
The Gang That Couldn't Shoot Straight: The Not So Magnificent Seven of the WTO Appellate Body

Petros C. Mavroidis*

Abstract

The World Trade Organization's (WTO) Appellate Body has produced a volume-wise important body of case law, which is often difficult to penetrate, never mind classify. In his EJIL Foreword article, Robert Howse has attempted a very lucid taxonomy of the case law, using the standard of review as a benchmark for it. His conclusion is that the Appellate Body is quite cautious when facing non-discriminatory measures, especially measures relating to the protection of human life and health, while it has adopted a more intrusive standard (into national sovereignty) when dealing with trade measures (like anti-dumping), which are by definition discriminatory since they concern imports only. In my response, I share his basic conclusion and add that this is not the outcome of a process that mandates this standard of review but, simply, a political reaction aimed at placating the WTO membership.

1 The Argument

I propose to entertain my response to the *EJIL* Foreword article by Robert Howse in three parts.¹ In the second part, I ask whether there are statutory underpinnings supporting the approach privileged by the Appellate Body. My response is no. If at all, the framers of the World Trade Organization (WTO) wanted panels and the Appellate Body to adopt a deferential standard of review only when dealing with anti-dumping. The Appellate Body undid the statutory premise and applied deference not to disputes

* Edwin B. Parker Professor of Law, Columbia Law School, New York, United States; Professor, University of Neuchâtel, Neuchâtel, Switzerland. Email: Petros.Mavroidis@unine.ch. For helpful discussions and comments on previous drafts, I would like to thank Bill Davey, Henrik Horn, and Damien J. Neven for many discussions of the issue and comments on previous drafts.

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

regarding trade but, rather, to disputes regarding domestic instruments (policies). This is all judge-made law, and it reflects the quintessential belief of the Appellate Body on how things should be done, and Howse is absolutely right to single out this element.

In the third part, I move to explain that the Appellate Body has not adopted a consistent standard of review across domestic instruments and has outlawed many of them on shaky evidence. Still, it will not tinker with one category of such measures, those aiming to protect human health. On the other hand, the Appellate Body has imposed stringent requirements on key disciplines, like causality, when dealing with border instruments, but it has sugarcoated this approach through soft remedies and a generous understanding (for the regulator) of the obligations regarding continued imposition of duties (sunset reviews).

In the fourth part, I explain that trading nations often have little incentive to reveal the rationale behind the adoption of their domestic policies, and, absent similar knowledge, it is often hard to decide on who is right or wrong. Risk averse courts, worried about the institutional implications of false positives, might rationally prefer to avoid outlawing challenged measures. Alas, the Appellate Body has not followed a similar path in developing its approach. It has behaved as a political body reacting to signs of the times – a ‘Warren Court’ of trade. Predictions regarding the manner in which it will treat similar cases in the future are impossible to make. The fifth part recaps my main conclusions.

2 Standard of Review: Statutory Language and Practice

The Appellate Body did not start from a clean slate when developing its standard of review. In fact, it was called to use one generic standard of review across all cases and another, arguably more deferential, standard in anti-dumping disputes.

A Two Statutory Standards of Review

Article 11 of the Dispute Settlement Understanding (DSU) requests panels to make an ‘objective assessment’ of the matter before them.² Of interest to our discussion is not the substantive content of this standard. What we care about is the fact that the DSU provides for one standard to be applied across all cases, irrespective whether we deal with trade or domestic instruments (policies). There is only exceptional standard that is reflected in Article 17.6(ii) of the Agreement on Anti-Dumping.³ This provision (Article 17.6(ii)) states that panels (and the Appellate Body) should have recourse to the customary laws of public international law, when interpreting the WTO contract. The second sentence though, calls for panels (and the Appellate Body) to refrain from going any further when they have encountered an interpretation of the terms that is ‘permissible’. The working hypothesis for the framers must have been that more than one permissible interpretation was possible, at least on occasion. It is clear that the

² Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, 1869 UNTS 401.

³ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, 1868 UNTS 201.

USA, the instigator of this provision, had in mind a deferential standard of review.⁴ Various negotiating documents support this conclusion.⁵

B The Appellate Body: Master and Commander

Against this background, the Appellate Body performed two innovations: first, it merged the two standards into one, and, second, it elevated the protection of human health to the pedestal of global values.

