.⁸

⁸ These numbers reflect a comparison of the average number of exhibits submitted by the parties to the panels in the first ten appeals for which data was available as compared to the number of panel exhibits in the ten most recent appeals decided by the end of 2012.

Chart 3 - The number of panel exhibits

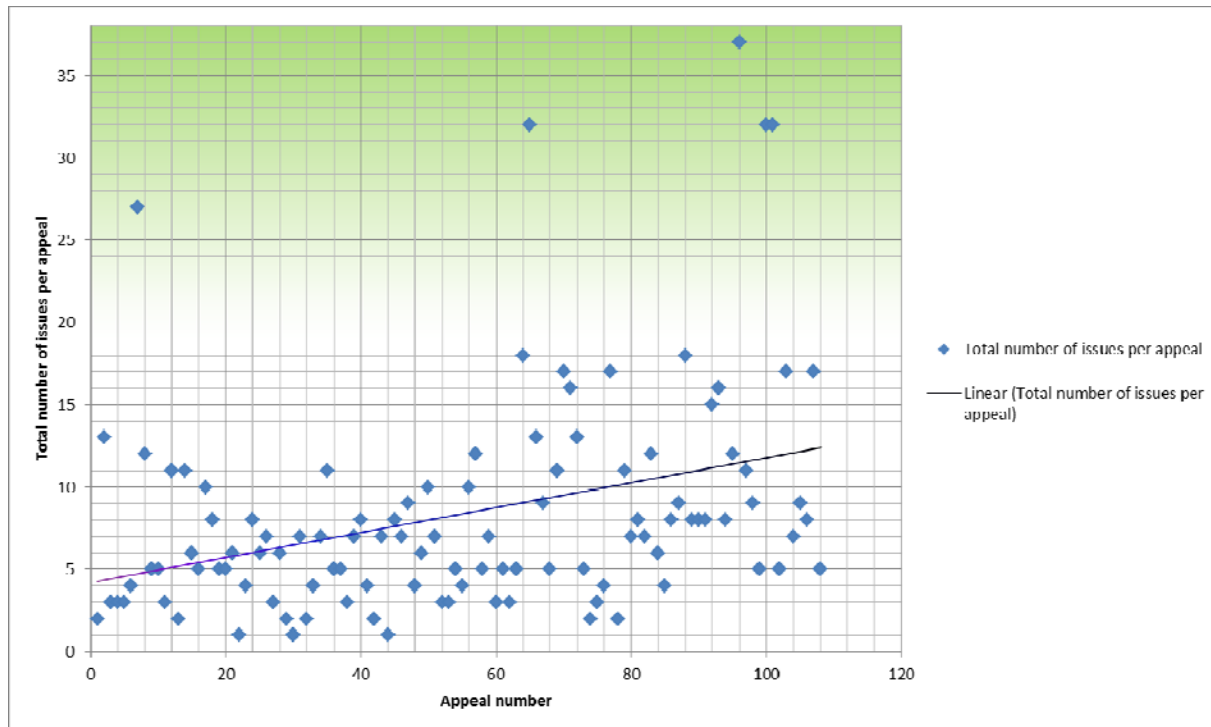


Turning to factors that have a direct bearing on the amount of work associated with an appellate proceeding, we recall the Appellate Body's obligation under Article 17.12 of the DSU to address each of the issues raised by the participants on appeal.⁹ As can be seen from the chart below, the average number of issues raised in each appeal has increased by more than 160% from approximately eight issues per case in the first ten appeals during the period between 1996 and early 1998 to more than 13 issues per case in the ten appeals adjudicated by the Appellate Body between the beginning of 2011 and the end of 2012.¹⁰

⁹ This includes issues raised in "other appeals", often called "cross-appeals". These are appeals by a party to the dispute other than the original appellant. Cross-appeals (involving one or more claims) have been filed in 77 of the 108 disputes (71%) brought before the Appellate Body.

¹⁰ This may reflect the growing number of claims brought before WTO panels.

