GLOBAL TRADE DISPUTE SETTLEMENTS AND HOW TO SURVIVE THE WTO APPELLATE BODY CRISIS QUITE NICELY

David Aronofsky Ph.D., J.D.*

*The author, David Aronofsky, Ph.D., J.D. reserves co-copyright with the Journal consistent with the 2024 Copyright Agreement executed between the Journal and the author. The views expressed in this article are solely the author's and not attributable to any other person or entity. The author may be contacted at aronofskyd@mso.umt.edu.

The author thanks Angela Marshall-Hofmann, his former law student, who is today one of the world's top international trade law experts, for her recommendations about various aspects of this article. He practiced International Trade Law, as well as International Law generally, at a large Washington, D.C. law firm for twelve years and then taught International Trade Business & Trade Law, along with other International Law courses, for nineteen years at The University of Montana Law School before retiring as university general counsel and as a law faculty member. He also regularly taught International Trade Law courses at Uruguay's University of Montevideo Law School between 2003 and 2021, as well as at several law schools in China, where he directed a China-Taiwan WTO lecture series held at over two dozen sites and held a Faculty Fellows appointment at the Southwest University of Political Science and Law International Trade Law Center in Chongqing. For ten years he also directed and taught a faculty-led International Trade & Environment Law seminar in Chile. As a lawyer and law professor he has actively participated in the American Law Institute (ALI) World Trade Law Project; worked on both pre-WTO GATT and WTO disputes; counseled the U.S. Senate Trade Subcommittee; attended multiple WTO Ministerial Conferences; and advised several non-U.S. governments on bilateral and multilateral trade agreement negotiations with the U.S. He has a Ph.D. from Florida State University, J.D. and B.S. degrees from The University of Texas at Austin, and a Master's degree from Southern Methodist University. Although retired, he maintains his active Montana and Texas attorney licenses and does limited legal and academic consulting and teaching. He lives in Missoula, Montana with his beautiful Chilean wife and their two cats.

[1] Agreement Establishing The African Continental Free Trade Area, Mar. 21, 2018; *The African Continental Free Trade Area*, AFR. UNION (Jan. 15, 2024), https://afcfta.au.int/en. and https://afcfta.au.int/en.

INTRODUCTION

To paraphrase the great Charles Dickens' novel, *A Tale of Two Cities*, global trade seems to be living in "the best of times" and recovering from "the worst of times."[6] After 10 years of nearly unprecedented growth following the 2008 global recession, the Covid-19 pandemic caused the world's international trade in goods and services to plummet from nearly $20 trillion U.S. dollars in 2019 to some $18 trillion in 2020. The pandemic's worst days may be behind us, but its lingering legacy remains, with continued disrupted global supply chains, computer chip shortages

[2] Free Trade Agreement, CL-UY, Oct. 4, 2016.
[3] The China-Australia Free Trade Agreement, CN-AU, 2015.
[4] Canada-Israel Free Trade Agreement, CN-IL, Jan. 1, 1997.
[5] Comprehensive Economic Partnership Agreement Between Japan and the Republic of India, JP-IN, Feb. 16, 2011.
[6] CHARLES DICKENS, A TALE OF TWO CITIES 1 (Richard Maxwell ed., Penguin Classics 2003) (1859).

hampering manufacturing production everywhere to slow the flow of getting goods to market, and troublesome labor shortages in many key markets. In addition, the Ukraine conflict has significantly impaired global agriculture commerce. Despite these problems, however, global trade is booming and 2023 may well set a historical record for the import-export dollar volume of global goods and services, projected at $33 trillion U.S. dollars in 2023. Even adjusted for inflation triggered mainly by the pandemic effects, these are impressive numbers.[7]

The past several years have also seen some of the more significant international trade law and policy issues emerge since World War II ended. President Trump's America First philosophy reflected in his 2019 decision to impose unilaterally tariffs on steel and aluminum imports from most U.S. trading partners for stated national security reasons, along with his decision to impose tariffs on numerous Chinese products as sanctions for intellectual property theft and discriminatory foreign investment laws, prompted China to impose retaliatory tariffs on various U.S. products.[8] Most other countries affected by the proposed U.S. steel and aluminum tariffs chose not to follow China, and instead filed complaints with the World Trade Organization (WTO), which still remain undecided because of the WTO Appellate Body crisis discussed below. The U.S. national security reasons used to justify steel and aluminum tariffs pose an issue barely tested to date under WTO legal rules, likewise the case with China-specific tariffs based on intellectual property theft and discriminatory investment treatment.[9] In late 2022, WTO panels ruled against the U.S. in several of these disputes by determining that the U.S. improperly invoked national security claims to

[7] Jean-Francois Trinh Tan, *What You Need to Know About International Trade*, WORLD ECON. F. (Aug. 15, 2023), https://www.weforum.org/agenda/2023/08/international-trade-what-you-need-to-know-august- (describing 2022 trade volume and projecting 2023 growth); *2023 Supply Chain Outlook: Expert Advice on Thriving in Times of Change*, APPIAN, at 8 (2023), https://assets.appian.com/uploads/ebook-supply-chain-outlook_EN.pdf; Joe McKendrick, *How to Address the Supply-Chain Staffing Crisis*, HARVARD BUS. REV. (Sept. 18, 2023), https://hbr.org/2023/09/how-to-address-the-supply-chain-staffing-crisis (discussing supply chain issues).

[8] *See generally Symposium: International Trade in the Trump Era*, YALE J. INT'L L. (Nov. 25, 2018), https://www.yjil.yale.edu/features-symposium-international-trade-in-the-trump-era/ (discussing the rise of protectionism in international trade).

[9] For a summary of WTO national security disputes, *see* Tania Voon, *Testing the Limits of WTO Security Exceptions*, E. ASIA F. (June 14, 2023), https://www.eastasiaforum.org/2023/06/14/testing-the-limits-of-security-exceptions/. These disputes themselves (DS544, DS552, DS556, DS564, and DS543) can be found on the WTO website Disputes Chronology web page. https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm.

justify the tariffs and China sanctions.[10] The U.S. then appealed these panel decisions "into the void" created by the lack of a functioning WTO Appellate Body.

President Biden pledged significant trade reform and greater international cooperation during his campaign. Since taking office in January 2021, however, he has kept in place most Trump trade measures, including Chinese tariffs and sanctions. Trade news headlines now regularly read "**BIDEN CONTINUES TO FOLLOW TRUMP TRADE POLICIES WITH NO CHANGES IN SIGHT.**"[11] Almost all Biden Administration trade attention has focused on U.S. - China trade conflicts, and an anticipated increase in attention to WTO issues never materialized.[12] Donald Trump has indicated he intends to increase tariffs significantly if elected; while Kamala Harris has attacked this particular Trump proposal as exacerbating inflation.[13] Meanwhile, Biden trade policies continue.

International trade law has reached a legal crossroad. The World Trade Organization (WTO), now in its 29th year, provides the fundamental global trade legal framework, with trade dispute settlement rules and procedures generally accepted by countries and international businesses alike as the final word on how trade laws apply. Now, however, the WTO Appellate Body, often described as the WTO "Crown Jewel,"[14] has ceased

---

[10] Voon*, supra* note 9.

[11] *See, e.g.*, Noah C. Gould, *Biden-Trump Protectionist Policies Are Bad for the Economy and Don't Accomplish Their Supposed Aim*, NAT'L REV. (Oct. 11, 2021, 6:30 AM), https://www.nationalreview.com/2021/10/biden-continues-trumps-harmful-trade-policy/; Asma Kalid, *Biden Is Keeping Key Parts of Trump's China Trade Policy. Here's Why*, NAT'L PUB. RADIO (Oct. 4, 2021, 3:36 PM ET), https://www.npr.org/2021/10/04/1043027789/biden-is-keeping-key-parts-of-trumps-china-trade-policy-heres-why; Tobias Burns, *How Trump and Biden Killed the Free-trade Consensus*, THE HILL (Sept. 25, 2023, 2:57 PM ET), https://thehill.com/business/4222035-how-trump-and-biden-killed-the-free-trade-consensus/; Asma Kalid, *Biden Kept Trump's Tariffs on Chinese Imports. This Is Who Pays the Price*, NAT'L PUB. RADIO (June 27, 2023, 5:00 AM ET), https://www.npr.org/2023/06/27/1184027892/china-tariffs-biden-trump.

[12] *Remarks by Ambassador Katherine Tai at G20 Trade and Inv. Ministers' Meeting*, OFF. U.S. TRADE REPRESENTATIVE (Aug. 2023), https://ustr.gov/about-us/policy-offices/press-office/speeches-and-remarks/2023/august/remarks-ambassador-katherine-tai-g20-trade-and-investment-ministers.

[13] Sam Sutton, *Harris' trade policy balancing act* (Aug. 20, 2024), https://www.politico.com/newsletters/morning-money/2024/08/20/harris-trade-policy-balancing-act-00174914.

[14] Ambassador Ujal Singh Bhatia, *Launch of the WTO Appellate Body's Annual Report for 2018*, WORLD TRADE ORG. (May 28, 2019), https://www.wto.org/english/tratop_e/dispu_e/ab_report_launch_e.htm; Eric Arias, *Impartiality & US Influence in International Courts*, ASIA SCH. BUS. (May 3, 2023),

functioning. Although the WTO retains its other dispute resolution mechanisms, the Appellate Body absence may have broken the world trade legal system. Or has it?

This article examines the WTO from legal, historical, and practical perspectives. It next discusses the Appellate Body crisis, as well as the stop gap appeal measures a growing number of WTO members have adopted to address the problem. It then reviews other significant international trade and related investment law developments to explain how some are already filling the Appellate Body void or may well be doing so in the future. Finally, it concludes with the author's observations about what this all may mean for trade law and lawyers.

I. THE WTO: A BRIEF HISTORY AND WHY HISTORY MATTERS[15]

A. Background

The year 1995 saw the world's most significant international trade law event in history when the WTO began. Responding to pent-up global demand for an international trade body able to resolve disputes effectively and efficiently, based upon clear legal rules and principles applicable to general trade policies and practices, the WTO has, until recently, stood the test of time as an effective international body able to get things done. As seen below, however, this test has become exceptionally more difficult to study for and pass.

Understanding the WTO requires traveling back in time to the 1940s, when World War II was close to ending, with the 1944 Bretton Woods Conference in the U.S. state of New Hampshire, attended by World War II Allied Powers seeking to create post-War entities able to help rebuild war-

https://thedocs.worldbank.org/en/doc/3e5537ac17a795823a3e3c46b12c0351-0050022023/related/Session-6-3-Eric-AriasWTO.pdf.

[15]*See generally* World Trade Organization, www.wto.org, (containing most information used in this article). *See also* PETER VAN DEN BOSSCHE AND DENISE PRÉVOST, ESSENTIALS OF WTO LAW (2nd ed. 2021), https://doi.org/10.1017/9781108878845; JOHN H. JACKSON, THE JURISPRUDENCE OF GATT AND THE WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS (1st ed. 2007); JOHN H. JACKSON AND ALAN SYKES, IMPLEMENTING THE URUGUAY ROUND (1st ed. 1997); THE BRETTON WOODS AGREEMENTS: TOGETHER WITH SCHOLARLY COMMENTARIES AND ESSENTIAL HISTORICAL DOCUMENTS (Naomi Lamoreaux & Ian Shapiro eds., 2019), https://doi.org/10.2307/j.ctvk8vz01.

shattered national economies.[16] These meetings helped create the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (World Bank).[17]

The Bretton Woods sessions also focused on trade, albeit as a somewhat lower priority. Most experts agree that the great world depression extending throughout the 1930s resulted from national protectionist trade laws and policies imposing high tariffs. In turn, this became a major factor in causing the war, as nations unable to trade for or produce the goods needed to sustain their economies opted to take them from other countries. To keep this from recurring, the Allies envisioned both a treaty espousing free trade rules and principles, and an international structure for enforcing them.

In 1947, twenty-three countries met in Geneva, Switzerland, to draft a General Agreement on Trade and Tariffs (GATT) to meet Bretton Woods trade objectives.[18] The GATT called for free trade in goods with limited exceptions. A year later fifty-three countries met in Havana, Cuba, to draft an International Trade Organization (ITO) Charter based on 1947 GATT principles.[19] The U.S. never ratified the Charter because Congress blocked U.S. membership in new international organizations.[20] The U.S. President instead used executive authority to join twenty-one other countries in signing the 1947 GATT Agreement, making it applicable to the U.S.

The GATT functioned for about forty years focusing primarily on trading of goods based on two main legal rules. The first required parties to grant most favored nation (MFN) treatment to all other parties on an unrestricted basis.[21] The second required national legal treatment for like products imported from other party countries except for express GATT exceptions.[22] The MFN rule also generally prohibited import quotas, licenses, or other restrictions on goods from party states except for taxes

---

[16] Jeffry Freiden, *The Political Economy of the Bretton Woods Agreement*, *in* THE BRETTON WOODS AGREEMENTS: TOGETHER WITH SCHOLARLY COMMENTARIES AND ESSENTIAL HISTORICAL DOCUMENTS 21, 21-37 (Naomi Lamoreaux & Ian Shapiro eds., 2019), https://doi.org/10.2307/j.ctvk8vz01.4

[17] *Id.* at 28, 34.

[18] The General Agreement on Tariffs and Trade, WORLD TRADE ORG., https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm (last visited Jan. 21, 2024).

[19] The Havana Charter for an International Trade Organization, WORLD TRADE ORG., https://docs.wto.org/gattdocs/q/GG/SEC/53-41.PDF (last visited Jan. 21, 2024).

[20] *Id.*

[21] Principles of the Trading System, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (last visited Jan. 21, 2024).

[22] *Id.*

and duties applied equally to all member goods. The GATT further prohibited unfair trade practices, including dumping and certain government subsidies, by party states; and provided for complaint filing and resolution. However, GATT dispute settlement rules contained neither firm deadlines for processing and deciding complaints, nor mandatory enforcement. These became major factors in creating the WTO because in its pre-WTO 47-year history, the GATT resolved only a few cases per year.[23]

GATT provisions further required future negotiations, or rounds, to discuss reducing tariffs and non-tariff trade barriers on all GATT member goods.[24] Following the 1947 GATT, a number of negotiation rounds occurred. Most rounds through the 1980's focused primarily on reducing tariffs for products and product categories. The 1964-67 Kennedy Round recognized and incorporated into GATT certain developing country exceptions to MFN and general free trade provisions. The 1973-79 Tokyo Round resulted in agreements to reduce or eliminate numerous non-tariff trade barriers. The Uruguay Round talks in 1986 ultimately resulted in the 1994 Marrakesh Agreement establishing the WTO,[25] which greatly expanded both the prior GATT Agreement and the range of trade sectors in addition to goods.

