
The Judicial Sensibility of the WTO Appellate Body

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Abstract

When the World Trade Organization's new dispute settlement machinery was created in 1995, no one knew for certain what its consequences would be. Innovative and experimental in crucial respects, it represented an extraordinary gambit by the Uruguay Round negotiators, who agreed to its creation partly out of frustration with the perceived deficits of the General Agreement of Tariff and Trade's enforcement machinery, partly out of fear of unilateralism and partly in the context of a particular moment of post-Cold War faith in the international rule of law. Although a mythology very quickly emerged around this new dispute settlement machinery, according to which it represented a step-change from power-oriented to rule-oriented trade diplomacy, this was in truth always more of an aspirational expression rather than a statement of fact. In the mid-1990s, the new system had many possible futures, and its historical meaning was yet to be made. No one was more conscious of this than the seven original members of the Appellate Body, who understood well the stakes of their endeavour and felt very keenly the scrutiny of the international community as it watched how this institutional experiment would unfold.

Over the last 20 years, there has been no keener or more clear-eyed observer of the Appellate Body than Robert Howse. He has been there from the beginning, following closely the evolution of its complex jurisprudence and playing a major role in the debates to which this jurisprudence has given rise. In his *EJIL* Foreword article, Howse brings his decades of experience to offer a subtle and sophisticated reading of the Appellate Body's trajectory from its inception to the present day.¹ There is, in truth, no match for this article in existing World Trade Organization (WTO) scholarship – indeed, few have attempted a narrative of such comprehensive scope, ranging over the entire historical sweep of the Appellate Body's activity and covering key developments in the jurisprudence under most of the key WTO agreements. It is a formidable achievement.

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

The narrative that Howse tells is – appropriately, given the professional responsibilities of a legal scholar – critical of the Appellate Body in some important respects. But, taken as a whole, his story is, by genre, a hero's tale as much as anything, with the Appellate Body taking the starring role. The subtitle, 'Global Governance by Judiciary', is clearly carefully judged. Howse describes a world in which the Appellate Body cautiously, incrementally, but ultimately powerfully, carves out its own position as an actor in the field of international trade and indeed takes a leadership role in reshaping the project of economic integration in response to contemporary events. In some ways, according to Howse, the Appellate Body has fallen into this role or has at least been pushed into it by circumstances. From an early position of vulnerability, in the context of both internal and external legitimacy crises, with only the limited tools of the jurist at its disposal, it has somehow managed to build its own reputation and institutional strength and even to provide stability to the WTO system as a whole even as the costs and benefits of international economic integration have been fundamentally challenged.

In this response, I do not attempt to critique Howse's article – as it happens, I have few serious disagreements with the core of the story he tells. Instead, my aim is to offer a series of reflections prompted by Howse's rich narrative, including highlighting points of special interest that, in my view, deserve particular emphasis and perhaps further elaboration and noting some of the questions and challenges for international trade lawyers that are called forth with special urgency by Howse's powerful analytic.

Let me turn first to what I see as the heart of Howse's story, namely the claim that the Appellate Body has acted to 'soften or blunt', perhaps even to resist, the neo-liberal project of "deep integration" that transformed the field of international trade law during the 1990s.² The Uruguay Round agreements, in Howse's telling, were a reflection of this neo-liberal project: they reflected a policy agenda deeply influenced by 'the predominant economic ideology represented by the Washington Consensus',³ including 'expansive intellectual property protection to spur innovation; de-monopolization and deregulation of network service industries ... scaling down government health and safety and environmental regulation to what could strictly be justified under cost/benefit analysis and by "sound" science'.⁴ In the years after these agreements came into effect, he notes, there was always the strong possibility that the Appellate Body would see its role 'as the ultimate guardian of the new WTO system and its neo-liberal values'.⁵

Crucially, however, it did not. With one eye on the external criticisms of the WTO that arose from the late 1990s and another on the 'malaise, self-doubt and self-flagellation' of the insider WTO community,⁶ the Appellate Body crafted a different role for itself, self-consciously distancing itself from the WTO as an institution.⁷ By underscoring

² *Ibid.*, at 76.

³ *Ibid.*, at 17.

⁴ *Ibid.*, at 17.

⁵ *Ibid.*, at 25.

⁶ *Ibid.*, at 24.

