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Changes in the Jurisprudence of the WTO Appellate
Body During the Past Twenty Years

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Abstract

The paper examines changes in the jurisprudence of the WTO Appellate Body in three areas of law and concludes that the Appellate Body failed to acknowledge and cogently explain in each of these areas the changes it made. The paper concludes that all changes in jurisprudence reduce predictability but that predictability suffers even more when the changes are made in disguise because panels and Members then receive confused or conflicting normative signals. The paper argues that the Appellate Body should handle changes in jurisprudence more transparently and adopt internal procedures that make the need for them less likely.

Keywords

WTO Appellate Body, consistency of Appellate Body jurisprudence, internal decision making procedures of the WTO Appellate Body, application of judicial economy by WTO panels and the Appellate Body, the measure to be examined under Article XX of the GATT, other duties and charges permitted under Article II of the GATT.

Introduction*

David Unterhalter, who served on the Appellate Body from 2006 to 2013, points out “that the WTO dispute settlement system is required to provide security and predictability but does not create a formal norm of precedent. Yet, no observer of the practices of the dispute settlement system could fail to conclude that past decisions of the Appellate Body and the panels are central to the legal reasoning relied upon by litigants and adjudicators.”¹ In his view, the resort to precedents is not just lawyer’s habit or even a pragmatic way of disposing of a matter with economy. The past decisions carry weight because they are “bearers of the institution’s best efforts to render the covered agreements coherent and capable of being applied by the members of the WTO with consistency and predictability. That is a legacy of authority by reason, not diktat.”¹

Similar reasoning led the Appellate Body to conclude in *US - Stainless Steel (Mexico)* that

the legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the acquis of the WTO dispute settlement system. Ensuring "security and predictability" in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.²

Consistency of jurisprudence is in my view not only a principle of jurisprudence; it is also one of the political foundations of the WTO’s compulsory adjudication. Members may often be able to implement a ruling against them only if they can be confident that the interpretation on which the ruling against them was based will be applied equally to rulings on similar measures taken by any of the other 160 Members. A government that has to remove an obstacle to imports as a result of an adverse ruling may find it difficult to implement the ruling unless it can assure the political forces opposing the implementation that other countries would also have to remove similar obstacles in similar circumstances and that, as a result, what is lost on the import side will be gained on the export side. WTO Members abide by the rulings of panel and the Appellate Body with the expectation of reciprocity. Members prefer to have their measures examined under the dispute settlement procedures of the WTO rather those contained regional trade agreements because WTO procedures offer the advantage of near universal reciprocity: the party that lost the case in the WTO can invoke the interpretation on which the ruling against it was based by not only in future disputes with its regional trading partners but in those with virtually all its trading partners.

In short, consistency in the interpretation of WTO law ensures reciprocity, which in turn facilitate adherence to those rules and makes dispute settlement in the WTO an attractive alternative to dispute settlement under regional agreements. An Appellate Body ruling adverse to a Member that cannot be reconciled with a previous ruling, that is made without any cogently explained legal underpinning or that is so vague or so case-specific that it is incapable of general application deprives that Member of the assurance of reciprocal treatment by other Members and therefore undermines the acceptability of adverse rulings and the attractiveness of the WTO’s dispute settlement system.

* Formerly Director of the Legal Affairs Division of the GATT (1989-1994), Visiting Professor at the Georgetown University Law Center (1995 -1998) and Executive Director of the Advisory Centre on WTO Law (2001-2013). This paper builds on remarks that were presented at the WTO @ 20 Conference hosted by the European University Institute in Florence on 15 May 2015.

¹ David Unterhalter, *The authority of an institution: Appellate Body under review*, in: Gabrielle Marceau (ed.), *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System*, Oxford University Press 2015, page 473.

² Appellate Body Report, *United States - Final Anti-dumping Measures on Stainless Steel from Mexico*, WT/DS344 /AB/R para. 160.

While consistency of jurisprudence must for these legal and political reasons be a central objective of the Appellate Body, it cannot be its only objective. As Mitsuo Matsushita, who was a member of the Appellate Body from 1995 to 2000, points out “as a human institution, the Appellate Body cannot assume infallibility”.³ Each case before the Appellate Body not only presents new legal issues but also frequently opens new perspectives on issues already ruled upon, and therefore invites, and sometimes compels, a reconsideration of previous rulings. Given the extreme complexity of WTO law, it is often difficult to foresee all the legal consequences of an interpretation. A new case may for these reasons reveal that the application of an interpretation that offered a reasonable solution to one dispute would have unacceptable consequences in another. David Unterhalter, with his vast experience as an adjudicator, concluded: “Plainly, given the large number of decisions taken by the Appellate Body, there will be instances where an interpretational turn was taken that might now seem doubtful. There are cases where time and reflection might suggest that a line of reasoning is unavailing or an application of law to fact could have done differently. Any adjudicator who takes important decisions on significant contested issues arising from disputed interpretations may occasionally fall into error.”⁴ The objective of creating legal certainty through consistent jurisprudence can for these reasons come into conflict with the more fundamental objective of administering justice.

In domestic law, the interpretation on which a judicial ruling is based can be changed or corrected by the legislator. In the WTO, a legislative response to Appellate Body rulings is unavailable because the WTO’s procedures for amendments and authoritative interpretations are inoperative. The WTO has not yet been able to amend the text of any of the WTO agreements. Also the procedures for authoritative interpretations by the Ministerial Conference or General Council have never been successfully applied. Mitsuo Matsushita therefore rightly concluded “that one cannot expect that either the Ministerial Conference or the General Council could effectively come up with a new rule to remedy an incorrect or undesirable Appellate Body report”.⁵

The Appellate Body reports are binding on the parties to the dispute only if they are adopted by the Dispute Settlement Body (DSB), which theoretically permits the membership of the WTO to reject reports with incorrect or unacceptable interpretations. However, the Appellate Body reports are presumed adopted unless all Members present at the DSB meeting, *including the parties to the dispute*, decide otherwise.⁶ In the unlikely event that the respondent *and the complainant* agree that an Appellate Body report should not be adopted, they can be expected to agree that the complaint be withdrawn rather than take the risk of not being able to secure in the DSB the consent to the non-adoption of the report of all third Members present.⁷ It is therefore not surprising that the negative consensus requirement has never been met and the requirement of DSB approval has not permitted the membership of the WTO to exercise control over the results of dispute settlement proceedings.