1 And the Two Shall Become One

With two early exceptions,⁶ panels have sided with the Appellate Body report in *US – Hot Rolled Steel* (§62), where the Appellate Body saw no disharmony between the two statutory standards of review discussed above. *De facto*, this meant the end of deference in anti-dumping disputes.⁷

2 The Importance of Objective Sought

In *EC-Asbestos*, the Appellate Body underscored that it would be shaping its standard of review in light of the importance of the regulatory objective pursued. In subsequent case law, the Appellate Body adopted a deferential approach when protection of human health was at stake, and a more intrusive standard when other societal preferences were at stake.⁸

3 From Broad Lines to Deets

How has the Appellate Body operationalized its preferred standard of review?

A Domestic Instruments: Belts and Suspenders (in Principle)

Panels under the General Agreement on Tariffs and Trade (GATT) have struggled with the question of standard of review.⁹ Although formally they have adopted a 'no effects cum no intent' standard, which, *prima facie*, might sound quite intrusive (since it allows panels to outlaw measures that might have no demonstrable protectionist effect, while not inquiring into the intent at all), they have in fact attempted to show deference towards regulatory intent, to the extent that they were persuaded that it was not protectionist.

⁴ Croley and Jackson, 'WTO Dispute Procedures, Standard of Review, and Deference to National Governance', 90 *American Journal of International Law (AJIL)* (1996) 193.

⁵ Stewart, Markel and Kerwin, 'Antidumping', in T.P. Stewart (ed.), *The GATT Uruguay Round: A Negotiating History (1986–1992)* (1993) 1383, refer to many of them.

⁶ Both are discussed in P.C. Mavroidis, *The Regulation of International Trade*, 2 vols (2016), vol. 2, ch. 2.

⁷ WTO, *United States – Anti-Dumping on Certain Hot-Rolled Steel Products from Japan – Report of the Appellate Body*, 24 July 2001, WT/DS184/AB/R.

⁸ This case law is discussed in Mavroidis, *supra* note 6, vol. 1, ch. 7; Sykes, 'The Least Restrictive Means', 70 *University of Chicago Law Review* (2003) 403.

⁹ General Agreement on Tariffs and Trade (GATT) 1994, 55 UNTS 194.

1 Debates in GATT

The originally prevailing view was that the rationale for intervention should matter only as grounds justifying deviation from an obligation. Fearing that this approach would lead to an understanding of the GATT as instrument for deregulation (rather than non-discrimination, its original purpose), two reports endorsed the ‘aims-and-effect’ test, where likeness of goods would be a function of the regulatory purpose. Measures aiming to protect non-economic preferences would thus be judged to be GATT consistent. The GATT panels have not elaborated a meticulous intent test, when they have done so. They have satisfied themselves instead on the absence of protectionism based on little evidence.¹⁰

The case law, thus, has oscillated between an analysis where regulatory intent is irrelevant and one in which it is the centrepiece of the inquiry. Deference should not be regarded as the dominant standard of review. The quintessential report reflecting the deferential standard (*US – Taxes on Automobiles*) remains un-adopted and, consequently, of limited legal value.¹¹ In a subsequent case, *US – Tuna I (Mexico)*, the panel outlawed a US measure simply because it was unilateral, without even reaching the stage to ask the question regarding the relevance of the aim.¹² At the very least, therefore, the GATT did not leave a legacy of consistency regarding the treatment of domestic policies. The Appellate Body inherited this legacy. How did it go about it?

2 First, a Huge Sigh of Relief

US – Shrimp is a remarkable report.¹³ The Appellate Body set the record straight when holding that unilateral policies are not inconsistent simply because they are unilateral. It was a head on the reversal of the *US – Shrimp I (Mexico)*. The GATT, of course, was a tariff bargain supported by negative integration. Its members could design their domestic policies to their liking as long as they applied them in a non-discriminatory manner. All accounts of the GATT that extensively refer to the negotiating record, from early on by Clair Wilcox,¹⁴ to the seminal work of Robert Baldwin¹⁵ and John Jackson,¹⁶ to the most recent inquiries like the one by Douglas Irwin, Petros Mavroidis and Alan Sykes,¹⁷ agree on this score. Under the circumstances, *US – Shrimp* was a welcome sea change.

