

The Lack of Dissent in WTO Dispute Settlement: Is There a “Unanimity” Problem?

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I. Introduction

The supplanting of the General Agreement on Tariffs and Trade (GATT) by the World Trade Organization (WTO) has been roundly applauded.¹ In particular, commentators consider the changes in dispute settlement away from a diplomatic model and towards a more judicial, rules-based model to be positive ones. Interestingly however, while the new dispute settlement system is commanding a high level of respect and legitimacy – as reflected by the dramatic increase in cases brought when compared with the GATT era – panelists and Appellate Body members have been very cautious in issuing their opinions. Specifically, the decision-makers appear to be going to great pains to present the appearance of unanimity – even where unanimity does not actually exist. In 120 panel decisions to date, there have been only six dissents. And of the 76 Appellate Body decisions to date, there has been only a single opinion styled as a dissent, and one other separate opinion labeled a concurrence.² Even though there are provisions in the WTO rules expressly permitting panelists and Appellate Body members to put forth differing opinions, WTO jurists are overwhelmingly declining to do so. The fact that WTO disputes have been resolved almost entirely without dissenting opinions has

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¹ The WTO came into effect as of January 1, 1995. *See* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125 (1994) [hereinafter Final Act].

² The term “dissent” is used here to mean “the explicit disagreement of one or more judges of a court with the decision passed by the majority.” BLACK’S LAW DICTIONARY 472 (6th ed. 1990). A concurrence is used here to indicate an opinion in which the a judge agrees with the conclusions or results reached by the majority, but provides different reasoning or views in reaching the same result. *See id.* at 291. For ease of reading, this article generally uses the term “dissent” to refer to the writing of a separate opinion, be it in actuality a dissent or concurrence. However, when specific dispute settlement cases are discussed, the terms “dissent” and “concurrence” are used consistent with the actual opinions.

garnered little scholarly attention.³ This Article explores the issue in detail by examining the lack of dissent in WTO jurisprudence and concluding that the seeming unanimity of the decisions should be a cause for concern rather than celebration. Keeping the lid on dissents may ultimately erode the strength of the dispute settlement system and hinder the ability of the WTO Members to make appropriate changes to the Agreements. Part II sets forth the relevant dispute settlement understanding provisions, discusses the empirical evidence thus far with respect to panel and Appellate Body reports, and considers the WTO experience in the context of other international adjudicatory tribunals. Part III examines factors that may explain why there has been so little dissent in WTO dispute resolution. Part IV identifies the positive and negative functions dissents can serve. Part V addresses whether the lack of dissent should be a cause for concern in the WTO context, determining that the WTO may ultimately suffer if it does not adopt a more open approach towards differing opinions. Part VI concludes by considering ways the WTO might reform the DSU or its internal practices such that dissents would not be so heavily discouraged.

II. The Dispute Settlement Understanding and Experience

This section introduces the WTO dispute settlement structure and the relevant WTO rules pertaining to the form dispute settlement decisions should take. It then

³ The issue is occasionally mentioned in passing but has yet to be explored in depth. *See, e.g.*, James McCall Smith, *WTO Dispute Settlement: The Politics of Procedure in Appellate Body Rulings*, 2 *WORLD TRADE REV.* 65, 81 (2003) (stating that “isolated anonymous dissents have been included in WTO panel reports” but only citing to the EC-Poultry panel report, WT/DS69/R (March 12, 1998); John Greenwald, *WTO Dispute Settlement: An Exercise in Trade Law Legislation?* 6 *J. INT’L ECON. L.* 113, 123 n.18 (2003) (discussing the Corrosion-Resistant Carbon Steel Flat Products case substantively and, in noting its dissent was unusual, stating that “I fear it [this dissent] will die of loneliness.” Former members of the Appellate Body have provided some insights into the lack of dissent, but again have not examined the issue comprehensively. *See, e.g.*, Claus-Dieter Ehlermann, *Reflections on the Appellate Body of the WTO*, 6 *J. INT’L ECON. L.* 695 (2003); James Bacchus, *Symposium Address: The Role of Lawyers in the WTO*, 34 *VAND. J. TRANSNAT’L L.* 953, 960 (2001).

examines the incidence of dissents and separate opinions in WTO jurisprudence, and compares the WTO experience with that of other international judicial bodies.

A. From Diplomatic to Legalistic: The Evolution of the DSU

The WTO Dispute Settlement Understanding (“DSU”) and the results of the disputes resolved under the DSU thus far can best be appreciated by recalling the differences between the current and former systems of dispute resolution. Under the GATT, disputes were resolved through recourse to three-member panels. There was no appellate review of panel reports, but a given report only bound the parties to the dispute if there was a consensus of all GATT members to adopt that report. In other words, the losing party to a dispute had the power to veto adoption of a report not decided in its favor. The GATT system can thus be characterized as diplomatic in nature, in that it relied upon consensus and agreement of the parties for rulings to have any impact. The diplomatic nature of the dispute settlement system led to some notable instances of diplomatic breakdown in which losing countries elected to veto the adoption of reports against them.⁴ The lack of certainty that GATT dispute settlement reports would be adopted was considered a major drawback to the system, and countries brought relatively few of their disputes before GATT panels.⁵

In the Uruguay Round, Members elected to abandon the diplomatic style of dispute resolution used in the GATT era and instead drafted and adopted the DSU which sets forth a far more procedural, rules-based system for resolving members’ disputes. In

⁴ Examples include the reports in the United States’s complaint against the EC with respect to subsidies on exports of wheat flour; the United States’s complaint against the EC on subsidies for pasta product exports; and a Swedish complaint against the United States with respect to antidumping duties on stainless steel pipes. The adoption of each of these reports was blocked repeatedly by the losing party.

⁵ Between 1947 and 1994 approximately one hundred GATT panel reports were adopted. The total number of disputes brought slightly exceeded this figure, as some reports were not adopted due to the opposition of the losing party. However, the total was well under two hundred. A list of the adopted GATT reports is available at http://www.wto.org/english/tratop_e/dispu_e/gt47ds_e.htm (last accessed April 17, 2006).

particular, the Members changed the consensus rule to a reverse consensus system by which dispute settlement reports are automatically adopted unless there is a consensus not to adopt them. In other words, a report will be adopted unless the winner of the dispute agrees that it should not be. In addition, a level of appellate review was incorporated, in the form of a new Appellate Body. These more legalistic innovations have been widely viewed as significant improvements over the GATT system.⁶ Members appear to be pleased with the changes, as they are using the dispute settlement system much more actively than in the GATT era. Approximately three hundred separate disputes have been initiated before the WTO in the last eleven years, far more than were brought in the entire forty-seven year history of the GATT.

In a further shift away from the diplomatic and towards the legalistic approach, the DSU sets forth a variety of procedural requirements to be followed in WTO disputes at both the panel and Appellate Body level. In addition, the Appellate Body has adopted its own set of working procedures. Both the DSU and the Appellate Body's Working Procedures contain provisions reflecting a desire for consensus-based decision-making.

B. DSU and Appellate Body Working Procedures Provisions

Although the Dispute Settlement Understanding and Appellate Body Working Procedures each discuss separate opinions, the Working Procedures provide more

⁶ The dispute settlement mechanisms of the WTO have been hailed as one of the most successful elements of the organization. Much has been written on the basic features of and differences between GATT and WTO dispute settlement. Useful sources include DAVID PALMETER AND PETROS C. MAVROIDIS, *DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION: PRACTICE AND PROCEDURE* (2d ed Cambridge 2004); ANDREAS F. LOWENFELD, *INTERNATIONAL ECONOMIC LAW* (particularly Part III) (Oxford 2003); ERNST-ULRICH PETERSMANN, *THE GATT/WTO DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS AND DISPUTE SETTLEMENT* (1997); JOHN H. JACKSON, *THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE* (1999); and William J. Davey, *The WTO Dispute Settlement System*, in *TRADE, ENVIRONMENT, AND THE MILLENNIUM* 145-74 (Gary P. Sampson and W. Bradnee Chambers eds. 2002).

detailed guidance. The Dispute Settlement Understanding merely provides that “[o]pinions expressed in the panel report by individual panelists shall be anonymous” (Article 14.3)⁷ and that “opinions expressed in the Appellate Body report by individuals serving on the Appellate Body shall be anonymous” (Article 17.11).⁸ This language makes clear that separate opinions are permitted at both the panel and Appellate Body level, albeit anonymously, but does not seem to impart a sense of disapprobation towards the practice of writing separately.⁹

In contrast, the Appellate Body Working Procedures reflect a strong desire to reach unified decisions if at all possible: “The Appellate Body and its divisions *shall make every effort* to take their decisions by consensus. Where, nevertheless, a decision cannot be arrived at by consensus, the matter at issue will be decided by a majority vote” (Rule 3.2).¹⁰ The Working Procedures do not elaborate upon Article 17.11 of the DSU to provide any further guidance on how or whether a minority view can be expressed. And in practice, the Appellate Body has taken unmistakable steps to avoid dissenting opinions.¹¹ As such, “the spirit of Rule 3.2 first sentence of the Working Procedure has clearly prevailed over the possibility offered by Article 17.11 DSU.”¹²

In theory then, panel and Appellate Body members are free to express disagreement with a majority opinion. In practice, however, WTO jurists have generally

⁷ Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter DSU] Art. 14.3.

⁸ DSU Art 17.11.

⁹ The issue of anonymity is discussed *infra* in Part III.

¹⁰ Working Procedures Rule 3.2 (emphasis added).

¹¹ *See infra* Part III.

¹² Ehlermann, *supra* note 3, at 697 (noting that as of 2003, in only one case had member of the Appellate Body expressed an anonymous concurrent opinion).

declined to exercise this option.¹³ The following section documents the magnitude of this disconnect at both the panel and Appellate Body level.

C. Lack of Dissents: the Empirical Evidence

Since the WTO's inception, less than five percent of panel reports and less than two percent of Appellate Body reports have included dissenting opinions. Specifically, to date there have been only six dissents out of one hundred-twenty panel reports.¹⁴ Those dissents occurred in the following cases: 1) European Communities – Measures Concerning Importation of Certain Poultry Products;¹⁵ 2) U.S. – Import Measures on Certain Products from the European Communities;¹⁶ 3) United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany ;¹⁷ 4) European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries;¹⁸ 5) United States – Final Dumping Determination on Softwood Lumber from Canada;¹⁹ and 6) United States – Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”).²⁰

There have been even fewer dissents at the Appellate Body level. Out of seventy-six reports²¹ there has been only one dissent, in the recent Upland Cotton Subsidies

¹³ One is reminded of the Clash song “Know Your Rights” (“you have the right to free speech, as long as long as you’re not dumb enough to actually try it.”).

¹⁴ As of April 12, 2006.

¹⁵ Panel Report, *European Communities – Measures Concerning Importation of Certain Poultry Products*, ¶¶ 289-93, WT/DS69/R (March 12, 1998) [hereinafter “EC – Poultry”].

¹⁶ Panel Report, *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/R (July 17, 2000) [hereinafter “U.S. – Certain EC Products”].

¹⁷ Panel Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/R (July 3, 2002) [hereinafter “U.S. – German Steel CVDs”].

¹⁸ Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R (Dec. 1, 2003) [hereinafter “EC – Tariff Preferences”].

¹⁹ Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R (April 13, 2004) [hereinafter “U.S. – Final Lumber AD Determination”].

²⁰ Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins*, WT/DS294/R (Oct. 31, 2005) [hereinafter “U.S. – Zeroing of Dumping Margins”].