³ Mitsuo Matsushita *Reflections on the functioning of the Appellate Body* in: Gabrielle Marceau (ed.), *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System*, Oxford University Press 2015, page 557.

⁴ David Unterhalter, *The authority of an institution: Appellate Body under review*, in: Gabrielle Marceau (ed.), *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System*, Oxford University Press 2015, page 472.

⁵ Mitsuo Matsushita *Reflections on the functioning of the Appellate Body* in: Gabrielle Marceau (ed.), *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System*, Oxford University Press 2015, page 557.

⁶ Article 17:14 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

⁷ I presume here that, even after the issuing of the Appellate Body report, the complainant has the right to withdraw the complaint provided of course that the respondent agrees. I believe that this follows, *inter alia*, from DSU’s preference for solutions mutually acceptable to the parties to the dispute (Article 3:7). If the requirement of DSB adoption has any useful legal function at all, it is that it permits the parties to a dispute to settle their dispute by mutual agreement after they have taken cognizance of the Appellate Body’s reasoning.

For these reasons the WTO lacks the system of checks-and-balances that characterises modern constitutional governments.⁸ In practice, only the Appellate Body can therefore authoritatively determine the meaning of the provisions of WTO and only the Appellate Body can change that determination. This dual monopoly exposes the Appellate Body to a thorny problem. On the one hand, it is expected to respect the precedents it created so as to foster predictability and ensure the uniform treatment of Members; on the other hand, it is expected to settle each case in a manner that is soundly reasoned and makes practical sense. When a mistake has been made, it must therefore arbitrate between the expectation of stability and the need for change and hence perform an essentially legislative function. Moreover, it must recognize, acknowledge and remedy mistakes it made itself – a humanly difficult task. This task is further complicated by the fact that it must be undertaken collectively within the framework of internal procedures that do not specifically address the problem.

What has the Appellate Body done when its own rulings in past cases stood in the way of a legally sound ruling in a new case? How should it handle such instances in the future? It is these two questions that I would like to examine. I will begin by briefly looking at three areas of law in which the Appellate Body changed its jurisprudence. I have chosen those areas because they touch upon basic issues of WTO law that are of interest to all Members. I will then examine how the Appellate Body proceeded when it made a change. I will conclude by offering some suggestions on how the Appellate Body might deal with changes in jurisprudence in the future.

Examples of changes in Appellate Body jurisprudence

Judicial economy

In *US – Shirts and Blouses* the Appellate Body addressed for the first time the question which rulings a panel must make to resolve the dispute. It was the first case under the GATT and the WTO in which a panel used the concept of judicial economy to justify its refusal to address a matter raised by the complainant. In that case, the Panel did not rule on two aspects of a safeguard measure taken by the United States under the Agreement on Textiles and Clothing (ATC), namely the adequacy of prior consultations and the retroactive implementation of the measure. The Panel felt that it had resolved the dispute by declaring the US safeguard action to be inconsistent with the ATC for other reasons and that it could therefore exercise judicial economy on these aspects of the measure.

India appealed. Its main contention was that the Panel's limited rulings gave the United States the option of introducing a new safeguard measure with the same defects and then new litigation on issues that had already arisen would be necessary. It was thus not raising theoretical issues, but rather "a practical concern relating to the implementation of the Panel's recommendations by the United States."⁹ The Appellate Body rejected the appeal declaring that the DSU was not "meant to encourage either panels or the Appellate Body to 'make law' by clarifying existing provisions of the *WTO Agreement* outside the context of resolving a particular dispute".¹⁰ It thus considered the dispute resolved because one aspect of the measure had been found to be inconsistent with the ATC even though the other aspects of the measure on which no ruling had been made could become relevant during implementation process.

⁸ Mitsuo Matsushita *Reflections on the functioning of the Appellate Body* in: Gabrielle Marceau (ed.), *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System*, Oxford University Press 2015, page 557 and

⁹ Appellate Body Report, *United States- Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, page 6.

¹⁰ Appellate Body Report, *United States- Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, page 19.

In *Australia - Salmon* the Appellate Body made a ruling that implicitly accepted the argument that India had presented in *US - Shirts and Blouses*. It found:

A panel has to address those claims on which a finding is necessary in rulings so as to allow for prompt compliance ... In this case, for the Panel to make findings concerning violation of Article 5.1 with respect to other Canadian salmon, without also making findings under Articles 5.5 and 5.6, would not enable the DSB to make sufficiently precise recommendations and rulings ... An SPS measure which is brought into consistency with Article 5.1 may still be inconsistent with either Article 5.5 or Article 5.6, or with both.¹¹

One way of exercising judicial economy is to make an assumption *arguendo*. The first case in which the Appellate Body proceeded on the basis of a legal assumption was *Turkey – Textiles*.¹² The central question in that case was whether Turkey could invoke the customs union provisions of Article XXIV of the GATT to justify import restrictions on textiles that were found to be inconsistent with Articles XI and XIII of that Agreement. The EU, but not Turkey, was entitled to maintain certain restrictions on imports of textiles under the transitional provisions of the ATC. Turkey argued that it could apply the same restrictions as the EU because it was forming a customs union with the EU. The Panel, predictably, ruled that Article XXIV did not authorise the application of new import restrictions on the occasion of the formation of a customs union and Turkey, predictably, appealed this ruling.