B. The WTO Composition, Structure and Decision-Making Process

Created to begin in 1995, the WTO is based on a series of international agreements with treaty effect, including the Agreement Establishing the WTO and its Annexes, which in turn include an expanded GATT, and a series of other Multilateral and Plurilateral Trade Agreements, not all involving goods. The 1994 GATT[26] encompasses most of the 1947 GATT as amended by various subsequent rounds. Unlike the 1947 GATT, the 1994 GATT does not allow application of national laws or treaties existing

[23] 1 Dispute Settlement Reports within the Framework of GATT 1947, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/gt47ds_e.htm (last visited Jan. 17, 2024) (showing 90 cases decided by accepting panel reports and 31 cases undecided by party panel report rejections over 47 years).

[24] 1 Dispute Settlement Reports within the Framework of GATT 1947, WORLD TRADE ORG., at 17, https://www.wto.org/english/res_e/publications_e/gatt4895vol12_e.htm.

[25] Agreement Establishing the World Trade Organization, WORLD TRADE ORG., at 17, https://www.wto.org/english/docs_e/legal_e/04-wto.pdf

[26] General Agreement on Tariffs and Trade (GATT) 1994, WORLD TRADE ORG., https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_e.htm.

before 1994, which conflict with the 1994 GATT. The 1994 GATT continues prior national treatment (Article III) and MFN (Article I) rules, while reducing, eliminating, or phasing out tariffs on most non-agriculture goods.[27] GATT Article XI prohibits export bans and quantity restrictions, with a few exceptions.[28] Other key GATT rules include Articles XX(b) and (g), allowing countries to impose environmental restrictions on imports subject to national treatment and scientific evidence conditions (seldom met because these conditions must impact trade in the least restrictive manner); Article XX(a), allowing countries to restrict products violate of national public morality laws, subject to the national treatment rule (also a condition seldom met); and Article XXI, allowing genuine national security-related import and export restrictions. Article XXI is only now being fully tested.[29]

Other goods-related Multilateral Trade Agreements annexed to the WTO Agreement include:

- Agriculture, which permits subsidies on numerous products;[30]
- Textiles, which authorizes WTO member state quota agreements (but has since lapsed);[31]
- Antidumping, which codifies international antidumping legal rules;[32]
- Subsidies and Countervailing Measures, defining lawful and unlawful state export assistance;[33]

---

[27] General Agreement on Tariffs and Trade (GATT) 1994, Art. 3, WORLD TRADE ORG., https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art3_e.pdf (last visited Jan. 21, 2024); General Agreement on Tariffs and Trade (GATT) 1994, Art. 1, WORLD TRADE ORG., https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art1_oth.pdf (last visited Jan. 21, 2024).

[28] General Agreement on Tariffs and Trade (GATT) 1994, Art. XI, WORLD TRADE ORG., https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art11_oth.pdf (last visited Jan. 21, 2024).

[29] *See* Voon, *supra* note 9. In the Ukraine - Russia case, a WTO panel found that military conflict between the countries justified its application. Panel Report, *Russia — Measures Concerning Traffic in Transit*, at 53-54, WT/DS512 (Apr. 5, 2019). In the Qatar-Saudi Arabia case a panel found a similar national security rule in the WTO TRIPS Agreement could apply when countries had a serious diplomatic crisis based on potential military conflict, if a party complained against for invoking it enforced domestic laws which protected the complainant's legal rights. Panel Report, *Saudi Arabia — Measures concerning the Protection of Intellectual Property Rights*, at 116, 119-20, WT/DS567/R (June 16, 2020).

[30] Agreement on Agriculture, WORLD TRADE ORG., at 51, https://www.wto.org/english/docs_e/legal_e/14-ag.pdf (last visited Jan. 21, 2024).

[31] Textiles, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/texti_e/texti_e.htm (last visited Jan. 21, 2024).

[32] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, WORLD TRADE ORG., https://www.wto.org/english/docs_e/legal_e/19-adp.pdf (last visited Jan. 20, 2024).

- Safeguards, allowing WTO parties to impose emergency relief protections from serious economic harm caused by import surges (although the threshold for harm is so high that such measures are seldom permissible);[34]
- Technical Barriers to Trade (TBT), limiting the scope of permissible national product labeling, specifications, and regulations (such as import taxes) contrary to WTO principles;[35]
- Sanitary and Phytosanitary (SPS) Measures, which allow members to adopt product health and safety standards on an MFN basis, but also require sound scientific bases for such measures;[36]
- Pre-shipment Inspection, intended to facilitate customs treatment;[37]
- Rules of Origin, defining the national identity of goods for MFN treatment purposes;[38]
- Import License Procedures, designed to standardize licensure rules and procedures.[39]

These Agreements collectively and significantly exceed the prior GATT scope, as intended.

Three separate non-goods Multilateral Trade Agreements annexed to the WTO Agreement warrant inclusion here. These include the General Agreement on Trade and Services (GATS);[40] the Agreement on Trade-

[33] Agreement on Subsidies and Countervailing Measures, WORLD TRADE ORG., Art. XVI, at 19, https://www.wto.org/english/docs_e/legal_e/24-scm.pdf (last visited Jan. 20, 2024).

[34] Agreement on Safeguards, WORLD TRADE ORG., https://www.wto.org/english/docs_e/legal_e/25-safeg.pdf (last visited Jan. 21, 2024).

[35] Agreement on Technical Barriers to Trade, WORLD TRADE ORG., https://www.wto.org/english/docs_e/legal_e/17-tbt.pdf (last visited Jan. 21, 2024).

[36] Agreement on the Application of Sanitary and Phytosanitary Measures, WORLD TRADE ORG., https://www.wto.org/english/docs_e/legal_e/15-sps.pdf (last visited Jan. 21, 2024).

[37]Agreement on Preshipment Inspection, WORLD TRADE ORG., https://www.wto.org/english/docs_e/legal_e/21-psi.pdf (last visited Jan. 21, 2024).

[38] Agreement on Rules of Origin, WORLD TRADE ORG., https://www.wto.org/english/docs_e/legal_e/22-roo.pdf (last visited Jan. 21, 2024).

[39] Agreement on Import Licensing Procedures, WORLD TRADE ORG., https://www.wto.org/english/docs_e/legal_e/23-lic.pdf (last visited Jan. 21, 2024).

[40] General Agreement on Trade and Services, WORLD TRADE ORG., https://www.wto.org/english/docs_e/legal_e/26-gats.pdf (last visited Jan. 21, 2024).

Related Investment Measures (TRIMS);[41] and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).[42]

The GATS subjects almost all different types of services to MFN and national treatment free trade principles, with exceptions for public agency services.[43] The GATS allows WTO members to opt in and out of providing MFN and national treatment for services by express exemptions and inclusions. The GATS operates on a principle of encouraging WTO members to negotiate bilateral and multilateral service sector agreements by recognizing party rights based on MFN and national treatment. For example, education is a GATS service sector, although most WTO members have opted to exempt it from full GATS inclusion. As to educational credentials, GATS Article VII states: "A [WTO] Member may recognize the education or experience obtained, requirements met, or licenses or certificates granted in a particular country."[44] Health is another GATS service sector, viewed by observers as both a positive factor for increasing developing country access to health services and information through telemedicine; and as a problem area because of developing country health professional "brain drains" and increased health care privatization likely to reduce care access. Legal services are another GATS service sector subject to attention among attorneys, although to date the GATS has not notably increased licensure reciprocity because so many WTO members exempted them. GATS Article XIV(a) allows countries to restrict services imports on public morals grounds similar to GATT Article XX(a).[45]

The TRIMS Agreement ensures equal treatment of national and foreign investors by applying MFN and national treatment rules, along with established international law principles, to investments related to trade in goods. Of the forty-six TRIMS disputes to date, twenty-nine concluded with WTO decision implementations, and the others were amicably

---

[41] Agreement on Trade-Related Investment Measures, WORLD TRADE ORG., https://www.wto.org/english/docs_e/legal_e/18-trims.pdf (last visited Jan. 21, 2024).

[42] Agreement on Trade-Related Aspects of Intellectual Property Rights, WORLD TRADE ORG., https://www.wto.org/english/docs_e/legal_e/27-trips.pdf (last visited Jan. 21, 2024).

[43] General Agreement on Trade in Services, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm (last visited Jan. 22, 2024).

[44] General Agreement on Trade in Services, Art. VII, WORLD TRADE ORG., https://www.wto.org/english/res_e/publications_e/ai17_e/gats_art7_oth.pdf#:~:text=Where%20a%20Member%20accords%20recognition%20autonomously%2C%20it%20shall,in%20that%20other%20Member%27s%20territory%20should%20be%20recognized (last visited Jan. 22, 2024).

[45] General Exceptions: Art. XIV of the GATS, Art. XIV(a), WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/repertory_e/g4_e.htm (last visited Jan. 23, 2024).

resolved.[46] The TRIMS Agreement only allows WTO disputes between member states.

The TRIPS Agreement requires WTO member adherence to international intellectual property agreements (the Berne Convention for copyright, the Paris Convention for patents, and the Madrid Protocol for Trademarks), as well as the adoption of reasonable national law measures to protect all intellectual property forms.[47] Worth noting here are China's extensive intellectual property law reforms during the 1990s to avoid significant U.S. trade sanctions, laying the groundwork required for China's eventual WTO membership.[48]

The WTO also has two Plurilateral Trade Agreements (binding on and benefitting only those parties which sign them), including Government Procurement,[49] intended to apply MFN and national treatment principles to public agency purchases by WTO member states and reduce local purchasing requirements, and Trade in Civil Aircraft.[50]

All WTO Agreements contain special provisions allowing developing country (LDC) exceptions to requirements applicable to other WTO members.[51] The TRIMS Agreement had a five-year LDC phase-in period with extensions possible by consensus (although the 2000 date has long since passed, quite a few members have still not conformed their laws to TRIMS, and the U.S. has indicated its refusal to allow extensions). The TRIPS Agreement likewise contained LDC phase-in periods, although a number have now expired.

---

[46]Disputes by Agreement, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm (listing forty-six TRIMS cases) (last visited Jan. 21, 2024).

[47] Overview: the TRIPS Agreement, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (last visited Jan. 23, 2024).

[48] Jie Hong, Jakob Edler & Silvia Massini, *Evolution of the Chinese Intellectual Property Rights System: IPR Law Revisions and Enforcement*, *in* 18 MGMT. & ORG. R. 755, 758-59 (May 3, 2022), https://www.cambridge.org/core/journals/management-and-organization-review/article/evolution-of-the-chinese-intellectual-property-rights-system-ipr-law-revisions-and-enforcement/ACEF8E7FC893123D6D95FF6245CC51D6.

[49] Agreement on Government Procurement, Art. 3, WORLD TRADE ORG., https://www.wto.org/english/docs_e/legal_e/gpr-94.pdf (last visited Jan. 21, 2024).

[50] Agreement on Trade in Civil Aircraft, WORLD TRADE ORG., https://www.wto.org/english/docs_e/legal_e/air-79.pdf (last visited Jan. 21, 2024).

[51] Special and Differential Treatment Provisions, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm (last visited Jan. 21, 2024).

The WTO Agreements include the Understanding of Rules and Procedures Governing the Settlement of Disputes (DSU),[52] applicable to GATT and the Multilateral Trade Agreements as described below.

The WTO structure and decision-making process include:[53]

- The Ministerial Conference, which meets biennially and is comprised of all WTO member top trade officials, each with equal voting weight;
- The General Council, which has executive authority over WTO ongoing functions and operations; is comprised of representatives of all WTO members, each with equal voting weight; and interprets the various WTO Agreements;
- The various bodies reporting to the Ministerial Conference (Committees on Trade and Development, Balance of Payment Restrictions, Budget, Finance and Administration) or General Council, Dispute Settlement Body (DSB), Trade Policy Review Body, and Councils for Trade in Goods, Trade in Services and Trade-Related Intellectual Property Rights).

Most WTO Ministerial Conference and General Council decisions require consensus, i.e., unanimous support or no formal member objection, although the DSB process is excluded from this requirement. The Ministerial Conference can grant "exceptional circumstances" waivers of WTO obligations by a three-fourths vote. WTO procedural rules require only a majority Conference or Council vote.

One must remember that the WTO is comprised of member national governments, which make all relevant decisions collectively. The WTO currently has 164 members, with another fourteen countries applying to join. The European Union (EU) is a single member representing its twenty-seven member countries.[54] The WTO itself has a relatively small professional staff that facilitates member negotiations and other activities, including dispute settlement administration.

C. The WTO Dispute Settlement Process

The WTO provides for settling international trade disputes by parties pursuant to the Dispute Settlement Understanding (DSU) and using the

[52]Understanding on Rules and Procedures Governing the Settlement of Disputes, WORLD TRADE ORG., https://www.wto.org/english/docs_e/legal_e/28-dsu.pdf (last visited Jan. 21, 2024).

[53]About the Organization, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/thewto_e.htm (last visited Jan. 21, 2024).

[54] Members and Observers, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Jan. 21, 2024).

Dispute Settlement Body (DSB).[55] The DSU applies to all WTO Agreements and members, according to well-defined rules that contain the following sequential stages for resolving disputes.

- Consultation (negotiation) by dispute parties for 60 days unless the parties extend;
- Voluntary mediation if the parties wish it;
- Dispute panel establishment, investigation, and report (3-5 qualified persons not usually citizens of a disputing party), with panel reports normally due in 180 days;
- Appellate review of panel report legal findings (although panel report factual findings are not appealable), by a quorum of the permanent 7-member Appellate Body who can serve up to two 4-year terms, with three Judges deciding each appeal, in a supposed 90-day process, a stage step that is on hold indefinitely because there are no Appellate Body judges;
- Remedies arbitration if the parties cannot agree, also subject to Appellate Body review;
- DSB adoption of panel (if not appealed), and appellate decisions;
- Implementation of the decisions in a 3-step process, with WTO strongly favoring rules conformity (usually within 15 months after the decision) as the preferred remedy; and compensation or authorized retaliation allowed only when conformity does not occur.

