

WORLD TRADE ORGANIZATION

WT/BFA/W/109

18 March 2004

(04-1222)

Committee on Budget, Finance and Administration

Original: English

LETTER FROM THE CHAIRMAN OF THE APPELLATE BODY

The attached letter addressed to the Chairman of the Committee on Budget, Finance and Administration, from the Chairman of the Appellate Body was circulated to the Committee in November 2003 under the symbol CRP(03)50. The Committee decided that, in view of time constraints, the question would be taken up in 2004.

James Bacchus
Chairman
Appellate Body

Geneva, 17 November 2003

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Mr. Joshua C.K. Law
Permanent Representative
Hong Kong Economic and Trade Office
Allée David-Morse 5
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Reference:

Dear Mr. Law,

I am writing to you on behalf of my colleagues on the Appellate Body. The purpose of this letter is to request that the Budget Committee consider adjusting the compensation provided to Appellate Body Members. This would be the first such adjustment since the establishment of the Appellate Body over eight years ago.

As you may know, I will finish my second and last term with the Appellate Body next month and thus my interest in this relates solely to my conviction that the WTO and the Appellate Body are vital institutions and that their future viability must be supported and preserved.

As you know, the Appellate Body was established in 1995 pursuant to Article 17.1 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"). Some of the details regarding the operation of the Appellate Body are set out in Article 17 of the DSU. Additional details are found in the document entitled "Recommendations by the Preparatory Committee for the WTO"¹ ("Recommendations"), which was approved by the Dispute Settlement Body ("DSB") on 10 February 1995.

Paragraphs 10 - 12 of the "Recommendations" address the "conditions of employment" of Appellate Body Members. Paragraph 10 refers to the requirement in Article 17.3 of the DSU that "persons serving on the Appellate Body shall be available at all times and on short notice." Thus, it is stated that Appellate Members "have a priority working relationship with the WTO", and that they "may have other activities."

Paragraph 11 sets out the approach to compensation as follows:

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

¹ WT/DSB/1, 19 June 1995. A copy is attached for ease of reference.

considered at the latest at the first Ministerial Conference, to determine whether a move to full-time employment was warranted.

Paragraph 12 refers to the elements of the compensation package:

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

It was subsequently decided by WTO Members that, in addition to the monthly retainer of SF 7000, the following compensation would be paid to Appellate Body Members:

- a daily fee of SF 600 for each day the Member is required to be in Geneva on *official* business of the Appellate Body and for every day that the Member is required to work on an appeal in a place other than Geneva;
- a daily allowance to cover meals and accommodation of SF 435;
- an allowance for administrative expenses of SF 300 per month.

This compensation package has not been adjusted in over eight years.

It is evident in paragraph 11 of the "Recommendations", quoted earlier, that the compensation package was designed to permit Appellate Body Members to "continue to pursue other activities where they were resident". Paragraph 12 refers to the need to establish a compensation package that is "large enough to offset a member's opportunity cost of work foregone because of potential conflicts of interest, or incompatibility with sporadic trips to Geneva." However, the objective of pursuing "other activities" has often proved to be unrealistic, and members' trips to Geneva are frequent and regular, rather than "sporadic." Although it was originally envisaged that the workload of Appellate Body Members would be light, it is now generally recognized that the workload is very demanding. The average number of days per year spent by Appellate Body Members working on appeals is 174, with a high of 231 in 2001². The bulk of that work is conducted in Geneva; the average number of days spent per year in Geneva is 117, with a high of 170 in 2001. It is anticipated that the workload will continue to be significant over the next two years at a minimum, due to the fact that more panels have been established in 2003 than ever before, and the fact that 71 percent of panel reports have been appealed since 1995. There is no reason to assume that the workload will decline significantly in the years to follow.

The nature of the work makes it very difficult, if not impossible, for Appellate Body Members to take on other work. The fact that Appellate Body Members must be "available at all times and on short notice" interferes significantly with Members' being available for other work, especially if it is time-sensitive, because they have no control over their schedules working on Appellate Body matters. The Appellate Body does not have advance notice of whether or when appeals will be filed. Moreover,

² This covers 1997 through 2002, the only years for which such average data are available.

the requirement in the DSU to complete appeals within 90 days from the filing of the Notice of Appeal leaves little flexibility in scheduling appeals, especially given that two weeks of that 90 day period is devoted to translation of the Appellate Body Report.

