The World Trade Organization 20 Years On: Two Decades of Judicial Activism and Political Impasse

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1. Introduction

The judicialization of international law through specialized tribunals is an often remarked trend of the last decades. For some, judicialization merely increases anxieties about fragmentation; for others, it inspires hopes that international law, as *law*, will finally enjoy the institutional thickness that it traditionally lacked when tethered to diplomatic or political arrangements.

One would expect judicialization of international law to be a reflection of enhanced legitimacy and dynamic evolution of substantive norms. This is the story that Ruti Teitel persuasively tells in *Humanity's Law*[1] with respect to human rights and the law of war. But the World Trade

[1] Ruti Teitel, *Humanity's Law* (2011).

Organization presents an alternative and at first glance perhaps puzzling counter-narrative: conceived at the height of neoliberalism or the Washington Consensus, the legitimacy of the trade liberalization bargain struck in the Uruguay Round of negotiations and reflected in the WTO treaties came into question almost as soon as the ink was dry, so to speak. It was the riots of Seattle that made the WTO a household name; it became famous or notorious, as a target for the anti-globalization movement. But the rioting outside was only part of the story; a legitimacy crisis within the WTO was already brewing with developing countries feeling buyer's remorse about the Uruguay Round result, where, in areas such as trade in services and intellectual property rights, they made considerable concessions, with (as some developing nations increasing felt) little concrete in return. After numerous attempts to conclude a new round of negotiations, which involved the launch of the Doha development round in the wake of the 9/11 attacks, the talks were finally abandoned late in 2015. With the exception of highly technical agreements on information technology and trade facilitation (customs formalities), the official acceptance of the collapse of the Doha round constituted consecrated almost two decades of political paralysis.

Yet if we turn from the political and diplomatic setting to the dispute settlement system of the WTO, we see a judicial branch in full evolution through this entire period, entertaining and deciding hundreds of claims and producing a vast jurisprudential acquis. Despite the deep division among WTO Members about the future of the multilateral trading system, the continuing salience of critiques of economic globalization, many other events that might be seen as destabilizing international economic order, the sensitive issues often involved in WTO legal disputes (environment, animal welfare, preferences for developing countries, subsidies for renewable energy, management of scarce natural resources) the major challenges to binding

dispute settlement in other areas of international economic law (investor-state arbitration), the WTO judicial system has been largely spared attacks on its legitimacy.

2. The "Success" of WTO Dispute Settlement

The question of what makes an international judicial system effective, successful or legitimate goes to the much debated issues about the meaning of "compliance" in international law, the relationship between empirical or factual legitimacy and normative legitimacy and, ultimately, the interaction of politics and law in international relations. Without prejudging what are theoretically satisfactory or satisfying answers in these respects, one can speak in a common-sense way of the achievement or success of the WTO judicial system over the last two decades. Aside from the sheer number of disputes that the states parties (Members) have been prepared to submit to judicialized dispute settlement, and increasingly so, itself some sort of sign at least of empirical legitimacy, one can point to the relative lack of instances where Members have, upon losing a ruling, explicitly chosen not to implement it (ultimately on pain of retaliatory sanctions). While losing parties and sometimes other WTO Members have criticized individual rulings, including by the Appellate Body, these critiques have rarely challenged the overall authority or legitimacy of the WTO judicial mechanism. In the early years of the WTO judicial system, some critics, from academia and think tank-type policy institutions, did question whether in light of apparent judicial activism by the Appellate Body some kind of political or diplomatic control needed to be re-established over judicialized dispute settlement (e.g. Claude Barfield), but these calls never developed real traction among WTO Members. Finally as already mentioned in cases

involving sensitive issues of policy space, such as trade and environment disputes, the WTO judicial system largely succeeded in avoiding becoming a target of anti-globalization activists or constituencies more generally concerned with non-trade values that could easily be seen in conflict with what insiders would regard as the central, liberalizing if not neoliberal mission of the WTO. Only recently has one WTO Member, the United States, launched a persistent attack threatening the Appellate Body's independence, denouncing its judgments on a seemingly very technical but sensitive issue ("zeroing") concerning the application of WTO legal disciplines on a form of unilateral trade action, anti-dumping duties, and attempting to politicize the process of appointment and reappointment of Appellate Body Members.

This essay is aimed at presenting a narrative about the building of a judicial system in the WTO through a period of intense diplomatic and political divisiveness and (largely) impasse in the Organization. At the center of the narrative is the Appellate Body of the WTO, a standing body of 7 jurists charged with deciding appeals of law. The Appellate Body, as will be elaborated, responded to the political conflict and paralysis at the WTO by distancing itself from the Organization and making a number of crucial jurisprudential moves that led to its transformation into an independent court, which has often decided controversial questions in balanced or deferential ways that display, at best, neutrality to the neo-liberal "deep integration" trade agenda reflected in the Uruguay Round multilateral trade negotiations and many of its results, such as the WTO Agreements on Intellectual Property and on Technical Barriers to Trade, for example. In the early years, the Appellate Body's deviation from some of the basic tenets of the trade insiders at the WTO led to an open conflict with the delegates. The result, however, was the acceptance of the Appellate Body's authority. The same consensus practice of political and

diplomatic decision-making at the WTO that made negotiating breakthroughs allusive, also made it essentially impossible for the Members effectively to threaten or pressure the Appellate Body, since, ultimately, overruling any of its decisions, either through amendment of a WTO treaty or through an "authoritative interpretation", could not be done absent a consensus of Members. Appellate Body Members were well aware of this predicament. Publicly, at least, some actually expressed a wish that their rulings could be politically adjusted more easily, implying that the Appellate Body had to accept too much of the burden for the legitimacy of the WTO as a legal system, especially there were gaps in the legal text, or ambiguities. At the same time, however, it is clear that the Appellate Body was empowered or protected as an independent judiciary through the obstacles that the consensus decision-making practice combined with the general context of divisiveness with the Organization placed before an effort to make it change course.The Appellate Body, through case law that may often appear inconsistent or at least where various shifts in approach are inadequately explained, has nevertheless developed a variety of jurisprudential pillars, strategies, techniques that have oriented adjudication toward balance and deference, very conscious of the legitimacy issues that arise when passing judgment over domestic policies in sensitive areas of public interest, carefully avoiding the appearance that the Appellate Body is the agent, much less the avante-garde of the neo-liberal project represented by the Uruguay Round, or inspired by the "deep liberalization" telos reflected in agreements like TRIPs. The evolution of these elements of jurisprudence is the major substance of the narrative below. In the conclusion, I consider the durability of the edifice constructed by the Appellate Body in the face of the current US attack, and whether it is likely to provoke others of a similar kind.

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The Legitimacy Dilemma of the New WTO Judicial System

What I have referred to as the judicialization of the multilateral trading system-compulsory jurisdiction, automatically binding rulings, sanctions for non-compliance and an Appellate Body was by its chief architects arguably understood as part and parcel of the project of deepening and widening of economic integration on a neo-liberal model. The features in question would facilitate "compliance" or "enforcement" thus providing a bulwark against domestic interest driven pushback or reaction against the liberalization agenda. The Appellate Body would provide a safeguard against abhorrent decisions by the ad hoc panels, the kinds of decisions that under the GATT system were regarded almost by a consensus of the trade policy elite as somehow "wrong", not in line with the way the insider community understood as the intent of the law and the evolving practice of the community.

One rather obvious way that the new Appellate Body might have seen its role would have been as the ultimate guardian of the new WTO system and its neo-liberal values, adding the rule of law or even in the rather more grandiose language of some scholars, "constitutionalizing" the project of economic globalization, orienting its legal interpretations by the norms, practices and professional attitudes of the community that had managed the GATT and successfully concluded the negotiations that created the WTO. The Appellate Body would gain legitimacy by ensuring that the rulings of ad hoc panels conformed to, or approximated the best picture of, those norms, practices and professional attitudes. Instead, the Appellate Body took a very different direction, creating itself as an independent, semi-autonomous judicial branch of the WTO system, operating at a considerable remove from the political and diplomatic institutions of the WTO.

Often the Appellate Body appeared to sympathize with the concerns of typically anti-globalization stakeholders or constituencies rather than the neoliberal sensibility of the insider community (that is where it did not present itself simply as a treaty interpreter confronting a legal text beyond the fray of the globalization wars).

One way of understanding this move is to emphasize the clash between the different sensibilities and professional goals of technocrats and diplomats on the one hand, and jurists on the other. From this perspective staffing the Appellate Body with high-level legal professionals almost guaranteed that jurisprudence of the WTO would not simply be neoliberal trade diplomacy by other means. But the Appellate Body's declaration of independence, I believe, could be supported by weighty considerations of legitimacy. By the time the Appellate Body was delivering its first judgments, the neoliberal project was already embattled and contested in many countries and the WTO as represented by the aggressive Uruguay Round agenda was at the center of the controversy. How could the Appellate Body not become entangled in the globalization battles, as the ultimate "enforcer" of the WTO neoliberal agenda as represented in the Uruguay Round Agreements, if it were to be explicitly guided in its jurisprudence and institutional orientation by the "WTO system" and the norms it was understood to represent, both by insiders and enemies?

The negative consensus rule introduced in the Uruguay Round to determine the adoption, or binding character of rulings by the panels and the Appellate Body, was of course oriented toward "enforcement" or "compliance." But it had another significance as well, very important to understanding what I call the legitimacy dilemma of the WTO. In effect, there was no longer

any political filter for disputes settlement rulings in the Dispute Settlement Body; these would be adopted except in the implausible situation where even the winning party voted against; with the WTO divided against itself, and the political impasse surrounding a new round of negotiations, the "institution" would not have a strong hand to play in disciplining or pressuring the Appellate Body, much less in attempting to control it. Changing the actual WTO rules to override the Appellate Body ruling would itself require positive consensus. The WTO Agreement did contain a provision that allowed for authoritative interpretations of the WTO treaties to be adopted by a supermajority vote of the membership, but voting was never practiced in the GATT and there was a general aversion that continued into the WTO era to moving away from the consensus decisionmaking. In sum, by the combined effect of the negative consensus rule for dispute rulings and the positive consensus requirement (at a time of political disconsensus, if not impasse, within the WTO), the insider community of trade diplomats and officials could not plausibly reverse an approach taken by the Appellate Body at odds with its (typically neoliberal) view of the WTO system and its purposes.

If the Appellate Body were to be seen by neoliberal constituencies as too deferential to interventionist government policies, and not sufficiently aggressive as an enforcer of liberalization, it might disappoint certain claimants, particular the US and the EU, whose corporate lobbies pushed for the Uruguay Round deal. But there were also important anti-globalization constituencies in those Members challenging neoliberalism. In response to a perception of excessive deference, pro-liberalization constituencies might urge trade officials to take unilateral action in response to the "enforcement" failure. But such aggressive unilateralism

was, as Joost Pauwelyn has pointed out, significantly disciplined in the new WTO system, and unilateralism would thus create its own legitimacy problems.[2] (See also Mavroidis, 2015).

On the other hand, a ruling seen by the losing Member and constituencies critical of neoliberalism or economic globalization as inappropriately intrusive in domestic sovereignty, especially in sensitive areas such as the environment and human health, would likely drag the Appellate Body into the legitimacy woes of economic globalization. The Appellate Body would be embattled and there would be a possibility that its effectiveness would become questioned due to "civil disobedience" of the losing party, refusing to implement the ruling even on pain of retaliatory sanctions. As the Appellate Body soon found out with the *Bananas*[3] and *Hormones*[4] disputes such civil disobedience was a real possibility, and even considered by some WTO scholars such as Alan Sykes to be legal, a form of "efficient breach". Here the positive consensus rule for political adjustment of dispute rulings would function against the legitimacy of the Appellate Body; it could not easily transfer the responsibility for fixing the systemic risks of "civil disobedience" to a functional political decision-making process. In sum, non-compliance with its purported binding rulings poses a greater risk on balance to the Appellate Body's legitimacy than perceptions that it is overly deferential, failing to find violations of WTO rules where it ought. There is a greater downside risk from intrusiveness than deference, generally speaking. Insiders and academic commentators may criticize the latter; but the former is what is likely to lead to headlines and street demonstrations. It follows also that, even where

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[3]WTO, *European Communities – Regime for the Importation, Sale and Distribution of Bananas - Appellate Body Report*, 25 September 1997, WT/DS27/AB/R,

[4] WTO, *EC Measures Concerning Meat and Meat Products (Hormones) - Appellate Body Report*, 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R

finding a violation, the Appellate Body would be most likely to avoid serious legitimacy consequences, where the finding could be couched in terms that expressed appropriate deference or sensitivity as opposed to aggressive enforcement of neoliberal globalization or liberalization. Narrow as opposed to broad grounds of violation might allow a Member to comply through relatively technical or fine-grained changes to its regulations, leaving in place the main thrust of the public policy, thus lessening the risk of civil disobedience.

