

Equal Justice under the Treaty — A Farewell Speech

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Excellencies, ambassadors, heads of delegations, colleagues, and friends, Professor Pauwelyn, friends of the Graduate Institute, those online or present, ladies and gentlemen:

Good afternoon.

Today marks the end of my term as an Appellate Body Member. From tomorrow onwards, the Appellate Body will be an entity that exists only in the DSU Treaty.

As required by tradition and based on the duty of the last sitting Member, I shall present the farewell remarks today and share my reflections with you on the WTO's dispute settlement. It may take a bit more time than usual, for which I beg your pardon.

I. FAREWELL REMARKS

I have to confess that I didn't join the Appellate Body in its heyday. The selection process of new Appellate Body Members has been suspended since mid-2017, merely a half-year after my term of office had started. It was painful to witness the attrition of Appellate Body Members until the AB was unable to function. On one hand, there was mounting external pressure on the AB, on the other hand, the caseload never stopped increasing, even during 2020. This has provided a unique opportunity for me to reflect on the fundamental issues related to what had happened. The divide of Members' positions on AB matters at the monthly DSB meeting during the past three and a half years was deep and unprecedented in the history of the multilateral trading system. As I have been fully aware of this, I am

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constantly reminded of my duty as an Appellate Body Member to settle disputes for WTO Members independently and impartially. Moreover, before drafting these farewell remarks for today, I spent an enormous amount of time scrutinizing all the criticisms and comments I could collect and all documents on negotiating history. I know the WTO Members expect a neutral and objective view on these challenging issues from an AB Member.

I hope that the views presented will function as a stepping-stone that will help bridge our divide, provide a rational basis to enhance our understanding on AB matters, and help Members to find solutions in the future. The world needs healing, and the trade family should be united. This is the biggest challenge in my entire professional life. However, it is a task I can't shy away from, as I believe it is my duty as the last sitting adjudicator to the 164 WTO Members. I will present it independently and impartially based on the duty of an AB Member.

First, let me be frank. Although cases are still being brought to the panel stage, which manifests WTO Members' continued confidence in the dispute settlement system for the time being, the AB's docket continues to grow even after December 10, 2019, when the AB announced it would suspend all the existing cases and was unable to hear any new appeals. This was really worrisome. While the WTO Members constantly resolve to appeal, there are 14 pending cases before the AB, four of which were appealed after December 10, 2019.¹ If this situation continues, it will signify that the WTO dispute settlement system has been brought back to the GATT era, when any defendant could easily block panel reports. This makes the WTO dispute settlement system effectively non-binding, which has been a dramatic derogation and regression from the WTO dispute settlement system since the Uruguay Round. To avoid a complete paralysis, we must take action to fix the current situation. The stalemate in one key pillar (i.e. dispute settlement) and the lack of progress in another pillar (i.e. negotiation), are not good signs for the future of the multilateral trading system. The WTO has a major existential crisis. All Members should be highly alert about and clearly sense this problem. Save the dispute settlement system and save the WTO. We have no time to waste. This is the first message I will take this chance to convey to the WTO Members and the

¹ The four cases are: *Saudi Arabia — Measures Concerning the Protection of Intellectual Property Rights* (DS567), appeal notified on July 28, 2020; *European Union — Cost Adjustment Methodologies and Certain Anti-Dumping Measures on Imports from Russia* (DS494), Second Complaint, appeal notified on August 28, 2020; *United States — Countervailing Measures on Softwood Lumber from Canada* (DS533), appeal notified on September 28, 2020; and *United States — Tariff Measures on Certain Goods from China* (DS543), appeal notified on October 26, 2020.

trade world.

In the following remarks, I will address three issues: 1) the reflections on the debate regarding the AB; 2) the AB's contributions to dispute settlement and the international rule of law; 3) the way forward and suggestions for the future.

II. REFLECTIONS ON THE DEBATE REGARDING THE AB

Disclaimer: The views expressed are purely mine and do not represent the AB or any agency. My intention is to help WTO Members and the WTO legal community to better understand their debates before they make their decisions. I will provide a framework of analysis instead of giving an answer.

Introduction — The Conflict of Ideas: After an overall review of all WTO Members' debates about the AB that traces the criticism back as early as 2002 and 2003,² I feel that the whole debate somehow reflects a conflict between Members regarding two contrasting views or norms and different styles of adjudicating WTO dispute settlement, including that of the AB's operation. It also implies that WTO Members have very different expectations of the Uruguay Round's negotiation outcome. To some extent, the debate actually carries over differences of negotiation that were ingeniously embedded into the treaty with constructive ambiguities 25 years ago. Inevitably and sadly, Members' different beliefs regarding ideal international adjudication clash with the treaty of WTO on dispute settlement.