WTO Members recognized, as set out in paragraph 11 of the "Recommendations", that it was important, in designing the compensation package, to "reflect the overriding concern that candidates are of a high enough calibre to ensure the integrity and authority of decisions taken by the Appellate Body" and that the "requirement that high-calibre members be available at all times." The Members also noted, in paragraph 12, that the daily fee, travel expenses and *per diem* should be set with reference to "current rates for equivalent services under similar conditions." With this in mind, it may be useful to compare the compensation packages of those providing similar services in other bodies. I attach, for information, a copy of excerpts from a proposal submitted by Canada, in the context of the negotiations on improvements and clarifications to the DSU, where Canada calls for adjusting the *per diem* remuneration provided to WTO panelists, which Canada describes as "very low". (The *per diem* fee for Appellate Body Members is the same as that for panelists.) The annex to Canada's proposal sets out various *per diem* rates for services similar to those carried out by Appellate Body Members, ranging from a low of SF 719 per day paid to NAFTA panelists other than those deciding investor-State disputes, to a high of SF 5842 per day paid for some London Court of Arbitration cases.

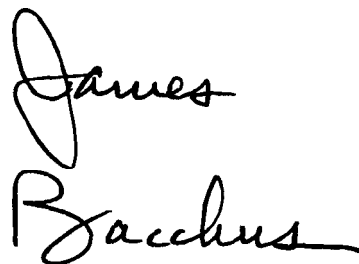
I have also attached information on compensation paid for similar services performed in institutions not included in Canada's list.

The Appellate Body will complete consideration of its 60th appeal at the end of 2003. The first appeals having been heard in 1996, this would mean a workload of an average of 7.5 appeals per year. The International Court of Justice, by contrast, has rendered 61 judgments and 23 advisory opinions since 1947 (an average of 1.5 decisions per year).

In the light of the above, I would request the Budget Committee to consider adjusting the compensation package provided to Appellate Body Members.

I will be pleased to discuss this matter with you and the members of the Budget Committee should you find this useful.

Yours sincerely,

The image shows a handwritten signature in black ink. The first part of the signature is 'James' in a cursive script. Below it, the last name 'Bacchus' is written in a larger, more stylized cursive script.

James Bacchus
Chairman
Appellate Body

cc: Dr. Supachai Panitchpakdi, Director-General
Mr. Rod Abbott, Deputy Director-General
Mr. Rufus Yerxa, Deputy Director-General
Appellate Body Members

Excerpt from TN/DS/W/41 dated 24 January 2003, "Contribution of Canada to the Improvement of the WTO Dispute Settlement Understanding: Communication from Canada" (pp. 5 and 14)

2. Remuneration of Panelists

In addition, providing an adequate level of compensation to panelists will help to ensure that sufficient numbers of qualified individuals are willing to advance their candidacy to the Panel Roster and that those selected to serve on a panel will not be penalized financially for the time they dedicate to this task.

Canada appreciates the resource constraints faced by the WTO. However, an adjustment to the *per diem* remuneration of panelists is warranted. Compared against other international tribunals, the *per diem* offered to WTO panelists is very low (see Annex 2). Remuneration accorded to WTO panelists must reflect more closely the value of panelist service not only to the individual parties to a dispute but also to ensuring the ongoing capacity of the DSU to provide security and predictability to the multilateral trading system to the benefit of all WTO Members.

[Annex 2 of excerpt continued on next page]

