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This is a guest post from law professor Luca Rubini:

In yesterday's speech in Geneva, Ambassador Katherine Tai, the current USTR, said:

> **"Reforming dispute settlement is not about restoring the Appellate Body for its own sake, or going back to the way it used to be.**
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> **It is about revitalizing the agency of Members to secure acceptable resolutions.**
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> **A functioning dispute settlement system, however structured, would provide confidence that the system is fair. Members would be more motivated to negotiate new rules.**
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> **Let's not prejudge what a reformed system would look like. While we have already started working with some members, I want to hear from others about how we can move forward."**

This brief piece, initially written a few weeks ago, is a somewhat basic reflection on the rise and fall of the Appellate Body of the World Trade Organization ('WTO'), long considered as a very successful – if not the most successful – example of international court. To many its track-record was impressive and spotless. While criticism of some of its jurisprudence, and more generally of some of the features of the whole dispute settlement mechanism, were raised, the Geneva-based "court" continued in its day-to-day work - relentlessly. In 2015 the criticism erupted into a full-fledged crisis with the United States (Obama administration) vetoing the replacement of a retiring member. The main claim, a long-standing one for the US, was that the Appellate Body was systematically 'creating law'. This veto lasted from through the Trump administration with the result that, one by one, the 7 members were reduced to less than 3 on 10th December 2019 – the minimum number for the body to adjudicate. In effect this meant killing the Appellate Body.

In this brief note I explore the historical origin of dispute settlement in the trade context and attempt to analyze the causes of this demise, while looking at the future.

The GATT era

At the very beginning, the General Agreement on Tariffs and Trade ('GATT') did not have a dispute settlement system. This birth defect depended on the fact that the GATT was designed to be a simple part of a bigger regulatory framework with at its centre a fully-fledged organization, the International Trade Organization. With the US Congress,

however, jettisoning the ITO because of its perceived intrusion to American sovereignty, the only part of the deal that remained standing was the GATT which only included two very general provisions on disputes. No mention was made of the adjudicating bodies that should solve them, no reference to their composition or procedures.

What then happened is a miracle of diplomatic pragmatism. The closely-knit community of GATT and government officials created step by step a functioning dispute settlement system. For many years, it operated more as a mediation or conciliation system with working parties which included representatives of the litigating parties, aiming at finding a positive settlement between them. Through the years, with the constitution of *ad hoc* independent panels, there was a shift from a diplomatic to a more legalistic approach – where litigants argue on the basis of legal points and a winner (and a loser) necessarily emerge from the process.

The miracle is that the system worked and served the world trading system reasonably well for more than 45 years. Importantly, unlike judicial decisions in a domestic system, the reports produced by the Panels were not automatically law but had to be adopted by all Contracting Parties. Although the incentive for the losing party simply to object the adoption was clear, 80% of the Panel reports were adopted (only 8 reports remaining toothless printed paper). The Contracting Parties certainly had the perception that today's loss could turn in tomorrow's win. More importantly, however, they valued the system and played by the rules of the game.

If the GATT dispute resolution system is often tagged as an example of a diplomatic means to solve international disputes, it increasingly became more legalised. Perhaps, this had to do with the fact that lawyers were recruited in the mid-1970s for the first time (see Marceau, 2015). With the increasing legalization and judicialization of the system, the birth defects showed that it had reached its full potential, and reform was necessary. (For a masterful history of the GATT dispute settlement the works of Robert Hudec are still unsurpassed; see for example the volume *Enforcing International Trade Law*, 1993.)

The WTO era

The Uruguay Round negotiations, launched in the mid-1980s, eventually led to the creation of the WTO. The legal package included also a specific agreement on dispute settlement which thus filled the gap of the GATT period. It is, however, clear from the negotiations record that the idea of the Appellate Body was an after-thought, it came late in the negotiations and was not really carefully discussed and pondered. It was the first example in history of an appellate level in international judicature. The literature (Mavroidis, 2016) has recently explained the main political focus of the negotiations on dispute settlement: it was necessary to buy the US in the idea itself of an international dispute settlement and thus constrain their unilateralism.

