
The WTO 20 Years On: ‘Global Governance by Judiciary’ or, Rather, Member-driven Settlement of (Some) Trade Disputes between (Some) WTO Members?

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Abstract

In this response to Robert Howse’s EJIL Foreword article, it is argued that Howse overestimates the extent and type of effectiveness and legitimacy achieved by the World Trade Organization’s (WTO) dispute settlement system to date. Moreover, the effectiveness and legitimacy the system has built up has not been achieved by the Appellate Body ‘distancing itself’ from WTO members or the Geneva-based trade policy elite but, rather, because panels and the Appellate Body have, for the most part, skilfully read, reflected and responded to underlying and evolving WTO member country preferences. The system’s success flows not from Herculean ‘declarations of independence’ by the Appellate Body or ‘open conflict with the trade policy elite’. On the contrary, it is largely explained by the Appellate Body’s ‘judicial minimalism’ (to which Howse refers) and the subtle, informal symbiosis that has emerged between the WTO Secretariat, panels and the Appellate Body, on the one hand, and WTO members and the Geneva-based trade policy elite, on the other.

Robert Howse’s *EJIL* Foreword article offers an impressive overview of the first 20 years of WTO dispute settlement.¹ Under one roof, it presents the story of the evolution from the General Agreement on Tariffs and Trade (GATT) to the World Trade Organization

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¹ Howse, ‘The World Trade Organization 20 Years On: Global Governance by Judiciary’, 27 *European Journal of International Law* (2016) 9.

(WTO), a description of the ‘imbalance’ or contrast between a struggling WTO negotiating machine and a productive WTO dispute settlement arm as well as a razor-sharp summary of core Appellate Body jurisprudence.²

In this short comment, I want to focus on the article’s core normative claim: that despite the ‘diplomatic and political ... malaise in the Organization’, the Appellate Body has managed to build ‘an effective, legitimate judicial system’ and has done this by ‘distancing itself from the Organization’ (deviating from ‘some of the basic tenets of the trade insiders at the WTO’, including the ‘neo-liberal deep integration trade agenda’ reflected in the 1994 WTO Agreement).³ According to Howse, the Appellate Body pulled this off (its ‘declaration of independence’⁴) largely because (i) it was ‘staff[ed] ... with high-level legal professionals’, ‘distinguished generalist jurists, not eminent experts in GATT/WTO law’⁵ or Geneva-based, trade insiders and (ii) the Appellate Body knew that WTO members themselves would be unable to reign in its ‘independence’ (or its move away from ‘the neo-liberal project’⁶) since any overturning or control of the Appellate Body ‘could not be done absent a consensus of [all] the Members’, which, given the political stalemate in the organization, is ‘essentially impossible’.⁷

I want to question two elements in particular. First, in my view, Howse overestimates the extent and type of effectiveness and legitimacy achieved by the WTO’s dispute settlement system to date. Second, the effectiveness and legitimacy the system has built up has *not* been achieved by the Appellate Body ‘distancing itself’ from WTO members or the Geneva-based trade policy elite but, rather, because panels and the Appellate Body have, for the most part, skilfully read, reflected and responded to underlying and evolving WTO member country preferences. As limited (and member and insider focused) as it may be, the system’s success flows not from Herculean ‘declarations of independence’ by the Appellate Body or ‘open conflict with the trade policy elite’.⁸ On the contrary, it is largely explained by the Appellate Body’s ‘judicial minimalism’ (to which Howse refers) and the subtle, informal symbiosis that has emerged between the WTO Secretariat, panels and the Appellate Body, on the one hand, and WTO members and the Geneva-based trade policy elite, on the other.⁹ If anything, what is noteworthy (but admirable) is not so much the Appellate Body’s acts of belligerence against, or emancipation from, WTO members but, rather, its overall cautiousness and careful ear to the grumbings, fluctuating preferences and varying levels of tolerance of the WTO membership (knowing, of course, that in a specific dispute there can always be a disgruntled loser), notwithstanding the fact that, from a formal, legal perspective, individual Appellate Body rulings are beyond the control of that same membership

² General Agreement on Tariffs and Trade (GATT) 1994, 55 UNTS 194.