ANNEX 2
REMUNERATION OF WTO PANELISTS COMPARED WITH
OTHER INTERNATIONAL TRIBUNALS

ORGANIZATION	REMUNERATION	AVERAGE PER DAY* (CHF)
International Centre for Settlement of Investment Disputes (ICSID)	US\$2,000 per day	CHF 2,772
London Court of International Arbitration (LCIA)	£150 -£350 per hour	CHF 2,503 - 5,842
American Arbitration Association (AAA) International Centre for Dispute Resolution	US\$250 - US\$450 per hour	CHF 2,599 - 4,678
British Columbia International Commercial Arbitration Centre (BCICAC)	CDN \$250 - US\$400 per hour for international arbitrations.	CHF 1,687 -4,159
International Chamber of Commerce (ICC) International Court of Arbitration	Arbitrators' fees are based on the amount in dispute. (For example, if the amount in dispute is US\$5,000,000, the arbitrator would receive between US\$23,750 and US \$108,500.)	N/A
World Intellectual Property Organization (WIPO) arbitrators	The arbitrators' fees are based on the amount in dispute. (For example if the amount in dispute is US\$5,000,000, a three-person tribunal would receive approximately US\$271,250.)	N/A
Court of Arbitration for Sport (CAS)	Approximately CHF 200 per hour	CHF 1,500
North American Free Trade Agreement (NAFTA) Chapter Eleven tribunal members	Approximately US\$350 - US\$450 per hour	CHF 3,639 - 4,678
NAFTA Chapter Nineteen and Twenty panelists	CDN \$800 per day	CHF 719
World Trade Organization panelists	CHF 600 per day	CHF 600

* Based on a working day of 7.5 hours. CHF 1 = 0.449627 GBP; 1.11150 CAD; and 0.721715 USD (exchange rates 14.01.2003).

Compensation Paid for Similar Services

Performed in Institutions Not Included in Canada's Annex

International Court of Justice

The United Nations General Assembly sets the salaries, allowances and expenses received by judges of the International Court of Justice (ICJ), situated in The Hague. The judges of the ICJ receive \$US 160,000 per annum, travel costs, assistance with education costs, and a retirement pension equal to half the annual salary at the time of retirement, provided the judge has completed a nine-year term, and a proportion of that amount if less than nine years has been served. The compensation package is reviewed every three years, and was last revised in 1999.

International Criminal Court

The full-time members of the International Criminal Court (ICC) receive Euros 180,000 *per annum*, while the non-full-time members will receive Euros 60,000 *per annum*, *plus* travel expenses and a remuneration package similar to that received by judges of the ICJ. The Court was established in 2002 and has its seat in The Hague.

WORLD TRADE ORGANIZATION

WT/DSB/1
19 June 1995
(95-1633)

ESTABLISHMENT OF THE APPELLATE BODY

Recommendations by the Preparatory Committee for the WTO approved by the Dispute Settlement Body on 10 February 1995

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

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

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

A. Composition of the Appellate Body

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

1. Expertise of persons serving on the Appellate Body

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

2. Representative balance

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

3. Impartiality and confidentiality

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

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

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

4. Conditions of employment of members

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

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

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

expenses and a per diem. The actual amounts should be set on the basis of further research on current rates for equivalent services under similar conditions. The contractual conditions for each member of the Appellate Body should be the same, reflecting the principle that all the members should have equal status.

5. Selection procedure

13. The DSU provides that "the DSB shall appoint persons to serve on the Appellate Body." The decision by the DSB to appoint Appellate Body members could be made on the basis of a proposal formulated jointly, after appropriate consultations, by the Director-General, the Chairman of the DSB, and the Chairmen of the Goods, Services, TRIPS and General Councils. Suggestions for candidates could be forwarded by delegations to the Director-General. These suggestions could include candidates of nationalities other than that of the forwarding delegation.

B. Matters Concerning the Internal Procedures of the Appellate Body

14. The DSU provides that "working procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information."³ Matters such as guaranteeing the rotation required by the DSU and facilitating communications, if necessary, within the Appellate Body should form part of the working procedures. The DSB Chairman, at the appropriate time, should consult with Members in order to obtain their views on the working procedures prior to advising the Appellate Body.

C. Administrative and Legal Support

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

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

17. The Appellate Body and its support staff should be independent from the Secretariat. The support staff should be selected by the Director-General, in consultation with the Chairman of the DSB, on a competitive basis following a public advertisement. They should be employed by the WTO, on conditions similar to those accorded secretariat staff of similar rank, but should otherwise be administratively separate from it and answerable to the Appellate Body. Any movement of support staff from the Appellate Body to the WTO Secretariat should be on a competitive basis following a public advertisement, and not by simple administrative transfer. The Secretariat shall put aside sufficient space to house the Appellate Body.

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