

The Future of the WTO Appellate Body

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Abstract: The World Trade Organization (WTO) Appellate Body (AB) had functioned effectively until the Trump Administration destroyed it. The dispute settlement mechanism (DSM) without the AB has experienced severe malfunctions. The appeal arbitration arrangement is beginning to become relevant and may have an institutional impact. The AB may not be restored in the short term, but will definitely be restored in the future.

Keywords: WTO, Appellate Body Crisis, Appeal Arbitration Arrangement, WTO reform

I. INTRODUCTION

The title “The Future of the WTO (World Trade Organization) Appellate Body (AB)” clearly predicts the future — what will be the AB’s future? However, this title is also an expectation for the future — a wish that the WTO AB recovers! Predictions are in the eye of the beholders and involve waiting to observe the outcome, while expectations are the minds of the participants, a hope to contribute in this process. Therefore, when combining predictions and expectations, the title’s implication is that if everyone collaborates, the WTO AB will have a bright future.

Predictions and expectations are subjective judgments, but should be based on objective facts. Predictions without factual support are unconvincing, while expectations without factual support are just “unrequited love”. The “future” will come later, but predictions and expectations are based on facts that happened in the past and are happening in the present, including things that have happened (past), and things that are happening (present). It is particularly necessary to stress that “facts” are not merely phenomena, such as

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the suspension of the AB; more important aspects are the causes of these phenomena, such as the reasons for suspending the AB. The AB has indisputably ceased to function, but there are different viewpoints regarding the reasons. Therefore, an unavoidable problem related to predictions and expectations is an understanding of the causes. We can make correct predictions and reasonable expectations on this basis only if we find out the real reasons. Considering this, this paper argues that the Trump Administration created the WTO AB crisis and restoring it is essential, but a more complicated situation may occur in the future, especially with the co-existence of interim appeal arbitration.¹

II. CAUSES OF THE APPELLATE BODY CRISIS

The historical stages of the WTO AB are clear: before and after the Trump Administration. The AB had been effective and attained notable achievements, until the Trump Administration assumed office; after the Trump Administration assumed office, the AB went from bad to worse until it shut down.

A. Operation of the Appellate Body

On January 1, 1995, the WTO was formally established, and immediately began to prepare for the AB.² In early 1996, the AB received its first case.³ By the end of 2019 when it stopped receiving cases,⁴ the AB had accepted and heard a total of 124 cases,⁵ and the WTO dispute settlement mechanism (DSM) as a whole accepted and heard 593 cases.⁶ This caused the WTO to become the

1 I am the author of *Back to the Jungle? The Rise and Fall of the WTO Appellate Body* (People's Publishing House, May 2020; hereinafter referred to as "my book"), which features a comprehensive summary and analysis of the origin, establishment, operation, improvement, crisis, and prospects of the WTO AB. This paper is a sequel and summary of the past three years, as well as a further reflection on AB-related issues.

2 See the WTO document: Establishment of the Appellate Body, Recommendations by the Preparatory Committee for the WTO, approved by the Dispute Settlement Body on February 10, 1995 (WT/DSB/1). The main content of this document is based on selections of seven AB members. See pages 33-41 of my book.

3 The first case accepted and heard by the AB was *US — Gasoline* (DS2). It was brought by Venezuela against the United States, who appealed on February 21, 1996. The AB issued its ruling on April 29, and the United States implemented it on August 19, 1997. A summary of this case is available on the WTO website: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds2_e.htm (Last Visited on November 13, 2022).

4 See Page 173 of my book.

5 By the end of 2019, 120 rulings had been issued, and within the following six months, four more were issued on accepted cases. Statistics are compiled according to Zhu Lanye. See also the WTO website: https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (Last Visited on November 13, 2022).

6 See the WTO website: https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (Last Visited on November 13, 2022).

world's most active international DSM, making it into the “crown jewel” of the multilateral trading system.⁷

The WTO AB rulings are high-quality and have gained widespread recognition.⁸ Specifically, the increased number of appeals demonstrates the confidence of WTO Members in the AB.⁹ Since 2013, when the AB had operated for nearly two decades, WTO Members have expressed the most concern about its excessive number of cases and “overwhelming burden”. They have proposed suggestions to increase membership, and the WTO has begun to increase the membership of the AB Secretariat, which previously included over 30 people!¹⁰ In other words, the AB is successful and thriving.