²¹ As of April 12, 2006.

case,²² and one concurring opinion, in the European Communities – Measures Affecting Asbestos and Asbestos-Containing Products (“EC – Asbestos”) case.²³

D. How does the WTO Experience Compare to Other International Tribunals?

The lack of dissent in WTO dispute resolution is no accident. Instead, it reflects a concerted effort on the part of the members of the Appellate Body to reach consensus whenever possible. This effort may appear incongruous given that dispute resolution based on consensus was essentially rejected in the formation of the WTO, and in fact it may reflect an attempt to hold onto one of the diplomatic aspects of GATT dispute resolution.²⁴ The incidence of dissents in WTO dispute resolution is low, as a percentage of disputes heard,²⁵ but the lack of dissents is especially striking when compared with the practices of other international judicial bodies. This section examines the experiences of other international tribunals and demonstrates that the WTO experience is not representative of international tribunals as a whole.

²² Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R (March 3, 2005) ¶¶ 631-641 (out of 763 paragraphs).

²³ Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (March 12, 2001). See also Ehlermann, *supra* note 3, at 698 n.3; Claus-Dieter Ehlermann, *Six Years on the Bench of the ‘World Trade Court’ in THE WTO DISPUTE SETTLEMENT SYSTEM 1995-2003* 499, 508 (Ernst-Ulrich Petersmann & Federico Ortino, eds., 2004) (“None of the reports is accompanied by a dissenting opinion. In only one case [EC – Asbestos] has a member of the Appellate Body expressed an anonymous concurrent opinion.”).

²⁴ As discussed *supra*, under the GATT, the losing party to a dispute could block the adoption of the panel report against it. Under the WTO, this is no longer possible. Instead, panel reports are adopted unless there is unanimous consensus against adoption.

²⁵ At the Appellate Body level there has been only one dissent out of seventy-odd cases, or less than two percent of the time. Even when the one concurring opinion is accounted for, the incidence of separate opinions is still under three percent. Similarly, fewer than five percent of panel reports have included separate opinions of any kind.

It can be challenging to define what precisely qualifies as an international judicial body,²⁶ and many entities could be so characterized.²⁷ This article does not attempt to examine all possible international tribunals as comparative reference points. Instead, it examines the experience of the adjudicatory bodies with the widest membership – namely the International Court of Justice (ICJ) and the International Tribunal for the Law of the Sea (ITLOS). In addition, this section additionally looks at the North American Free Trade Agreement (NAFTA) dispute settlement tribunals because the nature of the disputes heard in NAFTA dispute settlement are very similar to those resolved by WTO dispute settlement panels and the Appellate Body.²⁸

1. The International Court of Justice

The ICJ is the primary judicial organ of the United Nations. Any of the Member States of the United Nations (at present 191 members) may bring disputes before the

²⁶ New York University's Project on International Courts and Tribunals (PICT) has prepared a synoptic chart to illustrate which tribunals might qualify. See http://www.pict-pcti.org/publications/synoptic_chart/Synop_C4.pdf. (last accessed April 17, 2006).

²⁷ In connection with PICT, Cesare P.R. Romano has, in a very helpful article, attempted to define which entities should be considered international judicial bodies. See Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 709, 711-23 (1999). For further information on PICT see <http://www.pict-pcti.org/index.html> (last accessed April 17, 2006). PICT defines international judicial bodies as those that meet the following five criteria: (1) permanent institution; (2) composed of independent judges; (3) adjudicate disputes between parties at least one of which is a state or international organization; (4) follow pre-determined procedural rules; and (5) issue decisions which are legally binding. See JOSE E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* 458 (Oxford 2005).

²⁸ A number of the other entities identified as international judicial bodies by Romano (*supra* note 27, at 715-17) permit dissents, including the European Court of Human Rights (ECHR); the Inter-American Court of Human Rights (IACHR); the Central American Court of Justice (CACJ); the Common Court of Justice and Arbitration of the Organization for the Harmonization of Corporate Law in Africa (for arbitrations); and the Judicial Board of the Organization of Arab Petroleum Exporting Countries, with some, particularly the ECHR, experiencing frequent dissents. The ECHR provision permitting dissents is worded considerably more neutrally than Rule 3.2 of the Appellate Body Working Procedures: "if a judgment does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion." See Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, amended by protocol No. 11, May 11, 1994, art. 45(2)) Europ. T.S. No. 155 (entered into force November 1, 1998) [hereinafter European Convention], available at <http://www.echr.coe.int/Convention/webConvenENG.pdf> (last visited March 5, 2006). For a helpful discussion of European regional tribunals see Carl Baudenbacher, *Judicialization: Can the European Model be Exported to Other Parts of the World?*, 39 TEX. INT'L L.J. 381 (2004).

ICJ.²⁹ Dissents are permitted and occur frequently in the ICJ. The ICJ has been criticized for having ideological factions amongst its judges, a factor that has undoubtedly led to a high level of dissent.³⁰

2. The International Tribunal for the Law of the Sea

At present there are 149 State parties to the United Nations Convention on the Law of the Sea, the Convention for which ITLOS resolves disputes.³¹ Dissents are permitted in ITLOS decisions, and this right has been exercised vigorously. In fact, there have been separate or dissenting opinions in every ITLOS disputes for which a decision has been issued.³²

3. NAFTA

Under NAFTA, different panels are constituted to hear different types of disputes. So-called Chapter 20 panels resolve all disputes except those relating to investment³³ or to antidumping and countervailing duty matters. Chapter 20 panels may issue separate opinions but must, as in WTO dispute settlement, be anonymous.³⁴ Chapter 19 panels resolve antidumping and countervailing duty disputes. Their reports also may contain concurrences and dissents.³⁵ The NAFTA Chapter 19 and Chapter 20 panels, unlike the WTO panels, have exercised their right to issue separate or dissenting opinions. In 14 of

²⁹ See <http://www.icj-cij.org/icjwww/igeneralinformation/icjgnnot.html> (last accessed April 17, 2006).

³⁰ Debra P. Steger, *Improvements and Reforms of the WTO Appellate Body*, in *THE WTO DISPUTE SETTLEMENT SYSTEM 1995-2003* 41, 45 (Ernst-Ulrich Petersmann & Federico Ortino, eds., 2004).

³¹ See http://www.itlos.org/start2_en.html (last accessed April 17, 2006).

³² ITLOS has been the subject of some criticism for precisely this reason. See, e.g., Donald M. McRae, *The WTO in International Law: Tradition Continued or New Frontier*, 3 J. INT'L ECON. L. 27, 39 (2000).

³³ NAFTA investment disputes are covered in Chapter 11 of the Agreement, which provides that investor-State disputes can be resolved through various arbitral mechanisms such as ICSID and UNCITRAL. Investor disputes are not resolved by dispute settlement panels as are Chapter 19 and Chapter 20 disputes, and as such are not considered here.

³⁴ North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 289 & 32 I.L.M. 605 (entered into force Jan. 1, 1994) (hereinafter NAFTA) arts. 2016(3), 2017(2).

³⁵ NAFTA Annex 1901.2. Chapter 19 and Chapter 20 disputes are resolved by five-member panels. Panelists are selected from a roster of up to 30 individuals. Roster members are appointed by consensus for terms of up to three years and may subsequently be reappointed. See NAFTA art. 2009.

51 cases to date there have been separate or dissenting opinions from the decisions issued.

The experience of the ICJ, ITLOS, and NAFTA would seem to suggest that the WTO's high rate of unanimous decisions is the exception rather than the rule in international dispute resolution. The political nature of the ICJ and to some extent ITLOS cases may be one reason why those tribunals experience a much higher rate of dissent. The NAFTA tribunals however resolve disputes quite similar to many of the WTO's disputes. Perhaps then there are factors unique to the WTO that explain its unusually high level of consensus.

III. Potential Explanations for the Lack of Dissent in WTO Dispute Resolution

This Section explores why there has been so little dissent in WTO dispute resolution. While there are many possible explanations, it seems certain that the reason cannot be attributed to happenstance or chance. Instead, it is quite clear, particularly in the Appellate Body, that separate opinions have been discouraged to a significant degree. The Appellate Body appears to be motivated by a variety of factors to discourage dissents. In addition, there may be procedural and institutional factors increasing the likelihood of unanimous decisions.

A. Dissent is Actively Discouraged

The original members of the Appellate Body made a conscious decision to avoid dissent, which is reflected in their Working Procedures. It appears that the divisions of the Appellate Body have taken to heart their task to "make every effort to take their

decisions by consensus.”³⁶ James Bacchus, former Chairman of the Appellate Body, has explained that:

Whatever our individual role may be in any particular appeal, each of us strives always to reach a ‘consensus’ in every appeal. We are not required to do so. The treaty does not prohibit dissents....the ‘consensus’ we have achieved in the many appeals that have been made, thus far, to the Appellate Body has not always been achieved easily...³⁷

The apologetic language used by the dissenter in the Upland Cotton case conveys the author’s discomfort with writing separately. First, rather than styling the differing view as a “dissent” the author instead stated that: “[o]ne member of the Division hearing this appeal wishes to set out a brief separate opinion.”³⁸ However, in substance the opinion is clearly a dissent rather than a concurrence. The member then went to great pains to highlight his or her³⁹ agreement with the Report as a whole: “At the outset, I would like to make it absolutely clear that I agree with the findings and conclusions and reasoning set out in all preceding Sections of this Report, but one, namely, Section C above ... It is only on the interpretation of Article 10.2 that I must respectfully disagree.”⁴⁰ The dissenter bends over backwards to limit the scope of the disagreement and emphasize agreement in all other areas. Within the dissent, the author uses the first person numerous times (such as “this suggests to me”) which further heightens the sense that the author recognizes he or she has gone out on a lonely limb in order to speak separately.

³⁶ Working Procedures Rule 3.2.

³⁷ James Bacchus, *Table Talk: Around the Table of the Appellate Body of the World Trade Organization*, 35 VAND. J. TRANSNAT’L L. 1021, 1029-30 (2002).

³⁸ Consistent with DSU Art. 17.11 the author of the “separate opinion” is not identified.

³⁹ Merit Janow (United States) was the presiding member. She was joined by Luiz Olavo Baptista (Brazil) and A.V. Ganesan (India).

⁴⁰ Appellate Body Report, *United States – Subsidies on Upland Cotton*, ¶ 631, WT/DS267/AB/R (March 3, 2005).

The Working Procedures and the Cotton dissent reflect the Appellate Body's desire to avoid dissent. What requires further scrutiny to determine is, *why* is unanimity such a high priority for the Appellate Body and dispute settlement panels?

1. Desire for Legitimacy

The primary reason the dispute settlement jurists have emphasized consensus appears to be out of a desire for legitimacy and a belief that speaking as one voice will prove their independence. Former Appellate Body Member Claus-Dieter Ehlermann has explained that:

“every one of the seven Appellate Body members was conscious and determined to contribute to the building of a new institution. Every one of us wanted to contribute to the strength and authority of this new institution. We were of course aware that we had to build up the reputation, acceptability, and the ensuing legitimacy of the Appellate Body from scratch.”⁴¹

The Appellate Body members were determined to build an independent institution and for the members themselves to be seen as independent: “The determination to gain credibility, acceptability, and legitimacy, combined with the paramount concern for independence, explains the Appellate Body's attitude towards consensus, as opposed to voting and individual opinions, be they dissenting or concurrent.”⁴²

Similarly, Former Appellate Body Chairman James Bacchus also supported the decision to issue collective opinions, explaining that: “It has been important for all of us who are members of the Appellate Body to focus on establishing our institution, to speak with one voice, and to submerge our own identities into the system itself. I have tried very hard to do that.”⁴³

⁴¹ Ehlermann, *supra* note 3, at 695.

⁴² Ehlermann, *supra* note 3, at 696.

⁴³ Bacchus, *supra* note 3, at 960.

