GLOBAL TRADE DISPUTE SETTLEMENT IN TRANSITION: *SURVIVING THE WTO APPELLATE BODY*

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A signature achievement in establishing the World Trade Organization ("WTO") in 1994, the Dispute Settlement Body ("DSB") and, more prominently its Appellate Body ("AB"), are currently in crisis. That crisis inspired Professor Aronofsky's article in which he details the alternative prospects beyond the WTO's mechanism for resolving trade disputes. The nature and scope of international trade and its dispute-settlement processes have also been an academic and practice interest of mine.[1] I will focus my

*This piece is a comment by Prof. Robert E. Lutz on Dr. David Aronofsky's piece which begins on page 324 of this journal.

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comments on the WTO crisis involving the Appellate Body and its possible solution.

I. THE CRISIS

Although the World Trade Organization and its pioneering dispute settlement process are now thirty years old,[2] criticisms of their various aspects began to appear shortly after the founding. By 2000, the use of the Agreement on Understanding on Rules and Procedures Governing the Settlement of Disputes ("Dispute Settlement Understanding" or "DSU") revealed problems. And since 2000, the two most litigious members of the WTO—the EU[3] and the U.S.,[4]— have consistently registered complaints; many centering on the AB.[5]

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[1] For some time after its founding, I was on the WTO list of non-government persons qualified by the WTO to serve as arbitrators for the three-person panels that heard disputes involving goods and services. And, for many years, I sat as an arbitrator of and/or as the chair of NAFTA arbitrations between the U.S., Canadian and Mexican parties. Today, as a semi-retired professor (emeritus), I continue to focus on both Trade Law and dispute settlement issues: I work with the General Counsel's Office of the U.S. Department of Commerce and its Commercial Law Development Program ("CLDP") assisting it on a voluntary basis (pro bono) to conduct legal assistance with developing and post-conflict countries. The focus is to assist such countries adopt "global commercial law best practices." Recently, I also chaired a Working Group of the California Lawyers Association to co-author state legislation (AB 1903 in 2024) revising and updating California's International Commercial Arbitration and Conciliation Act of 1988.

[2] In 1994, the agreement to establish the World Trade Organization was signed by parties in Marrakesh, Morocco. The WTO settled into its building in Geneva, Switzerland, the Palais des Nationes, its staff was hired, and by 1996 the first appellate case was filed. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154.

[3] Twenty-seven countries are members of the European Union, but the EU is registered as one member of the WTO. *The European Union and the* WTO, https://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm.

[4] Roughly 50% of WTO cases are brought by or are against the US; about 40% by or against the EU; and the rest by other nations. *Disputes by Member*¸ WTO, https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm#respondent.

[5] Several U.S. administrations have weighed in against the AB. Obama vetoed one nominee for appointment to the AB; Trump followed continuing to object to appointees; and now Biden refuses to consensually support appointees to the Appellate Body.

Some concerns about the AB even pre-date 2000. In fact, in 1996 when I visited Geneva to see for myself the "new" international trade organization, I met with lawyers of the Office of the U.S.

But in 2020, the Trump Administration arguably sealed for a time the fate of the AB, which the Biden Administration has not reversed. By December 2019, only three of the seven AB member's terms[6] had not expired; two expired at the end of 2019, with the third and final member's term expiring in February 2020. All future appointments were blocked by the U.S., meaning no nominee to the AB could achieve consensus. No one was appointed to the AB with the consequence that no AB panels (requiring a quorum of three persons) could exist. Additionally, even though a right to appeal under the DSU[7] is provided, no appeal is possible. Consequently, parties "appeal" into the "void" or "Limbo", and there is no finality to their cases.

II. U.S. COMPLAINTS

One might initially consider this U.S. unilateralism "heavy-handed." Yet early in the life of the WTO, the U.S. expressed concerns that the WTO's Dispute-Settlement system (and most notably, the AB) was not functioning

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Trade Representative, the agency of the U.S. Government that represents the U.S. at the WTO. I discussed the pending decision by the U.S. about whether to appeal a case, *Reformulated Gasoline*, which it had lost at the arbitration panel level. It would require using the new and untested AB. Having just lost at the panel level to the Brazilians and Venezuelans and the remedy requiring the U.S. Congress to change the applicable law, the USTR lawyers expressed their hesitancy to appeal. They felt at the time that they would lose in the AB, and they feared that doing so would set a precedent—i.e., appeals would subsequently be automatic in all circumstances by all members when losing at the arbitration level. Eventually, the U.S. did appeal the panel decision and lost, and *Reformulated Gasoline* became the first AB case of the WTO. Keith M. Rockwell, *WTO Dispute Settlement Reform Hinges on Washington*, EUROPEAN CTR. FOR INT'L POL. ECON. (Feb. 2024), https://ecipe.org/blog/wto-dispute-settlement-reform-hinges-onwashington/#:~:text=Although%20the%20Trump%20administration%20is,were%20put%20forward%20and%20agreed.; Appellate Body Report, United States-Standards for Reformulated and Conventional Gasoline, WTO Doc. WT/DS2/AB/R (adopted Apr. 29, 1996).

