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Review

Much Ado about Nothing: The curious case of WTO Appellate Body's lack of authority

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Introduction

This short essay aims to provide a critical review of Gregory Shaffer, Manfred Elsig, and Sergio Puig's seminal work, *The extensive (but fragile) authority of the WTO Appellate Body*[2]. The WTO's Appellate Body (AB) is an integral and indispensable part of the WTO dispute resolution mechanism[3]. The AB provides for a legal – procedural channel for dissatisfied member nations of the WTO to flag other member states' violation of the WTO laws and to claim remedies and invoke retaliatory measures[4]. The membership of the WTO's AB typically consists of seven judges, and the membership rotates every four years[5]. What is commonly invoked as the AB crisis refers to the blockage of the selection of new judges by the United States in December 2019 when the membership of two of the three judges came to an end[6]. Since then, the

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[2] Shaffer G, Elsig M and Puig Sergio, "The Extensive (But Fragile) Authority of the WTO Appellate Body" [2016] Law and Contemporary Problems 237
[3] Jens Lehne, *Crisis at the WTO: Is the Blocking of Appointments to the WTO Appellate Body by the United States Legally Justified?* (Carl Grossmann Verlag 2019).
[4] Matsushita M, Schoenbaum T, Mavroidis P, and Hahn M, *The World Trade Organization Law, Practice, and Policy* (Oxford University Press 2015).
[5] Ibid.
[6] Aditya Rathore and Ashutosh Bajpai, 'The WTO Appellate Body Crisis: How We Got Here and What Lies Ahead' [2020] Jurist < The WTO Appellate Body Crisis: How We Got Here and What Lies Ahead? - JURIST - Commentary - Legal News & Commentary> accessed 07 December 2021.

WTO's dispute resolution process has come to a halt. As Alan Reinsch puts it aptly, 'the Appellate Body now lacks a quorum necessary to hear appeals, grinding the dispute settlement system to a halt and throwing into doubt the WTO's role in enforcing multilateral trade rules'[7]. Such an alarming situation has provoked an outcry in academic, legal and bureaucratic circles, seeking both to explain the crisis and to offer a practical solution.

Relatedly, Gregory Shaffer, Manfred Elsig, and Sergio Puig[8] ("authors")'s narrative has arguably acquired a prominent standing in the current discourses in International Trade Law on understanding the recent downfall of the WTO's AB. Their eminent account presents a very emphatic—at times compelling—narrative of the rise of WTO's AB and attempts to explain how AB's demise of authority was **inevitable**. The authors trace the provenance of AB's escalation to *prominence*, and its gaining of *influence*—which in the words of the authors connote to AB's "**authority**". The authors accurately note how the wave of greater trade liberalization and the post-Cold war disenchantment towards unilateral systems of trade regulation led to conditions conducive to WTO's development.

Methodologically, the authors borrow Alter, Helfer, and Madsen's sophisticated classificatory-scheme of narrow, intermediate, and extensive authority[9]—backed by empirical data—to establish that AB relatively rapidly (within two decades) developed extensive authority. Furthermore, they declare that AB's "success story" (i.e., its pace of development relative to the magnitude of authority it obtained) is a remarkable one[10]. However, despite this remarkable rise of AB's authority, the authors caution that such authority is fragile and prone to rapid decline. Such potential decline could be attributed to factors such as the limitations inherent in the

[7] Alan Reinsch, 'The World Trade Organization: The Appellate Body Crisis' (*Center for Strategic for International Studies,* 2021) <https://www.csis.org/programs/scholl-chair-international-business/world-trade-organization-appellate-body-crisis> accessed 7 December 2021.
[8] Shaffer G, Elsig M and Puig Sergio (n 2).
[9] Alter K, Helfer L and Madsen M, 'How Context Shapes the Authority of International Courts' [2016] Law and Contemporary Problems 9.
[10] Shaffer G, Elsig M and Puig Sergio (n 2).

WTO's institutional structure, and the international community's rising disenchantment with multilateralism and the role of global regulatory authorities. The authors' narrative of AB's development is methodic in its factual exposition of AB's trajectory, providing a thorough insight into the then nascent AB's progressive aims and modest ambitions.

Nonetheless, the authors' argument ultimately runs dry as its conclusions overreach way beyond the theoretical constructs the authors employed. In other words, AB's rise to power is not the same as AB having extensive authority, nor is AB's development as an international court as unique as the authors suggest. Moreover, it is debatable whether (contrary to the authors' claims) there was ever a change of venue from political negotiations to a truly (independent) legal mechanism.

