1-2019

‘Overreaching’ or ‘Overreacting’? Reflections on the judicial function and approaches of WTO appellate body

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'Overreaching' or 'Overreacting'? Reflections on the Judicial Function and Approaches of WTO Appellate Body*

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"If Satan should ever replace God he would find it necessary to assume the attributes of Divinity."

Robert A. Heinlein, "Double Star"

Since 2017, the US has blocked appointments to the WTO Appellate Body (AB), citing various concerns over its judicial approach, with the most significant being the issue of judicial overreach. This article provides a critical analysis of this issue and makes important contributions to the ongoing debate. Drawing on the fundamental function of the WTO, it offers a fresh approach to assess judicial overreach and shows that AB rulings in major non-trade remedy cases (that have consistently concerned the US) have served that function and hence should not be treated as 'overreaching'. We argue that, the allegation of judicial overreach, while untenable, does reflect systemic concerns with the legislative failure of the WTO Members to provide effective checks against the judicial power. This will need to be addressed, or else it will continue to haunt the AB or any other adjudicative body that takes over its role. We propose several fresh solutions to restore a proper balance between the legislative and judicial functions of the WTO, before concluding that as a Member-driven organization, the success or failure of the WTO ultimately depends on its Members.

1 INTRODUCTION

The multilateral trading system is at a crossroads. Substantive reform is needed, lest it falls into dysfunction and oblivion. Among the many challenges facing the system, the most pressing is the United States' (US) continuous blockage of the appointment of members to the WTO's highest court, the Appellate Body (AB). As of this writing, less than six months are left for WTO Members to resolve this issue, or the entire WTO dispute settlement mechanism (DSM) may be paralysed. Indeed, without a

* The authors are grateful to Dan Xie for valuable research assistance. We are responsible for any errors or oversights. All websites cited are current as of 1 July 2019.

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Zhou, Weihuan & Gao, Henry. "'Overreaching' or 'Overreacting'? Reflections on the Judicial Function and Approaches of WTO Appellate Body'. *Journal of World Trade* 53, no. 6 (2019): 951–978.

functioning AB, a disputant can stall the process by simply filing a notice of appeal, leaving the case in limbo.

The US has taken issue with a host of substantive and procedural problems in the adjudicative activities of the DSM, especially those concerning the AB. These included, inter alia, AB creating laws beyond the written rules agreed by WTO Members (known as 'judicial overreach'), issuing advisory opinions unnecessary to resolve disputes, reviewing matters of fact while its function is limited to reviewing issues of law, establishing a de facto system of precedent whereby its rulings must be followed by panels in the absence of 'cogent reasons', failure to comply with the mandatory ninety-day deadline for deciding appeals and continued service by persons who are no longer AB members.[1] In order to resolve the AB impasse, WTO Members have started to propose reforms of the relevant WTO rules, particularly the Dispute Settlement Understanding[2] (DSU), to specifically address US concerns.[3] Leading WTO scholars and commentators have also put forward detailed proposals on how these issues may be resolved.[4]

A major problem with all the proposals is that they accept the US allegations without questioning whether these allegations are well founded. While the validity of the procedure-related allegations is relatively easy to establish, the substantive claims are more controversial. For example, Gao has criticized the lack of foundation of the US allegation relating to the AB's issuance of *obiter dicta*, also known as advisory opinions.[5] Voon and Yanovich have shown that the distinction between issues of law and issues

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1 *See* Office of the United States Trade Representative, *2018 Trade Policy Agenda and 2017 Annual Report of the President of the United States on the Trade Agreements Program* [hereinafter '2018 Trade Policy Agenda'], Mar. 2018, at 22–8, https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2018/2018-trade-policy-agenda-and-2017.

2 Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994).

3 *See* e.g. WTO, General Council, Minutes of Meeting on 12 Dec. 2018, WT/GC/M/175 (20 Feb. 2019) 18–44.

4 *See* generally Tetyana Payosova, Gary Clyde Hufbauer & Jeffrey J. Schott, *The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures*, Peterson Institute for International Economics Policy Brief 18–5 (Mar. 2018), https://piie.com/system/files/documents/pb18-5.pdf; Robert McDougall, *Crisis in the WTO: Restoring the WTO Dispute Settlement Function*, CIGI Papers No. 194 (Oct. 2018), www.cigionline.org/sites/default/files/documents/Paper%20no.194.pdf; Jennifer Hillman, *Three Approaches to Fixing the World Trade Organization's Appellate Body: The Good, The Bad and The Ugly?*, Inst. of Int'l Econ. L., Georgetown University Law Center, IIEL Issue Briefs (10 Dec. 2018), www.law.georgetown.edu/wp-content/uploads/2018/12/Hillman-Good-Bad-Ugly-Fix-to-WTO-AB.pdf; Andrew Stoler, *Crisis in the WTO Appellate Body and the Need for Wider WTO Reform Negotiations*, Inst. for Int'l Trade, The University of Adelaide, Policy Brief 01 (Mar. 2019), https://iit.adelaide.edu.au/system/files/media/documents/2019-04/IIT%20PB02%20Crisis%20WTO%20Appellate.pdf; Ernst-Ulrich Petersmann, *How Should the EU and Other WTO Members React to Their WTO Governance and WTO Appellate Body Crises?*, EUI Working Paper RSCAS 2018/71 (Dec. 2018), http://cadmus.eui.eu/bitstream/handle/1814/60238/RSCAS_2018_71.pdf?sequence=1&isAllowed=y.

5 *See* generally Henry Gao, *Dictum* on *Dicta: Obiter Dicta in WTO Disputes*, 17(3) World Trade Rev. 509(2018). *See also* Giorgio Sacerdoti, *A Comment on Henry Gao, 'Dictum on Dicta: Obiter Dicta in WTO Disputes'*, 17(3) World Trade Rev. 535 (2018).

of fact 'is fraught with difficulty' and the AB's review of the former may often need to rely on an examination of the latter.[6] Given the exigency of the AB crisis, it is understandable for WTO Members to focus on dispelling US concerns rather than having a lengthy debate over the various issues. However, in the long run, these issues will need to be properly examined with an aim to reaching a shared understanding of, and a systematic solution to, the issues.

This article is dedicated to the issue of judicial overreach which is not only one of the longest-lasting concerns for the US but also the most significant one. In one of its earliest proposals for DSM reform in 2005, the US cautioned that in interpreting the WTO agreements, panels and the AB must exercise reasonable care so as to avoid adding to or diminishing the rights and obligations of Members under the agreements, as required under Article 3.2 of the DSU.[7] More recently, the US reiterated this concern in almost all of its official condemnation of the AB and highlighted it as the most significant issue in its 2018 Trade Policy Agenda.[8] Other Members recognized that this issue is highly complex and contentious and hence warrants careful and considerable discussions, but decided to move on to contemplate a solution to it precisely because of the urgent need to save the appellate system.[9]

This article is organized as follows. Section II briefly reviews the concept of judicial overreach or judicial activism in domestic and international court systems with a focus on the debate over the DSM. It then considers this issue in light of the overarching function of the WTO. We show that the underlying function of the WTO is to constrain the use of protectionist measures while allowing the use of trade instruments for legitimate, non-protectionist policy objectives. It is submitted that an AB ruling that serves this function should not be treated as 'overreaching'. This offers a fresh approach to examining the issue of judicial overreach. This approach is important because a judicial interpretation based on the general rule of interpretation codified in the Vienna Convention on the Law of Treaties[10] (VCLT) may well lead to inconsistent results and divergent opinions.[11] In such circumstances, consideration of the underlying function of the WTO provides a powerful test of whether judicial overreach has occurred. Indeed, in a recent

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6 *See* generally Tania Voon & Alan Yanovich, *The Facts Aside: The Limitation of WTO Appeals to Issues of Law*, 40(2) J. World Trade 239 (2006).

7 *See* generally WTO, Dispute Settlement Body, *Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding*, Communication from the United States, TN/DS/W/82/Add.1 (25 Oct. 2005).

8 *See* Office of the United States Trade Representative, 2018 Trade Policy Agenda, *supra* n. 1, at 22.

9 *See* e.g. WTO, WT/GC/M/175, *supra* n. 3, at 42–3.

10 Vienna Convention on the Law of Treaties 1969, 23 May 1969, 1155 U.N.T.S. 331.

11 *See* Bernard M. Hoekman & Petros C. Mavroidis, *The Dark Side of the Moon: 'Completing' the WTO Contract Through Adjudication*, Nov. 2012, at 5, http://globalgovernanceprogramme.eui.eu/wp-content/uploads/2012/11/Hoekman-Mavroidis-MESSERLIN-FEST_FIN.pdf.

farewell speech, outgoing AB member Professor Van den Bossche recalled that in his nine-plus years of service as an AB member, '[t]he most challenging cases … were those regarding the balance struck in the relevant WTO agreement between free trade and conflicting societal values'.[12] This observation speaks to the importance of ensuring that WTO judicial decisions maintain a balance between trade liberalization and domestic autonomy, which therefore provides a useful benchmark to identify cases of judicial overreach.