¹⁰ See Hudec, ‘GATT/WTO Constraints on National Regulation: Requiem for an “Aims and Effect” Test’, 32 *International Lawyer* (1998) 619, for an excellent description of the ‘aims and effect’ test and why inquiries into regulatory intent, irrespective of the manner in which the test had been applied in case law, was necessary for GATT to be understood as an instrument for non-discrimination and nothing beyond that.

¹¹ WTO, *United States – Taxes on Automobiles – Report of the Panel*, 11 October 1994, DS31/R.

¹² WTO, *United States – Restrictions on Imports of Tuna – Report of the Panel*, 3 September 1991, DS21/R.

¹³ WTO, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body*, 12 October 1998, WT/DS58/AB/R.

¹⁴ C. Wilcox, *A Charter for World Trade* (1949).

¹⁵ R.E. Baldwin, *Non-Tariff Distortions in International Trade* (1970).

¹⁶ J.H. Jackson, *World Trade and the Law of the GATT* (1969).

¹⁷ D. Irwin, P.C. Mavroidis and A.O. Sykes, *The Genesis of the GATT* (2008).

The question for the Appellate Body was whether it should pick one of the two tests already developed in GATT case law or whether it should develop its own. In name, it adopted the 'marketplace' test. Regulatory intent would be of relevance in a very limited set of circumstances when the burden of proof rests with the complainant (*Chile – Alcoholic Beverages*). Conversely, intent would be quite relevant when the burden of proof would shift to the defendant (Article XX of GATT) when it would be called to justify the violation of an obligation.¹⁸

3 Then, the Appellate Body Missed the Compass

I think I am not the only professor of WTO law who, over the years, has found it exceedingly hard to explain the non-discrimination test devised by the Appellate Body. In *Japan – Alcoholic Beverages II*, consumers would define likeness preferably through the use of the best predictor we have – cross-price elasticity.¹⁹ Less favourable treatment, at least in the panel's (clearer) reading of the situation, did not exist because the measure imposed a higher burden on imported competing goods and the defendant had not advanced any policy rationale to justify its choices.

Every report that followed, instead of improving the situation, substantially muddied the waters. In *Korea – Alcoholic Beverages*, recourse to econometric indicators and non-econometric indicators was put at par.²⁰ This could well be the case, only if the former yielded no adequate response (because, for example, a good has been *de facto* banned). Surprisingly, the price of goods was absent from the list of relevant factors, as if the purchasing decision for the majority of consumers is not a function of scarcity of monetary resources.

Liikeness was predicated either on an intense competitive relationship between a dyad (or more) of goods or upon sharing the same six-digit classification (*Japan – Alcoholic Beverages II*). In *Philippines – Distilled Spirits*, the Appellate Body was dealing with goods that do not share the same six-digit classification, but which, in its view, were still like because they were in an intense competitive relationship.²¹ It referred to studies that measured the cross-price elasticity coefficient, and the resulting range was between 0.01 and 0.07. A value of 0.01 would imply that a tax on imports that increases the price of imports by 50 per cent would increase the volume for the domestic product by 0.5 per cent, which is close to nothing. If elasticity was only marginally smaller, and it equalled 0, the two products would be completely independent. The Appellate Body tried to make up for this argument by holding that the goods shared the same end uses and so on. A bicycle and an airplane share the same end use (transport), but no one would call them like goods.

¹⁸ WTO, *Chile – Taxes on Alcoholic Beverages – Report of the Appellate Body*, 13 December 1999, WT/DS87/AB/R.

¹⁹ WTO, *Japan – Taxes on Alcoholic Beverages – Report of the Appellate Body*, 4 October 1996, WT/DS8/AB/R.

²⁰ WTO, *Korea – Taxes on Alcoholic Beverages – Report of the Appellate Body*, 18 January 1999, WT/DS75/AB/R.

²¹ WTO, *Philippines – Taxes on Distilled Spirits – Report of the Appellate Body*, 21 December 2011, WT/DS403/AB/R.

