

The WTO Entrenched in a World (*Trade*) War Crossroads: Lessons for Future Appellate Body Mechanisms

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This Second Special Guest-Editorship of the Global Trade and Customs Journal (GTCJ), named *The WTO entrenched in a World (Trade) War crossroads: Lessons for future AB Mechanisms*, has four related articles unfolding on the themes of the World Trade Organization (WTO) Appellate Body and the Appellate Body Members Farewell Speeches.

These four articles have systemic repercussions because they are examining a wide range of different but interconnected issues. These topics are about the *error in adjudicando* of the Appellate Body on matters related to the Third-Parties' rights, the flaws of the Multi-Party Interim Appeal Arbitration Arrangement (MPIA), a rich diplomatic analysis of the states' life from 'bilateral bullying' to 'defensive multilateralism' as a means to 'block rival's influence'; and finally, on the institutional safeguards and checks-and-balances of the UNCITRAL-AB design to avoid another juridical-diplomatic *débâcle* and demise.

Before briefly bringing into light the content of these four articles, it is necessary to provide proper context to link this second issue with the first one. This issue is a sequence of the first Guest-Editorship (GTCJ, 20_10, October 2025) on the Farewell Speeches of the WTO Appellate Body Members, in which it was possible to gather in a *Compendium* all the Farewell Speeches from all the former Appellate Body Members, but for Feliciano and Ambassador Lacarte-Muró – this last one is in our possession for a future publication. This *Compendium* served as the basis for pioneering a study on the Farewell Speeches in a systematic manner. It is necessary to find Feliciano's Farewell Speech. It exists, as Claus Ehlermann (1939–2025) mentions in a footnote of an article that he has a copy in his possession.

In the first special issue is found five academic articles focused on the issues of: (1) the Farewell Speeches as answers to complaints on lack of independence, impartiality and judicial activism by Professor Lehne, (2) on issues of sovereignty by Professor Silingardi, (3) an exam

on the amicus curiae adjudicative flaw by Pant and Gandhi, (4) lessons to the UNCITRAL AB from the Speeches by Phuong, (5) negotiations on digital trade by Acerbi, plus the collaboration of two former Appellate Body Members. The first former WTO Appellate Body Member Georges Abi-Saab conceded an interview with the primary scope to memorialize, in written form, his Farewell Speech delivered in 2008. In this manner an important page of the WTO-AB history could be preserved.

The second Appellate Body Member evaluated, with one more article, his colleagues' Farewell Speeches by seeking an underlying general theme of the AB *savoir-juger* to ponder that, the philosophical-policy view of the Founding Fathers of the Appellate Body as the *World Trade Court* were displaced, *from day one*, from the WTO Members' original intent of the *modus operandi* assigned thereto.

From it, this editorship assessed that many of the quarrels against the AB are based on this Appellate Body nonsense of what the Appellate Body is and which is the role of the Appellate Body Members. Indeed, the WTO-AB double *Adam's apple* concerns the self-attributed role of a 'WTO judge', and how far is the reaching of *intra-murus* crafted adjudicative policies, that is, '(...) the Members shall convene on a regular basis to discuss *matters of policy, practice and procedure*' (emphasis added), WTO-AB-WP, Article 4.1.

While 130 WTO Members have reiterated requests to open the selective process for the reappointment of Appellate Body Members, it is a known case that an ambassador from a major country slammed the United States for its unilateral measures by blocking the reappointment of Appellate Body Members. Once confronted by another Ambassador from a very important 'country' that the US claims to have valid reasons, the first openly and, out of the blue, started to criticize the Appellate Body. It is an open secret that many WTO Members disagree with the AB but do not want to say it publicly,

Notes

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but why?? Evidence from 2019 research of Fiorini et al., however, found that:

With regard to the professional affiliations of those who took the survey, it is notable that government officials based in Geneva involved in DS, and practitioners in law firms, have expressed the view that the AB has gone beyond its mandate (50% and 60%, respectively) (Q2) (Figure 4).