³ Howse, *supra* note 1, at 9. Agreement Establishing the World Trade Agreement 1994, 1867 UNTS 154.

⁴ Howse, *supra* note 1, at 30.

⁵ *Ibid.*, at 27.

⁶ *Ibid.*, at 28.

⁷ *Ibid.*, at 9, 28.

⁸ *Ibid.*, at 9.

⁹ *Ibid.*, at 66ff.

(any 'legislative correction' would, as Howse points out, require the consensus of all WTO members).

1 How Effective and Legitimate Really?

Like many WTO commentators,¹⁰ Howse uses as the main proxies for effectiveness and legitimacy 'the sheer number of disputes that the states parties [members] have been prepared to submit' and 'the relative lack of instances where members have, upon losing a ruling, explicitly chosen not to implement it'.¹¹ Yet, usage rates only tell us how many disputes have actually been filed; they do not say anything about the total number of violations or disputes that are out there, including those that have *not* been filed. In the first 20 years (1995–2014), 488 WTO requests for consultations have been filed. However, Global Trade Alert estimates that, since November 2008, G-20 countries alone have enacted 5,775 measures 'that discriminated against some foreign commercial interests'.¹² And, over time, usage rates have gone down, not up. In the first 10 years, 324 consultation requests were filed, and 109 panel and 64 Appellate Body reports were circulated; in the second 10 years, 'only' 164 consultation requests were filed, and 'only' 89 panel and 51 Appellate Body reports were circulated.¹³

Moreover, disputes that have been submitted to the WTO are submitted, first, predominantly by and against a small sub-set of WTO members. Around one third of WTO members did not file a single dispute; close to 40 per cent of WTO members have never been challenged and less than one quarter of WTO members have ever been a main party before the Appellate Body. In the first 10 years, the USA was a defendant in 40 per cent of Appellate Body cases; in the second 10 years, this number increased to a staggering 51 per cent.¹⁴ Second, the disputes that have been submitted lie in a small sub-set of issue areas. More than half of the Appellate Body reports to date are in the technical sub-field of trade remedies; many others focus on discrimination; very few are filed in respect of trade in services, intellectual property or regional trade agreements. These are 'black holes' in WTO dispute settlement that, at the very least, question its effectiveness.

Similarly, the rate of compliance with adverse WTO rulings by panels and the Appellate Body may be high. Still, this alone tells us little, if anything, about overall compliance with WTO rules (the WTO disputes actually filed and ruled upon may only be the relatively uncontroversial tip of the iceberg of total number of violations out there) nor even about the actual compliance pull of WTO rulings (WTO rulings may

¹⁰ See M. Elsig, B. Hoekman and J. Pauwelyn, Thinking about the Performance of the WTO: A Discussion Across Disciplines, EUI Working Paper RCAS 2016/13 (2016), at 10.

¹¹ Howse, *supra* note 1, at 11.

¹² S. Evenett and J. Fritz, *Global Trade Plateaus: The 19th Global Trade Alert Report* (2016) at 38.

¹³ Statistics are drawn from World Trade Law, available at <http://worldtradelaw.net> (last visited 3 November 2016).

¹⁴ Statistics compiled from the World Trade Organization (WTO) website, available at www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited 3 November 2016).

be complied with because they impose relatively low burdens or remedies, because losing states see it in their own interest to do so anyhow or because of reasons external to the WTO such as threats to pull-back development aid). As Yuval Shany puts it, ‘a *low-aiming* court, issuing minimalist remedies, may generate a high level of compliance but have little impact on the state of the world’.¹⁵ In addition, over time, a significant number of so-called compliance panels have had to be established (in many cases because the original ruling was not clear), prominent cases have led to compensation rather than compliance (think of *EC – Hormones* or *US – Upland Cotton*)¹⁶ and many new disputes have actually been about violations that had already been found with respect to earlier, similar measures, often enacted by the same country (think of ‘zeroing’, which continues to be practised by the USA).