The Appellate Body concluded that Turkey could institute a system of certificates of origin enabling the EU to distinguish between textiles originating in Turkey and textiles originating in third countries. The formation of the customs union with the EU therefore did not require the application of restrictions identical to those applied by the EU. The Appellate Body concluded from this that Turkey had not demonstrated that the formation of a customs union between Turkey and the European Communities would be prevented if it were not allowed to adopt these restrictions and that Article XXIV was therefore not available to Turkey as a defence.¹³ The Appellate Body added:

We wish to point out that we make no finding on the issue of whether quantitative restrictions found to be inconsistent with Article XI and Article XIII of the GATT 1994 will *ever* be justified by Article XXIV. We find only that the quantitative restrictions at issue in the appeal in this case were not so justified.¹⁴

The Appellate Body thus essentially concluded that Turkey and the EU could form a customs union under Article XXIV without harmonizing their trade policies in the field of textiles. That conclusion would have required an examination of the question of whether they would in that case still apply “substantially the same regulations of commerce” as required by Article XXIV. But neither party had submitted any facts or claims on this issue. Nor had the panel made any factual findings in that respect. Instead of ruling on the legal issue decided by the Panel and appealed by Turkey (“Can Article XXIV justify inconsistencies with Articles XI and XIII?”) the Appellate Body ruled on an issue that neither the parties nor the panel had considered relevant to the resolution of the dispute (“Would the EU and Turkey apply substantially the same regulations if they did not harmonize their restrictions on textiles?”) This modified drastically Turkey’s implementation options. It could not, as it had claimed, maintain the restrictions irrespective of the substantially-the-same requirement; it could maintain them only to the extent that all divergences between its external trade policies and those of the EU taken together, including those in the field of textiles, conformed to “substantially-the-same” requirement.

¹¹ Appellate Body Report, *Australia - Measures Affecting Importation of Salmon*, WT/DS18/AB/R, para. 224.

¹² Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Imports*, WT/DS34/AB/R.

¹³ Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Imports*, WT/DS34/AB/R, para. 62.

¹⁴ Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Imports*, WT/DS34/AB/R, para. 65.

In *China – Publications and Audiovisual Products*¹⁵, the Appellate Body adopted an entirely different attitude towards the use of an assumption *arguendo*. A central issue before the Panel in that case was whether China could invoke Article XX(a) of the GATT, which permits measures “necessary to protect public morals”, as a direct defence for breaches of China's trading rights commitments as set out in its Accession Protocol. The Panel decided not to rule on this issue because China had in any event not established that the measures at issue satisfy the requirements of Article XX(a). The Appellate Body rejected the Panel's approach: “...reliance upon an assumption *arguendo* is a legal technique that an adjudicator may use in order to enhance simplicity and efficiency in decision-making”, but the use of this technique “may detract from a clear enunciation of the relevant WTO law and create difficulties for implementation”.¹⁶ It then proceeded to make a ruling on the general question of whether Article XX(a) of the GATT could be invoked in respect of China's Accession Protocol. It did not explain why the Panel's failure to rule on this issue detracted from a clear enunciation of the WTO law relevant to the resolution of the dispute and why it created difficulties for implementation, and I do not see how it did.¹⁷

To summarize: In *US – Shirts and Blouses* the Appellate Body declared a dispute on a safeguard measure with multiple legal defects to be resolved through a ruling on one of these defects. A ruling on the other defects was declared to be impermissible law making outside the context of the resolution of a dispute. The Appellate Body reversed this ruling in *Australia – Salmon* by requiring panels to make rulings on all issues that could arise in the course of implementation. In *Turkey – Textiles* the Appellate Body used an assumption *arguendo* to avoid a ruling on the central legal issue appealed by Turkey and thereby changed Turkey's implementation options. In *China – Audiovisuals* it required panels to avoid assumptions *arguendo* when this would prevent a clear enunciation of the relevant WTO law and to cause difficulties in implementation without however explaining why its additional rulings were required to resolve the dispute and how they changed China's implementation options.

The determination of the scope of the finding and rulings required to resolve the case is one of the most difficult issues a judge has to face. Clearly, the judge must have discretion in structuring the legal analysis of the case and in determining the issues that need to be addressed to resolve it. However, the right to exercise judicial economy cannot be limitless and must be based on basic principles uniformly applied in all cases. Appellate Body guidance was therefore necessary to ensure uniformity.

That guidance was not provided.

There is no legal rationale for the differences in the approaches to judicial economy in cases I reviewed. In fact, the Appellate Body has never identified the scope of the rulings required to resolve a case as a generic issue cutting across the exercise of judicial economy and the use of assumptions *arguendo*; consequently it also did not develop a coherent legal standard on this issue. This legal void creates a moral hazard for both panelists and Appellate Body members. Preoccupied with their internal difficulties to reach a common view, they may at times look inside rather than out when the determining the scope of their rulings: they resort to judicial economy on issues on which no consensus can be reached and make unnecessary rulings when this helps them reach a consensus, all the while losing the legitimate interests of the parties out of sight. The obvious solution would be for the Appellate Body to approach the scope of the rulings required to resolve the case as a generic issue, set clear standards for both panels and the Appellate Body and apply those standards consistently.

¹⁵ Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R.

¹⁶ Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R para. 213

¹⁷ Frieder Roessler, *Comment: Appellate Body Ruling in China-Publications and Audiovisual Products*, in: *The WTO Case Law of 2009: Legal and Economic Analysis*, edited by Henrik Horn Peter C. Mavroidis, American Law Institute, 119-131. Cambridge [etc.]: Cambridge University Press, 2010.