Members of the Appellate Body may therefore have refrained from voicing their views when they have not agreed with the majority out of “fear that they will, through their dissent, weaken the effectiveness and reputation of the group to which they belong.”⁴⁴

2. Competence and Credibility

The drive for legitimacy may have been grounded in a desire to be seen as independent, but also as competent and credible. As a new institution, the Appellate Body may have particularly prioritized unanimity because revealing internal dissension could have undermined their nascent role as the ultimate experts on WTO matters.⁴⁵ Bacchus explains that “[b]y relying on the mutual exercise of reason, we have reached a consensus ... in every single one of our – to date – nearly sixty appeals....[N]o Member of the Appellate Body has – to date – ever dissented to even one of our ultimate rulings and recommendations. This has added to the credibility of our judgments and to the historic force of the uniqueness of WTO dispute settlement.”⁴⁶

Bacchus reveals that the Appellate Body particularly strives for consensus because the issues they face are not clear cut, and are nearly all issues of first impression.⁴⁷ It is arguably important to appear to be on the same page when shedding light on new and complex issues. However, it seems even more important to let the WTO Members see any differing views regarding these highly complex, nuanced, issues that are being raised and examined for the first time. Using false consensus to hide uncertainty may lead to short-term institutional legitimacy, but cannot possibly be a

⁴⁴ CASS SUNSTEIN, *WHY SOCIETIES NEED DISSENT* 29 (2003).

⁴⁵ Smith, *supra* note 3, at 81.

⁴⁶ James Bacchus, *Lone Star: The Historic Role of the WTO*, 39 *TEX. INT’L L. J.* 401, 409 (2004).

⁴⁷ Bacchus, *supra* note 37, at 1030.

positive in the long-term development of WTO jurisprudence. WTO Members ideally should be able to see any judicial interpretations that the Members perhaps hadn't considered when drafting the WTO Agreements, or even an analysis that better accords with their intended meaning than does the majority's opinion.

3. A Bacchus-Marshall Link?

Former Appellate Body Chairman James Bacchus has a background in history and law, and is thus likely quite familiar with the history of the United States Supreme under the reigns of one of its earliest Chief Justices, John Marshall.⁴⁸ Given the similarity in approach to separate opinions taken by Marshall and the nascent Appellate Body, it may be that Bacchus urged his colleagues that the Appellate Body should conduct itself like the early Marshall Court to gain legitimacy.⁴⁹ Marshall dispensed with the original American system (following the practice of the King's Bench)⁵⁰ of issuing seriatim opinions in favor of single opinions seemingly reflecting unanimous judgments in every case. Marshall insisted on this practice because he felt it would enhance the legitimacy of the fledgling court, and many have argued that in so doing, Marshall succeeded.⁵¹ Marshall's strong disapproval of separate opinions carried the day for many

⁴⁸ Marshall was the fourth Chief Justice, following Justices Jay, Rutledge, and Ellsworth. Bacchus's writings tend to begin with a historical reference or anecdote. *See, e.g.,* Bacchus, *supra* note 46; Bacchus, *supra* note 37; and Bacchus, *supra* note 3.

⁴⁹ Others have suggested parallels between WTO dispute settlement and the Marshall Court. *See* Raj Bhala, *The Myth about Stare Decisis and International Trade Law*, 14 AM. U. INT'L L. REV. 845, 860-61 (1999) ("[T]he more appropriate analogy is not between WTO tribunals and present-day American courts. Rather, it is between these newborn tribunals and the infant Supreme Court of Chief Justice John Marshall. Thus, exploring ... whether the WTO faces the same issue our great Chief Justice did might be fruitful: how to enhance the legitimacy of the judicial branch?").

⁵⁰ For a useful discussion of 1600s and 1700s British judicial structure and practice *see* Karl M. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L.Q. 186 (1959).

⁵¹ *See, e.g.,* DONALD E. LIVELY, *FORESHADOWS OF THE LAW: SUPREME COURT DISSENTS AND CONSTITUTIONAL DEVELOPMENT* xxii (1992); 3 ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 15-16 (1916). Others, including this author, have criticized Marshall's practice of speaking for the Court. *See* A.J. Levin, *Mr. William Johnson, Creative Dissenter*, 43 MICH. L. REV. 497, 521 (1944); Meredith Kolsky,

years, and separate opinions were all but unknown until Justice William Johnson – with strong encouragement from Thomas Jefferson – stood up to Marshall and voiced his opposition to majority opinions with which he disagreed.⁵² Bacchus appears to share Marshall’s view that consensus leads to legitimacy, and perhaps this belief was reflected in Bacchus’s leadership of the Appellate Body.⁵³

Little has been written about Bacchus’s or any of the other Chairmen’s substantive leadership of the Appellate Body, but their leadership styles may also have contributed to the level of consensus. In the Supreme Court context it has been suggested that there been a higher level of consensus among members of the Court under chief justices who have utilized task and social leadership.⁵⁴ Even Charles Evan Hughes, who as an associate justice on the United States Supreme Court famously wrote that: “A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the Court may have betrayed”⁵⁵ became more reserved upon becoming the head of the Court. There is evidence to suggest that, upon becoming Chief Justice in 1930, Hughes tried to discourage dissent whenever possible,

Note, *Justice William Johnson and the History of the Supreme Court Dissent*, 83 GEO. L.J. 2069 (1995). The references to early United States practice in this article are primarily drawn from the author’s earlier work, cited above.

⁵² See generally Levin, *supra* note 51, and Kolsky, *supra* note 51.

⁵³ See Thomas G. Walker et al., *On the Mysterious Demise of Consensual Norms in the United States Supreme Court*, 50 J. OF POL. 361, 379 (1988) (citing David J. Danelski, *The Influence of the Chief Justice in the Decisional Process of the Supreme Court*, in JOEL B. GROSSMAN AND RICHARD S. WELLS, EDS., CONSTITUTIONAL LAW AND JUDICIAL POLICY MAKING 237 (1980)). The marked increase in dissenting opinions in United States Supreme Court decisions that began in the 1940s has been linked to the poor leadership of Chief Justice Harlan Fiske Stone. Dissents were noticeably less frequent under Chief Justices with reputations for leadership and collegiality. See Walker et al, *supra*.

⁵⁴ See Walker et al., *supra* note 54, at 379-82.

⁵⁵ CHARLES EVAN HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 68 (New York 1928).

even joining in decisions with which he disagreed in order to present the appearance of a united Court.⁵⁶

B. Process

In addition to the Appellate Body Members' decision to strive for unanimity where possible, there may also be aspects of the process WTO panelists and Appellate Body Members have taken in resolving disputes that have led to fewer separate opinions than might otherwise have been expected.

1. Collegial Approach

The Appellate Body has come up with numerous procedures to effectuate unanimity where possible. In addition to the aforementioned Rule 3.2 which directs the Appellate Body to make every effort to achieve consensus, the Working Procedures also contain a series of provisions under the heading "Collegiality." These provide in relevant part as follows:

- (1) To ensure consistency and coherence in decision-making, and to draw on the individual and collective expertise of the Members, the Members shall convene on a regular basis to discuss matters of policy, practice and procedure.
- (2) The Members shall stay abreast of dispute settlement activities and other relevant activities of the WTO and, in particular, each Member shall receive all documents filed in an appeal.
- (3) In accordance with the objectives set out in paragraph 1, the division responsible for deciding each appeal shall exchange views with the other Members before the division finalizes the appellate report for circulation to the WTO Members....⁵⁷

⁵⁶ See Walker et al., *supra* note 53, at 382.

⁵⁷ Working Procedures for Appellate Review Rules 4.1-4.3, WT/AB/WP/5 (4 Jan 2005).

The Members have invested a great deal of time and effort into the “exchange of views” process called for in Rule 4.3, above. This has undoubtedly contributed to the high level of consensus within the institution.⁵⁸ Shortly following oral hearings on appeals, all seven members of the Appellate Body meet in Geneva and consult with the three members that are hearing the particular appeal. The members engage in an extensive dialogue that can last from two days to a week. Each member has an opportunity to weigh in on each issue, and the discussions continue until each issue has been fully discussed. This process has led to a high level of consistency and consensus.⁵⁹

In addition, the members of the Appellate Body have thus far remained highly collegial and have not divided themselves into smaller camps or coalitions.⁶⁰ Debra Steger the first director of the Appellate Body Secretariat attributes this collegiality in part to the fact that members do not represent regions or “seats” and as such can be distinguished from the ICJ: “Not only is the ICJ selection process extremely political, but the judges, having been appointed to represent a particular region, also tend to vote in favor of their region. The Members of the WTO should seek to protect and preserve those aspects of the Appellate Body culture that guarantee the maximum independence and impartiality.”⁶¹

⁵⁸ Steger, *supra* note 30, at 44.

⁵⁹ Steger, *supra* note 30, at 44; *see also* JACKSON, *supra* note 5, at 80 (additionally noting the benefit of continuity for future cases).

⁶⁰ Steger, *supra* note 30, at 44.

⁶¹ Steger, *supra* note 30, at 45. *But see* Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1 (2005) (arguing that international tribunals are more effective when they are not independent). Posner and Yoo include the GATT and WTO in their examination of different international tribunals and suggest that “the WTO’s court-like dispute settlement system does not necessarily improve behaviour under international trade law and may make it worse.” *Id.* at 50.

2. Early Agreement on Interpretive Principles

The Appellate Body also may be achieving a high level of consensus due to a meeting of the minds regarding the meaning of the Article 3.2 requirement that the covered agreements be clarified “in accordance with customary rules of interpretation of public international law.”⁶² The Members determined that this provision meant interpretation in accordance to the rules set forth in Article 31 of the Vienna Convention on the Law of Treaties.⁶³ This interpretation is reflected in the Appellate Body report in the US – Gasoline case, in which it is stated that the Vienna Convention “has attained the status of a rule of customary or general international law”.⁶⁴ Former Appellate Body Member Claus-Dieter Ehlermann explains that “the very early consensus on interpretive principles has facilitated decision-making and contributed considerably to the consistency and coherence of Appellate Body reports. At the same time, this consensus has also contributed to the already mentioned high degree of collegiality and friendly co-operation among the seven Appellate Body members.”⁶⁵ Ehlermann distinguishes the Appellate Body approach from that of the European Court of Justice (ECJ), noting that: “I do not remember that the ECJ has ever laid down openly and clearly the rules of interpretation that it intended to follow.”⁶⁶ He argues that the Appellate Body has taken a “literal” interpretation of “object and purpose” while the ECJ has taken a “teleological” interpretation.⁶⁷ To Ehlermann and others, this approach has provided a measure of

⁶² Ehlermann, *supra* note 23 at 508. Ehlermann suggests that this agreement has led to consistency and coherence in the Appellate Body reports.

⁶³ Ehlermann, *supra* note 23 at 508.

⁶⁴ See Ehlermann, *supra* note 23 at 508; Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline (US – Gasoline)*, WT/DS2/AB/R, adopted 20 May 1996, DSR, 1996:I, p.3 (16).

⁶⁵ Ehlermann, *supra* note 23, at 509.

⁶⁶ Ehlermann, *supra* note 23, at 509.

⁶⁷ Ehlermann, *supra* note 23, at 509.

“security and predictability” as required by the Dispute Settlement Understanding⁶⁸ and has had a legitimizing effect.⁶⁹

If the rules of interpretation are clear, there may be less room for disagreement. However, even with a common understanding on approach, it still seems likely that the Appellate Body members must have had more significant disagreements than have been reflected through separate opinions to date.

