

The Farewell Speeches of WTO Appellate Body Members

This Special Issue of the Global Trade and Customs Journal (GTCJ) has six articles, one Interview and 17 out of the possible 21 or 22 Farewell Speeches. However, this Editorial starts by paying tribute to the former World Trade Organization (WTO) Appellate Body Member (ABM) Claus-Dieter Ehlermann, whose passing occurred on 10 April 2025 in Brussels.

If there were a Top ten list of WTO academic texts, Ehlermann surely has one publication therein: *'Six Years on the Bench of the "World Trade Court" – Some Personal Experiences as a Member of the Appellate Body of the World Trade Organization'* (2002).

Notably – and unbeknownst to Prof. Dr Jens Lehne of this Editorial commentary – when I read Lehne's article for this Special Issue (*'Looking in the rearview mirror: First-hand accounts of the Appellate Body in light of its downfall'*) I found that it demonstrates Ehlermann's ubiquity and prophetic words on the functioning and issues of the Appellate Body (AB).

Prof. Lehne, the author of the insightful book *'Crisis at the WTO: is the blocking of appointments to the WTO appellate body by the United States legally justified?'*, uses his finely documented background knowledge on the controversies related to the appointments of ABMs to reveal the imperfectly tuned polyphony of voices found in the Farewell Speeches.

Lehne's analysis of the discourse focuses on the intra-argumentative *minuet* interplayed between two parts: the audience and the speaker. It is composed of four core axes on the AB Farewell Speeches ((1) *if it was a court*, (2) *the role of precedents*, (3) *its independence*, and (4) *the persistent issue of judicial activism*).

It goes into the heart of what I call the AB '*politics of adjudication*' – an often neglected WTO theme, through glossing from the multiple adjudicator's speeches their experienced perception of their own judicial activity, according to Article 4[1] of Working Procedures of Appellate Review, on '*matters of practice, policy and*

procedure'. It is an extensive and intensive reflection of years of adjudicative experience.

The rarely debated overarching Article 4[1] of the Working Procedures for Appellate Review just above mentioned is, indeed, the '*never center*' that binds the entire WTO caselaw as if it were the unfolding of a symphony or a play. WTO scholars can find here ample material to explore the important operation of what political scientists would call the politics of adjudication. Adjudicative policies and politics of adjudication that come along with legal reasoning were deliberately debated in the WTO-AB exchange of views sections as well as in the AB Divisions deciding a case. The US literature thereon in the US Supreme Court is rich.

This Special Issue creates an opportunity for the WTO academic community to focus on the adjudicative policies beyond the caselaw as reflected in the Farewell Speeches. As Lehne demonstrates, the Farewell Speech is the *locus* in which the adjudicator wants to convey a message, *intra* and *extra* WTO walls.

While much of Lehne's article brings into light the WTO-AB adjudicative policies from the mouth of its adjudicators such as the important phrase '*the AB adjudicates in an unflinching manner*' (a phrase used by Lacarte-Muró), there are also a series of landmark concepts found in the Farewell Speeches of the *savoir-jûge* (meaning, to know, how to judge). This institutional adjudicative culture is translated and crystallized in the Farewell Speeches. Lehne's article brings all of it to centre stage, the converging and dissonant melodies.

These adjudicative values, such as the ones above mentioned, are meta-legal-adjudicative concepts. They influence the AB's Kelsenian adjudicative pyramid¹ establishing the AB's *modus adjudicandi*: '*not in clinical isolation*', '*absent cogent reasons*'. These adjudicative tools ('cross fertilization') and adjudicative techniques ('judicial economy') were often applied and reiterated AB *modus adjudicandi*. This pinnacle of evaluative-adjudicative

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¹ <https://plato.stanford.edu/entries/lawphil-theory/> (accessed 19 Jul. 2025).

tools, adjudicative techniques, and manners – ‘style’ (*‘in an unflinching manner’*), as one speech posed, shapes one of the *façades* of the AB reports.