The measure to be examined under Article XX of the GATT

The first issue that arises in the analysis of a defence under any of the ten public policy exceptions of Article XX of the GATT is that of the precise identification of the “measure” that requires justification. I would like to explain the importance of identifying this measure with an example. Suppose a Member adopts a law that prohibits advertisements for all tobacco products but exempts domestic products for a period of five years. Suppose further that the panel found the law to be inconsistent with Article III:4 of the GATT because it accords imported tobacco products treatment less favourable than that accorded to like domestic products and now turns to the defendant’s assertion that the law is necessary to protect human health and therefore justified under Article XX(b) of the GATT. At this point in the analysis, it must identify the measure that must be demonstrated to be necessary. The Appellate Body addressed this issue in three different cases: *US – Gasoline*,¹⁸ *Thailand – Cigarettes (Philippines)*¹⁹ and *EC – Seal Products*.²⁰ The panel would find in these cases support for three different approaches to the identification of the measure:

- *US – Gasoline*: The provisions of the law affecting domestic products and those affecting imported products, “taken as whole”, are the measure to be examined. In this case, the panel would examine whether it is necessary to prohibit the advertisement of imported tobacco products and later also that of domestic products to protect human health. The panel would then examine such matters as the health effects of smoking, the impact of advertisement bans on the incidence of smoking and alternative, less trade-restrictive anti-smoking policies available to the defendant. If it finds that the law is indeed necessary to protect human health, it will examine the measure under the chapeau of Article XX, according to which measures falling under any of the sub-paragraphs of Article XX are subject to the requirement that they are not “applied in a manner which would constitute ... a disguised restriction on international trade”. At this point in the analysis it will examine the difference in the treatment of domestic and imported tobacco products and will presumably find that, because of that difference, the law is applied in manner that constitutes a disguised restriction on trade.
- *Thailand – Cigarettes (Philippines)*: The measure is the aspect of the law that was found to be inconsistent with Article III:4, namely the difference in the treatment of domestic and imported tobacco products that led to the finding of inconsistency. The panel would find that the difference in treatment is not necessary to protect human health and that the measure is not justified under Article XX(b). The analysis under Article XX would stop there; an examination of the measure under the chapeau of Article XX would not be necessary.²¹

¹⁸ Appellate Body Report, United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R.

¹⁹ Appellate Body Report, Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines, WT/DS371/AB/R.

²⁰ Appellate Body Reports, European Communities – Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS400/AB/R WT/DS401/AB/R.

²¹ If, in respect of national-treatment violations, the difference in treatment is defined as the measure to be examined under Article XX and the respondent invokes one of the three subparagraphs of Article XX under which the measure must be proven to be “necessary”, the chapeau of Article XX will normally not be relevant: It is unlikely that the panel will find the measure at issue to be “necessary” to achieve the public policy goal but nevertheless consider it to be a means of unjustifiable discrimination or a disguised restrictions on trade. However, in respect of invocations of sub-paragraphs under which the measure must only be proven to be “related to” or “involving” certain policy goals, the chapeau will remain relevant. It should be noted in this context that the wording of Article XX distinguishes between the adoption or enforcement of measures and the manner of their application: The sub-paragraphs apply to the former; the chapeau applies only to the latter. However, that distinction is irrelevant to the findings of inconsistency under the basic provisions of the GATT: a regulation can be found to be inconsistent either “as such” or “as applied”. It would be incongruous to distinguish under Article XX between the regulation as such and as applied: the measure found to be inconsistent, be it the regulation as such or the application of the regulation, and the measure to be justified under Article XX must logically be the same. In practice, the distinction made in the text of Article XX has therefore been ignored and the chapeau has operated as a provision setting out requirements that the measure to be justified must meet in addition to those set out in the sub-paragraphs.

- *EC – Seal Products*: The measure is the advertisement ban and the exceptions from that ban, taken together. In this case the panel would essentially proceed as in *US – Gasoline* but examine in addition whether the net impact of the ban and the time-bound exception for domestic cigarettes taken together is such as to contribute to a reduction in smoking. If it finds that this is so, it would move to the chapeau and will presumably find that, because of that difference, the law is applied in manner that constitutes a disguised restriction on trade.

Under all three approaches the final result is the same: the difference in the treatment of domestic and imported cigarettes cannot be justified under Article XX. However, the scope of the findings required to arrive at this conclusion and the evidentiary burden borne by the parties differ significantly under the three approaches.

- Under the *Thailand - Cigarettes (Philippines)* approach, the panel only has to examine whether the difference in the treatment of domestic and imported cigarettes is necessary to protect human health. In this case, the panel limits its examination precisely to the aspect of the law challenged by the complainant and addresses an essentially technical issue that falls squarely into the realm of WTO law and that can be resolved quickly with a minimum of evidence. (“Must the respondent treat imported tobacco products less favourably than domestic tobacco products in order to achieve its health objectives?”)
- Under *US - Gasoline* approach, the panel has to examine not merely the discriminatory treatment it found to be inconsistent with Article III:4 but the law as whole. It is therefore required to extend its examination to matters that were not challenged by the complainant. (“Do advertisement bans reduce the incidence of smoking?”) It must delve into factually complex and politically sensitive issues on which WTO law gives no normative guidance, with a concomitant increase in the evidentiary burden borne by the parties.
- Under the *EC – Seal Products* approach, the panel’s analysis would be even more complex because it would have to evaluate not only the impact of the ban but also the impact of the exception and then examine whether their net impact is such as to reduce the incidence of smoking (“Does the law reduce the incidence of smoking or does it merely shift the origin of tobacco products consumed from foreign to domestic sources?”). Needless to say that the complexity of issues and the evidentiary burden borne by the parties is the greatest under this approach.

Why should the anti-smoking law as a whole be *analysed* even though only certain aspects of that law must be *justified*? The complainant’s claims under the GATT and the findings of inconsistency of the panel do not relate to the system as whole, only to certain features of that regime. What purpose is then served by providing the respondent with the benefit of an analysis of the regime as whole?

I can see only a political purpose.