⁷ *Ibid.*, at 28.

the character the WTO agreements as ‘a kind of fundamental balance or equilibrium between an inherent right to regulate and specific disciplines on its use’,⁸ the Appellate Body imagined its own role primarily as preserving that equilibrium – and not as the mouthpiece of free trade values in their neo-liberal form.⁹ A key consequence of this approach, for Howse, is the way that the Appellate Body came to interpret the new, ‘post-discriminatory’ obligations introduced in a number of Uruguay Round texts as consistent with – and, indeed, largely coterminous with – the original regulatory provisions of the General Agreement on Tariffs and Trade (GATT) itself.¹⁰ Importantly, Howse suggests that the Appellate Body’s approach was ‘very much inspired by or anchored in’ the ‘post-war embedded liberalism’ of the ‘original GATT’.¹¹

The core argument is a persuasive one and is substantiated by reference to an abundance of caselaw. Noticing the importance of the Appellate Body’s core initial move – that is to say, its move of imagining the WTO agreements not as a reflection of ‘free trade values’ in some simple sense but, rather, as a balance or equilibrium between different values – is a wonderful and powerful insight. It may now seem so much like second nature to many trade lawyers that we forget what a relatively recent invention it is, and that it was by no means pre-ordained. But while I agree with the overall thrust of this argument, there are two aspects in which my emphasis would differ.

The first has to do with the characterization of the Appellate Body’s approach as anchored in post-war embedded liberalism. While it is true, as Howse argues in section 6.B of his article, that the Appellate Body has read the post-discriminatory obligations in ways that assimilate them to the original GATT non-discrimination norms, what also needs to be emphasized is that these original GATT non-discrimination norms have themselves been reinterpreted at the same time. The result of the Appellate Body’s approach, then, has not been a simple return to the embedded liberal compromise found in GATT but also the crafting of something new.

As all WTO lawyers know, there has always been an important disagreement within GATT/WTO law over the appropriate interpretation of the non-discrimination ‘package’ contained in GATT Articles III and XX. Without wishing to oversimplify the debate, the core choice has been between a school of thought that sees non-discrimination primarily as a norm of anti-protectionism and another school that views non-discrimination as competitive neutrality. While these competing interpretations may in many cases produce similar results, they proceed on the basis of very different visions of the proper role of WTO dispute settlement. To put the contrast most simply, where the former sees the primary purpose of the WTO as disciplining governments that seek to ‘cheat’ by providing an unfair competitive advantage to home grown products, the latter sees the WTO as engaged in a much broader project of disciplining regulatory design more generally, by ensuring that all competitive disadvantages suffered by imports as a result of regulatory measures are carefully scrutinized and strictly justified.

⁸ *Ibid.*, at 44.

⁹ *Ibid.*, at 60.

¹⁰ *Ibid.*, at 76. General Agreement on Tariffs and Trade (GATT) 1994, 55 UNTS 194.

¹¹ Howse, *supra* note 1, at 76.

As I have described elsewhere, there have been twists and turns in the GATT non-discrimination jurisprudence as one or the other school of thought has been reflected in this or that decision.¹² Broadly speaking, however, there has been a shift over time from the former interpretation (focused on protectionism) to the latter (focused on competitive neutrality). An understanding of non-discrimination as anti-protectionism was dominant during the early decades of GATT, but the tide began to turn, slowly and inconsistently, from about the 1990s onwards. During its first 10 or 15 years, the Appellate Body did not consistently hew to one approach, but over the last five or so years, the picture has cleared somewhat. In most of the big cases involving domestic ‘non-trade’ regulation over the last few years, we have seen a clear movement towards an approach to non-discrimination focused on the existence and justification of measures that cause competitive distortions. The hallmarks of this approach are – exactly as Howse describes – a combination of three primary moves: first, a relatively straightforward finding of discrimination based primarily on the existence of a detrimental impact on the competitive position of imports; second, considerable deference to the collective values and goals reflected in the regulatory measure at issue; and, third, heightened scrutiny of the design of the measure (the regulatory ‘means’) to determine if the competitive distortion is strictly justified.