Authority implies more than influence, prominence, and effectiveness

Firstly, the theoretical construct borrowed by the authors is a narrow one. Such a framework defines authority in overtly political terms ("*as a form of power*"), and thus sees authority in purely functional terms. According to this model, power is simply about AB's outreach and influence rather than the normative superiority (i.e., it sees power narrowly as a force to command and *coerce* rather than *oblige*). Using Joseph Raz's perspective, authority implies a *moral* force to obligate, whereby the subjects willingly surrender engagement in *instrumentally* weighing of costs and benefits of every single task to an entity[11]. This could be explained by a simple, everyday example. Once patients (subjects) have conceded to their doctor's (authority's) superior decision-making and advising ability (for e.g., due to the doctor's medical expertise and experience), such patients then do not go on to independently assess (and question the legitimacy and credibility) of the doctor's actions, every time they receive any advice or instructions by their doctor. We do not see this type of submission to authority here: member states never undertook to ceding such authority to AB. Thus, AB did not have an authority because it never enjoyed that degree of

[11] Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford University Press 2009).

legitimacy to seek unquestioning compliance. And to that effect, the empirical indicators the authors quote of the AB's rise to authority alludes more to AB's growing *influence*. While authority is an internal characteristic, exerting of influence is an external one, which bases itself upon the popular public-political reception[12].

Seen from this *internal-external* perspective, AB's *narrow* authority is no authority in true sense since it directly relates to the litigating member states' own initiative (self-imposed commitment) to recognize WTO obligations upon themselves. Similarly, authority presumes a degree of sovereignty, which we see is absent in AB's case. Thus, *intermediate* authority is also suspect since it does not arise independently of the WTO general memberships' accession to WTO. At best, such intermediate authority approximates to Bourdieu's *symbolic capital*[13], the leverage of which is nonetheless tightly constrained by the expectations of stakeholders in the field of trade regulation. Likewise, the authors disregard that authority necessarily involves a one-way exertion of influence/force. Thus, AB's *extensive* authority is also suspect since as per the authors' account AB, rather than *unilaterally* providing such influence, relies upon the recognition, support, collaborations, acknowledgement, and endorsement of international agencies/actors. Thus AB, rather than exerting authority, exists in a symbiotic and mutually reinforcing relationship with (and is thus dependent upon) such public international agencies.

Therefore, although the authors' primary concern is to provide an account of AB's authority, they fall short of precisely identifying its *essential* feature. Is it the sheer *legal* power to coerce? (No, since AB decisions are not binding in national courts. Also, AB's power to coerce is indirect as it merely allows a complainant country to retaliate, rather than having its own sanction system); is it the normative superiority over other legal systems? (No, since AB does not bring either an original text or interpretative principle to bear upon its decisions. It constantly evokes customary Public International Law's principles); is it the *political* legitimacy to seek compliance with

[12] Ibid.
[13] Pierre Bourdieu, *Distinction: A Social Critique of the Judgement of Taste* (Routledge 1984).

member states? (No, since as per the authors' own account member states use WTO dispute settlement system strategically to their own ends for e.g., by filing trivial claims to create a precedent for the subsequent, *real*, largescale claims). Thus, AB's force is not the same as *authority*, but at best, refers to wide *influence*, global presence/prominence, and a system of universal endorsement by other states, international agencies, and bodies etc.

Consequently, the authors' limited framework of authority (as denoting power) is problematic not only theoretically (as it limits the scope of inquiry), but also practically since it creates an inaccurate depiction of AB having authority, and only then being on the verge of losing it. Whereas, it seems like AB never had acquired such authority in the first place , and thus its portended demise should come as no surprise.

The Authors' macro-level perspective ignores the role of subjective power struggles in shaping AB's authority

Also, the authors also adopt an exclusively macro-level perspective of AB's rise to power and the reasons for its demise. Although they briefly acknowledge reference to diplomats' practices as having been influential in the early formative years of WTO[14], they fail to discuss the political dynamics between AB and other WTO organs. Likewise, they accord insufficient consideration to how AB's practices are viewed by those internal to it. The authors portray AB as a single, ideologically monolithic entity, whereas AB's membership was randomly rotating, and hence diverse. Therefore, it is a bit far-fetched to attribute to it a degree of singlemindedness and purposiveness, which did not exist. Moreover, the authors do not seem to appreciate how AB's practices are mediated through the lens of such individuals' personal nexus and professional agendas rather than being predominantly governed by any grand-narratives of state sovereignty and economic-theory rationalizations imposed upon them (AB's practices). Seen this way, AB's objective quest for authority is also underlain by subjective power struggles.