In *EC – Asbestos*, likeness was delinked from market analysis.²² Two goods are like if a ‘reasonable consumer’ thinks so, and no market evidence to this effect is warranted. The judgment of the members of the Appellate Body (the ‘reasonable consumer’, for all practical purposes) can substitute for this.²³ This case law established the importance of the objective as a relevant criterion to decide on the degree of deference that panels should show to the regulator.

And when we thought we had seen the end of innovation, along came the Appellate Body report on *Argentina – Financial Services*, where likeness was presumed this time.²⁴ The Appellate Body invented a concept that it had never used before, and it made us wonder what exactly it meant with ‘presumption of likeness’.²⁵ The interpretation of ‘less favourable treatment’ presents us with similar discomfort. In *Dominican Republic – Import and Sale of Cigarettes*, the Appellate Body stated that measures creating disparate effects would not be judged inconsistent, if the rationale for the adoption of measure was unrelated to the origin of the good.²⁶ Then came *EC – Seal Products*.²⁷ The Appellate Body deplored our poor reading of the unambiguous and hard to misunderstand paragraphs in its previous report and stated that the presence of disparate effects meant less favourable treatment. This case law cast doubt on the generic relevance of the deference standard to domestic policies. Deference was effectively limited to cases where human health is at stake (*EC – Asbestos*) and not when other societal preferences are advanced.²⁸

In *Korea – Various Measures on Beef*, the Appellate Body outlawed a non-discriminatory measure (dual retailing) that, in its own admission, was genuinely aiming at protecting the stated regulatory objective.²⁹ It held that the measure was unnecessary, but it did not provide any evidence regarding the disparate trade impact of the measure. If the intent was legitimate, and disparate trade effects were absent,³⁰ on what evidence was the measure judged to be GATT inconsistent?

²² WTO, *European Communities – Measures Affecting Asbestos and Products Containing Asbestos – Report of the Appellate Body*, 12 March 2001, WT/DS135/AB/R.

²³ To avoid misunderstandings, I published my views when stating that the European Union (EU) should have prevailed but not because the two goods were unlike. It should have prevailed because France was not affording less favourable treatment when banning sales of health-impairing goods. It is the privilege of any World Trade Organization (WTO) member to define its level of protection, and France can have a higher level of protection than Canada if it so wishes, but those who disagree are not necessarily unreasonable. See Grossman, Horn, and Mavroidis, ‘Domestic Instruments’, in H. Horn and P.C. Mavroidis (eds), *Legal and Economic Principles of World Trade Law* (2013) 205.

²⁴ WTO, *Argentina – Measures Relating to Trade in Goods and Services – Report of the Appellate Body*, 14 April 2016, WT/DS453/AB/R.

²⁵ Of course, likeness can never be presumed, since different consumers in different markets may react in different ways to the same pair of goods, and, absent some market research, the competitive relationship between the goods cannot be established.

²⁶ WTO, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes – Report of the Appellate Body*, 25 April 2005, WT/DS302/AB/R.

²⁷ WTO, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products – Report of the Appellate Body*, 22 May 2014, WT/DS401/AB/R.

²⁸ Sykes, *supra* note 8.

²⁹ WTO, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef – Report of the Appellate Body*, 11 December 2000, WT/DS161/AB/R.

³⁰ The panel had found that Korea was routinely absorbing the legal import quota in place. This was quite normal in light of the difference between the world and the Korean price for beef.

In *EC – Hormones*, the Appellate Body accepts the zero-risk policy (whatever it means) practised by the European Union (EU) and goes so far as to suggest that the precautionary principle is not confined to Article 5.7 of the SPS Agreement (as some, including me, might have thought) but, rather, permeates the whole agreement.³¹ A few years later, Japan invoked a zero-risk policy with respect to fire blight, a disease in apples. In *Japan – Apples*, the Appellate Body found nothing wrong with the risk assessment supplied by the defendant, but it outlawed the measure because it considered it unnecessary.³² This report looked like one bad apple, as Damien Neven and Joseph Weiler have suggested, and it lends suspicion to those arguing that the Appellate Body serves one sauce for the goose and one for the gander.³³ The more likely explanation though is that the objective pursued by the EU (protection of human health) defined endogenously the standard of review for the Appellate Body.

