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From the Green Room to the Court Room (And Back): Judicial Clarification of Ambiguity in WTO Law and the Effects on Subsequent Negotiations

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Abstract

The WTO provides an opportunity to observe the recent creation, development and operation of a "hard law" adjudicative legal system, with legal subjects of greatly varying degrees of power, embedded within an intensely political environment. Between these parallel political and legal communities there are numerous points of contact. At each point of contact one finds played out (or to be played out) and resolved, re-iteratively, the basic drama between power-based and rules-based approaches to disputes. An examination of the Dispute Settlement Understanding and of subsequent developments - from the particular perspective of a participant within the WTO legal system - suggests that the rules-based approach was initiated in a somewhat low profile manner. Once the process had been quietly booted-up, ambiguity and discretion embedded in the rules has been systematically crystallizing, under the influence of lawyers and adjudicators acting both in and out of the court room, so as to substantially further develop and consolidate a more complete rules-based operating system. This is something to which the Members themselves do not appear to have objected. In the long term, the fundamental driving motor for this process, which ultimately outweighs all other considerations, is a necessity recognised by all participants and their constituents – that is, legal security and predictability for firms engaged in international trade. However, the legitimacy of particular outcomes will ultimately continue to rest upon the rationality, reasonableness and openness of adjudicators and their judgments. This repetitive process of shared experience and palliative outcome is progressively binding the political and legal communities together in a shared fate. The process is proving remarkably successful, and may both serve as a model for (and have spill-over effects in) other areas of international law. Ultimately, the system's continued success depends upon jealously guarding the independence of adjudicators, including the process by which they are selected, as well as ensuring the availability of effective remedies.

* Any opinions expressed are personal and do not reflect the position, formal or informal, of the European Commission or the European Union. The author is a Member of the Commission Legal Service WTO Team, and frequently represents the EU in WTO litigation, particularly with respect to the General Agreement on Tariffs and Trade, the Anti-Dumping Agreement, the Agreement on Subsidies and Countervailing Measures, the Agreement on the Application of Sanitary and Phytosanitary Measures and the Agreement on Technical Barriers to Trade. James Flett, james.flett@.ec.europa.eu

Key words

Sociology, law, international law, World Trade Organisation, WTO, ambiguity, silence, Dispute Settlement Understanding, DSU, Appellate Body, negative consensus, adjudication, interpretation, application, clarification, discretion, gap-filling, overreaching, power-based, rules-based, fact, evidence, panel composition, secretariat, working procedures, Vienna Convention, burden of proof, implied jurisdiction, inherent jurisdiction, legal interest, remand, mootness, judicial economy, preliminary rulings, dissent, precedent, open hearings, legal representatives, third parties, amicus curiae, time limits, remedies, arbitration appeals, DSU review.

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Introduction

The Green Room is a relatively small dark room in the vicinity of the office of the WTO Director General, in the WTO building in Geneva, frequently used for negotiations among a limited number of WTO Members, particularly as a round draws to a close.[1] GATT or WTO negotiating rounds are monumental enterprises, extending over many years and encompassing a vast range of topics. Typically, WTO Members do not disclose their final positions from the outset in their written proposals. Rather, they keep their cards close to their chests until the eleventh hour. The Green Room is where the end game is played out. It is a secret place, for the invited few. There is generally no official public written record of what transpires. Essentially, it's a question of horse-trading among diplomats and politicians. Inevitably, the domestic constituency of one WTO Member is played-off against the unrelated domestic constituency of another.[2] Thus, the Green Room is a place of favour and perfidy – it is the essence of politics, that is, the art of the possible. It rather reminds me of the board game Cluedo. Who betrayed the domestic constituent? It was the Ambassador, in the Green Room, with a knife in the back. The corpse is generally quietly rolled-up in some ambiguous language (of general and prospective application) and dumped in a footnote or a schedule. Fingers crossed that no one will find it, for a few years at least.

Just downstairs, in the same building, is the large and luminous Court Room, by which I mean to refer most particularly to the WTO Appellate Body.[3] I use the term "court" deliberately notwithstanding several years of academic debate as to whether or not the Appellate Body is aptly described as a court. In my view, also comparing my experience in the English courts and before the Court of Justice of the European Union, there is no doubt that the Appellate Body is aptly described in those terms. It is easily the most judicial instance before which I have litigated. The Court Room is the place where, years later (generally long after the Ambassador has received his final posting), and in the context of a particular set of facts (that is, a case) the corpse and to a lesser extent the scene of the crime[4], are forensically examined. It is, increasingly, an open place, where any member of the public can attend. Its proceedings are a matter of public record. Armed with the instruments of the customary rules of interpretation of public international law, as codified, at least in part, in the Vienna Convention, the legal and to a considerable extent the factual issues are systematically examined in minute detail. Thus, the

[1] The WTO web site puts it in the following terms:
"One term has become controversial, but more among some outside observers than among delegations. The "Green Room" is a phrase taken from the informal name of the director-general's conference room. It is used to refer to meetings of 20–40 delegations, usually at the level of heads of delegations. These meetings can take place elsewhere, such as at Ministerial Conferences, and can be called by the minister chairing the conference as well as the director-general. Similar smaller group consultations can be organized by the chairs of committees negotiating individual subjects, although the term Green Room is not usually used for these. In the past delegations have sometimes felt that Green Room meetings could lead to compromises being struck behind their backs. So, extra efforts are made to ensure that the process is handled correctly, with regular reports back to the full membership." (WTO.org 2011).

[2] This may be compared with the position in the rules-based arena of dispute settlement. Article 3.10 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)* (WTO 1994) provides that: "It is understood that complaints and counter-complaints in relation to distinct matters should not be linked".

[3] Appellate Body hearings take place in a number of different rooms. I am here referring particularly to the Eric Wyndham White Room – the principal WTO meeting room where large appeal hearings are often held.

[4] That is, the preparatory work and the circumstances of the conclusion of the treaty (Vienna Convention, Article 32).

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Court Room is a place of truth and justice - it is the essence of law, that is, the art of the rational and the reasonable.

It is almost as if some mischievous unseen student of politics and law has set the whole thing up as an experiment, just to see what might happen when essence of politics and essence of law are mixed so closely and immediately together,[5] which does sometimes make me feel like a bit of a lab rat.[6] But perhaps the outcome of this experiment is not very surprising. After all, if one puts lawyers together in a legal arena it is surely not very surprising if they do what lawyers generally do. That is, they work with rules to resolve disputes, secreting as they go their legal view of the world, like ants building a nest or bees a hive. Once the process is initiated, or as one former Member of the Appellate Body has put it, once the "genetic code" is in place (Abi-Saab 2006), it's a bit like the point at which robots start designing robots (or computers computers). Perhaps it would be an exaggeration to describe the process as exponential, but at least by comparison with what has gone before it is probably fair to say that it is accelerated.

The first section of this paper contains some brief observations on how it could be that such a thing as the WTO could ever come about, viewed from the limited perspective of a practitioner within the system, and particularly the *DSU* itself. It seems remarkable and surprising that so many powerful nations should subject themselves to binding adjudication. So if one would wish to emulate it in other areas, it might be helpful to better understand the details of how it was done and who might have contributed to it. The key document must be the *Dispute Settlement Understanding*. But it is hardly a blueprint of the building we seem to have today, since almost all of the important features are either not in it at all or barely apparent from it. If anything, it's more like one of those building application notices that we pay little or no attention to, returning from holiday to find construction substantially completed and apparently irreversible (absent an earthquake). We might like the architecture, but it may not be exactly what everyone anticipated.

The second section of this paper turns to a more theoretical discussion of the way in which power is both exercised and limited in the court room, again, drawing particularly on my experiences as a litigator within the WTO system. Whilst I agree with Abbot and Snidal (2000) that politics and international law are "deeply intertwined", that politics "permeates" international law and that the two are "deeply connected", nevertheless essentially the whole point of creating the WTO was to emphasise the *separation* between politics and law. Thus, the idea here is that in order to better understand how non-legal considerations can actually penetrate (or be excluded from) a WTO legal analysis, it is helpful to have a good understanding of the anatomy of a WTO judgment. This involves sharpening our thinking about concepts such as legislative "ambiguity" and judicial "activism" or "gap-filling", as well as concepts such as law, fact, evidence, claim, argument, substance, procedure, interpretation, application, and so forth.

In the third section of this paper I turn to the question of the way in which WTO judges have actually handled adjudication, including both the legal and non-legal considerations that they may have brought to the process. Since space does not permit an entire survey of the WTO case law, and since it would be problematic to take a sample that is at the same time both objective and relevant, I have focussed on what one might think of as the self-referential aspects of the WTO dispute

[5] In other words, the WTO is probably the best current example of "incomplete contracting" combined with "delegation" to "judicial institutions" described in Abbot and Snidal (2000).

[6] As the old joke goes, it may not be such a bad idea to replace lab rats with lawyers, since it stops the researcher from getting too attached to the subject, and there are certain things that even rats won't do.

settlement system.[7] That is, I have looked at what one might think of as the badges or operating system of a court, and considered the way in which these issues have been handled by WTO adjudicators both in and out of the courtroom. One advantage of this is that in such cases I think we see the adjudicators showing their true colours. That is because what is at stake is not the particular trade interest of a WTO Member, but rather something that is close to the heart of the adjudicator (or should be), namely the integrity and effectiveness of the adjudicative system itself. A second related advantage is that, when it comes to considering what the Members make of this, we filter out the background noise associated with a particular trade interest. Perhaps not surprisingly, the picture that emerges is that, once the system has been booted-up, it is fairly inevitable that the rules will be used to consolidate a rules-based operating system. Interestingly, the general response of Members and academia to this process appears to be rather positive, its legitimacy resting substantially on the quality of the judgments – that is the rational and reasonable way they explain their conclusions.

In the fourth section of this paper I briefly take a look at the way in which Members have responded to this process, particularly in the context of the continuing negotiations concerning reform of the *DSU*.

My conclusion is that the WTO has "got it right". The key to its success is simple enough: agreements should be kept,[8] and security and predictability (*DSU*, Article 3.2) demand an exhaustive and rigorous interpretation and application of the law according to consistently applied interpretative rules. The only two potential problems I see are with the selection of adjudicators and the enforcement of judgments – the two loose ends, as it were, at each end of the system, where in my view the excessive influence of politics and economics respectively is yet to be curbed. Furthermore, I do not see the success of the *DSU* as creating an imbalance within the WTO between judicial and political activity. Rather, I tend to think that there is a constant feedback loop or symbiotic relationship between the juridical and political branches: the political community needs and relies on the judges to complete their agreement; and the judges ultimately need and rely upon the political commitment of the Members, not least when it comes to compliance. The paper concludes with some suggestions about how this interactive process might be seen not as an imbalance, but as a virtuous cycle, and managed and developed so as to contribute to the objectives of the WTO.

1. From power-based GATT to rules-based WTO: quietly booting the system

It is often observed that one of the features of the WTO that makes it different from the GATT is binding adjudication – the WTO dispute settlement system is often described as the "jewel in the crown" of the WTO system. I certainly agree with that observation.[9] It is true that it has been suggested that compliance rates are not much better under the WTO than they were under the GATT (Hudec 1993). However, I am not particularly persuaded by that argument. I rather think the WTO system of remedies is still very much in its infancy, and that there is still a great deal more to come. And I also think that it is likely that many more issues are being resolved without recourse to litigation simply because the possibility of binding adjudication is there.

[7] For a general discussion, see: Sacerdoti et al. (2006), Part II: *Trade Negotiations and Dispute Settlement: What Balance between Political Governance and Judicialization*. For a persuasive refutation of the charge of judicial "activism" in more substantive terms see: Howse (2006) and Davey (2006).

[8] As the recitals of the Vienna Convention put it: "Noting that the principles of free consent and of good faith and the *pacta sunt servanda* rules are universally recognised." *Pacta sunt servanda* may be translated as "agreements should be kept".

[9] I would therefore not agree with the proposition that the benefits flowing from hard law adjudication in the WTO could also be reaped through a soft law mechanism (Abbot and Snidal 2000).

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This being so, one of the intriguing questions is how on earth such a powerful international judicial system happened to come into existence in the first place. Leaving aside the difficulty for smaller WTO Members to make effective use of remedies, at least as the *DSU* is currently interpreted, one of the effects of an adjudicative system, indeed essentially the whole point of it, is that all subjects are equal in the eyes of the law. Thus, essentially, the rules-based system protects weaker WTO Members. It is perhaps understandable that the EU, the birth and development of which would not have been possible without the Court of Justice of the European Union, might support such a project. It is perhaps more remarkable that the US was willing to do so, recalling that the International Trade Organisation originally failed because the US Congress failed to ratify the Havana Charter.