Before looking at those debates in real life, I would like to review at least two sets of conceptual issues with respect to international adjudication.

A. The Conflict of Ideas — *Ad Hoc* Approach vs. Consistent Approach

International adjudication has come a long way from war to peace, from bilateral settlement to third-party adjudication, from diplomatic conciliation to legal settlement, from *ad hoc* adjudication to institutional adjudication, from bilateral to plurilateral and multilateral adjudication, and from one stage to two stages of adjudication. It has moved in a seemingly spiral trajectory during the evolution of adjudicatory form, aiming to achieve justice among stakeholders in relevant international fields.

Some believe that unlike the domestic adjudication process, international adjudication should follow an *ad hoc* approach and should be conducted on a case-by-case basis as long as participating Members agree. Investor-State Dispute

² USTR, *Report on the Appellate Body of the World Trade Organization*, February 2020, Annex A-17.

Settlement at the International Centre for Settlement of Investment Disputes (ICSID) could be an example. Some insist that international adjudication should maintain consistency in its decisions. Both the International Court of Justice (ICJ)³ and the European Court of Justice (ECJ), although they do not recognize any binding effect to their own decisions, do seriously consider previous decisions.⁴ The *ad hoc* approach and the consistent approach treat previous decisions, precedents, and jurisprudence quite differently in international adjudication. Obviously, the critics of the AB's practice prefer the idea of *ad hoc* approach to the consistent approach. The majority of DSB Members prefer the consistent approach by emphasizing the importance of maintaining "consistency and predictability" in the interpretation of rights and obligations under the covered agreement.⁵ In my view, the different preferences and emphases of the two approaches represent the core of divisions between Members' views on the AB's practice of adjudication.

B. The Different Styles of International Adjudication: Judicial Activism vs. Judicial Restraint

"Judicial activism" and "judicial restraint" definitely belong to the most difficult legal vocabulary to define in terms of their nature and scope. Here, they are used just for the convenience of illustrating two different styles of adjudication.

"Judicial activism" refers to an adjudicating style whereby the adjudicators actively make decisions or provide interpretations, while "judicial restraint" refers to an adjudicating style whereby adjudicators are restrained and cautious to make sweeping decisions or provide comprehensive treaty interpretation.

WTO Members or academics focusing on international trade have no universal view regarding the AB's adjudication style. The current criticisms of the AB's practice seemingly refer to its "active adjudication" style in making decisions and providing treaty interpretations, while its opponents prefer or expect it to rely on a "restrained adjudication" style.

3 All ICJ decisions flow from and are built upon past decisions, although the ICJ has been careful to refrain from indicating that reliance on precedent was mandatory. The Court gives great weight to finding and applying international law consistent with its prior decisions.

4 Gilbert Guillaume, *The Use of Precedent by International Judges and Arbitrators*, *Journal of International Dispute Settlement*, Vol. 2, No. 1, 2011, pp. 5-23.

5 Although recognizing "precedent is not created through WTO dispute settlement proceedings", WTO Members emphasize that "consistency and predictability in the interpretation of rights and obligations under the covered agreement is of significant value to Members". See WTO, *The Informal Process on Matters Related to the Functioning of the Appellate Body*, Report by the Facilitator, H.E. Dr. David Walker (New Zealand), October 15, 2019, Job/GC/222.

After briefly overviewing the two conceptual legal issues pertaining to adjudication, let's examine the essential allegations against the AB on which Members hold divergent views. In my opinion, the benchmark of measurement of whether the AB operated as designed should be the WTO's treaty and not the expectations or beliefs of people who make this claim. Therefore, let's review the treaty's contents and assess its challenges by comparing it with its real-life application.

1. Did the AB Overreach?

If "overreaching" is defined as a situation where adjudicators make decisions outside the scope of issues appealed or make decisions on issues not necessary for settling disputes, I would agree with this definition and actually did not do so in my term as an AB Member.⁶ Yet some criticisms of the AB seemed to point to its creation of jurisprudence, establishing binding precedents, and making rules rather than settling individual disputes. These claims are mostly based on the third sentence of DSU's Article 3.2.