4 Deference Yes, but to a Limited Class of Domestic Policies, Namely ...

The Appellate Body cannot be accused of having provided a clear methodology that will enable it (and subsequent panels) to distinguish the wheat from the chaff. There are four key terms in the body of Article III of the GATT: 'like'; 'directly competitive or substitutable'; 'in excess'; and 'applied so as to afford protection'. Only the term 'in excess' has been interpreted in consistent manner. The Appellate Body has adopted a deferential standard of review only towards measures aiming to protect human life and/or health. It has not provided any reason for doing so other than the fact that, in its view, risks to human life and/or health deserve maximum deference. The deferential standard towards measures aiming to protect public health is a knee-jerk reaction to what is the highest value – the quintessential human right.

B Trade Instruments: Gung Ho (in Principle)

Although disputes regarding tariff treatment have been infrequent in the GATT, case law in anti-dumping has provided a lot of ammunition for heated discussion across the membership.

1 GATT Debates

Case law in anti-dumping and countervailing, in particular, stands for the proposition that remedies in this context should be retroactive. This remedy has not gone down well, especially with the EU and the USA. In fact, as Robert Hudec explains, the introduction of retroactive remedies was a reason why the rate of adoption of GATT panel

³¹ WTO, *European Communities – Measures Concerning Meat and Meat Products (Hormones) – Report of the Appellate Body*, 16 January 1998, WT/DS26/AB/R. A very comprehensive analysis is offered by Davey, 'Reflections in the Appellate Body Decision in the Hormones Case and the Meaning of the SPS Agreement', in G.A. Bermann and P.C. Mavroidis (eds), *Trade and Human Health and Safety* (2006) 118. Agreement on Sanitary and Phytosanitary Measures 1994, 1867 UNTS 493.

³² WTO, *Japan – Measures Affecting the Importation of Apples – Report of the Appellate Body*, 26 November 2003, WT/DS245/AB/R.

³³ Neven and Weiler, 'Japan – Measures Affecting the Importation of Apples: One Bad Apple?', in H. Horn and P.C. Mavroidis (eds), *The WTO Case Law of 2003* (2006) 280.

reports fell in the 1980s.³⁴ I have argued elsewhere that the EU and the USA attempted to reverse this trend during the Uruguay Round negotiations, to no avail.³⁵

On the other hand, the case law has been rather ‘gentle’ when it comes to examining whether the requirements for lawful imposition and/or review of duties imposed have been met. In *US – Swedish Steel Plate*, the panel decided that it was not warranted for the USA to review 20-year-old duties, even if the following was true:

- Sweden had reduced its production of steel products;
- it was selling more to the EU because it had signed a free trade agreement with it (and the EU had eliminated duties on imports of Swedish steel);
- Avesta (a Swedish company) had bought a mill in Indiana and, consequently, was selling to the US market through its Indiana site and
- the USA had concluded a voluntary export restraint with many exporters, as a result of which the health of US industry had considerably improved.³⁶

2 *Even Tougher*

The Appellate Body adopted interpretations that made recourse to contingent protection burdensome. It set aside the expressed intent of the instigators of the standard of review embedded in Article 17.6(ii) of Agreement on Anti-Dumping. It took the causality requirement seriously; correctly so. Anything can affect the trade outcome, and a trigger happy investigating authority is often happy to attribute to dumped, or subsidized, or increased imports if the injury is inflicted by other factors. The Appellate Body requested the evidence of genuine and substantial relationship between cause and effect before the recourse to duties has been made. This standard requires attribution of injury to increased imports, and the evidence of non-attribution of injury to increased imports, when other factors have caused it. It requests WTO members to examine their conclusions in light of other alternative explanations and to decide on the imposition of duties only when they have done so. Sykes, reading the case law, has gone so far as to ask whether it will ever be possible for an (elaborate) investigating authority to meet the test established in the case law?³⁷ We would add that the case law in the realm of non-discrimination would have been drastically different had the Appellate Body adopted a similar understanding of the causality requirement as well. Howse is certainly right in pointing the discrepancy in this direction.³⁸ As always though, it played good cop, bad cop. We explain in what follows.