In the context of the Uruguay Round, no doubt the Members were looking to move to a system of binding dispute settlement given years of GATT frustration in that respect. It also appears that the US was interested in exploiting its comparative advantage in IT, services and IP and that there was a particular configuration of other circumstances that favoured the conclusion of the round (Howse and Nicolaidis 2006). It seems that the US was of the view that it generally complied with the rules, and that binding adjudication was necessary in order to ensure that others would (US Communication 1987).[10] Notwithstanding this initial view, subsequent events have demonstrated that the US and indeed also the EU have frequently lost WTO cases. It should be noted, however, that many of these are trade remedy cases and particularly anti-dumping cases. In retrospect, it should probably come as no surprise that other Members should seek unobstructed entry to such important markets as the US and the EU. It should also come as no surprise that they have often been successful in litigation. In economic terms, the *Anti-Dumping Agreement* is clearly increasingly irrational in an increasingly integrated

[10]That document reads as follows: "The US delegation believes that an effective dispute settlement mechanism, which is seen to be both reliable and expeditious, is an essential element of a healthy, expanding international trading system. The present dispute settlement system of the GATT has performed reasonably well in a number of disputes; however, it has displayed conspicuous shortcomings in some cases, which have diminished its credibility and, with it, confidence in the larger institution -- the GATT.
The most obvious problem is that some disputes have not been resolved, perhaps partly because of inadequate panel reports or difficult rules in a few cases, but more often because one or more parties have been unwilling to allow a resolution. In addition, the process takes too much time. Partly this is again a problem of the attitude of parties; for example, a party whose measures are challenged will all too often claim the need for further consultations as a means of stalling. This occurs even when an issue has already been stalemated through lengthy informal and formal consultations, sometimes over a period of years. Delays also arise from the difficulty of finding willing, qualified panellists, haggling over terms of reference, and delaying tactics during a panel's work. The failure to resolve disputes expeditiously (or in some cases to act at all) leads to frustration, and diminishes respect not only for dispute settlement but for rights and obligations under the GATT.
Improvement of the GATT dispute mechanism, therefore, deserves high priority. But any attempt to improve the mechanism needs to be supported by a change in attitude of contracting parties. Too often, dispute settlement in the GATT is viewed as a zero-sum contest in which for every winner there must be a loser. Disputing parties focus on the narrow issue at stake rather than their broader interests in an effective trading system. In truth, the failure to resolve disputes satisfactorily can be costly, not only to the disputants, but to innocent third parties as well. Successful dispute settlement, on the other hand, can benefit both the complaining party and the party whose actions gave rise to the complaint.
Improvements in the system and the attitude of governments toward the process of dispute settlement are not independent variables. Any process for settling disputes among sovereign States, however well designed, can be frustrated by a determined disputant. An effective process, however, can create an atmosphere of confidence leading to greater reliance by governments on that process in preference to situations in which problems fester or in which governments are led to unilateral actions.
The primary objective of dispute settlement should be to resolve disputes, and to do so expeditiously, fairly and in a manner that is consistent with the trade expansion objectives of the GATT. If we are all prepared genuinely to accept this objective, then we think we can move forward quickly in this area of negotiations. Reform will mean a better trading system for all contracting parties, not a trade-off among interests of different industries or countries. It is evident that many delegations have been giving considerable thought to the problems which have plagued the GATT dispute settlement process in recent years. For our part we will, prior to the next meeting of this Group, submit some proposals to improve the system. We hope other delegations will do so as well."

global economy. It has no preamble, the drafters apparently not even bothering to make an attempt to explain its rationale. The only mystery is why a date for its abolition is not on the table in current negotiations (a sunset clause for the *Anti-Dumping Agreement*). Against this background it is not altogether surprising that domestic anti-dumping authorities, who are often client-captured to some extent by their domestic industries, and who often lack the sharp legal perspective of the Appellate Body, should tend to push the boundaries of "interpretation" beyond reasonable limits, and so subsequently lose the case before the WTO.

In short, when we witness a certain reaction by some WTO Members, such as the US, to adverse WTO rulings, particularly by the Appellate Body (US Zeroing Communications),[11] what we are witnessing is probably not a lack of commitment on the part of the US to the rules-based system as such. Rather, what we are probably witnessing is the death throes of an anachronistic set of rules, accompanied by the shrill complaint of vested domestic interests that sporadically manage to capture the relevant channels of communication.[12] Recent changes in US policy support this view, insofar as the emphasis has been placed on enforcing the WTO Agreement against other Members, notably China (especially in the area of intellectual property), attack perhaps being seen as the best form of defence. Interestingly, and cleverly, China's initial compliance record appears to be excellent. China appears ready to absorb the economic pain of compliance, which is probably limited in any event for such a large economy; and to value the political reputation that goes with being a law-abiding Member of the club. Of course, China does not have Congress or anything quite like it with which to contend. It remains to be seen how this fascinating dynamic develops over the next few years.

Another aspect of the coming into existence of the WTO dispute settlement system that I think is fascinating is a number of features that I would describe as "under the radar". By this I mean to refer to certain features of what is undoubtedly a very "hard law" system that look as though they might have been designed to disguise it as softer than it really is.

For example, the WTO Court's rules of procedure are called: "Understanding on Rules and Procedures Governing the Settlement of Disputes (*DSU*)". The use of the term "understanding" of course suggests something that might be "soft" (although the document itself is obviously very "hard"). There are other "understandings" that form part of the WTO package and they are often, in my view, for one reason or another, significantly softer than the *DSU*.

Reading on through the *DSU*, before we get to the judicial bodies, Article 2 already introduces the Dispute Settlement Body (DSB), which of course is a political body. We learn that it is the DSB that has the power to establish panels, adopt reports and authorise countermeasures, and even more reassuringly that it takes decisions by consensus, defined as no Member present at the meeting formally objecting. We also learn, in Article 3.1, that Members affirm their adherence to the principles for the management of disputes under the GATT – the message being that this is evolution (when in fact it is revolution). Article 4 is all about "Consultations" and Article 5 "Good Offices, Conciliation and Mediation" – that is, "soft" dispute settlement mechanisms.

It is only when we get to Article 6.1 ("Establishment of Panels") that we get the first hint of something much "harder": at the request of a complaining party, a

[11] These types of documents are colloquially referred to in WTO circles as "bad loser" documents.

[12] In other words, if it is sometimes a puzzle to understand precisely *why* states bind themselves into a hard law adjudicative system (Abbot and Snidal 2000) perhaps sometimes the straightforward answer is that some persons simply misjudge their own capacity to comply with the rules.

panel shall be established by the DSB, unless the DSB decides by consensus not to establish a panel. But consider the way this is drafted. The language about the DSB deciding not to establish a panel is obviously redundant verbiage, since no WTO Member is going to request a panel and then participate in a consensus decision not to establish it. The only explanation for the presence of this language is that it is designed to obfuscate, or at least facilitate the adoption of a revolutionary rule by using familiar language (the language of consensus) to delimit it. It is not at all clear that a casual reader will immediately spot the significance of this language, not least given the earlier expressly stated rule that the DSB is to decide by consensus. In fact, it is not at all apparent from this provision that when the DSB establishes a panel it does not act by "decision" at all, but by "action" (this is the formal title of the WTO document subsequently circulated to all Members), an innocuous term that appears only in Article 2.1 of the *DSU*. It is because it is an action that it is not a decision and that it is not therefore adopted by consensus, but, in effect, automatically. Thus, we eventually see – but only after careful consideration of the text and context - that the DSB, introduced with much fanfare at the outset, in fact has nothing to say about this core issue. The same rule is re-iterated in the same somewhat covert terms for adoption of panel and Appellate Body reports and countermeasures (*DSU*, Articles 16.4, 17.14, 22.6 and 22.7).[13]

The next provision I would like to highlight in this context is Article 8 ("Composition of Panels"). What I find interesting about Article 8.1 is that, ostensibly, it is a rule requiring panellists to be "well-qualified" (a rule that one would have thought to be rather self-evident and not necessary to state expressly). However, if one reads on, in fact what one finds is a description of a very broad category of persons: including anyone having served on or presented a case to a panel, represented a Member, also in any Council or Committee, or served in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of any Member. This seems to be capable of capturing pretty much anyone that might be involved in the process of deciding whether or not a particular Member should adhere to the WTO. To me, it looks less like a meaningful description of quality, and more like an incentive for these persons to support adherence to the system – a system in which they themselves may have a (prestigious) role to play.

I also find the choice of language to describe the Supreme Court (Appellate Body) (*DSU*, Article 17) equally low key. Furthermore, I find it intriguing that the Secretariat is expressly mentioned (thus justifying its subsequent role) but in the very last article (DSU, Article 27) and in the briefest of terms – terms that belie the importance of its contribution in practice. This is the hidden executive, an express *ex ante* description of which would likely not have enhanced the prospects for adoption of the agreement.

Finally, and significantly, I think it is interesting to consider what is *not* in the *DSU*. In particular, the great majority of matters that are explored in the section of this paper below that relates to the way in which the rules have been used to further consolidate the rules based system are not apparent from the *DSU*.

Thus, I am not saying that there is anything dishonest about the way the covered agreements and particularly the *DSU* are drafted. I am just saying that the ability to move forward at the international level is a function of being able to persuade enough people in key countries, such as the US, that the "slices of sovereignty" being ceded are minimal. Nor am I suggesting that informed observers would have

[13] See: Abi-Saab (2005) ("… it was done by changing one word …"); and Howse and Nicolaidis (2006) ("Domestic deliberation of these rules is perfunctory and constrained by information and agency costs. This process produces a mass of general and often ambiguous rules, whose effects cannot easily be debated intelligently *ex ante* in national legislatures, and which must be accepted or rejected in a single package.").

understood these provisions incorrectly. I am just suggesting that there is evidence to support the view that the wheels of change – including the move to binding adjudication - were likely oiled at least some of the time with respect to some provisions and some people by the particular drafting techniques employed.[14] Further, I would suggest that this was probably done, at least in part, at the instigation of, or at least with the complicity of, committed multilateralists *also within national delegations*. In short, the power-based/rules-based fault line does not run between Members, but within them. In fact, in my experience, it is the defining bi-polar feature of all interactions in this area, cutting not just through Members, but also through institutions, delegations, departments, teams, and other professional or social groups.

2. Ambiguity and discretion in WTO adjudication

When non-lawyers, or even lawyers who do not litigate, speak about WTO law, or more particularly WTO adjudication, they have a tendency to think and express themselves as if what they are referring to is relatively homogenous. However, experienced litigators and judges know that the WTO adjudicative framework is far more complex and subtle than that. They spend a good deal of their time and energy – sometimes obsessively so – making what may seem to outsiders like arcane and esoteric distinctions between law and fact, fact and evidence, substance (primary rules) and procedure (secondary rules, or rules about rules), claim and argument, interpretation and application, and so forth. They know that cases can turn, or be made to turn, on the smallest detail – and heaven forbid it should be something they said, or didn't say, in one of their briefs.

Thus, when one is trying to understand how or why non-legal considerations might percolate or permeate the WTO adjudicative process (or be excluded from it), and similarly when one is trying to assess whether or not a WTO judgment (and thus an adjudicator) has objective legal merit, it really is necessary to have a clear grasp of these issues. That is because, in each of the above contexts, the possibilities for non-legal considerations to penetrate (or be excluded from) the legal process are quite different.

What does it mean to describe WTO law as "ambiguous" etc – in the pejoratively negative way this tends to be done? Are not some WTO legal rules so general as to be inherently "ambiguous" – such as good faith, or unjustified discrimination, or many other general principles – yet are they not, nevertheless, "good" (even essential) legal rules (Mitchell 2008)? Could any legal system function without such rules? Could a WTO judge refuse to apply a legal rule on the grounds that it is "ambiguous"? In cases of apparent conflict between two applicable legal rules, can a WTO judge refuse to apply either of them?

What does it mean to describe a WTO judge as "active" etc. – in the pejoratively negative way this sometimes tends to be done? In what sense could a judge perform his or her functions "passively"? What is it exactly that we direct judges to do when we appoint them, with respect to the facts, the evidence, the procedures, the application of the law to the facts, and legal interpretation? Is it not, by definition, impossible for the legislator to perform most or all of these functions? Can a legal system function or even exist if these functions would not be performed? Who is to perform them, if not the judge? Can a criticism of "activism" levelled against a judgment really be distinguished from a statement that one does

[14] In other words, if it is sometimes a puzzle to understand precisely *why* states bind themselves into a hard law adjudicative system (Abbot and Snidal 2000) perhaps sometimes part of the answer is that not all of the consequences were fully apparent to all of the relevant people.

not agree with the reasoning or outcome of the judgment? What relevance, if any, do such statements have for the legal system?

These are some of the questions I would like to explore in this section.

2.1.Different types of ambiguity in WTO law

The concept of "ambiguity" in WTO law is a difficult one. One can sketch out caricatures. For example: all law is expressed in language and language is inherently ambiguous; thus all law is equally ambiguous; thus one might as well have *only one* legal rule - subjects of the law must act reasonably at all times. Such a proposition would not appear to have much if any merit in either descriptive or functional terms. On the other hand, having experienced both the succinct principled simplicity of the French style of legislative drafting as well as the Anglo Saxon style of extensive definitions and excessive detail that attempt to regulate all eventualities, and observed that both seem to generate about the same amount of litigation, one sometimes speculates that perhaps less is more. The moderate truth no doubt lies between these extremes. Given its essential ambition and function of regulating future conduct, law needs to be sufficiently precise in order to permit a sufficient number of its subjects to be able to foresee the legal consequences of their intended actions in a sufficient number of instances. On the other hand, general principles must be available to resolve marginal cases. If too many or a growing number of cases appear to be regulated other than by the express terms of the law itself, with the law itself perhaps influencing the behaviour of the subjects, then the law may need to be re-cast. Thus, I think the key to a law achieving an effective balance between being both sufficiently precise to provide legal certainty (*DSU*, Article 3.2),[15] yet sufficiently general to remain relevant, is that it is based on past experience of the instances that its seeks to regulate, and yet is sufficiently flexible to adapt to changing circumstances (Appellate Body Report, *Japan-Alcoholic Beverages II*).[16]

Taken as a whole, I do not think that WTO law does a bad job at achieving this balance. If one compares, for example, the treaties establishing the EU with those establishing the WTO they are not entirely dissimilar in many respects. That said, I think there are a number of ways in which ambiguity in the WTO treaties could be reduced at little or no substantial cost, because some ambiguities are not in fact associated with political compromise (Kuijper 2003). In this respect, I recall that, having spent a number of years working in this area, I participated in the preparation of legal document containing guidance for negotiators. The gist of the document was to recall some of the past WTO cases in which the judicial construction of ambiguity had gone against the EU, and to suggest means of avoiding such outcomes by negotiating different treaty language in the future. The reception of this document among negotiators was somewhat muted, to put it mildly. The general sense of the reaction was that it must have been written by people who had never actually participated in WTO negotiations. It was then that the improbable realisation dawned on me. A significant amount of the time the negotiators were not actually trying to avoid such outcomes. Or at least they were taking interpretative risks, sometimes very considerable risks, because the other side was doing exactly the same thing, and there was no other means to conclude the agreement.

[15] "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system."

[16] At page 31: "WTO rules are reliable, comprehensible and enforceable. WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgements in confronting the endless and ever changing ebb and flow of real facts in real cases in the real world."

If it is not contradictory to try to be precise about ambiguity, I do think that there a number of things one can say about it that can help to understand how it may subsequently be adjudicated.