The analysis of the regime as a whole gives the respondent the possibility to present the result of the dispute settlement proceeding as a win on a central issue. It can announce: “The WTO has confirmed that our anti-smoking regime is necessary to protect the health of our population. Only certain technical aspects of that regime have been found to be inconsistent with WTO law.” By analysing the regime as a whole the panel provides the respondent with rulings that are not legally necessary but can be politically helpful in the implementation process. I believe that it is for this reason that it is normally the respondent that insists on the examination of the regime as whole: the United States did so in *US - Gasoline* case and the EU in *EC - Seal Products*. It is also possible that the panel or the Appellate Body division assigned to the case finds it easier reach an internal consensus on the measure at issue if it can include in its report not only negative findings on the discriminatory aspect of the measure but also positive findings on the overall objective of the law.

These considerations may explain why the respondent usually requests an examination of the law as whole and why the Appellate Body has acceded to this request in two cases. However, I see no

legal reason justifying the examination of matters on which the complainant did not request a ruling. A complainant has the right to determine the factual and legal contours of the matter submitted to the panel. The respondent has the right to choose its defences. But that right does not comprise a right to an examination of matters on which the complainants did not request, and on which the panel did not make, any rulings. Moreover, by satisfying the political needs of the respondent or their own desire to reach an internal consensus, panels and the Appellate Body are drawn into the assessment of policies that do not fall into the purview of the GATT. Thus, under the GATT Members are free to impose advertisement bans on tobacco products and panels would nevertheless have to examine whether advertisement bans are required to reduce the incidence of smoking. This can prompt justifiable complaints that the WTO is opining on matters outside its jurisdiction and expertise.

It is established jurisprudence that the purpose of a measure must be determined objectively, namely by examining the design, architecture and structure of the measure, not the declared intentions of the legislator. To exclude a priori from this examination certain elements in the design, architecture and structure of the measure, in particular any discriminatory aspects, seems to me to be at odds with this jurisprudence. The determination of the purpose of the measure will then vary with the elements of the measure excluded from the examination and is then bound to be arbitrary.

For all these reasons, the definition of the measure to be examined under Article XX has important procedural, institutional and political consequences and should therefore be approached with great care. I will now review in detail how the Appellate Body approached this issue.

In *US – Gasoline* the Panel - the first panel established under the WTO - examined

...whether the precise aspects of the Gasoline Rule that it had found to violate Article III – the less favourable baseline establishment methods that adversely affected the conditions of competition for imported gasoline – were primarily aimed at the conservation of natural resources.²²

The Panel found that the less favourable treatment of imported gasoline was not primarily aimed at the conservation of natural resources and could therefore not be justified under Article XX(g).

The Appellate Body stated that there was “certain amount of opaqueness” in the Panel’s reasoning because

...the Panel asked itself whether the "less favourable treatment" of imported gasoline was "primarily aimed at" the conservation of natural resources, rather than whether the "measure", i.e. the baseline establishment rules, were "primarily aimed at" conservation of clean air. In our view, the Panel here was in error in referring to its legal conclusion on Article III:4 instead of the measure in issue. The result of this analysis is to turn Article XX on its head. Obviously, there had to be a finding that the measure provided "less favourable treatment" under Article III:4 before the Panel examined the "General Exceptions" contained in Article XX. That, however, is a conclusion of law.²³

The Appellate Body then examined under Article XX(g) “the base line establishment rules, taken as whole (that is, the provisions relating to the establishment of baselines for domestic refiners, along with the provisions relating to baselines for blenders and importer of gasoline)” and found that they were primarily aimed at the conservation of natural resources. It proceeded to examine the differences in treatment identified by the panel under the chapeau of Article XX and found that they, “in their application, constitute ‘unjustifiable discrimination’ and a ‘disguised restriction on international trade’.”²⁴

²² Panel Report, United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/R para. 6.40.

²³ Appellate Body Report, United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R pages 15 -16.

²⁴ Appellate Body Report, United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, pages 19 - 29.

It is difficult to see the basis of the criticism of the panel by the Appellate Body. The panel made clear that it was not examining under Article XX(g) its legal conclusions on Article III:4 but rather “the precise aspects of the Gasoline Rule that it had found to violate Article III”, namely the difference in treatment of imported and domestic products. It clearly defined this difference in treatment as the measure to be examined, not its legal conclusions on that difference.

One cannot extract from Appellate Body’s report a reason for its conclusion. It postulates that the “measure” was the baseline establishment rules taken as a whole. However, whether that was so, was precisely the question before it. It further postulates that “less favourable treatment” was a conclusion of law, thereby *a priori* negating the possibility that the difference in the treatment of domestic and imported gasoline could be regarded as the “measure”. The Appellate Body failed to provide a cogent explanation why a whole legal regime should be examined under Article XX when only one of its features required justification. One wonders what motivated the Appellate Body, in its very first report, to castigate the panel’s reasoning with condescending language and to address the substance of the issue before it with a *petitio principii*.

In *Thailand – Cigarettes (Philippines)* had another opportunity to rule on the issue. This time it found:

...when Article XX(d) is invoked to justify an inconsistency with Article III:4, what must be shown to be ‘necessary’ is the treatment giving rise to the finding of less favourable treatment. Thus, when less favourable treatment is found based on differences in the regulation of imports and of like domestic products, the analysis of an Article XX(d) defence should focus on whether those regulatory differences are ‘necessary’ to secure compliance with ‘laws or regulations’ that are not GATT-inconsistent.²⁵

The Appellate Body referred in this context to the GATT panel in *US – Section 337*, which had ruled:

... what has to be justified as “necessary under Article XX(d) is each of the inconsistencies with another GATT Article found to exist, i.e. in this case, whether the differences between Section 337 and federal district court procedures that result in less favourable treatment of imported products ... are necessary.”²⁶

The Appellate Body did not mention its earlier ruling in the *Gasoline* case with one word, perhaps understandably so because that ruling lacked what David Unterhalter so elegantly described as “a legacy of authority by reason”.²⁷

The most recent case in which the question of the measure to be analysed under Article XX arose is *EC – Seal Products*. This case concerned an EU regulation that prohibited the placing on the market of seal products except, *inter alia*, products that were from hunts traditionally conducted by Inuit and other indigenous communities (IC exception) or by-products of hunting conducted for the sole purpose of the sustainable marine resource management (MRM exception).