Section III discusses AB's rulings under the Agreement on Technical Barriers to Trade[13] (TBT Agreement) in three major cases to examine whether these rulings have amounted to judicial overreach. These cases include *US – Clove Cigarettes*,[14] *US – Tuna II (Mexico)*[15] and two subsequent compliance proceedings (i.e. *US – Tuna II (Mexico)(Article 21.5)* [16] and *US – Tuna II (Mexico)(Article 21.5 II)* [17]), and *EC – Seal Products*.[18] There are two main reasons for the focus on TBT cases. First, the cases in which the US claimed judicial overreach largely fall within two categories, namely, trade remedy and non-trade-remedy cases.[19] While there have been rich discussions of judicial overreach in the trade remedy cases,[20] the same is not true for the non-trade-remedy cases which have mainly

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12 WTO, Appellate Body, *Farewell Speech of Appellate Body Member Peter Van den Bossche*, (28 May 2019), www.wto.org/english/tratop_e/dispu_e/farwellspeech_peter_van_den_bossche_e.htm.

13 Agreement on Technical Barriers to Trade, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120.

14 Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes* (*US – Clove Cigarettes*), WT/DS406/AB/R (adopted 24 Apr. 2012).

15 Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (*US – Tuna II (Mexico)*), WT/DS381/AB/R (adopted 13 June 2012).

16 Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (Recourse to Art. 21.5 of the DSU by Mexico) [US – Tuna II (Mexico)(Art. 21.5)]*, WT/DS381/AB/RW (adopted 3 Dec. 2015).

17 Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, *(Recourse to Art. 21.5 of the DSU by the United States) & (Second Recourse to Art. 21.5 of the DSU by Mexico)*, WT/DS381/RW/USA, WT/DS381/RW/2 (adopted 11 Jan. 2019). [hereinafter *US – Tuna II (Mexico)(Art. 21.5 II)*].

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

19 *See* Office of the United States Trade Representative, 2018 Trade Policy Agenda, *supra* n. 1, at 22–4. *Also see* Terence P. Stewart, *Can the WTO Be Saved from Itself? Not Without a Major Crisis, and Possibly Not Even Then*, Wash. Int'l Trade Ass'n (13 Apr. 2018), Attachment 1, www.stewartlaw.com/Content/Documents/Terence%20Stewart%20-%20WITA%20paper%20(April%2013%202018).pdf.

20 *See* e.g. Roger P. Alford, *Reflections on US – Zeroing: A Study in Judicial Overreaching by the WTO Appellate Body*, 45(1) Colum. J. Transnational L. 196 (2006); Michel Cartland, Gerard Depayre & Jan Woznowski, *Is Something Going Wrong in the WTO Dispute Settlement?*, 46(5) J. of World Trade 979 (2012); Marc Benitah, *China's 'Industrial Subsidies': Is the WTO's AB Jurisprudence About the Definition of a 'Public Body' An Instance of the Worst Kind of Judicial Activism?*, Int'l Econ. L. & Pol'y Blog (28 Mar. 2019), https://worldtradelaw.typepad.com/ielpblog/2019/05/chinas-industrial-subsidies-is-the-wtos-ab-jurisprudence-about-definition-of-a-public-body-an-instan.html; Ru Ding, '"Public Body" or Not: Chinese State-Owned Enterprise', 48(1) J. of World Trade 167 (2014); Amrita Bahri, *'Appellate Body Held Hostage', Is Judicial Activism at Fair Trial?*, 53(2) J. World Trade 293, 302–07 (2019).

involved the TBT Agreement.[21] Second, in all the selected TBT cases, the AB was requested to determine whether the contested technical regulations were designed to achieve certain non-protectionist policy objectives chosen by the responding Members. This provides a proper framework for the discussion of whether the AB rulings were 'overreaching' in light of the overarching function of the WTO. After a careful examination of the AB's interpretation of the relevant provisions of the TBT Agreement and the outcomes of the cases, we argue that the AB's decisions did not lead to judicial overreach but were reasonably confined to fulfilling the underlying function of the WTO. That is, the decisions have targeted the protectionist use of the policy instruments concerned without unduly interfering in the Members' pursuit of the non-protectionist goals, thereby achieving a good balance between the disciplining of protectionist measures and deference to domestic regulatory autonomy. Accordingly, at least regarding the TBT cases, we believe that the US allegation of judicial overreach is unfounded and has led to a misinterpretation of the AB rulings. Indeed, the mere fact that a losing party disagrees with an interpretation/decision of the AB does not necessarily mean that the AB has overstepped its authority.[22] Rather, 'one would have to stand legal analysis on its head to accuse the Appellate Body of having "created" law.'[23]

Section IV addresses the larger problems relating to legislative failure of the WTO and the lack of political check on decisions of the WTO tribunals. While judicial overreach is an unfounded allegation in light of the overarching function of the WTO, it reflects the entrenched frustration of the US about these broader and more systematic issues. Recognizing that the alleged problem of judicial overreach is just the symptom, not the root cause of the systemic problems in the WTO, we propose several solutions which would help restore a proper balance between the legislative and judicial functions of the WTO. They focus, respectively, on the problematic practice of 'constructive ambiguity' in treaty drafting, techniques to avoid politically sensitive questions in dispute settlement, mechanisms to grant more autonomy to disputing parties, and ways for the political bodies to exert more control on the decisions of WTO tribunals.

Section V concludes this article.

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[21] For a notable exception in this regard, *see* generally Robert Howse, *The World Trade Organization 20 Years On: Global Governance by Judiciary*, 27(1) Eur. J. Int'l L. 9 (2016).

[22] Lorand Bartels, *The Separation of Powers in the WTO: How to Avoid Judicial Activism*, 53(4) Int'l & Comparative L. Quarterly 861, 868 (2004).

[23] *See* Robert Hudec, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization*, 1(2) World Trade Rev. 211, 217 (2002). *Also see* Andrew Lang, *The Judicial Sensibility of the WTO Appellate Body*, 27(4) Eur. J. of Int'l L. 1095 (2016).

2 THE CONCEPT OF JUDICIAL OVERREACH AND THE FUNDAMENTAL FUNCTION OF THE WTO

2.1 Judicial activism

In past decades, judicial activism – a term often used interchangeably with judicial overreach – has acquired many distinct and sometimes contradictory meanings when being applied and vigorously debated in domestic legal systems.[24] Given its various dimensions, a key unresolved issue in the debate is the precise boundaries of judicial power or the criteria used to define activism amongst judges, scholars, lawyers, politicians and other commentators and stakeholders.[25]

In this article, we consider one specific dimension of judicial activism where courts make positive laws beyond their judicial power, thereby performing a role that is assigned to the legislature. At the domestic level, this dimension is typically embedded in a constitutional system based on separation of powers. Nevertheless, the proper boundary between necessary judicial interpretation and development of law and usurpation of judicial power remains controversial in many common law jurisdictions.[26] For instance, while some have suggested that 'the most justified and least dangerous way to practice judicial review' in US courts is one based on the structures of government embodied in the Constitution,[27] others have shown that the limits that the doctrine of separation of powers imposes on judicial review, and whether a judicial decision has crossed the limits, is subject to different interpretations.[28] In practice, some have argued that in a democratic society, judicial review 'can only rise to this level of activism … when other political forces have abdicated their role of directing social changes'.[29] Others have observed that judicial activism has been 'used to induce public disapproval of a court action that a politician opposes, but is powerless to overturn.'[30]

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24 *See* generally Keenan D. Kmiec, *The Origin and Current Meanings of 'Judicial Activism'*, 92(5) Cal. L. Rev. 1441 (2004); Alpheus Thomas Mason, *Judicial Activism: Old and New*, 55(3) Va. L. Rev. 385 (1969).

25 *See* generally Bradley C. Canon, *Defining the Dimensions of Judicial Activism*, 66(6) Judicature 236 (1983).

26 *See* Michael Kirby, *Judicial Activism*, 27(1) W. Austl. L. Rev. 1, 1–14 (1997). Under civil law legal systems, the relationship between the judiciary and the legislature has also been hotly debated. While the relatively limited judicial authority of civil law courts means that judges tend to be more conservative in performing their judicial functions, the issue of judicial activism has arisen (especially in constitutional courts) and generated similar difficulties in determining whether judges have overstepped their authority. *See* e.g. Susan Gluck Mezey, *Civil Law and Common Law Traditions: Judicial review and Legislative Supremacy in West Germany and Canada*, 32(3) Int'l & Comp. L. Q. 689 (1983); Hiroshi Itoh, *Judicial Review and Judicial Activism in Japan*, 53(1) L. & Contemporary Prob. 169 (1990); Juliano Zaiden Benvindo, *On the Limits of Constitutional Adjudication: Deconstructing Balancing and Judicial Activism* (Heidelberg: Springer 2010).

27 *See* generally Greg Jones, *Proper Judicial Activism*, 14(1) Regent Univ. L. Rev. 141 (2001).

28 *See* generally Frank M. Johnson, Jr., *In Defense of Judicial Activism*, 28(4) Emory L.J. 901 (1979).

29 *See* Wallace Mendelson, *The Politics of Judicial Activism*, 24(1) Emory L.J. 43 (1975).

30 *See* William Wayne Justice, *The Two Faces of Judicial Activism*, 61(1) The George Wash. L. Rev. 1 (1992).

In the international arena, although the power of courts/judges tends to be more limited as it must be delegated by Member States via treaties and exercised with due deference to national sovereignty, there have been similar concerns about activism due to the increasingly influential role of international tribunals 'in shaping the structure and content of international law'.[31] The core problem is how to draw a clear line between treaty interpretation for the settlement of disputes and law-making by the judiciary. This problem typically arises when judges of international courts are asked to address numerous complex legal claims and lengthy technical submissions in accordance with a treaty that is often incomplete and open to more than one permissible interpretation. This difficulty is not reduced by the application of internationally-recognized interpretative methods which may lead to either an extensive or conservative interpretation.[32] Indeed, it is reasonable to argue that a proper judicial review must reflect the compromises reached by the parties. However, such compromises are hard to identify due to the wide range of divergent interests involved in treaty negotiations.[33] The corollary is that judicial activism is difficult to establish from a legal perspective.