Chart 4 - The number of issues per appeal



The number of appeals including claims relating to the scope of original proceedings or compliance proceedings under Article 21.5 of the DSU has also increased over time. While such claims were raised in only four of the first 20 appeals (20%), ten of the 20 most recent appeals (50%) included such claims. Although the Appellate Body's jurisdiction is limited by Article 17.6 of the DSU to issues of law, the factual complexity of a dispute has nonetheless an impact on the work involved in an appeal for two main reasons. First, in order to properly discharge its functions, which include reviewing a panel's application of the law to the facts of the case, the Appellate Body must familiarize itself with the panel record. Second, Article 11 of the DSU requires a WTO panel to make an objective assessment of the matter before it, including an objective assessment of the facts of the case. When parties to the dispute raise claims under that provision on appeal, the Appellate Body must engage in a review of whether the panel's assessment of those facts was objective while, at the same time, being mindful of the need to give due deference to the discretion of the panel, as the "trier of fact", to weigh the evidence before it.

The number of claims brought under Article 11 of the DSU has increased over time.¹¹ In fact, such claims were raised in 18 of the 20 most recent appeals decided by the end of 2012 (90%), and in many of these appeals multiple Article 11 claims were raised. This represents a significant increase compared to the first 20 appeals, only eight of which (40%) included claims alleging that a panel acted inconsistently with Article 11.

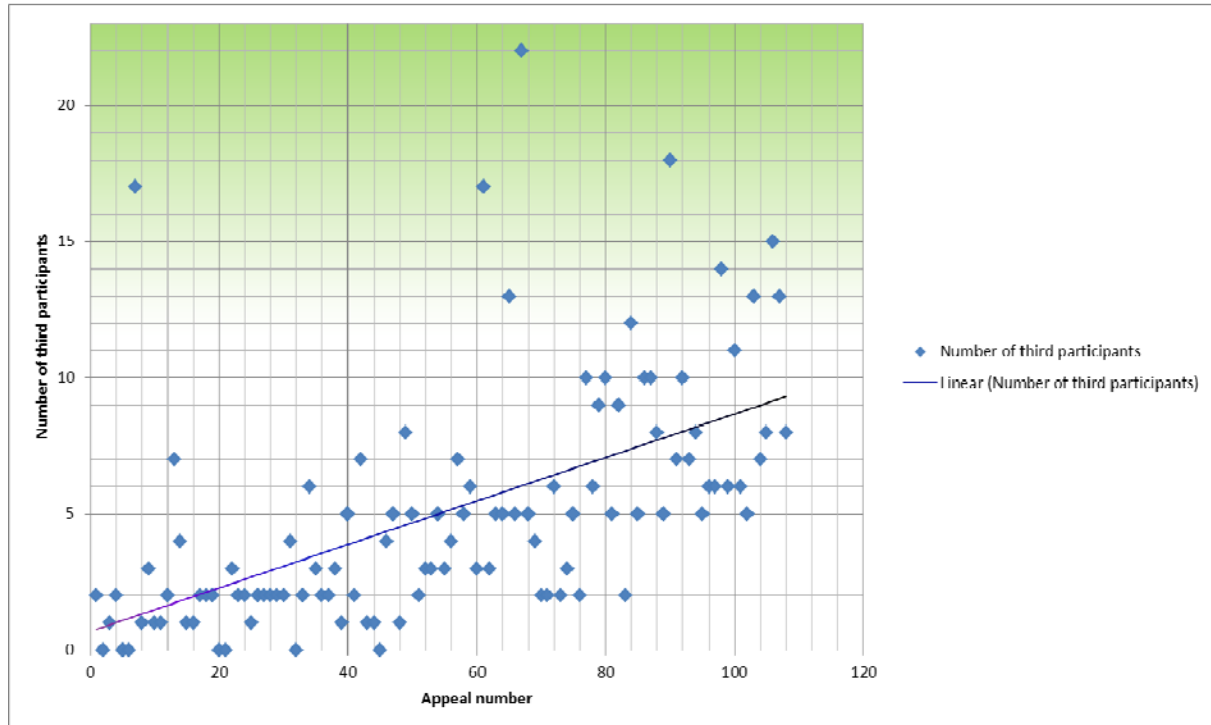
It has also become increasingly common for participants or third participants in disputes to make procedural requests of or seek procedural rulings from the Appellate Body during appellate proceedings. Procedural issues have arisen in all but one case completed in the last three years.¹²

¹¹ This phenomenon may be attributable to the growing factual complexity of disputes. It may also reflect increasing legalistic tendencies or sophistication in parties' argumentation.

