

**11<sup>th</sup> Annual Update on W.T.O. Dispute Settlement**  
**Graduate Institute, Geneva**  
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**Address of Mr Ujal Singh Bhatia**  
**Chair, Appellate Body**

2017 will be remembered as an extraordinarily strenuous year for the Appellate Body and the WTO dispute settlement system as a whole. The unprecedented challenges that confront us today stem from two interrelated factors. On the one hand, the high number and complexity of appeals currently before us is stretching our ability to staff cases and complete our work in a timely fashion; on the other hand, the composition of the Appellate Body is currently down to only four members due to the DSB's inability to fill three outstanding vacancies.

The Appellate Body was engaged in appellate proceedings throughout the year. It circulated five reports<sup>1</sup> touching, among other things, on Members' terms of accession to the WTO, the SPS Agreement, the Anti-Dumping Agreement, the SCM Agreement, the Import Licensing Agreement, the GATT 1994, and the DSU. The exceptionally large appeals in the Article 21.5 *Airbus* and *Boeing* proceedings<sup>2</sup>, filed in 2016 and July 2017, respectively, occupied a significant portion of Appellate Body staff resources throughout the year. The Secretariat also assisted an Arbitrator in issuing her award concerning the reasonable period of time for implementation of Panel and Appellate Body reports in an anti-dumping and subsidy case.<sup>3</sup> Six new appeals were filed in 2017<sup>4</sup>, followed by another 2 in the first months of 2018.<sup>5</sup> Such a heavy workload, coupled with our chronic resource constraints, caused some of these appeals to be staffed and hearings to be scheduled with delays of several months.

We expect more disputes, including the complex *Plain Packaging* case<sup>6</sup>, to be appealed soon. Overall, the Secretariat divisions that assist panels

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<sup>1</sup> Appellate Body Reports, *Russia – Pigs*; *US – Anti-Dumping Methodologies (China)*; *US – Tax Incentives*; *EU – Fatty Alcohols*; *Indonesia – Import Licensing*.

<sup>2</sup> *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)* and *US – Large Civil Aircraft (Article 21.5 – EC)*.

<sup>3</sup> Article 21.3(c) Arbitration Report, *US – Washing Machines*.

<sup>4</sup> *US – Large Civil Aircraft (Article 21.5 – EC)*; *Russia – Light Commercial Vehicles*; *EU – PET (Pakistan)*; *Indonesia – Iron or Steel Products*; *Brazil – Taxation*; and *US – Tuna II (Mexico) (Article 21.5 – US/Article 21.5 – Mexico (Second Recourse))*.

<sup>5</sup> *Korea – Radionuclides (Japan)* and *US – Countervailing Measures (China) (Article 21.5 – China)*.

<sup>6</sup> *Australia – Tobacco Plain Packaging*.

have estimated that over ten panel reports could be issued to the parties during the course of this year. By all indicators, the Appellate Body will remain busy in the foreseeable future.

While these figures and prospects confirm WTO Members' commitment to a robust and effective appellate system, they also stand in stark contrast to the political crisis we are currently facing. The second terms of office of my distinguished colleagues Ricardo Ramírez-Hernández and Peter Van den Bossche expired in June and December 2017, respectively. Furthermore, Hyun Chong Kim resigned from the Appellate Body effective on 1 August 2017. As a result, three Appellate Body seats were left vacant and should have been filled "as [vacancies] arise", as required by Article 17.2 of the DSU. Unfortunately, despite the numerous DSB meetings held since February 2017 until now, WTO Members remain unable to reach a consensus to initiate the appointment process for three new Appellate Body members, despite a joint proposal for the purpose by more than 60 Members.