B. Crisis of the Appellate Body

However, in 2017, Members began to shift their focus to the issue of

7 See World Trade Organization, *20 Years of the WTO: A Retrospective*, p. 81, https://wto.ru/upload/iblock/0c7/20years_wto_e.pdf (Last Visited on November 13, 2022); See also Peter D. Sutherland, Concluding the Uruguay Round — Creating the New Architecture of Trade for the Global Economy, *Fordham International Law Journal*, Vol. 24, No. 1, 2000, <https://ir.lawnet.fordham.edu/ilj/vol24/iss1/3> (Last Visited on February 24, 2023). Written in 2000 by the WTO's first Director-General, this article praises the WTO for accepting and hearing more than 200 cases within its first five years.

8 The year 2015 marks the WTO's 20th anniversary. *20 Years of the WTO: A Retrospective* has a special chapter on the DSM. Its main content is as follows: The DSM has accepted and heard 500 cases and issued nearly 300 rulings, including 115 AB rulings, making it the world's most productive and efficient international DSM. Moreover, the vast majority of these rulings have been implemented; that is, measures deemed incompatible with WTO rules have been corrected. See *Ibid.*, *World Trade Organization, 20 Years of the WTO: A Retrospective*, pp. 76-85. In addition, the AB's extensive experiences, especially its numerous cases, also provide a helpful reference for other international DSMs to interpret treaties. Studies have shown that the International Court of Justice, International Maritime Tribunal, Permanent Court of Arbitration, International Center for Settlement of Investment Disputes, European Court of Justice, and North American Free Trade Area's DSM often refer to WTO AB reports when interpreting treaties. Gabrielle Marceau, Arnau Izaguerri, and Vladyslav Lanovoy, The WTO's Influence on Other Dispute Settlement Mechanisms: A Lighthouse in the Storm of Fragmentation, *Journal of World Trade*, Vol. 47, 2013, pp. 481-574.

9 According to statistics, about 70 percent of cases are appealed. The high appeal rate demonstrates that WTO Members trust the AB, and it verifies the existence of “path dependence” — since there is appeal relief, it must be “exhausted”, which can delay time and address political considerations (in response to possible domestic criticism of the reasons why not to appeal). This latter understanding has also been one of the reasons why the United States has criticized the AB, as it holds that this contradicts the AB's original purpose, which is to hear only a limited number of cases. See United States Trade Representative, *Report on the Appellate Body of the World Trade Organization*, February 2020, p. 120, https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf (Last Visited on February 24, 2023).

10 Annex 1 The Workload of the Appellate Body, Appellate Body Annual Report for 2013, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/AB/20.pdf&Open=True> (Last Visited on February 24, 2023); Annex 2 Director-General's Speech to the DSB, Appellate Body Annual Report for 2014, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/AB/24.pdf&Open=True> (Last Visited on February 24, 2023).

non-reappointment and selection of AB members. Afterwards, the bizarre phenomenon of a lack of resolution of the issue of reappointment and selection of AB members emerged. As a result, the seven AB “judges” decreased until the end of 2019, when there were fewer than three members. This was an insufficiently high number to form a quorum panel, and the AB announced that it had stopped accepting cases. The timing of this shift was clear: the assumption of office of the Trump Administration and particularly of Trade Representative Robert Lighthizer, who was hostile to the AB.¹¹

The facts are clear: the United States alone opposed the reappointment and selection of AB members, while the vast majority of WTO Members expressed their objection¹² and proposed plans to cater to the “reasons” that the United States mentioned. However, the United States was not persuaded, chose its own way, and eventually destroyed the AB.¹³ Despite this, it is intriguing that many scholars and some WTO Members have begun to “reflect” on the AB’s problems, even believing that these problems are long-term and require thorough reforms.¹⁴ This is a social and psychological phenomenon called “the victim-blaming theory”. In the least, even if the AB has some problems, these are absolutely “curable” and can be completely improved by implementing normal procedures.¹⁵

11 The first reappointment controversy came in 2016 when Zhang Shenghe, an AB member, failed to win a second four-year term due to opposition from the United States. This could be considered an “accident” and this problem was later resolved. However, this incident “inspired” Lighthizer, who assumed office in May 2017, to begin a sweeping campaign against the reappointment and selection of AB members. For details, see pages 134-141 of my book.

12 In February 2018, sixty-eight Members including Mexico submitted a joint proposal calling for the immediate start of the process for selecting AB members. Later, up to 123 Members participated in this proposal. See the WTO documents: WT/DSB/M/419(2018), WT/DSB/W/609/Rev.21(2022), and WT/DSB/M/468 (2022). No Member approved of the actions of the United States.

