

## **SPEAKING UP: THE STATE OF THE APPELLATE BODY**

Thank you, Professor Boisson de Chazournes

Professor Elsig

WTO Member Representatives

Professors, Students, and Friends

Yogi Berra a great American baseball player of the 1950's, remains famous today in part for what are called his "Yogisms" – a unique mangling of the English language in ways that often, perhaps unwittingly, showed clever insight:

"It ain't over till it's over;"

"It's *déjà vu* all over again;"

"Half the game is 90 percent mental."

Yogi once told an audience: "Thank you for making this occasion necessary."

I want to thank the World Trade Institute, the University of Geneva, the Graduate Institute, the WTO, and my colleagues on the Appellate Body and AB staff, for helping to make this occasion *possible*. And I want to give special thanks to the WTI for helping to make possible the reception this evening.

And channeling Yogi Berra, I want to cite developments throughout this challenging year for making this occasion *necessary*.

It has been a difficult year. One Appellate Body colleague completed her second term and rotated off, and another AB colleague was not reappointed to a second term, giving rise to a discussion in the Dispute Settlement Body dedicated to the subject of the independence and impartiality of the Appellate Body in relation to the reappointment process, a discussion that we have followed and appreciate.

As a consequence of the vacancies, we have been five instead of seven Appellate Body Members for half the year. We have managed to do all right with that, with some of us overlapping on cases and all of us working a little harder. So far this year we have issued six reports, and the business of the AB has continued to be done. We expect to welcome soon two new Members. We are grateful for that and look forward to their joining us.

But Yogi Berra also said: The future ain't what it used to be.

Looking ahead, things are not going to get easier. For one thing, many things are unforeseeable. And for another, the “tsunami” of cases that has long been predicted is now upon us.

We have three appeals in process currently, including the enormous Airbus compliance appeal, and China’s appeal in U.S. Antidumping and Countervailing Duty Methodologies. We have been told by the Directors of the Legal and Rules Divisions to expect about 26 panel reports to be issued during 2017 – *twenty-six* -- including another enormous appeal, the Boeing Section 21.5 compliance case, and an appeal of the large and complex Australia Plain Packaging panel decision. Since historically more than two-thirds of all panel reports are appealed, we can expect 17 or 18 new appeals next year, along with the carry-over of Airbus, Methodologies, and Russia Pigs – the three appeals that are currently pending.

In other words, we are expecting next year almost three times the number of appeals that we had in the busy year that we are now completing, and those 20-plus appeals next year will, almost certainly, include cases that are unusually large and complex. This tsunami will cause a backlog that will build up and continue beyond 2017.

Moreover, during 2017 we will lose two more veteran Appellate Body Members whose second terms will expire, so there will be two more vacancies to be filled. By the end of next year, four of the seven Appellate Body Members will not have served more than one year. Currently we have only 16 lawyers to help us, a number that is flatly inadequate for the caseload we are facing. By comparison, more than 45 lawyers are working at the panel stage.

So we have chosen to speak up, to break out of the “splendid isolation” that has enveloped the Appellate Body during most of its first 20 years. We’ve begun doing that already: starting with the workload paper that we issued in 2013, and continuing with our participating in several receptions, including one kindly hosted by the Canadian Ambassador. We continued our communication with Members through “listening sessions” that my predecessor as Chair, Peter van den Bossche, held with individual delegations and representatives of groups of delegations last year. We co-hosted and participated in conferences celebrating the 20<sup>th</sup> Anniversary of the WTO, which were held over the past 17 months in Florence, Beijing, Seoul, Cancun, and Cambridge, Massachusetts (and still another is to be held in Delhi). Currently I am holding a second round of “listening sessions” with delegations and their representatives, which will conclude later this month.

We have learned a lot from listening to WTO Members. We have concluded that the benefits of communicating far outweigh any downsides. And, more than ever, we need to keep talking. I will return to that in a moment.

The Appellate Body has always struggled with – and succeeded despite – the fact that from the beginning we have been continuously adapting and making do with an organizational structure that was obsolete almost from the first day, because it was based on expectations that were very different from what in fact occurred.

The Appellate Body was an afterthought, created at the end of the Uruguay Round negotiations 20 years ago. It was an amazing achievement – the Uruguay Round – the culmination of changes that had begun to stir many years earlier, when an earlier generation of negotiators – the generation of the

grandfathers and grandmothers of some of you – began to tackle a category of subjects that were then called “non-tariff barriers” to trade.