The DSB process also permits binding arbitration in lieu of panels and the Appellate Body if parties agree; and during the decision implementation phase, the non-prevailing party has a right to binding remedies arbitration. Final DSU decisions, binding on all WTO members, get de facto automatic DSB acceptance because it requires WTO member consensus to overturn them.

Dispute remedies include (1) mutually satisfactory solutions in the consultation phase; (2) following panel or Appellate Body decisions, conforming the challenged conduct to the applicable Agreement rule; compensation; and/or (3) suspension of concessions (resulting in authorized

[55] WTO, Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 of the WTO Agreement, https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm (last visited Jan 21, 2024).

tariffs) by the prevailing party. Diplomacy also achieves acceptable remedies.

One key DSU aspect which has greatly enhanced WTO member DSU support is the right of third-party WTO members to participate both formally and informally in the dispute settlement process whenever a particular dispute affects, or is likely to affect, third-party trade interests. Once third parties notify the DSB that a particular dispute substantially affects their interests, DSU Article 10 allows direct third-party participation in panel proceedings, and DSU Article 17 allows third-party appellate review submissions.

D. Illustrative WTO Cases Showing Key Rules Applications

Since its first Appellate Body decision in 1995, soon after the DSU took effect, the DSB has received hundreds of complaints with a majority settled at the consultation stage or before any panel decision. Of cases decided at later stages, a number of them are significant. Listed below are cases closely studied by international trade lawyers and their clients as examples of how various WTO rules apply. Except where noted, these cases reflect Appellate Body decisions:

- The *Reformulated Gasoline* case, finding U.S. environmental rules applicable to Brazilian and Venezuelan refined gasoline imports violated the WTO national treatment rule.[56]
- The *Bananas* case, resulting in multiple panel and Appellate Body decisions finding European Union (EU) banana quotas and import license restrictions favoring bananas from former European colonies in Africa, based on a pre-WTO treaty, in violation of the WTO MFN rule.[57]

[56] WTO, Dispute Settlement DS2: One Page Case Summaries, *United States – Standards for Reformulated and Conventional Gasoline,* https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds2sum_e.pdf (last visited Jan 21, 2024).

[57] WTO, Dispute Settlement, DS27: *European Communities – Regime for the Importation, Sale and Distribution of Bananas,* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds27_e.htm (last visited Jan 21, 2024).

- The *Meat Hormones* case, resulting in panel and Appellate Body decisions that EU import bans of U.S. and Canadian hormone-treated beef violated the SPS Agreement by failing to meet required scientific evidence standards.[58]
- The *Copyright Music* case, a panel decision, not appealed, finding a U.S. copyright law that exempted bars and restaurants from recorded music playing royalty payments violated the TRIPS Agreement because the latter allowed no such exemption.[59]
- The *Foreign Sales Corporation* case, with panel and Appellate Body findings that a U.S. tax law benefiting U.S. exporters violated the SCM Agreement as an illegal export subsidy.[60]
- The *Dolphin-Tuna* case, resulting in various panel and Appellate Body findings that a U.S. environmental protection law barring imports of tuna fished in a manner harmful to dolphins violated WTO import restriction bans because the U.S. could not prove the law was needed to protect dolphins; and ultimately further finding U.S. tuna import labeling laws did not violate the TBT Agreement.[61]
- The *Steel Safeguards* case, with panel and Appellate Body findings that U.S. steel import restrictions violated

[58] WTO, Dispute Settlement DS26: *European Communities – Measures Concerning Meat and Meat Products (Hormones),* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm (last visited Jan 21, 2024); WTO, Dispute Settlement DS48: *European Communities – Measures Concerning Meat and Meat Products (Hormones),* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds48_e.htm (last visited Jan 21, 2024).

[59] WTO, Dispute Settlement DS160: *United States – Section 110(5) of US Copyright Act,* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds160_e.htm (last visited Jan 21, 2024)

[60] WTO, Dispute Settlement DS108: *United States – Tax Treatment for "Foreign Sales Corporations,"* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds108_e.htm (last visited Jan 21, 2024).

[61] WTO, Dispute Settlement DS381: *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products,* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm (last visited Jan 21, 2024).

the Safeguards Agreement by not meeting import surge criteria.[62]

- The *Byrd Amendment* case, resulting in panel and Appellate Body findings that a U.S. law giving financial compensation to U.S. importers harmed by illegal dumping and subsidies violated WTO Anti-dumping and SCM Agreement remedy rules.[63]
- The *China Audiovisuals* and *Intellectual Property* cases, resulting in panel and Appellate Body findings that Chinese import sales and distribution restrictions on artistic and multi-media products violated WTO import restrictions rules and could not be justified on GATT Rule XX(a) or GATS Article XIV(a) public morals protection grounds.[64]
- The *Country of Origin (COOL)* product labeling case, with panel and Appellate Body findings that U.S. import product labeling requirements violated the TBT Agreement.[65]
- The *Internet Gambling* case, resulting in panel and Appellate Body findings that U.S. online gambling bans violated the WTO national treatment rule because of online gambling permitted in some U.S. states, while recognizing a WTO member right to restrict gambling generally for public morals protection as long as it meets national treatment and MFN requirements.[66]

---

[62] WTO, Dispute Settlement DS252: *United States – Definitive Safeguard Measures on Imports of Certain Steel Products,* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds252_e.htm (last visited Jan 21, 2024).

[63] WTO, Dispute Settlement DS217: *United States – Continued Dumping and Subsidy Offset Act of 2000,* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds217_e.htm (last visited Jan 21, 2024).

[64] WTO, Dispute Settlement DS363: *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products,* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds363_e.htm (last visited Jan 21, 2024).

[65] TO, Dispute Settlement DS384: *United States – Certain Country of Origin Labelling (COOL) Requirements,* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds384_e.htm (last visited Jan 21, 2024).

[66] WTO, Dispute Settlement DS285: *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services,* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm (last visited Jan 21, 2024).

- The *Rare Earths* case, resulting in panel and Appellate Body findings that China's minerals export restrictions violated WTO export restriction rules.[67]
- The *Seal Products* case, resulting in panel and Appellate Body findings which upheld most EU bans of seal mammal byproducts as a valid WTO Article XX conservation measure, but disallowed certain exceptions for EU indigenous tribe exports.[68]
- The *Aircraft Subsidies* case, with numerous Appellate Body and panel decisions finding that U.S. (including U.S. state) and EU (including EU country) financial support for aircraft exports violated the SCM Agreement.[69]

E. Ministerial Conferences[70]

The key WTO meetings are biennial Ministerial Conferences. The primary ones initially included the 1999 Seattle Conference and the 2001 Doha Conference.

i. The 1999 Battle at The Seattle Conference and Why It Failed

Consistent with its mandate to hold ongoing conferences and

---

[67] WTO, Dispute Settlement DS431: *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum,* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds431_e.htm (last visited Jan 21, 2024).

[68] WTO, Dispute Settlement DS400: *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products,* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds400_e.htm (last visited Jan 21, 2024).

[69] *Measures Affecting Trade in Large Civil Aircraft,* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds316_e.htm (last visited Jan 21, 2024); WTO, Dispute Settlement DS353: *United States – Measures Affecting Trade in Large Civil Aircraft -Second Complaint,* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds353_e.htm (last visited Jan 21, 2024).

[70] WTO, Ministerial Conferences, https://www.wto.org/english/thewto_e/minist_e/minist_e.htm (last visited Jan 21, 2024) (The topmost decision-making body of the WTO is the Ministerial Conference, which usually meets every two years. It brings together all members of the WTO, all of which are countries or customs unions. The Ministerial Conference can take decisions on all matters under any of the multilateral trade agreements).

negotiations on all WTO aspects, the parties scheduled a November 1999 meeting in Seattle. Topics to be discussed included whether to:

- Increase transparency and non-government participation in WTO disputes (which are conducted in secret unless parties agree to open them) and permit only member states to participate except for non-party briefs in the WTO appeal process;
- Link environmental and worker rights protection measures to WTO trade rules and require dispute panels to consider them in decisions; and
- Negotiate a new Agriculture Agreement which would eliminate all subsidies in a shorter phase-out period.

In response to great public interest in the Seattle meeting, President Clinton openly encouraged all persons and groups interested in WTO to come to Seattle. Many U.S. environmental and labor organizations, as well as many non-U.S. counterparts, came to Seattle to protest past WTO failures, to address the above issues, and to urge changes. Neither the U.S. Government nor Seattle public officials anticipated the large number of demonstrators. When local law enforcement agencies proved unable to keep order, the Seattle meeting broke down after the demonstrators took control of Seattle's streets and blocked WTO delegates' ability to attend scheduled meetings for nearly two days. Most demonstrations lacked local government permission, and thousands of protesters rioted in the streets, destroying downtown Seattle property in what became known as the Battle of Seattle.[71]

Even when the delegates were finally able to attend at least some meetings, there was neither sufficient time nor much desire to conduct serious discussions about any of the above controversial proposals, objectionable to many members. Most developing countries oppose any linkage of environmental protection measures to WTO trade rules and policies because they believe they lack the resources to conform to such

[71] University of Washington Libraries: *WTO Seattle Collection*, https://content.lib.washington.edu/wtoweb/ (last visited Jan 21, 2024) (This has been the most documented Ministerial Conference. An excellent source of information describing it is the University of Washington WTO Seattle Collection); *see also* Clyde Summers, *The Battle in Seattle: Free Trade, Labor Rights, and Societal Values,* 22 U. PA. J. INT'L ECON. L. 61 (2001); Susan Tiefenbrun, *Free Trade and Protectionism: The Semiotics of Seattle,* 17 ARIZIZ. J. INT'L & COMP. L. 257 (2000). (This author attended the Seattle Conference at the U.S. Senate Trade Subcommittee Chair's invitation to participate in various negotiation sessions, a number of which were canceled after the riots began).

measures. Many (although not all) developing countries oppose linking labor protections and employee rights to WTO trade rules for similar reasons. Although many countries do not necessarily oppose greater transparency in WTO decisions and perhaps limit NGO or other non-party participation in disputes, present WTO rules requiring party consensus as a condition for change make negotiating details likely to achieve such consensus difficult. Because the EU has traditionally opposed an end to most agricultural subsidies and a number of other WTO members share this view, the likelihood of a new Agriculture Agreement being seriously negotiated in Seattle was likewise remote.

The Seattle delegates left without accomplishing anything.

ii. The 2001 Doha Conference Highlights

Despite the September 11, 2001, World Trade Center attacks and resulting travel disruptions, the 2001 WTO Ministerial Conference scheduled for Doha, Qatar, proceeded without incident and resulted in some significant new WTO directions.

- The Conference responded to concerns by developing countries impacted by AIDS epidemics and the lack of available, affordable medications by proposing several intellectual property measures to make such medications available through mandatory licensing by pharmaceutical companies, under certain conditions (although to date few such licenses appear to have been granted).
- The Conference formally approved China's (and Taiwan's) WTO membership, subject to the adoption of required domestic law changes.

iii. Subsequent Conferences Highlights

Since Doha, Ministerial Conferences have been held in Cancun (2003), Hong Kong (2005), Geneva (2009 & 2011), Bali (2013), Nairobi (2015), Buenos Aires (2017), and Geneva (2022). Before the Nairobi Conference apart from approving new members, including Russia (2011), these Conferences achieved relatively few changes and appeared to be mainly discussion forums for long-range trade objectives. The Bali Conference did develop specific steps to help lesser-developed members become more effective trading partners. A primary point of contention in all these Conferences prior to Nairobi was whether to and how to eliminate agricultural subsidies despite an emerging consensus favoring agriculture export subsidies elimination (nonetheless raising serious doubts about how

to distinguish direct from indirect export subsidies). The Nairobi Conference has probably been the most productive one since the WTO began in terms of results because the negotiators agreed to eliminate almost all agriculture export subsidies; develop favorable customs treatment for the least developed country products; and eliminate most tariffs on information technology products. The Buenos Aires Conference focused mainly on trying to finalize a fisheries subsidies agreement, which has not yet happened. The WTO indefinitely postponed the Ministerial Conference, scheduled for June 2020 in Nur-Sultan, Kazakhstan, because of WTO organizational problems caused by the Appellate Body crisis and the WTO Director General's resignation, as well as Covid.

The WTO held its next Conference in Geneva in 2022, where much appeared to be accomplished. Results included a long-awaited final Fisheries Subsidies Agreement; easing TRIPS Agreement licensing requirements for pandemic-related products; allowing food export restrictions for food security purposes; continuing customs duty exemptions for electronic commerce transactions; and a commitment to improving WTO operations, even though the Conference failed to resolve the Appellate Body crisis.[72]

The most recent Ministerial Conference took place in February 2024 in Abu Dhabi, where serious discussions about whether to revive the WTO Appellate Body occurred but with no progress made; and little else of significance resulted.[73]

F. The Appellate Body Crisis[74]

[72] WTO, Ministerial Conferences: *MC12 "Geneva Package" – in brief*, https://www.wto.org/english/thewto_e/minist_e/minist_e.htm (last visited Jan 21, 2024) (The topmost decision-making body of the WTO is the Ministerial Conference, which usually meets every two years. It brings together all members of the WTO, all of which are countries or customs unions. The Ministerial Conference can take decisions on all matters under any of the multilateral trade agreements).

[73] *Remarks by Ambassador Katherine Tai at G20 Trade and Inv. Ministers' Meeting*, *supra* note 12; Ken Heydon, *MC13 Success Critical to the Liberal Trading Order*, E. ASIA F., (Sept. 26, 2023). https://www.eastasiaforum.org/2023/09/26/mc13-success-critical-to-the-liberal-trading-order/; Norman P. Aquino, *WTO Plans to Fix Appellate Body Paralysis by 2024*, BUS WORLD, (Sep. 14, 2023, 12:33 AM). https://www.bworldonline.com/top-stories/2023/09/14/545399/wto-plans-to-fix-appellate-body-paralysis-by-2024/; *see also, WTO | 2024 News items - MC13 ends with decisions on dispute reform, development; commitment to continue ongoing talks*.