Yet, here I would like to draw your attention to the first sentence of Article 3.2, which provides an essential function of dispute settlement that shouldn't be ignored. It mentions that the dispute settlement system is a central element of "providing security and predictability to the multilateral trading system". Thus, whether this is the ultimate objective and purpose of dispute settlement or an integral part of that objective of dispute settlement becomes a vital issue. If the first sentence of Article 3.2 should be emphasized when interpreting the DSU's purpose and objective, then panels and the AB are both required to perform their duties to provide the multilateral trading system with "security and predictability". In that context, panels and the AB are only working towards achieving the DSU's purpose and objective by maintaining like decisions in like cases and following jurisprudence in interpreting the same provision under the covered agreement. If so, panels and the AB did not overreach, but performed their duties under the treaty's mandate.

Therefore, a careful reading of Article 3.2 and other provisions of Article 3 of the DSU objectively and holistically, it could be well noted that WTO dispute settlement functions in two perspectives: 1) first and foremost, to specifically settle

⁶ For example, I recall the first case I adjudicated as a Division Member was on an anti-dumping measures. One participant requested the AB to decide on systematic issues concerning the general principles of WTO dispute settlement under Article 3 of the DSU. After reviewing and making decisions on provisions under the Anti-Dumping Agreement, which the Division believed to be sufficient to settle that dispute, the Division exercised judicial economy and declined to render interpretations under general matters of Article 3 of the DSU.

disputes; and 2) to generally provide the multilateral trading system with security and predictability. These two perspectives should work effectively and complement each other.⁷

2. *Did the AB Interpret or Make Rules?*

This critique seems to be referring to the AB's alleged "overreaching" in individual cases or in specific situations.

The DSU clarifies that WTO dispute settlement is intended to "preserve rights and obligations" of Members rather than create rights and obligations. The dispute settlement system is obviously not set up for making rules. Yet panels and the AB are instructed to "clarify the existing provisions" of the covered agreement in accordance with "customary rules of interpretation of public international law". Thus, treaty interpretation is obviously a key method for clarifying the existing provisions to settle disputes for Members. In other words, the WTO dispute settlement system is centred on treaty interpretations.

Then, when the treaty itself is drafted with constructive ambiguities and a WTO Member mentions them during a dispute settlement proceeding, the issue is whether clarifying the existing provision based on treaty interpretation to resolve that dispute constitutes so-called "rule making" or "gap filling".

That is the real, hard issue and a very close call.

It leaves the adjudicating body with two options: it either is unable to deliver its decision, or risks crossing the red line, if preferring an extremely strict view of interpreting "adding or diminishing rights and obligations". Let us try to examine it more closely.

First, regarding specific dispute settlement, any matter that is raised properly before the adjudicating body is defined as within the adjudicating body's autonomy or discretion to render a decision within its scope of adjudicatory review as the DSU requires. It is, at least, not overreaching.

Second, if the adjudicating body conducted treaty interpretation in accordance with the "customary rule of interpretation of public international law", as the DSU mandates, it shall not be regarded as rule making *per se*.

Third, if that ambiguity issue is properly raised before the adjudicating body,

⁷ Professor John Jackson indicated that "we could appraise the dispute settlement system by asking how effective it is in promoting the settlement of cases or how it develops the jurisprudence in the sense of providing greater certainty and stability while resolving ambiguities in the rule structure". See John Jackson, *The Role and Effectiveness of the WTO Dispute Settlement Mechanism*, Brooking Trade Forum 2000, Brookings Institution Press, p. 208, DOI: <http://doi.org/10.1353/btf.2000.0007> (Last Visited on March 5, 2021).

it means that the Members are ready to subject themselves to jurisdiction and are prepared to accept the adjudication outcome. A *post hoc* result-oriented criticism would spark concerns regarding whether these critics are in line with the good faith principle in treaty implementation under the Vienna Convention on the Law of Treaties.

Fourth, should the adjudicating body decline to render a decision pertaining to interpreting any provision with ambiguity, is it in conflict with the requirement of addressing each of the issues appealed before it under Article 17.12 of the DSU?

Following the above discussion, if a term or concept is not perceived as drafted with ambiguity in the negotiation, it implies that an ordinary meaning should be given to it if there is a need to define it for a dispute settlement purpose. If so, would the adjudicating body's provision of a definition to this term constitute "adding or diminishing rights or obligations" under Article 3.2 of the DSU? Is the adjudicating body interpreting rules or making rules by providing this definition of ordinary meaning for the purpose of settling the dispute before it? I pose this issue to all of you.

These could be crucial issues that WTO Members may wish to determine so that they could provide clear guidance to the adjudicating body.

The other issue that could affect whether an interpretation by an adjudicating body would constitute "rule making" is what effect that body will give to that interpretation. Does the specific interpretation have any binding or persuasive effect?