From those seeds the Uruguay Round negotiators, between 1986 and 1995-- produced 22 agreements setting forth new rules aimed at fostering open and fair trade competition over a wide range of subjects, many of which had not been the specific subject of trade rules before. And along with these new rules, the Uruguay Round negotiators created a new and larger international institution - the WTO -- to house, promote, and reconsider the WTO rules, and to settle disputes arising under them.

As most of you know, one of the bold innovations of the Uruguay Round was adoption of the “reverse consensus rule”: that a final dispute-settlement finding becomes a decision of the WTO Dispute Settlement Body, and therefore becomes subject to mandatory compliance backed by the possibility of trade retaliation, unless the decision is opposed by consensus of the DSB members. This created one of the most *credibly enforceable* dispute settlement system in the history of international law.

The virtually automatic adoption of panel reports, backed by the possibility of authorized trade retaliation, made some of the negotiators nervous. What if a dispute settlement panel got it wrong? And so, late in the Uruguay Round, the negotiators added a few lines to the new Dispute Settlement Understanding and thereby created a second level for the review of initial panel reports. They called it the Appellate Body.

As created, the Appellate Body was a sort of a court, but not exactly a court, since its decisions were subject to DSB approval albeit under the reverse consensus rule. Appellate Body Members were sort of judges, deciding cases and subject to strict Code of Conduct and ethical rules. But the AB Members were unlike most other judges, since they were to be part-time, were not expected to live in Geneva, and were not prohibited from holding other jobs.

Few expected the Appellate Body to be very busy or to play a central role in WTO dispute settlement. One prominent scholar said many delegations saw the newly created Appellate Body “as a kind of Super-Panel to give a losing party another bite at the cherry, given that the losing party could no longer block adoption of the Panel”. Another called the Appellate Body a safety measure against “bad” panel reports. The Chairman of the WTO dispute settlement negotiations, the late, great Julio Lacarte, who also was the first Chairman of the Appellate Body, said later that many governments believed *panels* would continue to be the “backbone” of WTO dispute settlement, and that “the newly created Appellate Body would be called upon infrequently.”

At the time, on average there were about six cases a year, at the panel level. A small portion of these six were expected to be appealed. And so, for the Appellate Body’s beginning in 1995, the WTO Dispute Settlement Body decided that, “a reasonable level of support in the initial stages of operation of the Appellate Body would be one registrar, *three* professional assistants with legal training, and sufficient clerical staff.”

Perhaps they had not seen an American film of about the same period, called *Field of Dreams*, which gave rise to a pithy aphorism that is still widely used: “If you build it, they will come.” As Lacarte later put it, “[i]t was WTO Members themselves who resorted to appealing almost every panel report from the very beginning.” In the early years, the appeal rate was nearly one hundred percent.

The appeal *rate* eventually settled down to about 70 percent of all panel reports. But the *number* of appeals, the number of issues appealed, and the number of arguments and pages, have all grown enormously, especially in recent years.

In the Appellate Body's first three years appeals averaged three per year. In the most recent three years there have been 24 appeals in total, an average of eight per year. And next year, as I said earlier, the Appellate Body expects to be dealing with 20 or more appeals, between two and three times the annual average.

And the cases have grown much larger. The length of WTO panel reports that have been appealed has more than doubled since the early years of WTO dispute settlement to an average of more than 350 pages. The average number of exhibits submitted by the parties to panels, and, thus, frequently on appeal to the Appellate Body, has increased from around 60 per case in the early years, to over 500 currently. The factual and legal complexity of disputes has also grown over time, and the growing body of WTO jurisprudence further contributes to the length and complexity of submissions on appeal. This trend has intensified as we predicted in workload paper that we circulated in 2013.

Mega-cases, such as the Airbus and Boeing cases, have stretched our capacity and made delays and queues necessary, and will do so again.

Outside lawyers now represent parties in most disputes, and while their presence sharpens issues and makes additional expertise available, and is welcomed by us, it also may contribute to increasing the number of issues raised and arguments made. In fact, the average number of issues raised on appeal has more than doubled since the early cases. The number of claims brought under Article 11 of the DSU, requiring us to examine a panel's assessment of the facts, has also increased, and so has the number of procedural requests made during an appeal.

Remember that we were an afterthought, that the Appellate Body was designed to review a few cases a year and that the rules that define our structure have not changed in the 20 years since our founding.

Appellate Body Membership is still officially a part-time job; many Appellate Body Members have had other professional commitments, an expectation that is reflected in the rules.