Why does this Special Issue highlight the utmost importance of the scrutiny of these Farewell Speeches in a systematic manner? Because it is necessary: (1) to add layers of knowledge on the debate whether the AB reports are flawless – The Farewell Speeches provide an opportunity to extract relevant information, (2) To bring into light that there are different narratives on the AB – and it comes from the mouth of the adjudicator, (3) to preserve the institutional memory of the unique double-degree adjudicative court in the mankind, (4) to foster the debate on the AB adjudicative policies, (5) to identify contradictions in the Farewells Speeches demonstrating dissonances and points of inflections, and; finally, (6) to prove that there is no neutrality among judges, but their ‘public policy choices’ (on trade remedies for instance) can be seen as deliberated political decisions.

Remarkably, ABM Abi-Saab, at the age of ninety-three years old and with an impressive sharp memory and precise legal analysis, shared in his interview – a life lesson to the interviewers Jeff Snyder and I – his recollection of a concept from ABM Ganesan’s Farewell Speech – that *‘the Appellate Body is to iron the wrinkles in the covered agreements’*. The Interview of ABM Abi-Saab is a rich reflection on the AB, such as *‘the Appellate Body was created with the DNA of a court of law’*.

Tom Graham’s article named “From Afterthought to Centerpiece” to Closure. *The Arc of the Appellate Body as Told by Its Members* goes to the fine details of the of the overarching problems of the AB. For instance, he shows the different views of the purpose of the AB by two fundamental actors on the AB: Debra Steger and Julio Lacarte-Muró.

The simple mention that there are conflictual narratives on the conceptual idea of what was the AB, defies the linearity of a WTO scholarship disconnected from reality. This same contribution points out, that after the policies set by the founding fathers of the ABM, the AB started to neglect the criticisms and how it led to *‘diplomatic row’*, to remind Ehlermann’s expression on amicus curiae. The AB was not intended to be a ‘court’ but, over time, vested itself as one. This *‘diplomatic row’* accrued over time on different legal issues and lead the US ask for an entire review of the AB.

An old idiom says, *‘The bigger the giant, the greater the fall’*. The brief but enticing storytelling contained in the meticulous article by Prof. Dr Stephano Silingardi proves that in the *‘theater of the world’*, while the adjudicative actor proclaimed like *Figaro* its own greatness: *‘the DSM is a remarkable success’* – *‘tutti mi vogliono’* –, and higher and louder: *‘120 cases in 25 years’* – *‘tutti mi chiedono’*, our *Figaro* did not realize that, although his apparent success, the world surrounding him was and is falling apart. The reason is because the international relations has shifted its paradigm, from a neoliberal value – like a boomerang – to a nationalistic diplomatic view.

Ironically, Silingardi’s reconstruction of the events explains how in the *‘theater of the world’* the AB went off track, then lost the adjudicative ground and finally fell.

The AB forgot to add one single ingredient to their adjudicative process: Nations became more nationalistic. In the politics of the adjudication, the first Multi-Party Interim Appeal Arbitration (MPIA) provided, in contrast with the WTO case law, a legal recognition that under Article 17.6(ii) of the WTO Anti-Dumping Agreement there are more than one ‘permissible interpretation’. However, the AB rejected any possible reading that a rule of law can be interpreted in more than a manner, in an area in which deference to the WTO Member is expected.

In other words, in the operation of the AB, there is even a deeper layer of understanding than the US claim on *‘judicial activism’*. In a diplomatic sense, the US reclaimed its delegated sovereignty that was delegated to the AB in 1995 *vis-à-vis* the AB jurisprudential flaws. It is a counterpoint that many countries have made, without saying it aloud, but for amicus curiae.

This change, in the global context, was an inflection point that the adjudicative process carried out by AB did not pay enough attention to. The AB should have changed its course of action. In my view the AB kept applying the adjudicator’s legal preferences rather than employ the strength of legal reasoning. These legal preferences, adjudicative policy choices, are based on – consciously or not – the *politics of adjudication*. This is what is revealed in the study of these speeches, and why we have pursued this Special Issue pursuing and analysing the message that the treaty interpreter wants to convey to his audience.