A number of recent major cases illustrate the way in which the Appellate Body has been willing to embrace a role in which it engages in careful scrutiny of rationality of the design of the domestic regulation, even as it exhibits deference to regulatory goals. Thus, in *US – Tuna II* (and the more recent *Article 21.5* decision in the same case), the ability of the USA to put in place a labelling regime to promote dolphin conservation was reaffirmed, even as the Appellate Body found against the USA on the basis of an extremely fine-grained analysis of the way in which the labelling regime was designed and applied.¹³ In *US – Clove Cigarettes*, the same basic approach was adopted, with the Appellate Body explicitly affirming the importance of WTO members’ ability to restrict the sale of flavoured cigarettes for reasons of public health, while seeing no justification for exempting menthol cigarettes from the scope of the regulation.¹⁴ In *EC – Seal Products*, it was accepted that the moral concerns of European consumers over seal hunting techniques in other countries constitute a perfectly permissible basis for adopting even severe trade restrictions, but the European Union (EU) was pulled up failing to design and apply the restrict import regime in question in a scrupulously and demonstrably objective and even-handed way.¹⁵ And in *Canada – Feed-in-Tariff*, the Appellate Body appeared to go out of its way to establish that support for renewables

¹² A. Lang, *World Trade Law after Neoliberalism* (2011).

¹³ WTO, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Report of the Appellate Body (US – Tuna)*, 13 June 2012, WT/DS381/AB/R; WTO, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico – Report of the Appellate Body*, 3 December 2015, WT/DS381/AB/RW and Add.1.

¹⁴ WTO, *United States – Measures Affecting the Production and Sale of Clove Cigarettes – Report of the Appellate Body*, 24 April 2012, WT/DS406/AB/R.

¹⁵ WTO, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products – Report of the Appellate Body (EC – Seal Products)*, 18 June 2014, WT/DS400/AB/R, WT/DS401/AB/R.

was not WTO inconsistent *per se* and that the problematic aspect of the measure was the clearly discriminatory on local content contained in the design of the measures.¹⁶

In many ways, this is merely to repeat the interpretation of the jurisprudence that Howse offers in his article.¹⁷ The point, however, is that this is not quite a return to the regulatory balance represented by the 'post-war embedded liberalism' of the original GATT.¹⁸ It is certainly true, as Howse notes, that this approach represents a turning away from a project of 'deep integration' based on regulatory harmonization and the disciplining of regulation through cost-benefit analysis. But it is not a return to the past; it is something new. Non-discrimination is now imagined rather differently from the way it was imagined in post-war embedded liberalism, not as a tool to stamp out 'cheating' and to constrain protectionist forces but, rather, as a means of disciplining regulatory arbitrariness and promoting better designed, tightly focused and more efficient regulation. In my view, this is new – an invention of the Appellate Body that represents a deft middle ground between a truly neo-liberal model (at least in the sense of 'neo-liberal' used by Howse) and the embedded liberal model of the mid-20th century.

The second aspect of Howse's story I would want to elaborate has to do with the characterization of the Uruguay Round texts as fundamentally allied to a neo-liberal view of economic integration. Howse makes very clear that, in order to adopt the above approach, the Appellate Body has had to distance itself from the 'WTO as an institution'.¹⁹ This is based on the view that the Uruguay Round texts, and the 'trade insider' community, more broadly, unambiguously adopted the new trade agenda defined by late 20th-century neo-liberal thinking and sought to reshape international trade law around it. Of course, as a matter of historical record, there is no doubt that this did occur to some degree. But it seems to me that the WTO agreements, and the views of the WTO membership, are much more ambiguous and conflicted in this respect than is often suggested. For example, while the Agreement on Technical Barriers to Trade and the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) do contain obligations with respect to regulatory harmonization, these obligations are qualified in ways that reduce their practical significance in important ways.²⁰ And while the SPS Agreement has clearly been influenced by a rigorous 'sound science' approach to risk regulation, at the same time there is a clear effort in the text of the agreement to permit certain kinds of precautionary measures and to safeguard each WTO members' rights to regulate and diverse risk tolerances. Similarly, while the General Agreement on Trade in Services reflects a neo-liberal agenda in the sense that many of its obligations are premised on the de-monopolization and re-regulation of certain network service sectors, it does not clearly mandate those outcomes and,

¹⁶ WTO, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector/Canada – Measures Relating to the Feed-in Tariff Program – Report of the Appellate Body (Canada – Renewable Energy)*, 24 May 2013, WT/DS412/AB/R, WT/DS426/AB/R.

¹⁷ Howse, *supra* note 1, see especially s. 6.A.