³⁴ R.E. Hudec, *Enforcing International Trade Law* (1993).

³⁵ Mavroidis, ‘Mind over Matter’, in K. Bagwell and R.W. Staiger (eds), *Handbook in Commercial Policy* (2016).

³⁶ WTO, *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheets and Strip from Korea – Report of the Panel*, 22 December 2000, WT/DS179/R, paras 246ff.

³⁷ Sykes, ‘The Safeguards Mess: A Critique of WTO Jurisprudence’, 3 *World Trade Review* (2003) 216.

³⁸ Howse, *supra* note 1. It is true that, on occasion, the Appellate Body, on the one hand, has announced a very demanding causality test, only to decide on causality on shaky basis a few paragraphs later. The standard announced though, might still serve as some sort of signalling mechanism to the effect that the Appellate Body will take this exercise seriously.

3 *A Touch of Mild*

Under the circumstances, it is quite odd that the Appellate Body refused to see a causality requirement in sunset reviews. Why is it the case that one needs to show that dumping causes injury in the original investigation and not so at the sunset stage? The Appellate Body has pointed to the absence of specific language to this effect. True. But does the absence of specific language lead to the conclusion that, whereas only injurious dumping can be sanctioned at the stage of original investigation, non-injurious dumping can be counteracted at the sunset stage? Had the Appellate Body investigated even briefly the negotiating record, it would have realized that the introduction of sunset reviews was a hard fought victory for its proponents. The whole idea was that duties lapse, unless a sunset review points to the recurrence of injury in the case of withdrawal. Negotiators have a small window for the continued imposition of duties. The Appellate Body has turned it into a wide avenue.

Indeed, Howse and Robert Staiger have expressed their profound disagreement with this statement and have argued for a comprehensive legal test that could be applied in order to sustain the plausibility of continued impositions.³⁹ The Appellate Body turned a blind eye to this article, as it consistently does to academic writings that rarely, if ever, feature in footnotes.⁴⁰ The Appellate Body has not pronounced in a comprehensive manner on remedies. WTO panels, with one exception, have consistently held that remedies are prospective. This is a major concession to the members that defended this view during the Uruguay Round and that did not manage to persuade the rest of the membership on this score.⁴¹ A cheap exit for the first five years or so is now *de facto* institutionalized.

4 *And, as Usual, a Lot of Confusion*

There are numerous inconsistencies in the case law on trade instruments, and, in this respect, the Appellate Body has reproduced the record of its case law under domestic instruments. To provide but one illustration, I will refer to the case on pass through, which is a major issue in subsidies. The Appellate Body dealt in quick succession with two cases regarding pass through, both discussed by Gene Grossman and Mavroidis.⁴² The first time it held that the payment of the market price when goods are privatized always exhausts previously bestowed benefits. In the second, it held that privatization at arm's length could result in the exhaustion of similar benefits. Both findings cannot be right; one of them has to be wrong. And, yet, the Appellate Body did not even bother to address the inconsistency between the two reports. *Errare humanum est*,

³⁹ Howse and Staiger. 'US-Sunset Reviews of AD Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan', in H. Horn and P.C. Mavroidis (eds), *The WTO Case Law of 2001–3* (2007) 601.

⁴⁰ There are other examples of soft behaviour by the Appellate Body. In the softwood lumber disputes, for example, the Appellate Body disregarded the explicit wording of Article 14 of the Agreement on Subsidies and Countervailing Measures 1994, 1867 UNTS 14, and it went on to justify the use of benefit calculation by the USA that did not correspond to any of the standards reflected in the exhaustive (on textual grounds, at the very least) list of this provision.

⁴¹ This issue is discussed at length in Mavroidis, *supra* note 35.