Appellate Body Members are not expected to live in Geneva, and the incentive system, while improved, reflects the expectation that we will live in our home countries, but be available at all times and on short notice for travel to Geneva. We spend a lot of time in jet lag.

The original rules still call for us to complete the consideration of appeals and to release our final reports within 90 days of the date an appeal is filed, a deadline that simply is not realistic in view of the size and complexity of appeals today, and especially considering that the first 21 days following the filing of an appeal are taken up with the filing of submissions, and that we must give the translators our final report two or three weeks before the report is to be issued, to allow adequate time for translation.

We have to note, also, that whether we exceed 90 days or not, the appeal stage, during which we hear a case, accounts for only a small portion of the overall duration of WTO dispute settlement proceedings, which may take up one and a half or two years, or longer in exceptionally big cases. By way of comparison, the average duration of the proceedings before the International Court of Justice is 4 years, and before the General Court and the Court of Justice of the European Union - more than 3 years. And the ICJ has 15 judges and 60 professional staff.

From the beginning, the Appellate Body has had to adapt to workloads and demands that were not expected, with an institutional structure that was not designed for such workloads and demands. So far, the Appellate Body has been able to adapt well enough.

Quantitatively, the Appellate Body has issued 142 reports, including reports regarding parties' compliance under Article 21.5 of the DSU. During the same period (1995- 2016), the International Court of Justice rendered 65 judgments and 5 advisory opinions – less than half the Appellate Body's number -- and the International Tribunal for the Law of the Sea rendered 12 judgments and 2 advisory opinions.

Whether there has been a “resolution of a dispute” is not always a precise concept, but we can say for certain that compliance with our rulings has not continued to be an issue, under WTO auspices, at least, in all but a small handful of the disputes that have come before us.

Qualitatively, like judges everywhere, we work with less than perfect rules, rules that were the subject of negotiators' compromises, rules that are sometimes ambiguous, imprecise, incomplete, or contradictory, rules that sometimes are not fully up to date with rapidly changing globalized trade. We can't read the minds of the negotiators who concluded the agreements, nor is it our job to do so. We work with the words on paper.

But that is rarely as simple as it might sound. The Dispute Settlement Understanding states, in the most relevant part of Article 3.2, that the WTO dispute settlement system “...serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.” It further states that findings of the dispute settlement system “cannot add to or diminish the rights and obligations provided in the covered agreements.”

But, in almost every appeal that comes before the Appellate Body, the very heart of the question at issue is whether an interpretation advocated by one of the participants would correctly reflect the balance struck in the treaty provisions, or would add to or detract from the rights and obligations of a WTO Member. Whether we have struck the balance correctly is often in the eye of the beholder.

Maintaining the balance struck by the negotiators and written into the rules is, in fact, a nearly-constant theme in our deliberations. For example, a lot of our cases touch upon national laws and policies regarding subjects as sensitive as health and safety, protection of natural resources, and even protection of “public morals.” We are keenly aware of the balance that is struck between the rules on fair and open competitive trade opportunities, on one hand, and proper space for domestic regulation, on the other hand, as reflected, for example, in the exceptions such as those expressed in GATT

Article XX; in the preambles of several of the Uruguay Round agreements; and in many of the rules themselves.

We try hard to discern and give meaning to that balance as reflected in the treaty text and to get our interpretations right. We can't expect all Members always to agree with us. We don't always agree even among ourselves. But we do bring to these discussions respect for one another and our honest best efforts, by our own lights. We read the statements that parties to our appeals make in the DSB, and we are always open to constructive criticism.

We also have tried to be more efficient in the way we handle cases, and more user-friendly in the way we write our reports. Last year we began, on a trial basis, annexing to our reports the participants' and third participants' executive summaries of their arguments, instead of summarizing those arguments ourselves in the opening pages of our reports. We also have begun restating the reasoning behind our conclusions in the final pages of our reports, in the section listing the findings and conclusions. This is an effort to make it easier for those who turn quickly to the "Findings and Conclusions" section to understand the decisions and the reasoning. We are always looking for ways to improve the interaction between ABMs and participants in oral hearings, and we have heard the suggestions that have been made in this respect.

We are well aware that developing-country Members face considerable burdens for participation in the WTO dispute-settlement system, and that, so far, the system has been used only once by a least-developed-country Member. But we are happy that through the Advisory Centre on WTO Law – an institution unlike any other that we are aware of in any other international court system – developing country Members are provided excellent legal services and training at low costs. Notably, LDC-Members of the WTO, or countries in the process of acceding, are entitled to the services of the Advisory Centre without having to become its members or to contribute to its fund.