The Appellate Body's initial set of moves to separate itself from, and establish its autonomy in relation to the WTO as an institution or neo liberal projects could be collectively described as its "declaration of independence". More apt perhaps is the unforgettable image in the great painting by David of Napoleon taking the crown from the pope and coronating himself as emperor. By acting like a court not an enforcement wing of the WTO institution, the Appellate Body created itself as a judicial branch. This came in a range of decisions over the roughly 3 year period in which the anti-globalization movement was refocusing itself on trade leading up to the 1999 Seattle riots, and increasingly affecting trade politics in a range of countries including the United States, where Bill Clinton lost fast track authority in 1997, for example.

-minmizing the normative significance of the GATT acquis

-replacing the teleological and functional interpretation characteristic of GATT panels in the service of trade liberalizing goals with textualism and formalism that abstract from the context of the WTO as an institution and the liberalizing goals of the multilateral trading system, instead

emphasizing a formal semantic exercise guided by the Vienna Convention on the Law of Treaties[5], an instrument obviously neutral in terms of the specific values of free trade

-developing a doctrine of implicit judicial powers, including to fill gaps

-rejecting a notion of institutional balance that would require some deference to political/diplomatic rule-making processes of the WTO, even where they are given an explicit role in policing certain institutional norms

-along similar lines, rejecting any notion of political question or non-liquet as a way of leaving to political negotiation or diplomacy certain contested or contentious issues

-minimizing the precedential value of the GATT acquis and emphasizing the precedential weight of the Appellate Body's own decisions

-giving itself a sort of remand authority (completing the analysis) that allows the Appellate Body itself to illustrate how its correction of the panel's legal interpretation is to be applied to the facts of the dispute

-developing a doctrine of judicial economy, that allows the Appellate Body some leeway as to how its decides a dispute, and lessons party or legal secretariat control over the dispute

[5] United Nations Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331

Some of the main "articles" of the Appellate Body's declaration of independence were articulated in two very early rulings *Japan-Alcohol*[6] and *LAN-Equipment*[7]. Neither dispute necessarily raised any important systemic issues. The former case concerned non-discrimination (National Treatment) in taxation: Japan taxed much more heavily classes of alcoholic beverages that were mostly important than other classes mostly produced in Japan. This was the kind of dispute about protective discrimination that had been litigated not infrequently in the GATT era. Not dissimilarly, LAN Equipment was a classic dispute about the meaning of tariff concessions and the interpretation of classifications: were certain products to be regarded as computing equipment or telecommunications equipment for purposes of calculating duties under the EU's schedule of tariffs? On the these kinds of questions the GATT acquis offered no lack of guidance, with its panel rulings, working parties, practices, normative axioms and other material generated inside the "institution." The panels did not hesitate to draw on this *acquis*.
Now consider what the Appellate Body did when its jurisdiction was invoked to review these panel reports.

First of all, in *Japan-Alcohol*, while paying lip service to "continuity" between the GATT and the new WTO system, the Appellate Body rejected the panel's notion that prior GATT reports, even if adopted by the WTO Membership, constituted either "decisions" or "subsequent practice" that would somehow be binding or authoritative for the Appellate Body. Adopted GATT panel reports were merely one normative source that should be "taken into account when

[6] WTO *Japan – Taxes on Alcoholic Beverages - Appellate Body Report*, 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R,
[7] WTO *European Communities – Customs Classification of Certain Computer Equipment - Appellate Body Report*, 22 June 1998, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R

they are relevant."[8](p. 13) The systemic implications of this move by the Appellate Body were blunted or obscured by the fact that the Appellate Body did, in its textual interpretation of non-discrimination with respect to taxation, extensively (albeit selectively) cite previous GATT jurisprudence, even though emphasizing that its approach was driven fundamentally by the analysis of the words in the treaty text.

Second, in *LAN-Equipment*, the Appellate Body indicated that use of the negotiating history as a basis for interpreting commitments under WTO should be strictly disciplined by Article 32 of the Vienna Convention on the Law of Treaties, i.e. such material should be used solely as a supplementary source of interpretation. In the GATT era, the negotiating history had often been regarded as controlling by the dispute panels, and continuation of this approach was regarded as desirable and likely by such GATT era luminaries as the late John Jackson.

In adopting the VCLT as its guiding hermeneutic, and strictly and mechanically applying its previsions to each interpretative issue, the Appellate Body risked being taken as rather unsophisticated judicial body, and numerous critics relished the chance to excoriate the crude literalism of recourse to dictionary definitions and the plodding manner in which the cannons in the VCLT were deployed by the Appellate Body in solving interpretative questions. But by acting in this manner the Appellate Body may in fact have been making a shrewd estimate of the requirements of legitimacy at a time at which the WTO as an institution, and the neoliberal ethos of the Uruguay round, were very much in question. The Appellate Body's mission was defined

[8] *Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages - GATT Panel Report*, L/6216, 10 November 1987, BISD 34S/83

not by the trade liberalization telos of the WTO but by the imperatives governing treaty interpretation in general international law. Moreover, as former Appellate Body Member George Abi-Saab would note, "despite the oft claimed specificity of international economic law, a thorough look at the jurisprudence (case-law) of the Appellate Body does not reveal any mention of, or reference, to one or more rules of interpretation to this particular field that would come to complement or substitute for" the general VCLT rules.

Third, in *LAN Equipment*[9] and also in the *India-Patents*[10] case (the first intellectual property dispute in the WTO), the Appellate Body rejected the pro-liberalizing doctrine that WTO commitments should be read in light of the legitimate or reasonable expectations of those seeking the benefit of liberalizing disciplines (exporters or private rights holders in the case of TRIPS[11]). Legitimate expectations was presented by the panels as an interpretative principle that emerged from the GATT acquis; the Appellate Body held that where the claim is one that a treaty provision is violated the expectations are defined by the treaty provision, read semantically, rather than vice versa. A further step was taken toward the rejection of a liberalizing or neoliberal telos as a basis for interpretation in the case of *EC-Hormones*[12].

In the *India-Quantitative Restrictions* case[13], the Appellate Body was faced with arguments that it should display deference to political decision-making in the WTO concerning whether delay in a WTO Member removing trade restrictions to protect the balance of payments was justified by

[9] Id at 15

[10] *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products - Appellate Body Report,* 16 January 1998, WT/DS50/AB/R

[11] WTO Agreement on Trade-Related Aspects of Intellectual Property Rights 1994, 1869 UNTS 299

[12] Id at 12

[13] *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products - Appellate Body Report*, 22 September 1999, WT/DS90/AB/R

considerations of macroeconomic policy, and development policy as set out in the relevant provisions of the GATT. In the past, determinations of this kind had been made by a special committee of WTO delegates, the balance of payments committee. In the committee, India had obtained the agreement of many of its major trading partners to a particular timetable for removing its balance of payments-based restrictions but he US was dissatisfied with what it saw as unnecessary delay. The United States' response was to block consensus in the balance of payments committee and take India to dispute settlement. The situation displayed the intrinsic difficulty with the use of political or diplomatic processes in the WTO to make what might be called mixed judgments of law and policy concerning the way in which Members use flexibilities under the WTO Agreements; a single Member can permanently block any decision, where its perceived interests are opposed to the general sense of the Membership. Under the old GATT system, considerable restraint in the use of dispute settlement to deal with these kinds of mixed questions and the disinclination of GATT panels to address them arguably created or at least complemented an atmosphere of compromise. In the Uruguay Round a new WTO instrument was negotiated that tightened up the control on balance-of-payments based trade restrictions, reflecting a compromise between neoliberal views and the particular concerns of developing countries to maintain flexibilities. In that instrument, the availability of dispute challenges in the case of "application" of balance of payments based trade restrictions was explicitly affirmed, while the committee process for policing the phasing out of these restrictions was also maintained. The United States, with its complaint against India was bringing to the fore the issue of the equilibrium between these aspects of the Balance of Payments Understanding.

The Appellate Body held that the expression "application" did not in any way constrain the competence of the dispute settlement organs to review the underlying policy justifications for continuing to maintain balance of payments-based trade restrictions; India's argument that "application" refers only to issues that arise with the detailed implementation of trade restrictions, not their general policy grounds was summarily rejected. So was India's argument that the Appellate Body should limit its competence in such a way as to preserve a meaningful institutional balance between the dispute settlement organs and the balance of payments committee. The Appellate Body categorically rejected the notion that institutional balance is a "principle of WTO law." While the Appellate Body suggested that the "deliberations and decisions" of the balance of payments committee should be taken into account, it did not even indicate that *were* there a consensus in the committee, the Appellate Body would be bound to defer, as opposed to coming to its own conclusions about the policy justifications for trade restrictions. Further, responding to India's argument in the alternative that even if the dispute settlement organs had competence institutional balance dictated "judicial restraint", the Appellate Body suggested that, where the dispute settlement organs had competence, "judicial restraint" would be inconsistent with the obligation to exercise that competence when requested to do so by a claimant.

Not long after *the India-Quantitative Restrictions* ruling, the Appellate Body, in the *Turkey-Textiles*[14] case, had the opportunity to reconsider its rejection of the principle of "institutional balance." Under the GATT the assessment of regional trade agreements, including customs unions such as the EU, and their consistency with the law and policy of the multilateral trading

[14] *Turkey – Restrictions on Imports of Textile and Clothing Products - Appellate Body Report*, 19 November 1999, WT/DS34/AB/R.

system was a function arguably confided to a committee of the delegates, known in the WTO era as the Committee on Regional Trade Agreements. As Mavroidis suggests, the original intent of the GATT drafters was: "the nature of the multilateral review would come close to that of a merger authority; no [customs union or free trade agreement] would be consummated absent multilateral clearance" (p. 292) The formal legal conditions for establishing and maintaining a customs union or free trade area are contained the GATT[15], and include liberalization of substantially all trade between the parties to the preferential arrangement and avoidance of greater trade restrictiveness against WTO Members who are non-parties. Ultimately, it is consistency with Article XXIV[16] that allows WTO Members to deviation from the Most-Favoured Nation obligation that is a cornerstone of the multilateral trading system and to treat other parties to the preferential arrangements better than non-party WTO Members.

As preferential trading arrangements proliferated, becoming a major concern for trade policy scholars such as Jagdish Bhagwati dedicated to the value of non-discriminatory multilateral free trade, it became particularly clear that what Mavroidis calls "multilateral clearance" was largely a failure. There were few cases where a free trade agreement or customs union was carefully examined ex ante by the CRTA, much less where the committee came to a clear conclusion about consistency of a particular agreement with the law and policy of the multilateral trading order.

[15] Article XXIV, General Agreement on Tariffs and Trade 1994, 1867 UNTS 187
[16] Ibid

In *Turkey-Textiles*[17] the issue was whether a particular otherwise WTO impermissible restriction that Turkey had imposed on India could be justified as necessary in order to harmonize Turkey's external customs regulations in order to fulfill its obligations under a customs union with the European Union. It was not especially controversial as a matter of judicial competence that the dispute settlement organs could review the particular restriction imposed by India and its nexus to the customs union with the EU. But in *Turkey-Textiles*[18] the Appellate Body reinforced its approach in *India-Balance of Payments*[19], overturning the view of institutional balance of the panel of first instance as well as the prior GATT practice, and finding that judicial competence extended to reviewing the *overall or per se* consistency of the customs union with the conditions in GATT Article XXIV, and not merely the appropriateness of the specific measure. The Appellate Body held: "we would expect a panel, when examining such a measure, to require a party to establish [inter alia, whether the customs union fully meets the relevant requirements of Article XXIV]". The Appellate Body explicitly linked its finding here on the broad scope of judicial review to the rejection of the institutional balance principle in *India-Balance of Payments*.(paragraph 60) There can be little doubt that in *Turkey-Textiles* the Appellate Body was making a pointed statement about the wide extent of its authority over the diplomatic and political organs of the WTO; for, as the Appellate Body noted, it did not need to reach the issue of whether it had jurisdiction to review the WTO-consistency of a customs union as a whole in order to resolve the appeal.