¹⁸ *Ibid.*, at 76.

¹⁹ *Ibid.*, at 28.

²⁰ Agreement on Technical Barriers to Trade (TBT Agreement) 1994, 1868 UNTS 120; Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) 1994, 1867 UNTS 493.

indeed, contains a number of flexibilities and carve-outs that point in the opposite direction.²¹

None of this is news to Howse, who has written about all of these aspects of the WTO agreements as perceptively as anyone. The point, simply, is that we need to be careful before unambiguously assimilating the Uruguay Round texts, the trade insider community, or the WTO membership as a whole to the ideology of the Washington Consensus. The texts are overwhelmingly conflicted and multi-layered on this point, with the result that there is a great deal of textual support for the Appellate Body's current approach. And the ambivalence of the texts no doubt reflects in part the underlying ambivalence and lack of consensus on the part of the membership itself. The practice since the Uruguay Round, and the response of WTO members to Appellate Body jurisprudence over the last twenty years, suggests an alternative story, in which the views of the membership as a whole remained unsettled and mobile in the years following the conclusion of the Uruguay Round and have since been solidifying around something very similar to the approach that the Appellate Body now appears to have adopted. On my reading, then, the Appellate Body's adoption of the 'regulatory balance' approach to the interpretation of the post-discriminatory norms is probably best understood not as a decisive break with the neo-liberal ideology of the WTO as an institution but, rather, as the product of an ongoing implicit intra-institutional dialogue, a dialogue in which the Appellate Body has acted as a *de facto* thought leader and in which its jurisprudence has served as a focal point in relation to which broader institutional common sense has evolved.

At this point, let me put aside the larger trajectory of the story that Howse traces and focus instead on the particular jurisprudential techniques and moves that he uses to illustrate this trajectory. The wealth of jurisprudential detail is one of the features of this article, giving it a rare richness and depth, and it is one of the signal strengths of Howse's analysis that he can so clearly see through the particular doctrinal move in question to the larger function it serves for the Appellate Body as an institution. His list of techniques for creating judicial independence are a perfect example, ranging across such matters as recourse to normative resources from outside the WTO system; the adoption of textualism rather than teleology as a primary interpretive approach; emphasizing the precedential weight of its own decisions; completing the analysis; as well as such procedural moves as permitting private counsel.²²

In fact, although Howse makes it look easy, this is a much more difficult story to tell than it may seem. If at the level of 'judicial policy' there is a relatively clear story to tell, at the level of judicial techniques the story becomes very complex. This is because, for almost every jurisprudential trend that Howse correctly identifies in the jurisprudence, an opposing trend can also be identified. Thus, while it is true to say that in many cases

²¹ General Agreement on Trade in Services 1994, 1869 UNTS 183.

²² Howse, *supra* note 1, at 37–38.

the Appellate Body often self-consciously eschews teleological reasoning in order to ground its legitimacy in the text, it is also true that in other cases it adopts teleological reasoning to achieve a different effect.²³ Similarly, while Howse is right, of course, that there is a line of SPS jurisprudence in which the Appellate Body applies its standard of review in a relatively deferential manner, with a view to the underlying regulatory balance of the agreements, there is also another line of cases in which the same standard of review is used to facilitate relatively intrusive scrutiny.²⁴ And, to offer a third example, while it is right to note that the Appellate Body has on occasion established and enhanced its independence by refusing to give particular weight to internal documents coming from WTO committees, on other occasions, the purposes of objectivity and impartiality appear to have been better served by precisely the opposite move.²⁵

None of this is inconsistent with Howse's analysis. It is certainly true, as Howse argues, that the Appellate Body has sought over the last 20 years to build its legitimacy by marking its independence, by striving for balance and displays of self-restraint. It is just that different and sometimes opposing techniques will be required to achieve these effects, depending on the context. Sometimes, a display of judicial independence will demand that the Appellate Body distance itself from members' views; on others, independence will require deference to the membership. Sometimes an appearance of balance and objectivity will require formalism and textualism; sometimes it may be better served through the use of more teleological reasoning. And, of course, a balance needs always to be struck between the competing demands of judicial independence and judicial self-restraint, a balance that is likely to be calibrated in different ways depending on the precise circumstances of the decision in question.