A speech on the state of the Appellate Body would be incomplete without some mention of independence and impartiality. My colleagues and I welcome the discussion in the "Dedicated Session" that is taking place in the DSB. Needless to say, the independence and impartiality of adjudicators are vital to any adjudicative system, including the WTO dispute settlement system, and we need to safeguard it.

We consider that independence can be challenged in various ways. Pressures regarding reappointment may be one way. Indirect pressures, for example, to limit resources or staffing may be another way of compromising our independence.

I also would consider our "speaking up" to be incomplete without a brief word about the unique position of the Appellate Body and our Secretariat within the WTO structure. We are the only unit in the WTO framework that has its own senior management – the Members of the Appellate Body – and whose staff is directed by that senior management and largely independent from the WTO Secretariat. This, too, is an essential element of our independence. WTO Members recognized this in the very first Decision of the Dispute Settlement Body, of 10 February 1995, which says in part: "The Appellate Body and its support staff should be independent from the Secretariat...", and that the Appellate Body staff "should be employed by the WTO, on conditions similar to those accorded secretariat staff of similar

rank, but should otherwise be administratively separate from it and answerable to the Appellate Body....”

Regarding the sufficiency of the Appellate Body staff, the Dispute Settlement Understanding says in Article 17.7 that the Appellate Body "shall be provided with appropriate administrative and legal support as it requires." The first DSB decision, regarding the Appellate Body, adds that, "the number of support staff needed depends on the anticipated workload of the Appellate Body." The number of the staff allocated to the Appellate Body, and the timing of their appointments, is decided by the senior administration of the WTO, within the parameters set by the Budget Committee.

In conclusion:

The massive volume of appeals next year and beyond, some very large, will tie up a large part of the Appellate Body staff, and will command much of the time and energy of Appellate Body Members, for long periods of time. And that, in turn, will reduce our capacity to staff and consider other appeals in parallel.

We will do what we can, with the staff and resources that we have, on a sustainable basis. We will not attempt to drive our staff beyond what is sustainable by them and permissible under the rules. Our staff members are very talented; they work for us by choice, but we can't keep them unless they have reasonable working conditions, *and* reasonable opportunities for professional advancement.

In striking the balance between quality, speed, sustainability, and capacity, we will give priority to quality within our capacity. This means that almost certainly there will be delays and queues. We will work with the Members and case participants to handle these problems as well as possible.

And that brings me to a request directed to the Members of the WTO:

Our constituents are you, the Members of the WTO who created the Appellate Body, framed our mandate, bring your disputes to us, have the ultimate word on acceptance of our findings, and must comply with our findings after they are authorized by the DSB. Let us see if we can work together to maintain, nurture, and preserve the trust and credibility that has been built up over the years in this dispute settlement system, which is uniquely effective, but fragile, and which cannot be taken for granted.

Can we find a better way for WTO Members and the Appellate Body to discuss long-standing structural problems? As it is, the best efforts on both sides have resulted in our talking past one another to some extent. Our interactions are mainly transactional: We issue decisions; you comment on them in the DSB. Our management of this joint enterprise is mainly unilateral - on both sides: We say from time to time that we are understaffed, very busy and under strain. You make statements in existing WTO bodies or form groups to consider what might be done, but without our input or feedback. Might it be possible to close that gap, and find a way to interact about the structural problems of the dispute settlement system, and in particular of the Appellate Body?

The resolution of disputes, the measures of stability, clarity, and predictability that the Dispute Settlement System has brought about have been achieved by our working together: you provide us with

quality pleadings, and we try to respond with quality rulings. But maybe it is time to see if a common effort might put this fragile enterprise, which started as an afterthought, onto a sounder footing, not only in the area of independence and impartiality but also in areas such as matching resources to the growing demands. Maybe we should engage with one another more broadly, and more frequently, than merely meeting across the podium in the hearing room.

In speaking up about the state of the Appellate Body, I have tried to show how we think about this role to which we are all, in our ways, so committed. Maybe in doing so we lose a little of the majesty of “splendid isolation.” Maybe in drawing back the figurative robes we expose ourselves to additional criticism.

But we chose to speak up, hoping that by trying to promote more understanding of how we see things we might contribute toward healing some of the scrapes and scratches of this challenging year, and maybe even begin a process that may result in adapting the Appellate Body better to the challenges it faces today and will face more in the intense years of adjudication ahead.

After all, by speaking up this way we are only following the advice of Yogi Berra, who said, “When you come to a fork in the road, take it.”

Thank you.