

---

# The World Trade Order: Global Governance by Judiciary?

Bernard Hoekman\*

## Abstract

*The World Trade Organization (WTO) Appellate Body has established itself as an authoritative court through which WTO members settle disputes. It has done so in parallel to contested multilateral negotiations (the Doha Round) that ultimately were unsuccessful and a deteriorating environment for efforts towards deepening integration. In his article in this volume, Robert Howse characterizes the consequence of this disconnect as the emergence of 'global governance by judiciary'. In this response, I discuss some elements of the argument that the Appellate Body positioned itself against the bias in the trade community towards neo-liberalism to enhance its legitimacy, consider the role of the Appellate Body in global trade governance, and reflect on emerging tensions within the WTO on the operation of the Appellate Body.*

## 1 Introduction

In his recently published *EJIL* Foreword article, 'The World Trade Organization 20 Years On: Global Governance by Judiciary', Robert Howse discusses the dispute settlement mechanism (DSM) of the World Trade Organization (WTO), arguing that by 'avoiding becoming a target of anti-globalization activists or constituencies more generally concerned with non-trade values that could easily be seen to be in conflict with what insiders would regard as the central, liberalizing, if not neo-liberal mission, of the WTO', the Appellate Body of the WTO has become 'a formidable engine of global economic governance'.<sup>1</sup> Howse's main theme concerns how the Appellate Body managed to establish its authority given the contestation of the 'deep integration bargain' struck in the Uruguay Round, the resulting 'legitimacy crisis within the WTO' and the 'political paralysis' that culminated in the failure of the Doha Round.<sup>2</sup> He argues

---

\* European University Institute, Florence, Italy; Centre for Economic Policy Research, London, UK. Email: Bernard.Hoekman@EUI.eu. I am grateful to Chad Bown and Petros Mavroidis for comments on a first draft.

<sup>1</sup> Howse, 'The World Trade Organization 20 Years On: Global Governance by Judiciary', 27(1) *EJIL* (2016) 9, at 11, 75.

<sup>2</sup> *Ibid.*, at 10.

that the key to success is the development of case law calibrated to minimize intrusion on the prerogatives of governments to regulate domestic economic activities, while taking a relatively consistent stand against violations of the core WTO non-discrimination rule. In the process, a large body of case law has been generated, including on politically sensitive matters such as the trade impacts of product safety and environmental regulation (for example, the use of asbestos, hormones and the protection of dolphins) and industrial policy (for example, Boeing Airbus and renewable energy). The number of failures – outcomes where the non-implementation of rulings has led to the authorization to retaliate – have been limited.<sup>3</sup>

Howse provides an insightful, informed and in-depth discussion of how the Appellate Body has sought to differentiate between measures designed so as to afford protection to domestic producers and domestic regulatory policies that may adversely impact foreign products but are not designed to be protectionist. What follows will not address the substance of the legal reasoning of the Appellate Body in its case law. As argued by Petros Mavroidis<sup>4</sup> and Frieder Roessler,<sup>5</sup> among others, and recognized by Howse, there is much to be said in regard to the clarity and consistency of the Appellate Body's reasoning on what is, and what is not, permissible and why. Instead, I focus on the parts of his narrative that concern the 'global governance by judiciary' claim and the argument that the Appellate Body has performed a valuable balancing role in offsetting a purported neo-liberal bias of trade community insiders.

## 2 Legitimacy through Leadership or by Design?

While the Appellate Body undoubtedly has taken a strategic approach to disputes of different types, the system in which the Appellate Body operates was crafted by the governments that created the DSM. Thus, the consensus rule protecting the independence of the Appellate Body was designed to do so. The shift to negative consensus for creation of panels and the adoption of Appellate Body rulings was a deliberate choice, based on experience under the General Agreement on Tariffs and Trade (GATT) and the desire to tame American 'aggressive unilateralism'.<sup>6</sup> This goal was achieved—the USA has worked through the WTO in contesting foreign trade policies, small countries have successfully challenged US policies and the USA has mostly complied with rulings against it.