The reasons for this impasse are well-known and need not be restated here. More interesting – and alarming – are the consequences of the ongoing stalemate. First, the fact that the Appellate Body is now operating at half-capacity, i.e. with only four active Members, is seriously undermining the collegiality of our deliberations, reflected in Rule 4 of the Working Procedures for Appellate Review. Second, the lack of a proper geographical representation threatens to dilute the legitimacy of the Appellate Body. Finally, the decrease in serving Members is likely to cause further delays in appellate proceedings. Unless WTO Members take swift and robust action to remedy this situation, there may soon come a time when Divisions of three Appellate Body members can no longer be formed, thereby effectively paralyzing appellate proceedings.

Such a paralysis would not concern only the Appellate Body, but would have profound implications on *panel* proceedings as well. Indeed, the Appellate Body and panels are part of one dispute settlement mechanism, and one cannot properly function without the other. Imagine, for instance, a scenario where a panel report is appealed, but no Appellate Division can be formed to hear that appeal. Under current DSU rules, the adoption of the panel report has to be suspended pending the appeal, but the Appellate Body itself would not be in a position to complete its proceedings. Such a scenario would entail the *de facto*

demise of the negative consensus rule that has characterized the WTO dispute settlement system since 1995. While the negative consensus rule would remain on the DSU books, any losing party could prevent the adoption of the panel report by appealing it to a paralyzed Appellate Body. The consequences of such a scenario working out are obvious. Circumventing the disciplines of the DSU would not automatically time-warp us back to the GATT era: the more likely result is the spread of the paralysis to the panel process.

Likewise, I disagree with suggestions that weakening the WTO's dispute settlement arm would help revitalize its negotiating function. The prospect of agreeing on new multilateral trade rules would lose much of its traction if the negotiating Members were not confident as to the principled and effective enforcement of those rules. Hence, the paralysis of the Appellate Body would cast a long and deep shadow on the continued operation of the multilateral trading system as a whole.

What is to be done? The answer lies firmly in the hands of WTO Members. For over 20 years, trading nations have shown an unfaltering commitment to independent and impartial dispute settlement. Aside from the sheer number of disputes that have been submitted to panels and the Appellate Body, it is worth mentioning the almost total absence of instances where Members have, upon losing a ruling, explicitly chosen not to implement it. While losing parties and sometimes other Members have criticized individual rulings, these critiques have rarely challenged the overall authority or legitimacy of the WTO dispute settlement mechanism. It is, therefore, incumbent on Members to evaluate whether that commitment continues to exist today, in a world that is witnessing the resurgence of sovereigntist tendencies in trade relations.

Engagement and dialogue are also of the essence. As Chair of the Appellate Body, I have been holding consultations with a number of delegations that make frequent use of WTO dispute settlement. The vast majority of my interlocutors, while expressing deep concern about the current situation, reaffirmed their desire to preserve the system in its current configuration. The principles enshrined in the DSU continue to be acceptable to all Members. The present debate is about whether the Dispute Settlement System has been faithful to them. That is a debate certainly worth having.

As far as the Appellate Body is concerned, I am well aware that there remains room for improvement in our proceedings. A number of decisions, for instance, have been criticized for being excessively technical and therefore indecipherable for lay readers. Other rulings were accused of being too broad in scope and addressing issues that were not strictly necessary to provide a positive solution of the dispute at hand. Whatever one thinks of those critiques, they provide useful food for thought and offer guidance as to how to further enhance the functioning of the Appellate Body. In recent years, a number of initiatives have helped simplify and streamline the content of reports. In particular, the section devoted to conclusions now summarizes the key points of the reasoning for the benefit of readers who do not wish to go through the entire text. Moreover, except in some mammoth disputes such as the *Large Civil Aircraft* cases, the length of reports has been significantly reduced. None of the decisions issued in 2017, for example, exceeds 70 pages in length.

To conclude, it is our shared responsibility to maintain and preserve the trust and credibility that the WTO dispute settlement system in general, and the Appellate Body in particular, have built up over more than twenty years. Only by embracing this responsibility and engaging in constructive dialogue will the WTO Membership succeed in nurturing and sustaining a system that is uniquely effective, but which cannot be taken for granted.