The Appellate Body has, it seems to me, been incredibly sensitive to this reality and, as a consequence, has developed a jurisprudential style specifically designed to maintain its flexibility and freedom to respond appropriately as the context changes. Indeed, this is such a prominent feature of Appellate Body jurisprudence that I would add 'flexibility' as a sixth judicial policy, adding to the five that Howse lists. Throughout its case law, we see the Appellate Body adopting reasoning that leaves questions open, refusing to tie its own hand in future cases. Thus, for example, we find many decisions that rely heavily on the facts of the case at hand²⁶ as well as relatively frequent recourse

²³ *Ibid.*, at 37, 51.

²⁴ *Ibid.*, at 85. For an extended version of this argument, see Lang, 'New Legal Realism, Empiricism, and Scientism: The Relative Objectivity of Law and Social Science', 28 *Leiden Journal of International Law* (2015) 231.

²⁵ See, e.g., *US – Tuna*, *supra* note 13, para. 366ff.

²⁶ Examples would include *WTO, EC – Measures Concerning Meat and Meat Products (Hormones) – Report of the Appellate Body (EC – Hormones)*, 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R; *US – Tuna*, *supra* note 13; *WTO, Canada – Continued Suspension of Obligations in the EC – Hormones Dispute – Report of the Appellate Body (Canada – Continued Suspension)*, 14 November 2008, WT/DS321/AB/R; as well as *WTO, European Communities – Measures Affecting the Approval and Marketing of Biotech Products – Report of the Panel*, 21 November 2006, WT/DS291/R, Add.1 to Add.9 and Corr.1, WT/DS292/R, Add.1 to Add.9 and Corr.1, WT/DS293/R, Add.1 to Add.9 and Corr.1. It is also worth mentioning the ongoing disputes over Australia's plain packaging regulations, in which a large proportion of the argument is built around reams of factual evidence relating to the effects of different sorts of packaging on consumers as well as the effects of the measure in question.

to *arguendo* reasoning, which helps to leave certain key legal questions unresolved.²⁷ Elsewhere, especially in politically sensitive or potentially systemically important cases, we see the Appellate Body refusing to complete the analysis,²⁸ or limiting the frame of reasoning by hewing closely to the content of parties' arguments,²⁹ or relying on its limited institutional mandate to avoid questions that it may feel unable to resolve legitimately.³⁰ We also see the incremental development of complex, composite, multi-layered tests – the combination of the necessity test and the *chapeau* in GATT Article XX is the best example – which give the Appellate Body flexibility by enabling it to rely on one or another element of the test in different cases, as circumstances demand.³¹

This flexible jurisprudential style, it seems to me, is evidence of the Appellate Body's fundamentally cautious judicial sensibility, a sensibility that valorizes the virtues of modesty, narrowness and incrementalism over grand statements of law or larger integrative moves.³² While the virtues of this sensibility are clear, so too are its risks. There is no doubt that the Appellate Body's prioritization of flexibility and attentiveness to context has created a body of jurisprudence that is overly complicated and opaque – mystifying, even, to many first-time observers. Perhaps more importantly, this jurisprudential style certainly leaves them open to charges of inconsistency and lack of discipline – as we have seen recently in the current US criticism of the 'activism' of certain Appellate Body members. While it will be clear that I see this criticism as fundamentally misconstruing what is driving WTO jurisprudence, nevertheless it is true that the Appellate Body has in part helped to set the conditions in which such a criticism can flourish. Now, 20 years after its first decisions were adopted, a key challenge looking ahead will be to find new jurisprudential resources and techniques that maintain its admirable aspiration to modesty and caution, but without paying as high a price as it has so far at the level of consistency and complexity.

²⁷ There are numerous examples that could be given, two famous illustrations are WTO, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft – Report of the Appellate Body*, 1 June 2011, WT/DS316/AB/R (on the question of 'the parties' under Art. 31(3)(c)) and both WTO, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body*, 6 November 1998, WT/DS58/AB/R (on the question of the extraterritoriality of measures under Art. XX).

²⁸ See, e.g., *Canada – Continued Suspension*, *supra* note 26; *Canada – Renewable Energy*, *supra* note 16.

²⁹ E.g., *EC – Seal Products*, *supra* note 15 (as to the contested meaning of 'related' in the definition of technical regulation).

³⁰ Eg, *EC – Hormones*, *supra* note 26, para 123; WTO, *Mexico – Tax Measures on Soft Drinks and Other Beverages – Report of the Appellate Body*, 24 March 2006, WT/DS308/AB/R, para. 56.