3. Acting as an Institution Rather Than as Individuals

The Dispute Settlement Understanding defines the Appellate Body and panels very much in institutional rather than individual terms. Decisions are rendered on an anonymous basis, rather than by specific people. The decisions themselves are styled as reports – more evocative of an institutional or collective product – rather than opinions, which evoke images of an actual individual author or authors. Decisions of panels and Divisions of the Appellate Body are therefore decisions of the DSB as a whole, and are not and should not be taken as the opinions of their authors alone.⁷⁰

This approach – in many senses more akin to a civil law court than a common law one – may further explain the mentality of consensus at almost all costs. If Appellate Body members are acting in an institutional sense, the opinions of the individual members are arguably not relevant. There are right answers to be found, and there should not be differing views about what that answer is or how that answer is derived.

⁶⁸ See DSU Art 3.2 (“The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system.”).

⁶⁹ Ehlermann, *supra* note 23, at 509; See also J.H.H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, 13 AM. REV. INT’L ARB. 177, 195 (2003) (arguing that the Appellate Body has acted with the aim of achieving internal and external legitimacy).

⁷⁰ For further discussion on the institutional approach, see Kevin M. Stack, Note, *The Practice of Dissent in the Supreme Court*, 105 YALE L.J. 2235, 2238-40 (1996) (discussing Paul W. Kahn’s book, *THE REIGN OF LAW: MARBURY V MADISON AND THE CONSTRUCTION OF AMERICA* (1997)).

In the civil law context, judges may see their roles as institutional or administrative rather than individual or creative, and as such they would be more likely to feel that there is a “right answer” and less likely to seek to author separate opinions.⁷¹ Dissents are arguably more prized in the common law tradition because the common law views judges as individuals. In the words of former United States Supreme Court Justice Hughes, “[d]issenting opinions enable a judge to express his individuality. He is not under the compulsion of speaking for the court and thus of securing the concurrence of a majority. In dissenting he is free lance.”⁷²

To be sure, dissent is more inherently a part of the common law tradition than it is in civil law systems where judges are primarily interpreting code provisions.⁷³ In the common law context, publishing dissents “suggest that it would be legitimate and appropriate for them one day to form a majority; it makes law in principle infinitely revisable.”⁷⁴ But where does WTO dispute resolution fall along the spectrum? The WTO agreements are not fully analogous to civil code provisions. They are generally less detailed and comprehensive and require significant interpretation on the part of the panels and Appellate Body. At the same time, WTO jurists are engaging in treaty interpretation, not applying common law principles. Treaty interpretation is arguably

⁷¹ I owe thanks to Duncan Webb for raising this point. See also Arthur Jacobson, *Publishing Dissent* at 31 (forthcoming, on file with author). Jacobson argues that the civilian legal authority echoes the intellectual structure of its patron, the Catholic Church, and similarly features a transcendental sense of “rightness”. The idea of dissent is anathema to this transcendental sense of rightness and hierarchical structure. *Id.* at 8. This form was not inevitable by virtue of following religious authority, however. Jacobson notes that the rabbinical tradition of biblical law (Halakhah) not only tolerates but in fact highly values dissent, and that the Talmud itself provides transcendent validation for dissent. *Id.* at 9-10 (citing numerous sources in translation).

⁷² HUGHES, *supra* note 55, at 68.

⁷³ While dissents and concurrences have featured routinely in American appellate courts for quite some time, this trend is not universal even within the United States. See David A. Skeel, Jr., *The Unanimity Norm in Delaware Corporate Law*, 83 VA. L. REV. 127, 132 (1997) (noting that the Delaware Supreme Court justices have issued unanimous decisions in ninety-seven percent of reported cases).

⁷⁴ Jacobson, *supra* note 71, at 33.

subject to less discretion, less disagreement, less variability of opinion than the issues addressed by judges in a domestic setting, particularly in common law countries.⁷⁵

However, if this were the sole explanation we would expect to see a low rate of dissents in the opinions of other international courts and tribunals.⁷⁶ As section II (c), *supra*, demonstrates, however, to the extent other international courts and tribunals permit dissents, there has been a far higher incidence of them than in the WTO context.

4. Nonjudicial Nomenclature

Related to whether the Appellate Body Members see themselves as fulfilling more administrative and institutional roles or individual judicial ones is the issue of just how judicial the Appellate Body is intended to be. While many consider the Appellate Body essentially to be a court of last resort, notably it is not called “court.” Decisions are issued in reports, and are not called decisions, judgments, or opinions. Again, if the Appellate Body is an administrative organ, dissents would be less appropriate than if it is a judicial one. J.H.H. Weiler argues that the Appellate Body, in procedure and substance, is a high court.⁷⁷ He sees the choice of nonjudicial nomenclature as serving “the internal legitimacy of the construct to pretend” that the Appellate Body isn’t a court, even

⁷⁵ Although the United States did not adopt the Uruguay Round Agreements as treaties, the agreements are considered treaties as a matter of international law. Accordingly panelists and the Appellate Body members must apply the rules of treaty interpretation found in the Vienna Convention on the Law of Treaties (“The Vienna Convention”) May 23, 1969, 1155 U.N.T.S. 331; [8 I.L.M. 679](#) (1969). Useful articles discussing the Vienna Convention include Campbell McLachlan, *The Principle of Systematic Integration and Article 31(3)(c) of the Vienna Convention*, 54 I.C.L.Q. 279 (2005) and Susy Frankel, *The WTO’s Application of ‘the Customary Rules of Interpretation of Public International Law’ to Intellectual Property*, 46 VA J. INT’L L. __ (2005) (forthcoming).

⁷⁶ See Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 HARV. INT’L L.J. 271 (2003) for a discussion of the scope of the international judiciary. For a comparison between certain WTO procedures and those of other international judicial bodies, see FRIEDL WEISS, *IMPROVING WTO DISPUTE SETTLEMENT PROCEDURES: ISSUES AND LESSONS FROM THE PRACTICE OF OTHER INTERNATIONAL COURTS AND TRIBUNALS* (2000).

⁷⁷ Weiler, *supra* note 69, at 187.

though “the Appellate Body is a court in all but name.”⁷⁸ But “the failure to call a court a court actually diminishes the external legitimacy of the WTO in general and the Appellate Body more specifically.”⁷⁹

Notwithstanding the official nomenclature for the Appellate Body and its work, Members of the Appellate Body have clearly seen themselves as judges. For example, Claus-Dieter Ehlermann refers to himself as having been a judge: “Becoming a judge is in all circumstances an interesting experience. Becoming a judge of a newly established (quasi) judicial body ... is simply fascinating.”⁸⁰ Likewise, Ehlermann refers to the Appellate Body as “this newly established appeal ‘court’” and to participating “as a judge in a judicial ‘green field’ operation at the highest level for the world at large.”⁸¹ Likewise, James Bacchus explains that his role as a “faceless foreign judge” has been referred to as quasi-judicial, but that it is actually highly legalistic.⁸²

5. Actual Unanimity or Collegial Concurrence

It is possible of course that the high percentage of unanimous opinions is due to actual unanimity among the Appellate Body. This seems somewhat improbable because of the comments of Appellate Body Members suggesting there have been areas of disagreement.⁸³ It seems additionally unlikely because the Appellate Body has been

⁷⁸ Weiler, *supra* note 69, at 189.

⁷⁹ Weiler, *supra* note 69, at 190. Weiler thus advocates that the Appellate Body should be given the official name of “The International Court of Economic Justice” to be known colloquially as “The World Trade Court.” *Id.*; see also John P. Gaffney, *Due Process in the World Trade Organization: the Need for Procedural Justice in the Dispute Settlement System*, 14 AM. U. INT’L L. REV. 1173, 1191-92 (1999) (arguing that the Appellate Body acts much like a constitutional court and as such “is more likely [than dispute settlement panels] to foster a greater concern towards the integrity of the dispute settlement system. It may, therefore, evolve into a body that seeks to ensure decisions are taken with the appropriate procedures that foster the democratic and contractarian nature of the WTO system and engage in judicial activism to the extent necessary to achieve this end.”).

⁸⁰ Ehlermann, *supra* note 23, at 500.

⁸¹ Ehlermann, *supra* note 23, at 500.

⁸² Bacchus, *supra* note 37, at 1024-26.

faced with many challenging issues, most of them issues of first impression. It may be the case however that there has been “collegial concurrence” in some disputes where the disagreeing Member doesn’t feel, for whatever reason, that it is “worth” dissenting. This would suggest that dissents would likely only occur in matters of high institutional importance, rather than ones that would likely only affect the parties to the dispute.⁸⁴

One would expect that the fact that dissents have to be anonymous would lead Appellate Body members and dispute settlement panelists to issue relatively more dissents than if their identity was known. As Cass Sunstein has explained, “If people are allowed to say what they think without disclosing who they are, they will be more likely to say what they think.”⁸⁵ In practice, however, the cloak of anonymity clearly has not been enough to convince disagreeing jurists to write separately. Perhaps the reason is that while the public at large, the WTO membership, and the parties to the dispute would not know who a dissenter was, the two panelists in the majority would know, and presumably, in the case of an Appellate Body opinion, so would the non-participating four Members.⁸⁶ This conformity could therefore be a case of “collegial concurrence,”

⁸³ See, e.g., Bacchus, *supra* note 37, at 1029-30; Ehlermann, *supra* note 23, at 508.

⁸⁴ The unusualness of the EC—Asbestos concurrence has been linked to the subject matter at hand: “Separate opinions are unusual, if not previously unknown, in Appellate Body reports, a factor that itself tends to underscore the importance of the issue under consideration.” Bernard H. Oxman, *International Decisions*, 96 AM. J. INT’L L. 435, 438 n.20 (2002).

⁸⁵ See, e.g., SUNSTEIN, *supra* note 44, at 30. In Asch’s experiments the level of conformity and error were significantly diminished when participants gave their responses anonymously. See *id.* at 47. It has been argued that the dissents are anonymous so that Appellate Body members “cannot be accused of being biased.” Patrick Specht, *The Dispute Settlement Systems of WTO and NAFTA – Analysis and Comparison*, 27 GA. J. INT’L & COMP. L. 57, 86 (1998). In the NAFTA context, the anonymity requirement has garnered some praise: “Thus protests with respect to a possible national bias are avoided, and the integrity of the process is ensured.” *Id.* at 103; Jeffrey P. Bialos & Deborah E. Siegel, *Dispute Resolution Under the NAFTA: The Newer and Improved Model*, 27 INT’L LAW. 603, 617-18 (1993). Keeping dissents – and all opinions – anonymous also prevents parties from being able to try to manipulate the composition of Appellate Body panels. Specht, *supra*, at 86.

⁸⁶ While Appellate Body divisions consist of three members, the practice of the Appellate Body has been for division members to discuss their appeals openly with the other Appellate Body members. Working Procedures Rule 4.3

whereby members or panelists decide not to cause tension among their colleagues by issuing a lone and thus arguably useless dissent unless they feel particularly strongly about the issue in dispute.⁸⁷

If collegial concurrence were playing a role in the WTO context, we would expect to see relatively more separate opinions from dispute settlement panels than from Appellate Body opinions because the members of the Appellate Body are repeat players with one another and thus have more of an incentive to act collegially. In contrast dispute settlement panelists are chosen on an ad hoc basis and are far less likely to be repeat players at all, much less with their co-panelists.⁸⁸ In practice there has been a higher incidence of dissents at the panel level, but the level is so low at both the panel and Appellate Body levels that the difference does not appear particularly stark.

However, it may be the case that panelists and Appellate Body Members do disagree more than opinions reflect, but that they engage in collegial concurrence except in cases the disagreeing jurist feels is of particular institutional importance. The nature of the separate opinions seems to support this theory. In the EC-Asbestos concurrence, one of the Appellate Body members questioned the majority's formulation for determining whether forms of asbestos were "like products." The majority had framed the test in terms of the economic nature of the products. The concurring member was of the view that the hazardous nature of a product is also relevant. As such, the fact that certain forms of asbestos are carcinogenic would support a finding that carcinogenic asbestos

⁸⁷ See SUNSTEIN, *supra* note 44, at 182.