3. *An Issue of Adjudication Style*

In my opinion, the major criticisms of or concerns about the AB, such as "over-reaching", "rule making", "advisory opinion", or "*obiter dicta*", can actually be ascribed to an issue of an adjudicating body's adjudication style.

As indicated in the beginning, international adjudication could be categorized into two styles, i.e. "adjudicatory activism" and "adjudicatory restraint".

To my knowledge, a general inclination of WTO Members is to prefer short reports with sound reasoning instead of long and complicated reports. This has become a major and long-term concern for Members. I believe both panels and the AB have focused on addressing it, but perhaps they have not yet met Members' varied expectations. I think this is an issue that the AB should seriously consider to further improve. Although the scope and size of appeals sometimes have paramount roles in the size of the report rendered, I believe rigid formats used when

producing them may make them unnecessarily repetitive, and there is room to improvement.

In terms of the report's reasoning and interpretations, my view is that its legitimacy may be undermined if its legal reasoning will be sacrificed for the sake of reducing the length. An adjudicating body develops its reputation by producing credible and rational analysis, which I believe is something that Members and the WTO legal community highly appreciate.

After a cursory overview of the WTO Members' statements at the DSB as well as the academic work and comments that international trade circles have published, my impression is that there are wide-ranging and contrasting views on the outcome and style of AB reports. Some have commended it, most Members welcomed it, and almost every Member pledged to implement it only when a reasonable period of time (RPT) for implementation was necessary. Some scholars believed the AB is doing less than it should in interpretation, noticing that it avoided sweeping statements and preferred a cautious attitude that it might regret. Of course, some had the opposite complaint.

To me, the concerns Members expressed about the AB are mostly due to different understandings of its nature and function. However, they are also largely due to different ideas and styles of international adjudication.

In my view, every adjudicator has his or her own trait and style of adjudication. As long as the adjudication is within the mandate and compatible with the applicable rules, each adjudicator may exercise his or her adjudicatory autonomy and discretion. At the same time, I recognize that there is room to reconsider or improve the AB's adjudication style. Perhaps a more cautious and restrained attitude in adjudication would be safer and more desirable, particularly because the participants are mostly sovereign states, and most issues involved are highly sensitive. Personally, I always strictly stick to the treaty and interpret each issue objectively, faithfully, and in good faith, as the treaty provides.

4. The Issue of Precedent

"Precedent" is another highly controversial and complex issue. It has a central place in this debate.

To me, the rule of precedent is a typical phenomenon of how deeply a common law tradition could impact state practice in international adjudication and adjudication practice of international adjudication bodies. Lawyers from continental

law countries may think it's a bit bizarre that it's necessary to rely on past decisions to litigate a case while the law itself is self-evident. Why do judges, whose job is clearly defined as applying the law to facts and who are not allowed to make law, need to look at and rely on previous cases to make their judgement? Yet surprisingly, the rule of precedent is a tradition from Anglo-Saxon law that has not only influenced the major continental law countries' judicial practices but has also penetrated widely into many fields of international adjudication. It will take another lecture to thoroughly review this topic. For now, let me focus on its impact on WTO litigation.⁸ Interestingly and ironically, the common law countries that continue this tradition are the main ones that now criticize the AB for its adjudication practice based on case law.

"Precedent" is defined as a decided case that provides a basis for determining later cases involving similar facts or issues.⁹ It is a concept, rule, and practice rooted in the history of the Anglo-American common law system where judges are bound to the court's past decisions — also known as the principle of "*stare decisis*".¹⁰ Whereas, in several civil law countries, courts rely on the doctrine of "jurisprudence constante", where judges find that the sound reasoning of previous decisions is highly persuasive but not binding or controlling on issues of law in later adjudication. Therefore, although the legal theories or concepts of the two major legal families differ significantly, their practices actually have achieved similar results in maintaining the consistency of decisions by judiciary bodies.¹¹

International law doesn't contain the rule of precedent *per se* in any treaty,¹²

8 Raj Bhala, The Myth about *Stare Decisis* and International Trade Law: A Trilogy, *American University International Law Review*, Vol. 14, No. 4, 1999.