Many business respondents and legal practitioners believe that the AB has not provided coherent case law (40% and 50%, respectively). 30% of officials in capitals dealing with DS think the AB has not provided coherent case law either (Q12). Finally, 44% of respondents believe the AB has always acted consistently with the DSU (Q13). (Fiorini et al. 2019, page 21)

At this point lies this Special Issue as an accountability process on the WTO-AB activity to bring lessons for the future in the midst of this World (Trade) War. This second issue brings in an unbiased manner a tripod of appraisals:

(1) a juridical article on the past Appellate Body discharge of its judicial business of treaty interpretation by *'Understanding The Contours Of Admission Of "Third Parties" In Disputes At The WTO: In Quest For Devising An Objective Criterion'* from Ravishankar and Parikh. In this text, as a thematic sequence of the examination on Amicus Curiae in the first Special Issue, the authors thoroughly reviewed the Third Parties admissions, built up a synoptic table of the Appellate Body of the core reasoning of rationale behind the decisions, and demonstrated the failure to produce a coherent, systematic and objective criteria to permit Admissions,

(2) Sarkar and Mehta assessed the overall design of the MPIA with the article *'Temporary Relief, Permanent Disadvantages: The Limited Progress of the MPIA'*. This article shows how, in multiple instances, the MPIA does not fit in the WTO-DSS legal framework. It delves deeply in award *limbo* topics, enforcement, validity, jurisprudential coherence, *obiter dicta* already found in the MPIA awards, litigating issues, relationship between Awards and WTO Appeals, unclarity of DSU Article 25. *A posteriori*, it answers a complaint of a former ABM on why India is not a part thereof,

(3) The Peruvian Diplomat Luis E. Mayaute Vargas in his article *'Multilateralism at a Crossroads: Beyond practical implications on the WTO's fragmentation'* provides one of the richest conceptual articles on this topic pertaining the analysis of the multilateral existential crises during this Second Trump 2.0. So detailed is Vargas' *exposé* that requires the reader to use a magnifying

glass on to the multiple facets examined. His mainstream view of the current multilateral dystopia is also translated in oxymoron coined dramatic passage, born as a bestseller: *'The paradox today is evident: just when an active and robust Appellate Body is most needed, the membership itself has rendered it inoperative'*; and,

(4) a structural-institutional, that is, a set of lessons drawn from the Farewell Speeches of the WTO-ABMs *vis-à-vis* the building of the UNCITRAL-AB. *'Accountability without paralysis: WTO Farewell Speech insights for UNCITRAL's Appellate design'* written by Prof. Dr Lihua of Beijing Institute of Technology (BIT) and Nguyen Phuong shows how three layers of accountability: (1) interpretative accountability, (2) institutional accountability, and (3) constitutional accountability were designed to avoid choking points that led to the US action in the WTO.

Other studies on the Farewell Speeches could be made. For instance, by unveiling the content behind the adjudicative speech would give to WTO litigators leverage to understand some AB adjudicative hallmark policies. Narrowly tailored articles on how the ABMs handle questioning over results on certain Agreements would give a glimpse of their minds and AB policies.

Other lessons for future AB mechanisms would be our suggestion to restructure the AB selective process so that Appellate Body Members show curriculum preparedness to deal with the bulk of practical WTO litigation – beyond usual claims based on *Article I* and *Article III* – on trade remedies.

Anti-Dumping and Subsidies claims appeared 285 times in the 631 disputes submitted to the Dispute Settlement System (DSS). This last topic would also have given more intellectual muscles to avoid, in many areas, as a term coined by this editor, a *WTO zig-zag jurisprudence*, making WTO Members and Litigators rejoice over the *'security and predictability'* of the DSS.

These four articles complete a panoramic view on the Appellate Body activities covering multilateral issues (Vargas), adjudicative flaws (Pant and Gandhi), Appellate Body Members perspective (Tom Graham), historiography/Memory (Georges Abi-Saab), diplomatic negotiations (Acerbi), MPIA flaw designs and litigation issues (Sakar and Metha), accountability on the faulty designs of the WTO-AB to use on the UNCITRAL-AB (Lihua and Nguyen Phuong in this Issue; Nguyen Phuong in the previous one), current Statecraft (Silingardi), the first scrutiny of the content of almost all Farewell Speeches (Lehne), and to many other people. We also thank the General-Editor of the GTCJ, Jeff Snyder.

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