

## **The Problems of Plenty: Challenging Times for the WTO's Dispute Settlement System**

**Address by Ujal Singh Bhatia  
Chairman of the Appellate Body  
8 June 2017**

### **Release of the Appellate Body Annual Report 2016**

This is the first time that the Appellate Body has organized an event to mark the release of its Annual Report. We intend to make this an annual event. The purpose for doing so is easily stated: the Appellate Body would like to go beyond the text of its reports to provide meaningful insights to all stakeholders about how it works – its experiences, its constraints, its concerns, and its many satisfactions. We believe you have a right to know how we do our job, as well as what more we need to do, in order to do it better.

In the 22 years of its existence, the Appellate Body has come a long way, from a hesitant after-thought to a mature and well-respected international tribunal. Its 146 adopted reports, along with more than 300 panel reports, constitute tens of thousands of pages of jurisprudence which is as wide in its reach as it is deep in its probing of the meaning of the covered agreements.

To give you a flavour of the diversity of issues that have come up before the Appellate Body over the last two or three years, here is an illustrative, though by no means exhaustive, list: environmental protection, renewable energy subsidies, tax evasion, money laundering, patent protection, animal welfare, food safety, consumer information, dumping, so-called non-market economies, and multilateral trade rules and RTAs.

The prestige that the Appellate Body now enjoys has a solid foundation which is based on several pillars:

- the hard work, shared values and wisdom of our predecessors in the Appellate Body;
- the unstinting work ethic and expertise of its staff;
- the assiduous fact-finding and analysis done by panel members and the staff in the respective dispute settlement divisions;
- the dedication and support of the WTO staff as a whole, especially the interpreters, translators and the document production department;
- the increasingly sophisticated submissions and pleadings of the parties who appear before us; and
- and last, but by no means least, the unwavering support it enjoys from WTO Members.

(Let me add that the unwavering support of WTO Members is occasionally accompanied by criticism, and I will come back to this in a while).

The strongest pillar in this foundation is the shared commitment of all stakeholders to the belief that a rules-based multilateral trading system is a global public good that can be sustained only by a predictable, fair and prompt resolution of disputes. As the drafters of the DSU recognized, the WTO dispute settlement system is central in providing security and predictability for multilateral trade, by preserving Member's rights and obligations, and in clarifying the provisions as they exist in the covered agreements.

Indeed, the creation of the Appellate Body shows that Members recognized the importance of predictability, consistency and stability in the interpretation of their WTO rights and obligations. The rules and process governing panel and appellate proceedings show the emphasis Members placed on the promptness of dispute resolution.

Including the requirement of "prompt" resolution of disputes in the WTO dispute settlement mechanism was a major feature that distinguished it from other international adjudicative systems. The special emphasis on promptitude

was based on the common understanding that, in the world of commerce, time really is money. However, it is important to recognise that, in recent years, the WTO dispute settlement system has substantially ceded ground on this distinction.

In this connection, it is pertinent to recall that the demonstrated success of the dispute settlement system in effectively, predictably and expeditiously resolving disputes is why it is often called the crown jewel of the WTO. It is by no means an exaggeration to maintain that the good health of this system is vital for orderly global exchange.

Over the last several years, the Appellate Body has repeatedly informed WTO Members that, in view of the limited resources available to it, the increasing build-up of appeals is steadily leading to significant delays in their disposal. The mismatch between Appellate Body resources and the number, size and complexity of appeals has significantly intensified this year. At present, the Appellate Body is dealing with five appeals, including the very large compliance appeal in the "*EC – Airbus*" dispute. Another five appeals are likely to be filed later this year, including, again, in two very large disputes – the "*US – Boeing*" compliance case and *Brazil – Certain Measures Concerning Taxation and Charges*. At present, the Appellate Body has been unable to fully staff all appeals pending before it. By the end of the year, if all five of the projected appeals materialise, there will be further delays of several months in fully staffing and taking up these appeals.

This problem cannot be expected to go away by itself. In view of the high number of ongoing panel proceedings and filings at the panel stage, the workload of the Appellate Body is unlikely to abate in the next few years. Further, the expected increase in the number of appeals in large and complex disputes – such as the *EC – Airbus* compliance dispute currently before the Appellate Body – will further exacerbate the problem of delays because such appeals require a larger legal team and added support staff than most other appeals, and these larger appeals also require a longer period of time to be

heard; thus, a significant portion of the Appellate Body's resources will be unavailable for other appeals for considerable periods of time.

The consequential delays in handling appeals have implications not only for the dispute settlement process of the WTO, but also for the WTO itself.