<sup>3</sup> This is actually more of an open question than is generally recognized, given the lack of data on actual compliance with rulings and the incentives of small countries not to use authorized countermeasures. See Mavroidis, 'Dispute Settlement in the WTO: Mind over Matter', EUI Working Paper, RSCAS 2016/04 (2016).

<sup>4</sup> Mavroidis, 'The Gang That Couldn't Shoot Straight: The Not So Magnificent Seven of the WTO Appellate Body', in this issue, 1107–1118.

<sup>5</sup> Roessler, 'Changes in the Jurisprudence of the WTO Appellate Body during the Past Twenty Years', EUI Working Paper, RSCAS 2015/72 (2015).

<sup>6</sup> See J. Bhagwati and H. Patrick (eds), *Aggressive Unilateralism: America's Trade Policy and the World Trading System* (1990); Mavroidis, *supra* note 3. General Agreement on Tariffs and Trade 1994, 55 UNTS 194.

Deference to domestic regulation is built into the system. Policy space for domestic regulatory measures is a feature of WTO agreements. While the Uruguay Round expanded the set of policy areas subject to disciplines, it was an exercise in negative, not positive, integration: agreement to remove trade barriers and refrain from certain behaviour, not the adoption of common policies and institutions for coordinated policymaking.<sup>7</sup> The TRIPS Agreement is an exception, but even in it, there is substantial leeway on how to implement its provisions.<sup>8</sup> The SPS Agreement includes some elements that intrude on domestic policy – calling on measures to have a science basis, for governments to assess risk and establishing a presumption in favour of the adoption of international standards where these exist and are deemed appropriate.<sup>9</sup> While reflective of a desire by exporters to reduce the scope for regulation to restrict trade, these are not particularly intrusive norms and arguably constitute good governance practices. There is very little, if any, ‘deep integration’ on services in the sense of requiring signatories to change regulatory regimes.

The WTO continues to be about shallow integration, as was the GATT and, thus, is fully consistent with – and, indeed, requires – the Appellate Body to be deferential towards domestic regulatory policies. The Appellate Body is an agent of the membership, not a principal – it has limited degrees of freedom and no mandate to put into question the preferences of the member states – the principals. Essentially, its role is to complement the other parts of the WTO that provide committees, transparency, and surveillance services to ensure commitments by members are implemented – commitments that presumably reflect the preferences of those members (at least at the time the commitments were made).

Some panel reports in the late GATT years got it badly wrong in seeking to discipline the substance of domestic regulation aimed at achieving non-trade objectives as opposed to focusing the existence of discrimination in the application of such policies. But this did not become part of the GATT *acquis* – the reports were not adopted. The incorrectness of the reasoning of these panels was largely internalized in the aftermath of the unadopted GATT *Tuna – Dolphin* reports.<sup>10</sup> The decisions by the Appellate Body in the *Shrimp – Turtle* case reflected not just the appropriate application of WTO disciplines (not to mention common sense) in focusing on whether implementation of the regulatory policy was discriminatory, as opposed to its substance, but also the views of most members on how to consider regulations aimed at addressing market failures.<sup>11</sup> The approach taken by the Appellate Body in safeguarding policy space for domestic regulation goes with and not against the grain of the preferences of the WTO membership.

<sup>7</sup> J. Tinbergen, *International Economic Integration* (1954).

<sup>8</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights 1994, 1869 UNTS 299.

<sup>9</sup> Agreement on Sanitary and Phytosanitary Measures (SCM Agreement) 1994, 1867 UNTS 493.

<sup>10</sup> WTO, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Report of the Appellate Body (Tuna – Dolphin)*, 13 June 2012, WT/DS381/AB/R.

<sup>11</sup> WTO, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body*, 6 November 1998, WT/DS58/AB/R.