[6] AB is composed of 7 members. Members are appointed by consensus of the DSB (all WTO members). AB members may renew only one term, thus serving a maximum of 8 years. Appeals under DSU Art. 17 are made to 3-person AB panels. By December 2019, all but 3 panelists remained on the AB, and due to the U.S. blockage of any appointment, there was no consensus among the DSU members about proposed appointments for the four vacancies. By March 2020, all terms of current AB members had expired, necessitating appointments of seven AB members, which the U.S. continued to block. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU]; *United States Continues to Block New Appellate Body Members for the World Trade Organization, Risking the Collapse of the Appellate Process*, 113 AM. J. INT'L L. 822 (2019).

[7] DSU, s*upra* note 6.

according to the Rules[8] that had been agreed to by the U.S. and the WTO membership. In the USTR Report's blistering critique,[9] the overarching theme objecting to the AB is that "the AB expanded US obligations and diminished its rights."[10] Certainly, a review of its negotiating history reveals facts that suggest that the founding members of the WTO intended for the AB to serve a limited role. It is not referred to as a "court" in the DSU; rather, the term "appellate body" is used. Also, its members are not called "judges", but "members of the AB." The 60-90 day turn-around for written opinions of the AB—by the limited time allowed—suggests a narrow consideration of appealable issues; moreover, an AB member was intended to be non-resident and "part-time," with only occasional visits to Geneva for hearings.[11]

US objections over the years have been shared by other states as well. They include:

- Ignoring mandatory deadlines for deciding appeals;
- Allowing persons whose terms expired to continue to serve when it was extended by the Dispute Settlement Body;
- Not adhering to a limited standard of review as prescribed in the DSU;
- Issuing advisory-type opinions and opining on issues extraneous to cases; and
- Treating former panel opinions as precedent.[12]

[8] Among the WTO Agreements, the Dispute Settlement Understanding (DSU) establishes the Dispute Settlement Body ("DSB") institution of the WTO prescribing the process and setting the rules for dispute settlement in the WTO. *Id.*

[9] *Report on the Appellate Body of the WTO,* USTR (Feb. 2020), ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf. This language parallels the language of the DSU in Art. 3.2: "Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."; *see also* Robert McDougall, *Crisis in the WTO—Restoring the WTO Dispute Settlement Function,* CTR. FOR INT'L GOVERNANCE INNOVATION, CIGI Paper No. 194 (Oct. 2018).

[10] USTR Report, *supra* note 9.

[11] *See* DSU, Art. 17.8 which indicates "persons serving on the Appellate Body [receive] travel and subsistence allowance…."

[12] *See generally* USTR Report, *supra* note 9.

III. CONSEQUENCES AND FUTURE PROSPECTS FOR WTO DISPUTE SETTLEMENT

Without an operating AB, no appeal is possible using the institutions of the WTO. And without the full process of dispute settlement prescribed in the DSU, the effectiveness of the WTO dispute settlement process is called into question. As expressed in the DSU Article 2.2:

> "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system….[I]t serves to preserve the rights and obligations of Members under the covered agreements and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law."[13]

However, Professor Aronofsky's article points out, that the DSU, in Article 25, allows for resort to arbitration as an "alternative means of dispute settlement"[14] upon mutual agreement, including the procedures to be used. Thus, following the dysfunction of the AB in April 2020, the European Union[15] and 16 other countries originally formed the Multi-party Interim Arbitration Agreement ("MPIA").[16] While viewed as a temporary solution for the loss of an operating AB, the MPIA is a "stop-gap," ad hoc appeal

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[13] *See* DSU art. 2.2, *supra* note 7.

[14] DSU, art. 25.1, *supra* note 7.

[15] The EU (containing 27 countries) is a single entity in the WTO on account of its single external tariff. *The EU Market*, EUROPEAN COMMISSION, https://trade.ec.europa.eu/access-to-markets/en/content/eu-market-0#:~:text=The%2027%20Member%20States%20of,customs%20tariff%20for%20imported%20goods.