⁸⁸ Some argue the system of ad hoc panelists should be replaced with a permanent roster of panelists. See, e.g., WTO Dispute Settlement Body Report, Contribution of the European Communities and Its member States to the Improvement of the WTO Dispute Settlement Understanding, TN/DS/W/1 (Mar. 13, 2002); See also Mackenzie and Sands, *supra* note 76 at 281 (noting concerns with the ad hoc system).

and its noncarcinogenic alternatives are not like products.⁸⁹ The methodology for determining whether products are “like” has been the subject of much discussion and debate.⁹⁰ Thus, while the concurring member did not explain the reason for departing from the past practice of unanimity, it may have been due to the importance of the like product test, which is applied on a regular basis in a wide array of contexts.

In the Upland Cotton case, the Appellate Body appears to be in accord on all issues save one, involving an interpretation of Article 10.2 of the *Agreement on Agriculture*. On this issue, the Report states that Article 10 obliges members to subject export credit programs to the export subsidy disciplines of the *Agreement on Agriculture* immediately.⁹¹ One member of the Division disagreed with this interpretation, arguing that the absence of mention in Article 9 of export credit guarantees, export credits, and insurance programs means “that such measures would not be subject to any disciplines until such time as disciplines were internationally agreed upon pursuant to Article 10.2.”⁹² While this issue is of less significance to the whole of the WTO membership than the like product question raised in the EC – Asbestos case, the United States’ export subsidy programs have a significant impact on trade flows both within and outside the United States and as such much was riding on the outcome of the dispute.

⁸⁹ Appellate Body Report for *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, ¶¶ 149-54, WT/DS135/AB/R (12 March 2001).

⁹⁰ See, e.g., Won Mog Choi, *Overcoming the "Aim and Effect" Theory: Interpretation of the "Like Product" in GATT Article III*, 8 U.C. DAVIS J. INT’L L. & POL’Y 107 (2002); Donald H. Regan, *Regulatory Purpose and 'Like Products' in Article III:4 of the GATT (With Additional Remarks on Article II:2)*, 36 J. WORLD TRADE 443 (2002); Julian Wong, *Are Biotech Crops and Conventional Crops Like Products? An Analysis Under GATT*, 2003 DUKE L. & TECH. REV. 0027.

⁹¹ WTO Appellate Body Report, *United States – Subsidies on Upland Cotton*, ¶ 638, WT/DS267/AB/R (March 3, 2005).

⁹² WTO Appellate Body Report, *United States – Subsidies on Upland Cotton*, ¶ 631, WT/DS267/AB/R (March 3, 2005).

Similarly, at the panel level the reports containing separate opinions have dealt with contentious issues involving the major WTO economies. Each of the separate opinions comes in a case involving either the EC or United States or both. Several deal with antidumping and countervailing duty methodologies, the handling of which by panels and the Appellate Body has been the subject of much scrutiny, debate, and criticism. Others have addressed issues relating to the protection of agricultural markets, another highly controversial area that has an impact on most WTO members.

C. Institutional and Systemic Features

A final set of factors that may explain the dearth of WTO dissents lie in aspects of the institutional structure and system for resolving disputes. These factors include the length of Appellate Body Members' terms in office, the role of the WTO Secretariat, and structural issues such as the DSB's nondiscretionary docket.

1. The reappointment issue

The terms under which Appellate Body Members serve may be influencing their decisions not to write separately. Judges on international tribunals are often appointed for relatively short fixed terms, which are then renewable, as is the case with the Appellate Body Members, who serve four-year terms with the possibility of one renewal. Other examples include the Inter-American Court of Human Rights (six years) and the European Court of Human Rights and the European Court of Justice (six years).⁹³ Many have questioned whether this system influences international jurists such as the Appellate Body Members and others whose judicial appointments are subject to discretionary

⁹³ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 23(1) Nov. 4, 1950, ETS No. 5, 213 U.N.T.S. 222.

renewal to act in a way to maximize the likelihood of re-election.⁹⁴ Tellingly, for both the ICJ and ITLOS, in which dissents are prevalent, judges are appointed for 9 year terms.⁹⁵

The need to get reappointed may be a factor in convincing Appellate Body Members not to write separately. In the Luxembourg Courts – the EFTA Court, the ECJ, and the CFI (Court of First Instance of the European Communities)– judges all serve six-year terms with the possibility of renewal. There have not been complaints of lack of independence,⁹⁶ but there is no open vote system in any of these courts. “The main argument against introducing a dissenting opinion system in the Community courts and the EFTA Court is the fear that dissenting judges could be exposed to pressures by governments and their chances to be reappointed could be placed at risk.”⁹⁷ The solution in the WTO context could therefore be to change from a system of four-year renewable terms to one of a single eight-year nonrenewable term.⁹⁸ In addition to providing more independence generally, it might also lead to more dissenting opinions.

2. Institutional Characteristics

Studies have suggested that the presence or absence of certain institutional features seems to affect the likelihood of dissent. For example, there is a higher incidence of dissent in state supreme courts when there is an intermediate appellate court;

⁹⁴ See, e.g., Mackenzie & Sands, *supra* note 76, at 279; Baudenbacher, *supra* note 28; Ehlermann, *supra* note 23, at 502: a “four-year term, which may be renewed once, does not seem to guarantee sufficiently the independence of the person appointed.” See also Steger, *supra* note 30, at 46 (noting that one non-renewable term of 8 to 10 years would better ensure independence and impartiality than the current system of four-year terms that can be renewed once). In contrast, Judges serving either life terms or one non-renewable term need not worry about the impact their decisions will have on their job tenure. *But see* Posner & Yoo, *supra* note 61.

⁹⁵ Statute of the International Court of Justice, June 26, 1945, art. 13(1), Stat. 1055, 33 U.N.T.S. 993; United Nations Convention on the Law of the Sea, art. 5.1, Annex VI, Dec. 10, 1982, 1833 U.N.T.S. 397.

⁹⁶ Baudenbacher, *supra* note 28, at 384; Mackenzie & Sands, *supra* note 76, at 271.

⁹⁷ Baudenbacher, *supra* note 28, at 384. Member States have different practices for determining whether to renew. *Id.*

⁹⁸ See Steger, *supra* note 30, at 46.

heavy caseloads reduce the incidence of dissent; and a discretionary docket is correlated with more dissent.⁹⁹ It has been postulated that when a court's schedule is filled with nondiscretionary cases and a high volume of appeals (that would presumably be reduced through the presence of an intermediate appeals court), there is no time for competing views to emerge and as such, coalitions that form are inclusive rather than exclusive.¹⁰⁰ In the case of the WTO Appellate Body, all of these characteristics are present, which may be leading to fewer dissents. There is no intermediate appellate entity between the panels and Appellate Body; the Appellate Body has no discretion over its caseload; and the Appellate Body has a far busier workload than was initially contemplated.¹⁰¹

Furthermore, many of the Appellate Body's procedures, and the overall emphasis on consensus, make sense given that the DSU was replacing a system that relied entirely upon consensus.¹⁰² Indeed, the DSB did not intend for the Appellate Body to be an international trade court. Instead, it was meant to serve as a safety valve in the event a panel reached an incorrect decision.¹⁰³

3. The role of the WTO Secretariat

A final systemic factor that may be minimizing the number of dissents at the Panel level is the strong influence of the Secretariat. One might think that because the panels are ad hoc and often consist of individuals who are serving on their first panel, the decisions would be less unified. However, the WTO Secretariat provides significant

⁹⁹ Paul Brace & Melinda Gann Hall, *Neo-Institutionalism and Dissent in State Supreme Courts*, 52 J. OF POL. 54, 59 (1990) (citing studies).

¹⁰⁰ *Id.* at 59.

¹⁰¹ See Steger, *supra* note 30, at 41-42.

¹⁰² Cf. Skeel, *supra* note 73, at 133-36 (identifying the judicial selection process, size of the court, and internal rules and operating procedures as potential reasons why the Delaware Supreme Court is unanimous in the vast majority of its cases).

¹⁰³ See Skeel, *supra* note 73, at 133-36.

assistance to panels on not just administrative matters, but also on the substantive issues raised by a dispute.¹⁰⁴ With an experienced institutional entity providing significant guidance on the substantive legal issues, a panelist holding a contrary view would have to feel strongly indeed to express their disagreement with this expertise.

IV. In Support of Dissents

Notwithstanding the DSB's disdain for writing separately, there are compelling reasons why dissenting opinions should be permitted – without any associated disapproval – and indeed much has been written extolling the virtues of judicial dissent.¹⁰⁵ Dissents can help improve majority opinions and can provide useful reference points for later jurists reconsidering the issues under consideration. Furthermore, dissents can highlight ambiguities in the law as drafted, and in so doing prod the drafters to amend the law as needed. Dissents can without a doubt have a corrosive effect on cohesiveness, legitimacy, and collegiality, and as such should be used wisely. But under the proper circumstances dissents serve a valuable function.

¹⁰⁴ See DSU Art. 27.1; A Handbook on the WTO Dispute Settlement System (WTO Secretariat Publication, Cambridge, 2004) at 22 (“Because panels are not permanent bodies, the Secretariat serves as the institutional memory to provide some continuity and consistency between panels...”). The Secretariat staff's role varies depending on the panel's preference, but can include drafting the findings and providing other significant guidance. See James Cameron & Stephen J. Orava, *GATT/WTO Panels Between Recording and Finding Facts: Issues of Due Process, Evidence, Burden of Proof, and Standard of Review in GATT/WTO Dispute Settlement*, in FRIEDL WEISS, IMPROVING WTO DISPUTE SETTLEMENT PROCEDURES: ISSUES AND LESSONS FROM THE PRACTICE OF OTHER INTERNATIONAL COURTS AND TRIBUNALS 206 (2000). The Secretariat's legal advice has significance influence over Panelists, who the Secretariat also helps to select. See J.H.H. Weiler, *supra* note 69, at 195 (arguing that the Secretariat's legal advice should be provided more openly and transparently so that it can be properly evaluated by the Appellate Body and the Member disadvantaged by the advice).

¹⁰⁵ See, e.g., William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427 (1986); Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133 (1990); Andrew Lynch, *Dissent: The Rewards and Risks of Judicial Disagreement in the High Court of Australia*, 27 MELB. U. L. REV. 724 (2003); Kolsky, *supra* note 51; Stack, *supra* note 70; Edward McGlynn Gaffney, Jr., *The Importance of Dissent and the Imperative of Judicial Civility*, 28 VAL. U.L. REV. 583 (1994). Most of these pieces also identify arguments against dissenting, but all defend the practice in at least some instances.

A. Improving Judicial Decisions

The realistic possibility that a fellow jurist will dissent forces the majority to contend with alternate viewpoints. In so doing, the majority will correct some of its own errors¹⁰⁶ and will sharpen the logic of its opinion. Where single opinions are always issued, opinions are likely to be less sharp and less representative of the entire court's views.¹⁰⁷

As Justice Brennan eloquently explained, a marketplace of ideas will result in the best-informed decisions:

At the heart of that function is the critical recognition that vigorous debate improves the final product by forcing the prevailing side to deal with the hardest questions urged by the losing side. In this sense, the function reflects the conviction that the best way to find the truth is to go looking for it in the marketplace of ideas. It is as if the opinions of the Court – both for the majority and the dissent – were the product of a judicial town meeting.¹⁰⁸

In fact, published accounts of Appellate Body decision-making suggest that the members' "exchange of views" process is largely like that which Brennan describes. And Appellate Body decisions have probably in fact been improved through the majority contending with any minority views raised through this process. Unlike the modern United States Supreme Court, which has been described as being nine separate mini law

¹⁰⁶ SUNSTEIN, *supra* note 44, at 177. See also Richard Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 245-46 (1998) (noting that certain Supreme Court dissents such as Justice Harlan's dissent to *Plessy v. Ferguson*, 163 U.S. 537 (1896) and Justice Holmes's dissent to *Lochner v. New York*, 198 U.S. 45 (1905) are canonical texts in their own right and are often cited as authority despite the fact that the Court never formally overruled the majority decisions). Primus argues that the use of dissents as authority means the constitutional canon must be subject to revision, for dissenting opinions are, by definition, not authoritative at the time they are written. *Id.* at 247.