In the first 20 years of the WTO, there were some 500 requests for consultations of which one fifth were appealed, leading to Appellate Body reports. The majority of disputes were settled or did not proceed – less than 4 per cent resulted in retaliation being authorized. Most cases invoked GATT, with the preponderance dealing with anti-dumping and subsidies. The General Agreement on Trade in Services (GATS) and TRIPS provisions were invoked in only a little over 10 per cent of disputes.<sup>12</sup> Assuming dissatisfaction with ‘deep integration’ on services and intellectual property rights translates into non-implementation, one would expect more disputes. The fact that most cases concern ‘traditional’ GATT issues suggests deep integration is either less of a reality or less contested than argued. It also implies WTO jurisprudence is underdeveloped or non-existent in fields where deep integration is held to be a significant feature of the WTO. While this is a function of the cases that WTO members bring, it implies global governance by the judiciary is rather skewed. Illustrative in this regard is that there has been very little case law on GATS general obligations. Why this is the case deserves greater attention.

Much of the case load has involved anti-dumping and subsidies, but the Appellate Body has also played a significant role in imposing constraints on the use of safeguards. Outlawing quotas for textiles and clothing and voluntary export restraints was a major subject in the Uruguay Round. The Agreement on Safeguards was a key achievement for countries subjected to such measures, entailing a deal outlawing such quantitative restrictions in return for making safeguards more attractive (easier) to use.<sup>13</sup> The Appellate Body essentially devalued this piece of the heavily negotiated Uruguay package through case law that made it more difficult for governments to take a legal safeguard action.<sup>14</sup> Perhaps as a result, safeguards have not been used much by member countries of the Organisation for Economic Co-operation and Development (OECD), although they have been used by several developing economies.<sup>15</sup> In practice, the Appellate Body safeguards case law may not be that detrimental from an economic perspective, as it implies a country can impose safeguard actions knowing that it has about three years before it has to worry about retaliation – the time limit it takes a dispute to run its course. This is similar to the time frame for safeguard actions specified in the agreement and is long enough to allow adjustment to occur. However, from a systemic perspective, the case law implied the effective rewriting by the Appellate Body of a negotiated deal and may have led to greater use of discriminatory instruments such as anti-dumping.

### 3 Neo-Liberalism, Trade Insiders and the Appellate Body

The term neo-liberal or neo-liberalism is used 50 times in Howse’s Foreword article, at times with a somewhat pejorative tone. A major theme of the narrative is the tension

<sup>12</sup> Elsig, Hoekman and Pauwelyn, ‘Thinking about the Performance of the World Trade Organization: A Multi-Disciplinary Perspective’, EUI Working Paper, RSCAS 2016/13 (2016). General Agreement on Trade in Services 1994, 1869 UNTS 183.

<sup>13</sup> Agreement on Safeguards 1994, 1869 UNTS 154.

<sup>14</sup> A. Sykes, *The WTO Agreement on Safeguards A Commentary* (2006).

<sup>15</sup> See C.P. Bown, ‘Global Safeguard Database’, World Bank (2016), available at <http://econ.worldbank.org/ttd/gsgd/> (last visited 28 November 2016).

between the free trade ethos of regime insiders and those outside the trade community who question globalization, the 'Washington consensus' and the benefits of free trade and deep integration. While there are certainly deep differences between governments and within polities on the desirability of greater trade integration, the notion that the Appellate Body takes a more balanced ('enlightened') approach than do its principals (WTO member governments) is somewhat contrived.

The WTO does not have free trade as a goal. It is an instrument through which governments can seek better access to foreign markets but have to pay a 'price' (offering reciprocity). Trade policy is a negotiating currency in the WTO – the institution is deeply mercantilist. Member governments (with rare exceptions) do not strive to achieve free trade. The WTO is riddled with carve-outs, exceptions and mechanisms through which protection can be (re-)imposed on either a temporary or long-term basis (through the re-negotiation of concessions). Many developing countries have significant latitude to raise tariffs if they desire given high tariff bindings. There is substantial policy space to use production tax/subsidy and investment incentives, also because the remedy in instances where a violation found is usually prospective. The WTO does not do very much to constrain domestic policy and regulation as long as these are applied in a non-discriminatory manner. As noted by Howse, in most circumstances, the non-discrimination rule supports the realization of domestic (non-trade) regulatory objectives, so there is no conflict. Policy space is largely unconstrained when it comes to domestic regulation as long as policy is applied equally to domestic and foreign products.