One distinction that can be helpful, I think, is the distinction between choice, discretion and generality. Choice is the situation in which the Member has two or more options and is free to select the one that is preferred. Examples include the lesser duty rule in Article 9.1 of the *Anti-Dumping Agreement*, or the choice between adopting countervailing measures under Section V and pursuing an actionable subsidy case under Section III of the *SCM Agreement*. Providing for choice is the best way in which negotiators can exclude an adjudicator with a very high degree of certainty, but it is only possible if all parties agree that the two options are to remain available. It does not therefore generally provide a solution in the case where what the parties are seeking is a political compromise.

Discretion is the situation in which the Member is to have some discretion in deciding what course of action to take. The existence of discretion is often indicated by the use of terms such as "may". However, an adjudicator will always or almost always consider that any discretion is not perfectly unfettered, so the question in litigation will resolve itself into what the limits of such discretion might be. For example, it is a general principle of WTO law that a judge may draw inferences from a refusal by a party to answer a question (Appellate Body Report, *Canada – Aircraft*, paras 202 to 203) – but the mere fact that such power is discretionary does not prevent parties from litigating the question of whether or not such discretion was correctly exercised or not in a particular case.

Generality is the most difficult situation in which to avoid a WTO adjudicator's decision, especially when it is just a question of applying the law to a factual situation that clearly falls within the material scope of the rules in question. For example, Article 3 of the *Anti-Dumping Agreement* contains absolutely no rules at all about the identification of the period of investigation for the purposes of an injury analysis – it merely contains the very general rule that such analysis must be "objective". Nevertheless, the US successfully challenged a Mexican anti-dumping measure simply on the grounds that an excessive period of time had elapsed between the end of the investigation period and the initiation of the investigation (Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras 158 to 172). In fact, WTO adjudicators frequently rely on general principles in order to resolve specific legal issues (Mitchell 2008).

One particular type of ambiguity that arises quite frequently in WTO law and that could probably be eliminated with relatively ease is the case in which different terms are used to describe the same thing, or the same terms are used to describe different things. In the former case at least WTO adjudicators have demonstrated a willingness to interpret different terms as synonymous,[17] no doubt reflecting their

17 For example, the Appellate Body has held that the terms "contingent", "conditional", "tied to" and "tie" are synonymous in the context of Articles 3.1(a) and footnote 4 of the SCM Agreement (Appellate Body Report, Canada – Autos, para 107); that the terms "nature of competition" and "quality of competition" may be considered synonymous (Appellate Body Report, Korea – Alcoholic Beverages, paras 133 to 134); as may the terms "like" and "similar" (Appellate Body Report, EC-Asbestos, para 91); and the terms "jural society", "state" and "organized political community" (Appellate Body Report, *Canada – Dairy*, para 97 and footnote 73). The Appellate Body has also found that the term "except" in Article 2.4 of the *Agreement on Textiles and Clothing* is synonymous with the terms "only", "provided that" and "unless" (Appellate Body Report, *US-Wool Shirts and Blouses*, page 9, second para and page 16, final para.). If one looks at a frequently litigated agreement, such as the *Anti-Dumping Agreement*, one can identify many synonyms, such as for example: 1) the exporting country/the country of export/the supplying country/country of origin/the exporting Member 2) importing Member/the importing country 3) duty assessment proceedings/refund procedures 4) suppliers/producers or exporters 5) assurances/undertakings 6) a like product of the importing Member/the like domestic product 7) firms/companies 8) on-the-spot investigation/visit 9) allowance/adjustment.

efforts to inject some order into the sometimes chaotic drafting of the covered agreements. Another solution to this problem is to use definitions, something that the Members repeatedly asserted during the preparatory work that they were in favour of.[18] The covered agreements do contain definitions, although often they are haphazardly chosen, scattered through an agreement in unlikely places, hard to spot, and often themselves ambiguous with respect to one or more elements of the definition (what is defined, what it is defined as, for what purpose, and the strength of the obligation to apply the definition itself).[19] It is quite possible or even likely that, in fact, manoeuvring for political advantage has continued deep in the undergrowth, as it were, of such technical provisions, and this up to the last minute of negotiations, which explains why the texts are still not clear on such matters.

Another type of problem that I think is closely associated with this discussion is what I would call the "political" decision – that is, the matter that is simply not susceptible to judicial review. There may be more than one example of this type of problem in the covered agreements, but I think that one of the most important is the rule under the *SPS Agreement* that the importing Member sets its own appropriate level of protection (or ALOP). In other words, absent international harmonisation, the ultimate decision about whether to be relatively risk oriented or risk averse rests with the importing Member, provided that it is fairly and even-handedly applied, and provided that there is some element of science or rationality in the decision, appropriate to the circumstances (Flett 2010a). Against this backdrop, I think there is a very fine distinction between the fixing of the ALOP (from which the adjudicator is excluded) and the question of whether or not the measure selected is the least trade restrictive, which is expressly regulated (SPS Agreement, Article 5.6).

Another significant type of problem that frequently arises is that of apparent conflict or tension between different provisions. Sometimes this is expressly regulated – as is the case for example with the General interpretative note to Annex 1A of the *WTO Agreement*, which provides that in case of conflict the *GATT* and the Annex 1A covered agreements the latter prevail to the extent of the conflict. However, conflicts or tensions may arise not only between agreements, but also between provisions and even within single provisions or sentences and phrases, and usually there is no express rule to deal with them. Applying an "harmonious interpretation" rule can help in situations where provisions do not directly contradict each other, but is less helpful if the provisions were obviously to approach a given problem from different directions. A *lex specialis* rule[20] can also help up to a point, but often

[18] See, for example, in the context of the preparatory work for the *Anti-Dumping Agreement*: MTN.GNG/NG8/W/3, page 1 point A, page 2 point B, page 3 point H; MTN.GNG/NG8/W/7, page 1 points A3 and A4, page 3 point B10; MTN.GNG/NG8/W/10, page 2 point B first and second paras, page 5 point H; MTN.GNG/NG8/W/11, page 2 point 11.1(2); MTN.GNG/NG8/W/12, page 1 final para; MTN.GNG/NG8/W/15, page 1 point II.1, page 3 first indent; MTN.GNG/NG8/4 (Note by the Secretariat), page 2 point 9; MTN.GNG/NG8/W/7/Rev.1 (Note by the Secretariat), paras 1, 6, 8, 9, 10, 17, 48, 49, 50, 64, and 65 [**24 instances**]; MTN/GNG/NG8/W/26 (Note by the Secretariat), paras I.2, I.3, II.6, III.1, FN 1; MTN.GNG/NG8/7 (Note by the Secretariat), paras 4, 13 and 14; MTN.GNG/NG8/8, paras 1, 2, 4(1), 4(2) and 5; MTN.GNG/NG8/11 (Note by the Secretariat), paras 12 and 14; MTN.GNG/NG8/13 (Note by the Secretariat), paras 13, 16, 20, 22, 29, 36, 38, 39, 40, 41 and 44 [**12 instances**]; MTN.GNG/NG8/15 (Note by the Secretariat), page 4 para 3, page 8 paras 2, 3 and 4, page 9 para 3, page 11 para 7, page 12 paras 1, 4 and 8, page 14 paras 1 and 6, page 17 para 1, page 18 para 3, 4 and 7, page 19 paras 1, 2, 3 and 4, page 20 paras 1 and 4, page 21 paras 3 and 9, page 22 paras 1, 6 and 7, page 23 para 3, page 28 para 4, page 30 para 3, page 32 para 2, page 33 para 4 [**43 instances**].

[19] See, for example, in the context of the *Anti-Dumping Agreement*, and the terms: dumping; margin of dumping; injury; domestic industry; like product; interested parties; authorities; initiated; and levy (Articles VI:1 and VI:2 of the GATT 1994; Articles 2.6, 4.1, 6.11 and footnotes 1, 3, 9 and 12 of the *Anti-Dumping Agreement*).

[20] "The maxim *lex specialis derogate legi generali* is a generally accepted technique of interpretation and conflict resolution in international law." (International Law Commission 2006). *Ibid*, footnote 2: "For application in relation to provisions within a single treaty, see *Beagle Channel Arbitration (Argentina v.*

it may be difficult to know which provision is the more specific. In fact, many of the covered agreements regulate matters at a relatively high degree of abstraction – often the drafters are familiar with their own legislation on the relevant subject and sometimes seem to forget that future readers may not be. Consequently, one often finds an obligation in one place counterbalanced by a right somewhere else. A considerable part of the subsequent activity of WTO adjudicators involves finding a rational and reasonable balance between such provisions in the context of a particular dispute, which is a delicate combination of interpretation of the law and application of the law to the facts.

The situation with respect to preambles is also interesting. Object and purpose is one element of the interpretative rule in Article 31(1) of the Vienna Convention, and one of the obvious places to look is the preamble of the relevant agreement. Unfortunately, one often finds nebulous or all encompassing language capable of supporting either side of the debate. In some cases, there are even no recitals at all – as in the case of the *Anti-Dumping Agreement* – essentially because it is fundamentally irrational. Often that leads adjudicators to look at the overall design and architecture of the relevant agreement instead, so that a consideration of object and purpose merges into a consideration of context. Also quite often adjudicators narrow the scope of their assessment to looking at the object and purpose of a particular provision, rather than the agreement as a whole.

Another area that often causes difficulty is rules about the future or rules that otherwise lead to the need to posit a hypothetical. No one can know what the future holds and this is as true for lawyers as it is for anyone else. Thus, to frame a legal rule in such terms does cast an extremely heavy burden onto the judge. It often leads to excessively detailed analysis as the judge struggles to frame the assessment in objective terms. It also often leads to a heavy involvement of economists and an associated "battle of experts" that experience demonstrates does not necessarily assist the judge in reaching an objective conclusion. Examples of such rules applied at domestic level and reviewed in the WTO include rules about threat of injury (*Anti-Dumping Agreement*, Article 3.7, *SCM Agreement*, Article 15.7) (applications of which have not tended to be well-received) and sunset reviews (*Anti-Dumping Agreement*, Article 11.3, *SCM Agreement*, Article 21.3) (which have fared better). Examples of such rules that have to be applied directly at the level of the WTO would include market benchmarks or certain types of adverse effects under the *SCM Agreement* (*SCM Agreement*, Articles 14 and 6.3(c)). A particularly fascinating example arises under the *SPS Agreement* when scientists are asked to advise panels and the science on a particular matter is not cast in terms of repeatable and observable experiment, but rather in terms of hypothesis.

Finally, another area that I think worth briefly mentioning is the problem of different language versions. Most litigation (but not all) occurs in English, but the agreements are authentic in English, French and Spanish, (*WTO Agreement*, Article XVI:6) and the reports are translated into all languages. Sometimes there are differences between the text of the covered agreements – a matter that is also regulated by Article 33 of the Vienna Convention. In my view, this is a type of ambiguity that it ought to be reasonably easy to eliminate simply be ensuring a proper linguistic review prior to legislation being finally adopted.

Chile) ILR vol. 52 (1979) p. 141, paras. 36, 38 and 39; Case C-96/00, *Rudolf Gabriel*, Judgment of 11 July 2002, ECR (2002) I-06367, pp. 6398-6399, paras. 35-36 and p. 6404, para. 59; *Brannigan and McBride v. the United Kingdom*, Judgment of 28 May 1993, ECHR Series A (1993) No. 258, p. 57, para. 76; *De Jong, Baljet and van den Brink v. the Netherlands*, Judgment of 22 May 1984*,* ECHR Series A (1984) No. 77, p. 27, para. 60; *Murray v. the United Kingdom*, Judgment of 28 October 1994*,* ECHR Series A (1994) No. 300*,* p. 37, para. 98 and *Nikolova v. Bulgaria*, Judgment of 25 March 1999*,* ECHR 1999-II, p. 25, para. 69.".

To conclude, my purpose in this section has not been to set out exhaustively the different types of "ambiguity" that can arise in WTO law. However, the point that I would like to make is that one often hears the debate about the interface between politics and law in the context of adjudication being couched in simplistic terms, as if there would be only one type of "ambiguity". This rather reminds me of the way people sometimes speak about "sovereignty" in simple or homogenous terms, whereas we all know it is a much more complex and subtle matter than that. I think the problem of ambiguity in WTO law is much the same – as I have tried to indicate in this section, I think it is multifaceted. Thus, if one wants to understand and critique what is going on in general terms, I think one really has to understand and be able to critique what is going on in particular instances, and I think that part of being able to do that involves being able to distinguish between and understand different types of ambiguity.

2.2.Different types of discretion in WTO adjudication

Having tried to demonstrate that, looking at one side of the process (the process of legislation) there are different types of ambiguity, and that understanding this is a necessary part of critiquing what is going on, I would now like to briefly consider the other side of the process (that is, the process of adjudication). Essentially, the point I would like to make is the same. WTO adjudication is not a simple or homogenous process – it is complex and multifaceted. In fact, I would say that it is almost obsessive in its de-construction of disputes into their constituent parts. Far more so that has been my experience before domestic courts or the Court of Justice of the European Union. I suspect the reason for this is because the Membership of the WTO is so diverse, so WTO adjudicators are very well aware that there is no easy short cut to justice on the basis of shared values. The legitimacy of their judgments rests almost uniquely on the exhaustiveness and rigour of the analysis. Thus, if one wants to understand and critique what is going on in general terms in WTO adjudication, I think one really has to understand and be able to critique what is going on in particular instances, and I think that part of being able to do that involves being able to distinguish between and understand the different aspects of a judgment.

2.2.1.Facts

Every judgment necessarily floats in an ocean of *assumed* facts. The truth of this proposition will be immediately recognised by any parent who has played the "why" game with their child. Each explanation elicits the re-iterated uncritical cost-free question, until the patience of the parent fails, with the inevitable final response "because". The process must have its limits, because it cannot be that one must decide (or explain) everything before one can decide (or explain) anything. A WTO judge is not a philosopher; he or she is there to adjudicate on a real world dispute. Thus, separating facts that can be assumed from facts that need to be found, even if only implicitly, is, by definition, an inherent part of WTO judicial activity.