¹² Requests for procedural rulings may concern, for example, extensions of the time-limits for filing written submissions, the timing of the oral hearing, the protection of business confidential information, public observation of oral hearings, the correction of clerical errors in written submissions, and the issuance of separate Appellate Body reports.

As already explained, the number of parties and third parties in disputes has increased since the early years of WTO dispute settlement, resulting in a greater number of submissions to be reviewed and considered by the Appellate Body.¹³ The following chart shows that the average number of third participants has nearly tripled between 1996 and today to an average of eight third participants in the ten most recent appeals decided by the end of 2012.

Chart 5 - The number of third participants in appeals

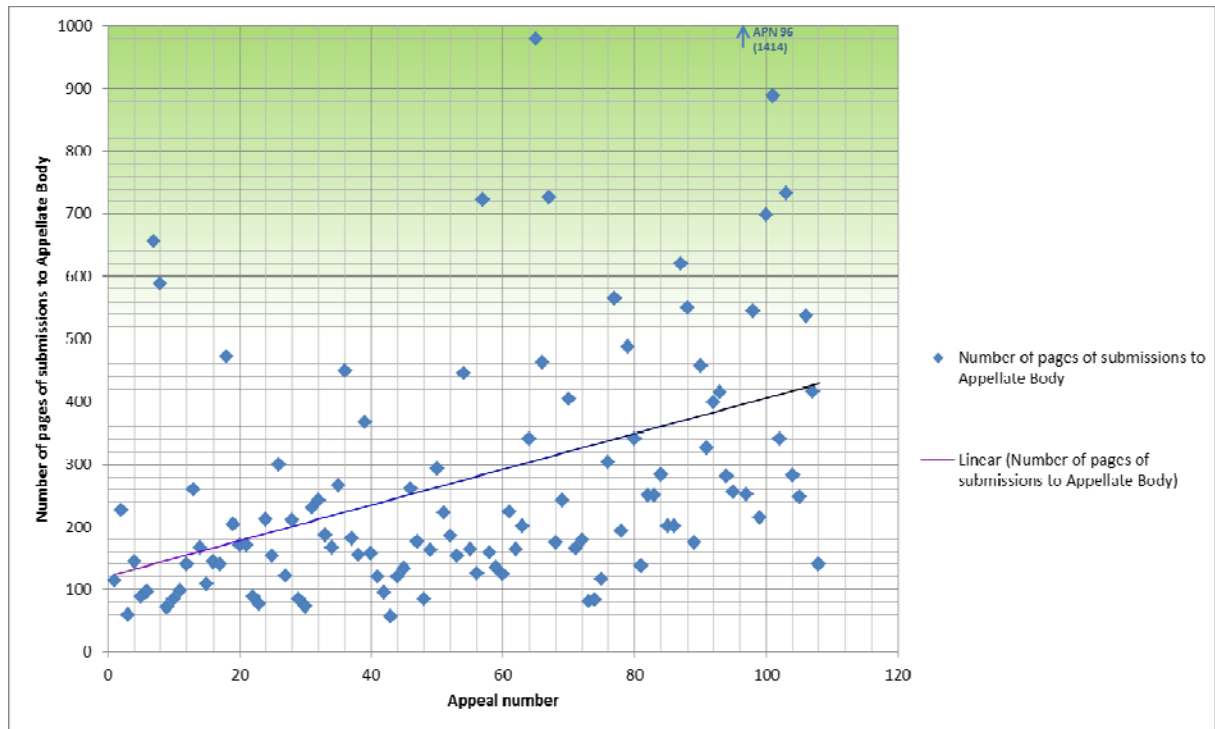


The existence of a substantial and growing body of WTO jurisprudence also contributes to the total length of submissions filed with the Appellate Body in a given appeal. One reason for this is that WTO Members invariably cite prior panel and Appellate Body reports in support of their arguments in any particular case. In order to address these arguments, and in an effort to ensure consistency and coherence of WTO jurisprudence, panels and the Appellate Body are called upon carefully to consider prior panel and Appellate Body reports.¹⁴ As can be seen from the following chart, the number of pages of submissions filed with the Appellate Body has more than doubled to an average of 450 pages per case in the ten most recent appellate proceedings completed by the end of 2012.