[17] Id at 22
[18] Ibid
[19] *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products - Appellate Body Report,* 22 September 1999, WT/DS90/AB/R

The Appellate Body rulings in *India-Balance of Payments* and *Turkey-Textiles* were subject to some criticism by WTO insiders, most explicitly by Frieder Roessler, a former director of the GATT legal secretariat, who it should be noted represented India in the former case. Yet there was not a major revolt against the assertion of expansive judicial authority by the Appellate Body. While these decisions reduced the control of the insider trade policy community, they did so with the effect of strengthening pro-free trade disciplines and were thus consistent with the underlying substantive values of the community even if at odds with the taste for diplomacy over hard legal outcomes. The extent to which the Appellate Body was establishing itself as an independent judicial authority operating at a distance from past GATT practice and from trade policy and trade negotiations was hardly noticed save by a rather small group of experts. At the same time, it is hard to imagine that such judicial self-assertion would have been so easily tolerated had the political and diplomatic processes in the WTO been functioning in a robust and effective manner. The judges fully understood the vulnerabilities of these processes and were able to frame their activism as a response to a reality they neither created nor could solve. What some criticized as activism was an unpleasant burden imposed by "the gap in effectiveness between the WTO's political bodies and its dispute settlement system." (Ehlermann & Ehring, p. 813) Former Appellate Body Member Matsushita observed that the real reason for much criticism of the Appellate Body was that the "legislature" of the WTO "was not working so well". Yet, at the same time, Matsushita suggested, revealingly that one should not wish for a state of affairs where it was easy for the political organs to override Appellate Body rulings. In other words, if one wanted a strong, independent judiciary the vulnerability of political institutions in the WTO might actually be a kind of blessing-at least up to a point.

***The Shrimp/Turtle*[20] rulings: the watershed**

No jurisprudence is more significant for marking the evolution of the Appellate Body as a judicial system independent of and operating at a distance from the WTO as an institution and from the ideological and policy orientations that tend to drive it, than the Shrimp/Turtle dispute. The entire trade/environment debate, with its central importance to turning the attention of the anti-globalization movement to international trade, originated with a GATT case in the early 1990s where two unadopted GATT panels, the *Tuna/Dolphin*[21] rulings, that held that trade restrictions in response to other countries' environmental policies or practices were per se inconsistent with the GATT; these rulings had were without a textual basis in GATT law, but rather based on some intuitive notion that allowing trade measures to address global environmental externalities was somehow countenancing a slippery slope toward endless green protectionism. The infamous product/process distinction was invented, whereby a country could not defend treating products differently under the GATT based upon their production methods, even where different methods led to different environmental or other harms. In *Tuna/Dolphin* the United States had banned tuna products that were caught with methods that led to high levels of dolphin mortality on a non-discriminatory basis, i.e. the ban included tuna of US origin.

The measures in *Shrimp/Turtle* were closely analogous-the US banned shrimp that was fished with methods that led to high number of deaths of endangered species of sea turtles. Using a different doctrinal conceit than the *Tuna/Dolphin* panels, the WTO panel in *US-Shrimp*

[20] *United States – Import Prohibition of Certain Shrimp and Shrimp Products- Appellate Body Report*, 6 November 1998, WT/DS58/AB/R

[21] *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* - Appellate Body Report, 13 June 2012 WT/DS381/AB/R

nevertheless affirmed the overall GATT era approach that had led to the clash between environmentalists and the multilateral trading system; the panel found that there was a complete incompatibility between trade measures that conditioned imports on the environmental policies or practices of other countries. The Appellate Body had to choose between affirming the orthodox free trader view that prevailed within the trade policy community or acknowledging in some way and attempting to mitigate the harm to the external legitimacy of the system from simply excluding even non-discriminatory trade policies to deal with global environmental problems. Had the Appellate Body upheld the panel's approach (or defended the result or a similar result on another doctrinal grounds), it would have clearly have been perceived as siding with the "institution" on an issue that sharply divided insiders from important outsider constituencies. To use the language some scholars have deployed, the AB would have chosen "internal legitimacy" over "external legitimacy". The AB took the opposite course. In *Shrimp/Turtle*, the Appellate Body revealed an important implication of its carefully-crafted independence of and distance from the "institution: the Appellate Body was quite capable of giving purchase to constituencies characteristically critical of, if not hostile to, the WTO as a neoliberal or free trade-driven institution. Yet this revelation was not so easy to see unless one followed carefully the GATT/WTO legal system, because while opening the door in principle to Process or production methods (PPM)-type measures, the Appellate Body found that, under the chapeau of Article XX[22], the preambular paragraph there were elements of discrimination in the manner in which US officials had implemented the legislative ban on turtle-unfriendly shrimp. Thus, the initial reaction of environmental groups was negative, while consummate insiders such as the late John Jackson were muted in criticism of the departure from the PPM theology, unsure

[22] Article XX, General Agreement on Tariffs and Trade 1994, 1867 UNTS 187

just how far the AB had really intended to go, given that, in the end, it had found several violations in the US scheme.

But there were other elements in the *Shrimp/Turtle* ruling that signified a turn toward constituencies and values traditionally understood as external to the WTO and its purposes. One of these was the way that the Appellate Body approached the interpretation of the language "conservation of exhaustible natural resources" in the Article XX (g) exception that the US had sought to rely on. The claimants, pointing to the negotiating history of the GATT, suggested that "exhaustible natural resources" referred only to non-living resources (petroleum, minerals, etc.) and thus that the protection of sea turtles was beyond the scope of XX (g). Yet case law under the GATT had already established that living species could be deemed "exhaustible" under XX (g).

Instead of simply relying on the precedent of an adopted GATT panel report (that the Appellate Body mentioned casually in passing), the judges constructed a complex hermeneutic as if they considering the matter as one of first impression in the WTO system. Having in earlier cases eschewed teleology when invited to interpret WTO disciplines in light of the purpose of progressive liberalization of trade, they now endorsed teleology in marking the limits to free trade as articulated in Article XX of the GATT; "exhaustible natural resources" needed to be read in light of sustainable development, a goal stated in the preamble to the framework agreement establishing the WTO. From this proposition followed the need to bring in the law and policy of biodiversity as it had evolved in recent decades. And the broader canon of evolutionary interpretation of WTO norms, interpretation that would necessarily vary depending

on how legal regimes outside the WTO themselves changed over time. The GATT drafting history and the collective memory or wisdom of the "institution" about what the drafters of the GATT meant, and even GATT case law that supported the AB's own position, were given short shrift, while external benchmarks from recent and dynamic fields of non-trade international law and policy were elevated to crucial hermeneutic tools. When responding to criticism by the insider trade policy community of its methodology in *Shrimp/Turtle*, Members of the Appellate Body might suggest that they were only bringing in non-WTO international law where indispensable for solving interpretative controversy about the meaning of the WTO Agreements. If so, then in *Shrimp/Turtle* doing so was only indispensable because of the Appellate Body's own decision to give so little weight to the GATT *acquis* on this issue that it needed to open it up as, to repeat, essentially a question of first impression. A more plausible but not inconsistent reading is that the Appellate Body purposely treated the issue of exhaustible natural resources in this way in order to bolster its external legitimacy at a time at which economic globalization was under persistent attack by outsider constituencies, including and especially environmental ones.

This reading is reinforced by the jurisprudential move that led to the most explicit and vehement reaction by the "institution" to the Appellate Body's new and independent judicial order: the Appellate Body holding that the panels, and indeed the Appellate Body itself had the authority to accept amicus briefs from non-governmental actors, including NGOs from non-trade constituencies such as environmentalism. The Appellate Body gave a textual justification in the case of the authority of the panels, based upon the right of the panel to seek information in the Dispute Settlement Understanding (DSU). But the Appellate Body also accepted an amicus brief that had been submitted to the Appellate Body itself, without any explanation of its authority to

do so. The Appellate Body might have thought that it was exercising an inherent judicial power, and this would be consistent with many of the other moves discussed above to create itself as an independent judicial branch of the WTO, such as completing the analysis (acting as a remand authority when one was not provided for in the Dispute Settlement Understanding.) Holding that official account might be taken, even in principle or symbolically, of the views of non-state actors on WTO disputes was the culmination of the Appellate Body's declaration of independence. The Appellate Body, as an autonomous judicial body operating at a distance from the "institution", could enter into a dialogue with outsider constituencies, one unfiltered and unmediated by the political and diplomatic organs of the WTO.

The attacks on the amicus decision multiplied, spreading from trade experts and academic commentators to Member delegates, producing a key test of whether the Appellate Body could withstand sustained political pressure from the "institution". The AB's initial response was to provide a grounding for its initial acceptance of an amicus brief in a subsequent case, *US-Carbon Steel*[23] decided shortly after *Shrimp/Turtle*: [i]n considering this matter, we first note that nothing in the DSU or the Working Procedures specifically provides that the Appellate Body may accept and consider submissions or briefs from sources other than the participants and third participants in the appeal. On the other hand, neither the DSU nor the Working Procedures explicitly prohibit acceptance or consideration of such briefs. However, Article 17.9 of the DSU provides [that working procedures are to be drawn up by the Appellate Body]. This provision makes clear that the Appellate Body has broad authority to adopt procedural rules which do not

[23] *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany - Appellate Body Report*, 19 December 2002, WT/DS213/AB/R

conflict with any rules and procedures in the DSU or the covered agreements [footnote omitted]'"(paragraph 39)

The fuller response came in the context of a different dispute, *EC-Asbestos*[24], where Canada was challenging France's ban on asbestos, an important public health measure against a toxic substance that had claimed 10s of thousands of victims in a number of countries. While the WTO panel had upheld France's measure under the GATT Article XX (b) human life and health exception, it had also made a ruling that incensed some public health constituencies by finding that, for purposes of analyzing discrimination, asbestos and substitute products were to be regarded as like, and in a competitive relationship-even though the substitute products had no record of being lethal to humans. Despite the acceptance of an Article XX defense by the panel, the panel's likeness analysis signaled a certain obtuseness to the values of human life and health in the assumption that at least at the preliminary stage of the analysis one could be indifferent to the fact that one of the products was killing large numbers of people and the other wasn't. The AB thus understandably anticipated the submission of amicus briefs by outsider constituencies in the *Asbestos* appeal. It decided to enter into what might be called an attempted dialogue with its critics in the institution. While not backing off on its authority to accept amicus briefs, the AB attempted to address certain criticisms based on considerations of due process and fairness to the parties, by promulgating a detailed procedure to be followed to obtain leave to submit an amicus, which would include time and length limits for submissions, and disclosure requirements to address the concern that amicus briefs might be surreptitiously directed or funded by interests connected to the WTO Members parties to the dispute.

[24] *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products - Appellate Body Report*, 5 April 2001, WT/DS135/AB/R

While the procedure appeared to make the consideration of amicus briefs a more orderly, open and objective process, it led only to an increased vehemence in the attacks on the Appellate Body by Member delegates. How could the procedure have made things worse, as it simply channeled and indeed in certain ways provided a restraint on an inherent authority the AB had already insisted it possessed?

Establishing a procedure *ex ante* had the appearance of *rule-making*. This was, ultimately, what was intolerable. The AB assertion of competence in *India-Balance of Payments* and *Turkey-Textiles*, where rule-making through diplomatic and political organs of the WTO was blocked or ineffective, had already given rise to anxieties that the AB was encroaching on the domain of political and diplomatic decision-making in the WTO. But these anxieties became significantly more intense and explicit where the AB was making rules to govern its relationship to actors outside the "institution". The attacks on the AB in the Dispute Settlement Body, the deliberative forum of delegates on dispute system issues, became intense, and the chair even communicated to the Appellate Body the dissatisfaction expressed by many delegates.

The AB faltered briefly, rejecting in the *EC-Asbestos* dispute, all of the applications for leave to submit an amicus brief that it had received under its procedure. Such a rejection could hardly not be interpreted as a response to pressure from the Membership. But in subsequent cases, while never reintroducing the procedure, the AB continued to affirm its authority to receive amicus briefs, though also ritually affirming that it was not required to take into account the arguments in the briefs in order to make its ruling. At the same time, amicus submissions became a standard part of the practice of panels of first instance, often responded to by the parties and sometimes cited by the panels.

Then, the Appellate Body was given the opportunity to clarify if not revise its ruling on the substance of the *Shrimp/Turtle* dispute. As noted, the AB had found that the even if the overall approach of the US shrimp ban was acceptable under WTO, some aspects nevertheless remained violations, or contrary to the conditions of the chapeau, or preambular paragraph of Article XX of the GATT, which dealt with the application of measures that a WTO Member is seeking justification for under Article XX. These aspects included inflexibility in the way that the statute was applied to different countries where different conditions prevailed, the failure to negotiate with some countries while negotiating with others a turtle protection agreement as an alternative to an embargo, and various shortfalls of due process in the way that decisions were made about import certification. The United States sought to change these aspects of the application of the US law in order to comply with the ruling; Malaysia, one of the original complainants, brought a compliance action under Article 21.5 of the Dispute Settlement Understanding, where it sought to reintroduce arguments about the per se unacceptability of trade measures to target other countries' environmental policy. Clearly, there was a belief by some that the AB, in the face of widespread criticism within the "institution", would back off on this second round, and find a way to close the door once again to environmentally-based trade restrictions. Instead, the AB pronounced itself fully satisfied that the US had addressed its concerns under the chapeau, and expressed surprise that Malaysia would, in effect, challenge the authority of the AB's original ruling with arguments apparently inconsistent with it. Indeed, the AB took the occasion to pronounce explicitly on the precedential value of AB rulings, and the expectation that future panels will follow them.

