

Author: Natalie LaMarche

Session: Reception & Dinner – Valerie Hughes

Title: Make the WTO ‘Great Again’

The lights were dimmed, jazz music filled the room, and all the attendees were much more relaxed at the Gala. It was a great chance to socialize, mingle, and laugh. Evermore, we were privileged to see Valerie Hughes receive the John E. Reid Medal. Ms. Hughes is the Former Director of the Legal Affairs Division of the World Trade Organization (WTO) Secretariat and has spent many years working with the Dispute Settlement panels and body.

During her acceptance speech, Ms. Hughes reminded the guests of the virtues of the dispute settlement mechanism at the WTO. It has been a very active Body since the GATT became the WTO. It has heard around five hundred disputes in the past twenty years. There are one hundred sixty four parties to the WTO, not all of which are states. For example Taipei, Hong Kong and the European Union are all parties to the WTO.

The WTO dispute settlement mechanism has been praised for its formalized structure, and robust decision-making process. Another positive aspect of the WTO is the high compliance rates, which averages at about 85-90%. Lastly, the speed at which decisions are rendered is a strong asset of the dispute settlement mechanism. Ms. Hughes stated that this fast pace is due to the reality that there are real financial costs associated with breaches in trade compliance to domestic parties. Consequently, it is crucial that decisions are rendered in a timely manner because every day that passes without changes in trade behavior, millions of dollars can be lost. The WTO has been known for its fair, impartial and speedy decisions, giving parties confidence in it.

The dream, however, only goes so far. The WTO is currently faced with challenges to its dispute settlement mechanism. It is overburdened and becoming less effective than it was in the past. Ms. Hughes argued that this is attributable to the fact that the cases that are being brought before the Bodies are of a very different nature than before. Cases are now bigger and more complex. For example, she explained that in the past cases brought had an average of 3-4 measures, a single claim, and/or up to 5 third parties. Additionally, the volume of cases has significantly increased. As mentioned, in the past 20 years the WTO has heard 500 cases, whereas in the forty years of the GATT there were less than 300 cases. Today, cases include up to eighteen measures, one hundred eighty claims and/or twelve third parties. Furthermore, about 70% of cases are being appealed.

What Ms. Hughes has observed is a strain on the dispute settlement mechanism that is having negative impacts. Parties to a dispute have an automatic right of appeal and it is being over-used. With the majority of cases going to appeal, it diminishes the importance of the panel stage. Ms. Hughes described it as a ‘mulligan’, since parties know that they’ll have a second chance to make their arguments.

The real issue is that the WTO’s dispute settlement was designed for a different set of conditions than those that it faces today. The Appellate Body (AB) was designed to hear matters related to legal findings, not facts. However, because most parties appeal and cross-appeal, the AB is increasingly performing a fact finding role. Essentially this makes the AB stage a ‘do-over’ and repeats the panel process.

As a result, the speed at which the AB is able to render its decisions has decreased. The AB is meant provide its report within 90 days. But with increasingly complex cases put before it, it has rarely been able to meet this deadline. Some disputes may take up to a year for a decision. Unsurprisingly, this has diminished the credibility of the dispute settlement mechanism and makes it less effective than it has been in the past.

Ms. Hughes argued that in order to make the system useful and effective, changes must be made. She proposed the idea of eliminating the two-tier system and resorting to single-tier. This change would ensure that decisions are rendered in a timely manner. Another solution would be to ensure that the AB is constrained to only hearing legal matters and preventing them from diving into a fact-finding role. For example, if the AB interprets a provision that would require different facts to answer, they could send the case back to the panel to find them. This would prevent the AB from starting from the beginning and allow the panel, which has more experience with the facts of the case, to assume responsibility for finding the relevant facts.

The WTO's dispute settlement mechanism has been regarded as one of the most robust among the international community. In the words of Valerie Hughes, we need to "make the WTO 'Great Again.'"