

**LAUNCH OF THE WTO APPELLATE BODY'S ANNUAL REPORT FOR 2018
TUESDAY, 28 MAY 2019**

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*Delivered at
Room CR, Centre William Rappard*

Excellencies, Ladies and Gentlemen,

This is possibly the last time I speak in public as a Member of the AB. It is also, possibly one of the last times the AB speaks *tout court*. Unless something extraordinary happens, in December 2019, the AB will fall below the three-Member *quorum* necessary to compose Divisions and hear appeals.

I have had the privilege of serving two consecutive terms as the Chair of the Appellate Body. From the perspective of the Appellate Body, it is no overstatement to say that we are living in extraordinary times.

In 2018, the Appellate Body's docket continued to grow with increasingly complex appeals. In the same year, the membership of the Appellate Body was reduced from the already diminished number of four to three.

Despite these challenges, in 2018, the Appellate Body circulated nine Appellate Body reports concerning six matters¹, including the Appellate Body report in *EC and certain member States – Large Civil*

¹ The Appellate Body reports circulated in 2018 were: *Russia – Commercial Vehicles*; *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*; *EU – PET (Pakistan)*; *Indonesia – Iron or Steel Products (Viet Nam)/ Indonesia – Iron and Steel Products (Chinese Taipei)*; *Brazil – Taxation (EU)/Brazil – Taxation (Japan)*; and *US – Tuna II (Mexico) (Article 21.5 – US) / US – Tuna II (Mexico) (Article 21.5 – Mexico II)*.

Aircraft (Article 21.5 – US). The covered agreements addressed by the 2018 Appellate Body reports included the Anti-Dumping Agreement, the SCM Agreement, the GATT 1994, the TRIMS Agreement, the TBT Agreement, and the DSU. These Appellate Body Reports dealt with sensitive issues spanning prohibited and actionable subsidies, animal welfare, domestic tax regimes, and unfair trade. The appeal in *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, filed in 2017, continued to occupy a significant portion of the resources of the Appellate Body and its Secretariat in 2018. Moreover, starting in 2017, and concluding in 2018, the Appellate Body Secretariat assisted an Arbitrator in issuing his award concerning the reasonable period of time for implementation of the panel and Appellate Body reports in *US – Anti-Dumping Methodologies (China) (Article 21.3(c))*.

This is not the end of the story. In addition to the circulated Appellate Body reports and arbitration award, 12 panel reports concerning 11 matters were appealed in 2018.² In sum, the heavy workload of the Appellate Body continues unabated.

² *Korea – Radionuclides; US – Countervailing Measures (China) (Article 21.5 – China); Korea – Pneumatic Valves (Japan); Australia – Tobacco Plain Packaging (Honduras) / Australia – Tobacco Plain Packaging (Dominican Republic); Ukraine – Ammonium Nitrate; Russia – Railway Equipment; US – Supercalendered Paper; EU – Energy Package; Colombia – Textiles (Article 21.5 – Colombia) / Colombia – Textiles (Article 21.5 – Panama); Morocco – Hot-Rolled Steel (Turkey); India – Iron and Steel Products.*

These indicators would appear to suggest that WTO Members consider the appellate system to be a key pillar of a robust and effective dispute settlement mechanism. However, the transformation of the AB from "crown jewel" to a problem child in urgent need of reform in the space of a few months has been as dramatic as it is mystifying. My job today is not to explore the reasons for this mood-swing, which are self-evident to those who have followed the debate. Nor do I intend to deny that the DSS, including the AB, needs reform.

Rather, I wish to extend an invitation to all WTO Members as they debate the future of the DSS: if good solutions are to be found, the right questions must be asked. Members should think carefully about what kind of system they want, what its role and reach should be, and what core principles should govern its operation. Only then will Members be able to engage in long-lasting reform projects.

As I see it, the ongoing debates should aim at answering two core questions:

- 1. What does it mean for WTO dispute settlement bodies to provide positive solutions to trade disputes?**
- 2. What does it take for the DSS to do justice to the needs of all Members, weak and strong, and to maintain legitimacy among its stakeholders?**

1. What does it mean for WTO dispute settlement bodies to provide positive solutions to trade disputes?

- The DSU indicates that the DS process "serves to preserve the rights and obligations of Members under the covered agreements" *and* "to clarify the existing provisions of those agreements" (Art.3.2).
- In my view, these two functions are inextricably intertwined, and both serve the overarching goal of providing long-lasting and positive solutions to trade disputes. What makes the DSS unique in the field of international adjudication is precisely its multilateral nature, coupled with extensive third-party rights, and the transparency with which rulings are disseminated across the WTO Membership.
- Obviously, under the DSU, rulings adopted by the DSB are binding only upon the parties to the dispute. But by progressively clarifying the content of WTO provisions, panels and the AB have offered guidance to Members on

how to comply with their WTO obligations, thereby *promoting* WTO-consistent practice and *preventing* the initiation of countless disputes. The importance of such clarifications for the smaller and poorer WTO Members who often lack the resources to examine their trade policies in the context of their WTO commitments, must not be disregarded.

- o There is no denying that, on occasion, both panels and the AB could have exercised greater economy in their legal reasoning. However, one of the core conditions for the legitimacy of international dispute settlement is that the adjudicators provide adequate reasons, including an interpretation of the relevant rules, to support their conclusions. If adjudicators were to limit their decisions to laconic "consistency/inconsistency" statements, the parties in dispute would be stripped of their right to have fully reasoned rulings. This would hardly foster compliance. How helpful would it be for governments to overcome domestic resistance against compliance, and to implement DSB recommendations consistently with WTO law, if they were not clearly told why their measures were violative?

- Against this backdrop, it is incumbent upon Members to decide where the appropriate boundaries of legal reasoning lie, and what role legal reasoning should play in securing positive outcomes to disputes.