More often than not, judges are criticized as being 'activist' for political reasons (rather than for legal reasons), especially by losing parties who are unsatisfied with the outcome of a case.[34] Like in the domestic systems, such criticism may reflect concern with the lack of effective mechanisms for political control that could be utilized to overturn a judicial decision.[35] This concern would become increasingly severe if Member States fail to further clarify or develop the existing treaty rules – i.e. a failure of the legislative function of an international organization – while tribunals have to apply these rules to disputes involving cutting-edge and politically sensitive issues. This means that regardless of whether judges take more 'activist' or 'self-restraint' approaches to judicial interpretation, they do need judicial discretion and autonomy to properly serve their functions.[36] However, to maintain the legitimacy of an international tribunal, we need to strike a balance between rule of law and legalization on the one hand, and the political demands of states and legislation on the other.[37]

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31 *See* Fuad Zarbiyev, *Judicial Activism in International Law – A Conceptual Framework for Analysis*, 3(2) J. Int'l Dispute Settlement 247, 248 (2012).

32 *Ibid*., at 253–54.

33 *Ibid*., at 260.

34 *Ibid*., at 252.

35 *Ibid*., at 263.

36 *See* generally Pieter Kooijmans, *The ICJ in the 21st Century: Judicial Restraint, Judicial Activism, or Proactive Judicial Policy*, 56(4) Int'l & Comparative L. Q. 741 (2007); Dragoljub Popovic, *Prevailing of Judicial Activism over Self-Restraint in the Jurisprudence of the European Court of Human Rights*, 42 Creighton L. Rev. 361 (2009).

37 *See* generally Robert O. Keohane, Andrew Moravcsik & Anne-Marie Slaughter, *Legalized Dispute Resolution: Interstate and Transnational*, 54(3) Int'l Org. 457 (2000); Richard H. Steinberg, *Judicial*

Since its birth, the WTO has faced many challenges to its legitimacy.[38] As far as the AB is concerned, judicial activism has been one of the major criticisms. However, like in domestic or other international courts, the boundary between judicial interpretation and judicial legislation is not clearly delineated under the WTO treaty. Indeed, Article 3.2 of the DSU sets out the key mandates of the AB as 'providing security and predictability to the multilateral trading system' and 'clarify[ing] the existing provisions of those agreements in accordance with customary rules of interpretation of public international law'. It also imposes a constraint that in fulfilling these mandates the AB must not 'add to or diminish the rights and obligations in the covered agreements.' Thus, the AB's judicial power is limited to treaty interpretation that *clarifies* the rights and obligations agreed by Members and does not include *creating* such rights or obligations. However, the considerable loopholes or ambiguities in WTO rules make it extremely difficult to ascertain what the agreed rights and obligations should be. While it is settled that the general rules of treaty interpretation contemplated in the VCLT should be applied in the interpretation of WTO agreements, the AB's application of these rules in individual disputes has been regularly criticized as being too conservative or creative and sometimes contradictory.[39] Moreover, the application of VCLT rules does not always lead to a definite interpretation and therefore is susceptible to criticism that another permissible interpretation should apply.[40] Given these legal uncertainties and controversies, the tension between the judicial and legislative powers under the WTO is unavoidable despite the overarching boundary contemplated in Article 3.2 of the DSU.

Yet, in many disputes the tension is more about the political impacts of a decision than about judicial law-making. While an AB decision is jurisprudentially important and necessary for the resolution of disputes, it often has significant and

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Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints, 98(2) Am. J. of Int'l L. 247 (2004).

38 *See* e.g. Daniel C. Esty, *The World Trade Organization's Legitimacy Crisis*, 1(1) World Trade Rev. 7 (2002); Joshua Meltzer, *The Challenges to the World Trade Organization: It's All About Legitimacy*, Brookings Global Econ. & Development Policy Paper 2011–04 (19 Apr. 2011), www.brookings.edu/wp-content/uploads/2016/06/0419_world_trade_organization_meltzer.pdf.

39 *See* generally Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body*, 21(3) Eur. J. of Int'l L. 605 (2010); Hoekman & Mavroidis, *supra* n. 11, at 9–14. For a comprehensive discussion of treaty interpretation in the WTO, *see* generally Asif H. Qureshi, *Interpreting WTO Agreements: Problems and Perspectives* (Cambridge: 2nd ed., CUP 2015).

40 *See* Petros C. Mavroidis, *Crisis? What Crisis? Is the WTO Appellate Body Coming of Age?* in *Opportunities and Obligations: New Perspectives on Global and US Trade Policy* 173, 176 (Terence P. Steward (eds), Netherlands: Kluwer Law International 2009). For examples of unresolved interpretations based on VCLT rules, *see* e.g. Weihuan Zhou, *The Role of Regulatory Purpose Under Articles III:2 & 4 – Toward Consistency Between Negotiating History and WTO Jurisprudence*, 11(1) World Trade Rev. 81, 83–7 (2012); Weihuan Zhou & Delei Peng, *EU – Price Comparison Methodologies (DS516): Challenging the Non-Market Economy Methodology in Light of the Negotiating History of Article 15 of China's WTO Accession Protocol*, 52(3) J. of World Trade 505, 509–18 (2018).

immediate political implications especially for losing parties. In reality, it is not uncommon for an AB decision to attract considerable political resistance from a losing party, although whether the decision has undermined the original compromises established by trade negotiators is often debatable. The consequence is that there is a political need for disputing parties to speak against unfavourable rulings in response to their domestic constituents, typically based on allegations that the AB's interpretation is legally erroneous and has affected the agreed compromises underpinning WTO rules. Thus, the AB operates in such 'dual legal and political environments'.[41] To promote the international rule of law, predictability, certainty and fairness without risking political backlashes, the AB has to constantly juggle diverse and sometimes competing interests, such as treaty interpretation, dispute resolution, judicial independence and political and legislative demands.[42]

Building upon the VCLT rules, several self-restraint techniques have been proposed for the AB to minimize political repercussions. For example, one early US proposal recommended that the AB adopt a strictly 'textualist' interpretative approach to avoid filling gaps or clarifying ambiguities that were left deliberately by negotiators in WTO agreements.[43] Commentators have observed that in certain highly sensitive cases, the AB did exercise self-restraint by employing deferential doctrines such as *in dubio mitius* whereby an ambiguous treaty term shall be interpreted in a way that minimizes burden on states.[44] They have also suggested that in dealing with such cases the AB may also consider 'avoidance techniques' such as judicial economy and non-justiciability to 'diminish the probability of severe political correction.'[45]

While the AB has often employed VCLT rules for treaty interpretation, it has shown a strong inclination for gap-filling and ambiguity clarification, which is often achieved through considerable judicial creativity. This choice of a more 'activist' and less deferential approach has become the core source of the concerns about judicial activism. Nevertheless, whether the AB's approach has fundamentally and adversely shifted the balance of rights and obligations between WTO

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41 *See* Cosette D. Creamer, *Between the Letter of the Law and the Demands of Politics: Judicial Balancing of Trade Authority Within the WTO*, University of Minnesota Working Paper 2017, at 2, https://scholar.harvard.edu/files/cosettecreamer/files/creamer_jls_v2.pdf.

42 *See* Steinberg, *supra* n. 37, at 267. For a more generalized piece on the values and norms of international courts, *see* Jeffrey L. Dunoff & Mark A. Pollack, *The Judicial Trilemma*, 111(2) Am. J. Int'l L. 225 (2017).

43 *See* WTO, TN/DS/W/82/Add.1, *supra* n. 7.

44 *See* Steinberg, *supra* n. 37, at 258–59; Robert Hudec, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization*, 1(2) World Trade Rev. 211, 215 (2002). For a discussion of some of these techniques, *see* Lorand Bartels, *The Separation of Powers in the WTO: How to Avoid Judicial Activism*, 53(4) Int'l & Comparative L. Quarterly 861, 868–77 (2004).

45 *See* Steinberg, *supra* n. 37, at 269. For a comprehensive discussion of the use of these techniques in early WTO cases, *see* generally William J. Davey, *Has the WTO Dispute Settlement System Exceeded Its Authority?*, 4(1) J. Int'l Econ. L. 79 (2001).

Members remains debatable.[46] It is also not clear as to whether the use of more deferential techniques would allow the AB to effectively avoid political repercussions without sacrificing its judicial function.

Faced with the legal and political complexities embedded in this ongoing accusation of the AB, there is a pressing need to establish workable standards/criteria for an objective assessment of the issue of judicial activism. The persistent absence of such standards has created an environment that has facilitated misinterpretations of AB rulings and unfounded allegations of judicial overreach, which have in turn led to misunderstandings of and hence opposition to the judicial approaches and decisions of the AB.

2.2 Assessing judicial activism in light of the function of the WTO

One useful way to assess whether the AB has overstepped its delegated authority in interpreting WTO rules is to assess its decisions in light of the fundamental function of the WTO. Where the application of VCLT rules permits different interpretations, whether the AB's interpretation is 'overreaching' would be hard to determine by merely relying on the legality of the interpretation(s). However, the AB's interpretation should not be treated as 'overreaching' if it serves the underlying function of the WTO.