9 Bryan A Garner, *Black's Law Dictionary*, Third Pocket Edition, p. 553.

10 There are multiple merits to following precedent: 1) it helps ensure the attainment of principle of equality before justice; 2) it restricts the scope of arbitrariness and bias of adjudicators or tribunals; 3) it helps enhance participants' confidence and trust by building a reasonable and predictable legal framework; 4) it helps losing parties abide by the law, as judgement is not particular to them but rather applies to all similar situations; 5) it is cost effective and efficient, as it may prevent unnecessary potential appeals; and 6) it enhances adjudicators' sense of responsibility when facing new cases to reflect on multiple alternative approaches. See P. S. Atizah and R. S. Summers, *Form and Substance in Anglo-American Law: A Comparative Study in Legal Reasoning, Legal Theory and Legal Institutions*, Oxford University Press, 1987; Chinese Version Translated by Jin Min, Chen Linlin, and Wang Xiaohong, China University of Politics and Law, 2005, p. 97.

11 D. Neil MacMormick and Robert S. Summers (eds.), *Interpreting Precedents: A Comparative Study*, Dartmouth Publishing Company Limited, 1997, pp. 1-11.

12 Scholars of international law may refer to Article 59 of the International Court of Justice Statute in this regard, according to which international court rulings are binding only on the parties in the dispute at hand and have no bearing on matters outside of the case. It is true also with the ECJ and many other international judiciary institutions.

at least to my knowledge, but it has become a prevalent practice among major international adjudicating bodies.¹³ Even in the context of investor-state dispute settlement (ISDS), which is an area where fragmentation and lack of coherence of ISDS jurisprudence has been the focus of widespread complaints, the Arbitral Tribunal often referred to the award rendered by previous tribunals on issues such as the definition of “investment”.¹⁴

My AB colleague Mr. Ricardo Ramírez-Hernández claimed in his farewell speech that “I’ve never seen a Member who has not argued its case based on previous case law”. Indeed, citing and reliance on past decisions have become normal practices in dispute settlement at both the panel and AB stages at the WTO.

From the perspective of those who criticized the AB’s practice, the AB at least maintained a certain form of “*de facto* precedent”, which allegedly exceeds its mandate of adjudicating each dispute individually on a case-by-case basis.

From the perspective of many WTO Members, “although recognizing precedent is not created through WTO dispute settlement proceedings, Members of the WTO emphasize ‘consistency and predictability’ in the interpretation of rights and obligations under the covered agreement is of significant value to Members”.¹⁵

From the perspective of the daily practice of dispute settlement at the WTO, it is no wonder that the driving force to run the cases is the WTO Members that are represented by their highly competent international lawyers. Adjudicators, panels, and the AB are merely recipients of the legal complaints presented. Therefore, if there is an ecosystem of WTO dispute settlement, panels and the AB are only part of it. If Members and their lawyers continue to present their submissions and oral statements with dozens of instances of case law as arguments or reasoning, it is very difficult for panels or the AB to refrain from responding to or emphasizing the value of past decisions.

From the perspective of the principle of “equality before Treaty” and “equal justice under Treaty”, the issue is now that all 164 WTO Members have an equal opportunity to access and benefit from equal adjudication under the WTO dispute

13 *Supra* n. 4. See also Krzysztof J. Pelc, *The Politics of Precedent in International Law: A Social Network Application*, American Political Science Association, <http://www.jstor.org/stable/43654392> (Last Visited on March 5, 2021).

14 The definition of “investment” in the awards of *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4 (July 2001) has been cited by several ISDS Arbitral Tribunals.

15 *Supra* n. 5, Report by the Facilitator, H.E. Dr. David Walker (New Zealand), p. 6; See also *The Informal Process on Matters Related to the Functioning of the Appellate Body, Communication from Japan and Australia*, WT/GC/W/768, p. 2.

settlement system, in terms of both their procedural and substantial rights under the covered agreements. I do not see that any Member would like to accept a different adjudication outcome on the same issue in similar situations. If dispute settlement cannot render fair outcomes, what is its use? This emphasizes the ultimate purpose and meaning of international adjudication. How could a dispute settlement system be sustainable if it constantly renders frivolous or conflicting outcomes? This is the fundamental issue that WTO Members should reflect on before making their decisions. It will also determine the future direction of the WTO dispute settlement system.

In my opinion, “precedent” is just a legal methodology to achieve “the rule of law”. This is actually an issue on how to achieve proper balance between “certainty” and “flexibility” in an adjudication system. This is a typical conundrum that any legal system faces regarding the rule of law. In other words, it is an issue of whether an adjudication system can accommodate gradual changes and correct its own mistakes. Even in the legal regimes where the rule of precedent has a dominant role, there are situations where the adjudicators could distinguish from, escape from, or even overrule (i.e. in exceptional circumstances) the previous case law as long as they can provide “sound reasons”.