- As the debates continue, Members may also want to reflect on the following points:
 - ✓ Panels are triers of facts and the AB is a forum to decide on legal interpretations developed by panels. But what happens when the factual analysis by panels is flawed, contaminating their legal analysis?

 - ✓ Is the "completion of analysis" a valid procedural tool for the AB to employ in view of its mandate, given the absence of a proper remand system?

2. What does it take for the DSS to do justice to the needs of all Members, weak and strong, and to maintain legitimacy among its stakeholders?

- As we all know, the legitimacy of any multilateral DSS can only be sustained if it is seen by Member governments and other stakeholders as operating in a fair, impartial and independent manner. While normative legitimacy is important, at the end of the day, legitimacy is about perception and is based on empirical performance. This implicates not only the quality of the adjudicators and their decisions, but also their timeliness.

- In recent months, several delegations have lamented the delays incurred by appellate proceedings beyond the 90 days set out in the DSU. Sadly, these critiques are accurate: the average duration of appeals completed in 2018 was 395 days.³ These slippages – which worry us as much as they worry Members – were often due to the AB's inability to staff cases with the reduced number of Appellate Body Members and supporting lawyers, as well as the complex nature of the issues raised.

- However, focusing exclusively on delays in appellate proceedings risks obscuring the broader issue of duration of WTO disputes. In fact, appellate review is but a fraction of the total time-length of proceedings, which has been

³ Calculated from the dates of filing of the Notices of Appeal to the dates of circulation of Appellate Body reports to Members.

steadily increasing in recent years. Suffice it to say that the panel reports the AB reviewed in 2018 took, on average, 859 days to complete⁴ against the stipulated 6 months as of panel composition, or, at most, 9 months as of panel establishment.

- o Moreover, one must consider the steps that often follow the adoption of panel and AB reports, such as the RPT, compliance proceedings, and retaliation. When one takes these factors into account, the picture becomes quite dramatic. Consider, again, the appeals the AB completed in 2018. The original panel requests in those disputes were filed, on average, 2,227 days prior to the circulation of the latest AB reports.⁵ These include the original panel requests in *Airbus*, filed on 3 June 2005, and in *Tuna*, filed on 9 March 2009. Even discounting these extraordinarily lengthy cases, however, the figure remains strikingly high: on average, 1,267 days have elapsed since the filing of the panel requests and the circulation of the AB reports. What is more, some of these disputes are still ongoing as I speak.

⁴ Calculated from the dates of panel establishment to the dates of circulation of panel reports to Members.

⁵ Calculated from the dates of filing of the original panel requests to the date of circulation of the latest AB reports in the respective disputes.

- All this, put together, means that "prompt settlement" of disputes (Art.3.3), which earlier was the USP of the WTO, is firmly a thing of the past. It is this larger context of the total life-cycle of WTO disputes which should be the focus of the debate as well as of reform initiatives.

- But if we are to address the 90-day issue frontally, it is important to address the problem in all its dimensions. In the last 3 years, 29 panel reports have been appealed, meaning an average of almost 10 per year. The requirement to complete this number of appeals within a 90-day time-frame has obvious implications for the number of ABMs required and staff resources. This would also require a discussion among Members about the size of appeals, procedures for extensions of the 90-day rule, the nature and depth of consideration by the AB and so on. It would also require discussions about how to sequence and structure the queue of unstaffed appeals. Given that AB reports are adopted by the DSB by negative consensus, the AB effectively functions as a last instance forum. Therefore, the AB must ensure that its interpretations and reasoning are of the highest quality

and should not be rushed to come to conclusions. In fact, any rushed conclusions cannot be corrected (save perhaps, for authoritative interpretations by Members).

- o This has obvious implications for the rigour and attention to detail that must inform deliberations in the AB. These considerations are also pertinent for Members' discussions of the 90-day rule.

One thing should be abundantly clear: ultimately, the performance and legitimacy of the DSS will not rest on some abstract principles of international law, but on its ability to address the pressing needs of real-life trade. Every minute we spend without a properly functioning DSS is a minute where WTO-inconsistent measures remain in place, trade flows are hindered, and companies across the globe lose precious business opportunities. This accentuates, as nothing else can, the real value of an independent and effective DSS in a multilateral setting.

In the next few weeks and months, WTO Members face critical choices regarding the future of the multilateral trading system. Let us be clear - the crisis of the AB is the crisis of trade multilateralism. Binding commitments of WTO Members must necessarily rest on the bedrock of impartial and effective dispute resolution. It is difficult to imagine how this can be achieved without a well-functioning appellate process.

The choices that are made will define the prospects for international cooperation in trade for the next decades. In appointing Ambassador David Walker as Facilitator for this important debate, WTO Members have chosen wisely. I have no doubt they will exhibit similar wisdom in the choices they eventually make.

Finally, I would like to express my deep appreciation for the always competent members of the AB staff who have collaborated to produce the comprehensive Annual Report. My special thanks, in no particular order, to Chibole Wakoli, Leslie Stephenson, Alexandra Baumgart, Stephanie Carmel, Hugh Lee, Rhian Wood as well as others who have contributed case summaries for the Report.

I cannot conclude without performing a delicate but pleasant task – of paying tribute to my friend Peter without embarrassing him inordinately. I have had the privilege of knowing Peter and being his friend for several years now. For much of this time he has been for me a valued guide through the maze of legal complexity. He has also been an unerring beacon for all of us in the AB for his deep commitment to the rule of law and to justice. He has always combined academic rigour with a deep commitment to justice and equity. But more than anything else, he has been for me the

human being I would have liked to be. I'm sure Patricia is smiling today.
God bless you, Peter, for what you are.

Thank you.