¹³ Most third parties file a third participant's submissions and/or make an opening statement at the oral hearing.

¹⁴ At the time of the first appeal in 1996, only 84 adopted panel reports under GATT 1947 existed. Today, in addition to those reports, there are 109 Appellate Body reports and 177 WTO panel reports, comprising thousands of pages of jurisprudence.

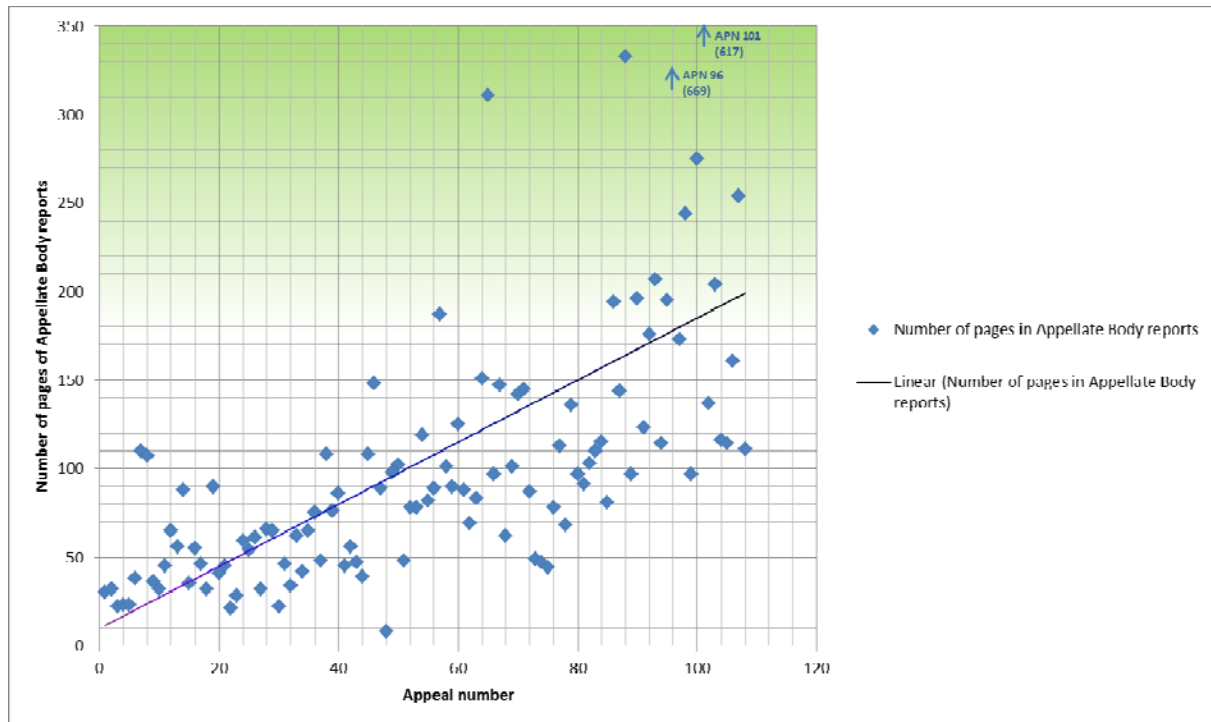
Chart 6 - The number of pages of submissions to the Appellate Body



In sum, our analysis reveals: (i) a growth in the size of disputes appealed to the Appellate Body; (ii) a higher number of issues raised on appeal, including more frequent claims under Article 11 of the DSU; (iii) an increased number of participants and third participants in appeals; and (iv) a consequent increase in the total length of submissions filed with the Appellate Body in an average appeal. Taken together these factors naturally have led to a significant increase in the average length of Appellate Body reports. As can be seen from the chart below, the average length of Appellate Body reports has more than quadrupled from the early years of WTO dispute settlement to close to 210 pages per Appellate Body report.¹⁵

¹⁵ This figure reflects the average number of pages for the ten most recent Appellate Body reports circulated by the end of 2012.