Therefore, I would suggest Members to consider bringing the doctrine of “jurisprudence constante” into the WTO dispute settlement as a way to resolve this conundrum. This principle and practice from the continental law system will help resolve the sensitive issue of how to address previous decisions (precedents) by adjudicators within the WTO dispute settlement system, as well as consider the need to maintain the system’s “consistency and predictability” by giving no binding effect to any previous report while recognizing its persuasive impact on later cases, wherever appropriate.

I hope that switching from a common law tradition to civil law methodology could be a pragmatic and balanced middle way¹⁶ to resolve this conundrum of dispute settlement practice at the WTO.

¹⁶ Among the 20 or so papers on AB reform by WTO Members in the past three years, Honduras submitted its working document, *Addressing the Issue of Precedent*, on February 1, 2019, proposing a possible middle path by suggesting: “1) the report will be adopted by negative consensus solely with respect to the outcome for the disputing parties, while adopting legal interpretation in the report through positive consensus, whether it can form precedent forming a part of the WTO law; or 2) legal interpretations of the Appellate Body take the form of precedent only once they have been repeated a given number of times in similar context; or 3) all the 7 AB Members endorse an interpretation in a specific report or on thematic issues”.

5. *Why a Second Stage of Adjudication?*

A second stage of adjudication is not only a *quid pro quo* for parties' concessions to give up their political right to block the adoption of a panel report,¹⁷ but also a chance to correct mistakes. To WTO Members, it is also a second chance for the adjudicators to hear their arguments on legal matters and potentially obtaining a fairer outcome. It is important for WTO Members with a procedural right to have fair access to a second stage of adjudication when they notice a legal error in a panel report. If the multilateral trading system has established two stages of adjudication within the treaty, it is the Members' fundamental right to maintain this right and ensure that it is readily accessible.

Could a second stage evolve and adapt to gradual changes and correct its mistakes? First and foremost, legislative action, i.e. via the Ministerial Conference or General Council, is used to make and amend the treaty as well as issue authoritative interpretations to update the rule book so the adjudication body can follow them. Second, the adjudicating body itself, i.e. the AB, could adapt to the change in circumstances and update its jurisprudence based on "sound reasons" wherever it is appropriate. My understanding is that the AB did gradually evolve its jurisprudence, although many may not have recognized this fact.¹⁸

6. *Why Were More Cases Brought to the Second Stage than the Negotiators Expected?*¹⁹

As illustrated above, dispute settlement cases are not driven by the adjudicating body, but are in the hands of WTO Members. In the past, the major Members were the system's most frequent users. Most recently, even more developing countries, particularly smaller economies, have gotten involved.

My perception is that it is more likely that the future of WTO dispute settlement will involve more cases rather than fewer. Therefore, my advice to the Membership is that the WTO should be better prepared for a drastic increase in disputes in the days ahead. Perhaps this could not be easily restrained by implementing quantitative restrictions or quotas. Or it may not be feasible to define what

17 Debra P. Steger, *The Founding of the Appellate Body, A History of Law and Lawyers in the GATT/WTO — the Development of the Rules of Law in the Multilateral Trading System*, Edited by Gabrielle Marceau, Cambridge University Press, 2018, p. 447.

18 This has not made much difference with what a court did at a national level.

19 *Supra* n. 2, USTR (2020), p. 1. "WTO Members agreed to a standing 'Appellate Body' ... as a means to correct egregious mistakes by dispute settlement panels".

constitutes an “egregious mistake” as a benchmark for an appeal. Nobody 25 years ago anticipated the increase in cases, and it was nobody’s fault. Maybe it is a positive sign that access to international adjudication is no longer a luxury or privilege limited to a small group of Members. It represents a more egalitarian status before the Treaty, for which we commend the Membership.

III. THE AB’S CONTRIBUTION TO DISPUTE SETTLEMENT AND THE INTERNATIONAL RULE OF LAW — A FAIR JUDGEMENT

It is challenging for any of us to comprehensively and objectively assess the institution where we work. However, as the last sitting Member of the AB before its return, I am obliged to say a few words about the AB’s work as an institution, my fellow AB Members, and the support staff. I will try to use facts to establish my observations.

Fact 1: Despite harsh criticism, throughout the history of international adjudication and compared with other major international adjudicating bodies, the Appellate Body has been unparalleled in its effectiveness and efficiency. In its 25 years of operation, the seven-member AB has resolved 195 disputes,²⁰ compared to around 160 cases that the ICJ has completed in its 74 years of existence, with 15 standing judges.²¹ In terms of efficiency, the AB spends an average of a few months²² on each case, while other major international adjudicating bodies usually need a few years to complete a decision.