After the AB held its ground in the second *Shrimp/Turtle* ruling, there was no further concerted effort to apply political or diplomatic pressure on the amicus or trade and environment issues. Several years later, the AB found a basis for opening up its hearings to the public through closed circuit television, by consent of the participants/parties in the dispute; this had already happened at the panel level. For the AB, this was arguably an even more activist move than allowing amicus briefs, as the Dispute Settlement Understanding stated that Appellate Body proceedings are to be confidential. The AB read down "proceedings" here to apply narrowly to the kinds of deliberations between judges and clerks that in any judicial system would normally occur behind closed doors. A number of the Members who had objected to acceptance of amicus curiae briefs also vehemently opposed opening of hearings to the public, but this time the criticism was barely noticed.

Part of the reason must surely have been that any Member that was a party to a particular dispute could simply object to open hearings and this would be enough to ensure confidentiality. But something else was happening around the time of the second *Shrimp/Turtle* ruling; after failing to agree on the launch of a new round of negotiations at Seattle and then at Cancun, at the WTO ministerial in Doha Qatar a declaration was achieved on the outlines for a new round. One of the elements of this declaration was the stipulation of negotiations on the relationship of multilateral environmental agreements to existing WTO rules. Another was an agreement to negotiate reform of the Dispute Settlement System. The second *Shrimp/Turtle* ruling had been circulated just a week before the Doha Declaration. The apparent will at Doha to break through the impasse led to at least a brief hope by some that the criticized aspects of Appellate Body judicial activism might be reversed through treaty amendment as part of the new round. The Appellate Body was given a breathing space from immediate political pressure, though in fact its second

ruling in *Shrimp/Turtle* was more emphatic in the break with the GATT past than the first, in that an environmentally based trade embargo was found to be without fault whatsoever under the WTO legal system.

But it soon became apparent that the Doha Declaration had papered over fundamental divisions among the Membership about the future orientation of the WTO, including the very meaning of calling the Doha Round a "Development" round. The major developed country players sought a further thrust toward "deep integration", only slightly chastened by the broader legitimacy crisis of neoliberal globalization; in return developing countries might receive some additional concessions in sensitive areas like agriculture and textile and clothing trade. Many developing countries, by contrast, as well as non-governmental constituencies, sought a rebalancing of the Uruguay Round result toward greater policy space and more meaningful special and differential treatment of developing countries. Only on TRIPs and the access to HIV/AIDS medicines issue was there some explicit recognition of the need to re-balance the Uruguay Round result away from neoliberalism. As the Doha Round negotiations floundered, plagued by similar divisions that had plagued Seattle and Cancun, new issues were emerging such as the relationship of WTO to climate change mitigation measures with trade dimensions, carbon border adjustment etc. The WTO Director General insisted inflexibly that new subjects could not be added to the Doha agenda until a successful agreement on the existing items was achieved. This inflexibility and the dirigiste style of Pascal Lamy led to considerable frustration and acrimony in Geneva, a crisis of confidence in the WTO as an institution; now the Members had enough grievances with the WTO Secretariat as led by Lamy and so many renewed or intensified differences among themselves that any sense of a common will to stand up to judicial activism, so-called, largely atrophied. In this setting, the Appellate Body was able to come to maturity as a judicial

body, through twists and turns moving to solidify the main pillars of its jurisprudence, cautious to remain above the fray even when deciding sensitive matters, as well as to avoid a head on confrontation with outside critics of the WTO system. Let us now turn to these main pillars.

The Non-Discrimination Regime of the Appellate Body

In the *Shrimp/Turtle* case the Appellate Body had signaled that it would examine the consistency of domestic policies with the WTO treaties through a different or broader lens than the prevailing outlook in the WTO "institution", which emphasized progressive liberalization of trade and a certain skepticism that much regulation is captured by protectionist interests or a pretext for protectionism, if not simply irrational by some economic theory about first best instruments for correcting market failures. It would take many twists and turns in the case law, however, for the AB to work out the doctrinal edifice for its approach--one more sensitive to values that are external to the trade liberalization project (at least in large measure) and more respectful of the choices and constraints of domestic regulators while sending signals that, at the same time, protectionist abuse of flexibilities is being effectively identified and constrained.

This doctrinal edifice is what I call the non-discrimination regime. In the non-discrimination regime the examination of domestic policies is trifurcated. There, is first of all, an examination, under the National Treatment or MFN non-discrimination norms, of whether the policies complained of result in less favorable treatment either of imported products (National Treatment) or of imports from some particular WTO Member(s) (MFN). Consideration of regulatory intent or evidence of purposeful discrimination plays no role in this analysis. The adjudicator makes a determination of whether the products are "like" based upon objective criteria, such as physical characteristics and end uses, while consumer preferences can also be dispositive, and then undertakes a formalistic (not empirical analysis) of whether the regulatory intervention in

question has detrimental impact on competitive opportunities for imported like products. In this disparate impact or de facto discrimination analysis there is no apparent room for consideration of outside values or legitimate regulatory purposes. The approach in effect excuses the WTO litigator from having to make any substantive judgments about the legitimacy or justification of the policies in question.

The second stage of the trifurcated regime, is what I call rationality review of policies that have been found to have a detrimental impact on competitive opportunities. Here the Appellate Body applies a rather deferential standard of review to determine whether, given the impact on trade, the defending Member has acted reasonably in the choice of policy instrument for its chosen objective. Under the GATT rationality review in undertaken through application of the exceptions in Article XX; under the TBT Agreement[25], as is explained further in the next section, through the Appellate Body's own construct of the notion of a "legitimate regulatory distinction" which it has read into the non-discrimination norms of the TBT Agreement in order to reconcile the approach of the TBT Agreement with that of the GATT. Rationality review is broadly deferential not only to the chose of policy objectives and the level or strictness of regulation (see section ?? below on respect for collective preferences) but also the general form of the regulation, the basic choice of policy instrument.

The third or final stage in the non-discrimination regime is the strict scrutiny of specific or special features of the policies complained of that may, again on a formalistic analysis, lead to a detrimental impact on imports in the way in which the regulatory scheme is applied or

[25] WTO Agreement on Technical Barriers to Trade, 1868 UNTS 120

operationalized in practice. Here the Appellate Bodymay find a flawed procedure, some arcane or anomalous distinction in the fine print of the regulatory scheme, which may often lead to underinclusiveness (exceptions or limitations on the operation of the scheme that appear to give some advantage to domestic products over imports). This stage of analysis will likely result in the WTO Member being called on to fine tune its regulatory intervention without however major changes in the basic choice of policy instrument.

Sliding Toward Rationality Review/Deference: The Appellate Body and Article XX of the GATT

Especially toward the end of the GATT era, when a kind of crude economistic ideology and strong deregulatory orientation had come to permeate the insider trade community, it was notoriously almost impossible to justify public policies under Article XX of the GATT. It was possible to defeat a defense under Article XX just by dreaming up a theoretical less trade restrictive alternative policy that could serve the GATT member state's objective, regardless of its, costs, its real world feasibility, and the degree of certainty or uncertainty as to whether, in real world conditions, the policy would actually attain the GATT member state's objective. Almost always an economist could think of a policy other than trade restrictions that might, in an ideal world, achieve a given policy goal. Defending policies under Article XX under these conditions was essentially a sucker's game. The *Thai Cigarettes*[26] case is a clear illustration. Thailand banned imported US cigarettes but not domestic cigarettes. Here, Thailand argued that, given the kind of marketing and advertising that were associated with the imported cigarettes, they posed a health risk in terms of attracting young people to cigarette addiction that did not

[26] *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines - Appellate Body Report*, 15 July 2011, WT/DS371/AB/R

exist in the case of domestic cigarettes. The GATT panel found that Thailand's import ban could not be justified under Art. XX (b) of the GATT, on the basis that other, less trade restrictive measures such as control of advertising. But the WHO representative intervening in the panel proceedings noted that "Multinational tobacco companies had routinely circumvented national restrictions on advertising through indirect advertising and a variety of other techniques." The panel simply ignored this evidence, which suggested an important reason as to why, for Thailand, advertising regulation might not be a reasonably available less trade restrictive alternative to an import ban Starting with some of its earliest decisions, the Appellate Body step-by-step transformed Article XX into an effective means of protecting legitimate policy space under the GATT non-discrimination regime. In *Reformulated Gasoline*[27], the AB lighted on the precise wording of the "exhaustible natural resources" exception in GATT Article XX (g) to argue for rationality review rather than a strict scrutiny approach. The requisite connection between the measure and the objective in XX (g) was expressed in the wording "related to"; this was different from the language "necessary" in the other paragraphs of Article XX, which covered matters such as public morals, and human and animal life and health. Then, in the *Korea-Beef*[28] ruling, the AB dropped the other shoe, as it were: "necessity" doesn't necessarily mean necessary. One meaning of necessary was "indispensable" but that was not the only meaning; a measure could be necessary if it was, on a continuum, significantly closer to being indispensable than to merely making some contribution to the Member's objective. Necessity in this attenuated sense was, however, to be determined by a holistic judgment based on "weighing

[27] *United States – Standards for Reformulated and Conventional Gasoline - Appellate Body Report,* 20 May 1996, WT/DS2/AB/R

[28] *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef - Appellate Body Report,* 10 January 2001, WT/DS161/AB/R, WT/DS169/AB/R

and balancing" a series of factors, including the contribution, the importance of the values and interests protected by the law or regulation, and the accompanying impact of the law or regulation on imports or exports. Now clearly the older GATT jurisprudence with its dependence on the least trade restrictive alternative test had assumed that a measure must be indispensable to be "necessary" in the sense that *no* other measure other than a trade restrictive one (at least trade restrictive to that extent) could achieve the same contribution to attaining the Member's objective. The notion of "weighing and balancing" undid the doctrinal purity of the notion of the least trade restrictive alternative. To some it implied an alternative proportionality analysis of measures that were asserted to be "necessary" though not "indispensable." That what the AB was doing was really shifting to rationality review only became apparent in a series of later cases, *US-Gambling*[29] (which dealt with public morals under the GATS equivalent of Article XX), *Brazil-Retreaded Tyres*[30] and *EC-Seal Products*[31]. In order to make a prima facie case that its measure is justified as necessary under Article XX, a WTO Member would only need to show that its measure made a "material contribution" to the objective-a material contribution would have to be of a significant nature, the AB seemed to be saying, given the level of trade restrictiveness of the measure. However, the AB also held that there is no need to quantify or measure the extent of the contribution. That a measure of the kind would address the problem in a meaningful way was a matter of common sense reasoning not empirical proof. To put it bluntly if you do not quantify or measure a "contribution" it is really impossible to say if it is significantly closer to being indispensable than to making any including a trivial contribution

[29] *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, Appellate Body Report*, 20 April 2005, WT/DS285/AB/R

[30] *Brazil – Measures Affecting Imports of Retreaded Tyres - Appellate Body Report*, 17 December 2007, WT/DS332/AB/R

[31] *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products - Appellate Body Reports*, 18 June 2014, WT/DS400/AB/R / WT/DS401/AB/R

to the attainment of the Member's objective. Once a Member made a prima facie case of its measure making a sufficient-"material" contribution, then the complainant might raise "reasonably available" less trade restrictive alternatives. As long as the defending Member, however, could provide a reasonable explanation of why it did not adopt this alternative, its justification would stand. Such a reasonable explanation could include: "[the alternative measure] is merely theoretical, … the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties."(*Brazil-Retreaded Tyres*, paragraph 156). *In other words, Article XX review largely boils down to assessing the overall reasonableness of the Member choosing the measure that it do to achieve its objective, given the trade restrictiveness of that measure.*

That this is the logical outcome of the various twists and turns of the Appellate Body on "necessity" under Article XX becomes very clear in the EC-Seal Products ruling. There the AB found that the EU's ban on seal products was necessary for the protection of public morals, understood in terms of animal welfare or countering cruelty to animals. The AB clarified: "We therefore do not see that the Appellate Body's approach in *Brazil – Retreaded Tyres* sets out a generally applicable standard requiring the use of a pre-determined threshold of contribution in analysing the necessity of a measure under Article XX of the GATT 1994." (Paragraph 5.213). the Appellate Body further held: "in order to qualify as a "genuine alternative", the proposed measure must be not only less trade restrictive than the original measure at issue, but should also "preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued." [footnote omitted] The complaining Member bears the burden of identifying possible alternatives to the measure at issue that the responding Member could have taken." (Paragraph 5.261) Finally, the Appellate Body clarified that *any* substantiated

reason why the alternative measure is not “reasonably available” (not just the reasons listed in *Brazil-Tyres*) may be sufficient to rebut the complainant’s invocation of hypothetical less trade restrictive alternatives. [The formulation in Brazil-Tyres] does not foreclose the possibility that there may be other indications that the alternative measure is "merely theoretical in nature". As we see it, if there are reasons why the prospect of imposing an alternative measure faces significant, even prohibitive, obstacles, it may be that such a measure cannot be considered "reasonably available”.” (Paragraph 5.277)

Chapeau or Chapeau-like Strict Scrutiny If the Appellate Body needed to make assurances of policy space to establish and enhance its legitimacy in an era where neo-liberal globalization is highly contested, it certainly also needed to show it could maintain meaningful constraints on protectionist abuse of public policies that undermined the value or integrity of the basic GATT-like commitments on border measures. From its earliest jurisprudence under Article XX of the GATT, the Appellate Body underlined the importance of the chapeau of Article XX in allowing such a balancing act; as explained in the next section, the AB has assimilated the norms of the Uruguay Round TBT Agreement to the GATT-based anti-discrimination regime (I/III/XX). Thus, chapeau-type strict scrutiny also occurs with the AB’s discrimination termination under Article 2.1 of the TBT Agreement, which includes both National Treatment and MFN obligations.