Starting in the mid- to late 1980s, many governments pursued the liberalization of foreign trade and took actions to improve the investment climate and bolster the rule of law. The behaviour of many governments around the world suggests less disagreement on policy fundamentals than is implied by Howse. The Appellate Body may have been successful in part because of a convergence in views on what was desirable. The post-1980s period was characterized by sustained economic growth in many developing countries, especially in Asia but not only there, accompanied by a large increase in developing countries global trade shares and the rise of global value chain production and cross-border direct investment flows. As a group, developing nations today account for 45 per cent of global trade, up from 20 per cent in the late 1980s. Since 1990, per capita incomes in East Asia have increased six-fold, while those in South Asian countries have tripled.

These developments were in part the result of unilateral trade liberalization and the adoption of related 'neo-liberal' policies.<sup>16</sup> Notwithstanding the claim that moves 'in the direction of the neo-liberal model of optimal economic policy for development and growth were understandably the focus of much of the attack', governments proceeded to adopt such policies – with positive results.<sup>17</sup> The GATT/WTO provided a supporting framework. This was most evident in accession countries, with new members taking many actions to improve trade institutions and reducing policy uncertainty

<sup>16</sup> Estevadeordal and Taylor, 'Is the Washington Consensus Dead? Growth, Openness, and the Great Liberalization, 1970s–2000s', 95 *Review of Economics and Statistics* (2013) 1669.

<sup>17</sup> Howse, *supra* note 1, at 21.

by binding tariffs close to or at applied rates. This contrasts with the large differences between applied and bound rates for many developing country incumbents.<sup>18</sup> Research finds a positive trade impact for countries that joined the WTO after 1995, reflecting improved economic governance.<sup>19</sup>

Rather than a backlash against neo-liberalism in trade policy, an alternative narrative in explaining the lack of progress on rule making was the deeper integration of developing countries into the trading system, the rapid expansion of their market shares and the more active pursuit of their interests in the WTO. The disagreements in the Doha Round had many dimensions, but an underlying factor was the success of trade-driven ‘neo-liberal’ growth strategies so opposed by some activists. The price of this success was insistence by the USA and other OECD countries on greater reciprocity, without being able or willing to offer much in return. The fact that those ‘impatient to move further towards the neo-liberal utopia that was permitted in the Uruguay Round’<sup>20</sup> proposed an agenda that was clearly unbalanced in putting the onus on developing countries to pursue certain policies without being willing to address the negative international spillovers caused by their own policies arguably also played a role.<sup>21</sup> From a global governance perspective, it was arguably a positive development that the way the agenda was conceived by *demandeurs* for rules on subjects like competition and investment policy was opposed by a large number of WTO members – on this point, I am in agreement with Howse.

Be that as it may, I would posit that most governments regard much of what is in the WTO as beneficial, including its many transparency provisions and the regular surveillance of trade policies, which support accountability and better governance. The fact that the 2008 financial/banking crisis and the ensuing trade slowdown/recession – now entering into its eighth year – did not lead to large-scale imposition of protectionist policies, despite the various ways in which this could be done in a WTO legal manner is also suggestive that there is less disagreement than is often argued to be the case. Also relevant in this connection is that there was not a sharp increase in disputes brought to the WTO contesting protectionism – the number and type of disputes did not change.

The tough bargaining and differences in views across the WTO membership on the market access issues on the table in the Doha Round cannot be equated with reactions to neo-liberalism. Within the trade community, members are all strongly wedded to national sovereignty over domestic policy, first and foremost the United States and other OECD nations. There is little evidence that the Uruguay Round outcome/WTO embodies the ideology represented by the Washington Consensus – that is, the notion that what is good for market access is good for domestic economic governance, including de-monopolization, deregulation, scaling-down government health and safety

<sup>18</sup> Bown, ‘What’s Left for the WTO?’ World Bank Policy Research Working Paper no. 7502 (2015).

<sup>19</sup> Tang and Wei, ‘The Value of Making Commitments Externally: Evidence from WTO Accessions’, 78 *Journal of International Economics* (2009) 216.

<sup>20</sup> Howse, *supra* note 1, at 21.