While the fundamental function of the WTO remains a subject of debate,[47] classic theorems of free trade and public choice offer a powerful and influential explanation of why the rules-based trading system is designed to discipline the choice of trade policies and policy instruments by governments in pursuit of various policy objectives.

This function may be expounded briefly as follows.[48] The doctrine of comparative advantage, which demonstrates the economic benefits of free trade, merely

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46 *See* Steinberg, *supra* n. 37, at 269–73.

47 For a comprehensive analysis of literature on an array of proposed rationales for the formation of the WTO, *see* WTO, *World Trade Report: Six Decades of Multilateral Trade Cooperation: What Have We Learnt?* 50–98 (Geneva: WTO 2007).

48 The explanation of the relevant theories draws on some of the most seminal works and their subsequent developments, such as, Douglas A. Irwin, *Against the Tide: An Intellectual History of Free Trade* (New Jersey: Princeton University Press 1996); Anthony Downs, *An Economic Theory of Democracy* (New York: Harper & Brothers 1957); Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Cambridge, Mass.: Harvard University Press 1965); Gene M. Grossman & Elhanan Helpman, *Protection for Sale* 84(4) Am. Econ. Rev. 833 (1994); Kenneth W. Abbott, *The Trading Nation's Dilemma: The Functions of the Law of International Trade* 26(2) Harv. Int'l L. J. 501 (1985); Ernst-Ulrish Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law* 95–138 (Fribourg, Switzerland: Westview Press 1991); Richard Blackhurst, *The Economic Effects of Different Types of Trade Measures and Their Impact on Consumers* in *International Trade and the Consumer* 94–111 (OECD, Paris, 1986); Peter H. Lindert, *International Economics* (Illinois: 8th ed., Richard Irwin 1986) Ch. 6.

establishes a case for unilateral liberalization but not necessarily trade cooperation. Instead, the need for international cooperation on trade regulations arises from the politics of trade. To maximize the chances of retaining power, politicians are highly tempted by short-term political gains obtainable from granting protection to influential constituencies (i.e. importing-competing industries *v.* consumers), even though they recognize the longer-term economic gains from trade liberalization and economic costs of protection. Consequently, in their choice of trade policies and policy instruments, they are prone to choosing the ones that afford higher protection and are typically more trade-restrictive and distortive from an economic perspective.

The creation of a rules-based system for trade cooperation incorporates the interests of exporters into the domestic decision-making process, which counteracts the protectionist pressure on policy-making and makes it politically costly to deviate from economically efficient and transparent policy instruments.[49] The system creates strong incentives for exporters to lobby for reciprocal trade liberalization, that is, the opening-up of their own market in exchange for enhanced access to foreign markets. WTO rules regulate the choice of trade policies and policy instruments in a way that largely conforms to the guide of economic theories.[50] As such, these rules promote the use of less-trade-restrictive and more economically efficient policy instruments to achieve policy objectives.

However, one major qualification for this function of the WTO is that the system does not require Members to sacrifice 'the pursuit of any economic or social policy goal' for the pursuit of free trade.[51] From an economic perspective, trade liberalization may not be an economically viable policy if governments are restricted from addressing domestic externalities/objectives. Instead, it could be welfare-enhancing if the externalities/objectives are tackled through first-best policy instruments that attack directly the source

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[49] *See* generally Jan Tumlir, *International Economic Order: Rules, Co-operation and Sovereignty* in *Issues in International Economics* 1–15 (Peter Oppenheimer (eds), Stocksfield, Northumberland, England: Oriel Press Ltd., 1980); Frieder Roessler, *The Scope, Limits and Function of the GATT Legal System*, 8(3) The World Econ. 287 (1985). *See also* Robert Hudec, *Circumventing Democracy: The Political Morality of Trade Negotiations* 25(2) N.Y.U. J. Int'l L. & Pol. 311, 316 (1993); Kenneth W. Dam, *Cordell Hull, the Reciprocal Trade Agreement Act, and the WTO* in *Reforming the World Trading System: Legitimacy, Efficiency, and Democratic Governance* 83, 96 (Ernst-Ulrich Petersmann (eds), Oxford, New York: Oxford University Press 2005).

[50] *See* generally Frieder Roessler, *The Constitutional Function of the Multilateral Trade Order* in *National Constitutions and International Economic Law* 53–62 (Meinhard Hilf & Ernst-Ulrich Petersmann (eds), Deventer, The Netherlands: Kluwer 1993). *See also* Ernst-Ulrich Petersmann, *National Constitutions and International Economic Law* in *National Constitutions and International Economic Law* 3–52, 47–8 (Meinhard Hilf & Ernst-Ulrich Petersmann (eds), Deventer, Boston: Kluwer Law and Taxation Publishers 1993).

[51] *See* e.g. Petersmann, *supra* n. 48, at 230; Roessler, *supra* n. 49, at 294; Alan O. Sykes, *Regulatory Protectionism and the Law of International Trade*, 66(1) The Univ. Chi. L. Rev. 1, 6–7, 23 (1999).

of each externality/objective.[52] From a political perspective, when nations decide to relinquish aspects of their sovereignty to the WTO to make international trade rules collectively, it is unlikely that their intention is to empower the WTO to decide on their behalf what non-trade objectives would be legitimate.[53] Thus, a WTO dispute settlement decision that unduly impairs Members' capacity in pursuing domestic policy goals would be economically and politically undesirable. Accordingly, the WTO's function of disciplining the use of policy instruments should not amount to an undesirable impediment to Members' pursuit of legitimate policy objectives.

The application of this function to the assessment of judicial activism means that the key consideration would be whether an AB decision achieves a proper balance between the regulation of protectionist policy instruments and the flexibility for Members to pursue non-trade interests. Significantly, this approach goes beyond the legality of a decision and allows for an evaluation of its economic and political soundness. It therefore encapsulates the foundation of the multilateral trading system and offers a systemic way to determine judicial activism.

3 THE LEGITIMACY OF AB DECISIONS IN TBT CASES

Generally speaking, the AB has demonstrated a good understanding of the underlying function of the WTO and the economic and political implications of its decisions. In various rulings, the AB has drawn a distinction between policy objectives and policy instruments stressing repeatedly that what WTO rules seek to regulate are the instruments and that its decisions should not be taken as restricting Members' freedom of attaining non-trade policy goals.[54] These rulings suggest that, in principle, the AB has taken a coherent and balanced approach in disputes involving non-trade interests.

The AB's approach, however, has not dispelled growing concerns over judicial activism. Under the TBT Agreement, US concerns have centred on the AB's

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[52] *See* generally Jagdish N. Bhagwati, *The Generalized Theory of Distortions and Welfare* in *Trade Balance of Payments and Growth: Papers in International Economics in Honor of Charles P. Kindleberger* 69–90 (Jagdish N. Bhagwati et al. (eds), Amsterdam London: North-Holland Publishing Co. 1971). For a comprehensive review of the historical development and application of the theory of distortions, *see* Jagdish N. Bhagwati, *Free Trade Today* (Princeton and Oxford: Princeton University Press 2002).

[53] *See* e.g. Ming Michael Du, *The Rise of National Regulatory Autonomy in the GATT/WTO Regime*, 14(3) J. Int'l Econ. L. 639, 644 (2011).

[54] *See* e.g. Panel Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/R (adopted 20 May 1996), para. 7.1; Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R 29–30 (adopted 20 May 1996); Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R (adopted 6 Nov. 1998), paras 199–200; Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R (adopted 17 Dec. 2007), para. 140.

interpretation of the non-discrimination rules contemplated under Article 2.1.[55] In *US – Clove Cigarettes*, the very first dispute in which the non-discrimination principle was interpreted, the US criticized the AB's rulings as second-guessing the judgment of US regulators without solid evidence and failing to pay due regard to the different regulatory considerations involved.[56] In *US – Tuna II (Mexico)*, the immediately subsequent dispute in which the AB adopted and applied the same interpretative approach, the US raised similar concerns and reiterated that WTO tribunals are not equipped to question complex regulatory considerations of Member States.[57] In contrast, in *EC – Seal Products*, in which the AB ruled against the EC's discriminatory measures for the protection of animal welfare, the EC did not challenge the AB's authority and competence to judge the WTO-lawfulness of its measures and the US implicitly endorsed the AB's rulings as being reasonably deferential.[58] The different attitudes of the US in these disputes suggest that its claim of judicial overreach may have more to do with the political implications of losing disputes than with the actual legal approach and standards developed by the AB. To further examine the validity of the US allegations of judicial overreach in light of the fundamental function of the WTO, we provide a brief analysis of the AB decisions in these cases below.