13 The United States proposed a number of opinions, mainly concerning “ultra vires”, “following precedents”, “law of fact”, “advisory opinions”, “extended service”, and “extended trial”, which were compiled in a 174-page report. See the United States Trade Representative, *Report on the Appellate Body of the World Trade Organization*, February 2020. The reappointment and selection of AB members follows the WTO’s “consensus” decision-making mechanism. As a consequence, any WTO Member can block it.

14 It is inappropriate to name specific scholars and WTO Members here, but this is popular among professionals. It is worth mentioning that the AB’s problems have not been addressed during negotiations on the reform of dispute settlement procedures, which have lasted for more than a decade and identified key issues. See the WTO Document: Job (08)81. See also Yang Guohua (Ed.), *Understanding of WTO Dispute Settlement Rules and Procedures*, Peking University Press, August 2019, 1st Edition, p. 272.

15 Articles 9 and 10 of the WTO Agreement contain “authoritative interpretation” and provisional amendment procedures. However, instead of invoking these “statutory” provisions, the US brazenly resorted to unilateral blocking measures.

III. STATUS QUO OF THE DISPUTE SETTLEMENT MECHANISM

After the crisis started, WTO Members proposed practical solutions, and the DSM has not ceased operating. It is still accepting and hearing cases, but the rulings for some of these cannot take effect.

A. Reform Proposal

The main reform proposal is the Walker Proposal, which has won the support of numerous Members.¹⁶ It was clearly designed to respond to the issues that the United States raised, while considering the concerns of other WTO Members, particularly the AB's independence. However, it still did not meet all of the United States' demands, and became irrelevant.

This proposal, which has gained a consensus among many Members, could still be a basis for restoring the AB from a political viewpoint, i.e. from that of listening to the United States. If the AB is restored, some requirements on its future can still be made regarding this proposal.

B. Information about Cases

The AB ceased to function, but the WTO DSM did not stop accepting cases. In fact, since the end of 2019, 21 cases have been brought to the WTO, and panels have issued rulings on 18.¹⁷

There have been two outcomes for the cases in which the panels have ruled. Firstly, the rulings take effect directly and without appeal; and secondly, an appeal is made to the nonexistent AB.¹⁸ Initiating appeals can be considered a legal right, which WTO Members possess. Moreover, the Notification of Appeal states that the case can still be heard when the AB is restored.¹⁹ The number of appeals also reflects the actual needs of WTO Members. However,

16 David Walker, Chairman of the Dispute Settlement Body, made this proposal in 2019, when he served as the Facilitator of the Informal Process on AB Matters. See the WTO document: WT/GC/W/791.

17 Based on statistics made by Hu Jianguo. See also the WTO website: https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (Last Visited on November 13, 2022).

18 This type of appeal was made in a total of 14 cases. See the WTO website: https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm (Last Visited on November 13, 2022).

19 For example, the Notification of Appeal in the *India — Sugar and Sugarcane (Brazil)* (DS579/DS580/DS581) stated that no AB member was available to hear the case and that India was willing to wait for further notice from the AB. See the WTO documents: WT/DS579/10, WT/DS580/10, and WT/DS581/11.

this practice is also motivated by the suspicion of abuse because one of the effects of appeals is to invalidate the panel report. The United States' appeals are even more ridiculous — it decides to appeal after destroying the AB!²⁰ In general, the DSM without the AB has become fragmented.

IV. INTERIM APPEAL ARBITRATION ARRANGEMENT

In order to solve the problem of the lack of an appeal mechanism, some Members have innovatively made appeal arbitration arrangements, and specific cases have begun to appear.

A. Institutional Arrangement

The European Union (EU) has a very clear attitude towards the appeal mechanism, regarding it as indispensable and firmly supporting its restoration.²¹ Based on this guiding principle, the EU has demonstrated its creativity and leadership by starting with a bilateral Appeal Arbitration Arrangement with Canada and Norway respectively (2019),²² then establishing a Multi-Party Interim Appeal Arbitration Arrangement (MPIA) with 52 WTO Members, including China (2020),²³ and finally creating a model that combined the bilateral Appeal Arbitration Arrangement bilateral and MPIA.²⁴

The legal basis for appeal arbitration is Article 25 (Arbitration) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). Although the legality of appeal arbitration may be disputed based on the original intention of Article 25,²⁵ later examples have proven that it is the

20 The United States appealed in the following cases: *United States — Anti-Dumping and Countervailing (South Korea)* (DS539), *United States — Tariff Measures (China)* (DS543) and *United States — Softwood Lumber VII (Canada)* (DS533). See the WTO website: https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm (Last Visited on November 19, 2022).