The phenomenon appears most clearly in cases where there is no municipal measure accompanied by an administrative "record" purporting to establish the facts. It is particularly in such cases that the unfathomed sea of knowledge potentially relevant to the dispute is readily apparent. One thinks, for example, of alleged undue delay under the *SPS Agreement*. Complaining Members in such cases often try to use the consultation process to fix a closed list of documents that will form the basis for the dispute; and defending Members generally resist that, because what documents may be relevant really depends on how many re-iterations of questioning the complaining Member and the WTO adjudicator will eventually introduce. However, the observation is also true in cases where there is such an administrative record, such as, for example, anti-dumping or countervailing

duty cases, such administrative record *itself* similarly floating in an ocean of assumed facts.

I am referring here to something other than the facts that are asserted and/or found. Naturally, some facts will have to be asserted by the complaining party in order to make its case; and some facts may also have to be asserted by the defending party in order to make its defence. If not properly contested (by asserted counter-fact and adduced evidence and explanation) asserted facts, at least when referenced in the judgment, are effectively *found* by the judge, rather than *assumed*. As in other jurisdictions, in the WTO there are procedural limitations relating to the establishment of the facts – for example facts cannot generally be asserted or contested for the first time on appeal. However, even leaving aside these procedural limitations, and even leaving aside the submissions of the parties, some facts are so "self-evident" in the context of particular proceedings that they are adequately dealt with through a process of assumption.

Accordingly, every WTO judge, by definition, has a significant degree of "discretion" when sketching out the factual base of the pyramid, at the apex of which will stand the adjudication of the dispute.

2.2.2.Evidence

Turning to the question of evidence, judges, and particularly WTO judges, do not, indeed cannot, directly sense the relevant facts. Like everyone else involved in the case, they must attempt to perceive reality largely through the evidence placed before them, almost always in the form of written documents. This is a formidable task. The task is that much more difficult in the area of economic law for several reasons. First, the "evidence" is almost always incomplete or conflicting. Second, it rarely brings one into immediate proximity with the facts, in the sense that the document adduced in evidence is in the nature of a "first impression" from the facts, as one might consider a photograph to be. Rather, the document typically refers to other documents or concepts, and will need to be carefully considered by the judge, together with all the evidence, in order to build up a reasonably reliable picture of the facts. Third, such documents are rarely free from legal characterisations of the facts. One might say that, in economic law litigation, there are no facts, only evidence.

The WTO judge must "weigh the evidence", taking into account authenticity (rarely expressly questioned since that would suggest a lack of good faith by the party adducing the evidence - Appellate Body Report, *US-Continued Zeroing*, para. 340), relevance of the asserted fact, persuasiveness (including the stature and interests of the person originating the evidence) and the way the evidence fits or conflicts with the other evidence. Thus, in weighing the evidence, and particularly in preferring one piece of evidence over some other conflicting evidence, the WTO judge is also necessarily exercising a significant degree of "discretion".

2.2.3.Procedures

Turning to the question of procedures, one may observe that, in one sense, all law, or at least all litigation, is procedural, in the sense that the ultimate litigator's truth is a procedural one: the judge has decided and the judgement is binding. No matter how right a party might be on the facts or even the law, if procedurally absent or deficient, that party risks an adverse or default judgment.

This is one area in which I think the notion of judicial "activism" and criticism of it makes sense. Litigation is in the nature of a contest or game that the parties agree beforehand will be conducted according to certain rules and the outcome of which will be binding. Most obviously, the parties agree to defer the use of unilateral force

until such time that they might seek to induce compliance with the judgment. Since the unfettered expression of opinion can in certain circumstances be likened to the exercise of power, this necessarily implies control of the process, particularly through alternate written and oral pleadings within specified time limits. Parties never speak simultaneously in hearings. The very concept of allowing each party to have their say necessarily implies that the case is made, in factual, evidential and legal terms, and that each party has the opportunity to defend or rebut. That in turn necessarily implies that the jurisdiction of the judge is restricted to adjudicating the dispute actually put before the court by the parties. To the extent the judge would do otherwise, he or she would be offering an "advisory opinion" not requested by the parties for the purposes of resolving their dispute. I think that this type of activity, detached from the actual resolution of a dispute, could be likened to legislative activity, insofar as it has no value other than with respect to future cases that are yet to arise. It might therefore reasonably be described as "judicial activism".[21]

Obviously, the problem is particularly acute with respect to the legal aspects of a case. This is a point on which the WTO has reasonably well-developed rules. A WTO judge does not have jurisdiction to consider legal claims or arguments parties have not made. There is more flexibility with respect to facts and evidence, reflecting the reality that, within a defined legal framework, a case may reasonably develop from a factual and evidential point of view, as the essential elements of the dispute are refined in the pleadings. However, here too, there is a real risk that a judge might teleologically solicit facts and evidence with a particular legal outcome in mind, and in my view WTO procedures would, in this respect, benefit from increased rigour.

2.2.4.Distinguishing law and fact and applying law to fact

I would like to turn now to the judicial processes by which law and fact are distinguished and law applied to fact.

All language is categorical. We use words as labels to express and communicate what we repeatedly sense. No two sense-events, accompanied by the word, are identical, but they are similar enough that, over time, the meaning of the word develops from one that is specific to a particular sense-event to one that is categorical. One sees this very clearly in the way a child learns its first language by repeatedly pointing at an object and intimating that it wishes the word associated with that object to be spoken. After a number of repetitions, the child grasps the essential characteristics of the category, rapidly assimilating quite subtle if imperfect distinctions; begins to use those words itself when pointing (thus, itself placing the sensed object within the relevant category); and eventually uses those words even in the absence of the object – that is, in a categorical manner, detached from any sense-event.

There is nothing absolute about these categories. They simply encapsulate a set of different but sufficiently similar sense-events. Further, the content of the same category is necessarily different for each individual. In effect, we all speak our own private language. Languages may be designed or develop in such a manner that, in the real world, we generally manage to understand each other well enough, enough of the time, to achieve whatever objective we have in seeking to communicate. Nevertheless – and this is the point – it is impossible to eliminate the "ambiguity"

[21] For example, in *Australia – Automotive Leather II (Article 21.5 – US)* the Panel construed the *DSU* as providing for *ex tunc* remedies despite the fact that the parties agreed that the remedy was *ex nunc*. Leaving aside the substantive merits of the Panel's assessment, unless one considers this a matter that a panel may address of its own motion, which seems difficult to argue, then this does look like a case of judicial "activism", and certainly the parties complained to that effect in the DSB minutes.

associated with categorical language because, by definition, it is impossible for us to experience another individual's experience.

WTO law, like any other, is obviously categorical. However, what is not always so clearly understood is that facts asserted before a WTO court, like any other, are generally also categorical, in the sense that the judge does not directly experience the asserted fact. Thus, when a WTO judge applies the law to a given fact, what the judge is doing is comparing two categories.

The essential difference between the law-category and the fact-category is that, leaving aside the particular matter of retroactive laws, the law-category is forward looking, in the sense that it is designed to catch (or exclude) facts that are yet to occur when the law is enacted; whilst the fact-category is backward looking, in the sense that it refers to past events. If the asserted facts have not yet occurred there is no dispute to adjudicate. A state in which the law-category is *only* backward looking is not a state of law, but a state of despotism. The very essence of law and its essential social function is the provision of a framework for future events, giving members of society the security and predictability to interact with knowledge of the consequences. The point is not that one must necessarily have a different individual performing the legislative (forward looking) function and the judicial (backward looking) function (as in classic constitutional division of powers theory). The point is that, it follows from the essence of law that these are, by definition, different and distinct functions that it is impossible to merge (even if performed by the same individual at different times).

The essential thing about two different categories – and pretty much all one can say about them in general terms (with the possible exception of numbers) – is that they are different. One can see the truth of this observation in a discussion of two issues commonly arising in the WTO context.

The first is the type of statement one hears quite often from WTO Members to the effect that their laws are "WTO-plus". In fact, they are just different. With a little imagination, it is generally always possible to envisage a case within the municipal law that would nevertheless be WTO inconsistent. Thus, the truth is that the WTO consistency of a law may depend more on how it is interpreted and applied in a particular case, than the manner in which it is framed. And experience suggests that when such laws, particularly as interpreted and applied in particular cases, are actually put to the test of WTO litigation, they are frequently found wanting.

The second is the related discussion of the so-called "mandatory/discretionary" distinction, according to which, if a municipal law *could* be interpreted and applied in a WTO consistent manner, it is "as such" WTO consistent. This proposition is obviously flawed, and certainly in the absence of any operational interpretation in conformity rule in municipal law. For example, if a municipal anti-dumping law provides that, having calculated a margin of dumping, an importing Member may *either* apply an anti-dumping duty equivalent to the margin of dumping *or* an anti-dumping duty double the margin of dumping, it is no defence to invoke the first option to argue that the law is "as such" WTO consistent. For this reason, the Appellate Body has effectively and correctly consigned the mandatory/discretion doctrine to history, in ruling that it should not be "mechanistically" applied – the very essence of the doctrine being its mechanistic application (Bhuiyan 2002, Naiki 2004, Flett, 2005).

Thus, to conclude on this section, also in the processes of distinguishing law and fact and applying law to fact there are ambiguities that cannot, by definition, be resolved by the legislator, and can only, by definition, be addressed by a judge.

2.2.5.Interpretation

The final matter that I would like to consider in this section relates to the process of interpretation of WTO law. I will be relatively brief because I return to this issue below, and because quite a lot has been written by others on this matter (Van Damme 2009). The main observation that I would like to make here is as follows. When power-based interests sometimes criticise the rules-based output of the WTO adjudication system one often hears the criticisms couched in terms of alleged abuse of the interpretative process. However, oddly enough, I do not think that it is in the rules of interpretation that one finds the greatest degree of potential judicial "wiggle room" as it were. I think this is particularly so in the case of the WTO because of the tendency to draw upon the *Vienna Convention* to provide a systematic framework for the process of interpretation. Thus, when one hears such criticisms, in reality what one is generally hearing are criticisms of aspects of the process that are common to all judicial systems (such as the weighing of the evidence), and such criticisms are usually driven simply by an adverse outcome in a particular case.

Thus, in my view, a great deal of the game in litigation is in fact played out in other parts of the arena (that is, apart from the arena of legal interpretation). To put it bluntly, in my experience, a hostile judge, and particularly (but not only) one subject to appeal, will not try to "stitch up" a particular litigant on the law – something that an effective advocate should be able to preclude in any event. Rather, they will do it in other parts of the process. However, and this is a very important point, litigants do have the possibility to substantially control and constrain *that* process. That is why one of the most fundamental aspects of the exercise is due process – because as long as one is given the opportunity one can deal with the problem – and one of the most distinctive hallmarks of a bad judgment is that it contains surprises for one or both litigants. It is also why, once one has established the facts and reviewed the evidence and the law, one generally has a very good idea about how the judge will decide. The two areas that I would identify as the most difficult for a litigant to control in advance are applying the law to the facts (because of the inherent difficulty of comparing two categories) and (probably more important) the weighing of conflicting evidence.

To conclude on this section, I hope I have managed to explain how the way in which non-legal considerations might (or might not) penetrate a WTO legal analysis is not a simple matter, but complex and multifaceted. I hope I have also been able to explain that, in my view, the main potential point of entry, as it were, is not the rules of interpretation, at least in the WTO. Furthermore, I hope I have been able to explain that such possibilities as exist for directing the post-legislative process generally flow from ambiguities embedded in the legislation and not from the adjudicative process itself. In other words, responsibility for not only the emergence but also the development of the WTO rules-based system rests with the politicians, which is how matters should be. One cannot criticise the lawyers for doing what they are programmed to do – that would be to shoot the messenger.

3. Clarifying ambiguity and exercising discretion to build a rules-based operating system

In my experience the frontier between power and rules is never really stable. It is rather like a disputed international boundary, where neither party is happy with what they have got, and both are convinced that the other has more than they should have. From time-to-time trouble flares up: there is an incursion or one fires a salvo into the other's territory. And always in the background there is a threat of a wider conflict, potentially disastrous to the interests of both. However, with the passage of time there is always the hope that things settle down and that eventually both sides acquire the habits of co-existence.

What I would like to do in this section is pick out and analyse some of those instances or issues in WTO adjudication where the power-based and rules-based views of the world have actually met each other in specific circumstances. In doing so, I would like to focus on what one might call the symbols of a court – that is, those things that distinguish a particular activity as judicial in nature. I think it emerges from this discussion – and the observation is perhaps not surprising – that over time the WTO dispute settlement system and particularly the Appellate Body has gradually being consolidating the rules-based approach. There are, however, a couple of areas where the process is not yet stable, including the selection of adjudicators and the availability of effective remedies.

3.1.Selecting the Judges

As already indicated, the selection of judges is one area where I think that the WTO dispute settlement system has yet to fully develop from a rules-based point of view.

If one looks at Article 8 of the *DSU*, which regulates panel composition, I think its main contours are clear. Panels are to be well-qualified, independent and balanced; citizens of parties and third parties are excluded unless the parties agree otherwise; names are drawn from an indicative list maintained by the Secretariat; there are three panellists (unless the parties agree to five); the Secretariat nominates and parties may only oppose for a compelling reason; absent agreement within 20 days the Director-General composes; a developing country litigant gets at least one panellist from a developing country on request; and expenses are met from the WTO budget. Thus, the two critical powers or responsibilities (nomination and final composition) rest with the WTO institutions.

In practice something rather different has been happening. First, the Secretariat asks the parties to express their views about general criteria. This is odd, since the criteria are already set out in Article 8. Typically, the parties may try to make this process work to their advantage. For example, in litigation there is often one party that is taking what is fundamentally a more "legalistic" approach to a given problem, whilst the other is taking what is fundamentally a more "economic" approach. Obviously, the first party will seek lawyers on the panel, whilst the second will seek economists. Second, and probably most significantly, the Secretariat generally nominates six names for a panel of three. In my view this is not consistent with the provisions of Article 8, which indicate three panellists and provide for the Secretariat to make nominations for the panel. The particular consequence of this is that the parties tend to be driven to express a preference, which develops into a tendency to invent a compelling reason to object, even if none really exists. Third, and also significantly, the Secretariat has adopted the habit of inviting the parties to a meeting to express their views. This facilitates the expression of spurious compelling reasons because there is usually no written record. Fourth, as already indicated, the parties tend to invent compelling reasons

that are in reality utterly spurious. Fifth, some Members consider the process "confidential", even though there is no rule to that effect in the *DSU*, and on the contrary one may reasonably and in my view correctly argue that a defect in panel composition is a matter that can be raised before a panel and eventually before the Appellate Body. Sixth, a situation has developed in which some Members no longer even bother expressing a compelling reason, but merely say that they are "still considering" the nomination and ask for a new set of proposals. Thus, in effect, such Members are just flicking through the list until they reach their preferred name. And a very real part of the problem is that they appear to be looking at potential adjudicators not by reference to their objective qualities as an adjudicator, but rather by reference to whether or not they might be inclined to favour the arguments of that Member. Seventh, if one does go to the Director-General experience suggests that he or she may be reluctant to appoint anyone to whom one of the parties has objected.