2 More and More About Less and Less?

These ‘black holes’ and repeat cases, with ever more language and complexity (not always clarification) around a limited set of legal disciplines (basically, trade remedies and non-discrimination) create the impression that, as WTO jurisprudence evolves, we know ‘more and more about less and less’, with the risk that one day, as the saying goes, we may know ‘everything about nothing’.¹⁷

Do not misunderstand me: Howse is correct when pointing out that the Appellate Body has achieved remarkable success in terms of the overall rigour and consistency of its legal analysis, its impartiality (including from those WTO members of which the Appellate Body members themselves are nationals) and collegiality (relatively few dissents have been issued in Appellate Body jurisprudence to date). However, these are testimony of the Appellate Body’s legal or normative legitimacy (does it meet certain objective standards such as valid consent to jurisdiction or compliance with the rules that apply to the tribunal) – not of its sociological legitimacy (whether a particular constituency accepts the authority of a tribunal or believes this authority to be justified?).¹⁸

3 The Appellate Body’s Audience and Source of Legitimacy: Mainly Internal

When it comes to the sociological legitimacy of the Appellate Body or WTO dispute settlement more broadly, it remains mainly ‘internal’ or, as Joseph Weiler has put it,

¹⁵ Shany, ‘Assessing the Effectiveness of International Courts: A Goal-Based Approach’, 106 *American Journal of International Law (AJIL)* (2012) 225, at 227.

¹⁶ WTO, *European Communities – Measures Concerning Meat and Meat Products (Hormones) – Joint Communication from the European Communities and the United States*, 30 September 2009, WT/DS26/28; WTO, *United States – Subsidies on Upland Cotton – Notification of a Mutually Agreed Solution*, 23 October 2014, WT/DS267/46.

¹⁷ See the adage – ‘A specialist is a man who knows more and more about less and less’ – generally attributed to William J. Mayo, quoted in *Reader’s Digest*, November 1927.

¹⁸ See Grossman, ‘Legitimacy and International Adjudicative Bodies’, 41 *George Washington International Law Review* (2009) 107. Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331.

coming from ‘the world of the WTO itself and its principal institutional actors: the Delegates and delegations, the Secretariat, the Panels, and even the Appellate Body among others’.¹⁹ Today, one should add to this list of ‘insiders’ – that is, the core audience to which the Appellate Body speaks and draws legitimacy from – lawyers practising WTO law and academics and other observers commenting on WTO jurisprudence. The reputation or legitimacy that WTO dispute settlement enjoys in the ‘outside world’ is questionable. With the notable exception of petitioners for, and targets of, anti-dumping or countervailing duties, the business world or private sector actually conducting trade remains relatively unaware or uninterested: for lack of private standing or meaningful remedies; because of the time it takes to win a case or because of the politics involved in litigating a dispute, complying with an adverse ruling or deciding to file a case in the first place. In addition, civil society, which expressed some concern in the early years, seems to have lost interest, probably because of the types of cases dealt with (as noted earlier, more than half are about trade remedies) and due to the judicial minimalism and legal/technical complexity of those cases that could appeal to a broader audience (think of *EC – Seals* or *US – Tuna II*).²⁰

4 Symbiosis with, Rather Than ‘Open Conflict’ or ‘Independence’ from, the Membership

In sum, WTO dispute settlement is there mainly for and by WTO members: members set out the treaty rules, decide which cases to file, appoint panelists (by agreement; if not, the WTO director-general appoints), select (and re-appoint) Appellate Body members (by consensus of all WTO members) and determine if, when and how to comply with adverse rulings. WTO dispute settlement has excelled, for example, in diffusing (if not always resolving) trade spats that otherwise have risked spoiling broader economic, political or even security relations (think of the European Union–United States disputes over hormones, genetically modified organisms or aircraft subsidies; China-related cases on raw materials and rare earths; or money-laundering issues pitting Panama against Colombia and Argentina).