[74] Brandon J. Murrill, *The WTO's Appellate Body Loses Its Quorum: Is This the Beginning of the End for the "Rules-Based Trading System?",* CONG. RES. SERV., (Dec. 16, 2019) https://crsreports.congress.gov/product/pdf/LSB/LSB10385; Jorge Miranda & Manuel Sánchez Miranda, *Chronicle of a Crisis Foretold: How the WTO Appellate Body Drove Itself into a Corner*, 26 J.INT'L L. 435 (2023); Peter Van den Bossche, *Can the WTO Dispute Settlement*

To date, the WTO has successfully modernized global trade rules and efficiently settled many trade disputes. However, the U.S., at President Trump's direction, blocked the appointment of new Appellate Body members to replace those with expired terms, who are not allowed to continue. In November 2019, the Appellate Body lost its quorum required to function, and a year later its last member left. President Biden indicated no intention to change Trump's position. This left the Appellate Body with no members to hear cases for the past several years, and effectively shut down much, although by no means all, of the DSU dispute resolution process for cases not settled, before the Appellate Body stopped functioning.

The U.S. tacitly supported by some other countries, disagrees with the broad scope of past Appellate Body rulings and seeks renegotiation of the overall dispute settlement process, including the requirement for WTO member consensus to overturn Appellate Body rulings. The U.S. further objects to Appellate Body decisions using prior cases as precedent as outside the scope of Appellate Body powers, and to frequent Appellate Body delays in meeting what were intended to be strict DSU decision deadlines.[75] So far, the situation remains at an impasse, with no clear resolution in sight.

Meanwhile, the Appellate Body crisis has partly created what may well be the Appellate Body critics' intended effect of shutting down panel decision appeals to block final dispute resolutions. Dispute parties who disagree with panel decisions can and do appeal such decisions "into the void," knowing these appeals cannot be heard.[76] To date, twenty-eight panel

System Be Revived?, Options for Addressing a Major Governance Failure of the World Trade Organization, (WTI, Working Paper no. 03/2023, 2023) https://www.wti.org/media/filer_public/dc/68/dc6816ae-6d34-4f95-8d8d-837597ce54f3/wti_wp_03_2023.pdf.

[75] Off. of the U.S. Trade Representative, Rep. on the APP. Body of the WTO (Feb. 2020), https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf; James Bacchus, *The Biden Administration Continues to Be Wrong about the WTO*, CATO INST., (Sept. 26, 2023, 11:13 AM). https://www.cato.org/blog/biden-administration-continues-be-wrong-about-wto.

[76] WTO, Dispute Settlement: *Understanding on rules and procedures governing the settlement of disputes,* Annex 2 of the WTO Agreement, https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm#25 (last visited Jan 21, 2024); Peter Ungphakorn, *Technical note: Appeals 'Into the Void' in WTO Dispute Settlement*, TRADE B BLOG (Sept. 19. 2023). https://tradebetablog.wordpress.com/technical-note-appeals-into-the-void-in-wto-dispute-settlement/.

decisions have fallen into this void, with many more expected.[77] The EU has recently hinted that panel decisions should perhaps be considered final for the purpose of allowing whoever wins the dispute to impose sanctions under WTO rules, but this would appear to conflict with the DSU provisions themselves unless all parties to the dispute agreed.[78] Such an approach would resemble the pre-WTO GATT dispute resolution process, which was so universally criticized that it helped create the current DSU.

As demonstrated below, however, the Appellate Body's absence has not necessarily paralyzed trade dispute resolution finalization, neither at the WTO nor elsewhere.

G. The MPIA and Other WTO Arbitration Alternatives to No Appellate Body

In 2020, the EU (on behalf of its twenty-seven member countries) plus twenty-two countries, but not the U.S., signed the Multi-Party Interim Arbitration (MPIA) Agreement subjecting WTO panel decisions to binding arbitration appeals in cases involving the signatories as parties, conditioned on the absence of an Appellate Body to hear them; and any non-signatory parties may join the Agreement if they choose.[79] Article 25 of the DSU expressly allows arbitration as a substitute for resolving any WTO dispute when parties agree.[80]

Numerous WTO members, led by the United States, have not signed

---

[77] WTO, Dispute Settlement: Appellate Body, https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm (last visited Jan 21, 2024).

[78] EC Trade Consultation: *Information gathering on the Indonesian export ban and domestic processing requirement on nickel ore* (July 7, 2023), (https://policy.trade.ec.europa.eu/consultations/information-gathering-indonesian-export-ban-and-domestic-processing-requirement-nickel-ore_en; https://policy.trade.ec.europa.eu/consultations/information-gathering-indonesian-export-ban-and-domestic-processing-requirement-nickel-ore_en; Panel Report, *Indonesia – Measures Relating to Raw Materials*, WTO Doc. WT/DS592/R (Nov. 30, 2022) (This Consultation is in direct response to a favorable panel decision regarding Indonesia's nickel ore export ban and domestic processing requirements, which Indonesia appealed into the void).

[79] WTO Plurilateral, *Multi-Party Interim Appeal Arbitration Arrangement (MPIA)*, https://wtoplurilaterals.info/plural_initiative/the-mpia/ (last visited Jan 21, 2024). (To date 53 WTO Members are MPIA Parties, although the 27 individual EU countries are counted for numbers purposes even though the EU is a single WTO member).

[80] WTO, Dispute Settlement: *Understanding on rules and procedures governing the settlement of disputes,* Annex 2 of the WTO Agreement, https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm#25 (last visited Jan 21, 2024).

on to the MPIA and some experts predicted it would likely fail.[81] However, after a slow start, it now looks like the MPIA has taken root as a viable Appellate Body alternative. The MPIA has produced two final WTO decisions.[82] Perhaps even more significantly, ten additional WTO cases to date, which include those involving major trading nations such as the EU, Canada, Australia, and China, have MPIA appeal arbitration agreements, with eight pending, one dismissed for failure to pursue the appeal, and one recently resolved through pre-arbitration consultation.[83] The EU seems especially pleased with the MPIA option and actively encourages all WTO members to use it.[84] On the other hand, the U.S. has refused to consider MPIA participation and likened the MPIA to the Appellate Body's "worst

---

[81] David A. Gantz, *The Demise of WTO Dispute Settlement: Are Dispute Settlement Mechanisms Under Free Trade Agreements a Viable Substitute?*, (July 11, 2019), https://ssrn.com/abstract=3418621.

[82] Panel Report, Arbitration Award, *Colombia — Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands*, WT/DS591/ARB25 (Dec. 21, 2022); Panel Report, Arbitration Award, *Turkey — Certain Measures Concerning the Production, Importation and Marketing of Pharmaceutical Products*, WT/DS583/ARB25 (July 25, 2022).

[83] Panel Report, Appeal Arbitration Agreement, *Canada — Measures Concerning Trade in Commercial Aircraft*, WT/DS522/20 (June 3, 2020) (case withdrawn); Panel Report, Appeal Arbitration Agreement, *Costa Rica — Measures Concerning the Importation of Fresh Avocados from Mexico* WT/DS524/5/Rev.1 (Dec. 2, 2021) (panel decision adopted); Panel Report. Appeal Arbitration Agreement, *Canada — Measures Governing the Sale of Wine*, WT/DS537/15 (Mar. 6, 2020) (case settled); Panel Report Appeal Arbitration Agreement, *China — Measures Concerning the Importation of Canola Seed from Canada*, WT/DS589/5 (Sep. 28, 2021) (case dropped); Panel Report, Appeal Arbitration Agreement, *China — Anti-dumping and Countervailing Duty Measures on Barley from Australia*, WT/ DS598/5 (Aug. 20, 2021) (case settled); Panel Report, Appeal Arbitration Agreement, *China — Anti-Dumping Measures on Stainless Steel Products from Japan*, WT/ DS601/6 (Apr. 13, 2023)(panel report adopted); Panel Report, Appeal Arbitration Agreement, *China — Anti-Dumping and Countervailing Duty Measures on Wine from Australia*, WT/DS602/3 (Dec. 20, 2021) (panel suspended at parties' request); Panel Report, Appeal Arbitration Agreement, *Australia — Anti-Dumping and Countervailing Duty Measures on Certain Products from China*, WT/DS603/4 (Sept. 20, 2022); Panel Report, Appeal Arbitration Agreement, *China — Measures Concerning Trade in Goods*, WT/DS610/10 (July 7, 2023 (case extended); *China — Enforcement of Intellectual Property Rights* WT/DS611/7 (July 7, 2023) (case extended). WTO, Dispute Settlement: The Disputes, Chronological lists of disputes cases, https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited Jan. 21, 2024) (these disputes and their parties' MPIA arbitration agreements may be accessed at the WTO Disputes Chronology Webpage).

[84] WTO, Dispute Settlement: *Türkiye states intention to implement findings in pharmaceuticals dispute with EU*, (Aug. 29 2022), https://www.wto.org/english/news_e/news22_e/dsb_29aug22_e.htm; European Commission Press Release, EU welcomes Japan joining dispute settlement arrangement (Mar. 10, 2023), https://policy.trade.ec.europa.eu/news/eu-welcomes-japan-joining-dispute-settlement-arrangement-2023-03-10_en.

practices."[85]

One case has also recently been submitted for non-MPIA arbitration pursuant to the Article 25 general arbitration provision.[86] Interestingly, the U.S. and EU used Article 25 arbitration years ago to resolve the above *Copyright Music* case. It remains to be seen how much Article 25 MPIA and non-MPIA arbitrations can replace Appellate Body decisions, given the limited history to date. Major trade nations are using the MPIA, which bodes well for its future.

H. Some Special WTO China Considerations

China's WTO participation warrants a separate mention because of its membership importance. For years, China sought unsuccessfully to join the GATT because Taiwan was an early GATT proponent, even though GATT members ultimately excluded Taiwan because of concerns about China's reaction, subsequently, the WTO, when its economy began globalizing in the 1980's. Although membership requires unanimous WTO approval, it is always granted at some point after a country seeking to join makes significant changes in its laws and economic systems to ensure compatibility with MFN, national treatment, and other WTO rules and agreements. These changes often take, and in China's case did take, many years. The U.S. and the EU guided membership discussions in a manner requiring China to make these changes. The WTO lays out the lengthy chronology and steps leading to China's 2021 membership.[87] In addition to its required legal and economic changes, another key reason China received U.S., E.U., and other member support was to subject China to DSU rules and procedures, which China gladly accepted.

China's WTO membership has fostered, and continues to foster,

---

[85] WTO, Dispute Settlement: *Panels established to review Indian tech tariffs, Japanese export restrictions EU palm oil measures* (July 29, 2020), https://www.wto.org/english/news_e/news20_e/dsb_29jul20_e.htm.

[86] WTO, Dispute Settlement System Training Module: Chapter 8, *Dispute Settlement without recourse to Panels and the Appellate Body*, 8.2 Arbitration pursuant to Article 25 of the DSU, https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c8s2p1_e.htm (last visited Jan 21, 2024).

[87] WTO, Accession, *China*, https://www.wto.org/english/thewto_e/acc_e/a1_chine_e.htm: (last visited Jan 21, 2024); *see also* PETROS C. MAVROIDIS & ANDRE SAPIR, CHINA AND THE WTO: WHY MULTILATERALISM STILL MATTERS (Princeton Univ. Press 2021).

controversy because its critics do not believe China's legal and economic changes have necessarily met expectations. Critics also believe China has abused its status by entering as a developing country under a 15-year plan and continuing to act like one.[88] However, China has actively participated in numerous WTO disputes as a primary party and when it loses cases, it has consistently agreed to comply with Appellate Body and panel decisions. Two concrete examples reflect this point. In a complaint filed by the United States against China's restrictions on publications and media products (WTO Case DS 363), China lost the case at the Appellate Body and agreed to comply with the decision.[89] The same occurred in the above-referenced WTO Rare Earths case.[90] There are numerous other examples.

China's commitment to rule-based dispute settlement matters in terms of how it handles future trade disputes. As noted above, China has joined the MPIA, subjecting panel decision appeals to binding arbitration. Perhaps more importantly, China took the leadership role in negotiating the Regional Comprehensive Economic Partnership (RCEP Agreement), now in effect with some sixteen other countries, which contains binding dispute resolution rules similar to the WTO's.[91] This seems ironic in that the U.S., which insisted on China's firm commitment to the DSU process as a WTO membership condition because of the U.S. commitment to law-based trade case decisions, now refuses to help reinstate the Appellate Body; refuses to join the MPIA; and has rejected in its own trade agreements any effort to apply WTO or WTO-like dispute settlement principles.

i. A Brief WTO Assessment

The GATT generally accomplished its main purpose before the WTO was created by moving the world towards eliminating, phasing out, and reducing tariffs on many non-agricultural products and quite a few agricultural products. The GATT firmly entrenched national treatment and

---

[88] Council on Foreign Relations, *What Happened When China Joined the WTO?* (June 17, 2021), https://world101.cfr.org/global-era-issues/trade/what-happened-when-china-joined-wto; Henry Gao, *WTO Reform And China: Defining or Defiling the Multilateral Trading System?,* 62 HARV. INT'L L.J. 1 (2021); Petros C. Mavroidis & Andre Sapir, *China in the WTO Twenty Years On: How to Mend a Broken Relationship?*, 24 GERMAN L.J. (2023), published online at https://www.cambridge.org/core/journals/german-law-journal/article/china-in-the-wto-twenty-years-on-how-to-mend-a-broken-relationship/DDC80B78E5352E51AEEF6C6866488946.

[89] Mavroidis & Sapir, *supra* note 88, at 233.

[90] *Id.*

[91] *See infra*, notes 114-119 and accompanying text.