³¹ Regan's argument to the effect that the different elements of the GATT, *supra* note 10, Art. XX necessity test point in quite different directions and proceed on the bases of quite different forms of review, is pertinent here. Regan, 'The Meaning of "Necessary" in GATT Article XX and GATS Article XIV: The Myth of Cost-Benefit Balancing', 6(3) *World Trade Review* (2007) 347.

³² See also Lang, 'Twenty Years of the WTO Appellate Body's "Fragmentation Jurisprudence"', 14(3) *Journal of International Trade Law and Policy* (2015) 116.

Finally, let me offer some brief forward-looking reflections prompted by one of the most significant and insightful passages in Howse's article in one of its concluding paragraphs:

The equilibrium between domestic regulatory autonomy and trade liberalization discerned by the Appellate Body is very much a construction – one that is normatively stabilizing at a time when there are few agreed answers about the costs and benefits of globalization or the ideal shape of global economic governance in relationship to differing domestic policy paths. For the contestants in these debates on either side, this normative stabilization cannot but seem to have an element of the arbitrary and artificial to it. Yet it may well have contributed to a sense that, while the WTO appears to be stalled in its negotiating functions during this period, there has been some basic durability to the given legal framework and its enforceability.³³

This is hugely important. As recent political developments in Europe and the USA have made clear, we are living in a period in which the normative foundation of global economic integration is fundamentally contested. If Howse is right – and I think he is – then we can discern in the evolution of Appellate Body jurisprudence the development of one attempt to craft a new normative foundation for economic integration and a new vision for the role of institutions of international economic governance, which has arisen in part as a response precisely to this contestation.

Reduced to its core, and no doubt oversimplified, this is a vision that starts from the position that there is a trade-off to be made between, on the one hand, the genuine and significant economic benefits of global integration and, on the other, its political costs in the form of reduced domestic regulatory autonomy and sovereign control. The normative vision proposed is imagined as a new compromise between these conflicting demands, one that captures many of the benefits of 'deep integration', but that avoids the legitimacy problems that have proved to come with a full throated pursuit of regulatory harmonization and the disciplining of regulation through cost-benefit analysis. The compromise adopted by the Appellate Body in its jurisprudence is that described earlier, in which nation states retain the freedom to define and pursue almost any regulatory objective they see fit, but the means by which they choose to pursue such ends are subject to relatively strict international oversight from the perspectives of proportionality, rationality and good governance. In this compromise, global institutions associated with economic integration have neither the authority nor legitimacy to restrict the purposes of market regulation at the level of the nation state, but they do have a legitimate mandate to intervene to improve (perhaps even optimize) the design and administration of regulatory regimes. Of course, this emergent vision of the nature, purpose and direction of global economic integration is hardly the creation of the Appellate Body alone. But I think it is fair to say the WTO jurisprudence provides a very good window onto it and that the Appellate Body has been one important voice in its development. And, as Howse notes in the passage quoted above, the emergence of this new vision has been part of the conditions providing some degree of normative stability for the regime during turbulent times.

It is here that the focus of my comments turns away from the Appellate Body itself, to the larger project of economic integration to which the Appellate Body is both

³³ Howse, *supra* note 1, at 76.

contributing and responding. One of the profound virtues of this passage in Howse's article is that it presents before us a hugely important set of questions about the adequacy of this vision. In what ways is it an acceptable compromise and in what ways does it fall short? Does it constitute an acceptable and potentially durable answer to the concerns of those who now so strongly voice their rejection of global economic integration? Howse's analysis itself, it seems to me, offers the beginnings of an answer to these questions.

Taken on its own terms, there is a great deal to commend this compromise. To the extent that there is a balance to be struck between the economic benefits and political costs of economic integration, the oversight role for international institutions suggested by the Appellate Body is vastly superior to the excessive intrusiveness that is contained in some extreme versions of the neo-liberal agenda of economic integration. To a large extent, the Appellate Body has successfully responded to the critiques of many who have over the past two decades raised concerns about the potential for WTO law overly to constrain members' regulatory freedom. As currently interpreted, these constraints, while real, are within reasonable limits. Furthermore, and importantly, through the 'jurisprudence of balance', which Howse so clearly describes, the Appellate Body has provided a strong answer to those who were concerned that the WTO may be biased in favour of 'trade values' over 'non-trade values' in those disputes in which such values are in conflict. One of the great virtues of the Appellate Body's approach has been to demonstrate that WTO law has sufficient resources internally to respond adequately to problems of value conflict, without the need always to resort to normative and other resources outside the law of the WTO.³⁴ This has been a major, and welcome, development.