Panel and Appellate Body reports, in turn, are written by member-appointed adjudicators (a large majority of whom are serving or former trade diplomats or government officials;²¹ very few are ‘generalist jurists’²²) and WTO Secretariat staff members. These reports are, moreover, largely written for a Geneva-centred, trade audience, and

¹⁹ Weiler, ‘The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement’, 35 *Journal of World Trade* (2001) 191, at 193.

²⁰ WTO, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products – Report of the Appellate Body*, 22 May 2014, WT/DS401/AB/R; WTO, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Report of the Panel*, 15 September 2011, WT/DS381/R.

²¹ See Pauwelyn, ‘The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators Are from Venus’, 109 *AJIL* (2015) 761.

²² *Ibid.*, at 27.

they are long, complicated and replete with technical terms and abbreviations, fully reflecting and weighing member state arguments and responding to each of them, thereby further enhancing the privileged status of the handful of law firms practising WTO law and the ‘frequent users’ of the system.

The above narrative not only better reflects today’s reality. Contrary to what some academic commentators may have hoped for, it was most probably also what negotiators had in mind when they created WTO dispute settlement in the mid-1990s and what made, and continues to make, the system palatable and acceptable in the first place.²³ When the USA recently objected to the re-appointment of an Appellate Body member, it was not because that member had decided against the USA in specific disputes (something that would, indeed, threaten the Appellate Body’s independence in the strict sense) but, rather, because the USA was of the view that ‘his service’ did not ‘reflect the role assigned to the Appellate Body by WTO Members’²⁴ – that is, securing a positive solution to a dispute as it was submitted by Members, not to provide ‘*obiter dicta* ... [or] advisory opinions on legal issues’ or ‘to “make law” outside of the context of resolving a dispute’. The Appellate Body ‘is not an academic body that may pursue issues simply because they are of interest to them’.²⁵ This episode underscores the member-driven mandate of the Appellate Body and the overall control that WTO members continue to exercise over the Appellate Body’s operation.²⁶

Moreover, I would contest that the 1994 WTO Agreement, as Howse frames it, reflects a ‘neo-liberal “deep integration” trade agenda’. This may have been what certain EU and US special interests thought. Yet the actual treaty text and level of commitment is much more balanced, and it is largely to this negotiated balance that the Appellate Body gave effect, following a largely textual approach, rather than a purpose-based interpretation that, through a ‘declaration of independence’, was meant to move away from what the treaty negotiators had in mind.²⁷ Rather than opposing prevailing membership views, the Appellate Body has, by and large, reflected and responded to these views. Think of the *amicus curiae* saga and the judicial minimalism

²³ See Pauwelyn, ‘The Transformation of World Trade’, 104 *Michigan Law Review* (2005) 1, at 5: ‘High levels of legalization and discipline, such as a strong [WTO] enforcement mechanism, entail limited exit options and naturally *require* and *lead to* high demands for voice via participation and political input, such as consensus decisionmaking.’

²⁴ Statement by the United States at the Meeting of the WTO Dispute Settlement Body, 23 May 2016, available at https://geneva.usmission.gov/wp-content/uploads/2016/06/Jun22.DSB_.pdf (last visited 3 November 2016) at 1.

²⁵ *Ibid.*, at 3.

²⁶ Other WTO members objected to the US move and spoke out in favour of Appellate Body independence (in the strict sense). However, at no stage did other members dispute the US view of the member-defined and member-driven role of the Appellate Body. See WTO, WTO Members Debate Appointment/Reappointment of Appellate Body Members, 23 May 2016, available at www.wto.org/english/news_e/news16_e/dsb_23may16_e.htm (last visited 3 November 2016).

