Book Review

A BOOK REVIEW ON PETROS C. MAVROIDIS "THE WTO DISPUTE SETTLEMENT SYSTEM: HOW, WHY AND WHERE?" (EDWARD ELGAR, 2022)

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ABSTRACT

Petros C. Mavroidis' book tells a unique story of the World Trade Organization (hereinafter "WTO")'s dispute resolution practices since 1995. He focuses on a more numerical and visualized picture of the WTO dispute adjudication world by unveiling important numbers, figures, trends, and preferences "hidden" in real disputes between WTO Members. A comprehensive examination of the questions of "what" disputes were resolved, "who" resolved them, and "how" are they resolved enables the reader to better understand "where" the world trading (dispute resolution) system is/should be standing. Mavroidis argues that the WTO's Dispute Settlement Understanding (hereinafter "DSU") of the current design has been excessively compartmentalized, and the justice has been seriously delayed. Benefiting from the empirical results, he advances a new version of the DSU, that is the DSU 2.0, to meet the actual needs and expectations of WTO Members and the international trading community in establishing an effective dispute resolution mechanism within the WTO. More specifically, he proposes that the DSU 2.0 should repudiate the Appellate Body

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mechanism and improve to a one-instance WTO court with an enhanced engagement of the WTO at the consultation stage.

KEYWORDS: *World Trade Organization, dispute adjudication, appellate body, DSU 2.0*

Ever since the advent of the World Trade Organization (hereinafter "WTO") in 1995, it has played a significant role in removing tariff and non-tariff barriers to facilitate trade liberalization; it has also made a tremendous contribution to solving international trade disputes through mechanisms of consultation and two-instance adjudication (i.e., panel proceedings and appealing proceedings) established in the Dispute Settlement Understanding (hereinafter "DSU") agreement. However, the WTO's adjudication mechanism is currently experiencing a serious crisis: the appealing mechanism is not functioning since there are no members of the Appellate Body.[1] This is because the appointments of new judges to the Appellate Body have been consistently blocked by one of the WTO Members—the United States (hereinafter "US").[2] Petros C. Mavroidis' book provides a timely and thoughtful solution to this judicial crisis of the WTO by presenting a new version of the DSU, that is the DSU 2.0. The institutional framework of the DSU 2.0 is designed on the basis of a full consideration of the WTO records and practices in solving trade disputes over the past twenty-five years. The DSU 2.0 reflects and corresponds to the actual need for an effective dispute resolution mechanism within the WTO.

Mavroidis' book consists of twelve chapters and can be divided into three parts. Chapters 1 and 2 form the first part which provides the reader with the historical context of the WTO crisis as well as the salient features of its dispute settlement mechanism. In Chapter 1, Mavroidis introduces both "endogenous" and "exogenous" factors that have contributed to the WTO crisis, including, *inter alia*, China's accession, Trump's Administration, the 2008 financial crisis, and the COVID-19 pandemic.[3] He argues that both the judicial and legislative functions of the WTO are at risk and that solving the narrow judicial crisis is a necessary, but not sufficient, condition to deal with the wider legislative crisis.[4] While the WTO has been engaging in various efforts to respond to the dispute settlement crisis, the results have been far from satisfactory. Mavroidis then presents a primer on the compulsory third-party dispute settlement mechanism within the WTO regime. He briefly introduces the origin, objectives, basic features, main stages, and alternative proceedings of the WTO adjudication, as well as types of complaints that the WTO dispute settlement mechanism may address. Mavroidis stresses that, unlike the European Union (hereinafter "EU"), the WTO is an exclusive, self-enforcing forum where all disputes that may arise among the WTO

[1] *See Dispute Settlement: Appellate Body*, WTO., https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm (last visited Sept. 8, 2022).
[2] *See* Simon Lester, *Ending the WTO Settlement Crisis: Where to from Here?*, IISD (Mar. 2, 2022), https://www.iisd.org/articles/united-states-must-propose-solutions-end-wto-dispute-settlement-crisis.
[3] PETROS C. MAVROIDIS, THE WTO DISPUTE SETTLEMENT SYSTEM: HOW, WHY AND WHERE? 10-56 (2022).
[4] *Id*. at 81.

Members may only be addressed through its compulsory, third-party dispute settlement mechanism.[5] While acknowledging the great value of the original design of the WTO adjudication, Mavroidis points out some issues that had not been thought of by the designers which may have undermined the pursuit of the WTO's objectives.