Thus, if one looks at what the rules provide, and what is actually happening, the two things are worlds apart and in my view this is having a number of negative consequences. First, there is an excessive emphasis on individuals, as opposed to their objective qualities as adjudicators, as if it would be a good thing for anyone if the case would be won because of a panellist's pre-conceived ideas as opposed to the objective merits of the legal arguments. Second, if the quality of the panel report is inadequate, this puts an excessive amount of pressure on the Appellate Body and unnecessarily stresses the system. Third, I have the impression that it may be increasingly difficult to find good quality panellists willing to subject themselves to this sort of process (I believe that their availability generally has to be checked before their names are put forward). Fourth, I also have the impression that sometimes Members actually seek weak panellists if they believe that to be in their interests in a particular case, something that in my view cannot be in the interests of the system. Fifth, I also sometimes have the impression that the Secretariat itself proposes names that it knows the parties will never agree to, simply because it is withholding its real selection until one of the parties goes to the Director-General.

In my view, what should be happening is a written proposal for three, preferably from the indicative list; any objections should be required to be in writing; and in the exercise of his or her discretion the Director-General should not hesitate to overrule spurious compelling objections and proceed with the composition as originally proposed.

I do not think that the Secretariat is entirely free from responsibility for the current state of affairs. Apart from allowing the centre of gravity of the process to drift away from the institution and back to the litigating parties, I sometimes have the impression that their approach to this problem is somewhat ambivalent. One does sometimes have the impression that the role of the Secretariat in advising panels is important, and given the ambiguities in the covered agreements this sometimes means that the Secretariat is acting almost as a hidden executive. In this situation, the temptation may sometimes be there to prefer weak panellists, which I do not believe is in the long term interests of the system. Furthermore, returning the process to its proper balance would require that the Secretariat and the Director-General properly exercise their powers as responsibilities. There are very few areas indeed in which the covered agreements specifically create what is in effect an institutional role for the Secretariat and the Director-General, and if even these are not correctly fulfilled then one may hardly expect that a more important and proactive role for the executive might develop. Thus, in making nominations the Secretariat itself must pay special attention to the objective qualities of persons as adjudicators, and avoid the temptation of proposing people simply because their known views happen to correspond to those of the Secretariat, or of excluding

others simply because in some past case they preferred to depart from the advice given by the Secretariat.

Finally, there is an interesting issue about the chair. The *DSU* itself does not refer to a panel having a chair, although it is probably reasonable that at least for the conduct of procedural matters, especially hearings, there should be one. In practice the chair, although equal with the other panellists in theory at least on matters of substance, appears to play a more developed role. Thus, it is interesting that the Secretariat has adopted the practice of itself making specific proposals as to who should be the chair (usually two of the six names proposed), as opposed to allowing the panel itself to determine this matter once composed (as happens with an Appellate Body division) (Working Procedures for Appellate Review, Rule 7.1). This probably enhances the influence of the Secretariat.

Some of these issues have bubbled to the surface in litigation. For example, in the *US-Upland Cotton* case the parties originally agreed that the panel could include two citizens of the third parties. At the compliance panel stage the US purported to re-invoke the provisions of Article 8.3 of the *DSU* in order to remove them and, remarkably, the Secretariat acquiesced in that. Brazil complained in the DSB and the US counter-complained about an alleged breach of confidentiality.[22] No doubt not wishing to provoke the new panellists Brazil did not raise the issue in the litigation, although the EU did as third party – although as third party its observations were not taken up by the panel or Appellate Body (Panel Report, *US-Upland Cotton (Article 21.5 – Brazil),* paras 8.27 to 8.28 and footnote 83, Appellate Body Report, *US-Upland Cotton (Article 21.5 – Brazil)*, para. 171). The gambit does not seem to have assisted the US and may even have worked against it, given the findings in the compliance panel reports.

Similarly, in the *US-Zeroing* case, in what was in my view an ill-conceived approach, the panel was composed of one EU and one US panellist with a chair from New Zealand. There was a dissenting opinion in favour of the EU which, although anonymous, is widely assumed to have been authored by the EU panellist. At the compliance stage only the EU panellist was still available, so once again the US removed him supposedly on grounds of citizenship and the Secretariat acquiesced in that. The EU complained unsuccessfully to the panel and Appellate Body not because it was attempting to revive "its" panellist, but because, as a matter of principle, it did not agree that adjudicators could be removed in this way during the process by one of the parties (Appellate Body Report, *US-Zeroing (EC) (Article 21.5 – EC)*, paras 164 to 172).

It remains to be seen how this issue develops. I am not suggesting that the issue of whether or not a particular reason is compelling could or should be frequently litigated before the Appellate Body. But I am suggesting that the Secretariat and the Director-General could and should interpret and apply the rules correctly; that if they did so it would be very unlikely that the Member invoking the overruled compelling reason would appeal; and that in order to get the Secretariat and Director-General to move in the right direction a substantial poke from a more rules-based perspective – that is, from the Appellate Body - may do the trick. The interesting issue that might arise is the situation where only three proposals remain, agreed to by one party, but the response of the other party is that it is "still considering" one or more of the proposals. In that situation, in my view, absent any reasons let alone a compelling reason, the panel is composed, and any different

[22] Minutes of the DSB Meeting on 26 October 2006 (WT/DSB/M/221), paras 75 to 79; Minutes of the DSB meeting on 21 November 2009 (WT/DSB/M/222), paras 82 to 89; Minutes of the DSB Meeting on 19 December 2006 (WT/DSB/M/224), paras 59 to 67.

composition would entail a legal defect justifying subsequent reversal of the panel report.

Thus, my conclusion would be that, on this issue, the rules are not yet being interpreted and applied so as to consolidate and enhance the rules-based system, most likely because the Appellate Body is infrequently involved. I do not, however, see any reason why this should not change, and my hope and expectation is that it eventually will.

3.2.Administrative Support

The next issue I would like to briefly comment on relates to the role of the Secretariat. A rules-bases system cannot work without a judge and all judges cannot work all of the time without some assistance. It is significant that the *DSU* expressly refers to the "responsibilities" of the Secretariat (*DSU*, Article 27.1) (an interesting choice of words – perhaps no-one would wish to suggest that the Secretariat has "powers"). However, the extremely brief and weak drafting of this provision belies the important role of the Secretariat in litigation. There was a rare glimpse of this on one occasion when two draft panel reports appeared with essentially identical drafting, indicating the extent to which the Secretariat is involved in individual cases.

Another interesting point here is that the secretariat assistance to panels originates from different parts of the WTO according to the type of dispute. Thus, anti-dumping and subsidies cases in particular are assisted by the so-called "rules division" of the WTO, whilst other cases are assisted by the "legal affairs" division. The reason for this split is not entirely clear.

But the main point that I think is of interest here is the position with respect to the Appellate Body. Article 17.7 of the *DSU* provides only that the Appellate Body shall be provided with appropriate administrative and legal support as it requires. In principle, nothing would appear to exclude the possibility that this support could be drawn from the general secretariat. However, the Appellate Body has its own secretariat that, although in the same building, is tightly separated from the rest of the organisation. I think this has probably played an important ancillary role in the development of WTO jurisprudence. One has the impression that members of the general secretariat, who may in fact be in regular contact with Members on other issues, are to some extent more influenced by the practice of Members. On the other hand, members of the Appellate Body secretariat appear to be more influenced by the objective rules of interpretation. In short, I think that the establishment of its own secretariat has probably been an important factor in the development by the Appellate Body of a more rules-based system.

3.3.Rules of Procedure

The next point I would like to discuss concerns the rules of procedure. I think that rules of procedure are one of the essential badges of a court in a rule-based system. Of course the *DSU* itself constitutes in substantial measure the rules of procedure. However, Appendix 3 of the *DSU* contains model working procedures for panels, and Article 17.9 of the *DSU* provides for the Appellate Body to adopt its own working procedures.

There is an interesting legal question about the relationship between such working procedures and the *DSU* itself. The conventional wisdom, which I think is correct, appears to be that one can do more or less anything in the working procedures,

provided that one stays within the material scope of the *DSU*, and at the same time does not contradict anything in the *DSU*.

The model panel working procedures in Appendix 3 of the *DSU* are relatively short. They tend to get adapted according to the needs of particular cases, and it is notably that there has as yet been no attempt by the Secretariat to consolidate these various adaptations into a more elaborate standard model. Interesting issues however often arise.

One such issue, for example, is the problem of "executive summaries". This may appear to be a trivial matter, but there is rather more to it that meets the eye. Appendix 3 does not refer to executive summaries. However, it is a standard insertion by panels (that is, the Secretariat) to either ask or even require the parties and third parties to provide "executive summaries". One hopes that the reason for this is not that the panellists do not read the submissions – although one should recall that they are *ad hoc* part-timers and that sometimes submissions are several hundred pages long. Rather, the reason appears to be to facilitate the preparation of panel reports. I am not certain that this is an entirely desirable thing. One does tend to notice two basic types of report – the type in which the parties' submissions are consecutively summarised by cutting and pasting the executive summaries, and the type in which a single summary for each party has been prepared by the panel (that is, by the secretariat). I am not particularly impressed by the first type, recalling the somewhat cynical definition of a university lecture as a means of getting information from the notes of the lecturer to the notes of the students without passing through the minds of either. A linked question is whether the panel can require executive summaries, and what it might do if a party or third party refused to provide them. I tend to think that the panel would not be in a position to draw adverse inferences or exclude submissions. This discussion is also linked to the issue of translation (some early reports annexed and translated the parties' submissions) and delay in the issuance of panel reports (recalling the various time limits in the *DSU*). In my view, in order to get at the root of this problem, it would probably be necessary to restrict the length of parties' submissions, something that is common in other courts and that I think can and should be done under the *DSU* as it stands. In turn, it would probably be necessary to create an environment in which parties felt confident about restricting their claims to the core issues. That could be done, for example, by facilitating the addition of claims during the proceedings should that prove appropriate (subject to due process), by having an expansive notion of compliance proceedings, and by ensuring that retaliation is assessed by reference to the measure as a whole (*US-Gambling* Article 22.6 Arbitration Panel Report, anonymous individual opinion).

Another interesting issue that has arisen concerns so-called business confidential information (BCI). The basic tension here is between the desire of firms to have their data protected even when it is referenced in litigation, and the proposition that the final judgment should be comprehensible and accessible to all Members, and indeed the wider public (Appellate Body Report, *Japan-Drams*, paras 106 and 279). There is nothing in Appendix III on this issue and special working procedures are adopted from time-to-time, notwithstanding the fact that the *DSU* provides more generally for confidentiality. There are different circles of confidentiality. In its most extreme form, sometimes parties refuse to even provide information to panels – an approach that, fortunately, is generally not fruitful for them. Then there is the question of other parties – here the general approach is to require the other party to keep the information confidential and in particular not disclose it to any employee or agent of a competitor. Then there is the question of third parties – here from time-to-time third parties are excluded from but may fight for access to BCI information. Finally, there is the question of the final report – and here some reports have in my view suffered from excessive bracketing, although the Appellate

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Body would rather seem to be of the view that it should generally be possible to draft without express reference to BCI (*DSU*, Article 18.1). In general, the Appellate Body appears to strike the balance much more in the direction of openness – that is, the rules-based system – rather than confidentiality, and rightly so in my view.

Another interesting question that has arisen is the question of open hearings and the associated additional working procedures – but this matter is discussed in more detail below.

It is interesting to compare the flexible and somewhat messy situation with respect to panel working procedures with the situation in the Appellate Body. Article 17.9 of the *DSU* provides that working procedures for appellate review shall be drawn up by the Appellate Body. In itself this constitutes a remarkable power. The possibilities for secondary rule making in the WTO are extremely limited, and even more so when they are constrained only by a "soft" requirement of consultation with the Chairman of the DSB and mere "communication" to Members for their information. To some extent this may be seen as a compensation for the fact that the *DSU* contains only one article (Article 17) that relates specifically to the Appellate Body – which is remarkable given its importance within the overall system.

The Working Procedures for Appellate Review (WT/AB/WP/6*) is an impressive document by any measure. Almost 9,000 words long it is almost as long as the *DSU* itself (which is about 11,500 words long). It is eminently legalistic in its drafting – the first Article contains 25 definitions. It regulates a whole range of issues, including: the duties and responsibilities of Appellate Body Members; decision-making; collegiality; the election and role of the Chairman of the Appellate Body; the constitution of divisions; the election and role of the presiding Member of the division; rules of conduct; incapacity; replacement; resignation; transition; general process; documents; *ex parte* communications; commencement of appeals; appellant submissions; appellee submissions; multiple appeals; amending notices of appeal; third participants; transmittal of the record; working schedules; oral hearings; written responses; failure to appear; withdrawal of appeals; prohibited subsidies; entry into force and amendment; and timetables. Thus, the Appellate Body appears to have taken full advantage of the power afforded to it by Article 17.9 of the *DSU*, and has included under the relatively nebulous heading "working procedures" matters that are also of an institutional or even constitutional nature. There is no doubt that there are a number of provisions in this document that, in themselves, make an important contribution to the rules-based system. For example, Rule 4 on collegiality provides for an exchange between all seven Members before the three Members of the division decide a case. Rule 6 provides for the selection of a division on the basis of rotation, while taking into account the principles of random selection, unpredictability and opportunity for all Members to serve regardless of their national origin. Rule 18 provides that no document is considered filed unless received within the specified time-period. And so forth. From time-to-time the Appellate Body amends the Working Procedures for Appellate Review and there are also "soft" additional procedures for consultations adopted by the DSB (WT/DSB/31). These discussions always attract very close attention from the Members, particularly those frequently engaged in litigation, because they well understand that very small changes in the rules can have substantial and important consequences in the operation of the system, both in general terms and in the context of specific cases (Alvarez-Jimenez 2009).