What typifies Chapeau or Chapeau like (in the case of TBT) strict scrutiny is a focus on the fine print of the regulatory scheme, and particularly those features that raise concerns that the way the scheme is applied in practice may entail elements of discrimination-a detrimental impact on like imported products or (in the case of MFN) like imported products of particular WTO Members. Rationality review displays deference not only to the collective preferences of the society in

question but also to the general form of intervention: a ban, a mandatory labelling scheme, a PPM, no matter. But under strict scrutiny of the fine detail, any distinction or classification that could give rise a discriminatory impact in the actual operation of the scheme is suspect, and must be explained as, essentially, indispensable to the regulatory objective of the scheme as a whole. As with the preliminary analysis of discrimination under the National Treatment or MFN operative provisions (Articles III and I), there is no need for the complainant to show actual deleterious impact, but only a formal analysis that the distinction or classification could operate in such a way as to disfavor imports, or imports from certain WTO Members. A dramatic illustration of this is the recent *EC-Seal Products* case; the EU's ban on seal products was accompanied by an exception for indigenous subsistence seal hunts. Since Greenland had a large indigenous seal hunt, discrimination was found on the basis that Canada's and Norway's commercial sealing industries could suffer a deleterious impact; the theory would have to be that demand would be shifted from Canadian and Norweigian seal products (banned) to Greenland (EC origin) products, permitted under the indigenous exception. However, after the EU ban on non-indigenous hunts, in fact Greenland seal industry exhibited a tremendous downturn in sales. There was certainly no empirical evidence that consumers were responding to a ban on commercially hunted seal products by buying more indigenous products.

There are a number of ways in which reserving strict scrutiny for the fine print blunts or mitigates the intrusiveness of putting a Member's domestic regulations under a microscope. First of all in many instances the "fine print" has been a matter of regulations or administrative practices, which can be alter without the need to alter the legislative scheme itself. This was conveniently the case with the problems that the AB identified under the chapeau in *Shrimp/Turtle*. Even if some legislative change is required, tweaking the details of a complex

regulatory scheme may not raise the kinds of sensitive political problems involved in attempting a major overhaul.

Perhaps most significantly in case after case where the AB has found discrimination at the stage of chapeau or chapeau-like strict scrutiny, the problem has been *underinclusiveness* of one sort or another. In US-Cloves[32], the problem (under 2.1 of the TBT Agreement was that the US had banned clove cigarettes but not all other flavored cigarettes that appeared to raise the same public health concerns (most notably, menthol); in *EC-Seal Products*, as just mentioned, the indigenous exception, as well as certain other kinds of very limited exceptions; in US-Tuna II, strict monitoring and verification of the "Dolphin-Safe" label had been extended to the fisheries that applied to the complainant Mexico but not to certain other Tuna fisheries; in *US-COOL*[33] the country-of-origin labeling scheme of the United States imposed burdensome tracing and record-keeping requirements on operators who were processing partly foreign origin meat but the actual information given to consumers about national origin was less than that generated by the considerable regulatory burden. In each instance, it would clearly be possible to respond to the finding of chapeau or chapeau-like discrimination by making the regulatory scheme stricter or more water-tight. *This is likely to better serve, as opposed to undermining, the main interests and values behind the regulation.* When the EU closed or narrowed some of the exceptions in the seal ban that had been found by the AB to not meet the conditions of the chapeau, the animal welfare activists who pushed for the ban in the first place understandably *cheered*. There cause had actually benefited from strict scrutiny under the chapeau. Of course, it is always possible, and this is what the complainants count on perhaps, that the kinds of

[32] *United States – Measures Affecting the Production and Sale of Clove Cigarettes - Appellate Body Report*, 24 April 2012, WT/DS406/AB/R,

[33] *United States – Certain Country of Origin Labelling (COOL) Requirements - Appellate Body Reports*, 23 July 2012, WT/DS384/AB/R / WT/DS386/AB/R

adjustments required by the AB would be unacceptable, given the alignment of domestic interest groups around the particular regulatory scheme, pro and con. In the COOL case for example, the US sensibly responded to the AB ruling by requiring that the full information that operators were required to collect be provided to consumers; but this led to some additional issues for the AB upon review of US compliance; now it is possible, given the powerful US domestic interests who oppose country-of-origin labeling (though it is enormously popular with consumers), and the attitude of the Republican-dominated Congress, that mandatory country-of-origin labeling may be repealed altogether. In that case, the WTO complainants may have succeeded in their objective, even though it was open in principle to the US to respond to the chapeau problems identified by the AB by making the scheme tighter or stricter.

But consider the incentive effects of focusing chapeau strict scrutiny on features that are underinclusive or can be modified by making the scheme tighter or stricter. A potential claimant runs the risk that it will spend millions of dollars and several years, receive a positive result from the AB, only to find out that this is a pyrrhic victory, or worse in that the increasing strictness of the scheme makes it even harder to achieve the market access that the claimant is seeking.

Another feature of the focus of chapeau or chapeau-strict scrutiny is what I would call a kind of reverse "regulatory chill" effect. The "fine print" features impugned under chapeau or chapeau-like strict scrutiny may well be idiosyncratic features of a particular Member's regulatory scheme that another Member seeking to regulate the same kind of problem using the same kind general policy instrument would not need to duplicate or include in their own regulation. To take the Seal Products example, the concerns of the AB about the EU indigenous exception would obviously be irrelevant where a Member had no indigenous population and thus no need

for this kind of exception. By limiting strict scrutiny to regulatory design or operational features likely to be specific to a particular Member's situation the general signal the AB sends is a positive one of policy space-but with an warning, as it were, about not the fine print of regulation, or administrative discretion, to abuse this policy space for protectionist ends.

Reading Out-or Down-the "Post-Discriminatory" Features of the Uruguay Round Agreements

As we have just discussed at some length, in the presence of normative dissensus about the future of direction of the WTO and under conditions of continuing intense contestation of a neoliberal approach to trade liberalization, the Appellate Body has understandably shifted the focus of its scrutiny of domestic regulations from second-guessing of the rationality or efficiency of substantive domestic policy choices to an emphasis on the prevention of protectionist abuse of domestic regulations, on process norms, and above all on the examination of discriminatory elements in the detailed legal, regulatory and administrative provisions that operationalize the substantive policy choices. But of course the Appellate Body could not simply wish away the existence of Uruguay Round WTO Agreements that, to no small extent informed by a neoliberal or Washington Consensus outlook, sought to go beyond the discrimination norm and discipline purportedly irrational or inefficient domestic regulations that represented barriers to trade while not necessarily having any features that discriminated against imports The Sanitary and Phytosanitary Measures (SPS)[34] and Technical Barriers to Trade (TBT) Agreements were clearly seen by their architects as moving well beyond the basic non-discrimination norms of the GATT-National Treatment and MFN-towards spurring market-friendly regulatory reform or

[34] WTO Agreement on the Application of Sanitary and Phytosanitary Measures, 1867 UNTS 493

deregulation, as well as global regulatory harmonization through the use of international standards. One of the most remarkable aspects of the judicial activism of the Appellate Body has been to read (with some zig-zagging in its early years) what Robert Hudec calls the "post-discriminatory" provisions in these agreements in such a way as to give little opportunity to claimants to challenge measures that either would not violate the non-discrimination provisions of the GATT or would be upheld under the Article XX exceptions.

In the case of the TBT and SPS Agreements this hermeneutic strategy has been most explicit. In the *US-Clove Cigarettes* ruling the Appellate Body pointed to language in the preamble of the TBT Agreement that resembled or reiterated elements of the GATT non-discrimination regime (including Article XX exceptions) and held:

"The balance set out in the preamble of the TBT Agreement between, on the one hand, the desire to avoid creating unnecessary obstacles to international trade and, on the other hand, the recognition of Members' right to regulate, is not, in principle, different from the balance set out in the GATT 1994, where obligations such as national treatment in Article III are qualified by the general exceptions provision of Article XX."(Paragraph 96) This statement is remarkable. It suggests that the WTO judiciary must not read provisions of TBT that are different from and additional to those in the GATT in such a way as to create a "balance" that is more liberalizing or more restrictive of domestic regulatory autonomy than the GATT itself. In the case of the SPS Agreement, in its very first decision the AB made the remarkable teleological pronouncement that the "post-discriminatory" harmonizing features of SPS were merely a *means* to disciplining discrimination and disguised restrictions of international trade (as opposed to exhibiting a neoliberal "deep integration" objective): "The ultimate goal of the harmonization of SPS measures is to prevent the use of such measures for arbitrary or unjustifiable discrimination

between Members or as a disguised restriction on international trade, without preventing Members from adopting or enforcing measures which are both "necessary to protect" human life or health and "based on scientific principles", and without requiring them to change their appropriate level of protection."(Paragraph 177)

The text and structure of the TBT Agreement, taken on their own, suggest a greater limitation on policy space, and more second-guessing of domestic policy choices than in the case of the GATT. (This is understandable because the spur for TBT was the sense that the GATT was inadequate to address regulatory barriers to trade that were in the form of regulations that might not be discriminatory but were overly cumbersome or inefficient) First of all, the National Treatment and MFN provisions of the TBT Agreement (Article 2.1) are not made subject to an Article XX type public policy exception. Secondly, the provision of the TBT Agreement that at first glance resembles Article XX of the GATT, 2.2., actually requires justification of all technical regulations as not creating unnecessary obstacles to trade, *regardless* of whether they violate the non-discrimination or any other provisions of the TBT Agreement or GATT. Third, Article 2.4 of TBT requires WTO Members to use international standards as a basis for their technical regulations where available and relevant and appropriate. This kind of regulatory harmonization is nowhere to be found in the GATT.

Now let us see how the Appellate Body has managed claims under these provisions so as to ensure that the balance between trade liberalization and regulatory autonomy remains unaltered from the GATT. First of all, the Appellate Body simply read into 2.1 of the TBT Agreement a kind of Article XX exception; a feature of a technical regulation found to provide less favourable treatment either to a like imported product (National Treatment) or of some imported products

(MFN) could nevertheless be found not to violated 2.1 if this feature stemmed exclusively from a "legitimate regulatory distinction." With respect to 2.2 of TBT, the Appellate Body has placed much more emphasis on the language in the second paragraph of 2.2. that refers to a measure being required to be no more trade *restrictive* than necessary rather than the "unnecessary obstacle" terminology of the first. In articulating what trade restrictive means the Appellate Body referred to a previous ruling that interpreted restriction on trade in the context of Article XI of the GATT, which makes illegal quantitative restrictions, which tend to be inherently discriminatory against imports. The Appellate Body has given no indication that it can conceive as trade restrictive where it does not have the kinds of effects on conditions of competition that would lead in any case to a finding of a violation of non-discrimination norms in the GATT. At the same time, overturning findings of violation of 2.2 by the panels in *US-Cloves* and *US-Tuna II*, the Appellate Body has emphasized that applying TBT 2.2 involves the same kind of weighing and balancing exercise as GATT Article XX, with a considerable margin of appreciation in examining possible alternative measures a Member might take that are less restrictive, and that there is no need to quantify the contribution of the measure or possible alternatives to the Member's objectives. The Appellate Body has also underlined elements in 2.2 that point to deference or margins of appreciation, for example, unlike Article XX of the GATT the initial burden of proof is on the complainant to show excessive trade restrictiveness, and 2.2 of TBT requires that in determining whether a measure is more trade restrictive than necessary the nature of the risks that would occur if its objective were not to be fulfilled must be taken into account. The overall emphasis is on a holistic exercise to determine the reasonableness of the Member's policy choice usually. In light of an inquiry what other instruments might have been available that could make an equal contribution to its objective,

while being less trade restrictive. In light of these jurisprudential moves, it seems hard to conceive of an instance where a Member could make a successful claim under TBT 2.2 against a measure that did not violate the GATT.