The second part of this book concerns empirical analyses of the actual practices of WTO dispute resolution in the first twenty-five years since its inception (namely from 1995 until 2020). The main objective of these chapters is to answer the "what", the "who" and the "how" questions: what disputes were resolved, who resolved them, and how were they resolved. In Chapter 3, Mavroidis first presents a taxonomy of the WTO Members by classifying the 164 WTO Members into 5 groups as well as a "functional" understanding of the term "disputes".[6] He then displays some empirical findings regarding the caseload of the WTO adjudication and the duration of adjudicatory proceedings. He concludes that the WTO dispute settlement mechanism is facing a declining number of disputes and that the statutory deadlines for different stages of adjudication have commonly been not observed.[7]

In Chapter 4 and Chapter 5, Mavroidis investigates to what extent the five groups of the WTO Members have been using consultation, panel proceedings, and the Appellate Body mechanism in practice. He also presents the actual participation of third parties and amicus curiae in these stages. Mavroidis argues that the WTO courts do not impose stringent standing requirements as to who are entitled to appear, which, according to Mavroidis, should be one important issue to be discussed in designing the DSU 2.0.[8]

In the following three chapters, Mavroidis' empirical studies center on the subject-matter, the outcome, and the enforcement of specific disputes of the WTO adjudication processes. In Chapter 6, he presents three sets of data: disputes that arise under Annex 1A (trade in goods) to the Agreement Establishing the WTO, disputes under Annex 1B (trade in services) and disputes under Annex 1C (trade-related aspects in intellectual property rights). According to Mavroidis' data, a great majority of disputes concern the General Agreement on Tariffs and Trade 1994 (hereinafter "GATT"), provisions on national treatment and most-favored-nation treatment of the GATT being the most frequently invoked in the requests for consultations.[9] On the contrary, the actual number of disputes under the General Agreement on Trade in Services (hereinafter "GATS") is rather limited, which,

[5] *Id*. at 107.
[6] *Id*. at 135-44.
[7] *Id*. at 144-59.
[8] *Id*. at 197.
[9] *Id*. at 230-34.

according to Mavroidis, lies in the fact that "services markets have not been liberalized in a meaningful manner" and that "commitments under the GATS have remained shallow."[10]

In Chapter 7 and Chapter 8, Mavroidis empirically introduces different outcomes of the WTO disputes that involve different groups of WTO Members, including lapse of panel's authority, achievement of a mutually agreed solution, withdrawal of the complained measures, implementation of the rulings, disputes being abandoned, and retaliation being requested and authorized. Among those disputes that are finally concluded, mutually agreed solutions and implementation as a result of an adverse panel or Appellate Body rulings are the outcomes that appear the most.[11] He finds that the cardinal preference of WTO dispute resolution—settlement—is "fast becoming the exception and not the rule."[12] Moreover, Mavroidis challenges the legitimacy of retaliation because retaliation normally takes the form of "less trade" which is not consistent with the objective of the WTO contract;[13] he also challenges the current institutional design of the arbitration proceedings for determining the level of retaliation as unnecessary and inefficient.[14]

In the next Chapter, Mavroidis addresses an important component of the WTO dispute settlement, that is the WTO judges who are deemed as "the guardians of the system".[15] In particular, he demonstrates the frequency of appointments of Appellate Body Members and panelists from these five groups of WTO Members. He finds that the EU and the US have been the most frequent complainant and respondent, though their nationals being the most infrequent panelists in the last five years.[16] He also finds that non-roaster panelists account for an overwhelming majority of appointed panelists and thus questions if it is still necessary to have a roster for any purpose.[17] In Chapter 10, Mavroidis then discusses the dispute avoidance regime in a couple of WTO agreements, namely the Technical Barriers to Trade (hereinafter "TBT") and Sanitary and Phytosanitary Measures (hereinafter "SPS") agreements. The investigation of the consultation mechanism under the TBT and SPS Committee allows Mavroidis to conclude that such an elaborate and systematized consultation mechanism that involves multiple WTO Members and experts with elements of science-

[10] *Id*. at 230.
[11] *Id*. at 296-97.
[12] *Id*. at 271-73, 466.
[13] *Id*. at 361.
[14] *Id*. at 364-74.
[15] *Id*. at 437.
[16] *Id*. at 414.
[17] *Id*. at 419-20, 427-28.

component in their discussions has been "the most effective means to 'settle' disagreements across the membership."[18]

As an overview, Mavroidis summarizes the story of the WTO over the past twenty-five years through a series of numbers in Chapter 11 where he presents the aggregate numbers in many aspects, such as the total output of WTO courts, frequency of participation of each WTO Members, subject matter of disputes, and the involvement of panelists and Appellate Body judges. These numbers, according to Mavroidis, "hopefully can inform the next stage of multilateral trade adjudication."[19]