21 EU Concept Paper on WTO Reform, see the EU website: https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf (Last Visited on November 19, 2022); *Reforming the WTO: Towards a Sustainable and Effective Multilateral Trading System*, see the EU website: https://trade.ec.europa.eu/doclib/docs/2021/april/tradoc_159544.1329_EN_02.pdf (Last Visited on November 19, 2022).

22 For the Arbitration Agreement between the EU and Canada, see the WTO document: JOB/DSB/1/Add.11, July 25, 2019. For the Arbitration Agreement between the EU and Norway, see the WTO document: JOB/DSB/1/Add.11/Suppl.1, October 21, 2019.

23 See the WTO document: JOB/DSB/1/Add.12, April 30, 2020.

24 See the case of *Turkey — Pharmaceutical Products (EU)*.

25 Judging from the text of Article 25, its original intention is apparently not for purposes of appeals.

most reliable and feasible plan.²⁶

B. Specific Cases

During the two years after the EU led the creation of bilateral and multi-party arbitration arrangements, no case has been heard. Instead, a provisional arrangement between the EU and Turkey became the first appeal arbitration case, i.e. the case of *Turkey — Pharmaceutical Products (EU)*.²⁷ In April 2022, the case was appealed, and an *ad hoc* tribunal gave a ruling within a legal deadline of 90 days, which received widespread praise.²⁸ Later, Turkey officially announced its willingness to implement this ruling.²⁹

Soon afterwards, MPIA accepted its first case. In October, the *Columbia — Frozen Fries* case was appealed and heard by a panel of three MPIA arbitrators.³⁰ The emergence of this case caused people to start thinking about the long-term significance of appeal arbitration, i.e., the possibility of this becoming a conventional appeal method.³¹

V. CONCLUSION

Since the Trump Administration caused the WTO AB crisis, the AB should have been restored after this administration left office in early 2021. However, history is often not so simple. The Trump Administration created the crisis and triggered the WTO Members to reflect on issues regarding the AB, which evolved into a discussion on its reform. If the Walker Proposal was a perfunctory effort to respond to the Trump Administration, subsequent institutional reform

26 For example, appeal arbitration would be more acceptable for WTO Members than setting up a separate appellate system without the United States. See pages 165-166 of my work.

27 See the WTO documents: WT/ARB25 and WT/ARB25/Add.1. For relevant information, see the WTO website: https://www.wto.org/english/news_e/news22_e/disp_25jul22_e.htm (Last Visited on November 19, 2022). For a case profile, see the WTO website: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds583_e.htm (Last Visited on November 19, 2022).

28 See the EU website: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_4670 (Last Visited on November 19, 2022).

29 Turkey formally submitted documents to the DSB, and made its position clear at the DSB regular meeting on August 29, 2022. See the WTO document: WT/DS583/15 and the WTO website: https://www.wto.org/english/news_e/news22_e/dsb_29aug22_e.htm (Last Visited on November 19, 2022).

30 See the WTO website: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds591_e.htm (Last Visited on November 19, 2022).

31 See Julia Qin (Qin Ya), DSU Article 25 Arbitration: A Long-term Solution for the Appellate Body Crisis? <https://ielp.worldtradelaw.net/2022/09/dsu-article-25-arbitration-a-long-term-solution-for-the-appellate-body-crisis.html> (Last Visited on November 19, 2022).

ideas, including the idea of eliminating the AB,³² were unusual approaches. It was an embarrassing social and psychological phenomenon similar to the Stockholm (Hostage) Syndrome: A simple and crude act of vandalism leads to a decent theoretical study! The Trump Administration was being unreasonable, but it made everyone self-reflect and try to pander!³³

It is a mystery why the Biden Administration did not support efforts to restore the AB when it took office.³⁴ However, three years have passed, and this has already happened. The reality must be faced — what is there to do now?