For many years, the system has been applauded for its success. Since the beginning Members made use of the system. At the time of writing, 606 disputes have been registered. At the same time, many have consistently appreciated its compliance record. The mantra has been that losing parties do comply with the rulings and recommendations of the Dispute Settlement Body and that only in a handful of cases retaliation (the last resort in remedies) had been authorizedd and in very few of these instances applied. Though one may legitimately question this mantra (what does compliance really mean? See Mavroidis, 2016), we will not deal with this point.

The Dispute Settlement Mechanism of the WTO, with the permanent Appellate Body at its top, was frequently referred to as the 'jewel in the crown' of the WTO system.

The problems

Since the beginning, the literature has given large space to the decisions of the Panels and especially the Appellate Body, with analysis which increasingly matched the sophistication of the legal issues raised by disputes. In the early 2000s, the American Law Institute even set up a project where all decisions of the Appellate Body (and many of the Panels) were annually commented by a team constituted of one lawyer and one economist (the reports can be found here). As in any 'public law' system, big jurisprudential questions about sovereign prerogatives and their limits were continuously raised. One increasingly common theme in the literature was, however, the dissatisfaction with the attitude and quality of the Appellate Body's decisions, especially concerning the interpretation of certain key agreements (for example, whether the anti-dumping agreement permits the practice of 'zeroing') or the asserted precedential nature of previous Appellate Body's decisions (for few examples of this literature see, e.g., Mavroidis, 2013; Mavroidis, 2016; Rubini, 2016; for different assessment of 20 years of WTO Appellate Body jurisprudence see Howse, 2016).

This scholarly criticism found its political counterpart in the monthly meetings of the Dispute Settlement Body, the political organ of government representatives called to discuss and adopt the Appellate Body's reports. Consistently, one of the strongest voices of criticism came from the United States – and this irrespective of the color of the administration.

An old and rooted conviction of the Americans was that the Appellate Body was undoing the promises and commitments of the parties, it was, using jargon, "adding to the rights and to the obligations" of the parties. In a word, it was an activist body, indulging in creating law. All this, clearly, to the detriment of US' interests (see Stewart, 2018; Condon, 2018).

Facts followed words. Jennifer Hillman, initially appointed by President George W. Bush, was not re-appointed by President Obama in 2011. Allegedly, she had not sufficiently defended US' interests in the cases she was involved too. This was clearly a 'bad omen' for

the trading system (Hufbauer, 2011). Hillman's farewell speech in December 2011 was a measured defence to the importance of judicial independence. In May 2016 the US blocked the re-appointment of another member of the Appellate Body, this time Seung Wha Chang from South Korea. The reason was the disagreement "with the jurisprudence articulated in four Appellate Body decisions on which Chang was one of the three appellators on the division deciding the case" (Charnovitz, 2016). President Trump continued with the blockage, vetoing all new appointments to come, with the effect that the Appellate Body was doomed. The drama concluded with the fiery farewell speech by Thomas Graham, the last US Appellate Body Member, that seemed to fully back the long-standing US accusations and even escalated them by finger-pointing the Appellate Body Staff leadership (NB: the Appellate Body members used to be assisted by a special unit of the Secretariat).

But is the US the only complainer? According to a recent (2020) empirical study by the EUI, "the data reveal strong support for the basic design of the dispute settlement system but also that the United States is not alone in perceiving that the [Appellate Body] went beyond its mandate. There are substantive questions that need to be addressed if the Appellate Body impasse is to be resolved."

Analysis

It is now time for a bit of analysis. Those conversant with the system know that the WTO dispute settlement system has essentially been a two-level court in the shadow of the secretariat. It is highly likely that the helping hand of the officials in charge has often gone too far. This is not limited to the appellate level. Panellists are often not qualified enough. The quality of Appellate Body Members has arguably been decreasing appointment after appointment (I witnessed myself one former Member, excusing himself at a conference celebrating the twenty year anniversary of the Appellate Body, because he admitted not to have sufficient legal expertise to contribute to the debate). In a word, the endemic lack of professional and experienced lawyers on the bench has inevitably led to the Secretariat supplementing. This, in a sense, can also be seen as the lingering impact of the diplomatic GATT dimension within a system which has now the mission of being legalistic.