The third part of this book is the last chapter—Chapter 12—which addresses the "where" question, namely, where to go for the DSU 2.0. In this Chapter, Mavroidis acknowledges that the new dispute resolution mechanism of the WTO should still be exemplified through the establishment of a compulsory third-party adjudication, which is said to be the most important factor for WTO adjudication.[20] However, Mavroidis' DSU 2.0 features a two-step but one-instance court dispute resolution mechanism: "two-step" stands for consultation and adjudication while "one-instance" signifies the repudiation of an appealing proceeding.[21]

Firstly, he proposes an enhanced process of consultation for the purposes of inciting settlements; more particularly, national experts should be encouraged to attend governmental consultation and the WTO, in particular, the Director-General, could involve more in the consultation proceedings, such as transmitting information about each other's reservation point and the status of case law.[22] For the one-instance adjudication, Mavroidis proposes that the WTO Members establish a WTO court in the composition of fifteen permanent judges which can be divided into chambers of three or five judges to address different disputes. For certain important issues, the plenum of fifteen judges should intervene and discuss, such as questions where *non liquet* has been raised by one of the parties, novel issues, and issues where chambers have reached irreconcilable outcomes.[23] In this design, the plenum replaces the role and function of the old Appellate Body and any decision concerning retaliation should be determined by the same group of people with no need to re-establish a panel for this purpose. The judges should be selected by certain standards including independence, impartiality, and competence.[24] The entire design, according to Mavroidis, not only avoids excessive compartmentalization as the DSU 1.0 used to be, but also

[18] *Id*. at 449.
[19] *Id*. at 505.
[20] *Id*. at 517.
[21] *Id*. at 521-22.
[22] *Id*. at 524-27.
[23] *Id*. at 533-41.
[24] *Id*. at 554-59.

maintains the nature of de-politicization to "serve not only trade liberalization, but also international cooperation at large."[25]

Overall, Mavroidis' book provides a comprehensive account of the WTO records from various aspects, ranging from subject-matter of disputes, use of different dispute resolution mechanisms, outcome of disputes, enforcement of panel reports and Appellate Body reports, to selection of panelists and Appellate Body Members. These empirical results and analyses present a full and realistic picture of how dispute resolution mechanisms in the WTO have been performing so far, which enables the reader to better discern real expectations of the WTO dispute resolution and properly assess the (in)effectiveness of each mechanism. As also advocated by Mavroidis, numbers do tell the story and the new design should profit from previous experiences. A proposal of the DSU reform based on empirical investigations, together with related theoretical supports, will then truly satisfy the needs of the WTO Members as well as the whole trading community in building an effective dispute resolution mechanism within the WTO.

For instance, Mavroidis' suggestion of establishing a more engaged consultation mechanism is advanced on the basis of his empirical data and study: that the current regime of consultation does not do enough to incite withdrawals and settlements and that 70% of all settlements were reached before a panel report had been issued.[26] His proposal of involving national experts and the WTO's Director-General in the consultation proceeding therefore corresponds to the need to incite and facilitate settlements in a more efficient and effective way. Another example is the DSU deadlines. While the compliance panels are expected to decide the cases within ninety days, they have exceeded this deadline by over 400% on average.[27] Considering these findings as well as the main objective of the compliance panel mechanism (which is to avoid unliteral qualifications to the effect that compliance has been achieved), Mavroidis concludes that there is no need for this stage to exist and proposes that one original panel could decide on whether the compliant should be upheld and what the level of countermeasures should be.

There are plenty of other examples that reflect the consistency of Mavroidis' proposal and the real performance of the WTO dispute resolution mechanism, which makes this book unique in the academic scholarship on international trade law and dispute resolution. While Mavroidis has fully utilized his empirical results to make an innovative and effective dispute resolution mechanism for the WTO, it remains to be further tested if this DSU 2.0 can function perfectly as expected.

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[25] *Id*. at 570.
[26] *Id*. at 522.
[27] *Id*. at 332.

This book is recommended to people working and studying international trade law. Academics, practitioners, and students who are interested in international investment arbitration, international/alternative dispute resolution, and empirical legal studies are also recommended to read this book as the research methodology used in this book is inspiring for research in many other areas, such as the investor-state dispute settlement reform in international investment law and the dispute resolution mechanism for sustainable development provisions in free trade agreements.

REFERENCE

Book

MAVROIDIS, PETROS C. (2022), THE WTO DISPUTE SETTLEMENT SYSTEM: HOW, WHY AND WHERE?.

Internet Sources

Dispute Settlement: Appellate Body, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm.

Lester, Simon, *Ending the WTO Settlement Crisis: Where to from here?* INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT (March 2, 2022), https://www.iisd.org/articles/united-states-must-propose-solutions-end-wto-dispute-settlement-crisis.