But, of course, problems remain. There will be some, for example, who will think that the Appellate Body has gone too far in its attempt to assuage these concerns. After all, to 'preserve regulatory autonomy' in WTO law in reality means to grant to WTO members the privilege to inflict harm on other states (or at least certain segments of their populations) in the pursuit of their regulatory values. We may legitimately ask whether the Appellate Body has done all it can to ensure that domestic regulatory process are as 'other regarding' as possible in this respect.³⁵ Are the external costs of regulatory actions distributed fairly and borne by the most appropriate actors? It is not always clear that they are, nor is it clear that the Appellate Body has turned its attention to this aspect of the problem as directly as it might have, even if it may be

³⁴ Note, e.g., the way in which the Appellate Body in the *EC – Hormones* litigation refocused the question of the status and relevance of the precautionary principle in WTO law into a question about the meaning of terms such as 'sufficient' in the SPS Agreement. *EC – Hormones*, *supra* note 26, para. 124. A more recent example is in *WTO, Peru – Additional Duty on Imports of Certain Agricultural Products – Report of the Appellate Body*, 31 July 2015, WT/DS457/AB/R, paras 5.112–5.113, in which the Appellate Body made clear that, in relation to the question of whether a regional trade agreement between WTO members can derogate from WTO obligations, the controlling text is GATT, *supra* note 10, Art. XXIV, not Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331, Art. 41.

³⁵ See generally Stewart, 'Remedying Disregard in Global Regulatory Governance', 108(2) *American Journal of International Law (AJIL)* (2014) 211; Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders', 107(2) *AJIL* (2013) 295.

limited in its ability to address it. One challenge for the future, then, may be to craft an approach that pays greater attention to the incidence of regulatory costs, which insists on greater responsiveness on the part of states to the external costs of their regulatory choices – but without reverting to the overly intrusive model of compulsory regulatory harmonization and cost/benefit analysis.

Furthermore, the present context of political discontent over economic globalization in both Europe and the USA highlights another potential weaknesses of the normative vision set out above. The core message of this vision is that economic integration does require giving up some degree of sovereign control but that, ultimately, the economic benefits are worth it, provided regulatory constraints are kept within certain bounds. But to those domestic constituencies who feel intensely the loss of political control, but who see few of the economic benefits of integration, this is a compromise with few, if any, attractions. Indeed, it only reinforces the intuition that globalization, at its base, necessarily requires populations to accept restrictions on their ability to determine their own destiny and reaffirms the idea that the state is the best and most effective site for the exercise of political control over economic life. The tragedy is that in many, and perhaps most, cases neither is true. Sometimes, collective action of some kind is the only mechanism to assert any kind of meaningful control and sometimes state-based control over certain economic activities is nothing more than a nostalgic illusion. Arguably, then, what may be needed to respond to the concerns of these constituencies is not a different or better balance between the economic benefits of globalization and its accompanying political costs but, rather, a different vision of integration altogether – one that embraces international cooperation as a means of re-asserting political control, rather than surrendering it. Of course, to be more than merely rhetoric, it may require a modified political agenda, refocused on, for example, the creation of global public goods or addressing the problems of harmful regulatory and tax competition.

It seems to me that these are some of the larger questions that Howse's analysis puts on the table, and while they are not the sort of issues that the Appellate Body is institutionally equipped to resolve, nor can it entirely ignore the larger context in which its jurisprudence is received and interpreted. In the end, this is perhaps one of the most important lessons we might wish to take from Howse's article. In any body of law, at least any with the stakes of WTO law, there is an inevitable mutuality between jurisprudential technique, context and larger historical trajectories, which is crucial to understand if as scholars we want to understand the underlying dynamics of the law. This is difficult to capture using traditional legal analysis, and it is one of its immeasurable strengths of Howse's article that it moves so effortlessly between the technical minutiae of WTO jurisprudence, through meso-level analysis of 'judicial policies', to the larger global political dynamics of the project of global economic integration. In this, it is a model of scholarship to which many will aspire.