⁴² Grossman and Mavroidis. 'Recurring Misunderstandings of Non-Recurring Subsidies', in H. Horn and P.C. Mavroidis (eds), *The American Law Institute Reporters' Studies on WTO Case Law* (2007) 381.

and it does not diminish the credibility of a court to state that it has erred. The Court of Justice of the European Union certainly did not suffer when the judgment in its notorious *Keck and Mithouard* explicitly distanced itself from the prior case law.⁴³

There is worse. The Appellate Body never explained in its second decision under what conditions payment of market price exhausts benefits. And it did not ask the correct question in either of the reports, which, as Grossman and Mavroidis show, is whether the investment has (or has not) become infra-marginal.⁴⁴ The result is, predictably, confusion, and there is proof for it. Amazingly, the proof of confusion has been reflected in an Appellate Body report. In *EC – Large Civil Aircraft*, the three members of the division had three different opinions regarding the extinction of subsidies as a result of privatization at arm's length when a 'fair market value' had been paid.⁴⁵

4 The Appellate Body Legacy

Eric Stein offers this wonderful passage when trying to explain the merits of keeping the court – a decisive court – away from the public eye:

[T]ucked away in the fairyland Duchy of Luxembourg and blessed, until recently, with the benign neglect by the powers that be and the mass media, the Court of Justice of the European Communities has fashioned a constitutional framework for a federal type structure in Europe.⁴⁶

What will the Appellate Body members think of reports that are 120 pages long only to announce at the end that they could not decide the issue before them? What will they think of the confusion they have created through hundreds of pages where the same issue is discussed from all sorts of unnecessary angles only to confirm a decision they have reached in the first paragraph of the discussion?

A Political Deference versus Deference When in Uncertainty

The typical scenario when dealing with domestic policies would be a case where Home knows the rationale for regulating and has little incentive to inform Foreign about it. If Home reveals the truth (regulation is meant to protect the domestic matador), it goes to jail. If Home lies, then it might avoid jail. It is a classic prisoner's dilemma. The question for the judge will be to devise a test that will provide Home with the incentives to reveal the true information. Wise courts would, in the face of uncertainty, avoid committing a false positive. What did the Appellate Body do? It devised a 'no intent-cum-no trade effects' standard, which allows it, unconstrained by any methodological discipline, to decide cases brought before it.⁴⁷ Deference that the Appellate Body shows is the automatic consequence of the decision by regulators to protect human health. There is nothing more to it.

⁴³ Cases C-267/91 and C-268/91, *Criminal Proceedings against Bernard Keck and Daniel Mithouard*, [1993] ECR I-06097.

⁴⁴ *Ibid.*

⁴⁵ WTO, *European Communities – Measures Affecting Trade in Large Civil Aircraft – Report of the Appellate Body*, 18 May 2011, WT/DS316/AB/R, para. 726.

⁴⁶ Stein, 'Lawyers, Judges and the Making of a Transnational Constitution', 75 *AJIL* (1981) 1.

⁴⁷ See Grossman, Horn and Mavroidis, 'Domestic Instruments', in Horn and Mavroidis, *supra* note 23, 205, for a test that panels could usefully employ to operationalize nondiscrimination.

To avoid misunderstandings, I am not suggesting that the Appellate Body should view a measure aiming to protect health in the same way it reviews the legality of anti-dumping. Assuming the propensity to commit mistakes is the same across WTO-covered agreements, errors when a health policy is outlawed can be devastating, whereas, in the case of anti-dumping, they will be limited to pure trade damage. I am suggesting though, that, in the name of avoiding costly errors, the Appellate Body cannot do away with its self-imposed requirement to issue reasoned reports.⁴⁸

B Keep Them Happy

Overall, the members of the Appellate Body can take pride in the fact that they have not caused a major upheaval. Bar the issue of providing a stage for *amici curiae* – a rather inconsequential decision that surprisingly provoked a heated debate across the membership – no decision by the Appellate Body has provoked a (quasi) unanimous hostile reaction. Furthermore, the membership has not voted with its feet. Mavroidis and André Sapir provided empirical evidence to the effect that there is no forum diversion.⁴⁹ The number of disputes in the second decade of the Appellate Body is substantially lower than it was in the first decade,⁵⁰ but WTO members still litigate only before the WTO. Disagreements do occur, but no one has requested total recall.

C Keep Them Happy?

Mutually reinforcing accounts have been given on why the role of the judge is to 'complete' the contract through case law.⁵¹ Roughly, since trade agreements only through generic language can address the various issues of trade integration, judges, by specifying the rules to the facts of the case, can provide information about the coverage of existing disciplines as well as the manner in which they will be adjudicating future disputes. To perform this function, judges must privilege methodology over political sensitivity or any other similar concern. This is where the Appellate Body has failed, as the examples provided above have attempted to show.