MFN principles as bedrock rules now incorporated into all other multilateral and bilateral trade agreements including the WTO's. The WTO nonetheless reflects a keen desire by most GATT member states to solve two problems inherent in the prior GATT. The first, perhaps most important to international trade attorneys, involved the need for clear trade dispute resolution rules with set procedures and deadlines. Because the pre-WTO GATT lacked these, relying instead on dispute party willingness to cooperate in good faith when bringing disputes, plus a strong bias favoring diplomatic negotiation resolution, it decided relatively few cases. The second problem, fundamentally important for all global trade, involved the need to expand the pre-WTO GATT scope from merely an agreement for the trade of goods, to agreements encompassing all key international trade activities such as services, intellectual property, science-based health and safety trade regulations, government procurement, modern subsidies, and anti-dumping rules, among others. The WTO creation resolved both.

From a positive perspective, the DSU process seemed to work well before the Appellate Body crisis, and most parties complied with DSB decisions upholding results from prior stages. Even the WTO mega-cases noted below tended to get resolved in phases. Moreover, most countries want it to continue. The consultation stage has become a place for diplomatically resolving the majority of trade disputes. In addition, at least anecdotally the existence of the DSU consultation and other prescribed stages has prevented many disputes, through diplomatic negotiations, from ever being filed with the WTO. The ongoing WTO negotiations through Ministerial Conferences and member initiatives to eliminate or reduce trade barriers in all trade activities and sectors likewise play a positive role in enhancing trade. The approval of China in 2000 and Russia in 2011 as WTO members were major developments because these memberships required both countries to adopt thousands of new laws and regulations as conditions. The fact that virtually all countries are either WTO members or are in the membership application process means almost all global trade now operates subject to WTO rules and agreements. Finally, the overall record of DSU decision compliance is very high.

From a negative perspective, the DSU process has received sharp criticisms going well beyond the Appellate Body.[92] These include a lack of

[92] Helpful WTO criticism sources include Jeffrey Kucik & Sergio Puig, *Do International Dispute Bodies Overreach? Reassessing World Trade Organization Dispute Ruling*, 66 INT'L STUD.Q. (Oct. 31, 2022); Marco Bronckers, *Trade Conflicts: whither the WTO?*, 47 LEGAL ISSUES OF ECON. INTERROGATION 221 (2020), at 221-23; Steve Charnovitz, *A WTO If You Can Keep It*, GEO. WASH. UNIV. L. SCH. RSCH. PAPER NO. 2019-46 1, 8-9 (2019) for helpful WTO

meaningful regard in the DSU process for national law and international treaty environmental protections despite GATT Article XX because most environmental protection arguments have failed at the panel and Appellate Body stages when they restrict trade. Another criticism includes the absence of any labor rules protecting workers from abusive working conditions in the production of export-related goods, and increasingly services. The DSU process does not allow direct non-government party participation, requiring private actors to rely on their own national governments to make the non-government entity arguments even when private party relations with their governments are hostile. A lack of transparency created strong attacks because the DSU imposes confidentiality on its entire process until panel and Appellate Body decisions become final. Developing countries have also long viewed the DSU with suspicion, because the process often requires expensive legal, economic, science, and industry experts to bring or defend cases, even though DSU developing country participants have fared reasonably well with their case results.

Another justified criticism of the WTO, shared by this author in regards the relative handful of mega-cases that last for decades, involve many members as direct and third-party participants, and do not seem ever to attain permanent compliance.[93] These cases, almost always characterized by retaliatory remedies fighting both inside and outside the WTO process, often involve the two largest WTO members – the U.S. and the EU (operating as a single member representing the EU country bloc). Examples include the above-mentioned *Bananas*,[94] *Meat Hormones*, and *Aircraft*

criticism, available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3498574; and *especially* former Appellate Body U.S. Member James Bacchus, *The World Trade Organization: Myths versus Reality*, CATO INSTITUTE (Sept. 26, 2023), https://www.cato.org/publications/world-trade-organization-myths-versus-reality, which provides an incisive WTO criticisms point-counterpoint analysis.

[93] *See* Marc D. Froese, *Does Trade Retaliation Work? How Members Learned Effective Retaliation at the WTO and Applied those Strategies to the Trump Tariffs*, SSRN 5-6 (July 8, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4157936. Although Professor Froese's intent is not to criticize these cases, he describes them in significant chronological detail leaving no doubt about their effects.

[94] Although technically the *Bananas* case did not involve the U.S. as a claimant, U.S. companies owned much of the banana production and commercialization in the WTO member countries which did file their complaint against the EU. With the private sector financial support, first at the GATT and then transferring into the WTO when it began. Professor Bhala provides an in-depth discussion of the case, which continued for years past his publication. Raj Bhala, *The Bananas War*, 31 MCGEORGE L. REV. 839, 843-45 (2000).

Subsidies cases. Another classic mega case is the U.S.-Canada *Softwood Lumber* anti-dumping and subsidies dispute which began well over twenty years ago at the WTO, thirteen years before that at the GATT and through the North American Free Trade Agreement (NAFTA) dispute resolution process; and continues as a conflict over how the U.S. should calculate WTO-approved tariffs on subsidized and dumped lumber.[95] After losing the *Meat Hormones* case, the EU still refused to allow these product imports, entitling the U.S. and Canada to impose offsetting tariffs on various EU products, with further disputes lasting years over the application of these tariffs and their amounts. Fortunately for the WTO, such cases are the exception, and the Appellate Body crisis has frozen these, along with some others, in place as parties continue assessing other appeal and trade remedy options.

Perhaps the biggest future challenge to the WTO dispute settlement process will come from the increasing number of alternatives available to countries for resolving trade disputes through provisions contained in multilateral and bilateral trade agreements. Some are discussed below.

II. NON-WTO TRADE AGREEMENT DISPUTE SETTLEMENT MEASURES

Although many still consider the DSU the world's primary legal forum for settling trade disputes, most other multilateral and bilateral trade agreements contain substantially similar or viable alternative dispute settlement provisions. So far, about twenty-five percent of the WTO member countries have agreed to use arbitration as an alternative WTO appeals mechanism through the MPIA or otherwise, but if the United States and other large trading nations like India do not participate, non-MPIA member disputes have no binding finality.

This does not mean, however, that countries lack viable trade dispute settlement mechanisms outside the WTO. The multilateral and bilateral trade agreements described below, which collectively involve most WTO member countries as parties, all have dispute settlement provisions substantially similar or legally equivalent to the DSU for the same dispute types including, in almost all cases, single panel binding arbitration by

[95] *See* World Trade Organization, *Index of Disputes Issues,* WTO.ORG, https://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm (last visited Jan. 11, 2024) (for the list of the disputes between the U.S. and Canada). *See also* Olivier Rancourt & Gabriel Giguère, *Canadian Softwood Lumber: A Costly Dispute for Consumers and Companie*s, MONTREAL ECON. INSTITUTE (June 30, 2022) https://www.iedm.org/canadian-softwood-lumber-a-costly-dispute-for-consumers-and-companies/ (for a dispute of chronology).

arbitrators required to have the same high qualifications as WTO panel members and remedies arbitrators.

These other agreement dispute settlement measures have not yet been much utilized except for those within the EU and North American Free Trade Agreement (NAFTA) countries because of WTO member preference for the DSU; and also, because some key agreements are new. That said, these agreements can nonetheless be used in lieu of the DSU by their respective parties in disputes against each other. Moreover, some are starting to be. Rule XXIV of the 1994 GATT Agreement expressly recognizes the validity of these agreements, if they contain the same WTO trade liberalization objectives and do not result in more restrictive trade.[96] As of August 2023, the WTO reports 360 regional trade agreements in force.[97] Some are discussed below.

A. U.S. Trade Agreement Dispute Settlement Measures

Despite its refusal to resolve the WTO Appellate Body situation, the U.S. has numerous multilateral and bilateral trade agreements with detailed dispute settlement measures. Since 2002, U.S. law has required these agreements to include trade-related environmental and labor protections, a major departure from the WTO.

i. NAFTA & USMCA Dispute Resolution

The NAFTA[98] and its United States, Mexico, and Canada Agreement (USMCA)[99] successor, have comprehensive trade dispute settlement procedures similar in certain aspects to those in the DSU. The NAFTA consultation and panel stages mirrored those at the WTO, although the NAFTA had no Appellate Body. Its panel decisions were final, which went to the losing party government for implementation. These Agreements give the three country parties the option of using their own processes or the DSU, and once a complaining party chooses the forum, it becomes

---

[96] General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 194 art. XXIII.

[97] World Trade Organization, *Regional Trade Agreements Database,* https://rtais.wto.org/UI/PublicMaintainRTAHome.aspx (last updated Jan. 12, 2024).

[98] North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M 289.

[99] The United States-Mexico-Canada Agreement, Oct.1, 2018, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between.

exclusive to the dispute.[100] Both Agreements cite multiple WTO Agreements as sources to be used in interpreting the former, indicating party reliance on the WTO for interpreting and applying NAFTA and USMCA terms. NAFTA Chapter 11 encompassed investor-state disputes; Chapter 14 encompassed financial disputes; Chapter 19 encompassed anti-dumping and subsidies cases; and Chapter 20 covered most other NAFTA areas. The NAFTA dispute processes received and resolved quite a few different cases pursuant to all these Chapters. Various *Softwood Lumber* case aspects have been presented to NAFTA Chapter 19 for resolution. The NAFTA provisions still apply to complaints filed before the USMCA 2020 effective date, but parties have already begun filing cases under USMCA rules and procedures.[101]

The NAFTA broke the new U.S. trade agreement ground by including labor and environmental dispute provisions requiring each party to enforce its own labor and environmental laws. Mexico had to enact modern environmental laws to get NAFTA approval. In 2002, the U.S. Congress enacted a law requiring the inclusion of labor and environmental protection provisions in all future U.S. trade agreements.[102]

USMCA Chapter 31 essentially incorporates these multiple NAFTA Chapters for the purpose of providing rules and procedures for most USMCA disputes except for Chapter 11 investor disputes. The USMCA eliminates such investor disputes between Canada and U.S. parties altogether; and substantially limits them for disputes between U.S. and Mexican parties to direct expropriation cases. Mexican and Canadian investors' private party disputes fall outside the scope of USMCA, although both Mexico and Canada are parties to the CPTPP, which does allow them.[103] USMCA Chapter 31 has labor and environmental dispute provisions subject to some added consultation requirements. USMCA

---

[100] David A. Gantz, *Dispute Settlement Under the NAFTA and the WTO: Choice of Forum Opportunities and Risks for the NAFTA Parties*, 14 AM. U. INT'L L. REV. 1025, 1026-27 (1999).

[101] To review NAFTA disputes and their outcomes, as well as disputes filed under the USMCA, *see* The Secretariat, *Publications,* CAN-MEX-USA-SEC.ORG, https://can-mex-usa-sec.org/secretariat/report-rapport-reporte.aspx?lang=eng (last visited Jan. 14, 2023) and SCOTT SINCLAIR, THE RISE AND DEMISE OF NAFTA CHAPTER 11, 28-61 (2021) for a list of NAFTA Chapter 11 disputes.

[102] 19. U.S.C. §§ 3802(a)(5) and 3802(a)(6).

[103] For USMCA dispute resolutions and overall Agreement explanations, *see* M. ANGELES VILLARREAL, THE UNITED STATES-MEXICO-CANADA AGREEMENT (USMCA) 32 (2023); Nina M. Hart, *Enforcing International Trade Obligations in USMCA: The State-State Dispute Settlement Mechanism*, (Jan. 3, 2020), chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://crsreports.congress.gov/product/pdf/IF/IF11399.

Chapter 27 requires each party to have modern anti-corruption laws and enforce them.[104]

The USCMA has so far seen three disputes decided by panels. One favored the U.S. challenge to Canada's dairy import restrictions;[105] another favored Canada and Mexico against the U.S. challenging automotive content requirements;[106] and a third generally favored Canada's challenge to U.S. solar product safeguards applied to Canada.[107] Although the automotive report does not mention the WTO, the dairy and solar reports make several WTO references affecting the decisions. A panel was also recently formed to hear a U.S. dispute challenging Mexico's ban on genetically modified corn products.[108] In addition, the U.S. has requested another panel for a dispute over Canada's alleged failure to comply with the 2022 dairy products decision.[109]

The USMCA has generated another series of U.S. complaints against Mexico arising under Chapter 31 Annex A labor provisions, which allow rapid response investigations of specific employer sites to see whether Mexico is enforcing its labor laws to protect workers.[110] To date, all complaints have been successfully resolved, with several resulting in

---

[104] *See also* The United States-Mexico-Canada Agreement, art. 27.2.

[105] ELBIO ROSSELLI ET.AL., CANADA – DAIRY TRQ ALLOCATION MEASURES (CDA-USA-2021-31-010) 17-8 (2021), https://ustr.gov/sites/default/files/enforcement/USMCA/Canada%20Dairy%20TRQ%20Final%20Panel%20Report.pdf.

[106] ELBIO ROSSELLI ET.AL., UNITED STATES – AUTOMOTIVE RULES OF ORIGIN (USA-MEX-CDA-2022-31-01) 10-3 (2022), https://ustr.gov/sites/default/files/enforcement/FTA/USMCA%2031/USMCAAutomotive%20ROO.pdf.

[107] MARIO MATUS BAEZA ET. AL., CRYSTALLINE SILICON PHOTOVOLTAIC CELLS SAFEGUARD MEASURE (USA-CDA-2021-31-01) 4 (2022), https://ustr.gov/sites/default/files/enforcement/USMCA/Chapter%2031%20Disputes/Final%20Report%20USMCA%20solar.pdf.

[108] Office of the United States Trade Representative, *WHAT THEY ARE SAYING: U.S. Establishes USMCA Dispute Panel on Mexico's Agricultural Biotechnology Measures*, (Aug. 21, 2023), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2023/august/what-they-are-saying-us-establishes-usmca-dispute-panel-mexicos-agricultural-biotechnology-measures..

[109] Office of the United States Trade Representative*, United States Establishes Second USMCA Dispute Panel on Canadian Dairy Tariff-Rate Quota Policies*, (Jan. 31, 2023), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2023/january/united-states-establishes-second-usmca-dispute-panel-canadian-dairy-tariff-rate-quota-policies.