Finally, a further notable feature of the Working Procedures for Appellate Review is that they provide in rule 16.1 that, where a procedural question arises that is not covered by those rules, a division may adopt an appropriate procedure for the purposes of that appeal only, provided that it is not inconsistent with the *DSU*, the

other covered agreements and those rules. This can be seen just as a reservation of the possibility of acting quickly on an *ad hoc* basis in a particular case should that prove necessary. However, it also confirms the general proposition that the adjudicator is free to do what is not precluded (even if not expressly authorised by the *DSU*), which is a key point, and central to understanding, for example, the discussion with respect to *amicus curiae* briefs (see further below).

3.4.Rules of Interpretation

One of the most important and earliest issues relates to the applicable rules of interpretation. I think that non-lawyers often tend to characterise WTO adjudicators as exercising power, whereas I think that Members of the Appellate Body might rather think of themselves as exercising responsibility. The distinction may be a fine one, but it makes all the difference. It is true that adjudicators exercise judgment and can never hope to achieve perfect objectivity even if they might strive to do so. But I do not think that that residual element of subjectivity can usefully be characterised in the same terms as the essentially unfettered power exercised by a primary legislator. Obviously, what constrains the adjudicator is that the court is limited to interpreting and applying the law. Thus, the question of what are the applicable rules of interpretation and how they are to be applied plays an important role in delimiting the role of the adjudicator, and thus in turn the power-rules relationship.

The *DSU* states that the dispute settlement system is to "clarify" the covered agreements in accordance with customary rules of interpretation of public international law, but is not to add to or diminish the rights and obligations in the covered agreements (*DSU*, Articles 3.2 and 19.2). There are a number of interesting points arising from this provision.

The first relates to the term "clarify". Unlikely as it may seem, it periodically occurs that a litigant in a weak position attempts to argue that WTO adjudicators do not actually have the authority to "interpret" WTO law, only to "clarify" it. It is only the Members that have the right to seek "authoritative interpretation" through decision–making under the WTO Agreement (*DSU*, Article 3.9). This argument has never succeeded, and likely never will, because of the subsequent reference to "rules of interpretation" in the same provision, because it is difficult to understand what the distinction might be between "clarifying" and "interpreting", and because in any event adjudicators can apply the law and the distinction between application and interpretation is not a sharp one. On this point, therefore, the rules-based approach has to-date prevailed and very likely will continue to do so.

This leads to a second interesting point, which is the relationship between the judicial interpretation referenced in Article 3.2 of the *DSU* and the Members' "authoritative interpretation" referenced in Article 3.9 of the *DSU*. I think it is reasonably clear that the latter would prevail over the former. However, in fact, this "victory" for the power-based approach is entirely illusory, since Article 3.9 of the *DSU* has never actually been used, subject as it is to the heavy decision making rules in the WTO Agreement, whereas the judicial interpretation referenced in Article 3.2 of the *DSU* has been used very frequently. In practice, therefore, the rules-based approach prevails.

A third point is the tension that exists between the statement that WTO adjudicators are to interpret the law and the statement that they are not to add to or diminish the rights and obligations provided for in the covered agreements. Once again, one often sees a weak litigant invoking the latter statement and ignoring the former. This is somewhat self-defeating because even the latter statement is doubly two-edged – that is, it refers to both adding and diminishing, as well as to

both rights and obligations – so it is generally a simple matter for the stronger litigant to simply toss the phrase back, and it will generally ring truer in the mouth of the stronger litigant. Perhaps more interesting is the tension between the two statements themselves. Obviously the process of interpretation may well involve resolving apparent conflicts between different provisions of the covered agreements. Here, the theory would appear to be that the adjudicator is not adding to or diminishing, but simply discovering the law as it always has been - but this rather depends on having an agreed interpretative cipher (a point to which I return below). Interestingly, there is no reference here to applying the law, it being taken for granted, understandably, that that is what adjudicators necessarily do. As indicated above, the distinction between interpretation and application is a fine one: one can reason in the realm of interpretation that the term "vehicle" is to be interpreted as including the notion of a skateboard; or one can reason in the factual realm that the skateboard in question is a vehicle. Thus, application clearly does involve putting factual meat on the legal bones of the treaty, and it is not easy to see how this is possible without in some sense adding to what is initially there – and this is indeed what the case law is progressively doing.

That in turn raises the interesting question of what the limits to this process of judicial interpretation and application are. In my view, this is a matter in the hands of the legislator at the outset, and is a question of the scope of the legislation in the first place. It is for the legislator to set out the material, personal, territorial and personal scope of the legislation, and these are the primary parameters that limit subsequent judicial activity. If the legislator wishes to place specific matters outside the scope of adjudication it can and should do so. An example is that the *DSU* only applies to so-called situation complaints only up to point at which a panel report is circulated to the Members (*DSU*, Article 26.2). Another possibility is for legislators to specifically provide that Members have a choice – and an example of that is the so-called lesser duty rule under Article 9.1 of the *Anti-Dumping Agreement*. Conversely, if the legislator intends that a given set of rules should be exhaustive on a particular subject that may also be provided for. Examples of this include the rules in the *Anti-Dumping Agreement* and *SCM Agreement* that no specific action should be taken against dumping and subsidy other than in accordance with the provisions of those agreements (Anti-Dumping Agreement, Article 18.1 and *SCM Agreement*, Article 32.1). Such statements confirm that the adjudicator must rule on factual issues that fall within the material scope of the rules, even if they are not expressly addressed in the legislation. The alternative, which would be to not rule – sometimes referred to as a *non liquet* – simply represents a win for the defending Member.

That in turn leads to an interesting discussion of the "permissible interpretation" standard in Article 17(6)(ii) of the *Anti-Dumping Agreement*, a phrase that begs the question: who is to judge permissibility? The Appellate Body's interpretation of that provision (and notably the prior reference to customary rules of interpretation of public international law) is in my view correct (Appellate Body Report, *US-Zeroing II (EC)*, paras 265 to 275). The doctrine of deference to an administrative authority's reasonable interpretation and application of statute (Chevron in the US, margin of appreciation in the EU) makes sense in a classic constitutional structure of legislature, executive and judiciary. It might make sense, for example, if the WTO Secretariat would be properly established as an executive and would have and overtly exercise executive power to interpret the WTO Agreement (which is generally not the case). It makes no sense when the court acts not in the field of administrative law, but rather as a constitutional court. This is not a cultural difference between the US and the EU (Brightbill 2006). There might be some deference by the CJEU to the other institutions when it acts in the field of administrative law; but when the CJEU acts as a constitutional court, one of its primary functions is to ensure that EU law has the same meaning throughout the

Union. Thus, Article 17(6)(ii) does not introduce some unspecified degree of wiggle room for WTO Members. The only range of cases caught by Article 17(6)(ii) will be that of two competing interpretations in perfect equipoise (thus preserving the meaning of the provision), which is quite likely, as a matter of fact, never to arise. 'Permissible interpretation' is thus rather like an unsuccessful organ transplant: there was no tissue match in the first place; and the rules-based system simply cannot assimilate it.

In short, to conclude on the tension between the two statements, I think it is clear that the first statement has systematically prevailed. The adjudicators have been busy interpreting and applying the law and in that process inevitably adding to it – nor is it possible to conceive of a judicial system that would do otherwise. In this light, the second statement appears to be essentially rhetorical, incapable as a matter of simple logic of resisting the normal operation of the rules-based approach.

A fourth interesting question is: what are the customary rules of interpretation of public international law? At a relatively early stage WTO adjudicators identified Articles 31 to 33 of the *Vienna Convention on the law of the Treaties*. This has been enormously important in providing a systematic framework or agreed interpretative cipher, especially for the Appellate Body, and that in turn has given considerable support for the proposition that the judges are simply discovering the law as it has always been – that is, exercising responsibility as opposed to power. However, this has in turn provided a new arena for power *versus* rules tensions.

One interesting point here is that the *DSU* does not actually expressly refer to the *Vienna Convention*, and yet that is the manner in which the reference to the customary rules of interpretation of public international law has been understood. This, in itself, represents a step in favour of the rules-based approach, for two reasons. First, if one looks beyond the *Vienna Convention* there is actually no consensus about what the customary rules of interpretation of public international law actually are. If the interpretative tool box is uncertain, then this lends itself to a power based approach, because interpretative tools can be selected and/or weighted as a function of the desired outcome. Similarly, if the interpretative tool box is excessively broad then this also lends itself to a power based approach, since from a broad range one can also often find an interpretative rule well-suited to a particular outcome. The best example of this problem is the *in dubio mitius* rule, according to which, in case of doubt, the obligations entered into by a State in a treaty should be interpreted restrictively. This rule is not mentioned in the *Vienna Convention*, yet has been referenced in the WTO – although has not featured in more recent cases (Larour 2009).[23] My own view is that it might have been suited to a past age involving bilateral treaties with weak enforcement mechanisms, but is completely unsuited to a multilateral treaty such as the WTO. References to the *Vienna Convention* are sometimes qualified with the specification that it consolidates *in part* the customary rules of interpretation of public international law, leaving open the possibility of other rules coming into play, and some observers consider that express references to the *Vienna Convention* are on the decline in the case law. In my view, however, it still has an important role to play. Second, not all WTO Members are parties to the *Vienna Convention* (notably the US, a frequent party in WTO litigation). Nevertheless they find the treaty consistently applied to them in the context of WTO litigation.

[23] Actually, the reference in *Hormones* made sense because of the rule that the importing Member sets its own ALOP.

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A further interesting point to note is that other provisions of the *Vienna Convention* have been extensively referenced in the litigation, notwithstanding the fact that they do not appear to be rules of interpretation (Flett 2009). Thus, once again, one sees a development of the rules-based approach.

Turning to Articles 31 to 33 of the *Vienna Convention* itself, these provisions are sometimes criticised for relegating the preparatory work to a supplementary means of interpretation that comes into play only to confirm the meaning resulting from the application of Article 31, or if Article 31 leaves the meaning ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable. I think one can also see this as something that tends to enhance the rules-based approach. I tend to think that appealing to the intent of the Members is rhetorical, and I tend to agree with the proposition that, in the context of a multilateral treaty such as the WTO, the text of the treaty is best seen as the authentic expression of the parties' intent. Experience suggests that such documents as are available are not easy to categorise as preparatory work, often being authored by one Member. And in any event such documents can often be turned both ways: one can argue that the existing text should be understood as reflecting an earlier proposal; or that rejection of the earlier proposal precludes that meaning. I recall one third party hearing in which Members present were invited to state if, when the WTO treaty was negotiated in 1994, they understood a particular provision to have a particular meaning. One-by-one each of the dozen or so third parties "raised their flags" and carefully confirmed that they had no such intention, the last confirmation coming from China – provoking a stage whisper from one member of the panel: "but you weren't there" – to some hilarity amongst the delegations.

Another interesting aspect of Article 31 of the *Vienna Convention* is that, even though the title makes it clear that it contains a single general rule of interpretation, its different elements (good faith, ordinary meaning, context and object and purpose) are often considered in isolation. Even if they are ultimately combined, this systematic approach is also something of a product of the rules-based approach, because it allows the reader to understand how each element of the rule has played-out in the context of a particular issue, and even the relative weight afforded to each element.

To conclude with respect to the rules of interpretation, if one looks at the starting point, that is, the text of the treaty, and then looks closely at the way in which the power versus rules drama has played out in the specific context of the rules of interpretation, then what one sees is a systematic preference for the rules-based approach. This is hardly surprising. If one asks the question: "do you prefer a power-based or a rules-based approach?" in an arena that defines its very identity in terms of rules, and this with respect to the basic tools to be used in that arena, it seems to me inevitable that the rules-based approach will be preferred.

3.5.Burden of Proof

As I think I have already suggested, burden of proof is another one of those issues that is a symbol or badge of the judicial function. It shows a particular pre-occupation not only with the law, but also with the facts and evidence, and this in a specifically procedural context, in the sense that, no matter how brilliant your case or right you might be, if you have not proven the matter in a timely fashion you will lose.

The *DSU* itself does not speak expressly to the question of burden of proof, which is remarkable for a rules-based system. It is really difficult to see how any court can function, or at least function efficiently and in a manner that respects due process, without some general rule regarding burden of proof. Not surprisingly this issue

arose in one of the earliest cases, and was settled by the Appellate Body by drawing widely on other sources of international law (Appellate Body Report, *US-Wool Shirts and Blouses*, pages 13 to 16).

Essentially, the Appellate Body found that the party asserting a particular claim or defence (that is, in essence, a particular fact) has the initial burden of adducing evidence in support of that fact sufficient to rise to the level of a *prima facie* case. In many respects this is simply a matter of common sense, and hardly constraining for the judge, since the question of what amounts to a *prima facie* case is a matter to be judged on a case-by-case basis. Thus, in my view, it is less the substantive issue and more the way in which the symbolism of court proceedings is brought expressly into the *DSU* that is perhaps the most important aspect of this judgment. In fact, I tend to think that this judgment gave rise to a certain rigidity in the distinction between the notions of claim and affirmative defence that has not always subsequently served the system well. The WTO Agreement is replete with obligations and rights that are scattered across numerous provisions, more than one of which may be relevant to any given case. It is not always easy, and often not necessary, to particularly determine which provision forms the basis for a claim and which the basis for an "affirmative" defence. Rather, applying a bit of robust judicial common sense, and if necessary putting questions to the parties, it should not be unduly problematic to elicit the evidence necessary to decide a case one way or the other (Grando 2009).