3.1 US – Clove Cigarettes

The US measure involved in *Clove Cigarettes* was a prohibition of cigarettes with characterizing flavours other than tobacco or menthol. This measure affected Indonesia, the largest exporter of clove cigarettes to the US. Under Article 2.1 of the TBT Agreement, the AB upheld the panel's findings that menthol and clove cigarettes were 'like products' and that by banning imported clove cigarettes but not menthol cigarettes of US origin, the measure had a disparate impact on the imports in favour of the domestic goods.[59] The legality of the measure, consequently, hinged on whether it served the claimed policy objective of reducing youth smoking by prohibiting the manufacture and sale of cigarettes with certain 'characterizing flavours' that appeal to youth. After a careful interpretation of the term 'less favourable treatment' based on the VCLT rules, the AB established a test of whether the disparate impact of the measure 'stems exclusively from a legitimate

[55] *See* Office of the United States Trade Representative, 2018 Trade Policy Agenda, *supra* n. 1, at 23.
[56] WTO, Dispute Settlement Body, Minutes of Meeting on 24 Apr. 2012, WT/DSB/M/315 15–6 (27 June 2012).
[57] WTO, Dispute Settlement Body, Minutes of Meeting on 13 June 2012, WT/DSB/M/317 6 (31 July 2012).
[58] WTO, Dispute Settlement Body, Minutes of Meeting on 18 June 2014, WT/DSB/M/346 21–2 (28 Aug. 2014).
[59] *See* Appellate Body Report, *US – Clove Cigarettes, supra* n. 14, paras 131–32, 144–45, 160, 222.

regulatory distinction rather than reflecting discrimination against the group of imported products'.[60] This test may be seen as a Rationality Test because the key issue is whether the discrimination has a rational connection with the chosen objective. If such a connection is lacking, then the discrimination is most likely a disguised protectionist instrument. Applying this test, the AB found that the US measure was unjustifiable as it was not even-handed in the pursuit of the chosen objective by excluding 'menthol cigarettes, which similarly contain flavours and ingredients that increase the attractiveness of tobacco to youth, from the ban on flavoured cigarettes.'[61] The US offered two explanations for the exemption of menthol cigarettes: to avoid (1) 'the potential impact on the US health care system associated with the need to treat "millions" of menthol cigarette addicts with withdrawal symptoms', and (2) 'the risk of development of a black market and smuggling to supply the needs of menthol cigarette smokers'.[62] The AB rejected these explanations as there was no proof that the risks 'would materialize if menthol cigarettes were to be banned, insofar as regular cigarettes would remain in the market.'[63]

As will be shown below, the WTO tribunals applied the Rationality Test to assess whether a discriminatory measure was justifiable in the subsequent TBT cases. This test, however, has been controversial. The latest and most comprehensive criticism of the US was presented in the meeting of the Dispute Settlement Body (DSB) where the reports of the second compliance panel and the AB in *US – Tuna II (Mexico)(Article 21.5 II)* were adopted. While the AB ultimately ruled in favour of the US, the US forcefully challenged the AB's interpretation of the non-discrimination rules on two major grounds, contending that the Rationality Test (1) finds no textual support in the TBT Agreement, and (2) has imposed unreasonably high standards/burdens for Members to satisfy in designing and applying domestic regulations and hence 'would diminish WTO Members' rights to pursue legitimate and important public policy measures.'[64] Scholars are also divided on the reasonableness of the test.[65] For the

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60 *Ibid*., paras 167–82.
61 *Ibid*., paras 225, 236.
62 *Ibid*., para. 225.
63 *Ibid*.
64 US Mission to International Organizations in Geneva, Statements by the United States at the Jan. 11 DSB Meeting, at 3–16, https://geneva.usmission.gov/wp-content/uploads/sites/290/Jan11.DSB_.Stmt_.as-deliv.fin_.pdf.
65 *See* e.g. Petros C. Mavroidis, *Driftin' Too Far from Shore – Why the Test for Compliance with the TBT Agreement Developed by the WTO Appellate Body Is Wrong, and What Should the AB Have Done Instead*, 12(3) World Trade Rev. 509 (2013); Gabrielle Marceau, *The New TBT Jurisprudence in US – Clove Cigarettes, WTO US – Tuna II, and US – Cool*, 8(1) Asian J. of WTO & Int'l Health L. & Pol'y 1 (2013); Weihuan Zhou, *US-Clove Cigarettes* and *US-Tuna II (Mexico)*: *Implications for the Role of Regulatory Purpose under Article III:4 of the GATT*, 15(4) J. Int'l Econ. L. 1075 (2012); Emily Lydgate, *Is It Rational and Consistent? The WTO's Surprising Role in Shaping Domestic Public Policy*, 20(3) J. of Int'l Econ. L. 561 (2017).

purpose of this article, a detailed examination of the different academic positions would be unnecessary. Rather, it would suffice to note that the debate over the Rationality Test lends support to the view that the application of the VCLT rules may well lead to more than one permissible interpretation. However, the fact that the AB has adopted one of the permissible interpretations to which others disagree does not mean that the AB's interpretation is 'overreaching'. Instead, it suggests that judicial overreaching cannot be adequately evaluated solely based on legal interpretations but requires a consideration of the broader implications of the AB's interpretation.

In light of the underlying function of the WTO, we discuss the implications of the *Clove Cigarettes* decision by explaining how the AB sought to strike a balance between disciplining of protectionist policy instruments and deference to domestic autonomy. While questioning the discriminatory effect of the US measure, the AB did not rule against the measure as a whole. This leaves flexibility for the US to maintain the ban as long as the discrimination is removed. Moreover, the AB considered the US's explanations for the exclusion of menthol cigarettes from the ban, thereby leaving room for Members to justify discrimination based on reasons other than stated policy objectives. However, any such justifications rely heavily on evidence. In *Clove Cigarettes*, the evidence adduced by the US failed to substantiate the need for the discrimination to achieve the public health goal (as clove and menthol cigarettes are equally addictive) or to avoid the declared side effects on the US health care system and the tobacco market.[66] Since the discrimination was not rationally connected with the policy objective, it made the US ban less economically efficient and more distortive in addressing the negative externalities associated with the consumption of cigarettes. The fact that the discrimination isolated domestic menthol cigarettes from foreign competition without serving the claimed policy objective provided a strong indicator that the sole purpose behind it was to afford protection to the domestic industry involved.[67] The existence of strong protectionist pressures behind the US's choice of policy response to the health goal was also evident from the fact that the US was politically unable to comply with the AB rulings by either lifting the ban on clove cigarettes or extending it to menthol cigarettes. Instead, the US convinced Indonesia to enter into a mutually agreed solution to the dispute, buying time to address domestic political resistance to WTO compliance which would adversely affect the vested interests of the US tobacco industry.[68]

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[66] *See* e.g. Tania Voon, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, 106(4) Am.n J. Int'l L. 824, 828 (2012).

[67] *See* Mavroidis, *supra* n. 65, at 526; Tomer Broude & Philip I. Levy, *Do You Mind if I Don't Smoke? Products, Purpose and Indeterminacy in US – Measures Affecting the Production and Sale of Clove Cigarettes*, 13(2) World Trade Rev. 357, 389 (2014); Simon Lester, *Domestic Tobacco Regulation and International Law: The Interaction of Trade Agreements and the Framework Convention on Tobacco Control*, 49(1) J. of World Trade 19, 30 (2015).

[68] *See* William K. Watson, *As Expected, WTO Clove Cigarettes Case Goes Nowhere*, Cato Institute (8 Oct. 2014), www.cato.org/blog/expected-wto-clove-cigarette-case-goes-nowhere. For a critical analysis of

Thus, the Rationality Test and the AB's application of it in *Clove Cigarettes* do not seem 'overreaching'. Contrary to US accusations, the AB did not overstep its authority by engaging in a 'cost and benefit' assessment of the US measure on behalf of US regulators. All the AB did was to compel the US to remove the discriminatory element of the measure which evidently reflects the protectionist influence of the import-competing industry. In the meantime, the AB left considerable policy space for the US to pursue its public health policy without requiring it to comply in a particular way or ignoring any other reasonable regulatory considerations that it may have. By doing so, the AB's decision struck a proper balance between disciplining protectionism while allowing regulatory autonomy.

3.2 US – Tuna II (Mexico)

The measure involved in *Tuna II (Mexico)* – i.e. the US 'dolphin-safe' labelling scheme – had a similar discriminatory element as that of the US tobacco ban but in a more covert form. Under the scheme, tuna products were categorized based on the *technique* employed in tuna-harvesting and the *area* where tuna was harvested. Specifically, a regulatory distinction was made between tuna products containing tuna harvested in the Eastern Tropical Pacific Ocean (ETP) using purse seine nets and those containing tuna harvested outside the ETP using techniques other than setting on dolphins. The scheme imposed a number of different requirements on the two categories of tuna products to determine their eligibility for a 'dolphin-safe' label. The major issue was that the requirements applied to the former regulatory category, within which almost all Mexican tuna products fell, were more onerous than those applied to the latter category which covered almost all US tuna products. Thus, the measure was found to have an asymmetric impact on the competitive opportunities of Mexican tuna products in the US market.[69] In assessing the US's claim that the measure served to inform consumers and protect dolphins, the AB applied the Rationality Test and concluded that the discriminatory treatment of Mexican tuna products in favour of their US counterparts was unjustifiable. In reaching this conclusion, the AB relied on evidence showing that the US measure did not address the harms to dolphins associated with the use of techniques other than setting on dolphins in tuna-fishing outside the ETP.[70]

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the settlement of the dispute and its implications for the DSM, *see* Johannes Norpoth, *The Mutually Agreed Solution between Indonesia and the United States in US – Clove Cigarettes: A Case of Efficient Breach (or Power Politics)?* in *International Economic Law: Contemporary Issues* 129–47 (Giovanna Adinolfi et al. (eds), Switzerland: Springer 2017).

69 *See* Appellate Body Report, *US – Tuna II (Mexico), supra* n. 15, paras 234–35.

70 *Ibid.*, paras 251, 288.