Chart 7 - The number of pages in Appellate Body reports



The Appellate Body's workload is particularly intense in situations where several appeals in different disputes are filed simultaneously or within a short period of time.¹⁶ As explained above, the Appellate Body is composed of seven Appellate Body Members, three of whom serve on any one case. When three or more appeals are pending at the same time, several of the seven Appellate Body Members will be on more than one appeal. When an Appellate Body Member is on the Divisions in two simultaneous appeals, there can be no overlap in the scheduling of hearings and internal meetings for those appeals. In each appeal, Division Members will spend several weeks engaged in thorough deliberations. In addition to participating in such deliberations, the Division Members must also read and analyse voluminous submissions and documents from the panel record and prepare and revise drafts. It is not possible for an Appellate Body Member to simultaneously do this for multiple appeals that are on identical or largely overlapping time schedules. It is also extremely difficult for one individual to complete the necessary work at the required level of engagement when serving as a Division Member on multiple overlapping appeals that have staggered schedules.

¹⁶ The timing of panel report circulation depends on a number of variables, including the date of the request for the establishment of the panel, the time required for panel composition, the requests of the parties concerning scheduling and the size of the underlying dispute. Because each panel of three is composed of different individuals, multiple panel proceedings may run in parallel and multiple panel reports may be circulated within a short period of time. No mechanism currently exists for staggering the working schedules of WTO panels so as to make more efficient use of translation resources available to the WTO and permit the staggering of panel report circulation.

III. Outlook

Panel activity has been intense in recent years. For the period 2010 through 2012, 25 panel reports were circulated, compared to 18 in the previous three year period of 2007-2009.¹⁷

According to the Legal Affairs Division and the Rules Division, a large number of panels will continue to be active for the foreseeable future. Twenty-seven requests for consultations were received in 2012, the highest number since 2002. This led to the establishment of 11 panels in 2012, the highest number in five years.¹⁸ There are currently seven panels in composition, and six more panel requests are pending before the DSB.¹⁹ Third party participation continues to be high.²⁰ Four new requests for consultations have been received in 2013, and four panels have already been established this year covering five disputes.²¹ Significantly, the compliance proceedings in the aircraft subsidy disputes between the United States and the European Union are also presently under way. Thus, a large number of panel proceedings are currently in progress or about to begin. Assuming: (1) that panel proceedings take, on average, one year from the time of establishment of the panel; (2) that the compliance panel proceedings in the aircraft subsidy disputes will take 1.5-2 years; and (3) that, based on the consistent practice of WTO Members involved in disputes since 1996, roughly two-thirds of all panel reports circulated will be appealed²² the Appellate Body can expect to receive up to a dozen appeals towards the end of 2013 and in 2014. Such an increase in the number of appeals, on top of the increased complexity and size of the average appeal, is likely to exacerbate the challenges confronting the WTO dispute settlement system in the near future.²³

¹⁷ These figures include the very voluminous panel reports in the large civil aircraft disputes between the European Union and the United States.

¹⁸ These panels cover 13 disputes. Similar disputes may be consolidated under a single panel pursuant to Article 9 of the DSU.

¹⁹ As of 13 May 2013.

²⁰ In one dispute, 35 Members have reserved third party rights. In two others, 19 and 17 Members, respectively, have reserved third party rights.

²¹ As of 13 May 2013.

²² The overall average of panel reports that were appealed from 1995 to 2012 was 67%.

²³ The increased workload of panels and the Appellate Body will exacerbate the burden already placed on the translation resources available to the WTO. Indeed, it is well-known that panel and Appellate Body reports are circulated simultaneously in the three official languages of the WTO and therefore require translation. Highly specialized expertise is required in order to ensure the quality of translations and, in turn, the coherence and consistency of reports in the three official language versions. The translation process has become particularly intense and demanding given the increased size and complexity of disputes brought to the WTO together with the short amount of time available for translation. This is so particularly given that allowance must also be made for revision of translations, as well as for text-processing, production control, and the printing process.