5 Concluding Remarks

The negotiators of the Uruguay Round did not spend too much time thinking about the Appellate Body. It was thought of more as a counterweight to the automaticity in establishing panels and adopting their reports than anything else. Furthermore, it is an entity that operates under severe time constraints, which, as empirical analysis shows,

⁴⁸ WTO, *United States – Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb from New Zealand – Report of the Appellate Body*, 1 May 2001, WT/DS177/AB/R, para. 106.

⁴⁹ Mavroidis and Sapir, 'Dial PTAs for Peace: The Influence of Preferential Trade Agreements on Litigation between Trading Partners', 49 *Journal of World Trade* (2015) 351.

⁵⁰ Note that the WTO counted more members in its second decade than it did in its first.

⁵¹ Horn, Maggi and Staiger, 'Trade Agreements as Endogenously Incomplete Contracts', 100 *American Economic Review* (2010) 394; Maggi and Staiger, 'The Role of Dispute Settlement Procedures in International Trade Agreements', 126 *Quarterly Journal of Economics* (2011) 475.

it routinely respects.⁵² These are all mitigating factors that one should take into account when discussing the quality of its output. The Appellate Body was put in place in order to provide guidance regarding the manner in which panels should understand WTO law. It is one case at a time as far as the Appellate Body is concerned, and this should mean that it should cross that bridge when it comes to it and not before. Undeniably though, and by its own admission in its report on *US – Stainless Steel (Mexico)*, panels should cross that bridge in the way that it was showed to them and not in a different way.⁵³ The Appellate Body, thus, has the responsibility to ensure that panels will cross bridges in a particular way. This is what methodology amounts to. The Vienna Convention on the Law of Treaties is not a surrogate for the missing methodology.⁵⁴ It is a checklist of elements that the Appellate Body can, or may, take into account.

The Appellate Body seems to neglect all of this. The best proof that it has not honoured this task – its main task – is the number of panel reports that it modifies or reverses. It simply cannot be that people do not get it. There are cases, of course, where panels have consciously deviated from prior case law established by the Appellate Body. A couple of panels voluntarily did not adhere to the outlawing of zeroing by the Appellate Body, and they explained in plain English why this had been the case.⁵⁵ But there must be something wrong when panel reports cite the Appellate Body in support of their position, only to be reversed or modified by the Appellate Body a few weeks later. Reasoning in an (almost) endogenous manner (what is politically acceptable?), it has failed often enough to provide guidance on how to resolve disputes. Add the hundreds of totally useless pages that hide the few important paragraphs, and you have the whole nine yards.

Post Scriptum

As I was finishing this article, reports emerged to the effect that the USA was opposed to the reappointment of the Korean member of the Appellate Body.⁵⁶ The reason given, according to the reports at least, was that this member of the Appellate Body had participated in cases where the body had overstepped its mandate. This is the first major crisis since the *amici curiae* saga. In my view, this action misses the target. The real issues are the corporate governance of the body, the selection process, the background and the role of the Secretariat (the clerks). So far, the only scrutiny comes from the annual reports written by academics, and it is limited to the quality of the output.⁵⁷ The Appellate Body occupies only one provision in the DSU. It deserves substantially more thinking.

⁵² Horn, Johannesson and Mavroidis, 'The WTO Dispute Settlement System: 1995–2010: Some Descriptive Statistics', 45 *Journal of World Trade* (2011) 1107.

⁵³ WTO, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico – Report of the Appellate Body*, 30 April 2008, WT/DS344/AB/R, paras 158–62.

⁵⁴ Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331.

⁵⁵ Mavroidis, *supra* note 6, vol. 2, ch. 2, discusses them in detail.

⁵⁶ 'Inside US Trade', *World Trade Online* (14 May 2016).

⁵⁷ The American Law Institute (ALI) first put together a group of academics that met annually and discussed the case law of the previous year. This group has continued to meet annually and discuss the case law after the ALI left the project. Papers are annually published in a commercial review.