Therefore, the measure was not even-handed in addressing the same risks to dolphins and hence had no rational connection with the declared objective.[71] However, the AB endorsed the necessity of the labelling scheme as a whole for the pursuit of the chosen objective essentially on the ground that there was no less trade restrictive means that could achieve the level of protection pursued by the scheme.[72]

To implement the AB rulings, the US amended the labelling scheme by strengthening the requirements applicable to tuna products containing tuna caught outside the ETP by techniques other than setting on dolphins.[73] However, the revised scheme maintained the same regulatory distinction and did not completely remedy the discriminatory requirements; consequently, in the first compliance proceedings the AB found that certain provisions of the revised scheme still lacked evenhandedness.[74] Subsequently, the US further strengthened the requirements on the same regulatory category to specifically address the deficiencies found by the first compliance tribunal. In the second compliance proceedings, based on the panel's thorough risk assessment of the different fishing activities which concluded that setting on dolphins causes more and higher harms compared with other fishing methods, the AB upheld the panel's finding that the further revised scheme was 'calibrated to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean.'[75]

Like in *Clove Cigarettes*, the AB's dissatisfaction with the US 'dolphin-safe' labelling scheme was narrowly focused on the discriminatory element of the scheme. As part of a comprehensive regulatory framework adopted by the US to protect dolphins, the labelling scheme was introduced to strengthen the existing framework by targeting the consumption of tuna in response to overwhelming public pressure.[76] There is evidence to show that the scheme was effective in changing the behaviour of consumers and producers in a way that reduced the harms to dolphins.[77] Thus, in the

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71 *Ibid*., paras 297–99.

72 *Ibid*., paras 328, 330.

73 Dispute Settlement Body, Minutes of Meeting held on 23 July 2013 (WT/DSB/M/334, 2 Oct. 2013), para. 1.51.

74 *See* Appellate Body Report, *US – Tuna II (Mexico)(Art. 21.5), supra* n. 16, paras 6.7–34, 7.231–266.

75 *See* Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (Recourse to Art. 21.5 of the DSU by the United States) & (Second Recourse to Art. 21.5 of the DSU by Mexico)*, WT/DS381/RW/USA, WT/DS381/RW/2, adopted 11 Jan. 2019, paras 7.164–717; Appellate Body Report, *US – Tuna II (Mexico)(Art. 21.5 II), supra* n. 17, paras 6.33–258.

76 *See* Rodrigo Fagundes Cezar, *The Politics of 'Dolphin-Safe' Tuna in the United States: Policy Change and Reversal, Lock-in and Adjustment to International Constraints (1984–2017)*, 17(4) World Trade Rev. 635, 642–45 (2018).

77 *See* e.g. Mario Teisl, Brian Roe & Robert Hicks, *Can Eco-Labels Tune a Market? Evidence from Dolphin-Safe Labeling*, 43(3) J.of Envtl Econ. & Mgmt. 339 (2002); Lorraine Mitchell, *Dolphin-Safe Tuna Labeling* in *Economics of Food Labeling* 25 (Golan, Kuchler and Mitchell (eds), Washington DC: Agricultural Economic Report No. 793, US Department of Agriculture 2000); Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, adopted 13 June 2012, paras 7.320–331.

original proceedings, the AB rightly endorsed the overall legitimacy and effectiveness of the scheme and paid due deference to the level of protection that the US chose to achieve by rejecting the alternate scheme established under the Agreement on the International Dolphin Conservation Program (AIDCP) which could merely offer a lower level of protection. However, the evidence before the tribunal did not provide a valid reason for why the two categories of tuna products should be subject to different labelling requirements when the fishing activities at issue tend to create similar risks to dolphins. In other words, the discrimination could not be explained by the policy objective that the US sought to achieve. Thus, the AB pushed the US to gradually narrow the differences in the labelling requirements between the regulatory categories so that the scheme became less discriminatory and protective. If one considers the scheme as an instrument to address information asymmetries in the US market as to whether tuna products are produced in a dolphin-friendly manner,[78] the revised scheme addressed this externality and hence the ultimate goal of protecting dolphins more closely.

In short, the AB's decision was reasonably focused on disciplining the protectionist element of the US scheme and was not overly intrusive into the policy space of the US in protecting dolphins. It provided flexibility for the US to maintain a comprehensive regulatory framework using a mix of policy instruments including the labelling scheme based on the regulatory distinction to achieve its desired level of protection. In addition, it also left room for the US to tackle the same production externality of different sizes in different ways, that is, to apply different labelling requirements under the different regulatory categories in response to larger risks to dolphins. While the labelling scheme involved a variety of political considerations, the AB's decision was solely aimed at counteracting the protectionist influence on environmental policies without impairing the capacity of the US government to respond to the interests of environmental groups.[79] Indeed, the likely effect of the decision was to provide an international constraint necessary for the US to overcome domestic protectionist pressures and improve the labelling scheme to enhance the protection of dolphins.[80]

3.3 EC – SEAL PRODUCTS

Seal Products concerned the EU's seal regime which imposed a ban on the importation and sale of seal products in EU markets. The regime, however, created several exemptions with the major one being the so-called IC exception which

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78 *See* Meredith Crowley & Robert Howse, *Tuna-Dolphin II: A Legal and Economic Analysis of the Appellate Body Report*, 13(2) World Trade Rev. 321, 343 (2014).

79 For an analysis of the politics behind the evolvement of the US labelling scheme, *see* generally Cezar, *supra* n. 76.

80 *Ibid.*, at 658–59.

excluded seal products obtained from seals hunted by Inuit or indigenous communities from the ban. The evidence before the panel showed that the exception was made available exclusively to Greenlandic IC hunts and consequently had a disparate impact on Canadian and Norwegian seal products vis-à-vis those originating in Greenland.[81] The complexity of the dispute arose from the fact that the seal regime was apparently designed to serve multiple objectives. According to the EU, the ban served to address public moral concerns about inhumane killing of seals and consumption of commercially-hunted seal products, and the IC exception sought to preserve the tradition and culture of indigenous people. However, the panel found that the IC exception had no rational connection with the objective of protecting seal welfare and therefore violated Article 2.1 of the TBT Agreement and constituted 'unjustifiable and arbitrary discrimination' under the Chapeau of GATT Article XX.[82] But the panel did accept that the regime as a whole was necessary to achieve the objective under Article 2.2 of the TBT Agreement because the alternative means proposed by the complainants would be less effective and unreasonably burdensome for the EU.[83] On appeal, the AB did not consider the panel's reasoning and findings under Articles 2.1 and 2.2 of the TBT Agreement after it reversed the panel's finding that the EU regime was a 'technical regulation' under the TBT Agreement.[84] Nevertheless, the AB upheld the panel's rulings that the IC exception cannot be reconciled with the moral objective and that the EU could have done more to address seal welfare in the context of IC hunts.[85] The AB further ruled that the EU could improve the criteria of the IC exception to avoid arbitrary application that exempts commercial hunts, and should have made 'comparable efforts' to facilitate the access of Canadian Inuit to the IC exception as it did for the Greenlandic Inuit.[86]

The most controversial part of the AB's decision in *Seal Products* is perhaps whether it has restricted the policy space that the EU needs to address multiple, competing non-trade interests. The moral objective of the ban and the preservation objective of the IC exception are conflicting to the extent that the latter created 'loopholes that might admit products of commercial hunts'.[87] We believe that the AB's rulings are not unduly restrictive but have left sufficient policy space

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81 Panel Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products (EC – Seal Products)*, WT/DS400/R, WT/DS401/R, adopted 18 June 2014, paras 7.157–170, 7.290–319, 7.592–609.

82 *Ibid*., paras 7.618–651.

83 *Ibid*., paras 7.478–505.

84 *See* Appellate Body Report, *EC – Seal Products, supra* n. 18, paras 5.8–70.

85 *Ibid*., para. 5.320.

86 *Ibid*., paras 5.337–338.

87 Rob Howse, Joanna Langille & Katie Sykes, *Sealing the Deal: The WTO's Appellate Body Report in EC – Seal Products*, 18(12) ASIL Insights (2014), www.asil.org/insights/volume/18/issue/12/sealing-deal-wto%E2%80%99s-appellate-body-report-ec-%E2%80%93-seal-products.

for the EU. As in the previous two cases, what the AB was concerned about was the discriminatory effect of the IC exception. Neither the moral objective nor the preservation objective could explain sufficiently why the IC exception was not applied in an even-handed manner. On the one hand, the effectiveness of the EU regime to the accomplishment of the moral objective was clearly reduced by the IC exception.[88] On the other, the exclusion of IC hunts other than the Greenlandic Inuit failed to afford equal protection of the rights of indigenous communities in all the parties involved. Accordingly, the discriminatory design and application of the IC exception resulted in a less efficient position in which both objectives were only partially addressed. This suggests strongly that the EU regime was likely compromised by commercial interests of domestic industries.[89] In reality, the discrimination did lead to 'substitution of imports from Canada and Norway with imports from Greenland.'[90] Thus, the AB was right to rule against the discrimination so as to defend the function of the WTO in disciplining the use of protectionist policy instrument. The AB's rulings have the effect of pushing the EU to improve the seal regime for the protection of seals as well as to provide equal access to indigenous hunts from the other parties under the IC exception.[91] In the meantime, the AB left the flexibility for the EU to continue to use the seal regime and the IC exception to pursue the chosen objectives. To the extent that its decision may adversely affect the subsistence need of Greenlandic Inuit community to hunt for commercial purpose, the AB left flexibility for the EU to address it more specifically using other policy instruments. Overall, the AB's rulings were reasonably balanced between the regulation of protectionist policies and the preservation of regulatory autonomy.