To be sure, the system has become more legalized in the WTO but the room for judicial gap-filling (and potentially policy-making) is very significant. Partly this was inevitable, and goes to the nature of WTO law which is in large respects an uncomplete contract. Many provisions are more akin to standards rather than rules (see Kaplow, 1992). The cost of negotiating specific rules was simply too high – mostly because agreement could not be found – and the parties concluded vague legal language, sometimes called 'creative ambiguity'. In a word, it is the Members' choice and responsibility to have opted for broad and vague language. This has, however, meant that, sooner or later, the standard had to be translated into a rule, it had to be construed. Gap-filling becomes *almost* inevitable, especially in a context where Members cannot find ways to update a rule-book negotiated

in the 1980s/early 1990s (another element of governments' responsibility). But, here comes the duty, responsibility and pressure of the adjudicators, who can perform their duty in different ways – being more deferential or indeed more creative. Arguably, there have been many instances where their constructions of the law seem to depart from what the parties agreed or, better, could *not* agree. See Rubini, 2016. Some of the most salient examples can be found in the sensitive jurisprudence on trade remedies (anti-dumping, safeguards, countervailing duties). See Rubini, 2014.

At the same time, jurisprudence has also been growing in complexity. Certainly, this has partly depended on the complexity of claims and facts (the epitome is Large Civil Aircraft litigation on financial support to Boeing and Airbus, the dispute that the system was not ready to handle – but the fault here is for those Members that escalated it into a legal dispute, not the dispute settlement system that was then obliged to deal with the "hot potato"; eventually reason came to town and a settlement was concluded; see Hufbauer, Rubini, Yee, 2009). But, rather than attempting to reduce this complexity to an efficient style of analysis and clear drafting, the judicial style seems to have remained entangled in it, at times even indulging in it. The quality of drafting suffered from it. More than this, this attitude has unduly led to tackling issues not strictly necessary to solve the dispute, to unnecessary obiter dicta, to excessively completing the analysis. The bigger picture emerging from this scenario is one where the Appellate Body was perhaps too much strongly aware of being the guardian of the system. This contrasts with what prevailed in the first years, mostly characterised by caution and self-restraint (see Ehlermann, 2003; Abi-Saab, 2006). In its 25 years of history, what is clear to the observer is an evolution in judicial leadership and strategy. See Rubini, 2016.

And now? Back to the past?

Two reactions have come out from the demise of the Appellate Body. On the one hand, those that have bitterly lamented the loss of the 'jewel', its unprecedented track-record in international dispute settlement, its good example as guardian of the rule-based system. On the other hand, others have asked themselves whether exploring the causes that led to this demise would have been a more fruitful exercise – we belong to this quarter. Quite inevitably, even the attitude on what to do with the dispute settlement system has been opposite between the two groups, with the former cohort suggesting that the veto – impasse should be tackled as a matter of urgency and the Appellate Body be reinstated in all its functions, and the latter group suggesting a period of reflection and possibly reform. Various proposals have been tabled (see the 'Walker Principles') and an interim appeal system has been signed to by several Members.

The literature is tackling various issues. Arguably, there is a need to go back to the fundamental questions. What type of dispute settlement do we want? Do we really need an appellate level? To do what? In the context of an international organization with no real

legislative function, how can 'wrong' judicial decisions be remedied? Surely, the elephant in the room is that, not only do we need dispute settlement but, before that, we also need a properly functioning *rule-making* activity. One without the other will not work. That was partly what happened in the WTO: no rules, too many rulings.

Dispute settlement is necessary for any legal system, but the type of dispute settlement is dictated by the nature of legal system. Legally and politically, the discussion boils down to the following questions: Is WTO law constitutional? Was the Appellate Body (supposed to be) a constitutional court? Or was the nature of the system and its laws more transactional and contractual? Using an economic language, who was the principal and who was the agent? Did the regulatory framework duly reflect these roles and introduce the necessary safeguards?

It is exactly in times of crisis, like the ones we currently live, that we need to go back to the fundamentals.