[16] For the MPIA, *see Multi-Party Interim Appeal Arbitration Arrangement (MPIA)*, GENEVA TRADE PLATFORM, https://wtoplurilaterals.info/plural_initiative/the-mpia. The parties to the MPIA today number 25 and are: the EU (27 countries as one block), Australia, Benin, Brazil, Canada, China, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Hong Kong (China), Iceland, Japan, Macao (China), Mexico, Montenegro, New Zealand, Nicaragua, Norway, Pakistan, Peru, Singapore, Switzerland, Ukraine, and Uruguay; s*ee* Geneva Trade Platform of the Geneva Graduate Institute's Centre for Trade and Economic Integration at wtoplurilaterals.info. Two appeals were finalized; seven ongoing appeals; three were finalized without MPIA appeal, withdrawn, or settled; *see* Joost Pauwelyn, *The MPIA: What's New? (Part I),* INT'L ECON. L. AND POL'Y BLOG (Feb. 21, 2023), https://ielp.worldtradelaw.net/2023/02/the-mpia-whats-new-part-i.html;. *see also* Joost Pauwelyn, *The MPIA: What's New? (Part II),* INT'L ECON. L. AND POL'Y BLOG (Feb. 27, 2023), https://ielp.worldtradelaw.net/2023/02/the-mpia-whats-new-part-ii.html; *see generally Multi-Party Interim Appeal Arbitration Arrangement (MPIA)*, GENEVA TRADE PLATFORM, https://wtoplurilaterals.info/plural_initiative/the-mpia.

measure that serves as a substitute for the AB and enables parties to obtain some finality to cases.

IV. IS MPIA A SOLUTION TO THE AB CRISIS?

While the MPIA has attracted a number of the most significant trading countries, the U.S. is notably not among the parties to the Agreement. Some commentary faults the MPIA process for replicating the former AB process, and repeating the "sins" of the prior AB. Others suggest that it would benefit from some case management control approaches employed by international commercial arbitrators. Certainly, without U.S. participation, the prospects of developing an AB jurisprudence are reduced.

For the U.S., its U.S. Trade Representative, Ambassador Katherine Tai, recently summarized the position of the U.S.:

> "The goal here is not restoring the Appellate Body or going back to the way things used to be. It is about providing confidence that the system is fair. And revitalizing the agency of Members to settle their disputes. The system was meant to facilitate mutually agreed solutions between Members. But over time, it has become synonymous with litigation—costly and drawn out, and often only accessible to Members who have the resources to foot the bill. The system has also suffered from a lack of restraint. The Appellate Body systematically overreached to usurp the role of Members themselves to negotiate and create new rules. And in so doing, it undermined the ability of all Members to defend their workers from harmful non-market policies.
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> For the last year, we've been actively participating in innovative and constructive discussions with WTO Members of all sizes—including developing country Members—to hear their concerns and solutions for a better system.
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> We are thinking creatively and have come forward with concrete ideas that could promote fairness for all Members. For example:
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> - We should make practical and appropriate alternatives to litigation—like good offices, conciliation, and mediation—real options for the entire WTO membership.
> - We should ensure that dispute panels address only what is necessary to resolve the disputes and resist the urge to pontificate. And any corrections to reports or decisions must be limited to addressing egregious mistakes.
> - We should end judicial overreaching and restore policy space so that Members can regulate and find solutions to their pressing needs, such as tackling

> the climate crisis or defending their workers' interests from non-market policies.
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> And we urgently need to correct WTO panel reports that have asserted that the WTO may second-guess Members' legitimate national security judgments, something none of us ever intended. This calls into question foundational principles of how far-reaching trade rules should be…
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> The United States wants a WTO where dispute settlement is fair and effective and supports a healthy balance of sovereignty, democracy, and economic integration. Where all Members embrace transparency. Where we have better rules and tools to tackle non-market policies and practices and to confront the climate crisis and other pressing issues.
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> As President Biden emphasized: We're going to continue our efforts to reform the World Trade Organization and preserve competition, openness, transparency, and the rule of law while, at the same time, equipping it to better tackle modern-day imperatives.[17]

CONCLUSION

In his wide-ranging survey of modern international dispute resolution processes available on bilateral, regional, international, and even multilateral bases, Professor Aronofsky intimates that the WTO's AB problem that stalemates its dispute settlement body does not pose a crisis to the WTO. To summarize his conclusions with a commonplace saying, there are "plenty of fish in the sea"; that is, many alternatives are available to which parties can resort.

Whether this is the "best of times" for trade dispute settlement (alluding to his article's opening sentence), the WTO's dispute settlement process is fractured, and the prospects for a viable AB at this time are not particularly good. Nonetheless, the crisis of trade dispute settlement caught the attention of WTO members, and makeshift measures, like MPIA, though temporary, are available. On the other hand, recognizing that GATT '47 lasted almost fifty years as a "provisional" set of goods-trading rules, it is possible the MPIA will stand the "test of time" as a provisional appellate option until reform is accomplished. And noting that the U.S. and the WTO are embarking on efforts to rehaul the trading organization's dispute settlement processes, the best of times may be yet to come.

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[17] *Remarks by Ambassador Katherine Tai on the World Trade Organization and Multilateral Trading System,* OFF. OF THE U.S. TRADE REPRESENTATIVE (Sep. 2023), https//: ustr.gov/about-us/policy-offices/press-office/speeches-and-remarks/2023se[te,berre,arls-a,bassadpr-katherine-tai-world-trade-organization-and-multilateral-trading-system.