[14] Shaffer G, Elsig M and Puig Sergio (n 2).

AB's juridical turn is not necessarily better than GATT-era's political negotiations

Equally problematically, the authors' account is based upon a sharp contrast of GATT's political negotiations with AB's juridicalized rules. However, in this case, judicialization of rules did not do away with the political unevenness and negotiating difficulties. Thus, the authors' celebratory account of AB's judicialization is old wine in new bottle as WTO tries to sell "neat" legal solution to the "messy" GATT-era political intra-state trade-regulatory contests. Whereas, in fact, the WTO has become a legal platform for member states to conduct such contests with far-reaching consequences. Hence, arguably, the politics-to-law turn never actualized, but instead the political and strategic maneuvering became disguised under AB's legalistic-formalistic reasoning.

Contrary to the authors' assertions, I believe, the AB's adoption of such technical, formalistic legal reasoning (to insulate itself from criticism by making the discourse only accessible to legal and technical experts/specialists) did not extend AB's authority. Rather it marks the epistemological limits of such authority. The reason why adopting legalistic reasoning does not extend AB's authority, but rather constrains it is because such mode of reasoning renders WTO's judgements arcane and technical. Thus, as a result, the judgements are inaccessible to the wider non-legal community of stakeholders that feels deprived of a discursive space in which it can meaningfully address and engage in non-legal arguments and issues.

Likewise, the AB's struggle in maintaining its authority is manifest in its prudent direction of its decisions to the member-state's executive bodies rather than their legislative wings; its desperate attempts at reaching unanimity and consensus in decisions; its practice of collegiality to achieve greater harmony and to discourage and avoid any indications of dissent; its extensive invocation of principles of Public International Law; and its exercise of judicial restraint. All these factors do not signal

a move towards AB's cleverly consolidating its authority. Instead, they signify the constitutional constraints over AB's authority.

AB's rise to power is not as unique or remarkable as suggested by the authors

In the same vein, the authors' suggestion that AB's rise to power (as an international court for trade law) is unique and remarkable does not factor into account the highly comparable development of the European Court of Justice (ECJ)'s powers. In both WTO's situation[15] and in the EU's[16], the member states joined the respective organizations with some hesitance, and by conditionally surrendering their sovereignties. Later, the organizations evolved towards a high level of judicialization and assumed a more activist role to achieve an unprecedented degree of legal integration among member states. Thus, AB's authority developed within two decades, the time it roughly took for the ECJ to solidify its claim to supremacy. Thus, in both AB and EU's case, the authorities derived their "authority" from the member states, that in turn happened to lament and resist every subsequent ceding to their power to the organizations, and then tried to adjust to it by strategically using the organization's highly developing nexus to their own national advantage. Moreover, just like the EU (where the ECJ remains unconstrained and largely independent of EU Parliament)[17], AB is virtually more powerful than the other wings of the WTO.

Widespread use of WTO is not necessarily a sign of its authority

Another central evidence presented by the authors in support of their argument about AB's rise to extensive authority is the massive use of the WTO's exclusive dispute settlement mechanisms[18]. The authors argue such usage, led AB to develop a rich and diverse jurisprudence on global trade law[19], and WTO law has found fields, domains

[15] Matsushita M, Schoenbaum T, Mavroidis P, and Hahn M (n 4).
[16] Paul Craig and Grainne de Burca, *EU Law: Text, Cases, and Materials* (7th edn, Oxford University Press 2020).
[17] Robert Schutze, 'The Morphology of Legislative Power in the European Community: Legal Instruments and the Federal Division of Powers' (2006) 25 Yearbook of European Law 91.
[18] Shaffer G, Elsig M and Puig Sergio (n 2).
[19] Ibid 238.

and avenues which have *internalized* WTO law[20]. However, the authors do not discuss how such influence has *not* been accepted or adapted unconditionally and unquestioningly. Rather such influence is carefully tailored and streamlined by various local and international actors and agencies to suit their own paradigms. Accordingly, rather than exemplifying the unqualified, general construction of AB's authority, they rather signify selective *deconstructions* of AB's authority. The support for this argument comes from the fact that AB has virtually no power in governing such usage of its jurisprudence beyond its own WTO organs.

