
The WTO 20 Years On: A Reply to the Responses

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I am greatly honoured and thankful to the editors of *EJIL* as well as to the five authors, some of the most eminent scholars in the field, who have chosen to engage with my essay. Their observations speak for themselves and in this brief reply I do not intend to tackle them systematically. That task is for future scholarship. Instead, I wish to take this opportunity simply to correct certain misunderstandings concerning the original essay that might be an obstacle to the open-minded reader assessing the debate that the responses have opened.

Perhaps the most serious misunderstanding is suggested by the response of Joost Pauwelyn, who says that my core normative claim is that the Appellate Body has achieved a high level of effectiveness and legitimacy; on the contrary, the central inquiry in my essay concerns the normative logic of the judicial techniques and policies that the Appellate Body may have adopted to create and enhance its legitimacy as a true world trade court. As I state at the outset of my essay, I bracket the deep question of what constitutes legitimacy in international adjudication, and assume a common-sense view, widely held, but surely deserving of more scholarly scrutiny, that the Appellate Body is a highly effective international court, issuing many rulings, and experiencing a high level of acceptance and compliance with those rulings, generally speaking. There may well be more to legitimacy than that, and Pauwelyn takes a different view of compliance – fair enough. My essay does not contain any data on compliance and what Pauwelyn is really challenging is not any of my central claims but my starting assumption. A second misunderstanding in Pauwelyn’s response is that I set out for myself the challenge of a comprehensive treatment of the case law of the Appellate Body; hence he takes me to task for devoting only two pages to the case law on trade remedies. In fact, my enterprise is to identify, in that section of the essay, the key judicial policies or jurisprudential techniques of the Appellate Body, not to survey its rulings across different areas of WTO law. A third misreading of Pauwelyn relates to the temporal dimension of my narrative; in portraying the Appellate Body in its early years as fiercely establishing its independence from the political and diplomatic institution of the WTO, I was not suggesting that it has continued to maintain an agonistic relationship to the political and diplomatic institution. Indeed, the increasing acceptance (overall) of Appellate Body rulings, and the abandonment of any concerted effort by insiders to challenge the legitimacy of the Appellate Body, are a part of my own narrative.

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Pauwelyn, Bernard Hoekman and Andrew Lang take issue with the extent to which I characterize the Uruguay Round result as a reflection of neoliberal deep integration thinking. I think there are at least two questions here. One is about the guiding spirit of the overall Uruguay Round agenda and the other about the texts that were actually agreed to. On the first, I believe I am on firm ground, and if that had been the major claim I sought to prove I could easily have produced a large body of evidence; but Dani Rodrik and Joe Stiglitz have among others written quite convincingly about this.¹ As to the result, I do agree that the texts contain many exceptions, limitations, balancing provisions and so on, which reflect the extent to which developing countries particularly were able to push back the full onslaught of the neoliberal agenda. Indeed, were it not for these features, it would have been much more difficult for the Appellate Body to hold to any semblance of textualism while overall, as I show, moderating or neutralizing the neoliberal thrust of agreements like the TBT Agreement. It was certainly possible, and indeed many expected, that interpreting SPS, TBT and TRIPs, for instance, the Appellate Body would take an expansive teleological approach to the text as written, emphasizing the neoliberal telos and taking a narrow approach to exceptions or limitations. My claim is that the Appellate Body did not do so, but went in an opposite direction, generally speaking.

Petros Mavroidis' response is as much or more a challenge to the Appellate Body itself as to my essay. Where we may somewhat disagree is his general prescription that judges 'must privilege methodology over political sensitivity' (at 1117). In an environment where globalization is strongly contested in many ways, I think that political sensitivity is important, especially in those cases where the Appellate Body is interpreting contested norms, or going into areas that excite strong political passions, such as animal welfare. Yet Mavroidis is surely right that the Appellate Body still over-relies on some of the techniques that I claim assisted it in early years to gain legitimacy such as parsing of texts based on Vienna Convention canons, and that it needs more clearly reasoned, methodological doctrine in many areas; the kinds of judicial policies that I articulate are not enough to give guidance about the direction of the law on specific but important points. The resource and time constraints on the Appellate Body have often been severe, but helpful measures to ease these constraints could include seeking to hire among the best law graduates in the world (some with PhDs in economics) as judicial clerks, as well as more frequent caucuses where the Appellate Body hears from scholars, former Appellate Body members and perhaps judges of other courts, from the ECJ to the US Court of International Trade to Mercosur. Panel reports are awkward, undisciplined messes produced by amateur panelists and (admittedly, often highly skilled) technocratic Secretariat officials. The lack of quality of the first instance adds considerably to the strain on the Appellate Body. While I emphasize in the essay how much the Appellate Body has achieved jurisprudentially in 20 years, Mavroidis is right to sound the alarm that we are getting to a point where public reason or discourse about the jurisprudence is being undermined through the difficulty of understanding

¹ See D. Rodrik, *The Globalization Paradox* (2011), at 76–78. See also, J. Stiglitz and A. Charlton, 'The Right to Trade', Commonwealth Institute (2012).

the Appellate Body on some issues, and what appears to be a reluctance to state candidly and lucidly what motivates some of the distinctions it makes and lines it draws. I myself have made this point in the aftermath of the *Seals* (chapeau) and *Tuna-Dolphin* 21.5 rulings. All this said, some of the obscurity, or lack of compelling reasoning, of the Appellate Body in certain areas can be accounted for by problems in the Uruguay Round texts, where there are gaps or perhaps intended ambiguities that no methodology can really clean up without the risk of complaints of illegitimate judicial activism from one side or another. The solution on zeroing would be to fix the Anti-Dumping agreement, but the political dissensus reflected in some criticisms of the case law also makes it impossible to provide a solution through treaty amendment.

In sum, my taking stock of the some of the Appellate Body's accomplishments, which are remarkable in the history of international courts and tribunals, should not be a basis for apologetics (the legitimate concern that H el ene Ruiz Fabri raises in her response) or complacency. Ruiz Fabri is absolutely right that the procedures and collegial practices of the Appellate Body have been crucial elements in its ability to accomplish the court-building that I narrate in my essay. More scholarship needs to focus on that, in comparative perspective. The Appellate Body has been fortunate in attracting directors of its Secretariat of a very high quality. But as I have suggested, the demands now put on it may indeed require an expanded college of judicial clerks of the first rank. The cost may be modest, all things considered, but will the Membership be up for it?