[110] *See* Office of the United States Trade Representative, *Chapter 31 Annex A; Facility-Specific Rapid-Response Labor Mechanism*, USTR.GOV, https://ustr.gov/issue-areas/enforcement/dispute-settlement-proceedings/fta-dispute-settlement/usmca/chapter-31-annex-facility-specific-rapid-response-labor-mechanism (last visited Jan. 21, 2024) for a list of complaints from the U.S. against Mexico.

remediation plans. These complaints fall outside WTO jurisdiction, which hears no comparable labor cases.

ii. Other U.S. Trade Agreement Dispute Settlement Provisions

The U.S. presently has separate multilateral and bilateral free trade agreements involving 20 other countries as parties.[111] In addition, the U.S. has initiated trade agreement negotiations with the EU, Japan, Kenya, and the UK. These agreements all contain dispute settlement provisions similar in various respects to those in the USMCA. Although they do not incorporate WTO rules or decisions into their own dispute settlement provisions, they mirror WTO substantive rules and binding procedures closely in the topics they cover. Unless the parties to these agreements choose to do so, there is no reason for them to submit disputes to the WTO in lieu of using U.S. trade agreement alternatives.

Interestingly, the U.S. Trade Representative cites no disputes between the U.S. and any of its bilateral or multilateral trade agreement partners, neither at the WTO nor under these various U.S. agreements since the latter took effect except for the USMCA.[112] This strongly suggests that the trade agreements themselves have strong dispute-prevention effects.

One finds an example of such a situation in the 2020 U.S.-China Economic and Trade Phase One Agreement,[113] which was not intended to be a free trade agreement, but rather a means of avoiding an unrestricted trade war between the two countries. The Phase One Agreement reflected

---

[111] These include bilateral agreements with Australia, Bahrain, Chile, Colombia, Israel, Jordan, Korea, Morocco, Oman, Panama, Peru, Singapore; the USMCA with Mexico and Canada; and the CAFTA-DR with Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua. Office of the United States Trade Representative, *Trade Agreements*, USTR.GOV, https://ustr.gov/trade-agreements (last visited Jan. 21, 2024).

[112] LAURA BUFFO ET AL., THE OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, THE 2023 TRADE POLICY AGENDA AND 2022 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM 42 (2023).

[113] Economic and Trade Agreement Between the Government of the United States of America and the Government of the People's Republic of China (Jan. 15, 2020), https://ustr.gov/countries-regions/china-mongolia-taiwan/peoples-republic-china/phase-one-trade-agreement/text; *See also* Nina M. Hart et al., *Section 301 Tariffs on Goods from China: International and Domestic Legal Challenges*, CONG. RSCH. SIDEBAR (2021); Daniel C.K. Chow, *A New and Controversial Approach to Dispute Resolution Under the U.S.-China Trade Agreement of 2020*, 26 HARV. NEGOT. L. REV. 31 (2020); and Daniel C.K. Chow, *A New and Controversial Approach to Dispute Resolution Under the U.S.-China Trade Agreement of 2020*, 26 HARV. NEGOT. L. REV. 31, 15-6 (2020) for more background information about Phase One.

China's commitment to purchase more U.S. goods in 2020 and 2021, as well as to make certain reforms in its technology, intellectual property, and other sectors in return for a U.S. commitment to refrain from adding tariffs or increasing their rates. Most experts deem the Phase One Agreement a failure because China has never come close to meeting its U.S. import purchasing commitments and the U.S. has not notably lowered tariffs, although the parties have not opted to initiate any specific dispute.[114]

The U.S.-China Phase One Agreement also contains specific dispute settlement provisions enabling both countries, if they choose, to bypass the WTO, where they currently have relatively numerous and serious DSU complaints pending against each other (with a growing number on hold because of the Appellate Body situation), in favor of Phase One resolution. China is an eager MPIA party, whereas the U.S. refuses to become one, and so far, neither China nor the U.S. have sought to apply Phase One Agreement resolution procedures to their outstanding WTO disputes. Chapter 7 of the Phase One Agreement requires multiple levels of mandatory consultations with specified deadlines at each level. It allows a complaining party to impose remedies unilaterally if these consultations fail to resolve the dispute, with either country retaining the right to withdraw from the Agreement if the withdrawing country finds the other has acted in bad faith. By effectively eliminating the need for the countries to utilize the WTO, Chapter 7 raises serious questions about the DSU's importance if other countries choose to adopt similar provisions in their own trade agreements, as a number have.

B. EU Trade Agreement Dispute Settlement Measures

Like the U.S., the EU has a long history of incorporating trade dispute settlement measures into its various trade and economic agreements involving its own members and other countries.

i. Intra-EU Dispute Settlement

The various EU trade and integration agreements applicable to its

---

[114] *Reflections on the Phase One*, CHINA BUS. REV. (Jan. 20, 2022), https://www.chinabusinessreview.com/reflections-on-the-phase-one-agreement/; Cathalijne Adams, *Biden Administration May Impose Further Tariffs on Chinese Imports*, ALL. AM. MFG. (Apr. 17, 2023), https://www.americanmanufacturing.org/blog/biden-administration-may-impose-further-tariffs-on-chinese-imports/.

twenty-seven EU member countries plus several other European countries,[115] which have agreed to be bound by these agreements, apply a binding judicial dispute resolution process in the European Court of Justice (ECJ). This Court has the power to declare, without effect, any national laws which conflict with EU agreement obligations.[116] In addition, the ECJ will apply WTO rules to intra-EU disputes to the extent such rules in turn affect the specific disputes themselves, although WTO rules are not per se binding on ECJ decisions.[117] As noted above, for WTO and other trade agreement purposes, the EU functions as a single party on behalf of all EU members.

ii. EU Multilateral and Bilateral Trade Agreements Dispute Settlement

The EU has multiple multilateral and bilateral trade agreements with non-European country blocs, either in effect or signed and awaiting ratification.[118] Multilateral agreements in effect, or with negotiations concluded and final approval pending, include the EU Colombia-Peru-Ecuador, Central America (six countries), CARIFORUM (fourteen Caribbean countries as parties, one pending), Western Balkans (five countries), Eastern and Southern Africa (eleven countries), West Africa (two countries as parties, fourteen more pending), Southern African Development Community six countries), and East African Community (six countries pending) Agreements, among others. The thirty-two EU bilateral trade agreements in effect with countries not party to one of the multilateral agreements include those with major trade nations such as Canada, Japan, Mexico, and Chile. The EU and the four primary MERCOSUR countries

---

[115] These include Norway, Switzerland, Iceland, and Lichtenstein.

[116] For more information on the Court of Justice of the European Union *see Court of Justice of the European Union (CJEU)*, EUR. UNION, https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/search-all-eu-institutions-and-bodies/court-justice-european-union-cjeu_en (last visited Jan. 23, 2004); *see generally* EUROPEAN UNION LAW (Catherine Barnard & Steve Peers eds., 3rd ed. 2020); RALPH H. FOLSOM, EUROPEAN UNION LAW INCLUDING BREXIT AND BEYOND IN A NUTSHELL (10th ed. 2021).

[117] E.g. Case C-66/18, European Comm'n v. Hungary E.C.R. (Oct. 6, 2020) (applying WTO GATS national treatment rules); Sven De Knop et al., *Importing into the EU: Overview*, THOMPSON REUTERS (Mar. 1, 2023), https://uk.practicallaw.thomsonreuters.com/w-010-1104?comp=pluk&contextData=(sc.Default)&transitionType=Default&firstPage=true&OWSessionId=NA&skipAnonymous=true.

[118] *See* European Commission, *Trade Agreements, EUR. COMM'N,* https://ec.europa.eu/info/business-economy-euro/trade-non-eu-countries/trade-agreements_en (last visited Jan. 22, 2024) for a list of trade agreements.

recently concluded negotiations of the EU's newest proposed multilateral agreement, which awaits signature and ratification. The EU-MERCOSUR Agreement allows disputes by parties against each other, but not investor disputes against states.[119] It expressly incorporates WTO rules and decisions into its dispute resolution chapter.[120]

All the above EU agreements contain detailed dispute settlement provisions involving consultations, mediation, binding arbitration panels, and exclusive forum clauses. When parties to a dispute are WTO members (almost always the case), panels apply WTO decisions in similar topic disputes to maintain global trade law consistency. The agreements also incorporate the various WTO agreements and rules as seen in the EU-MERCOSUR Agreement.

C. Other Multilateral Trade Agreement Dispute Settlement Measures

Multilateral trade agreements not involving the U.S. or the EU as a party also reflect strong dispute settlement examples. Here are select examples.

i. Comprehensive and Progressive Trans-Pacific Partnership (CPTPP) Agreement Dispute Settlement Measures

The December 2018 Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)[121] resulted from initial Trans-Pacific Partnership (TPP) negotiations initiated by President Obama. President Trump withdrew the U.S. from these negotiations in part because he disagreed with the proposed dispute settlement provisions. The eleven other countries nonetheless continued negotiations and created the CPTPP, one of the world's largest free trade areas based on total member GDP.[122] The UK

[119] EU-Mercosur Trade Association Agreement, Arg.-Braz.-Eur. Union- Para.-Uru., June 28, 2019, XXX, art. 2, § 3-6.

[120] *Id.* art. 11 § 2.

[121] Comprehensive and Progressive Agreement for Trans-Pacific Partnership, art. 28.12.3, Mar. 8, 2018, Off. U.S. Trade Representative, *TPP Full Text,* https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text (date last visited Jan. 22, 2023) [hereinafter CPTPP].

[122] *Id.* The countries that are a part of the agreement are Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam.

and Taiwan have applied to join and will likely be accepted. South Korea has expressed its intent to join and will likely do so relatively soon. China has also applied to join, but some CPTPP members strongly oppose this because China's trade laws and practices, while meeting WTO requirements, fall well short of CPTPP member country open government and economy requirements.

CPTPP Chapter 28 has comprehensive dispute settlement provisions comparable to those in the above-mentioned EU and U.S. agreements, with consultation and binding arbitration panels and no appellate review. Only member states, and not private parties, may use these provisions. As in most other agreements, the CPTPP incorporates WTO agreements, legal principles, and DSU decisions.[123] The CPTPP has comprehensive Labour (Chapter 19), Environmental (Chapter 20), and Anti-Corruption (Chapter 26.C) provisions. The CPTPP applies Chapter 28 dispute to these other Chapters. The U.S. had insisted on these provisions during Obama Administration negotiations, and they remain despite U.S. withdrawal.

The CPTPP has seen one significant Chapter 28 dispute resolved to date, finalized in September 2023. It involved a complaint filed by New Zealand against Canada over the latter's dairy products import restrictions. A divided 2-1 arbitral panel based much of its decision on the WTO Import Licensing Procedures Agreement in finding some Canadian restrictions compliant and others noncompliant with the CPTPP.[124] Both countries seem okay with the results.[125] If the UK and Korea join the CPTPP, its ample dispute settlement reach will be even broader, and some have suggested it as a viable WTO dispute settlement substitute.[126] If China succeeds in joining, the CPTPP dispute resolution process could become a game changer.

---

[123] CPTPP, *supra* note 121, art. 28.12.3.

[124] JENNIFER HILLMAN ET AL., CANADA – DAIRY TARIFF RATE QUOTA ALLOCATION MEASURES (CDA-NZ-2022-28-01) (Sept. 5, 2023) art. X. §§ 201-05.

[125] Nathan Eastwood, Alexis Martinez & Philip Kim, *CPTPP Canada – Dairy Dispute: Early Lessons for Governments And Investors*, WATSON FARLEY & WILLIAMS (June 26, 2023), https://www.wfw.com/articles/cptpp-canada-dairy-dispute-early-lessons-for-governments-and-investors/; *Canada and New Zealand Both Claim Victory in CPTPP Dairy Dispute,* ASIA PAC. FOUND. CANADA, (Sept. 8, 2023) https://www.asiapacific.ca/asia-watch/canada-and-new-zealand-both-claim-victory-cptpp dairy#:~:text=Following%20the%20verdict%2C%20Wellington%20claimed,a%20clear%20victory%20for%20Canada.%E2%80%9D.

[126]Natalia Gallardo-Salazar & Jaime Tijmes-IHL, *The Pacific Alliance and the CPTPP as Alternatives to WTO Dispute Settlement*, 86 REVISTA DE LA FACULTAD DE DERECHO 39 (2021).

ii. Regional Comprehensive Economic Partnership (RCEP)[127]

The December 2020 RCEP Agreement encompasses most East and Southeast Asian plus Oceana countries.[128] The RCEP is a comprehensive trade agreement focused primarily on tariff and non-tariff barrier removal, including the adoption of common rules of origin for all fifteen countries. It entered into force in October 2021, when the sixth member ratified it. The RCEP supplants most trade agreement aspects, including dispute settlement, of the Association of Southeast Asian Nations (ASEAN), established in 1967, as Asia's first significant regional trade organization by incorporating them into the RCEP with the five non-ASEAN countries.[129]

RCEP Chapter 19 contains dispute settlement provisions similar to the above agreements with consultation, mediation, binding arbitration panels without appeals, high arbitrator qualifications, exclusive forum clauses, and incorporation of WTO agreements, rules, and decisions. The RCEP has no dispute settlement history to date, but because China has strongly embraced Chapter 19, it is assumed all parties with China disputes will use it.[130]

iii. African Continental Free Trade Agreement (AfCFTA)[131]

In 2018, most African nations signed the AfCFTA, and when it became

---

[127] *Regional Comprehensive Economic Partnership Agreement (RCEP)*, AUSTL. GOV'T DEP'T OF FOREIGN AFFAIRS AND TRADE, https://www.dfat.gov.au/trade/agreements/in-force/rcep.

[128] Australia, Brunei, Burma (Myanmar), Cambodia, China, Indonesia, Japan, Laos, Malaysia, New Zealand, the Philippines, Singapore, South Korea, Thailand, and Vietnam. For good RCEP explanations, *see* Kate Whiting, *An Expert Explains: What Is RCEP, the World's Biggest Trade Deal?* WORLD ECON. F. (May 18, 2021) https://www.weforum.org/agenda/2021/05/rcep-world-biggest-trade-deal/; *Short Overview of the Regional Comprehensive Economic Partnership (RCEP*), EU EXTERNAL RELATIONS POLICY DEP'T REPORT TO EUROPEAN PARLIAMENT (Feb. 2021).

[129] For a good ASEAN description, *see What Is ASEAN?*, COUNCIL ON FOREIGN RELS. (Sep. 18, 2023), https://www.cfr.org/backgrounder/what-asean.