32 Here it is inappropriate to indicate who has this idea, but there are numerous skeptics about the AB.

33 Compared with the victim-blaming theory, the hostage syndrome is more serious, because the former is a preliminary reaction and self-reflection, while the latter indicates a victim's willingness to please the injurer and takes place over time. These two psychological phenomena are often related in terms of different times and degrees, but the common premise is to ignore the fact that someone does harm. It should be pointed out that these are common social psychological phenomena with a psychological basis and could occur to anyone, only to different degrees. Apparently, the facts are the most effective antidotes. The victim-blaming theory is also known as the just-world theory, i.e. the world is just and the victim is liable. See Hafer, Carolyn and Bègue, Laurent, Experimental Research on Just-world Theory: Problems, Developments, and Future Challenges, *Psychological Bulletin*, Volume 131, No. 1, January 2005. For the hostage syndrome, see Gao Minghua, Stockholm Syndrome: Manifestations, Causes and Responses, *Journal of China Agricultural University (Social Sciences Edition)*, Vol. 26, No. 1, March 2009.

34 The United States' official declaration is as follows: WTO Members have longstanding concerns about the DSM that have not yet been addressed. As a result, the United States cannot support the AB's restoration. The United States supports DSM reforms and is committed to achieving sustainable reform. The first step is to further understand the interests of all Members regarding dispute settlement. A genuine reform dialogue should be aimed at protecting Members' interests rather than presupposing the outcome of reform. The United States is willing to continue in-depth discussions with Members on this important issue. See the minutes of the Dispute Settlement Body meeting of July 21, 2022: WT/DSB/M/468 (2022). US Trade Representative Catherine Tai indicated that the WTO DSM requires reform, but it should focus on more than simply restoring the AB. See the USTR website: <https://ustr.gov/about-us/policy-offices/press-office/speeches-and-remarks/2021/october/ambassador-katherine-tai-remarks-prepared-delivery-world-trade-organization> (Last Visited on November 19, 2022). Trump disrupted the international order, and Lighthizer had a history of hostility, even a personal vendetta, against the AB, so it is unsurprising that Lighthizer destroyed the AB, which suited Trump. However, Biden advocated internationalism and international law, and immediately returned to the Paris Agreement on climate change and also restored relations with international organizations such as the NATO (North Atlantic Treaty Organization). Logically, Tai should support the restoration of the AB because it would match the image of internationalism. However, Tai has demonstrated inaction. Moreover, her remarks seem to link the WTO DSM reform to the restoration of the AB. This is clearly wrong, because the AB's problems are insufficiently severe to stop it from functioning. Furthermore, it is unjustifiable to use the consequences of a wrong approach, namely the AB's destruction, for other purposes. Finally, it should be noted that a binding DSM is in the United States' interests, but the current DSM and its impact on the multilateral trading system does not serve its interests. The United States should support the restoration of the AB for both public (the international order) and private (the United States) benefits. Allowing the AB to shut down would harm others without benefiting itself. See James Bacchus, International Rule of Law in Trade, speech at the 7th East Lake International Law Forum, November 26, 2022.

The WTO AB has not accepted and heard a case for three years. The DSM cannot function properly, and the appeal arbitration arrangement has begun to make an impact. Ideally, the Biden Administration would agree to resume the selection of AB members; everything would be all right if it agrees. Although this is an ideal possibility, it is not a fantasy. Moreover, it cannot be ruled out that someone who comes to power will publicly declare, or actually support the AB.

In a realistic scenario, assuming that the current situation remains unchanged and the Biden Administration retains its ambiguous stance, it may take a while to restore the AB and implement WTO reforms.³⁵ It is necessary to note here that although this restoration might be slow, it should be the correct choice because the vast majority of Members support it.³⁶ At the same time, as a temporary alternative arrangement, appeal arbitration will become an option for more Members. Moreover, this may still exist when the AB is restored. The international community tends to rely on realism. This may be a better and faster solution for disputes. As for the compatibility between these two mechanisms, the Members will naturally be able to discuss to reach a solution. Although “there will be a way to the hill”, there is no need to worry too much about it now.

35 I believe that the WTO reform is very necessary, especially improvements in the rule-making and implementation mechanisms. However, the AB's restoration is a separate issue and should not be addressed in parallel or in a “package” with this reform, because the Trump Administration created this issue. It was not and should not be an issue related to the WTO reform.

36 A more feasible option would be to restore the AB based on the Walker Proposal, which has gained widespread support and does not undermine the AB while responding to the United States' demands. What should be prevented is a situation where the AB is changed beyond recognition, even to the extent that its independence and impartiality are compromised. See *supra* n. 34, the speech by James Bacchus.