The AB has also established and maintained a standard and consistent practice of implementing its working procedures, particularly in due process, procedural fairness, and maintaining a good reputation for its adjudication.

The AB has significantly contributed to the security and predictability of the multilateral trading system. Although there was room for improvement, the AB has distinguished itself for its outstanding performance among all international adjudicating bodies, and history cannot ignore its accomplishments. No matter how many setbacks it encounters today, the AB’s establishment was a major achievement

20 Based on the number of notice of appeals included in the Appellate Body Annual Report, 2019-2020, Annex 9, pp. 202-241.

21 Although not exactly comparable, there were 6 cases by the International Criminal Court (ICC) with 18 judges in 17 years.

22 According to WorldTradeLaw.net, it is 140 days on average of each case by the AB.

in the international rule of law, as well as a significant development in human civilization.

Fact 2: AB Members are fully committed to the international rule of law. As the DSU has required, my fellow AB Members are “persons of recognized authority, with demonstrated expertise in law, international trade and subject matter of the covered agreements generally”.²³ The AB Members do not benefit from either the lifetime pensions of their peers in the ICJ and the International Criminal Court (ICC)²⁴ or the high daily fees comparable to their part-time ICSID peers.²⁵ I can think of no better words than “willing ox” to pay tribute to my fellow colleagues.

Fact 3: The AB Secretariat is also the most supportive team with whom I have worked. Comprised of only 25 staff members at its peak, the AB Secretariat is substantially smaller, both in absolute and relative terms, than its international peers, such as the Registry of the ICJ, which had 116 staff members in 2019.²⁶ Yet their diligence and professionalism have never been compromised due to the increasing workload.

I understand that the WTO Members and their constituents have high expectations for the AB. The AB is also inclined to improve once proper guidance is provided. However, given the AB’s lean structure, limited support staff, high appeal rate, and increasingly complex matters appealed, it is fair to say that we have delivered what we can deliver and are supposed to deliver.

We have undertaken this work, knowing that we have nothing to complain about, and can only work hard to the end as we promised. I will continue to talk about the AB’s perseverance, enterprising nature, courage, and cooperation in the future, which will inspire the future generations of AB Members. I believe WTO Members will make the right decision to restore the AB.

As a Chinese saying goes, “Please don’t dismantle the bridge after crossing the river”. From a historical point of view, the judgement of an international adjudicating body and its adjudicators should be, at least, fair.

²³ DSU Article 17.3.

²⁴ Report of the Secretary General of the United Nations, Conditions of service and compensation for officials other than Secretariat officials: members of the International Court of Justice and President and judges of the International Residual Mechanism for Criminal Tribunals, September 18, 2019, <https://undocs.org/pdf?symbol=en/A/74/354> (Last Visited on March 5, 2021).

²⁵ <https://icsid.worldbank.org/en/Pages/icsiddocs/Schedule-of-Fees.aspx> (Last Visited on March 5, 2021).

²⁶ Report of the International Court of Justice, 1 August 2019 – 31 July 2020, <https://www.icj-cij.org/public/files/annual-reports/2019-2020-en.pdf> (Last Visited on March 5, 2021).

IV. THE WAY FORWARD — SUGGESTIONS FOR THE FUTURE

The multilateral trading system has never faced such a difficult time in history with two pillars at risk, no Director-General, and regional trade blocs sidelining it for over a decade. It is no longer our familiar multilateral trading system. The pain of the Doha Round negotiation's failure has not receded, while new pains of division regarding dispute settlement are rising. WTO Members should reflect on this deep crisis. It is a moment to heal and unite.

In my view, having a mentality of collaboration is essential for WTO reform and the dispute settlement system's rejuvenation. Obviously, dispute settlement should obviously be the first item fixed. I suggest WTO Members to simultaneously put all their issues and demands on the table. There must be a grand bargain where issues old or new, trade-related or not, shall be put on the table. Then the Members should draw a blueprint with a vision, and make it happen, either all at once or step by step. Next, I will focus on the dispute settlement system's to-do list.

a. Resume the selection process of AB Members and restore the functioning of the WTO dispute settlement system, remembering the following:

- 1) Acknowledge that “not adding or diminishing Members’ rights and obligations” shall have a central place in dispute settlement, reinforcing a case-by-case dispute settlement mentality;

- 2) Recognize the importance of the dispute settlement system's central place in providing the multilateral trading system with security and predictability;

- 3) Reassure WTO Members that dispute settlement serves to preserve their rights and obligations, and clarify the existing provisions in accordance with customary rules of interpretation of public international law rather than making rules;