[130] Ulfah Aulia, *Giving a Chance to the RCEP's Dispute Settlement Mechanism,* ECON. RES. INST. FOR ASEAN & EAST ASIA (Mar. 21, 2023), https://www.eria.org/news-and-views/giving-a-chance-to-the-rceps-dispute-settlement-mechanism/; Yvette Foo, *Dispute Settlement under the Regional Comprehensive Economic Partnership: Part 1: An Overview of Chapter 19*, CTR. FOR INT'L LAW, NAT'L UNIV. SING. (2022), https://cil.nus.edu.sg/blogs/dispute-settlement-under-the-regional-comprehensive-economic-partnership-part-1-an-overview-of-chapter-19-by-yvette-foo/.

[131]Agreement Establishing The African Continental Free Trade Area, Mar. 21, 2018; *The African Continental Free Trade Area*, AFR. UNION (Jan. 15, 2024), https://afcfta.au.int/en.
and https://afcfta.au.int/en

operative in January 2021, all fifty-five African continent countries except Eritrea were signatories; thirty-eight had ratified it, with another ratifying since that time.[132] The AfCFTA is by far the world's largest regional trade organization and is second in size only to the WTO globally in size. This Agreement, which encompasses most of the same trade sectors as the WTO, also follows the WTO organizationally and functionally in most key respects. The Protocol on Rules and Procedures on the Settlement of Disputes has adopted virtually verbatim the DSU stages, bodies, and procedures including consultations, arbitration panels, arbitrator qualifications, a seven-member Appellate Body, a DSB comprised of all AfCFTA members, remedies, and deadlines.[133] In short, this is akin to a WTO for Africa. Although Africa has eight other operative regional multilateral trade agreements (seen in the above EU-Africa agreements) not discussed here, one major AfCFTA goal is to make trade conducted within and among these entities compatible with what the AfCFTA is created to do in terms of eliminating, reducing and phasing out tariffs, liberalizing trade in all sectors, and effectively resolving disputes. As with the RCEP, the AfCFTA has no dispute history, so it is too soon to determine how well the AfCFTA will function generally and regarding dispute settlements.[134] The legal framework nonetheless looks solid.

iv. MERCOSUR

The 1991 Treaty of Asunción[135] signed by Argentina, Brazil, Argentina, and Uruguay, created a common market for trade among the countries. The Treaty called for the parties to create a dispute settlement component by the end of 1994, which was done with a process limited to consultations among the members to determine solutions. The Treaty Protocols of Brasilia (1993), Ouro Preto (1995), and ultimately Olivos,

---

[132] *About The AfCFTA*, AFR. UNION, https://au-afcfta.org/about/.

[133] Paul Baker, Pablo Quiles & Smita Bheenick, *Mauritius: Mauritius and The AfCFTA Part 3: Dispute Settlement*, INT'L ECON. (Oct. 4, 2023), https://www.mondaq.com/international-trade--investment/1373790/mauritius-and-the-afcfta-part-3-dispute-settlement.

[134] For a good analysis of the protocol, *see* Francis Ojok, *The Efficiency of the AfCFTA Dispute Resolution Mechanism: An In-Depth Analysis*, KLUWER ARB. BLOG (Jul. 11, 2023), https://arbitrationblog.kluwerarbitration.com/2023/07/11/the-efficiency-of-the-afcfta-dispute-resolution-mechanism-an-in-depth-analysis/.

[135] Mercosur Free Trade Agreement, Mar. 26, 1991.

which entered into effect in 2004 and governs current dispute settlement,[136] created a comprehensive trade dispute settlement process with multiple stages including forum choice, consultation, referral to the Mercosur country representatives for review, and recommended settlement of the dispute, an initial ad hoc arbitration panel and a permanent arbitral panel empowered to review and modify ad hoc panel decisions, all subject to fixed deadlines. The dispute settlement provisions allow disputes between party states, but not private investor disputes against states.

This process seems more complex than most, but it nonetheless captures the essence of what the dispute measures in other agreements do in terms of providing mechanisms for resolving disputes relatively quickly and fairly. Its use has been relatively limited, however, with only eighteen reported arbitration awards since 1999, and the most recent award reported in 2012.[137] Experts cite political and cultural reasons why the signatory countries have not utilized the process more frequently.[138] Perhaps because MERCOSUR predates the WTO, it does not reference WTO rules or DSU procedures.[139]

D. Select Non-US and Non-EU Bilateral Agreement Dispute Settlement Examples

A review of various bilateral trade agreements not involving the U.S. and EU as parties indicates a common dispute settlement mechanisms pattern in all of them tending to parallel mechanisms in the other agreements described above. Below are representative examples.

i. The 2018 Chile-Uruguay Free Trade Agreement[140]

---

[136]Protocol of Olivos, Feb. 18, 2002; Raúl Emilio Vinuesa, *Enforcement of Mercosur Arbitration Awards within the Domestic Legal Orders of Domestic States*, 40 TEX. INT. L.J. 425 (2004-2005).

[137] *Olivos Protocol for the settlement of disputes in MERCOSUR, Permanent Court of Review*, MERCOSUR, https://www.mercosur.int/quienes-somos/solucion-controversias/laudos/ (last visited Jan. 24, 2024).

[138] Andressa Oliveira Soares, Marco André Germanò & Marco Antônio Zago de Castilho, *Assessing Mercosur's Dispute Settlement System: Comparative Analysis And Suggestions For Improvement*, GEO. UNIV. TRADELAB AND UNIV. OF SAO PAULO (July 2021), https://georgetown.app.box.com/s/yesfwimvdgdzhgc2a5l4ou9o5izuuaid.

[139] MERCOSUR countries can and occasionally do file WTO complaints against each other. *Id*. at 29.

[140]Free Trade Agreement, CL-UY, Oct. 4, 2016.

This Agreement is exceptionally comprehensive, encompassing trade in virtually all sectors. It includes environmental, labor, and anti-corruption chapters. The Chapter 18 dispute settlement stages include consultation, mediation, a single binding arbitration panel, and binding remedies arbitration, all with fixed deadlines. Although Chapter 18 does not explicitly reference the WTO (OMC in Spanish), the FTA extensively references and incorporates most of the WTO Agreements as interpretative guides and requirements. Chile has become a world leader in the number of bilateral and multilateral free trade agreements it is party to, with most bilaterals equally comprehensive.

ii. The 2015 China-Australia Free Trade Agreement[141]

This Agreement substantially parallels and incorporates by reference most of the various WTO agreements and covers most trade sectors, as well as investments similar to the WTO TRIMS Agreement. Chapter 9 authorizes investment disputes between private parties and the state in any established international investor-state dispute forum, or by mutual agreement through ad hoc arbitration. Chapter 15 contains the trade dispute settlement provisions, which include single forum selection, application of WTO decisions, consultation, voluntary mediation, and a single binding arbitration panel. Chapter 15 also has a unique feature which includes a section describing model arbitration rules and procedures for the trade dispute panels. Because China is aggressively negotiating bilateral and multilateral free trade agreements with many other countries around the world, this particular agreement serves as a possible model for any others based on international dispute settlement standards.

iii. The 1997 Canada-Israel Free Trade Agreement (Updated in 2018)[142]

These two countries entered into one of the earlier bilateral free trade agreements soon after Israel had concluded one with the U.S. The initial 1997 Agreement focused primarily on the trade in goods and incorporated much of the 1994 GATT provisions. It has a dispute settlement chapter similar to most of the ones above with consultation, mediation, single binding arbitration panels, fixed procedural deadlines, and single forum

[141]The China-Australia Free Trade Agreement, CN-AU, 2015.
[142]Canada-Israel Free Trade Agreement, CN-IL, Jan. 1, 1997.

requirements. The parties updated this Agreement in 2018 by adding anti-corruption, environmental, and labor protection provisions. Chapter 19 of this Agreement expanded the 1997 dispute settlement provisions with detailed procedural rules for binding arbitration panels while leaving intact the consultation, mediation, and single binding arbitration panel stages, along with the single forum requirement. The 2018 Agreement differs somewhat subtly from others discussed above by clauses favoring the Agreement over conflicting WTO interpretations in some situations.[143]

iv. The 2011 India-Japan Comprehensive Economic Partnership Agreement[144]

This Agreement incorporates the primary WTO agreements and terms to promote liberalized trade in most sectors. It involves two countries with economies that tend to complement, rather than directly compete with each other. The Agreement has anti-corruption and environmental protection articles like other such agreements but does not include any labor provisions. It also has a comprehensive investment protection component comparable to the WTO TRIMS Agreement and allows private parties to bring investor disputes against a state party in an international arbitration forum. Chapter 14 of the Agreement contains a comprehensive dispute settlement system with consultation, mediation, binding single arbitration panel stages, and an exclusive forum clause.

v. The 2021 UK Post-Brexit Trade Continuity Agreements

Since leaving the EU at the end of 2020, the UK has been actively negotiating and entering into trade agreements as an independent country party. These include:

- The April 2021 UK-EU Trade and Cooperation Agreement,[145] which grants both parties the same trade rights in all sectors they have under the WTO; incorporates WTO case law; has detailed labor and

[143] A Canada-Israel Free Trade Agreement art. 19.3, 20.6, annex 19.2, CN-IL, Jan. 1, 1997.

[144] Comprehensive Economic Partnership Agreement Between Japan and the Republic of India, JP-IN, Feb. 16, 2011.

[145] Trade and Cooperation Agreement between the United Kingdom of Great Britain and Northern Ireland, of the one part, and the European Union and the European Atomic Energy Community, of the other part, Apr. 2021.

environmental articles; and contains detailed dispute settlement rules and procedures in Part 6 plus Annexes 48 and 49 of the Agreement, including exclusive forum clauses, consultation, and single binding arbitration panels.

- Trade continuity agreements with various countries, allowing the UK to trade unilaterally as a non-EU country under the same conditions, including dispute settlement rules, as it had under the EU while negotiating comprehensive agreements separately, although, except for the UK-Canada Agreement which took effect in April 2021, most are still in the negotiation stage.

Even before its EU withdrawal, after it became apparent in 2019 that withdrawal would occur, the UK began negotiating multilateral and bilateral trade agreements on a provisional basis with most parties to then-existing EU trade agreements, in essence, subject to the same terms and conditions. These agreements are now concluded or in their finalization phase.[146]

III. THE INTERNATIONAL TRADE LAW-INTERNATIONAL INVESTMENT LAW RELATIONSHIP

A detailed international investment law discussion exceeds the scope of this Article, but briefly describing the international trade-international investment legal relationship is helpful to better understand how their dispute resolution mechanisms do and do not intersect.

The WTO TRIMS Agreement applies MFN, national treatment, and other key WTO rules to protect international investors. The TRIMS Agreement has two major deficiencies, however, because it is limited to trade in goods and adds little to the other WTO agreements which already prohibit various import and export restrictions. Additionally, it does not allow private investor DSU complaints. The TRIMS Agreement mainly benefits trade by barring discriminatory import/export practices. Thus, private investors must use bilateral or other investment treaties (BITs) to enforce their rights.

To date, the United Nations Conference on Trade and Development (UNCTAD) reports 2,831 BITs throughout the world, with 2,221 in

[146] *UK Trade Agreements In Effect*, DEP'T FOR BUS. AND TRADE, DEP'T FOR INT'L TRADE (Nov. 3, 2022), https://www.gov.uk/guidance/uk-trade-agreements-with-non-eu-countries.

force.[147] These BITs also include multilateral treaties such as those Mercosur has with various individual countries and country blocs. Of these totals, 4,430 contain private investor protection provisions, with 368 in force.[148] Those in force usually, although not always, allow private investors from treaty countries to file binding international arbitration claims against the other treaty countries, whenever investors allege unfair and inequitable treatment including violation of national treatment and MFN principles, as well as illegal expropriation. Most countries now have one or more BITs with these kinds of investor protection provisions. Despite facially impressive BIT numbers, however, countries appear to be backing away from them in favor of the newer, multi-faceted agreements described above.[149]

The International Center for Settlement of Investment Disputes (ICSID),[150] an autonomous part of the World Bank located in Washington, D.C., has been a primary forum for arbitrating BIT investor disputes. ICSID has 156 contracting state parties bound to abide by all ICSID arbitration decisions. ICSID has so far received about 900 investor arbitration cases pursuant to BITs and other investor protection treaties. Of those concluded, two-thirds were decided, and the other third were settled or dropped.[151]

A typical BIT example is the 2005 Uruguay-U.S. BIT,[152] ratified in 2007 by the U.S. Congress. It has language common to most BITs in requiring each country party to afford fair and equitable treatment to investors from the other country party based on national treatment, MFN, legal transparency, and international expropriation law principles, among others. It allows investors from one country to seek binding international arbitration of investment disputes against the other country, through ICSID, the United Nations Commission on International Trade Law (UNCITRAL), or any other forum agreed to by the parties.

---

[147] *International Investment Agreements Navigator*, U.N. CONF. ON TRADE AND DEV., https://investmentpolicy.unctad.org/international-investment-agreements.

[148] *Id*.

[149] Emily Osmanski, *Investor-State Dispute Settlement: Is There a Better Alternative?* 43 BROOK. J. INT'L L. 637 (June 1, 2018); Stephen R. Buzdugan, *The Global Governance of FDI and the Non-market Strategies of TNCs: Explaining the "Backlash" Against Bilateral Investment Treaties*, 28 TRANSNAT'L CORP. J. 131 (Sep. 3, 2021).

[150] INT'L CTR. FOR SETTLEMENT OF INV. DISPS., https://icsid.worldbank.org/ (last visited Jan. 24, 2024).

[151] *The ICSID Caseload – Statistics*, INT'L CTR. FOR SETTLEMENT OF INV. DISPS. (Aug. 9, 2023), https://icsid.worldbank.org/resources/publications/icsid-caseload-statistics.

[152] Treaty Between the United States Of America And The Oriental Republic Of Uruguay Concerning The Encouragement And Reciprocal Protection Of Investment, US-UY, Nov. 2005.