¹⁰⁷ In the Privy Council context, former Law Lords have indicated that the need to reach single judgments led either to weak "lowest common denominator" judgments or to judgments which often represented the view of the jurist author but not that of the bench as a whole. See Lynch, *supra* note 105, at 738.

¹⁰⁸ Brennan, *supra* note 105, at 430. See also Lynch, *supra* note 105, at 726 (arguing that the possibility of dissenting opinions leads to clearer decision drafting and sharper clarification of the views of the majority).

firms that rarely interact, the Appellate Body Members do sit around the table and talk through the issues. The primary difference between the ideal as described by Brennan and the Appellate Body approach appears to be that the Appellate Body members continue debating until the last holdout either comes to agree with the majority or decides to drop his or her opposition in the interests of obtaining a unanimous decision.¹⁰⁹

It may be that there have been cases where Members holding minority opinions have pushed their case, but then decided not to write separately once their argument has been addressed but rejected. Justice Brandeis utilized this approach on the U.S. Supreme Court, often circulating draft dissents but then deciding not to dissent to the final opinion if he did not think the opinion was going to cause significant harm.¹¹⁰ The Brandeis approach is laudable from a collegiality perspective, but is not as useful to interpreters of the court or to future jurists as is publishing one's dissents. Publishing dissents demonstrates that the majority was aware of the minority view, considered it, and rejected it for reasons that tend to be elaborated in the opinion.¹¹¹

Dissents also improve majority opinions by getting adjudicators to follow the law.¹¹² In a fascinating study published in the Yale Law Journal and discussed in Cass Sunstein's book on dissent, the authors argued that courts are more likely to comply with legal doctrine when there is a political or ideological split on the judicial panel: "This results from the presence of a minority position on the panel that creates an opportunity for whistle blowing – a minority member with doctrine on her side and the ability,

¹⁰⁹ In an informal discussion with the author, a former member of the Appellate Body explained that the members would discuss the issues at great length until everyone agreed, or barring agreement, until those that disagreed elected to back down so that consensus could be maintained.

¹¹⁰ Gaffney, *supra* note 101, at 608-09.

¹¹¹ See, e.g., Jacobson, *supra* note 71, at 13; Lynch, *supra* note 105, at 758.

¹¹² SUNSTEIN, *supra* note 44, at 176. Sunstein references Frank Cross and Emerson Tiller's study, cited *infra*, as showing "the importance of a potential dissenter, or whistleblower, in ensuring that courts follow the law."

through a dissent, to expose disobedient decision-making by the majority.”¹¹³ The presence of a whistleblower may lead the majority to keep its decisions in line with the legal doctrine.¹¹⁴ Perhaps this has been happening all along on the Appellate Body. However, it seems that for a whistleblower to have an effect on the majority, the threat of dissenting would have to be real rather than theoretical.¹¹⁵

B. Dissents as Markers for the Future

Dissents can serve the additional valuable function of drawing attention to the weaknesses or flaws in a majority opinion and providing an alternative approach. The dissent can then be used as a roadmap of sorts by future jurists panels revisiting the same issues – and on this subsequent consideration possibly to reach the result encouraged by the original dissenter(s).

C. Spurs for Political Action

Finally, dissents may point out the ambiguities or flaws in a law and thus spur legislators to make amendments if necessary. In the WTO context, where the legislative branch has been particularly weak, dissents might serve as a useful nudge to get the Members to make necessary changes.

D. Dissents Should be Used Judiciously

Although dissents serve many useful purposes, they can have negative effects on the judicial institution and the respect its decisions receive. Even supporters of dissent tend to agree that the practice should be exercised sparingly. The American Bar

¹¹³ Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2159 (1998).

¹¹⁴ *Id.* at 2159.

¹¹⁵ With only one dissent in seventy-six reports, and the Working Procedures language strongly discouraging dissents, it seems that the right to dissent is more illusory than real.

Association issued an opinion in 1923 cautioning for only limited use of dissents: “judges constituting a court of last resort should use effort and self-restraint to promote solidarity of conclusion and the consequent influence of judicial decision....[E]xcept in case of conscientious difference of opinion on fundamental principle, dissents should be discouraged.”¹¹⁶

In the WTO context, some feel that the Appellate Body should be applauded for banding together and avoiding the high levels of dissent in ITLOS and ICJ disputes,¹¹⁷ and feel that if the Appellate Body reports included minority opinions it would weaken the authoritative impact of the reports.¹¹⁸ These views may go too far in the other direction. Having dissents in every case clearly would not be desirable, but the status quo of having essentially none is also far from ideal.

The Appellate Body and dispute settlement panels should therefore utilize dissents and concurrences when there are significant disagreements as to interpretation and/or outcome. Even if the Appellate Body would reach the same outcome in a given dispute, there are likely instances when the members of the Division have different rationales for why the outcome should be what it is. Separate concurring opinions may be appropriate in such instances, rather than dissents. While this article opposes a shift to seriatim decisions, there are undoubtedly instances where the DSB would benefit from seeing the different alternative approaches panelists proffer, though the end result is the same.¹¹⁹

¹¹⁶ ABA Proposed Canons of Judicial Ethics, No. 19. *See also* LEARNED HAND, THE BILL OF RIGHTS 72 (1958) (a dissent “cancels the impact of monolithic solidarity on which the authority of a bench of judges so largely depends.”).

¹¹⁷ McRae, *supra* note 32, at 39.

¹¹⁸ Specht, *supra* note 85, at 86.

¹¹⁹ Ginsburg, *supra* note 105, at 136 (noting similar benefits of dissents and concurrences).

V. Does the WTO Need More Dissent?

This section explores whether the WTO would benefit if there were more dissents at the panel and Appellate Body levels, taking into consideration whether WTO decisions have a precedential effect on later disputes; potential negative consequences flowing from the lack of dissent; and whether the few dissents to date have had any influence.

A. Do Dissents Matter in the WTO Context – the Question of Precedent

One issue affecting whether dissents have a role to play in WTO dispute resolution is what weight previous WTO decisions will be given by future panels and Divisions of the Appellate Body. If decisions have precedential effect, then the logic used by the majority – and any minority – in a dispute is more important for future cases than if reports do not have precedential effect. While as a technical matter *stare decisis* does not apply in the WTO context, as a practical one, panels and the Appellate Body do appear to rely heavily on the logic in past reports.

The Appellate Body addressed this issue in the Japan – Alcoholic Beverages Case, stating that:

Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute.¹²⁰

The Japan – Alcoholic Beverages panel report notes that the Statute of the International Court of Justice has an explicit provision, Article 59, to the same effect:

“This has not inhibited the development by that Court (and its predecessor) of a body of

¹²⁰ Japan – Taxes on Alcoholic Beverages WT/DS8 (and 10, 11)/AB/R (1996) p. 14.

case law in which considerable reliance on the value of previous decisions is readily discernible.”¹²¹

Article 59 of the Statute of the International Court of Justice clearly disavows any *stare decisis* effect of that Court’s decisions: “The decision of the Court has no binding force except between the parties and in respect of that particular case.” But (ICJ Judge) Mohamed Shahabuddeen argues that Article 59 “has no bearing on the question of precedents.”¹²² There is nothing in Article 59 to preclude a given decision from being referred to in a future case as “a statement of what the Court regarded as the correct legal position.”¹²³ However, Shahabuddeen also says that “There is agreement on all hands that *stare decisis* is not applicable to the Court,”¹²⁴ though this lack of applicability is not due to Article 59 of the ICJ Statute.¹²⁵ Instead, judicial decisions fall within the category of subsidiary sources of international law as provided for in Article 38(1)(d). In fact, while the ICJ does not consider itself required to follow its prior decisions in the binding precedent sense, it in fact does refer to and consider its former decisions through reference to Article 38(1)(d).¹²⁶ The WTO dispute settlement panels and Appellate Body have similarly disavowed any requirement that they follow Appellate Body precedents, but have in practice made frequent reference to prior Appellate Body decisions.¹²⁷

¹²¹ Japan – Taxes on Alcoholic Beverages WT/DS8 (and 10, 11)/AB/R (1996) p. 14, n.30. *See also* PALMETER & MAVROIDIS, *supra* note 6, at 38-47 for a discussion of prior panel and Appellate Body reports as sources of law under Article 38.1 of the Statute of the International Court of Justice.

¹²² MOHAMED SHAHABUDEEN, PRECEDENT IN THE WORLD COURT 63 (1996) (arguing that Article 59 only has bearing on the parties to the current dispute).

¹²³ *Id.*

¹²⁴ *Id.* at 54.

¹²⁵ *Id.* at 99.

¹²⁶ PALMETER & MAVROIDIS, *supra* note 6, at 38.

¹²⁷ PALMETER & MAVROIDIS, *supra* note 6, at 38.

The WTO's training materials advise that: "As in other areas of international law, there is no rule of stare decisis in WTO dispute settlement according to which previous rulings bind panels and the Appellate Body in subsequent cases."¹²⁸

Likewise, the DSU provides that: "Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements"¹²⁹ and

Article IX.2 of the WTO Agreement states that: "The ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and the Multilateral Trade Agreements."

The WTO provisions seem to suggest that prior opinions do not have a significant role to play. But the Appellate Body's actions suggest otherwise:

Perhaps more important than the ambivalent texts is the practice of the Appellate Body, which from the beginning has acted as if it were a court. It has insisted that panels apply the law as if they were judicial bodies, including applying the law that has been developed in the decisions of the Appellate Body itself. And the Appellate Body has in practice followed its own prior decisions. Although there is no provision for stare decisis within the WTO process, the Appellate Body has effectively created a form of a doctrine of precedent in WTO dispute settlement, not unlike precedent in the early days of the common law.¹³⁰

Ehlermann likewise suggests that the Appellate Body views their decisions as having significant precedential value: "care must be taken not to use arguments that could lead to incorrect results in future cases. Legal security and predictability would not be served by an apparently richer motivation offered today if that motivation or reasoning

¹²⁸ http://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c7s2p1_e.htm (last accessed April 17, 2006).

¹²⁹ DSU Art. 3.2

¹³⁰ Donald McRae, *What is the Future of WTO Dispute Settlement?* 7 J. INT'L. ECON. L. 3, 7-8 (2004). See also JACKSON, *supra* note 6, at 83 (arguing that while under international law generally tribunal decisions do not have de jure precedential effect, in the WTO context "there is clearly a de facto precedential effect operating, albeit not strictly").

has to be changed or corrected in a future case.”¹³¹ Notwithstanding the ways in which the DSU and Appellate Body Working Procedures evoke civil law images, Don McRae has argued that: “The insistence of the Appellate Body on panels treating the Appellate Body’s interpretation of the WTO agreements as binding in future cases is very much in the common law tradition.”¹³² In effect, “All precedent now in the WTO dispute settlement system is binding. The only real question is whether it is binding in a de facto or de jure sense.”¹³³ Thus while there is some disagreement over the formal legal status of Appellate Body precedents, in practice the Appellate Body and panels have referred and deferred to the analysis set forth in prior decisions. As such, the lack of a formal system of precedent does not negate the value dissenting opinions would serve. Indeed, it has been argued that:

One of the more troubling aspects of WTO panel and Appellate Body decision-making has been the general absence of dissent. This may be tolerable in a civil law system that doesn’t put the same weight on precedent as in common law systems, but it should be unacceptable from dispute settlement bodies that routinely quote their former decisions as authority.¹³⁴

And even though there may be reasons why civil law jurisdictions are less likely to publish dissents, it is still troubling that they fail to do so. As Arthur Jacobson explains, “[b]ecause disagreement just as surely marks discussion in civilian panels, failing to publish separate opinions has the effect of masking it against public inspection or awareness.”¹³⁵ Likewise, it is hard to believe, notwithstanding the emphasis the

¹³¹ Claus-Dieter Ehlermann, *Experiences from the WTO Appellate Body*, 38 TEX. INT’L L.J. 469, 486 (2003).