The panel found that the EU Seal Regime was inconsistent with Article III:4 of the GATT mainly because the difference in the treatment of products from IC hunts as compared to the treatment of products from “commercial” hunts entailed de facto a less favourable treatment of imported seal products. The EU invoked as a justification primarily the public morals exception of Article XX. The complainants argued that the measure that had to be considered under Article XX was the difference in the treatment of domestic and imported seal products since that aspect of the EU Seal Regime had given rise to the finding of inconsistency. The EC argued that the regime as a whole should be

²⁵ Appellate Body Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/AB/R para. 1.77.

²⁶ GATT 1947 Panel report in *United States – Section 337 of the Tariff Act of 1930*, paras 5.25-5.27.

²⁷ See above page 1.

considered. The panel, referring to *US - Gasoline* as the guiding precedent, reached the following conclusion on this issue:

... although it is the aspects of the EU Seal Regime infringing the GATT 1994 (i.e. the IC and MRM exceptions) that must be *justified* under Article XX, our *analysis* under paragraphs (a) and (b) should first focus on the EU Seal Regime as a whole; it is the EU Seal Regime as a whole that pursues the European Union's identified objective, rather than the exceptions on their own independently from the ban.²⁸

Norway appealed this ruling and thereby put the Appellate Body in a dilemma: Which of the applicable precedents should it apply: *US – Gasoline*, on which the Panel had based its approach, or *Thailand – Cigarettes (Philippines)*, which supported Norway's contention? The Appellate Body attempted to tackle this dilemma by negating the contradiction between these precedents. It explained:

In *US – Gasoline*, the Appellate Body clarified that it is not a panel's legal conclusions of GATT-inconsistency that must be justified under Article XX, but rather the provisions of a measure that are infringing the GATT 1994. Similarly, in *Thailand – Cigarettes (Philippines)*, the Appellate Body observed that the analysis of the Article XX(d) defence in that case should focus on the 'differences in the regulation of imports and of like domestic products' giving rise to the finding of less favourable treatment under Article III:4. Thus, the aspects of a measure to be justified under the subparagraphs of Article XX are those that give rise to the finding of inconsistency under the GATT 1994.²⁹

In this paragraph, the Appellate Body links the references to the *US – Gasoline* and the *Thailand – Cigarettes (Philippines)* cases with the word "similarly", thereby suggesting that it arrived at similar conclusions on the measure to be considered in these cases. In fact the Appellate Body had castigated the panel in the *US – Gasoline* case for taking the approach that the Appellate Body subsequently adopted itself in the *Thailand – Cigarettes (Philippines)* case. The concluding sentence begins with the word "thus" thereby implying incorrectly that examining the rules applicable to imported and domestic products as a whole, as in the *US – Gasoline*, and examining the difference in treatment resulting from those rules, as in the *Thailand – Cigarettes (Philippines)* case, is legally equivalent. The misleading presentation of the applicable precedents in this paragraph is disconcerting.

The Appellate Body adopted in the subsequent paragraphs a novel approach to the issue that, in its view, can be reconciled with both precedents. It explained that:

... in the context of the claims under Article III:4 of the GATT 1994, we note that the Panel's finding that the measure accords treatment to Canadian and Norwegian seal products that is less favourable than the treatment accorded to EU seal products was based on an examination of the combined operation of the permissive component of the EU Seal Regime (i.e. the MRM exception, which allows the placing on the market of seal products of EU origin), together with the prohibitive component (i.e. the 'ban' that restricts market access for Canadian and Norwegian seal products) ... the permissive aspect of the MRM exception and the requirements thereunder would not have led to a finding of violation under Article III:4 in the absence of the "ban".³⁰

The Appellate Body concluded from this that, "what must be justified is both the prohibitive and permissive components of the EU Seal Regime, taken together."³¹ What the Appellate Body means when it says that the components must be examined "together" becomes clear when it analyses the

²⁸ Panel Reports Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seals Products*, WT/DS400/R WT/DS401/R, para. 7.624 (emphasis original).

²⁹ Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seals Products*, WT/DS400/AB/R WT/DS401/AB/R EC – Seals Products (AB) para. 5.185.

³⁰ Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seals Products*, WT/DS400/AB/R WT/DS401/AB/R, para 5.193.

³¹ Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seals Products*, WT/DS400/AB/R WT/DS401/AB/R, para 5.189.

claim of the complainants that the effect of the ban and the exceptions was to alter trade patterns but not seal welfare and the incidence of inhumanely killed seals. What the Appellate Body considered relevant in this analysis was neither the seals regime as a whole nor the difference in the treatment of domestic and imported seal products but rather whether the application of the prohibitive and permissive components of the regime resulted in a net overall contribution to the identified objective.³²

The *EC – Seal Products* case illustrates that the *US – Gasoline* approach can lead to an enormous increase in the factual and normative complexity of the issues to be argued by the parties and decided by the adjudicator. Among the matters that the Appellate Body was obliged to consider as a result of the Panel’s decision to follow the *US – Gasoline* approach were the following:

- Whether the Panel was required to assess whether the seal welfare risks associated with seal hunts exceed the level of welfare risks accepted by the EU in other situations such as terrestrial wildlife hunts;
- Whether the positive and negative contributions of the different elements of the measures resulted in a net overall contribution to the identified objective; and
- Whether the panel had grounds for concluding that IC and MRM hunts lead to poorer seal welfare than commercial hunts and whether the Seal Regime resulted in the replacement of seal products from hunts with lower seal welfare risks to products from hunts with greater seal welfare risks.³³