3.6.Inherent Jurisdiction

Another particular feature of a court is its capacity to decide issues arising before it from time-to-time and especially those that go to the orderly conduct of the proceedings. Again, this is an area in which the operation of the *DSU* has resulted in a clarification in the jurisprudence to the effect that panels and the Appellate Body have such jurisdiction (Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 - US),* para. 36; Appellate Body Report, *Mexico – Taxes on Soft Drinks*, paras 42 and 51 to 52; Appellate Body Report, *US-Continued Suspension*, para. 433; Appellate Body Report, *Canada – Continued Suspension*, para. 433; Panel Report, *India – Patents (EC)*, paras 7.9 to 7.24 (ruling on the propriety of its own establishment); Panel Report, *Australia – Automotive Leather II*, paras 9.13 to 9.15 (assessing the substance of Australia's claim that, on a proper interpretation of the *DSU*, the panel was established – also through the actions of the DSB – inconsistently with the *DSU*)). Once again, therefore, this makes an important contribution to the rules-based system.

3.7.Managing the Docket

There are a number of other issues that have arisen during the course of WTO litigation and that one would normally expect to find regulated or properly regulated in a court's rules of procedure. They are different but related, in the sense that in one way or another they all go to the ability of the court to control the cases coming before it, and so I have grouped them together under this heading, and would briefly summarise them as follows.

First, in one of its earliest cases the Appellate Body confirmed that there was no requirement under the *DSU* for a complaining Member to demonstrate what was referred to as a "legal interest". It was enough for them to complain that another Member's measure is WTO inconsistent. This arose in the *EC-Bananas III* case because the US was not a producer of bananas. I think that this is an extraordinarily important statement of principle from a rules-based point of view, even if in practice its full implications have yet to work their way through the

system, given that Members do not generally litigate without an underlying commercial interest.

Second, a well-known aspect of the *DSU* is that it does not provide any remand authority for the Appellate Body. That is, the Appellate Body cannot reverse a panel, and send the matter back to the same panel for re-determination. The Appellate Body can only uphold, modify or reverse the legal findings and conclusions of a panel (*DSU*, Article 17.13). The Appellate Body has responded to this situation by deciding that it does have the authority to "complete the analysis". That is, having reversed a panel finding, the Appellate Body may itself be prepared to determine the matter. Generally, it is only prepared to do this on the basis of facts in the record of the proceeding that are uncontested. The somewhat tenuous legal basis for this is the proposition that the *DSU* seeks prompt settlement of disputes (*DSU*, Article 3.3). This does create a significant amount of discretion for the Appellate Body, because it is not always clear whether or not particular facts have been fully evidenced or fully contested, and I think that the existence of that discretion is born out by the subsequent case-law, which is perhaps not always fully consistent on the question of when it is appropriate to complete the analysis. I think that this is an interesting example of a development of the rules-based system which seems to comport with common sense and to which none of the Members appear to object in principle. However, that does not necessary make it consistent with Article 17 of the *DSU*.

Third, and in similar vein, the Appellate Body has developed a technique of sometimes declaring panel findings moot and of no legal effect. Presumably, it does this because it does not wish to uphold, modify or reverse – however, once again, that does not necessarily make it consistent with Article 17 of the *DSU*.

Fourth, and in similar vein, the Appellate Body sometimes purports to exercise "judicial economy". This is in itself a very difficult concept, especially given the mandate of WTO judges to assess conformity of a measure with the covered agreements, and the distinction between correct and "false" exercise of judicial economy is a difficult one. However, perhaps more significantly, it is not at all easy to square this practice with the specific rule in Article 17.12 of the *DSU* that the Appellate Body is required to address each of the issues raised during the appellate proceedings.

Fifth, another significant area is the rule in Article 17.6 of the *DSU* that an appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by a panel. By implication, this would seem to exclude appeals on points of fact. However, it is notably that the Appellate Body has decided that the legal characterisation of facts (that is, mixed questions of law and fact) are legal issues susceptible to appeal. Similarly, the Appellate Body has decided that the meaning of municipal law is also an issue susceptible to appeal. Finally, the Appellate Body has shown itself increasingly open to appeals pursuant to Article 11 of the *DSU* alleging that a panel has failed to make an objective assessment of the facts. This is just an appeal on the facts by another name. I think that we may be currently seeing some of the consequences of this relative opening of the Appellate Body's mandate in the form of very long and factually intensive Appellate Body reports, as well as some difficulty in adhering to the very tight time limits for appeal set out in the *DSU*.

Sixth and finally another area that will surely see further developments is the area of preliminary rulings. These are not provided for in the *DSU* but common practice in panel proceedings. This has generated a number of open legal questions, such as can one immediately appeal a preliminary ruling; is one precluded from doing so later; and can a panel change its mind on a preliminary issue in its final report.

In short, in all of these areas, I think that what we can see is a substantial development of the rules-based system repeatedly based on crystallising ambiguity in the *DSU* and the exercise of discretion. Whilst I think that some are legally correct, the legitimacy of some others appears to rest rather on the fact that they make good sense and the Members do not object.

3.8.Relations With Other Jurisdictions

The next issue I would like to address is the relationship between WTO law and particularly the WTO dispute settlement system and other international law and domestic law. Just as a key issue for any nation is how it sees itself in relation to other nations, so a key issue for any court is how it sees itself in relation to other jurisdictions and courts.

With respect to other international law a lot of work has been done at the theoretical level to explain what the relationship might or might not be. My own view is that there is not enough material in the case law to support firm conclusions about how this issue may develop in the future (Flett 2009). In any event, I am not persuaded that WTO adjudicators are generally following a theoretical approach on this issue. Rather, I think that they might be following what might be termed a more modern and pragmatic approach, as other courts, including the CJEU, appear to be doing, faced with a proliferation of international law. A close analysis of the WTO Agreement reveals that there are in fact many points of contact between WTO law and other international law, probably inevitably so, and that such other international law is also spilling-over and otherwise influencing in more subtle ways the development of WTO law. In short, the relationship between WTO law and other international law is happening on the ground, even if there is no grand theory to explain exactly what is happening or why it is happening. Against this background I think it fair to say that as the rules-based system of the WTO is developing, it is at the same time gradually taking its inevitable place within the overarching structures of international law in general.

With respect to domestic law, the important issues that remain to be explored include not only the significance of direct effect in some monist Members, but also the question of an interpretation in conformity rule, and whether Article XVI:4 of the *WTO Agreement* requires such a rule to be present in domestic law.[24]

3.9.Limiting Dissent

Another area that I would briefly like to address, without repeating what I have written elsewhere (Flett 2010b), is the question of dissents. In short, these have been thankfully infrequent in the WTO to-date, which I think is a good thing. Also, they have been even less frequent in the Appellate Body, probably reflecting the more collegial approach, which is also a good thing.

3.10.Precedent

Precedent is also an important area that I have already touched on above, and here also the Appellate Body has significantly contributed to the development of the rules-based approach (Appellate Body Report, *US-Stainless Steel (Mexico)*, paras 160 to 161).

[24] If this area were to be further explored and developed, then I would not agree with the conclusion of (Abbot et al. 2000) that even hard international law (that is, the WTO) does not approach stereo-typical conceptions of law based on advanced domestic legal systems, anymore than I would agree with such a statement with respect to EU law.

3.11.Open hearings

Open hearings are an important aspect of any court system, and thankfully the WTO is gradually expanding the use of open hearings.

3.12.Lawyers in the delegation

Another interesting question that has arisen is whether or not Members are permitted to include private lawyers in their delegations at oral hearings. Under the GATT there was a convention that this was not permitted, the reasoning being that the discussion was between sovereign states and confidential, and that the essential purpose was to find a resolution or settlement of the dispute. Previously a lawyer in private practice, I have myself represented governments in GATT disputes and had the frustrating experience of drafting the written and oral briefs, but being left to sit in the corridor, and to read panel reports that some might think more diplomatic than legal. Even under the WTO it has occurred that one delegation has immediately exited from consultations when the other party turned up with lawyers, on the grounds that the purpose of consultations is to search for an amicable settlement and not to prepare the ground for litigation. The matter is not expressly addressed in the *DSU*, so the stage was set for an interesting discussion, which arose in one of the early cases (*EC-Bananas III*).

Before the panel, the complainants (Ecuador, Guatemala, Honduras, Mexico and the US) objected to the presence of private lawyers, and the panel "requested" the parties and third parties to observe the guidelines set out in its working procedures, which referred to governments. It is interesting that the panel did not rule on this matter, but the "request" appears to have been something that the participants would not have been in a position to refuse. The panel based its request on the following considerations: past GATT and WTO practice; the terms of its own working procedures; unfairness to participants who had not brought their lawyers with them; confidentiality; unfairness to smaller Members; and the intergovernmental character of the proceedings (Panel Report, *EC-Bananas III*, paras 7.10 to 7.12). In the appeal proceedings Saint Lucia, supported by Canada and Jamaica, re-iterated the request, still opposed by the complainants, and the Appellate Body agreed. The Appellate Body reasoned that nothing in the covered agreements precluded it; that it might be important for developing countries (who would not generally have the same level of in-house expertise as Members such as the US and EU); and that appeals are limited to issues of law and legal interpretation, so it is important that representatives be qualified counsel (Appellate Body Report, *EC-Bananas III*, paras 4 to 12). Today, this is standard practice both before the Appellate Body and panels (Sacerdoti 2005).

I think this development was important for the rules-based approach for several reasons.

First, in my view, one of the most significant aspects of it, at least initially, was symbolic. Just as there are certain "badges" of statehood, so I think there are certain "badges" of a court – and permitting representation by outside lawyers is, in my view, one of those badges. It sends the message that this is litigation, not diplomacy. It suggests that this is a technical exercise for specialists arguing about and eventually searching for the "truth"; not a political exercise in which any outcome is possible.

Second, I think it has a spill-over effect *within* Members: it enhances the view that the business of the *DSU* is a matter for lawyers and not generalists. One of the things that happened within the EU Commission when the WTO was created was that responsibility for representing the EU in WTO litigation shifted from generalists

(within DG Trade) to lawyers (within the Commission Legal Service). I do think this is important, because whilst judges decide, they can only work with the material that is provided to them. The skills of a lawyer, especially in litigation, and especially in an area as technical as the WTO, are not something that can in my view be rapidly acquired without appropriate training and experience. There is also a process by which litigation lawyers acquire a good feel for how a judge is going to interpret and apply the law, based on a balanced, rational and reasonable understanding of the rules. There is no doubt in my mind that this is a process that also contributes to bridging gaps between domestic constituents, also in different Members, with opposing economic interests.

Third, I would agree with the Appellate Body that this could be a matter of concern for smaller Members. It is interesting on this point to see how for the panel and the Appellate Body this same consideration worked in opposite directions. The panel seems to have been worried that private lawyers might be too expensive. The Appellate Body seems to have been worried that smaller Member might not have the same in-house expertise as larger Members. I think the Appellate Body was correct, and that the concerns about cost have since been addressed at least in part by the creation of the Advisory Centre for WTO Law. Thus, once again the rules are interpreted so as to enhance the protection for weaker Members – that is, in a manner that contributes to the rules-based approach.

Fourth, I think that this approach has probably contributed to the gradual emergence of a WTO law "bar". It is true that private lawyers were already active in this area, if not in the oral hearings themselves. But I think that presence in the oral hearing enhances that process. This is all the more so since the move to open hearings, since a wider audience becomes aware of the participation of private lawyers (their participation is not recorded in briefs or reports). There is no doubt in my mind that the creation of a WTO law "bar" is part of the process that is driving the gradual development of the rules based approach, just as the anti-trust bar has surely significantly contributed to the legalistic nature of competition law. I think that the continuing evolution of a WTO law "bar" also has other more subtle effects. In structural terms it creates an additional counterpoint to complement the perspectives of the WTO institutions, Members and academics. There is a considerable amount of academic and other material being produced by such practitioners. They frequently participate and support conferences. They also provide a significant and relatively flexible employment base, with individuals quite frequently moving between the private sector and other WTO related activities. This contributes to cross-fertilisation and networking that breaks down formal barriers and contributes to the emergence of shared views.

Fifth, if one looks at the different ways in which Members actually use private lawyers, I think it is clear that there are other dynamics at play. The big players, such as the US and the EU have their own in-house counsel. I am not sure I have ever seen a private lawyer in a US delegation. The EU has recourse to outside lawyers relatively infrequently and only in specific circumstances, and even less frequently allows them to speak at oral hearings (although this does happen). Japan sometimes permits private lawyers in its delegation, but never lets them speak. Interestingly, Members such as Korea and particularly China, an increasingly important player in WTO litigation, are increasingly relying on private lawyers to a considerable extent during oral hearings. This is particularly so when one gets beyond reading out the "oral" statements and into questions, and particularly before the Appellate Body, where there is no opportunity to subsequently submit written answers to questions. There would appear to be a language consideration at work here. The WTO official languages are English, French and Spanish, with most litigation conducted in English, to the advantage, especially, of US lawyers. Thus, in retrospect, whether intended at the time or not, I think that the Appellate Body's

decision has been an important factor in drawing China and other Members more tightly into *DSU* litigation, thus contributing indirectly to the overall coherence and rules-based character of the system.

3.13.The role of third parties

The next point that I would like to comment on relates to the role of third parties, whom I believe have made a significant if not always recognised contribution to the rules-based system. Amongst the main players in WTO litigation there are only a few that intervene in all or almost all cases, including the US and the EU, but also Japan. They do so not only because of their trade interest in the particular case, but also because of a wider systemic interest in the correct interpretation and application of the covered agreements. That in turn implies that what is decided in one case is of wider interest to other Members in other cases – that is, that there is some informal system of precedent. That indeed is what the Appellate Body has recently confirmed (Appellate Body Report, *US-Stainless Steel (Mexico)*, paras 160 to 161).

The point that I would like to make is that it is not at all clear from a close study of the *DSU* that it was ever intended that third party intervention should extend beyond a trade interest to include a systemic interest. At the consultation stage, Article 4.11 of the *DSU* requires a substantial trade interest and the agreement of the defending Member. It is not immediately clear that when Article 10.2 of the *DSU* (which relates to third party rights) subsequently refers to a "substantial interest" it is referring to something more than a trade interest. Nevertheless, this is the practice that has developed, probably influenced by the fact that larger WTO Members such as the US and EU tend to intervene in all cases, and often reserve their third party rights orally in the DSB. It seem inconceivable now that this matter would ever be re-considered.