4 SYSTEMIC SOLUTIONS: POLITICAL OVERSIGHT AND LEGISLATIVE IMPROVEMENT

The case studies above have shown that US allegation of judicial overreach in major TBT cases is untenable. Instead, the AB's approaches and decisions are not only legally and economically sound but also politically savvy. In line with the fundamental

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88 *See* Panel Report, *EC – Seal Products, supra* n. 81, paras 7.441–461.

89 Petros C. Mavroidis, *Sealed with a Doubt: EU, Seals, and the WTO*, 6(3) Eur. J. of Risk Reg. 388, 391–92 (2015). For an overview of the legislative history of the EU regime, *see* Katie Sykes, *Sealing Animal Welfare into the GATT Exceptions: The International Dimension of Animal Welfare in WTO Disputes*, 13(3) World Trade Rev. 471, 475–77 (2014).

90 Paola Conconi & Tania Voon, *EC – Seal Products: The Tension Between Public Morals and International Trade Agreements*, 15(2) World Trade Rev. 211, 225 (2016).

91 For the EU's implementation measure, *see* Regulation (EU) 2015/1775 amending Regulation (EC) No 1007/2009 on trade in seal products and repealing Commission Regulation (EU) No 737/2010, OJ L 262/2 (6 Oct. 2015). *Also see* Donald H Regan, *Measures with Multiple Purposes: Puzzles from EC – Seal Products* 108 AJIL Unbound 315, 321 (2015); Howse, Langille & Sykes, *supra* n. 87.

function of the WTO, the AB has endeavoured to strike an appropriate balance between reigning in protectionism and maintaining regulatory autonomy.

However, we believe that the underlying cause of US concerns about the AB – and the allegation of judicial overreach in particular – goes beyond the AB's interpretations and rulings in individual disputes. Rather, it reflects US frustration with the lack of an effective mechanism that allows a proper political check on the decisions of WTO tribunals.[92] Essentially, this is a result of the operation of the negative consensus rule whereby AB interpretations and decisions are automatically adopted while positive consensus or a special majority vote is required for Members to overturn these interpretations and decisions through authoritative interpretation[93] or amendments of WTO agreements.[94] This issue has been increasingly aggravated due to the continued legislative failure of the WTO in updating its rulebook to address new and challenging issues.

4.1 Recent proposals

Most of the recent proposals tabled by WTO Members have fallen short of providing an adequate and systemic solution to the issue of judicial overreach or US concerns about the imbalance between political and judicial powers. Indeed, the proposals devoted to the issue of judicial overreach have suggested that political scrutiny of judicial decisions could be exercised through either existing WTO mechanisms (i.e. authoritative interpretation or amendments) or new mechanisms such as creating an external review body or a regular dialogue channel between the AB and WTO Members.[95] However, the existing mechanisms are unlikely to work given the tradition of consensus decision-making.[96] Moreover, even if voting can be

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92 *See* generally McDougall, *supra* n. 4.

93 *See* Marrakesh Agreement Establishing the World Trade Organization, 15 Apr. 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement]. Art. IX.2 provides:
The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements. In the case of an interpretation of a Multilateral Trade Agreement in Annex 1, they shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement. The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members. This paragraph shall not be used in a manner that would undermine the amendment provisions in Art. X.

94 *Ibid.*, Art. X.

95 *See* e.g. WTO, General Council, Adjudicative Bodies: Adding to or Diminishing Rights or Obligations under The WTO Agreement – Communication from Australia and Singapore to the General Council, WT/GC/W/754 (30 Nov. 2018); WTO, General Council, Informal Process on Matters related to The Functioning of the Appellate Body – Report by the Facilitator, H.E. Dr David Walker (New Zealand), JOB/GC/215 (1 Mar. 2019); WTO, General Council, Informal Process on Matters related to The Functioning of the Appellate Body – Communication from Japan and Australia, WT/GC/W/768 (18 Apr. 2019).

96 For a detailed analysis of the shortcomings of the WTO decision-making process, *see* Claus-Dieter Ehlermann & Lothar Ehring, *Decision-Making in the World Trade Organization*, 8(1) J. of Int'l Econ. L. 51 (2005).

utilized, the special majority thresholds will also be difficult to meet.[97] On the other hand, further details of the proposed new mechanisms are required to assess whether they may provide the political oversight needed.

In view of the impending paralysis of the AB by the end of the year, several temporary solutions have been proposed to maintain a functional DSM. These included, inter alia, ad hoc agreements between disputing parties to resort to arbitration pursuant to Article 25 of the DSU,[98] a decision by WTO Members to temporarily waive appellate review pursuant to Article IX.3 of the WTO Agreement,[99] automatic completion of appeals on the day of the lodgement of a notice of appeal,[100] and the creation of an alternate appellate review mechanism by WTO Members excluding the US.[101] In the meantime, some disputing parties have agreed to not appeal panel decisions on a case-by-case basis.[102] Again, the major problem with these proposals is that they do not address the systemic issue relating to the lack of political oversight over rulings of WTO tribunals. Here, one must note that the issue of judicial overreach is not confined to the AB but may arise in any judicial body that has the power to develop international trade rules and decide the outcome of trade disputes. Thus, even if the AB were gone, this issue would still persist with respect to panels or arbitrators. Indeed, with the (anticipated) diminishing role of the AB and the trend of reverting to the one-stage dispute settlement system, WTO panels may become increasingly 'intrusive' in interpreting WTO rules. The panel's interpretation of the Security Exceptions clause in the recent *Russia – Traffic in Transit* case could be seen, by the US or other Members, as yet another example of judicial overreach as it rejected the US's firm position on how this exception clause should operate.[103] In *US – Differential Pricing Methodology*, the

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97 For an analysis of the difficulties in the use of authoritative interpretation under Art. IX.2 of the WTO Agreement, *see* Claus-Dieter Ehlermann & Lothar Ehring, *The Authoritative Interpretation Under Article IX:2 of the Agreement Establishing the World Trade Organization: Current Law, Practice and Possible Improvements*, 8(4) J. of Int'l Econ. L. 803 (2005). For a discussion of how to improve the voting rules to facilitate decision-making, *see* Jaime Tijmes, *Consensus and Majority Voting in the WTO*, 8(3) World Trade Rev. 417 (2009).

98 *See* WTO, *Interim Appeal Arbitration Pursuant to Article 25 DSU*, JOB/DSB/A/Add.11 (16 May 2019). For discussions of this proposal, *see* e.g. William Alan Reinsch et al., *Article 25: An Effective Way to Avert the WTO Crisis?*, Centre for Strategic & International Studies (CSIS), 24 Jan. 2019, www.csis.org/analysis/article-25-effective-way-avert-wto-crisis.

99 *See* Payosova et al., *supra* n. 4, at 10.

100 *See* Steve Charnovitz, *How to Save WTO Dispute Settlement from the Trump Administration*, Int'l Econ. L. & Pol'y Blog, 3 Nov. 2017, https://worldtradelaw.typepad.com/ielpblog/2017/11/how-to-save-wto-dispute-settlement-from-the-trump-administration.html.

101 *See* Pieter Jan Kuijper, *What To Do About the US Attack on the Appellate Body?*, Int'l Econ. L. & Pol'y Blog, 15 Nov. 2017, https://worldtradelaw.typepad.com/ielpblog/2017/11/guest-post-from-pieter-jan-kuiper-professor-of-the-law-of-international-economic-organizations-at-the-faculty-of-law-of-th.html.

102 *See* WTO, *Indonesia – Safeguard on Certain Iron or Steel Products*, Understanding Between Indonesia and Viet Nam Regarding Procedures Under Arts 21 and 22 of the DSU, WT/DS496/14 (27 Mar. 2019).

103 Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R, adopted 26 Apr. 2019.

panel started to offer new interpretations on the issue of zeroing.[104] While the panel's decision pleased the US,[105] it may well be regarded as judicial overreach by Canada and other WTO Members which oppose the US practice. The panel's bold deviation from well-established WTO jurisprudence on the issue of zeroing also impacts badly on the predictability and security that the DSM is designed to maintain. Thus, it won't be too long before the complaints about the AB will also be made about WTO panels. Therefore, rather than over-criticizing the AB, a systemic solution to the judicial overreach problem is needed.

4.2 Our proposals

To establish a proper balance between the legislative and judicial functions of the WTO, two elements are essential. First, the legislative function of the WTO must be re-activated to supply the necessary textual guidance to judicial interpretations. Second, when such guidance is inadequate and gap-filling or ambiguity clarifications are needed, a viable and effective mechanism must be put in place to allow political oversight over judicial decisions. More specifically, we offer the following suggestions.

First is avoiding 'constructive ambiguity'. Ultimately, the debate on judicial overreach arises from disagreements with the AB's interpretation of certain treaty text. Thus, the solution has to start with the drafting of the treaty. In the context of the WTO, there is a long history of resorting to 'constructive ambiguity', i.e. using ambiguous terms to paper over the differences between the parties' positions. While such drafting technique could make it easier for the parties to reach agreements, it does not solve the differences. If anything, it simply kicks the can down the road, which might snowball into a bigger problem that is difficult for the AB to handle. Thus, WTO Members should refrain from resorting to 'constructive ambiguity' in their negotiations as much as possible so as to minimize the gaps and ambiguities in the treaty.