On all of these matters little solid evidence was available and WTO law provided no normative guidance to resolve them. The Appellate Body returns to the difference in treatment that gave rise to the finding of inconsistency under Article III of the GATT only at the very end of its lengthy reports when it examines whether the EU seal regime meets the requirements of the chapeau of Article XX. In that context its main conclusion is that

...the European Union has failed to demonstrate. . . how the discrimination resulting from the manner in which the EU Seal Regime treats IC hunts as compared to "commercial" hunts can be reconciled with, or is related to, the policy objective of addressing EU public moral concerns regarding seal welfare.³⁴

If the Appellate Body had defined the difference in treatment of domestic and imported seal products as the “measure” and had consequently examined whether that difference was necessary to protect public morals, it could have concluded the case without a lengthy examination of the necessity of the Seal Regime as a whole, without opining on aspects of that regime that have not been found to be inconsistent with the basic provisions of the GATT and without an evaluation of policy matters that fall outside the purview of the GATT.

When addressing the question of the measure to be examined under Article XX in the *EC - Seal Products* case the Appellate Body did not acknowledge that it had to choose between two entirely different prior rulings. It simply declared the rulings in the prior cases to be consistent with one another. It then developed a third approach to the issue under which it examined the net overall contribution of the prohibitive and permissive components of the regime and declared also that new approach to be consistent with both precedents. Appellate Body obfuscated the contradictions between its three rulings and created thereby enormous legal confusion for Members litigating cases involving Article XX and panels adjudicating such cases.

³² Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seals Products*, WT/DS400/AB/R WT/DS401/AB/R, paras. 5.3.2.4 - 5.3.2.6.

³³ Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seals Products*, WT/DS400/AB/R WT/DS401/AB/R, paras. 5.194 – 5.280.

³⁴ Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seals Products*, WT/DS400/AB/R WT/DS401/AB/R, para. 5.320.

Other duties and charges on importation

In *India – Additional Duties* India did not submit any evidence that would have permitted the panel and the Appellate Body to decide whether the duties that India imposed in addition to its ordinary customs duties met the requirements of Article II:2(a) of the GATT, which permits the imposition of charges on or in connection with importation that are equivalent to sales or value-added taxes and other such internal charges. The United States, the complainant, had not submitted sufficient evidence on that matter either. Each side considered that the other had the burden of supplying the evidence. Since the panel came to the rather surprising conclusion that that burden fell on the United States, it concluded that the United States had failed to demonstrate that India's additional duties were inconsistent with Article II:1(b).³⁵

Given the lack of evidence, the Appellate Body did not determine whether the additional duties applied by India were covered by Article II:2(a) of the GATT but it did rule under what circumstances that would not be the case. It stated in its Conclusions that it:

... considers that the [additional duties] would not be justified under Article II:2(a) of the GATT 1994 insofar as it results in the imposition of charges on imports in excess of the sales taxes, value-added taxes, and other local taxes or charges that India alleges are equivalent to the [additional duties]; and, consequently, that this would render the [additional duties] inconsistent with Article II:1(b) *to the extent that it results in the imposition of duties in excess of those set forth in India's Schedule of Concessions*.³⁶ (emphasis supplied)

The Appellate Body's „consideration“ related to a measure that had not been proven to exist, but that might have existed or might be taken in the future. In substance, the „consideration“ is an advisory opinion on an abstract legal issue, not a ruling subsuming a specific measure under a provision of WTO law. The Appellate Body's novel initiative in this case can hardly be reconciled with Article 17 of the DSU, which does not give the Appellate Body the authority to issue advisory opinions, and with the Appellate Body's own ruling in *Turkey - Textiles* that the DSU was not “meant to encourage either panels or the Appellate Body to ‘make law’ by clarifying existing provisions of the *WTO Agreement* outside the context of resolving a particular dispute”.³⁷

While the Appellate Body went to the edges of its mandate, and possibly beyond, with the laudable intention to assist the parties in resolving their differences, it created nothing but confusion for them. Import duties and charges other than ordinary customs duties are prohibited in respect of bound items irrespective of their level. Duties and charges on bound items that existed when the binding was made are permitted when their nature and level are recorded in a Member's Schedule, they do not exceed the level recorded in such Schedule, and they existed on the relevant date specified in the Understanding on Article II:1(b) of the GATT. Members have the right to levy duties and charges meeting these conditions irrespective of the level of their tariff bindings. The Appellate Body's consideration that India could impose duties other than customs duties *provided their level does not exceed the tariff bindings in its Schedule* is therefore incorrect. The Appellate Body misconstrued Article II:1(b) as imposing a cap on the total of all charges imposed on a bound item. In fact, this provision is intended to reduce the administrative burdens of importers by prohibiting in principle all charges on imports other than ordinary customs duties irrespective of the level of the tariff binding.

Article II:2(a) gives Members the right to levy charges on imported products equivalent to the charges they impose on domestic products. Contrary to the consideration of the Appellate Body, the

³⁵ Panel Report *India – Additional and Extra-Additional Duties on Imports from the United States*, WT/DS360/ R, paras. 7.298 and 7.393

³⁶ Appellate Body Report, *India – Additional and Extra-Additional Duties on Imports from the United States*, WT/DS360/AB/R, para. 321.