<sup>21</sup> See B. Hoekman and M. Kostecki, *The Political Economy of the World Trading System* (2009).

and environmental regulation, and so on.<sup>22</sup> The idea that the WTO reflects a presumption that governments needed to be ‘cut down to size’ is difficult to square with how the WTO works and the specifics of the agreed texts. The WTO is a state-to-state entity, an inter-governmental organization. Whatever governments of the day may perceive to be in the national interest regarding domestic policy, they are very unlikely to want to limit their ability to implement domestic regulation through an international trade agreement. That was the case under the GATT, remains the case under the WTO and has recently been clearly demonstrated in the context of talks on the Transatlantic Trade and Investment Partnership (TTIP).<sup>23</sup> Whatever one’s view of the Uruguay Round outcome in terms of ‘deep integration’, there is no common political vision or end goal. WTO agreements are self-enforcing. There is simply very limited scope for the Appellate Body to constrain domestic regulation beyond non-discrimination even if it wanted to.

#### 4 Global Trade Governance: The Appellate Body in Context

The DSM/Appellate Body captures just one dimension of the global governance provided by the WTO. In addition to upholding of the ‘rule of law’, the WTO accommodated many new members, including large economies that do not epitomize espousal of neo-liberalism (China, Russia, Saudi Arabia); put in place mechanisms to help address capacity differentials and assist poor states to participate in the regime and provided a framework for governments to manage pressures for the protection of national markets. The 2005 ‘Aid for Trade’ initiative and the Enhanced Integrated Framework for assistance for least developed countries have mobilized greater funding for trade projects by development agencies and raised the profile of trade at the country level.<sup>24</sup> Although the Doha Round went nowhere on basic market access issues, an agreement was reached to outlaw agricultural export subsidies and a new Agreement on Trade Facilitation (TFA) was negotiated.<sup>25</sup> The TFA broke new ground in several ways and was, as noted by Howse, an encouraging development in disproving the ‘bicycle theory’ presumption that large-scale negotiating rounds are a precondition for sustaining trade cooperation.<sup>26</sup>

These considerations suggest the conclusion that, ‘overall, from the time that the Appellate Body was first faced with establishing itself as a legitimate, effective adjudicative body to the present, the WTO “institution” has presented itself and understood itself as being in a state of arrested normative development, to the point that its future

<sup>22</sup> Howse, *supra* note 1, at 17.

<sup>23</sup> Transatlantic Trade and Investment Partnership, draft dated 12 November 2015.

<sup>24</sup> Disbursements rose from some US \$25–30 billion in the early 2000s to around US \$45 billion a decade later. See Organisation for Economic Co-operation and Development, ‘Aid-for-Trade Statistical Queries’, available at [www.oecd.org/dac/aft/aid-for-tradestatisticalqueries.htm](http://www.oecd.org/dac/aft/aid-for-tradestatisticalqueries.htm) (last visited 28 November 2016).

<sup>25</sup> Agreement on Trade Facilitation, WTO Doc. WT/L/931 (2014).

<sup>26</sup> See, e.g., Hoekman, ‘The Bali Trade Facilitation Agreement and Rulemaking in the WTO: Milestone, Mistake or Mirage?’, in J. Bhagwati, P. Krishna and A. Panagariya (eds), *The World Trade System: Trends and Challenges* (2016).

relevance and viability could seriously be questioned' is too strong, whether or not this was a self-constructed narrative as Howse suggests.<sup>27</sup> Other parts of the WTO contribute to global trade governance as well. While space constraints preclude a discussion, they include the transparency mechanisms and the operation of committees – for example, the role played by the WTO on trade finance post-2008 crisis in working in tandem with other international organizations in a way that was not feasible during the GATT.

## 5 Open Questions and Emerging Tensions

A perennial issue for debate is the reliance on prospective remedies, which reduces incentive for firms to pursue a dispute. Howse argues that it is 'often noted and, indeed, lamented by free trade hardliners [that] remedies are only prospective'.<sup>28</sup> Economic analysis suggests stronger remedies can have the perverse effect of inducing countries to make fewer commitments in the first place.<sup>29</sup> Over time, countries may be complainants and respondents, creating incentives to adopt limited remedies,<sup>30</sup> as does the incomplete nature of the WTO contract.<sup>31</sup> While the case for retrospective remedies is ambiguous, the Appellate Body could recommend more specific remedies, including guidance on how its recommendations could be implemented. This could reduce uncertainty for traders and improve implementation of market access commitments – for example, in the area of enforcing the timeliness of sunset reviews.