Second is carving out specific issues from dispute settlement. Notwithstanding our first suggestion, we fully understand that the nature of international negotiations, especially over complicated issues such as trade, is such that it sometimes is impossible to reach agreement without adopting ambiguous language that can

[104] Panel Report, *United States – Anti-Dumping Measures Applying Differential Pricing Methodology to Softwood Lumber from Canada*, WT/DS534/R, circulated 9 Apr. 2019. The panel report was appealed by Canada on 6 June 2019.

[105] *See* Office of the United States Trade Representative, *United States Prevails on 'Zeroing' Again: WTO Panel Rejects Flawed Appellate Body Findings*, Press Releases (9 Apr. 2019), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/april/united-states-prevails-%E2%80%9Czeroing%E2%80%9D.

accommodate different interpretations. The fact that murky wording has been chosen out of diplomatic expediency, however, does not mean that such interpretative baggage has to be passed on to the panel, AB, or whoever is called upon to carry out the difficult task of interpreting such badly-worded treaty text. If even the negotiators themselves, after years of excruciating battle over the choice of words, could not settle on the meaning of a specific treaty text, or how best to draft it, how could they expect the judiciary, which has not been privy to the nuanced discussions in the smoke-filled rooms, to provide the perfect interpretation? Thus, we'd suggest that whenever the negotiators resort to 'constructive ambiguity', they should include an explicit moratorium on litigation concerning such texts, so as to avoid the problem of judicial overreach from arising in the first place. This avoidance technique could have many other variations to achieve the same purpose. For example, short of a moratorium on dispute settlement, controversial issues could still be subject to the normal dispute settlement process, with the proviso that it could only be invoked when there is proof of nullification or impairment of benefits, and the only remedy available is mutually satisfactory solutions.

The third solution focuses on giving more autonomy to disputing parties. It is always difficult to have 164 Members agree on the wording of specific treaty texts, or even merely the need to keep certain issues out of dispute settlement process. However, when there are only two Members involved, the chances of reaching agreement increase significantly. This could happen before, during, and after the litigation phase. For example, if the disputing parties agree, they could carve out specific issues from the tribunal's terms of reference, or at least the interpretation of these issues from the tribunal's terms of reference. Even if such issues are included in the terms of reference, if neither party is really fond of the interpretation adopted by the panel or the AB, they should be given the right to reach an agreement to not include the problematic interpretation in the report to be adopted.

The fourth solution calls for the creation of a mechanism that differs from the existing WTO mechanisms to make it easier for the political bodies to overrule the decisions of the judiciary. As mentioned above, the 'authoritative interpretation' mechanism, which has been suggested on numerous occasions, imposes a voting threshold that is too high to meet in practice.[106] In our view, the official interpretation mechanism is rather onerous and strange. It is onerous because it requires three-fourths majority of the Members, which implies that even Members which

[106] For suggestions on how to better utilize 'authoritative interpretations', *see* e.g. Ehlermann & Ehring, *supra* n. 97; Cosette D. Creamer, *Can International Trade Law Recover? From the WTO's Crown Jewel to Its Crown of Thorns*, 113 AJIL Unbound 51, 54–5 (2019).

are not present in the meeting where the decision is taken could potentially have the power to sabotage the adoption of the interpretation by simply being absent. It is strange because the three-fourth majority requirement for mere interpretation is higher than both that required for some official amendments which only need two-thirds majority,[107] and that for official decisions of the Ministerial Conference and the General Council, where only a simple majority is required. It is illogical that an interpretation, which by definition shall not create substantive rights and obligations on its own, should be subject to higher voting requirements than amendments and decisions, which imply the addition of new rights or obligations.

In contrast, our proposed mechanism is to allow the disputing parties, especially the respondent, to have the option of seeking a declaration from the General Council that a specific issue in the dispute is politically sensitive and unresolved by WTO Members, and therefore should not be subject to the interpretation of WTO tribunals. Such declaration would be different from 'authoritative interpretations', as it does not deal with the substantive rights or obligations embedded in WTO agreements, but only makes certain rules non-justiciable. Thus, the voting requirement should be substantially lower than that for official interpretations. We would suggest, if the disputing parties agree, that the declaration should be adopted as per the negative consensus rule. On the other hand, if only one party requests, then the declaration shall be adopted by one-third of the votes cast. Given the difficulties in adopting 'authoritative interpretations' or amendments of WTO rules, our suggestion for an expedited declaration procedure fills the gap by making it much easier for the political bodies to exercise oversight over the judicial bodies, and in the meantime avoids the risk of altering the existing rights and obligations of WTO Members. Along the same lines, we suggest that the declaration procedure should also be available for the General Council to clarify that any problematic interpretations in a case only apply to the current dispute and do not bind future panels and the AB. At the request of the disputing parties, this would also exonerate the AB from DSU Article 17.12 and allow the AB to decline to address certain issues, especially if they are not necessary to resolving the dispute at hand.[108]

Regardless of the option chosen, we believe that the key is to keep sensitive political issues out of the dispute settlement chambers, especially those which even the diplomats and politicians themselves could not have resolved. This is crucial to maintain the functioning, and to some extent even the survival, of the judicial

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[107] *See* WTO Agreement, *supra* n. 93, Art. X.4.

[108] Art. 17.12 of the DSU states that 'The Appellate Body shall address each of the issues raised in accordance with paragraph 6 during the appellate proceeding.' Art. 17.6 relevantly provides that 'An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.'

system. As famously stated by Justice Oliver Wendell Holmes Jr., 'hard cases make bad law'.[109] A judiciary that finds itself between a rock and a hard place too often will find it quite a challenge to maintain its existence, or even just its integrity. This is exactly the fate that has befallen on the AB.

5 CONCLUSION

In his masterpiece 'Double Star',[110] which won him a Hugo Award, Robert A. Heinlein told the story of a destitute actor who took on the job as the temporary double for an unspecified politician, only to find himself having to assume the role of the most prominent politicians in the Solar System for life when the subject of his impersonation died from the mistreatment suffered during his kidnapping. Reflecting on his adventure twenty-five years later, our hero makes the observation (misattributing the quote to Voltaire) that '[i]f Satan should ever replace God he would find it necessary to assume the attributes of Divinity.'

While such analogy is not entirely appropriate, we believe that it does somewhat reflect the fate of the AB, the panel, or whoever might be called upon to carry out the important yet thankless task of dispute settlement and treaty interpretation. As we have demonstrated above, to decide complicated international trade disputes based on highly abstract and sometimes incomplete rules, one necessarily has to improvise by putting oneself into the shoes of the drafter of the treaties. The US regards this mainly as a problem with the AB, and it tries to solve the problem by blocking the appointment process for AB members, probably in the hope of strangling the AB to death.

To avoid the potential paralysis of the DSM, WTO Members and trade law professionals have made considerable and dedicated efforts to address US concerns in the hope that the US will change its mind. To date, these efforts have been unsuccessful as the US continues to claim that its concerns have not been resolved.

By focusing on the issue of judicial overreach, which is the US's most significant concern, this article offers a number of arguments and solutions. First, it argues that the allegation of judicial overreach is untenable. There are no established criteria/standards for the determination of judicial overreach. Rather, the issue of whether the judiciary has overstepped its authority remains highly controversial not only under the WTO but also in domestic courts and other international courts. Moreover, judicial overreach does not occur merely because one disagrees with the interpretations adopted by WTO tribunals or the (unfavourable) outcome of a dispute. As the application of the general rules

[109] *Northern Securities Co v. United States*, 193 US 197,400 (1904) (Holmes dissenting).
[110] Robert A. Heinlein, *Double Star* (Del Rey Publishing 1986).

of treaty interpretation often leads to more than one permissible interpretation, a better way to assess judicial overreach would be to rely on the overarching function of the WTO in disciplining the use of protectionist measures that are disguised as non-protectionist regulatory goals. In the major TBT cases, the AB's approaches and decisions have served this function and hence should not be treated as 'overreaching'.

Second, the allegation of judicial overreach reflects two broader and more systemic issues – the failure by the WTO legislature to update trade rules and the failure of the political bodies to exercise meaningful oversight over judicial decisions. Thus, the underlying problem is not with the 'over-reach' of the judiciary, but is more about the 'under-reach' of the legislature in either filling gaps or clarifying ambiguities in WTO rules or finding ways to overturn AB rulings they regard as problematic. In this article, we have outlined a few proposals which are not only principled as they address the root of the problem, but also practical because they are much easier to implement than the existing mechanisms. The common goal of these proposals is to encourage the legislature to supply the textual guidance necessary for judicial interpretation and failing that, to create the flexibility for Members to prevent 'bad laws' by keeping 'hard cases' away from the dispute settlement system. These proposals, therefore, would help achieve a proper balance between the legislative and judicial functions of the WTO.

To this end, it is important to reiterate that judicial overreach is not exclusively an AB issue but may arise in any adjudicative body that takes over the role of the AB. Indeed, this issue has started to emerge with WTO panels in recent cases. Thus, most temporary solutions are unlikely to work in the long run if the systemic issues discussed above are not resolved. This is also true regardless of whether the AB survives this crisis. At the end of the day, the success or failure of the WTO, as a Member-driven organization, ultimately depends on its Members. As agents retained to carry out the will of the principal, the adjudicative bodies can only be as successful as the WTO Members, acting through various political bodies such as the General Council, allow them to be.