Moreover, until recently, the massive use of WTO's dispute settlement mechanism may not necessarily imply its effectiveness, but merely a lack of viable alternatives. Thus, we see that the proliferation of regional preferential trade agreements with their own dispute resolution mechanisms is beginning to draw traffic away from WTO. Moreover, even if we assume that immense use of WTO is a sign of its effectiveness, effectiveness is a necessary but not a sufficient condition of its authority. Thus, unlike the authors' assertions, the empirical evidence of the level of public interest, political support and scholarly attention to WTO are not *symptoms* of AB's power, rather its *sources.*

WTO's institutional design is not a sufficient factor in explaining its fragile authority

The authors also identify (deficiencies in) WTO's institutional design as a factor of its fragile authority. They correctly underscore how WTO's insubstantial enforcement mechanisms and remedies (such as lack of retrospective remedies for a breach, and lack of enforcement of WTO decisions under national jurisdictions or before national courts etc.) pose a threat to AB's authority. Likewise, the authors also add how the member state's noncompliance (for e.g., through 'delay tactics 'or by the passage of counter-balancing measures that would frustrate the effectiveness of WTO's decisions etc.) potentially pose a challenge to AB's authority. However, they fail to cogently

[20] Ibid 240.

explain why such deficiencies inherent in the WTO's structure pose such a critical problem *only now*. Thus, although such design features may constitute limitations to what AB can achieve, they, by themselves, are insufficient to explain AB's fragile authority. The answer apparently lies in the political patronage WTO enjoyed.

AB's fragile authority is not rendered fragile simply because of withdrawal of support from superpowers

Lastly, the authors suggest that one of the factors behind the establishment of WTO's authority was the political backing of the superpowers, and thus removal of such backing can lead to WTO's downfall. However, there is a noteworthy dissonance in the authors' account of the importance of superpowers in the maintenance of WTO order. On one hand, they postulate that the AB's future is at stake given the United States' disavowal of it[21], yet they also talk about the increasing participation of developing countries in WTO[22], and the changing geo-political balance of powers[23], thus implying that AB's continued authority does not rest upon the backing of superpowers.

However, I believe, the (lack of) political backing is only the tip of the iceberg. As Roland Barthes would say there is no author separate from the text[24], there is no AB authority separate from the global trade order itself. The rise of AB is coterminous with the rise of global trade[25], and thus—rather than the conscious lack of support by any developed country—AB's vicissitudes are tied with the limits of liberalization of trade possible at global level. Thus conceived, the decline of AB's authority may be seen in the wider context of a general rising mistrust of international courts—either as

[21] Ibid 273.
[22] Ibid 251, 262.
[23] Ibid 270.
[24] Roland Barthes, 'The Death of the Author' in Stephen Heath (ed), I*mage Music Text* (Fontana Press 1977).
[25] Colin Picker, 'The AB Crisis as Symptomatic of the WTO's Foundational Defects or: How I Learned to Stop Worrying and Love the AB' in Chang-fa Lo, Junji Nakagawa, and Tsai-fang Chen (eds), *The Appellate Body of the WTO and Its Reform* (Springer 2020).

proxies of superpowers or as functionally impotent[26] to be able to make a real difference—or in the rising defragmentation of the global political and economic order.

Conclusion

It is generally believed that despite its contested legacy, the WTO has for more than two been the world's premier regulatory body in international trade law. The very presence of WTO's structure and legal governance helped shape the politics of international trade as well as mobilizing the countries towards greater participation in international trade, Moreover, through its jurisprudence and political influence, WTO's AB restructured international trade dynamics. For e.g., in its capacity as a global forum for dispute settlement, to a great extent, it was successful in replacing trade wars with diplomatic settlements. However, we are now witnessing an end to that era. WTO's AB has suffered an arguably inescapable blow to its legitimacy, and its demise is looming over its head. The rising international sentiment against multilateral rules, and accusations at AB's judicial activism suggest that international trade regulation is heading towards an uncertain future.

In the wake of this global turn of events, currently many narratives are being circulated—by political scientists, trade law experts and WTO specialists—that zealously seek to articulate the underlying causes behind this apparently sudden and shocking paralysis of WTO. One amongst such widely popular and authoritative accounts is that of Shaffer, Elsig and Puig's that masterfully explains the almost magical rise of WTO' and its equally disquieting decline . This short essay reviewed their account and explained how the persistence and prevalence of WTO's clout has been somewhat illusive. Contrary to Shaffer, Elsig and Puig's perspective, this essay argued that WTO never enjoyed authority in a real sense, and thus, its disappearance should not come as a surprise. WTO certainly did enjoy significant influence, prominence, and outreach—however, that too had been limited in magnitude, and

[26] Peter Van Den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization* (Cambridge University Press 2017).

contingent upon a host of factors. Once those factors are displaced, the WTO's alleged authority disappears in a way which makes the trajectory of WTO's decline neither shocking nor sudden.