The Appellate Body is beginning to be more contested. Appellate Body decisions on zeroing are widely regarded as a major factor for the 2016 decision by the US Trade Representative to oppose reappointment of a non-US national Appellate Body judge (the USA had already done so previously for two sitting US judges).<sup>32</sup> US dissatisfaction with zeroing case law extends beyond the substance of the question; more important is the Appellate Body decision not to adopt the deferential standard of review that the USA thought it had negotiated in the Uruguay Round. The decision to block the reappointment of an Appellate Body member is a negative development for the WTO. The impression given by the US action is that an individual was targeted to give a signal to the Appellate Body as a whole. But how that signal is supposed to be interpreted is not clear.

It would have been much better for the USA to highlight the substantive concerns it has with the operation of the Appellate Body. Targeting an individual not only muddies the water by not identifying the nature of the perceived problem, it may have major negative spillover effects by incentivizing other WTO members to refuse to join

<sup>27</sup> Howse, *supra* note 1, at 24.

<sup>28</sup> *Ibid.*, at 19.

<sup>29</sup> R. Lawrence, *Crimes and Punishment: Retaliation under the WTO* (2003).

<sup>30</sup> Ethier, 'Trade Agreements and Dispute Settlement in the WTO System', in H. Beladi and E. Kwan Choi (eds), *Trade Disputes and the Dispute Settlement Understanding of the WTO: An Interdisciplinary Assessment* (2009) 349.

<sup>31</sup> Horn, Maggi and Staiger, 'Trade Agreements as Endogenously Incomplete Contracts', 100 *American Economic Review* (2010) 394.

<sup>32</sup> Howse, *supra* note 1, at 71.



the consensus on other matters in the future. The adoption of the TFA was significantly delayed as the result of India pursuing such a strategy in the course of 2014. If the large players in the WTO go down this road, much of the global governance that has been provided by the judiciary and other parts of the organization may be undone.

The US action suggests an urgent need for an open discussion in the WTO Council (Dispute Settlement Body [DSB]) on concerns about the Appellate Body, including serious engagement on the consistency and coherence issues raised by WTO members in the minutes of DSB meetings over the years and by scholars in their assessments of the Appellate Body case law. As noted by Howse, while the consensus rule safeguards the Appellate Body, it also creates constraints and dangers for the system that implies that efforts to revise elements of the Dispute Settlement Understanding (DSU) are very difficult.<sup>33</sup> There have been 15 plus years of discussions in the framework of the DSU review exercise that have not led to concrete outcomes, in large part as a result of the consensus constraint. This puts the burden on the Appellate Body itself to recognize and address problems of consistency or (mis-)perceptions created by past decisions.

Nothing constrains the Appellate Body from an internal process to consider specific aspects of its past case law and reasoning that independent analysts and scholars have found to be confusing and to give rise to uncertainty and a lack of predictability. Twenty years is a long enough period for such self-evaluation and reflection. In doing so, there is a strong case for the Appellate Body to engage not just with the legal community but also with the economics profession. At the end of the day, the Appellate Body is engaged in the enforcement of international *economic* law. More use of what the economics discipline has to offer may help in addressing some of the problems of consistency and coherence in the case law. Greater engagement with economics as a discipline could help the Appellate Body to define consistent methodologies that would enhance predictability of how the Appellate Body is likely to reason and rule in a given circumstance. Economics has a set of well-understood and tested conceptual frameworks (tools) that are directly relevant to some of the issues that the Appellate Body regularly confronts and where its case law has been criticized for a lack of consistency.<sup>34</sup> The idea here is not that the Appellate Body should start doing more economics (or econometrics) but, rather, to engage with the field in considering methodological approaches that could address some of the problems that have become evident over time.<sup>35</sup> A useful input into such a process of deliberation is the large body of analysis that has been generated starting in 2001 by a group of lawyers and economists who jointly prepare in-depth reflections on the WTO case law each

<sup>33</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, 1869 UNTS 401.