Now let us turn to 2.4 of TBT, international standards. In an early case under the TBT Agreement, *EC-Sardines*[35] the Appellate Body appeared to lurch in a neoliberal direction, implying that 2.4 of the TBT Agreement implied a large measure of regulatory harmonization: a very close fit or relationship between any technical regulation and the international standard, providing very little flexibility for regulatory diversity. In *US-Tuna II*, addressing the lack of any definition of an international standard in the TBT Agreement, the Appellate Body—in an unusual reliance on the work of a WTO committee-outlined a set of criteria that, cumulatively, at present very few international standardization initiatives are likely to meet. These include: "All relevant bodies of WTO Members should be provided with meaningful opportunities to contribute to the elaboration of an international standard so that the standard development process will not give privilege to, or favour the interests of, a particular supplier/s, country/ies or region/s" as well as complete transparency including at the drafting stage. There is ample scope for the Appellate Body to resist demands for regulatory harmonization through TBT 2.4, simply because of the complexity of the complainant proving that these criteria have been met with regard to the standards in question.

In sum, through its readings of Articles 2.1, 2.2 and 2.4 of the TBT Agreement has made it effectively impossible or at least very unlikely to succeed with a claim under the TBT Agreement that would not also succeed under GATT. At the very outset the Appellate Body had

[35] *European Communities – Trade Description of Sardines* - Appellate Body Report, 23 October 2002, WT/DS231/AB/R

established that the TBT and SPS Agreements were to be applied in parallel with, and not to the exclusion of the GATT (although where there are claims under both the newer agreements should typically be considered first). The incentives are now considerable for the parties to frame disputes about technical regulations as, essentially, GATT disputes about discrimination and/or policy justification through the general exceptions. After all, as the Appellate Body itself pronounced, the balance between trade liberalization and regulatory autonomy established by the GATT is to be maintained.

The route to this result under the SPS Agreement has been more tortuous. Arguably, SPS goes farther than GATT towards a "post-discriminatory" order that judges the rationality of public policies, as it appears to demand that SPS measures be sustained on the basis of scientific rationality. SPS 2.2 requires that SPS measures be based on scientific principles and be supported by "sufficient" scientific evidence. SPS 5.1 stipulates that measures be based on a scientific assessment of risk. In the first case under the SPS Agreement, *EC-Hormones*, the AB rejected a proceduralist approach that would have interpreted the science requirements as obligatory *inputs* into the process of deliberation and decision not substantive rationality standards against which the WTO judiciary would judge SPS regulations. This would have been a very effective and direct route to neutralizing or taming the most legitimacy-threatening neoliberal "post-discriminatory" elements of SPS. However, the AB would have had to deal with the fact that there is no phase-in period for SPS obligations, and they clearly applied to existing not just new measures, and thus interpreting the requirements in a procedural way would have produced a sort of retroactivity problem. It would have highlighted also a legitimacy problem of a different nature with the SPS reliance on science; few developing countries had the capacity or resources to conduct scientific risk assessments of the kind seemingly intended by the

SPS Agreement, and thus they would be penalized if the requirement of science were a requirement imposed on the domestic regulatory process, as opposed to an objective standard that could be fulfilled by pointing to a risk assessment conducted elsewhere or by an international body, that never was in fact part of the actual regulatory or political process that produced the measure.

So the AB found more subtle and indirect ways of avoiding the WTO judiciary being turned into a science court for domestic regulations. First of all, the AB held that science did not necessarily mean mainstream or majority scientific opinion. It was a sovereign right of a WTO Member to choose among differing scientific opinions, as long as the scientists were competent and a methodology corresponding to the scientific method in the broadest sense were adopted. Nor did risk need to be quantified. Second, in a moment of (relatively rare) eloquence the AB held that the risk to be considered was not only the kind of risk that could be assessed in a laboratory "but also risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and work and die." (paragraph 178) Third, the AB insisted in the sovereign right of a WTO Member to determine its own level of protection. Thus one took a society's risk preferences as one found them, and it would not be unacceptably unscientific for a Member to regulate so as to seek to attain a level of risk approaching zero, no matter what degree of trade restrictiveness of the regulation. If a Member's chosen level of protection was high enough, even a risk assessment that suggested the risk was very small would be sufficient to meet the requirements of SPS. Fourth, the AB largely gutted the regulatory harmonization provision of the SPS Agreement by holding that the requirement that "Members shall base their sanitary or phytosanitary measures on international standards" was of an aspirational, soft law character, despite the use of the word "shall". It did

so on the basis that the purpose of the provision was stated as “to harmonize…on as wide a basis as possible” and that this had an aspirational ring to it. Fifth, even though the EU had not invoked a provision of SPS (5.7) that allowed provisional regulations in the absence of sufficient scientific evidence on a precautionary basis, the AB held that, while it was not persuaded that there is a precautionary principle in international law with a normative force that would override SPS treaty provisions, nevertheless as an interpretive matter, “a panel charged with determining, for instance, whether "sufficient scientific evidence" exists to warrant the maintenance by a Member of a particular SPS measure may, of course, and should, bear in mind that responsible, representative governments commonly act from perspectives of prudence and precaution where risks of irreversible, e.g. life-terminating, damage to human health are concerned.”(Paragraph 124) Finally, the Appellate Body had to reckon with a provision of SPS that appears very intrusive into democratic decision-making about risk: Article 5.5, which requires WTO Members to avoid “arbitrary or unjustifiable distinctions” in the levels of protection it seeks in different situations…if such distinctions result in discrimination or a disguised restriction on international trade.” Reversing the panel, which had taken the view that the existing of “arbitrary or unjustifiable distinctions” resulted in a kind of presumption that there was “discrimination or a disguised restriction on international trade” the AB held that in fact the core of the 5.5 obligation was the avoid discrimination or disguised restrictions on international trade. The existence of “arbitrary or unjustifiable distinctions” in the levels of protection in different situations, merely functioned as one “warning” signal (Paragraph 215) of whether the measure was discriminatory or a disguised restriction. Thus the latter issue, essentially non-discrimination, becomes the crucial one for applying 5.5. Indeed, the Appellate Body made, as noted at the outset, a revealing statement that harmonization under the SPS agreement is merely

a *means* to achieving the goal of avoiding discrimination or disguised restrictions on international trade, conceptually distancing itself from a neo-liberal post-discriminatory agenda of imposing a notion of regulatory rationality or efficiency through the trading system.

Despite all these elements in reading down the "post-discriminatory" provisions of SPS into something approaching the GATT non-discrimination regime, the Appellate Body found the EU in violation of the SPS Agreement. The key point was that the EU had more or less admitted the lack of "laboratory" scientific evidence to support its banning of synthetic growth hormones in meat products but then argued that the science did not take into account the possibility that doses of growth hormones were being administered that were much higher than what was indicated by good veterinary practice. As noted, the AB was open to real world risk not just "laboratory" risk as a scientific basis for SPS measures, but the EU had failed to produce any study that showed the presence of this real world risk: i.e. abuses in the administration of hormones to the animals that threatened humans with much higher exposures to residues than would be indicated by laboratory studies supposing proper veterinary practices.

After many years of non-compliance with the AB ruling, the EU finally produced some new scientific studies that indeed showed directly the risk from synthetic growth hormones. It is in revisiting the dispute in this context that the AB has been able to clarify and reinforce the elements of deference built into its approach to SPS.

This clarification was particularly necessary as in two cases in intervening years the AB had appeared to accept intrusive approaches by panels that put risk assessments under a microscope, as if the panels themselves were equipped to determine what kinds of scientific inquiry or methodology were adequate to ascertain the nature or extent of the risk the defending Member was seeking to regulate (*Australia-Salmon*; *Japan-Apples*). In the case of *Japan-Apples* the AB

even threatened to undermined the fundamental pillar of respect for the regulating Member's chosen level of protection: in that case, the AB failed to overturning a finding of the panel, which read a proportionality requirement into Article 2.2 of SPS and held there was a violation because the measure was "clearly disproportionate" to the risk identified in the scientific studies. (At the same time, the AB seemed to protect its prior approach through reading the panel reference to "disproportionate" as a way of expressing the notion that there was no rational relationship between the risk as determined by science and the regulation actually adopted, as opposed to a fully-blown proportionality analysis.)

In its new ruling in *EC-Hormones*, the Appellate Body reiterated many of the deferential elements in its original ruling (that had been ignored by the panel in this new phase of the dispute, perhaps taking its cues from the apparently more intrusive stance in *Australia-Salmon*[36] and above all *Japan-Apples*[37] (the acceptability of non-majority, non-mainstream scientific opinion, the right to regulate based on "real world" risk like abusive veterinary practices). But most importantly the AB made a clear statement that the SPS Agreement does not invite the WTO judicial system to make its own judgment on the scientific justification of the defending Member's substantive regulation; the role of science in the adjudication of SPS claims is much more limited, and apart from the requirement that the defending Member *invoke* scientific evidence, essentially the same as rationality review under the non-discrimination regime. (Even under the GATT, a defending Member would likely present some kind of scientific evidence to support its regulation). Thus, according the Appellate Body, "it is the WTO Members task to perform the risk assessment. The panel's task is to review that assessment. *Where a panel goes*

[36] *Australia – Measures Affecting Importation of Salmon - Appellate Body Report*, 6 November 1998, WT/DS18/AB/R

[37] *Japan – Measures Affecting the Importation of Apple s- Appellate Body Report*, 10 December 2003, WT/DS245/AB/R

beyond this limited mandate and acts as a risk assessor it would be substituting its own scientific judgement for that of the risk assessor…and, consequently, would exceed its functions under Article 11 of the DSU. Therefore the review power of a panel is not to determine whether a risk assessment is correct, but rather to determine whether that risk assessment is supported by coherent reasoning and respectable scientific evidence." (paragraph 590). Anyone familiar with complex tort litigation, or even anti-trust litigation or investor-state dispute settlement, will be familiar with the phenomenon of each party being able to produce an expert or experts with a stellar cv., a teaching appointment at a leading university etc. who offers a carefully reasoned study in support of that party's position on the scientific facts. The Appellate Body has said clearly in *EC-Hormones* that all that a Member must do under SPS is that there *a* report by *some* competent, respectable scientist (who may well be expressing a minority or idiosyncratic point of that) that is coherently reasons and that supports the existence of the risk against which the Member is regulating. The Member is then free to take measures against that risk that correspond to the level of protection that it has a sovereign right to determine. This does not solve all the legitimacy concerns with the science requirement in SPS to be sure, because smaller developing countries may well have less capacity to SPS-proof their regulations through eliciting or producing such studies. But in principle and formally, the AB has really minimized, indeed close to eliminated, any real difference in scrutiny between the GATT and the SPS Agreement.