³⁷ Appellate Body Report, *United States- Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, page 19.

right of Members to levy on imports charges equivalent to those imposed on domestic products is in no way related to the level of their tariff bindings: A Member imposing a value-added tax of 20% on domestic products can therefore levy an equivalent charge on imported products even if it bound in its Schedule its customs duties at the level of 10%. Conversely, a Member levying a value-added tax of 10% could not consistently with Article II:2(a) levy an equivalent charge of 20% on imported products even if it bound its tariffs at the level of 20%. The Appellate Body's consideration that the application of such excess charges would be prohibited only if it results in the imposition of duties in excess of the bound rate is therefore also for this reason plainly incorrect.³⁸

The Appellate Body thus made an error with considerable consequences because, if left uncorrected, it would change completely the legal regime for import charges on the basis of which Members have exchanged their tariff concessions. That error had to be corrected. Fortunately, the Appellate Body did so, albeit vaguely and partially, in a report issued only six weeks later. In *China – Auto Parts*, it listed the types of charges distinguished under Articles II and III of the GATT, including “other duties and charges”, and added the following explanatory footnote:

We are also mindful that such duties and charges are permitted only when their nature and level are recorded in a Member's Schedule, they do not exceed the level recorded in such Schedule, and they existed on the relevant date specified in the *Understanding on Article II:1(b) of the General Agreement on Tariffs and Trade 1994*.³⁹

The footnote does not address an issue that arose in *China – Auto Parts*. One can therefore reasonably presume that its sole purpose was to reverse the ruling made in *India – Additional Duties*.

Article II:1(b) of the GATT makes the negotiated tariff commitments binding under WTO law. It is a central provision of the GATT, one of its “bread-and-butter” provisions known to all trade lawyers. It is regrettable that the Appellate Body was unable to apply it correctly. While the correction inserted into the report on *China - Auto Parts* was of course highly welcome, one can reasonably ask whether the manner in which the change was communicated was appropriate. We now have two contradictory rulings by the Appellate Body - one made visibly in the conclusions on a case, the other somewhat hidden in a purely explanatory footnote – and no explanation as to the relationship between them. The *lex posterior* principle does not seem to apply to Appellate Body rulings.⁴⁰ Formally, the two divergent rulings stand side-by-side. Any trade lawyer would of course invoke the “consideration” if asked to defend an additional import charge inconsistent with Article II of the GATT; the lawyer of the respondent would naturally invoke the footnote. The panel would then not quite know which of the two rulings it should apply and then the Appellate Body, upon appeal, would have no option but to communicate somehow that the later ruling trumps the former. If it does not do so clearly, the normative confusion it has created would continue.

Conclusions

The Members of the WTO intending to bring a complaint do not know which matters the panel or the Appellate Body will cover in their rulings because the Appellate Body has not developed a coherent jurisprudence clarifying which rulings panels are required to make to resolve a dispute. The Members do not know how to argue and prove their case under Article XX because of the variations in the

³⁸ For a detailed explanation see Frieder Roessler, Comment: *India – Additional and Extra-Additional Duties on Imports from the United States*. In: *The WTO Case Law of 2008: Legal and Economic Analysis*, edited by Henrik Horn Peter C. Mavroidis, American Law Institute, 265-272. Cambridge [etc.]: Cambridge University Press, 2010.

³⁹ Appellate Body Reports *China – Measures Affecting Imports of Automobile Parts* WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R, para. 141 and footnote 209.

⁴⁰ Note in that respect that the Appellate Body in *EC - Seal Products* went back to the approach on the measure to be examined under Article XX of the GATT that it had adopted in *US – Gasoline* and not the approach adopted in its later ruling in *Thailand - Cigarettes (Philippines)*.

Appellate Body's jurisprudence on the measure to be examined under that provision. And Members cannot be certain which of the charges that they impose on imports will be deemed to be consistent with the GATT because the Appellate Body has not clarified the relationship between a consideration offered in one case and a footnote in another. In all these cases the legal uncertainty does not arise from the Appellate Body's decision to change its jurisprudence but from its failure to acknowledge and cogently explain the change.

Every change in jurisprudence reduces predictability, whether it is made openly or in disguise. That is inevitable. However, if it is made in disguise, predictability suffers even more because panels and Members then receive conflicting or confused normative signals. If the Appellate Body makes a change but does not clearly communicate that a new ruling replaces a different previous ruling, then panels and Members are sent conflicting normative signals because they do not know on which ruling they should base their expectations. If the Appellate Body makes a change but declares or suggests that no change is taking place, it creates normative confusion. The Appellate Body's lack of transparency in dealing with changes in jurisprudence consumes for these reasons more of the precious capital of predictability than necessary.

Under the current working procedures of the Appellate Body the responsibility for deciding the case is assigned to a division consisting of three members. The division shall make every effort to take its decision by consensus. However, if no consensus can be reached the issue shall be decided by majority vote. The division has the obligation to exchange views with the other four members before it finalises the report. However, whatever the views expressed by the other members, the division has the final authority to decide the dispute.⁴¹ While a conflict of views within a division can be resolved through a majority vote, a conflict of views between the majority of a division (two of three members) and the majority of the Appellate Body members (four of seven members) cannot be resolved through a vote. This entails the risk that the outcome of a case is based on a legal approach that only two of the seven Appellate Body members favour and that a divergent approach favoured by the majority of members will prevail in future cases. The current procedures therefore do not prevent contradictory jurisprudence on issues on which the Appellate Body remains divided after the exchange of views. The former Appellate Body member Mitsuo Matsushita does not consider the procedures for the exchange of views useful and effective. In his opinion it would be preferable if all members of the Appellate Body together took the final decision on each report meeting in a "grand session".⁴²

The Appellate Body's practices related to changes in jurisprudence differ greatly from those of domestic courts of appeal that make, for the sake of legal certainty, their changes in jurisprudence explicit and that sometimes meet as a full bench to resolve a conflict of views between different sub-divisions of the court. I believe that the Appellate Body should similarly handle such changes more openly and directly and that it should adopt internal procedures ensuring that the need for such changes is less likely and that facilitate such changes when they are required.

⁴¹ Rules 4(3) and 4(4) of the Working Procedures for Appellate Review.

⁴² Mitsuo Matsushita *Reflections on the functioning of the Appellate Body* in: Gabrielle Marceau (ed.), *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System*, Oxford University Press 2015, pages 552-553.

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