<sup>34</sup> Mavroidis, *supra* note 4.

<sup>35</sup> An example is the decision by the Appellate Body to avoid ruling whether feed-in-tariffs for renewable energy production constitute a benefit under the SCM Agreement, *supra* note 9. See Charnovitz and Fischer, 'Canada–Renewable Energy: Implications for WTO Law on Green and Not-So-Green Subsidies', 14 *World Trade Review* (2015) 177. For a discussion of how basic economic concepts can be used to identify whether past subsidies are likely to have continuing adverse effects or whether there is a case for applying both a countervailing duty and anti-dumping on a product, see Prusa, 'The Use of Economics in WTO Appellate Body Decisions', EUI Working Paper, RSCAS 2013/12 (2013).

year.<sup>36</sup> The Appellate Body could build on this wealth of existing analysis and engage with some of the long-standing participants in this project as part of a deliberation on how to improve its case law.

## 6 Conclusion

Do we have global governance by judiciary? Yes and no. The Appellate Body is playing a positive role, but it is just one part of the WTO machine. Notwithstanding the failure of much of the Doha Round, the other parts of the WTO also play a positive role. The failure of the Doha Round, while regrettable because of the opportunity cost it implies for the global economy, did not preclude progress in specific areas on a critical mass basis or the negotiation of an innovative new agreement on trade facilitation. Overall, the organization is doing less badly than is often alleged. That said, there is cause for serious concern regarding trends in the performance of the different cogs of the machine. Eight years into a protracted global slowdown in trade growth, protectionist pressures are mounting. The steady rise in the number of preferential trading areas (PTAs) and the fact that PTAs appear to be seen as the default option for governments seeking to improve access to markets on a discriminatory basis is a long-standing challenge from a global trade governance perspective, even though PTAs are not doing that much better than the WTO in going beyond the status quo set of disciplines embedded in the WTO. The Trans-Pacific Partnership may not be ratified by the USA, there is no common view on the TTIP among European Union member state governments, and it is likely that the ongoing talks on a Trade in Services Agreement between a subset of WTO members will not deliver much if any liberalization of access to markets.

A key challenge that has become evident both through the Doha Round experience and the recent efforts to conclude mega-regional deals, is that there is no consensus on whether such agreements can help to improve the efficiency and efficacy of domestic regulatory regimes. Here there is a real divide between the ‘trade community’ and large segments of national polities. This divide is not one that can be characterized as a backlash against ‘neo-liberalism’ if this is understood as pursuit of pro-competitive regulatory stances and open trade and investment regimes – Donald Trump notwithstanding. It is instead one that revolves around ensuring transparency, accountability, equality of opportunities, greater equity in the distribution of the gains from trade, reducing the health and safety risks associated with global value chain-based production, guaranteeing data privacy and consumer protection and so forth. In large part, this implicates a domestic policy agenda on which the WTO has little to contribute. But in important dimensions international cooperation can help achieve these objectives – for example, to deal with the negative spillover effects of tax competition and the use of investment promotion incentives or to support interaction among domestic regulatory agencies to improve their joint ability to achieve regulatory objectives more effectively.

<sup>36</sup> The project is led by Chad Bown, Henrik Horn and Petros Mavroidis. The case studies are available at <http://globalgovernanceprogramme.eu.eu/wto-case-law-project/> (last visited 28 November 2016).

The demise of the Doha Development Agenda, the proliferation of discriminatory PTAs and the changing nature of international exchange call for global trade governance structures spanning a greater set of policies than is covered by the WTO; processes more supportive of deliberation and learning and more focused on monitoring outcomes and increasing accountability through greater engagement with and inputs from stakeholders. This prescription applies to the Appellate Body as well. It has made steps in this direction where it could do so – for example, in encouraging greater openness of its deliberations where the parties are agreeable to this and through its decision to permit *amicus* briefs. The challenge looking forward is for the Appellate Body to reflect on what it can and should do to improve the quality and predictability of its case law while maintaining its independence from the political pressures that, as Howse notes, are the consequence of success.