The fourth article in this Special Issue, *‘Opening the Doors or Skewing the balance – Amicus Curiae in the WTO and the quest for equitable justice’* is from Ishaan Pant and Shyam Gandhi. The quality of their article on the amicus curiae controversy is such that – not to mention the accurate extensive and thoughtful debate contained in the article – future publications on this subject can rely on it to check their contribution and synoptic table, because this article goes deep in the sought balance between adjudicative policies and WTO Membership rights. It will be an important article in the WTO literature on amicus curiae.

Next, Nguyen Luu Lan Phuong shows that some form of an ‘Appellate Body’ is not dead. In *‘Precedent Without Rules? WTO Lessons for UNCITRAL’s Emerging Appeal System’* he analyses the merits, and the systemic issues related to the establishment of an AB at UNCITRAL. The lessons from the demise of the WTO-AB can in this way inform future dispute resolution institutions. This article compares and provides suggestions to improve UNCITRAL’s double-degree adjudicative body. Is it a court of law or an adjudicative body? What is its DNA? (to echo ABM Georges Abi-Saab).

Finally, Pietro Acerbi, with his publication *‘The Fragmentation of The International Legal Framework on Technology and International Trade Law’* shows how difficult diplomatic trade negotiations are within the WTO. He shows how tough it has been for countries to

reach an Agreement in an area that resides on the frontline of civilization. ‘*Data mining*’ is a serious business and data transference across borders, this guest-editor dares to say, is and will be a piece of wealth in the next generations.

There are many people that I wish to thank. Some names will not be disclosed because they are fountains of wisdom. However, the first thank you goes to the General-Editor of the GTCJ, Jeff Snyder. He provided answers, gave guidance, and provided every single feedback – including new issues – to have this Special Issue published.

We also thank Prof. Dr Gabrielle Marceau for the last-minute help, Prof. Dr Van Damme, Niki Koumadoraki (*PhD cand.*) for verifying at the WTI Feliciano’s Library the existence of the Farewell Speech. Rhian Wood for checking in the WTO for Farewell Speeches; and Sharon Henry for the support to Abi-Saab interview. Lawyer Darcy Macdermid and Takae Suzuki.

I have been inspired by ABM Taniguchi whose words from there in Japan, ‘*I support this publication*’, were like a flag that we carried in our mind. Also, by Tomohiko Kobayashi for saying ‘*it is the right time to make this publication*’. We thank ABM Matsushita, Prof. Dr Marco Bronckers, Prof. Dr Freya Baetens.

We are missing three Farewell Speeches, unfortunately. They are from Florentino Feliciano (Lacarte Muró recollects parts thereof - ‘*the respect and application of the rule of law through independent and vigorously unyielding impartiality*’

in his article to the seminal book ‘A History of Law and Lawyers in the GATT/WTO’, from ABM A.V. Ganesan, and (if it exists) from ABM Said El-Naggar. I would like to use this platform to send out a request – if anyone knows where they can be found, please let us know. Lastly, we were unable to contact the family of Ambassador Muró, so they can authorize the publication of his Farewell Speech, so we have left it out. If you know how we can obtain authorization, please let us know.

My work is unfinished. The rich reservoir of expertise on this topic cannot be contained in a single Issue of the GTCJ. Already in the planning stages, we will have a second special Issue devoted to this topic in 2026, and we welcome contributions. Please consider this a call for articles or other submission on the Farewell Speeches (whether you are a defender of the AB or relish its demise).

Many minds make a bright work.

Augsburg, Germany, 18 of July 2025.

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Joao Otavio Benevides Demasi,

PhD student on WTO law

LLM (UC-Berkeley), LLM (USP),

Member of the Brazilian, Portuguese, and Italian Bar

Associations,

United States Chess Federation National Chess Master

Email: demasi@protonmail.com.

Top eighty-four Best US Chess player in Rapid Chess.