Let us bear in mind the prospective nature of WTO remedies. To the extent that delays in dispute resolution involve delays in the assertion of the rule of law, they provide an incentive to those who benefit from those delays. As the representative of Korea reminded the DSB in its meeting on 31 August 2015, WTO disputes are not about abstract disagreements: they involve real world interests. Allow me to quote an extract of the statement as recorded in the DSB minutes:

"Long delays created perverse incentives by lowering the cost of adopting and maintaining WTO-inconsistent measures. Interest groups seeking protection would pressure Members to adopt these measures, insisting rightly, that they would not be subject to review by the WTO for years. Members could therefore expect more protectionist measures, and more, not less, disputes being brought to the WTO".  
(End of quote)

These sentiments were echoed by several delegations in the same meeting.

That was in 2015. Let us cut now to 2017. In the DSB meeting on 22 May 2017, Canada made a statement on the Panel Report in DS 483 (China-Anti-Dumping Measures on Imports of Cellulose Pulp from Canada). Canada noted that despite efforts by the parties to focus on the key issues in the dispute through brief submissions, the panel proceedings had taken two years to complete. It further noted that the Panel's 65 page report had taken four months to translate. Regarding the implications of delays, it further added, (and I quote):

"Throughout the period, Canadian cellulose pulp producers have faced additional costs and lost sales due to the imposition of anti-dumping duties. As a result, Canadian producers of cellulose pulp have seen a

79% decline in export value to China between 2013 and 2016. We hope that the prompt implementation of this ruling will lead to the recovery of our industry and will benefit Chinese consumers". (End of quote)

When delays in WTO dispute resolution become the norm, they cast doubt on the value of the WTO's rules-oriented system itself. An erosion of trust in this system can lead to the re-emergence of power orientation in international trade policy. Delays compel WTO Members to look for other solutions, potentially elsewhere. And in this, it is the weaker countries that stand to lose the most.

On the issue of delays in WTO dispute resolution in general, and appellate proceedings in particular, I would like to draw your attention to three developments in 2016:

- First, the appeal rate of panel reports. While the appeal rate may fluctuate somewhat from year to year, over the previous 10 years the average was, I believe, 68%. However, I note that in 2016 the appeal rate had risen to 88%. Moreover, in recent years, most of the non-appealed panel reports were rather short, whereas the longest and most complex panel reports were almost always appealed.
- The second development is the increasing number, complexity and duration of Article 21.5 compliance proceedings. In 2016, Article 21.5 proceedings were initiated in six disputes. As you are aware, Article 21.1 of the DSU provides that "prompt compliance with the recommendations and rulings of the DSB is essential to ensure effective resolution of disputes to the benefit of all members". To this end, the increased activity in compliance proceedings is troubling.
- A third development relates to the well-known sequencing issue between Article 21.5 compliance proceedings and Article 22.6 arbitration proceedings on the level and nature of suspension of concessions or other commitments. We note that, in a number of recent cases, Article 22.6 proceedings have been directly initiated at

the end of the RPT (the reasonable period of time) without a sequencing agreement between the parties. This development appears to be related to the larger issue of delays in WTO dispute resolution. Parallel proceedings under Article 21.5 and Article 22.6 involving the same dispute – in the absence of sequencing agreements – convey an impression of dysfunction. Addressing the sequencing issue is of great importance for the successful operation of the WTO dispute settlement system, in which WTO-consistency is to be determined multilaterally and which provides for the right of appellate review of panel findings of inconsistency in Article 21.5 proceedings. The situation therefore requires responsible and careful action by Members to ensure that the system continues to function well. I note that this matter came up for extensive discussion in recent DSB meetings, including, in particular, the last meeting of the DSB. It is our hope that broad agreement can be reached among Members on this important issue.

There could be multiple reasons for these recent developments, but it is hard to ignore the underlay of restlessness with the increasing delays, which seem to be pushing Members to explore other options in pursuing their disputes. We can only speculate about the medium-term consequences of these developments on the credibility and utility of the WTO dispute settlement system.

These developments emphasise the need for concerted action by WTO Members to find solutions to the capacity constraints of the system. The dispute settlement system is the product of negotiations between WTO Members and functions in their interest. In a rapidly changing global trade environment, and a sustained rise in dispute settlement activity, it is important that adaptations are made whenever necessary, so that the system can continue to respond effectively to changing situations.

This brings me to the issue of DSU reform. Negotiations in this regard have been continuing for almost two decades. Members need to consider whether

some reform issues demand priority over others. The Appellate Body would be happy to provide its views on such issues, if consulted.

Needless to say, the Appellate Body itself has a role to play in improving its working procedures and internal practices. It is fully cognisant of this responsibility and constantly reviews its procedures and practices with the view to producing leaner reports more quickly, without compromising on quality.

In our consultations with Member representatives over the last few years, we have noted the high level of satisfaction among Members regarding the Appellate Body's functioning. We have also received some criticism. This criticism broadly covers three areas:

- timeframes for appellate review;
- allegations of "over reach" by the Appellate Body;
- issues relating to the "comprehensibility" of Appellate Body reports.