The Appellate Body has perhaps been fortunate that it has not often been required to decide on sensitive issues of policy space on other Uruguay Round Agreements that reflect a "Northern" neoliberal view of trade and domestic policy, in particular the TRIPs and Subsidies and Countervailing Measures Agreement. Even in these relatively rare cases the AB has found techniques to afford policy space while disciplining the specifically discriminatory element of

the policies. The one case where the Appellate Body was faced with applying the substantive standards of TRIPS, *US-Havana Club* raised the issue of whether the United States could deny trade market protection where the mark was originally owned by a business that had been confiscated during the Cuban revolution; the mark was then acquired from the Castro regime by a major Europe-based drinks conglomerate, Pernod but in the United States was used by the Bacardi group. The AB rejected the very broad reading of trademark protection urged by the EU and, significantly, held that not only the rights that existed under the Paris Convention (a WIPO treaty that long predated TRIPs) were incorporated into TRIPs but also all of the flexibilities and exceptions. At the same time, the Appellate Body pointed to a gap in TRIPs itself: TRIPs nowhere restricts domestic regulation of *whom* may own intellectual property. It only addresses the nature and scope of the rights that must be protected. In theory, governments could achieve very broad policy goals through placing conditions or restrictions on ownership of IP (subject to discrimination disciplines). At the same time, the Appellate Body also engaged in chapeau-type strict scrutiny, finding a violation of the non-discrimination norms in TRIPs because an arcane provision of the US trademark regime appeared to impose on foreign persons some kind of additional burden or regulatory step that did not apply to US persons. The United States had argued that in practice this could not lead to discrimination, because US persons would not in any case have a route available to them for protection under the provisions in question, due to other aspects of US law. But exhibiting a typical formalism, the AB found a violation because this anomaly at least created a hypothetic apparent possibility of less favourable treatment. This being said, the general signal sent by *Havana Club* was that the Appellate Body would read the substantive standards of TRIPs narrowly, assuming no greater degree of harmonization of IP protection than is strictly indicated by the text of TRIPS or the WIPO treaties regime that pre-

dates TRIPS and the neo-liberal intellectual property agenda. Perhaps this is why pro-IP interests have not pushed the US or the EU to challenge the use of TRIPs flexibilities by developing countries in WTO dispute settlement (one case was brought against Brazil concerning compulsory licensing then withdrawn). One of the few instances where WTO Members have succeeded through negotiation in re-adjusting the Uruguay Round result towards a more pro-South or less neo-liberal direction is the access to medicines issue, where patent rights under TRIPs have been asserted to prevent licensing to provide low-cost medications to poor people in the South. The agreement to adjust TRIPs on this issue, which entails considerable administrative obstacles to a developing country compulsorily licensing an essential drug that is produced in a different country, may have been acceptable to the US and the pharma lobbies in the shadow of the risk that the AB might have found even broader flexibilities in the existing text of TRIPs or the gaps in that text.

Respect for Collective Preferences As Petros Mavroidis has rightly noted, the Appellate Body's rejection of the product/process distinction in *Shrimp/Turtle* signaled an approach of deference or respect for the goals or objectives of regulation adopted by WTO Members. The Appellate Body will simply not sit judgment on the preferences of a given society as to what it regulates. This deference extends to the intensity or strictness of regulation. Thus, beginning with the *EC-Hormones* case, the Appellate Body affirmed the right of a WTO Member to determine its own level of protection against a given harm. In principle a government could seek in its regulation to achieve a risk of zero. The implication of this level of respect for collective preferences is the rejection of the notion of proportionality in the evaluation of the relationship between means and ends, discussed in the last section on Rationality Review. As explained, "weighing and balancing" as practiced by the Appellate Body leads to an overall assessment of the

reasonableness of the policy choices of a WTO Member, given its own objectives *and* its obligation under WTO law to avoid unnecessary trade restrictiveness. Proportionality, at least in its strict version, could lead to the invalidation of a policy instrument that makes a contribution towards the achievement of a given level of protection, where that contribution appears small relative to the level of trade restrictiveness in question. In other words, with proportionality, at the limit the WTO Member is required to make *some* sacrifice of the achievement of its chosen level of protection in order to avoid trade restrictiveness. This kind of trade off that is not consistent with the respect for collective preferences as the Appellate Body understands it. (As discussed in the next section, in one case under the SPS Agreement, *Japan-Apples* the AB deviated from its otherwise consistent rejection of proportionality).

Respect for collective preferences also goes to the relative weight or priority that a given society attaches to different regulatory objectives. Here, the Appellate Body has on occasion deviated from full respect for collective preferences, but-notably-only in order to justify affording an *additional* margin of deference under rationality review in cases where human life or health is at stake. (*Hormones*; *Asbestos*). What the Appellate Body has *never* done is to apply explicitly a relatively *higher* level of scrutiny out of a judgment that a regulatory objective was less vital or should be less vital for a given society.

An apparent textual difficulty in operating the respect for collective preferences in a consistent manner is that, with respect to the exceptions in Article XX of the GATT, for example, only some regulatory objectives are listed but far from all. One way of handling this, recommended by some scholars including myself, would be to be build collective preferences into the determination of whether a measure is discriminatory and thus in the first place required to be justified under Article XX. Yet as explained above, in the discussion of the Appellate Body's

non-discrimination regime, while the AB did go in this direction in at least one case, *EC-Asbestos*, where consumer preferences about health were considered in determining whether the treatment of different products could properly be compared for purposes of an analysis of discrimination, overall (after twists and turns in the case law)the AB has moved toward an approach where discrimination is found on the basis of an impact on competitive relationships alone, without regard to the basis of the distinctions in policy choices or collective preferences.

It is perhaps no accident, however, that in the very same case where the AB completed or fully articulated its orientation towards an exclusively competition-based approach to discrimination, *EC-Seal Products*[38] the AB also reinforced its resources to ensure the respect for collective preferences under Article XX of the GATT, through reaffirming a broad reading of the meaning of "the protection of public morals" in Article XX. This broad reading, already endorsed in *US-Gambling*[39] and *China-Publications*[40], appears to cross-cut all substantive fields of regulation, focusing on whether the measure in question is deemed by a given society to be derived from fundamental beliefs or values of that society.

The significance of such an approach for respect for collective preferences was perhaps not fully grasped with *US-Gambling* and *China-Publications*, because in those cases, the kinds of restrictions at issue, controls on betting and censorship of films, could be seen as rather pervasive, traditional or conventional forms of "moral" regulation. In *EC-Seal Products* what was at issue was animal welfare, the prevention of cruelty to seals. While in fact, as Sykes and I

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[38] *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products - Appellate Body Reports*, 18 June 2014, WT/DS400/AB/R / WT/DS401/AB/R

[39] *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services - Appellate Body Report*, 20 April 2005, WT/DS285/AB/R

[40] *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products - Appellate Body Report*, 19 January 2010, WT/DS363/AB/R

have shown, regulations addressing animal cruelty have been an element of public morality for some time in many societies, in general, the tendency in the trade policy community was to make light of the notion of opposing the seal hunt as a genuine moral matter (as opposed to a sentimental fad stoked by fanatical NGOs and celebrities hungry for more publicity). For the panel (grasping properly the respect for collective preferences already evident in the AB jurisprudence) and for the AB itself, there was no place for an inquiry into whether, objectively, concern for animal welfare generally, or indeed for the suffering of seals in particular, could or should be a matter of the fundamental beliefs or values of Europeans; this was essentially a matter of declaration or assertion by the EU, speaking for its citizens (subject at the limit to an implicit condition of good faith, i.e. that the declaration not be a sham or pretext for protection of domestic commercial interests).

Many expected a kind of anti-hypocrisy condition to be put on the invocation of public morals; if you act against cruelty to seals, to show you are serious that animal cruelty is a serious moral matter, you have to demonstrate that you are as concerned for the suffering of foxes, or chickens, or pigs. The rejection of this kind of argument (strongly urged by the claimants Canada and Norway) illustrates the consistency of the respect for collective preferences by the WTO judicial system. Caring more about some animals rather than others, or prioritizing some animal welfare causes over others, is not a question of rationality or irrationality nor does it necessarily raise the specter of hypocrisy; it is simply a function of the collective preferences of a particular society, which the WTO adjudicator has no business second-guessing.

Overall, the approach to public morals in *EC-Seals* should allow the Appellate Body to be consistent in its respect for collective preferences, providing the possibility of justifying measures for objectives that are not explicitly stated in the other exceptions in Article XX.

But there are questions about the respect for collective preferences that are raised by other aspects of the Appellate Body's jurisprudence that are been far from fully answered.

The WTO Subsidies and Countervailing Measures Agreement (SCM Agreement)[41], a product of the overall neoliberal orientation of the Uruguay Round, disciplines subsidies that have certain competition-distorting effects, but without an exceptions provision like Article XX of the GATT. The disciplines are essentially indifferent to collective preferences and are a product, in some significant measure, of the anti-industrial policy/picking winners bias of the thinking on regulation and its reform that dominated at least in the West in the 80s and early 90s, when it began to be seriously challenged. Some have suggested reading in Article XX to the SCM Agreement, on grounds that it is a lex specialis to the GATT that elaborates but incorporates the basic approach in the GATT to policy space. In the *Canada-Renewable Energy*[42] dispute the Appellate Body was faced with an important challenge with legitimacy implications. All renewable energy markets have historically been premised on government support; when one doesn't take into account negative environmental externalities, the cost of generating renewable energy has been higher than in the case of fossil fuels. In a competitive marketplace where consumers only cared about the lowest price for a given amount of electricity, no renewable energy would be generated. Yet the SCM Agreement is indifferent to policy objectives, even those as apparently imperative or vital as mitigating climate change. In this context, the AB had to be extremely creative in finding a way of bringing in respect for collective preferences. It did so through the concept of "benefit" as interpreted in the jurisprudence of the SCM Agreement.

[41] WTO Agreement on Subsidies and Countervailing Measures1994, 1869 UNTS 14

[42] *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program - Appellate Body Reports*, 24 May 2013, WT/DS412/AB/R / WT/DS426/AB/R

The subsidies disciplines depend on a notion that a benefit has been provided, an advantage over the situation of a normal competitive market. The AB hypothesized that a market could itself be the product of collective preferences. In Ontario the government had *constructed* a renewable energy market and structured it to achieve certain policy objectives. One had to take this framework as a given and ask not whether the price provided to renewable energy producers provided a benefit in relation to providers of fossil fuel energy, but whether there were competition-distorting subsidies *within* the renewable energy market as created and structured by the Ontario government based upon Ontario's collective preferences. One may well ask whether this approach may also have implications for the AB's choice of a purely competition-based approach to determining the existence of discrimination: if the government has created different markets for two products based upon collective preferences, is it proper to postulate a competitive relationship between the products as if there were a single market? (Herwig)

A second question about respect for collective preferences is raised by the COOL case, where the Appellate Body considered under the TBT Agreement US regulations mandating that information be provided to consumers through labeling about the national origin of certain meat products. As will be discussed in the next section, the AB's approach to this dispute is an example of its proceduralist and strict scrutiny of discrimination tropes; it jumped almost immediately to those tropes without really engaging in rationality review of the regulatory scheme as a whole. This would have involved some inquiry into the policy objectives in providing consumers with the information in question. Consumers might view national origin as a surrogate for quality or safety of meat (which could be rational or could be based on prejudice or misinformation or some of both). Or they might have preferences against certain countries.

Could facilitating the latter preferences be *intrinsically* inconsistent with the concept of non-discrimination in WTO law?

A third question emerges from the way in which the AB has been operating its strict scrutiny of discrimination. As noted, the AB operates strict scrutiny of discrimination under the chapeau of Article XX by requiring a tight justification of any distinctions or exceptions in the way that a regulatory scheme is designed to be applied in practice as against the stated objective. The *EC-Seals* judgment displays the difficult the AB has in imagining a situation where distinctions or exceptions reflect different objectives, each legitimate that need to be traded off to some extent. It was difficult for the AB to see the indigenous people's exception as a reflection of the strength of collective preferences for the protection of the traditional way of life of indigenous peoples that could legitimately limit the fulfillment of collective preferences with respect to protection against animal cruelty. The AB didn't exclude the legitimacy of trading off these different goals through an exception but required a kind of harmonization such that attaining the indigenous objective detracting to the minimum extent necessary from the "main" or "principal" objective of addressing animal cruelty. This seems to limit the extent to which the regulator can take into account the relative strength or intensity of different sets of collective preferences in determining how to make trade-offs within a given regulatory scheme.

Proceduralism

As already noted, in the *Shrimp/Turtle* case, there was a strongly proceduralist focus in the Appellate Body's chapeau strict scrutiny. The AB faulted the United States for having negotiated with some WTO Members and not others an agreement that would forestall a trade embargo, for rigid application of statutory criteria that did not take account of conditions in different countries, and for lack of reasons for decisions on individual importation applications.