¹³² McRae, *supra* note 130, at 8.

¹³³ Bhala, *supra* note 49, at 853.

¹³⁴ Greenwald, *supra* note 3, at 123-24.

¹³⁵ Jacobson, *supra* note 71, at 3.

Appellate Body has put on reaching consensus, that there haven't been serious disagreements. This raises the question of whether Appellate Body members have actually always become convinced of the majority's view, or whether on occasion members have stood in silent disagreement with a portion of a decision. It would be unfortunate if the latter were the case, though it seems likely that this is in fact what happens from time to time.

It may be that the dispute settlement panels and Appellate Body have had members who acted as potential whistleblowers and thus changed decisions from what they otherwise would have been. We cannot know whether this has happened. But even if this does occur behind the scenes, the WTO community would still be losing out on the other benefits of having opposing views actually set forth for all to see. Behind the scenes activities do nothing to improve the situation when the majority decision might otherwise be viewed as incorrect. In contrast, when the dissenter publishes his or her opinion, a future panel may reference that dissent as the better approach and reject the initial decision¹³⁶ in favor of the approach elucidated in the dissent. Of course it is possible in later cases for jurists to reach different outcomes even without the benefit of dissenting opinions, but the process is a much easier one when a roadmap exists setting forth the flaws in the first decision and an alternative path forward.

B. Dissents on Dissent

In addition to the reasons addressed in Part IV, *supra*, regarding the benefits of dissent generally, in the WTO context there are particular reasons why the overwhelming unanimity of panel and Appellate Body decisions should be a cause for concern. The

¹³⁶ Because the Appellate Body reports are not binding, as discussed *supra*, an Appellate Body panel would not overrule an earlier report with which it disagreed, but it could decline to follow the reasoning in an earlier report and instead adopt the interpretation set forth in a dissent.

lack of dissent is in many ways emblematic of the broader refrain that the WTO is insufficiently transparent. Likewise, developing countries see the unanimous decisions as monolithic edicts that do not reflect their concerns. In addition, the lack of dissent is arguably making it even more difficult for the already weak political arm of the WTO to fulfill its responsibilities.

1. Lack of transparency

Although WTO dispute resolution has garnered high praise in most respects, the process itself has been criticized for not being sufficiently transparent. Panel proceedings are closed to the public,¹³⁷ written submissions are not required to be public, and opinions are written anonymously. This secrecy is arguably just a continuation of some of the diplomatic behind closed-doors methods used in the GATT era. While this may be appropriate in the pre-Panel phase, when confidential resolution is still possible, there is little justification once a dispute reaches the stage of establishing a Panel.¹³⁸ The system may just reflect long-term institutional inertia, but “it should be recognized that we have put in place a judicial process. It is inconsistent with basic principles of open government and transparency of legal proceedings and inconsistent with the very significant issues now under dispute, that the principles of secrecy should still prevail.”¹³⁹

The lack of dissent in WTO dispute settlement coupled with the requirement that decisions be issued anonymously is a further illustration of the transparency problem. If panel and Appellate Body sessions were public, Members and other observers might have

¹³⁷ Some countries including the United States make their submissions available via the Internet almost immediately upon filing. Other Members can and do elect not to provide public access to their dispute settlement submissions.

¹³⁸ Weiler, *supra* note 69, at 191.

¹³⁹ Weiler, *supra* note 69, at 191.

a broader sense of who really supports a certain position and who likely went along just in the interests of consensus. But because sessions are closed and opinions are anonymous, it is not at all evident what the specific views are of individual panelists or Appellate Body Members. Thomas Jefferson disdained the issuance of single opinions prevalent under the early Marshall Court, referring to the practice as “certainly convenient for the lazy, the modest & the incompetent.”¹⁴⁰ While this article does not intend to impugn the members of the Appellate Body or dispute settlement panels as lazy, modest or incompetent, Jefferson did hit upon an important issue – that of accountability. The fact that opinions cannot be attributed to particular panelists or Division members is problematic, particularly in the current climate of dissatisfaction over the lack of WTO transparency.

This might not matter if, in fact, the Appellate Body were always in full agreement on all issues. It seems unlikely, however, that this is the case, particularly given some of the highly nuanced and challenging cases that have been decided thus far. Ehlermann acknowledges that the lack of dissent “is no proof of total unanimity in all cases with respect to all arguments” but he believes that if there weren’t actually a high degree of consensus, “one would probably have seen more manifestations of individual positions.”¹⁴¹ This may be correct; however, there have been indications from other members of the Appellate Body that unanimity has been by deliberate design rather than a natural outcome of individuals all in agreement with one another all the time.¹⁴²

¹⁴⁰ Letter from Thomas Jefferson to William Johnson (Oct. 27, 1822), microformed on The Thomas Jefferson Papers, Library of Congress Microfilm Series 1, Reel 53, printed in 12 THE WORKS OF THOMAS JEFFERSON 246, 249-50 (Paul L. Ford ed., 1905).

¹⁴¹ Ehlermann, *supra* note 23, at 508.

¹⁴² See *infra* Part III(A).

At least some former Members of the Appellate Body agree that more openness and transparency is needed in the process. Claus-Dieter Ehlermann has commented that:

Panel meetings are closed. This provision is clearly a remnant of the original function of panels as instruments of diplomatic dispute settlement, along with consultation, good offices, conciliation, and mediation. However, confidentiality of all phases of the panel proceedings – as opposed to the internal deliberations among the panelists, is hardly compatible with the new, quasi-judicial character of the panel process.¹⁴³

Likewise, Julio Lacarte, former Chairman of the Appellate Body, acknowledges that the WTO should be more transparent. He has argued that if proceedings of the United Nations Security Council are broadcast live on television and radio, surely the WTO could be more open than it is: “[D]oes anyone doubt that the public debates on Iraq were accompanied by intense, secret diplomatic contacts? If public discussion and private negotiations can take place simultaneously in the Security Council, they certainly can do so in the trade field.”¹⁴⁴ Lacarte advocates for, among other things, “open hearings of panels and the Appellate Body, and a substantially enlarged availability of documentation.”¹⁴⁵

Writing separate opinions allows those on the outside to see where the disagreements lie and how overall trends may change over time. In contrast, it may be the case that by masking disagreement through unanimous decisions, the Appellate Body is increasing the likelihood it will end up “cycling” from one interpretive or doctrinal approach to another¹⁴⁶ rather than refining its positions in a transparent fashion. In this respect, all

¹⁴³ Ehlermann, *supra* note 131, at 472.

¹⁴⁴ Julio A. Lacarte, *Transparency, Public Debate and Participation by NGOs in the WTO: a WTO Perspective*, 7 J. INT’L ECON. L. 683, 684 (2004).

¹⁴⁵ *Id.*

¹⁴⁶ See Skeel, *supra* note 73, at 153 (arguing that unanimity can lead to increased doctrinal instability by raising the risk of cycling and clouding the development of legal doctrine).

but requiring consensus in the name of achieving institutional legitimacy could result in a less predictable and reliable – and thus less legitimate – institution in the long run.

2. Proposals to require separate opinions

The unanimous nature of most dispute settlement decisions has not gone unnoticed by the WTO membership. In the course of the ongoing review of the DSU, there have been two proposals that would increase the number of dissents.¹⁴⁷ Interestingly, it has not been common law countries clamoring for more dissent and civil law countries advocating the status quo. Instead, the proposals have come from the Least Developed Countries (LDC) Group and the Africa Group – whose members reflect diverse national legal systems. These groups argue that development-oriented positions are not adequately expressed in monolithic decisions and that an increase in dissents would bring their issues more to the forefront and public eye.

The LDC Group's proposal bears setting forth in full:¹⁴⁸

The need for dissenting opinions in panel reports

1. A careful reading of the accumulated jurisprudence of the DS system thus far reveals that the interests and perspectives of developing countries have not been adequately taken into account. The panels and the Appellate Body have displayed an excessively sanitized concern with legalisms, often to the detriment of the evolution of a development-friendly jurisprudence. This stifling approach may be attributable to the requirement that every panel or Appellate Body Division should emerge with a single neat report. There is no provision for dissenting judgments in the DSU. This needs some re-thinking given the inadequacies highlighted in the DS jurisprudence. Often, and as demonstrated by judicial practice at the International Court of Justice, and in certain

¹⁴⁷ Members agreed in May 2004 to extend negotiations on the review of the Dispute Settlement Understanding (DSU), beyond the original deadline of May 31, 2004. These negotiations are ongoing.

¹⁴⁸ TN/DS/W/17 (October 9, 2002).

national court systems, dissenting judgments may bring to the fore usually unheard concerns which may in the long run shape the evolution of the system. Dissenting judgments should be allowed in the DS system through a rule that the Members of the panel or Appellate Body should each deliver a judgment and the final decision be taken on the basis of a majority. LDCs understand that this may mean additional resources and work for the Secretariat.

The African Group also put forth a proposal that Article 14.3 and Article 17.11 be amended to require panelists and Appellate Body members to issue separate opinions, though where two or more panelists or two or more members are in agreement, they would have the option of providing a joint opinion.¹⁴⁹

Victor Mosoti, the coordinator of the Africa Trade Program at the International Centre for Trade and Sustainable Development has explained that WTO dispute settlement is important to Africa; but that the benefits for the continent would be greater if there were more divergent opinions: “We also suggest that one way of ensuring that a development jurisprudence evolves incrementally is by allowing for panelists and appellate body Members to freely express their legal opinions unfettered by the strictures of having a single uniform consensual final opinion.”¹⁵⁰ The current WTO practice has the “unavoidable result of muting what could be bold divergent development oriented views.”¹⁵¹ Mosoti notes that in many common law countries some of the most widely accepted legal principles of today were introduced in the form of dissents, and argues that there is no reason the same thing couldn’t happen in the WTO, either with dissenting

¹⁴⁹ TN/DS/W/42, pt. VI; TN/DS/W/37, pt. VI (January 2003).

¹⁵⁰ Victor Mosoti, *Does Africa Need the WTO Dispute Settlement System?* http://www.proses.sciences-po.fr/documents/Mosoti_does_Africa_need_dsu.pdf at 13.

¹⁵¹ *Id.*

views ultimately becoming the majority view or with a coherent set of principles developing through the dissent process.¹⁵²

The LDC Group and Africa Group proposals have been jointly criticized on the grounds that it is already possible for panelists to dissent and that the current consensus approach leads to a more thorough vetting of issues than would occur if decisions were all seriatim.¹⁵³ However, it should be noted that the African Group proposal does not require seriatim opinions, but rather allows joint opinions in the event of agreement.