3.14.Amicus curiae

The *amicus curiae* discussion is often discussed as an instance where expressions of discontent by the Members constrained the actions of the Appellate Body. I am not sure that is the case because I think that the Appellate Body is correct. I rather think that the issue has not come to the fore for the time being because experience suggests that such briefs do not tend to contain material that is interesting from a legal point of view. They do not normally speak to issues or fact or evidence. They cannot add claims. And parties are generally pretty good at spotting and setting out the arguments. So I see the matter more in terms of public relations. It may be that the advent of open hearings may have some effect here, although it may work both ways. On the one hand the increased transparency might diminish the pressure for further movement on *amicus briefs*. On the other hand, once others see the arguments raging back and forth it cannot be excluded that they may be encouraged to return to this matter (Durling and Hardin 2005, Howse 2006).

3.15.Time limits

Another interesting area is to compare the time limit rules before panels with those before the Appellate Body. Time limits are one of the badges of a court, and the thing about them is that they are essentially binary. One either complies or does not, and many cases have been lost and won on that basis. Before panels the rule is generally although not always couched in terms of "should". In the Appellate Body the rule is "shall" (Working Procedures for Appellate Review, Rule 18.1). There are issues here about Members' different time zones in relation to Geneva, but in my view the logic for allowing for that disappears entirely or almost entirely

with modern electronic means of communication and filing. In a number of cases parties have tried to have the other side's brief excluded as untimely. So far this has not been successful before panels. However, in my view, it is only a question of time before the Appellate Body accepts such an argument.

3.16.The operation of the negative consensus rule in practice

There are some fascinating legal problems associated with the "negative consensus" rule, each of which represents, in my view, a particular stress point where the political and legal perspectives again collide or come together. They are like raindrops that reflect and focus the complex universe that surrounds them.

One of these problems is whether the special evidence discovery procedures in Annex V of the *SCM Agreement*, the existence of which reflects the fact that Members often hide the subsidies they grant, operate together with the special panel establishment rule in Article 7.4 of the *SCM Agreement*, that is, by negative consensus; or whether an Annex V procedure could only be launched by consensus (allowing the defending Member to strangle the entire process by starving it of information). The problem is that Article 7.4 refers expressly to negative consensus and Annex V refers back to Article 7.4, but Annex V does not itself refer to negative consensus – speaking only of the DSB "initiating" the Annex V process. My own view is that, on a proper construction, the negative consensus rule applies, because the default rule in the *DSU* for all dispute related matters is action by negative consensus. However, it remains to be seen how this matter will be decided when and if it comes to be litigated.

The second problem relates to what is something of a conventional wisdom to the effect that the first item on the agenda of any DSB meeting is approval of the agenda, which is a decision by consensus (Rules of Procedure for Sessions of the Ministerial Conference and Meetings of the General Council, Rule 6) allowing the defending Member to block. This temporarily happened, for example, following the Arbitration Panel in the *US-Byrd* case, and more recently when Taiwan objected to the appointment of a Chinese Member of the Appellate Body. Here again, my view is that the conventional wisdom is wrong because the *DSU* mandates adoption of the report by negative consensus and, on a proper construction, this trumps the rule regarding approval of the agenda.

A third interesting question is how a report gets onto the DSB agenda. In my view, it would be reasonable and correct to take the view that it is automatically on the agenda, since Article 16.4 of the *DSU* provides simply that reports shall be adopted by the DSB within 60 days. However, the conventional wisdom here appears to be that someone must place it on the agenda, and this has resulted in one report not being adopted (Panel Report, *EC-Bananas III (Article 21.5 – EC) (unadopted))*.

3.17.Enforcing the Judgment

An important issue for any court is how its judgment is to be enforced. In the WTO the remedy is authorised retaliation equivalent to the "nullification or impairment" arising from the WTO inconsistent measure, which is usually taken to mean the imposition of punitive trade sanctions with effect from the end of the reasonable period of time for compliance (*DSU*, Article 22). This is often criticised as being harmful to the retaliating Member, of little use to smaller or developing countries, and of no use in relation to past violations (Bown and Pauwelyn 2010, Shadikhodjaev 2009).

In my view this is an area where the WTO dispute settlement system still has a substantial amount of room to further develop the rules-based system. There have only been about a dozen cases to-date none of which have reached the Appellate Body, apparently because of a conventional wisdom, certainly erroneous in my view, that such matters cannot be appealed.[25] Consequently these matters have been handled by the original panels (that is, within the Secretariat) and have generally been characterised by an apparent hostility towards trade restrictive measures (forgetting that this is a means of enforcing the agreement to trade); increasingly complex, impenetrable and subjective economic analysis (under the influence of economists); and a lack of imagination when it comes to interpreting and applying the relevant legal provisions. In particular, the tendency has been to read the *DSU* as if it ultimately requires the complaining Member to demonstrate injury and causality, whereas in fact it provides that the nullification or impairment is presumed (*DSU*, Article 3.8). Furthermore, in my view, retaliation could take many different forms, provided that it is "equivalent", even extending to expropriation of assets on the complaining Member's territory. I also do not see why third parties at least cannot join a case as the stage of retaliation (since they will also have invoked the *DSU*) or participate from the outset pursuant to 9 of the *DSU* (without actually doing any work). In addition, if equivalence would also be understood for example relative to GDP, I do not see why smaller Members having successfully litigated against larger Members could not trade their retaliation rights at a handsome rate. Finally, contrary to the conventional wisdom, I do not see anything in the *DSU* that would preclude assessment of remedies *ex tunc*, as opposed to from the end of the reasonable period of time. In my view, approaches such as these could overcome most if not all of the problems identified with the WTO system of remedies. If this area were to be further explored and developed, then I would not agree with the conclusion of Abbot and Snidal (2000) that even hard international law (that is, the WTO) does not approach stereo-typical conceptions of law based on advanced domestic legal systems, anymore than I would agree with such a statement with respect to EU law.

4. The Members' Response

4.1.DSB minutes

One of the places where the Members' respond to what is going on in the WTO dispute settlement system is at the DSB meeting at which reports are adopted. These comments are recorded in the DSB minutes. The *DSU* specifically provides that the adoption of reports is without prejudice to the Members' right to express their views (*DSU*, Article 16.4 and Article 17.14). The comments are usually fairly predictable – the winning Member generally congratulates itself and the losing Member complains about the result. I think it is fair to say that these comments are generally lost in the sands of time – people generally refer to the reports and few bother looking at the minutes of the DSB. But there are exceptions.

[25] Appeals lie from "panel cases" (*DSU*, Article 17.1) and such matters are decided by "the original panel" (Article 22.6), which is also described as an "arbitrator". Article 1 of the *DSU* provides that the *DSU* applies to disputes concerning the *DSU* itself and Article 3.5 of the *DSU* requires all arbitration panel reports to be consistent with the *DSU*. When appeal is precluded the *DSU* specifically provides for that (Article 26.2). The requirement that the parties accept the decision as final (Article 22.7) precludes a second arbitration panel but not an appeal, and in any event does not preclude an appeal that seeks reversal of a legal error without any change in the award itself (and particularly when the arbitration panel has exceeded its jurisdiction).

On some occasions a Member has sought to have its document also circulated in the same series as the report (that is, with the same "DS" number) and this has been accepted, although the practice has also been questioned. This may raise the profile of the criticism to some extent, but it is probably of relatively little value. All or almost all of these comments relate to particular cases and do not relate to what I would call systemic issues.

4.2.DSU review

A 1994 WTO Ministerial Decision invited the Ministerial Conference to complete a full review of dispute settlement rules and procedures within four years after the entry into force of the WTO Agreement (that is, by 1 January 1999), and to take a decision on the occasion of its first meeting after the completion of the review whether to continue, modify or terminate the DSU rules and procedures (1994 Ministerial Decision). The review started in the DSB in 1997 and the time limit was extended to 31 July 1999 (WT/DSB/M/52), but there was no agreement. The Doha Ministerial Declaration of November 2001 agreed that negotiations should continue and aim to reach agreement not later than May 2003, and that they should not be part of the "single undertaking", that is, they should not be tied to the success or failure of the other negotiations (Doha Ministerial Declaration, November 2001). Following the Hong Kong Ministerial Declaration the negotiations are continuing without a deadline (Hong Kong Ministerial Declaration).

The Chairman of the Trade Negotiations Committee reported to the DSB most recently on 22 March 2010 (TN/DS/24, 22 March 2010). The DSB was informed that discussions were continuing on the basis of the consolidated draft legal text contained in the document issued under the Chairman's responsibility in July 2008 (JOB(08)/81 of 18 July 2008). The DSB was informed that that document covered the following issues: third party rights; panel composition; remand; mutually agreed solutions; strictly confidential information; sequencing; post-retaliation; transparency and *amicus curiae* briefs; timeframes; developing country interest, including special and differential treatment; flexibility and Member control; and effective compliance. Although the draft text of July 2008 is not a public document, the working documents of the *DSU* negotiations (including those containing proposals from Members) are public documents. The following brief summary of the main issues is based on the public working documents insofar as they relate to matters indicated by the Chairman to be included in the draft text of July 2008.

As a preliminary comment, it is interesting to note that there is a curious dynamic between *DSU* review and adjudication that sometimes comes to the fore. It quite often happens that issues that could quite easily be decided on the basis of the existing rules are put forward in the context of negotiations. Both communities sometimes draw inappropriate conclusions. Thus, sometimes the political community assumes that if a matter is the subject of negotiations it is off-limits for the judges. That assumption is clearly incorrect. Conversely, litigants sometime argue against a particular interpretation of the *DSU* because it happens to be something that the other party is pursuing in any event in the negotiation. That assumption is also incorrect.

With respect to third parties, the proposals include a time-limit within which to intervene (10 days), which is in any event already provided for in a DSB minute, as well as for enhanced third party rights, which is in any event not precluded by the existing text. There is also a suggestion to exclude third parties from confidential information – something that would represent a move away from the rules-based approach if it is not properly handled.

With respect to panel composition, there is a proposal for a long list on which parties would express preferences and panels would be composed on the basis of such preferences. There are some positive aspects to this proposal, but on balance it moves the centre of gravity of the matter away from the existing "institutional" text of the *DSU* and back towards the parties and as such represent a backward step, in my view.

With respect to remand, there is a proposal to permit one or both parties to remand a matter back to the original panel if the Appellate Body is unable to complete the analysis.

With respect to confidential information there are proposals to provide better protection for confidential information throughout the process. However, these do not in my view yet adequately explain how the tension between that objective and the open and rules-based nature of the system is to be resolved.

With respect to the so-called sequencing issue, there are proposals to resolve the apparent tensions in the existing text of the *DSU*, although in my view it is a simple matter of construction to reach the conclusion that the periods set out in Article 22.6 of the *DSU* run from the date of the adoption of the final report in compliance proceedings, and constrain the institutions, but not the complaining Member.

With respect to post-retaliation there is a proposal to allow for "reverse" compliance panels – although in my view that matter has already been correctly settled on the basis of the existing text of the DSU in the *US-Continued Suspension* cases.

There are also proposals with respect to open hearings and *amicus curiae* briefs – both issues that in my view may be adequately dealt with on the basis of the existing text of the *DSU*.

There are proposals under the heading of "flexibility and Member control", including guidance to adjudicators, although it is not clear how these, and especially the latter, extend beyond mere rhetoric or add anything to what is already in the text of the *DSU*.

Finally, there are some interesting proposals on compliance, including collective enforcement, nullification or impairment during the reasonable period of time, and more flexibility on cross-retaliation. Again, some of the issues in my view could be resolved on the basis of the existing text of the *DSU*.

Taken as a whole, one of the things that I think is quite striking about these proposals is that they do not appear to directly threaten the principle of binding "hard law" adjudication in itself. Rather, they mostly seek to address technical issues, or in some instances contain essentially rhetorical re-formulations of existing problems, that add little to the existing text of the *DSU* (Evans and De Tarso Pereira 2006, Hughes 2006, Bourgeois 2006, Brinza 2006, Cottier 2006). In other words, taken as whole, the Membership appears quite content with the process by which the rules-based approach has crystallised.

That said, I think it is problematic to witness a process by which the core document of the rules-based system is tossed into the scrum of political negotiations. One sometimes has the impression that some damage might be done inadvertently. One even sometimes has the impression that some aspects of the discussion might indeed reflect hesitancy about the central role of the WTO adjudicator. It must be a painful process for the adjudicators to watch and they must have their hearts in their mouths in the hope that the negotiators will "do no harm" to the system. In my view, the best people to deal with what are in essence the court rules of

procedure, that is, secondary rules (rules about rules) that are central to the system, are the judges themselves, possibly subject to some light control of the Members (as in the case of the Working Procedures for Appellate Review). This is common in other jurisdictions, including the EU. The most enlightened proposal would be to allow the Appellate Body to draw up any necessary proposed changes to the *DSU*, in close consultation with the Director-General, and subsequently the Members.

5. Conclusion

The WTO provides an opportunity to observe the recent creation, development and operation of a "hard law" adjudicative legal system, with legal subjects of greatly varying degrees of power, embedded within an intensely political environment. Between these parallel political and legal communities there are numerous points of contact. At each point of contact one finds played out (or to be played out) and resolved, re-iteratively, the basic drama between power-based and rules-based approaches to disputes. An examination of the Dispute Settlement Understanding and of subsequent developments - from the particular perspective of a participant within the WTO legal system - suggests that the rules-based approach was initiated in a somewhat low profile manner. Once the process had been quietly booted-up, ambiguity and discretion embedded in the rules has been systematically crystallizing, under the influence of lawyers and adjudicators acting both in and out of the court room, so as to substantially further develop and consolidate a more complete rules-based operating system. This is something to which the Members themselves do not appear to have objected. In the long term, the fundamental driving motor for this process, which ultimately outweighs all other considerations, is a necessity recognised by all participants and their constituents – that is, legal security and predictability for firms engaged in international trade. However, the legitimacy of particular outcomes will ultimately continue to rest upon the rationality, reasonableness and openness of adjudicators and their judgments. This repetitive process of shared experience and palliative outcome is progressively binding the political and legal communities together in a shared fate. The process is proving remarkably successful, and may both serve as a model for (and have spill-over effects in) other areas of international law. Ultimately, the system's continued success depends upon jealously guarding the independence of adjudicators, including the process by which they are selected, as well as ensuring the availability of effective remedies.

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