I would like to address each of these issues.

First, the DSU provides for a strict timeframe for appellate review. The Appellate Body gives much importance to the need to keep appellate proceedings as short as possible. However, it is obliged to address each finding and each legal interpretation appealed. In addition, the DSU explicitly provides that it is the mandate of the WTO dispute settlement system, and therefore also of the Appellate Body, to clarify the provisions of the covered agreements, with the objective of resolving the often-complex disputes between WTO Members and providing security and predictability to the multilateral trading system. WTO Members expect from the Appellate Body, and the Appellate Body has the responsibility to provide, reports of the highest quality, which, once adopted, assist the DSB in resolving disputes between Members. As the forum of last recourse, the Appellate Body cannot afford to take shortcuts.

Next, the allegations of "overreach" by the Appellate Body involve issues regarding the depth, as well as the breadth, of its analysis. We are well aware that panels and the Appellate Body cannot add to or diminish the rights or obligations provided for in the covered agreements. As is also well known, the Appellate Body's mandate requires it to address all issues raised on appeal. Moreover, the Appellate Body has to bear in mind that, while adoption by the DSB makes its rulings binding on the parties to the dispute, they also serve the purpose of providing guidance to other WTO Members, and thereby aid in avoiding future disputes. Dispute settlement practice demonstrates that WTO Members attach significance to the reasoning provided in previous panel and Appellate Body reports. Adopted panel and Appellate Body reports are almost always cited by parties in support of their legal arguments in dispute settlement proceedings, and are relied upon by panels and the Appellate Body in subsequent disputes. In addition, when enacting or modifying laws and national regulations pertaining to international trade matters, WTO Members take into account the legal interpretation of the covered agreements developed by panels and the Appellate Body.

As mentioned above, the clarifications of provisions of the covered agreements, as envisaged by Article 3.2 of the DSU, elucidate the scope and meaning of the provisions that are at issue in a dispute. They are an essential part of the mandate of the WTO dispute settlement system and the Appellate Body. While the application of a provision may be regarded as confined to the context in which it takes place, the relevance of clarifications contained in adopted panel and Appellate Body reports is not limited to the application of a particular provision in a specific case. As the DSU stipulates, the Appellate Body has to discharge this mandate "in accordance with the customary rules of interpretation of public international law". The Appellate Body is constantly aware of the need to ensure that each and every of its clarifications of WTO provisions meets this standard.

Finally, the issue of "comprehensibility" of its reports is something that the Appellate Body takes very seriously. Appellate Body reports cannot afford to be Brahminical treatises, intelligible to a chosen few. Their purpose is to resolve



disputes, and for that they must be capable of being understood by all stakeholders. As just mentioned by my predecessor Tom Graham, the recent innovation of the "Findings and Conclusions" section in our reports should help in their demystification. But this remains a work in progress.

Overall, I would agree that, as in other dispute settlement mechanisms, there is still some scope for efficiency gains in the Appellate Body's work. There is much to be said for the virtues of relentless focus, brevity and reader-friendliness, while at the same time ensuring parties their "day in court" by addressing their arguments and due process concerns, as well as guaranteeing the accuracy, quality and depth of the legal reasoning on the often very difficult issues raised in an appeal. My colleagues and I remain alive to these challenges and will continue to work in that direction.

The purpose of this address is not to present a litany of woes. Indeed, there is much today in the WTO's dispute settlement system that should be celebrated, not bemoaned. The system at large, including the Appellate Body, commands enormous support and respect from its users. The compliance rate with DSB rulings and recommendations remains very high. The high standard of lawyers in the Legal Affairs and Rules Divisions and the AB Secretariat is something of which we are genuinely proud. There is universal recognition that, amid the proliferation of bilateral and plurilateral trade agreements, the WTO dispute settlement system has played a crucial role in making WTO law one of the liveliest and most effective branches of public international law. The increasing use of WTO case law by other dispute settlement systems testifies to the growing influence of the WTO's dispute settlement system on international dispute settlement. Overall, there is much in the WTO's dispute settlement system that is rightly envied by other international adjudicatory systems.

But like any other man-made system, the WTO's dispute settlement system should not be taken for granted. It requires nurturing through timely interventions when problem areas emerge. The issue of delays is one such problem area which calls for broad, systemic solutions. It should be possible to find such solutions through determined action by WTO Members.

I would like to conclude by saying that the shared values and commitment to the objectives of fair, impartial and independent adjudication of disputes in the WTO among all its stakeholders are the greatest sources of the WTO's strength. The Appellate Body is proud of playing a role in this magnificent enterprise and shall continue to work to earn the confidence reposed on it.