11th Annual Update on WTO Dispute Settlement

WTO Dispute Settlement Body Developments in 2017

Ambassador Junichi Ihara (Japan), 2017 Chairperson of the DSB

3 May 2018

Ambassadors, colleagues, friends, ladies and gentlemen,

Thank you for being here tonight for this conference on the review of 2017 DSB activities. I also thank the Graduate Institute for organising this annual event. I am honoured to share this presentation with the AB Chairman, Ambassador Bhatia.

I think we all agree that 2017 has been a challenging year for the multilateral trading system in general, and in particular, the WTO dispute settlement system.

We have seen in 2017 the rise of protectionism and we are currently facing the risk of "tit for tat" measures being taken by certain prominent Members. Many observers have sounded the alarm bells on the danger we risk if that happens: at the end of the day all of us will be the losers in a trade war.

A big challenge for the WTO dispute settlement system is the impasse regarding the Appellate Body selection processes to fill three vacancies. Despite serious efforts, we have, as yet, not been successful. I will return to this issue later.

While I don't underestimate all the challenges that the multilateral trading system and the WTO dispute settlement are facing, it is not all doom and gloom. The statistics show that the dispute settlement system is functioning fairly well and is being widely used by Members, which indicates that there is confidence in the system as a means of solving trade disputes.

In 2017, the DSB was notified of 21 requests for consultations, 17 of which were new proceedings. Last year also, the DSB established 13 panels, three of which were compliance panels. The DSB further adopted nine panel and five Appellate Body reports. At the end of

2017 there were 25 active panel proceedings, seven appellate proceedings and three arbitration proceedings. Most recently, requests for consultations have been filed by as wide a range of countries as Australia, China, Korea, the United Arab Emirates, the United States and Viet Nam. In the original proceedings, an equal number of complaints were submitted by developed and developing countries. As for the respondents, approximately 41% were developing countries.

We see more and more Members participating in the DS process as third parties: the average number of third parties to each dispute has increased from three in the first years of the WTO to 12 in 2017. In total, more than 60% of WTO Members, many of which are developing countries, have participated in proceedings as third parties. I would encourage any Member that wishes to gain experience of the DS system to participate in a dispute as a third party. This will also help the system become truly multilateral.

As many disputes made their way through the system while I served as Chair, two systemic issues in particular drew my attention.

In 2017, we have seen the reappearance of tensions arising about the so-called "sequencing issue": how to treat proceedings under the Article 21.5 compliance process and Article 22.6 retaliation arbitration. There is a clear inconsistency between the time periods contemplated in Article 21.5 and Article 22 of the DSU. Under Article 21.5, the compliance panel shall circulate its report within 90 days after the date of referral of a matter to it. On the other hand, Article 22.2 allows the prevailing complainant to request authorization to retaliate as of day 20 after the expiry of the RPT. More importantly, Article 22.6 sets forth a hard-and-fast deadline of 30 days after the expiry of the RPT, and which falls prior to the expiry of the deadline for the issuance of a compliance panel report. Directly related to this issue is the jurisdictional question of whether an Article 22.6 Arbitrator has the capacity to assess the WTO-consistency of measures taken to comply before proceeding to assess the level of nullification caused by the measure. There is still no common understanding about sequencing and tensions are getting worse because disputing parties no longer seem to be adopting *ad hoc* agreements on the sequencing of procedures as before. Having said that, panels and arbitrators have generally proved themselves adept at working with the parties to

achieve a practical solution so that the proceedings can advance. Of course, it would be much better if we could resolve this sequencing issue once and for all in the DSU negotiations.

Another systemic issue that I observed as Chair is a recent tendency of disputes invoking the GATT Article XXI security exception. The Director-General queried whether the dispute settlement system is the appropriate forum for national security concerns to be litigated given the obvious sensitivities involved. Whatever your views on the issue, if this trend continues it will undoubtedly place an additional strain on the system.

As I mentioned in my introduction, currently the most pressing challenge facing the DSB revolves around the Appellate Body: particularly the selection processes to appoint new Appellate Body members and the questions raised by Members concerning the functioning of the Appellate Body. And this is where I will focus my remaining remarks.

I will first explain the history of this issue in the DSB. This issue was first dealt with by my predecessor, Ambassador Carim, in 2016. At that time, two Appellate Body positions were to become vacant within the year and Ambassador Carim, based on the views expressed by Members, suggested two approaches for filling the upcoming vacancies: separate processes with separate timelines for each of the two vacancies; or, a single combined process for both positions. After I took over the Chairmanship of the DSB in March 2017, I continued to consult on those matters; however, it was not possible for me to present a proposal that could be agreed on by consensus. That was the first phase.

The second phase started in May 2017, when two proposals regarding the AB selection process were placed on the Agenda of the DSB, reflecting those two different approaches: the separate processes proposal by Mexico and 6 other Latin American Members, which was opposed by the EU; and the joint process proposal by the EU, which was opposed by the United States. Throughout 2017, the proposals were placed on the agenda and discussed at DSB meetings, and consultations with Members were held in order to reach an agreement. Unfortunately, by the time Mr Ramírez-Hernández's term expired in June 2017, there was no consensus on which process should be adopted.

At the beginning of August, this issue suddenly entered a completely new phase. Mr Hyun Chong Kim tendered his resignation from the Appellate Body with immediate effect. The United States then noted its concern that Appellate Body reports would be issued even though one of the Appellate Body members who had reviewed the matter would no longer be a member. According to the United States, this was contrary to Article 17.1 of the DSU, which stipulates that three AB members shall serve on any one case.