The DSU review is ongoing so it remains to be seen whether these proposals will be given any currency. However, the Appellate Body seems quite happy with its procedures and as such may resist suggestions that its opinions become less unified.¹⁵⁴ Indeed, after consultations, the Appellate Body adopted a final version of the amended Working Procedures in October 2004, with the amendments taking effect for appeals initiated after January 1, 2005. No changes were made to Rule 3.2 or to otherwise alter the tone of disapproval towards dissents.¹⁵⁵

This Article does not advocate a return to seriatim opinions, as suggested by the LDC Group, as having every jurist author an opinion seems in other jurisdictions to lead to excessive confusion as to what actual decisions stand for.¹⁵⁶ And separate opinions

¹⁵² *Id.* Mosoti believes the ICJ has worked well despite dissents, a view not shared by Ernst-Ulrich Petersmann. See PETERSMANN, *supra* note 6, at 61.

¹⁵³ William J. Davey, *Proposals for Improving the Working Procedures of WTO Dispute Settlement Panels*, in THE WTO DISPUTE SETTLEMENT SYSTEM 1995 – 2003, 19, 29 (Federico Ortino & Ernst-Ulrich Petersmann eds., 2004).

¹⁵⁴ Smith, *supra* note 3, at 82.

¹⁵⁵ The current Working Procedures for Appellate Review appear in WT/AB/WP/5 (2005). The revised Working Procedures reflect amendments to Rules 1, 18(5), 20, 21, 23, 27, and Annex I, as well as the addition of a new Rule 23bis and a new Annex III. See *id.*

¹⁵⁶ See PERCIVAL E. JACKSON, *DISSENT IN THE SUPREME COURT: A CHRONOLOGY* 21 (1969) (noting that Justice Marshall rejected the then-practice of the Privy Council of issuing seriatim opinions because that

should not be written solely for the sake of having each panelist's voice represented, but rather when there is genuine disagreement as to approach or outcome. Nonetheless, both the LDC and Africa Group proposals raise a valuable point – namely that discouraging separate opinions stifles the ability of panelists to raise broader policy issues that otherwise may not be brought to the fore at all.

3. The link between dissent and possible reforms

If dispute settlement reports reflected any true disagreements on the panels or among the Division, it would assist WTO Members in negotiating and implementing necessary changes to WTO Agreements, a process that is not working well currently due to the weaknesses in the Organization's political arm.

At present, if WTO Members feel the Appellate Body has made a substantive error, they can respond in one of two ways.¹⁵⁷ First, they can adopt a different interpretation: “the Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations ... of the Multilateral Trade Agreements. ... The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members.”¹⁵⁸ Alternatively, Members can upon the proposal of any Member, amend the DSU by consensus. Such amendment “shall take effect for all Members upon approval by the Ministerial Conference.”¹⁵⁹ While it is therefore possible for Members to in

practice led to dissent and uncertainty). Subsequently the Privy Council shifted to a system of issuing only unanimous opinions. Finally, in 1966, the Privy Council again began to permit dissenting views. *See* Lynch, *supra* note 105, at 727.

¹⁵⁷ *See* Ehlermann, *supra* note 23, at 526.

¹⁵⁸ Art IX:2 of Marrakesh Agreement.

¹⁵⁹ *See* Article X.8 of the Marrakesh Agreement.

essence correct perceived errors made by the Appellate Body, however, the three-fourths majority requirement makes this quite difficult.¹⁶⁰

In practice, the Appellate Body has been criticized in DSB meetings for some of its interpretations – such as whether the DSU permits the filing of amicus briefs¹⁶¹ – when the proper response would be for the Members to adopt a different interpretation or amend the DSU.¹⁶² However, the Members have not historically taken such actions. Ehlermann argues that because the political arm is so ineffective, nothing should be done to strengthen the judicial arm (such as WTO Members giving private parties the right to invoke WTO law before their national courts) because this would heighten the imbalance.¹⁶³ In this regard, more frequent use of dissents would presumably make it easier for the political branch to use its legislative powers to change decisions reached by the Appellate Body.

Dissents would be particularly useful in reports in which panels or the Appellate Body interpret rules drafted by the Members. The Members should be privy to all of the interpretations made by the panelists and Appellate Body. That way if there is agreement among the Members that the dissent had it right, they can redraft the agreement to make the interpretation clearer. As it stands now, Members have no way of knowing whether

¹⁶⁰ The supermajority requirement makes other changes overly complicated as well, such as filling in the gaps in agreement provisions that have come to be recognized as ambiguous. *See, e.g.*, JACKSON, *supra* note 6, at 75.

¹⁶¹ *See* Ehlermann, *supra* note 23, at 526 for a discussion of the amicus brief issue. Other decisions that have attracted criticism include the Turkey – Textiles case in which the Appellate Body interpreted Article XXIV and India – Agricultural, Textile and Industrial Products, in which the Appellate Body addressed India's balance of payments system. Many feel these cases should not have been brought; however, the DSU does not provide the discretion to decline to hear a dispute, once it has been formally brought. As Ehlermann points out, neither of these cases would have been necessary if the committees called for in various agreements operated as proper “political filters”. The Committee on Balance-of-Payment Restrictions could have come to a decision on India's import restrictions. Likewise, the Committee on Regional Trade Agreements could have addressed the compatibility of the Europe – Turkey customs union with Article XXIV. Ehlermann, *supra* note 23, at 524-25.

¹⁶² *See* Ehlermann, *supra* note 23, at 526.

¹⁶³ *See* Ehlermann, *supra* note 23, at 527.

panel or Appellate Body Members actually all agreed, and if they did not, on what grounds the disagreement lay. Member governments already feel pressure from their domestic constituents to disregard decisions they perceive to be flawed; dissents in such cases would provide a stronger basis for Members to push for fixing the problem within the WTO.

C. Dissents Have Had an Impact

A final and crucial reason why dissents should no longer be discouraged in the WTO context is that the dissents that have occurred have had a clear impact, suggesting that more dissents would lead to a better, more thorough resolution of the issues. Out of the five panel reports featuring dissents that the Appellate Body has already reviewed, two were reversed at the Appellate Body level on the grounds raised in the dissent and in a third case the Appellate Body agreed with one of the dissent's two points.¹⁶⁴ These three cases are discussed briefly below.

1. EC – Poultry

In the EC – Poultry case, the Appellate Body report finds that the EC's special safeguard provision was inconsistent with para. 282, Article 5.1(b) of the Agreement on Agriculture. The dissenting panelist instead found that the use of c.i.f. price alone met the requirements of Article 5.1(b). On appeal, the Appellate Body reversed the panel with respect to its finding on Article 5.1(b).¹⁶⁵

¹⁶⁴ As of April 15, 2006 the Appellate Body had not yet issued its decision in the appeal of the Zeroing case.

¹⁶⁵ Appellate Body Report, EC – Poultry.

2. U.S. – German Steel CVDs

In the US – German Steel CVDs case, the Panel found that the lack of a one percent *de minimis* standard in U.S. countervailing duty law was a violation of Article 21.3 of the SCM Agreement. In particular, the Panel implied into Article 21.3, which addresses sunset reviews, the *de minimis* standard of one percent found in Article 11.9, which addresses investigations. One panelist dissented, arguing that the lack of a *de minimis* provision in Article 21.3 was dispositive, and that under customary rules of treaty interpretation, the *de minimis* standard in Article 11.9 could not be implied to apply in Article 21.3. The Appellate Body reversed the Panel’s finding that the Article 11.9 standard could be implied to apply to Article 21.3, and therefore followed the dissent rather than the majority on this point.

3. U.S. – Certain EC Products

In the U.S. – Certain EC Products case, the dispute settlement panel found that the United States’s increased bonding requirements violated GATT Articles II:1(a) and II:1(b), first sentence. One panelist argued that the bonding requirements in question did not fall within the scope of GATT Articles II:1(a) or II:1(b) first sentence, but that the requirements did violate GATT Article XI. The Appellate found that the panel had improperly linked the duties owed to the bonding requirements and that there was no violation of GATT Articles II:1(a) or II:1(b) first sentence. The Appellate Body did not address Article XI directly but clearly did not find the bonding requirements to violate any GATT provisions. As such, the Appellate Body partially agreed with the author of the separate opinion.

Given that three of five dissents appear to have directly affected the Appellate Body's decision on appeal, two of them in a way that impacted the merits significantly, it appears that dissents can have a significant impact at the panel level. The sole dissent at the Appellate Body level has not had an obvious effect in the form of proposed amendments or moves to adopt a differing interpretation. However, for the reasons expressed *supra* in Part IV, dissents at the Appellate Body level serve additional valuable functions.

VI. Conclusion

Squelching dissent may have boosted the legitimacy of the nascent Appellate Body by giving the appearance of a strong, unified membership. However, the enduring legitimacy of the dispute settlement panels and Appellate Body may be damaged if, going forward, the pressure not to speak separately remains in place. Dissents perform many valuable functions, and the WTO membership would benefit from having access to differing opinions when they arise on matters of significance.

It may be that many of the first cases, issues of first impression though they have been, have been "easy" ones. But over time, the number of difficult cases is likely to increase. And while issues of first impression may seem clear cut upon initial examination, later applications of the principle may reveal previously unrecognized complexities.

Would-be disputants have an increasingly sizable body of prior decisions that provide a strong point of reference as to how future disputes on similar issues are likely to be resolved. Thus we can expect that disputes that would revisit issues that have already been adjudicated may be settled rather than resolved through the formal dispute

settlement process. When the Appellate Body revisits old issues, it would be particularly valuable to have a record of any past disagreements regarding interpretation, scope, or application. Such a record would permit – indeed require – the Appellate Body to reconsider the fundamental issues and the original result.¹⁶⁶

And the disputes that are brought before dispute settlement panels will be ones that raise novel or difficult issues. Likewise, cases that are clear cut will presumably be less likely to be appealed than cases which have more than one plausible outcome. Therefore, even though the panels and Appellate Body have no discretion to decline to hear cases, it is likely that the cases that are brought will be increasingly challenging to resolve.¹⁶⁷

In addition to later panels or Members of the Appellate Body benefiting from access to previous dissents, WTO Members would also benefit from having serious differences of opinion or interpretation made transparent. Members would then have the opportunity to consider the competing views and to determine whether the majority interpretation is the preferred outcome. While Members have the ability to amend WTO Agreements to in essence overrule panel or Appellate Body reports, their impetus and ability to do is impaired without ready access to alternative visions of the same issue.

The DSB is still relatively new, and as such it should still be flexible enough to adjust to a more permissive attitude towards separate opinions. The more time goes by, however, the more ingrained its practices will become and the harder it will be to effect

¹⁶⁶ Brennan, *supra* note 105, at 436.

¹⁶⁷ See Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 806-07 (1982) (noting that easy cases are often settled, leaving the hard cases for judicial resolution).

change.¹⁶⁸ Likewise, the longer decisions stand undisturbed, the less likely future panels will be to revisit them.¹⁶⁹

For all of these reasons, the Working Procedures should be amended to remove the negative references to writing separately. Members should consider altering the terms of office for Appellate Body members to one nonrenewable term of eight years in order to provide them with the maximum degree of independence and to remove any perceived link between specific opinions and potential tenure on the Appellate Body. But most importantly, it is incumbent upon the DSB and particularly the Appellate Body to do away with the “consensus at all costs” mentality and to recognize the harm suppressing dissent will cause and the benefits separate opinions can offer.

¹⁶⁸ Kolsky, *supra* note 51, at 2092 93.

¹⁶⁹ This may be less true under the United States legal system, where many jurists approach the law as indeterminate (there is no one “right” answer) and as such courts may be less hesitant to revisit older decisions. Nonetheless, even in the U.S. courts do not disturb long-established precedents lightly. *See, e.g., Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 34-35 (1989) in which Justice Scalia declined to overrule *Hans v. Louisiana*, 134 U.S. 1 (1890), arguing that “the mere venerability of an answer consistently adhered to for almost a century, and the difficulty of changing ... the intervening law ... strongly argue against a change.”