- 4) Emphasize a restrained style of adjudication at the AB, focusing on issues raised and necessary for settling disputes, and refrain from advisory opinions or *obiter dicta*;

- 5) Clarify the issue of the 90-day limit, and communicate with participants to seek their views on extensions beyond 90 days;

- 6) Clarify Rule 15 so that the confirmation of extending an AB Member who needs to work more than two months beyond their term must be submitted to the DSB;

7) Consider an AB with 7 to 9 full-time Members, each serving one longer fixed term of 7 to 9 years;

8) Consider establishing fixed-term and rotating AB Secretariat staff; and

9) Encourage like-minded Members to join the Multi-party Interim Appeal Arrangement (MPIA) under Article 25 of the DSU until the AB's full functioning.

b. Improve the implementation of dispute settlement:

Many cases go through the second compliance panel, which could last four or five years or even longer. However, implementation is an essential issue that Members should address, and they should try to enhance defendants' quality of compliance.

c. Strengthen the panel proceedings:

1) Consider establishing a standing pool of panellists (from 21 to 30 people, enabling 7 to 10 panels to work at the same time);

2) Introduce fixed terms of five or six years and full-time panellists; and

3) Compose panels on a random rotation.

d. Clarify optional transparency rules in oral hearings at both panel and AB proceedings, as far as both participants agree, to avoid an inevitable breaching of the DSU by panel or the AB in their daily practice: Consider live-stream oral AB hearings and two substantive meetings at the panel stage.

e. Consider not allowing *amici curiae* submissions.

f. Establish a two-tier World Trade Court: an ideal long-term goal, as designed in the original ITO Treaty.

g. Enhance capacity building to narrow legal gaps among WTO Members.

h. Consider allowing Members to litigate in their mother languages.

V. CONCLUDING REMARKS

The WTO is standing at an historical point. What is the next step? Will the rules-based multilateral trade system be strengthened and revitalized, or will it continue to be side-lined due to regionalism or even threatened due to unilateralism? Will inclusiveness, equal justice under the treaty, rule of law, and a consistent jurisprudence tradition still be valued in dispute settlement and the implementation of treaty rules? Or will a frivolous, one-tier, *ad hoc* commercial arbitration approach be the WTO dispute settlement system's focus? It is high time for Members to make a decision. The WTO's future is in their hands.

I will conclude by sharing with you a famous legend that appears in several

ancient cultures, including Egypt, Saudi Arabia, India, and China — the nirvana of the phoenix and its rebirth.

Although the legend's details differ, its central theme is a phoenix's singing and dying in a fire, followed by its rebirth and another even more glorious life afterwards.

I cite this painfully beautiful story with multicultural origins to express my wish that the AB will experience a vigorous revival in the future.

Last but not least, let me thank WTO Members for selecting me and for their unabated confidence and support during the past four years. I also thank the Secretariats of all divisions for their indispensable logistical support. I thank the academics and practitioners from my legal family; I hope I have represented you well, and at least I tried my best. I also thank my family, my husband, and our son, for their lasting tolerance of the lack of my companionship, and I am grateful for my mother's raising me and still missing me and her grandson. I also thank every friend and colleague who helped in this way or that during the past four years. I also can't forget to thank the Graduate Institute, Prof. Pauwelyn, his team, and the Global Trade Platform for organizing this event.

Before fully discharging my current duty, there is one matter I can't put aside. That is our talented, behind-the-scenes professional lawyers who wholeheartedly devoted themselves to the dispute settlement system at its second stage. I sincerely call upon each Director to treasure them, to encourage them to carry on the second stage's institutional memory, and to foster their future professional development. They are the most invaluable assets that our multilateral trading institution could ever possess. Our institution should be able to guarantee that anyone who works for its adjudicating body be protected, and to work with no fear but with a sense of honour and security. Our institution should be strong and long-lasting so those who are young can believe that independence, impartiality, collaboration, and equality are always valued.

I have always told my AB colleagues and the team when each hard decision has been made for our case that at the last minute of life, one should not regret these decisions. That is the so-called final measurement. Everyone who works for this multilateral institution should remember its 164 Members' interests, as that is the final measurement of everything we do here. For the 164 Members, by the 164 Members, making sure the multilateral trading system benefits all 164, and making sure all 164 have equal rights of development and equal justice under the Treaty. These are the long-lasting objectives that all of us pursue.

For that purpose, I count on all of you, the promising younger generations, to carry on this goal and make our world better, fairer, and more prosperous.

All farewells should be reunions, the Chinese saying for which is “Mountains stand, but rivers flow”.

My best wishes for all of you.

Thank you for your attention.