The United States also raised an issue with respect to Rule 15 of the Working Procedures for Appellate Review, under which a person who ceases to be a member of the Appellate Body may complete work on any appeal they were working on before their term ended. In the United States' view, it is the DSB, and not the Appellate Body, which should have the power to authorize an AB member's continued work on such a case. For the United States, this is a priority issue to be resolved before the AB selection processes can re-start. In that context the United States has not joined a consensus on any of the proposals that have been put forward to launch the process to fill vacancies in the Appellate Body.

Facing this new development, I thought we needed more conversation among Members.

An informal, open-ended meeting of the DSB was held in mid-September 2017, in which delegations were able to better understand the views and positions of other Members, including the United States' concerns. Additionally, I encouraged delegations to work at the expert level to come up with concrete ideas aimed specifically at solving the problems related to Rule 15 of the Working Procedures, and they worked out several ideas. Having those ideas in mind, in January of this year I held intensive informal consultations with Members to explore possibilities of unblocking the impasse. These consultations revealed that many Members were concerned with the linkage of this issue to the filling of the vacancies in the Appellate Body, although a number of countries stated that they were open to discussions about Rule 15 as well as other issues related to the Working Procedures. Some Members, however, were not ready to engage in serious discussions.

Of pressing concern is the imminent possibility that the Appellate Body will be reduced to three members. Mr Servansing's first term of office will expire on the 30th of September 2018; if he is not to be reappointed for a second term this would result in yet another vacancy

to be filled, and would leave the Appellate Body in a very precarious position. Rule 6(2) of the Working Procedures envisions that the AB members constituting a division shall be selected on the basis of rotation—something that would not be possible following the reduction of the number of members to three. In addition, as three members are required to constitute a division, it would not be possible to hear any appeals in the case that a particular member cannot serve, due to, for example, a conflict of interest. Such a situation could have grave consequences for the appeals process.

If we want to preserve the good and proper functioning of the Appellate Body, it is imperative to take concrete action. Through my chairmanship, I have explored possibilities to find a quick solution, by focussing on procedural aspects of the issues: including the launch of the selection processes and the solution of Rule 15 and related questions. I now think, however, that an approach focusing on procedural aspects alone will not lead to a solution to the issues before us, because more substantial issues are also raised.

The US, in its "President's Trade Policy Agenda," pointed out issues such as judicial overreach, *obiter-dicta* or advisory opinions on issues not necessary to resolve a dispute, and precedent value of AB reports. As such, it might be difficult to find quick and simple solutions to those issues because Members have diverse views.

Taking those points into consideration, here is my personal proposal for how to approach the AB matters.

We need serious discussions on all of the issues raised by Members concerning the dispute settlement system and the Appellate Body and, at the same time, we have to fill all the vacancies ASAP. To realize these objectives, we may engage in two different tracks of talks: one for discussions on substantive issues; another for finding solutions to procedural issues. The second track includes filling the vacancies and finding a solution to Rule 15 questions, these two should be a package to be agreed on as soon as possible. The first track may take more time and may require an appropriate venue for discussion, which may be outside the regular DSB. For any action, we certainly need political engagement from each capital.

I will not go into the details of each element to be discussed. I just want to take up here the most fundamental, and probably the most controversial, issue: judicial activism, or judicial overreach.

Certain Members believe that the dispute settlement system of the WTO is composed of "activist judges" who are attempting to impose their interpretation of certain provisions on Member states without paying enough attention to their negotiating history. A negotiating process is a long and often complicated one. Negotiators say that a good compromise is one in which neither side is left happy; it is frequently the case that provisions in negotiated Agreements are drafted to reflect these kinds of good compromise. This means that there may be specific reasons why negotiators have drafted certain provisions broadly or to be more-open ended. In this regard, it may sometimes be best to refrain from making judgments on issues and provisions that may have been purposely ambiguously crafted. But panels and the Appellate Body have to provide answers to questions and claims raised by WTO Members in their disputes and they are asked to interpret and apply WTO provisions. This is not an easy task and there may not be a clear-cut answer to those questions. I would say that WTO Members should at least refrain from seeking judicial solutions to issues which are essentially political and that negotiators agreed upon with constructive ambiguity. On those issues, Members should rather engage in political discussions and try to reach mutually satisfactory solutions.

To conclude,

I believe that for the WTO system to function well, we need to maintain a good balance among all three pillars of the organization—negotiations, implementation and dispute settlement. As we know all too well, among those three pillars, the negotiation function has been paralyzed for quite a long time. In this regard, the dispute settlement mechanism cannot and should not be used as a way of compensating for the lack of progress on the negotiations front. It is not for the adjudicators of the dispute settlement mechanism to do the work for which negotiators are responsible. Asking the Appellate Body to do so is not what it was designed for, and it puts an additional strain on the dispute settlement system.

If we are to make any progress in addressing the issues facing the dispute settlement system, Members must be engaged in open-minded conversations, through which we should deepen mutual trust so that we could collaborate with each other. Trust and collaboration are needed more now than ever if we are to defy trade protectionism and advance our common goal of free and open, rules-based trade.

Ambassadors, colleagues, friends, ladies and gentlemen,

It has been a privilege to serve as the DSB Chairman during the last year; I thank all WTO Members as well as the Secretariat for their support and encouragement throughout my tenure. And I thank you all for your attention this evening.