²⁷ For further detail on this in the specific field of intellectual property, see Pauwelyn, ‘The Dog That Barked But Didn’t Bite: Fifteen Years of Intellectual Property Disputes at the WTO’, 1 *Journal of International Dispute Settlement* (2010) 389.

described by Howse, reflecting, not opposing, an increasing awareness of the need for 'policy space' among the broader WTO membership.²⁸

The Appellate Body's rather strict stance (certainly compared to that of the panels) against safeguards, anti-dumping and countervailing duties may, at first, be a puzzle in this respect (and Howse's treatment of Appellate Body jurisprudence on trade remedies in just two pages, although it represents more than half of the Appellate Body reports, does not really do justice to the field). However, as sensitive as trade remedies may be in Washington, New Delhi or Brussels, they are generally (and, in my view, wrongly) frowned upon in Geneva trade circles as being inherently protectionist. It is this Geneva-based sentiment that may at least partly explain the Appellate Body's strictness on trade remedies, a strictness that has increasingly upset US interests, not so much in Geneva but more so in Washington. The same is true with respect to the Appellate Body's (in my view, too) critical stance towards free trade agreements (FTAs), which Howse points out. It may not mirror the current focus in Brussels or Washington (where negotiating FTAs takes up most of the time). Yet it reflects a deep-seated Geneva-based aversion to preferential agreements. On both issues, the Appellate Body seems to have (rightly or wrongly) internalized, rather than moved away from, the views of the 'Geneva-based trade policy elite'.

5 WTO Adjudicators: Mostly Trade Insiders, Not 'Generalist Jurists'

Howse is correct when he points out that the first batch of Appellate Body members were predominantly 'generalist jurists, not eminent experts in GATT/WTO law' or Geneva-based, trade insiders. And it is, indeed, largely to these early Appellate Body members that we owe the Appellate Body's overall legal rigour, coherence, collegial approach and independence (independence from individual WTO members when ruling on a case that is a positive, but which should not be confused with the absence of overall control of, or interaction with, the membership at large, the type of 'independence' that I see as less desirable but Howse seems to have in mind when describing the Appellate Body's 'declaration of independence').

However, overall and especially more recently, very much like WTO panelists,²⁹ Appellate Body members generally have a governmental (not a judicial, legal academic

²⁸ Howse correctly points out that in its technical barriers to trade jurisprudence, 'the Appellate Body 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 the GATT'. Howse, *supra* note 1, at 56. But it remains to be seen whether this has emptied the Agreement on Technical Barriers to Trade (TBT Agreement) 1994, 1868 UNTS 120 (as Howse claims) or rather made the GATT stricter. Although Howse is correct when stating that GATT exceptions have been interpreted broadly, and Article 2.2 of the TBT Agreement may have lost much of its importance, the Appellate Body has made the test in the chapeau of GATT Article XX, as well as TBT Article 2.1, rather difficult to predict and meet.

²⁹ See Pauwelyn, *supra* note 21, at 799–800: 'WTO panelists tend to be relatively low-key diplomats from developing countries (very few U.S./EU nationals), with government backgrounds, often without law degrees or legal expertise ... The universe of WTO panelists ... is ideologically more homogeneous, with relatively little experience and a relatively low reappointment or experience rate, and with nominations more evenly distributed.'

or private sector) background and relatively limited experience in the judicial settlement of disputes. But, as I have argued elsewhere, ‘WTO dispute settlement is successful [in the, admittedly, limited way I described above] not *despite* its being run by relatively inexperienced trade diplomats but *because* it is so run’.³⁰ It bolsters the internal legitimacy I referred to earlier, makes the overall system digestible to WTO members and is made possible and compensated also by a strong WTO Secretariat assisting panels and the Appellate Body.

6 A ‘True Court of World Trade’?

In summary, because of the ‘black holes’ and limited effectiveness and member-focused, internal legitimacy of WTO dispute settlement, it is questionable to speak of the existence today of ‘a true court of world trade’.³¹ Similarly, because of how the Appellate Body, overall, followed and reflected WTO members’ preferences, and the broader symbiosis between the WTO membership and the Appellate Body (in early 2016, six of the seven members were former WTO ambassadors, trade diplomats or WTO Secretariat officials), it is questionable to speak of ‘global governance by judiciary’ or a ‘declaration of independence’ by the Appellate Body. It may be what some lawyers and some legal academics secretly dream of; but it is unlikely the intent or practice of the Appellate Body and certainly not what (most) WTO members want.

³⁰ *Ibid.*, at 764.

³¹ Howse, *supra* note 1, at 77.