Since the general focus of chapeau analysis, again as already discussed, is how the measure is or will be actually applied or operationalized, there is a large role for proceduralism in that analysis. As Dani Rodrik has noted, a focus on process as a means of checking protectionism may avoid the second-guessing of substantive policy choices and reduce the tension between democracy and globalization, which Rodrik has so well articulated. Proceduralism however is not without its risks and has been subject to justified criticism. Strictness with respect to procedures seems legitimate where the defending Member has a highly developed legal system, a regulatory democracy along the US or EU type of model. In the case, of less developed countries proceduralism can result in what obligation overload-which is perhaps why, as already noted, in some instances the AB rejected a proceduralist turn, for example rejecting an interpretation of the risk assessment requirement in the SPS Agreement that would have required that the actual WTO Member taking the measure itself conduct a scientific risk assessment. Secondly, as will be discussed below, the AB has taken a proceduralist turn, not only to avoid strict scrutiny of substantive policy choices by WTO Members where giving a precise or determinate meaning to a legal provision would open up broad normative controversy, or where the dispute is inherently a high stakes one for the legitimacy of the WTO or the dispute settlement system. This is a dispute or controversy avoidance technique that may have positive legitimacy effects in a situation where there are deep divisions between the Membership, even as to the WTO's aims and future direction. At the limit, though it can also produce a sense of legal incoherence, that may erode trust in the system and its ability to provide clear guidance as to the meaning of legal rules.

An excellent example of the strengths and perhaps also risks of proceduralism as a means of avoiding controversy concerning the meaning of legal norms is the *GSP* dispute. One of the

most divisive issues between developing and developed countries that goes to what it meant for Doha to be a "Development Round" was that of special and differential treatment of developing countries. One such kind of treatment has been the provision of tariff preferences to developing countries, i.e. lower rates of tariff than the MFN rate for developing country exports to developed country WTO Members.[43] Such non-reciprocal preferences represented a partial victory for developing countries in the struggle over a new international economic order in the 1960s and 1970s; a framework was created to allow for an MFN exception for these preferences and to encourage individual developed countries to grant them but the developing nations failed in their demand that these preferences were binding. By the time of the Doha Round, many of these preferences had their special value-or "preferentiality"-eroded by the reduction of tariffs on an MFN basis on many products, as well as the proliferation of Preferential Trade Agreements, including between developed countries that eliminated tariffs to zero or close. Furthermore, the preferences, having been granted voluntarily, were increasingly encumbered by conditions (ranging from anti-terrorism to protection of intellectual property rights to human rights and environmental protection) as well as by other forms of unilateral decision-making, like whether a country or product had "graduated" from GSP, i.e. had become competitive enough so as to no longer justify this form of Special and Differential Treatment. The legal instrument under the GATT and the WTO that allowed a deviation from MFN in order to operate the GSP, the

[43] The following draws from my previous scholarship on this dispute: See Robert Howse, "Back to Court After Shrimp-Turtle? Almost but not Quite Yet: India's Short Lived Challenge to Labor and Environmental Exceptions to the European Union's Generalized System of Preferences, 18 American University International Law Review1333 (2003); Robert Howse, "Reconciling Political Sanctions with Globalization and Free Trade: India's WTO Challenge to Drug Enforcement Conditions in the European Community Generalized System of Preferences: A Little Known Case with Major Repercussions for 'Political' Conditionality in US Trade Policy," 4 Chicago Journal of International Law 385 (Fall 2003); and Robert Howse, "The Death of GSP? The panel ruing in the India-EC dispute over preferences for drug enforcement," 1 Bridges (ICTSD)7 (January 2004); Robert Howse, "Appellate Body Ruling Saves the GSP, at Least for Now, 4 Bridges (ICTSD)4 (April 2004).

Enabling Clause, incorporated a number of criteria or desiderata from pre-existing GATT practices and, documents including that the preferences be operated in a non-discriminatory manner. However, the drafting of this instrument made it far from clear whether the criteria were of a legally binding nature, or whether they reflected the ultimate aspiration for what would be achieved through a voluntary preference scheme. In March 2002, notably a few months after the launch of the Doha Development Round, India launched a dispute at the WTO challenging conditions related to labor rights, environmental performance, and drug enforcement practices that had be incorporated in the EU GSP scheme; meeting these conditions would allow a developing country to receive the highest margin of preferentiality for its imports into the EU. India claimed that the conditions violated the non-discrimination provision of the Enabling Clause, which India claimed was "hard law" and prohibited *any* distinctions between different developing countries. A successful ruling for India might have given India and other developing countries a boost to negotiate greater legal security for this kind of special and differential treatment in the Doha Round. This was perhaps a gambit. Yet striking down conditionality on GSP preferences would have undermined a very strong understanding, especially among legislators in the EU and the US that GSP is a voluntarily conferred benefit to which strings can be attached. Being prohibited in attaching those strings might well have led to a loss of interest from legislators in supporting GSP at all.

As Greg Shaffer summarizes: "the GSP case represents a lawyer's paradise of ambiguous legal provisions interpreted by judicial bodies in a case having significant political and institutional implications." The complex proceduralist solution by the Appellate Body was enabled by India's own decision to limit its challenge to the drug enforcement conditions, dropping the claims against labor and environmental conditionality. Given that the Appellate Body had

recently affirmed in its second ruling in Shrimp/Turtle the legitimacy in principle of trade measures in response to other countries' environmental policies, and had apparently empowered in some measure some of the constituencies critical of neo-liberal trade liberalization, dropping environmental and labor was an understandable choice by India to reduce the risk of its gambit. But a feature of the drug enforcement conditionalities was that they were not accompanied by any specific criteria to determine a country's entitlement to obtain the preferences; listing a country as was an act of essentially unfettered bureaucratic discretion, with no requirement to give reasons or an explanation. This feature made the drug preferences fundamentally different from those related to environmental and labor conditionalities, which were rather precisely defined.

The panel below held for India that any conditionality in the granting of GSP preferences was incompatible with non-discrimination in the Enabling Clause. The AB's approach was quite different. First of all, it gave to India that the non-discrimination requirement in the Enabling Clause was a binding hard law commitment. Not to have done so would have sent arguably a very negative message about legal security in special and differential treatment and would have made the atmosphere of the Doha development round even more tense, in terms of divisions between developing and developed countries.

But having said that non-discrimination applied, the AB rejected the panel's view that any distinction would constitute discrimination. Instead the AB emphasized the importance of transparency and due process to the non-discrimination norm and relied heavily on the lack of objective criteria in the drug preferences. Drawing on the language in the Enabling Clause, the AB did impose one substantive discipline: to be non-discriminatory the conditionality had to

make a positive contribution to the development needs of the country concerned. Yet it was very unclear to what extent that the AB would engage in real scrutiny of the relation between the conditionality and the development need (as long as tariff preferences in principle could make a contribution and the development need was related to an "objective standard" such as some multilateral treaty deploying a concept of development.) In any event the AB made it rather clear that it would not be inclined to make its own judgment about the meaning of "development" or development needs.

According to Shaffer, many developing countries were deeply disappointed by the AB ruling. In effect, only through future dispute cases could they test how deferential the AB intended to be determinations of preference-giving developed countries concerning the meaning of the key substantive norm of positive contribution to development needs. Shaffer himself takes the view that the AB was in fact placing a tough hurdle in front of a preference-giving Member and regrets the unwillingness of developing country Members to test this in further litigation. But by leaving the key substantive norm undefined, the AB made any such effort inherently risky, for it could lead to a legal baseline unfavourable to efforts to secure greater legal security for preferences, the key objective of many developing countries.

Proceduralism has loomed large in another area of WTO law that has presented something of a political minefield-the constraints on unilateral trade measures that have been traditionally permitted under the multilateral trading order: anti-dumping duties and countervailing duties in response to purportedly unfair trade practices of other Members, and safeguard or emergency action, in response to a crisis in a domestic industry due to a sudden increase in imports. Negotiations in the Uruguay Round to constrain these forms of unilateralism were intense and difficult-the United States but also the EU placed a considerable weight on being able to retain

the ability to use these instruments, including (implicitly) in response to demands of protectionist domestic constituencies. Other countries saw these kinds of unilateralism, especially anti-dumping duties, as among the most damaging forms of protectionism remaining, especially given the ease with which definitions of "dumping" and other legal standards could be manipulated by "captured" domestic agencies. Economists have generally seen the legal standards for imposition of unilateral trade remedies as having no sound economic basis. There is no good economic theory to determine if "dumping", selling in export markets at a higher price than in domestic markets is "unfair" or determine whether a particular subsidy is "unfair" such that it merits a unilateral response (the neoliberal orientation toward multilateral discipline of subsidies was incorporated in the Uruguay Round SCM Agreement, as noted above, but the same neoliberal outlook was skeptical of using subsidization as a pretext for unilateral protectionist response).

With the substantive standards for disciplining unilateral trade remedies lacking coherence, and the product of a rather brutal power-based negotiation, it is not surprising that the Appellate Body tended to resort to proceduralism in these cases. In the early cases on safeguards, *Lamb* and *Steel* the AB tackled the substantive norms that required that to apply safeguards the sudden increases in imports must have been due to unforeseen developments and that the increases in imports have a causal relation to the injury to the domestic industry. Giving an economic meaning to these norms is well-nigh impossible; so the AB essentially faulted a lack of reasoning or inadequate consideration of the evidence, or failure to take into account all factors that might be contributing to injury. It impugned the quality of the process by which the domestic agency imposed the safeguards while giving little guidance as to what the substantive norms the agency was to apply actually do mean. At some point the quantity and quality of reasons given for the

decision, and evidence considered, would be sufficient, but to know what point was, some understanding of the substantive norm arguably would be required. The safeguards cases strained the limits of proceduralism though one can understand the logic of the AB in resorting to it.

In the more recent "zeroing" cases, where the issue is whether the amount of an anti-dumping duty should be lower to give the dumping firm a "credit" for negative dumping-i.e. for those sales where its price is higher in the export rather than domestic market-the Appellate Body strayed from proceduralism, however, with rather ominous results. "Zeroing", the failure to count in negative dumping transactions in determining the anti-dumping duty (so as to lower it, so named because these transactions are simply given zeros) is neither explicitly permitted nor prohibited under the AD Agreement. The Appellate Body nevertheless found that the practice of "zeroing" was incompatible with the norms of the AD Agreement, including the requirement to make a fair comparison of prices and to determine duties based upon comparing aggregate domestic and export transactions. Relentless pressure was applied to the AB from the USTR to back off from this approach-while gradually the US did implement the AB's rulings, it sent a note of criticism to the Appellate Body itself in two cases. In others, panels of first instance refused to follow the AB approach to zeroing issue (at the time the head of the legal secretariat serving the panels of first instance was an American, Bruce Wilson, with a Washington DC insider background). The US failure to allow the American Appellate Body Member Jennifer Hillman to serve a second term may well be related to the zeroing controversy. Finally, the USTR has apparently resolved to block any appointment of a new Appellate Body Member who is likely to be independent of trade insider circles, and especially any academic. The politicization of the appointments process, observed by political scientist Mark Pollack in an

important recent article, could be seen as an inevitable outcome of the Appellate Body's assertions of independence and authority in a treaty community that likes to see itself as "Membership-driven". But, when the US blocked the appointment of Professor James Gathii as an AB Member, most of that community at first stood up to US pressure, resulting in the failure of the first appointment process, a deadlock where the AB was not fully staffed for a period of time, while finally Kenya had little choice but to withdraw Gathii's candidacy. Significantly, the individual ultimately chosen was a non-lawyer and a consummate WTO insider. While the narrative of this essay has been one of the consensus rule protecting the AB against effective political interference or pressure, the Obama Administration USTR found a way of using the consensus practice to produce politicization, through holding out until a candidate who seen to be amenable to deciding cases with sensitivity to Member views was finally chosen over one who had the appearance of an independent minded jurist.

Why could the AB have not backed off to a proceduralist stance over zeroing, simply stating that where an agency zeroes it has to ensure or perhaps give reasons to show that the practice is "fair" all things considered? As we have elaborated, these kinds of proceduralist moves saved the AB from becoming immersed in political controversy over other heavily negotiated but unprincipled trade-offs in the constraints on unilateral trade remedies? The aggressiveness with which the United States applied pressure, and the relative openness (to show to protectionist domestic constituencies that it was playing tough) probably forced the AB to stand completely firm; even though jurisprudentially justified to some extent (after all, as noted, "zeroing" was not explicitly banned and different Members had different views in the negotiations on its compatibility with the overall normative approach of the Anti-Dumping Agreement), softening its approach would have made the AB appeared to have been subject to pressure, not from the "institution" or the

Membership in general, but from one Member, the United States. It would have undermined the consideration that ultimately probably allowed many other Members to put up with decisions that were independent but also anomalous from a trade insider perspective: namely that, overall, having a judicial organ that can counter to some extent the power-based nature of the WTO system, with the US as its most powerful Member, is worth it. Fortunately, one may question whether the kind of pressure applied in the zeroing controversy is much more than a reflection of the style of senior members of the current USTR, most notably Tim Rief as opposed to the inevitable reflex of a self-perceived hegemon facing an international tribunal. But the verdict is still out.

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