The ICSID *Philip Morris Company* tobacco company case against Uruguay, brought pursuant to the Uruguay-Switzerland BIT, illustrates a typical ICSID international investment arbitration process. The company claimed that Uruguay's legally mandated tobacco product labeling requirements violated its investment rights by unfairly imposing a costly new regulatory requirement. The ICSID panel first had to decide if the BIT gave the panel jurisdiction, by determining whether the claimant had followed the steps required by the BIT to initiate arbitration and whether the claimant's tobacco products commercial activity was an investment. The panel determined that Philip Morris met these requirements by (a) attempting to resolve the dispute through conciliation; (b) challenging the requirement's Uruguayan law validity in domestic courts; and (c) presenting sufficient evidence of an investment covered by the BIT.[153] The panel subsequently ruled on the merits in favor of Uruguay in rejecting various Philip Morris fair and equitable treatment, expropriation, trademark, and denial of justice claims (the last one arising from how Uruguayan courts ultimately decided the company's domestic law challenge, although one arbitrator dissented and agreed with Philip Morris on this claim).[154]

The ICSID *Italba* case against Uruguay, also brought pursuant to the Uruguay-U.S. BIT, provides an excellent example of how BIT arbitral panels consider natural person and corporate entity nationalities to determine whether a claimant can meet the BIT investor definition requirement based upon claimant nationality.[155] Here, the claimant was a U.S. corporation (*Italba*) personally owned by an individual Italian citizen who acquired a Uruguayan company to invest in a telecommunications venture. The panel rejected jurisdiction and dismissed the case because there was no evidence that the American corporation ever invested its own funds or other assets in the Uruguayan company. The panel instead found the Uruguayan investment made by the Italian citizen with personal funds outside the BIT scope.

ICSID has worked prodigiously over the past forty years to provide a professional forum for resolving investor-state disputes, achieving a high arbitration award compliance rate. Because many ICSID cases are

---

[153] The jurisdiction decision is reported at Philip Morris Brands Sàrl et al., v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7 (July 2, 2013).

[154] The merits decision is reported at Philip Morris Brands Sàrl et al., v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7 (July 8, 2013).

[155] The panel decision is reported at Italba Corporation v. Oriental Republic of Uruguary, ICSID Case No. ARB/16/9 (Mar. 22, 2019).

conducted subject to strict confidentiality, as with WTO and non-WTO trade settlement disputes, the lack of full ICSID transparency has caused strong criticisms.[156] Similar criticisms have been raised about the inability of non-parties to participate in these cases even when non-party interests may be directly affected. These same criticisms have been made against other treaty-based arbitration forums. However, strong legal protections for investors facilitate and promote liberalized trade, a primary objective of the WTO and non-WTO trade agreements. To the extent national legal barriers to international trade adversely impact international investors and investments protected by BITs and some of the above-described trade agreements, they may offer private parties a viable path to challenge the barriers. One commentator has even suggested that investment arbitration panels should adopt and apply WTO substantive law principles more frequently in their decisions.[157]

One recent CJEU judgment will likely affect multiple BITs between individual EU member countries and their investors. The Court has determined that EU laws disallow intra-EU investment arbitrations between investors and states, consistent with the EU trade laws requiring all trade disputes to be litigated through the legally prescribed EU judicial system.[158]

More recent bilateral and multilateral agreements today include both trade and investment disputes chapters, as noted above. Their dispute settlement mechanisms have the potential to change, perhaps dramatically, how investment disputes get resolved. This is because for the first time in modern trade law history except for NAFTA's Chapter 11, the process has merged trade and investment dispute settlements into one sole agreement. Trade and investment disputes have notably different remedy considerations, in that trade remedies tend to involve tariff changes, while investment remedies usually involve large monetary awards to investor

---

[156] Maria Laura Marceddu & Pietro Ortolani, *What Is Wrong with Investment Arbitration? Evidence from a Set of Behavioural Experiments*, 31 EUR. J. INT'L L. 405 (2020); Gabrielle Kaufmann-Kohler & Michele Potestà, *Why Investment Arbitration and Not Domestic Courts? The Origins of the Modern Investment Dispute Resolution System, Criticism, and Future Outlook* 7, INV. STATE DISP. SETTLEMENT AND NAT'L CTS. (June 30, 2020), https://link.springer.com/chapter/10.1007/978-3-030-44164-7_2.

[157] Siqing Li, Comment, *Convergence of WTO Dispute Settlement and Investor State Arbitration: A Closer Look at Umbrella Clauses*, 19 CHI. J. INT'L L. 189 (Aug. 16, 2018).

[158] *The CJEU Finds Investor-State Arbitration Clause in the Energy Charter Treaty Inapplicable to Intra-EU Disputes*, CLEARLY GOTTLIEB (Sep. 27, 2021), https://www.clearygottlieb.com/news-and-insights/publication-listing/the-cjeu-finds-investor-state-arbitration-clause-in-the-energy-charter-treaty.

prevailing parties.[159] Trade disputes occur between and among governments, albeit often with governments advocating their own citizens' causes to each other; investment disputes almost always involve complaints filed by individual investors against governments. How single agreements covering trade and investment disputes with common dispute resolution procedures will work remains to be seen. The fact that these agreements exist at all raises questions about whether time has rendered irrelevant the WTO TRIMS Agreement's narrow focus and lack of individual investor standing to file disputes against WTO members.

IV. TRADE AND INVESTMENT AGREEMENT DISPUTE SETTLEMENT OBSERVATIONS AND LAWYER TIPS

Although the WTO dispute settlement process faces turmoil over the Appellate Body crisis, and some major non-WTO trade agreements are still too new to have dispute settlement experience, important observations seem nonetheless apparent.

1. The WTO has achieved unparalleled success and acceptance for what it was created to do because every country in the world is now a member or seeks to join. Its mission of expanding and liberalizing trade, as well as developing a coherent and overall effective system for resolving trade disputes, has succeeded despite its critics and generally continues to succeed. The WTO has also, with its various agreements, created international rules applicable to all global trade, including national treatment, MFN, SPS and TBT, trade in services, and most other sectors.

2. The DSU still functions despite no Appellate Body because disputes still settle, although perhaps not as fast or as often. Since the Appellate Body ceased to function in late 2019, the DSU has seen twenty-eight new complaints formally filed[160] and twenty-four panel decisions,[161] which are totals similar to prior years. As in past years, some parties have not appealed their panel decisions, nor submitted them for DSB approval; while others have filed appeals "into the void" to delay indefinitely any final settlement. Yet others are now using the MPIA, and with more likely to do so.

---

[159] Ralph Ossa, Robert W. Staiger & Alan O. Sykes, *Disputes in International Investment and Trade*, NAT'L BUREAU ECON. RES. WORKING PAPER (Apr. 2020).

[160] *Chronological List of Disputes Cases*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm.

[161] *Current Status of Disputes*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/dispu_current_status_e.htm.

3. The Appellate Body situation still needs fixing because the DSU makes Appellate Body panel decision appeals a substantive legal right as a condition, albeit a waivable one, to any final DSB decision; and too many WTO members, including the U.S., have not agreed to MPIA or other Article 25 appeal arbitrations. Continuing to allow panel decision appeals into the void without their being heard means that numerous disputes cannot be decided under current DSU rules, which require WTO member consensus before they can be changed. Failure to resolve this issue could end up returning the DSU to prior GATT years when few disputes got resolved.

4. If the Appellate Body situation is not resolved, WTO members seeking to challenge adverse panel decisions must rethink how to proceed. The MPIA offers an obvious appeals avenue to its signatories, plus non-signatories which opt in for specific cases, as does WTO non-MPIA arbitration. Because such arbitrations are voluntary, however, mandatory dispute settlement closure remains elusive in many cases; and yet readily attainable in others.

5. The DSU must still be doing something right because most new multilateral and bilateral trade agreements not involving the U.S. have copied much of it. These other agreements have embedded the DSU consultation, mediation, panel arbitration, and remedies stages, along with arbitrator qualification requirements, mandatory application of WTO decisions, exclusive forum selection, and fixed deadlines, as their own dispute settlement mechanisms, albeit without an Appellate Body layer except in the new AfCFTA. This arguably makes dispute settlements via other agreements more efficient and perhaps even less contentious.

6. WTO members which are parties to other bilateral and multilateral trade agreements with DSU-like settlement measures should now seriously consider using them until, or even regardless of whether, the Appellate Body returns. If these agreements offer fair and efficient dispute settlement alternatives with WTO quality, there is little reason not to use them.

7. Even if the Appellate Body returns, it may be time to decide whether the WTO has become obsolescent because it lacks anti-corruption, environmental protection, and employee rights provisions linked to trade agreement dispute settlement. Given that most new bilateral and multilateral trade agreements now contain these provisions, the WTO should confront this issue directly because as long as the other agreements have them, the incentive to use their dispute settlement procedures in lieu of the DSU, when coupled with claimants' exclusive forum rule in all agreements, can diminish DSU use interest.

8. In pursuing international trade dispute settlement strategies,

parties injured by practices prohibited in their trade agreements should always determine whether to pursue an investment arbitration option when the investment is linked to trade and authorized by treaty. Although WTO members have the right to pursue TRIMS investment discrimination complaints against other WTO members state-to-state, to date, most TRIMS complaints have not gone past the consultation stage before concluding, and only one TRIMS case has been filed in the past several years.[162] In contrast, investment arbitration forums have extensive experience hearing and settling disputes with a resulting comprehensive body of law based on these decisions. Even though BITs and other investment agreements have so far mostly applied to private party disputes against states, these agreements generally also allow state-to-state investor dispute arbitrations which may be better suited than the WTO to hear these cases.

9. The growing number of viable trade and investment dispute settlement options should please governments and private parties alike. For the first time since the WTO was created, many countries have trade dispute settlement options other than the DSU. The U.S. has proved, at least concerning NAFTA and now the USMCA, that it does not need the DSU at all to resolve trade disputes with its growing number of trade agreement partners. Other countries may well find similar results. In addition, private parties in these countries have opportunities to participate more directly in the broader range of activities these agreements cover.

10. China's willing MPIA and RCEP participation in handling trade disputes incorporating WTO rules and principles, coupled with U.S. self-exclusion from these agreements so far, suggests China's willingness to accept rule of law applications to these disputes. This in turn should give the U.S. pause, because one reason the U.S. has been so antagonistic towards the DSU is its supposed misapplication of WTO rules to China. Yet it is the U.S., not China, which has seemingly turned against trade dispute settlement by rule of law, at least at the WTO.

11. Despite its hostility to the DSU, the U.S. has not backed away from rules-based trade dispute settlements, as seen in its own multilateral and bilateral trade agreements. Every U.S. trade agreement to date contains dispute settlement rules and procedures that are generally equivalent to the DSU without an Appellate Body. They also contain substantive agreement terms virtually identical to those in the various WTO

---

[162] *Disputes by Agreement*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm.

agreements. Moreover, these agreements include labor, environmental, and some private-party investor dispute settlement provisions that fall outside the DSU scope. The U.S. nonetheless faces the dilemma of whether to expand the number of trade agreements to cover other countries; reconsider its Appellate Body opposition and MPIA accession reluctance; or live with WTO appeals into the void, even in the cases it wins. These will not be easy decisions.

12. Even if the WTO disappears tomorrow, its legacy provides the legal rules and framework countries will likely follow in trade dispute settlement proceedings contained in their other agreements. This seems not even debatable.

13. Even non-trade lawyers should study international trade and investment law basics applicable to their clients' global commercial activities to help their clients and their clients' governments understand how best to avoid or confront illegal trade practices. Law school and CLE programs provide excellent ways to do so.

14. Lawyers should familiarize themselves with all international trade and investment agreements applicable to their clients and client governments, to help identify new client opportunities. For example, in addition to its bilateral U.S. trade agreement with the U.S., Chile has more than twenty similar modernized and comprehensive free trade agreements with other countries and country blocs, including the 2021 UK treaty, the CPTPP, and the three USMCA countries. Chile also has more than fifty other BITs in force. From a commercial standpoint, these agreements may allow non-Chilean companies to qualify as Chilean traders and investors by meeting the legal requirements to do so set forth in the agreements and Chilean law. This in turn opens up potential trade benefits involving many countries outside the U.S. even if the U.S. or other client governments lack agreements with some of them.

15. Lawyers should engage and stay engaged with government officials responsible for trade and investment agreement management. Because trade agreements generally do not allow private party trade complaints against governments, private sector attorneys involved with international trade can often best respond to another country's unfair trade practices affecting clients by urging their clients' governments to use the WTO or any other applicable trade agreement dispute settlement process.

16. Lawyers who represent companies adversely affected by another country's trade practices prohibited in multilateral and bilateral agreements should be ready and able to prepare their clients' legal cases for the client's government to present against the other country. It is unrealistic to assume that government lawyers and other officials responsible for handling trade relations have enough information

about an individual company's or even a whole sector's international business activities to prepare and argue a complex trade case. Moreover, it may be unrealistic to assume that these same government lawyers and officials have the time to research all potentially applicable WTO panel and Appellate Body decisions, as well as trade decisions in other forums, for inclusion in these cases.

17. Lawyers can effectively represent offshore clients engaged in international trade and investment in the lawyers' own countries. Representing offshore clients in cases involving a lawyer's own country offers significant opportunities but requires familiarity with applicable laws and agreements.

18. Lawyers can seek opportunities to represent their own or other governments in trade and investment disputes as specially appointed counsel to the extent legally permissible. Limiting international trade disputes to government parties need not foreclose private lawyer opportunities to participate directly in the cases. Countries commonly retain expert outside lawyers with special counsel appointments to represent and advocate their interests in WTO and other forums of trade and investment disputes. The WTO has even stated this in Appellate Body decisions and its own training materials.[163] Such representation, of course, requires expertise and conflicts of interest avoidance.

CONCLUSION

Returning to Dickens' *A Tale of Two Cities*, the growing number of trade agreements, especially those involving multiple countries, offer the best of times for dispute settlement, with no worst of times in sight for those who are parties to the newer agreements. They have the best of the WTO rules and DSU procedures to work with as these are incorporated into newer agreements, which also expand the range of dispute topics they cover. The WTO also remains, and its MPIA offers a mechanism to resolve trade disputes definitively without the Appellate Body. A cornucopia of viable dispute resolution options now awaits those willing to use them.

[163] *Participation in Dispute Settlement Proceedings*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c9s2p1_e.htm.