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Legal Reasoning and the International Law of Trade

The First Steps of the Appellate Body of the WTO

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I. INTRODUCTION

Only three years into its history, the dispute settlement mechanism of the World Trade Organization (WTO) has become the most widely used instrument for the peaceful settlement of disputes among sovereign States in modern history. To date, over 120 requests for consultations have been notified to the Secretariat of the WTO; more than 20 have been settled; almost as many have found their way to formal dispute settlement; nine have gone through the appellate process. Although the usual suspects—the United States, the European Community and Canada—continue to lead the pack in the number of disputes formally brought before the WTO, per *share* of international trade, the situation is, in some respects, much more encouraging. Developing countries are increasingly assertive of their legal rights and active in pursuing their interests through formal WTO dispute settlement, not only against developed countries, but also against each other. Of the first six appellate disputes that are the subject of the study, *four* involved developing countries (all four having been resolved in favour of the developing country in question), and one was solely between developing countries.

The first and the most obvious sign that the compromise on dispute settlement achieved after eight years of negotiations in the Uruguay Round could be said to have been successful.[1] The qualified assessment is not, however, an academic conceit. The success or failure of dispute settlement mechanisms is at best difficult to gauge. For example, according to one assessment, between 1948 and 1989 88 percent of panel reports under the dispute settlement mechanism of the General Agreement on Tariffs

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[1] In the period 1948–1989, 73 percent of all complaints under the GATT were filed by the United States, the European Communities and its Member States, Canada and Australia. During the same period, 83 percent of all complaints were filed against the United States, the European Communities and its Member States, Canada and Japan. Developing countries were complainants in 19 percent of cases and defendants in 13 percent of formal complaints under the GATT. See Hudec, Robert E., *Enforcing International Trade Law* (Salem: Butterworths, 1993), at p. 295.

and Trade (GATT)[2] had been implemented in one way or another.[3] However, whether this can adequately express the nature of the success of such institutions is open to question. That "success" rate did little to assuage the clamouring of the developing and developed world alike for a revamped dispute settlement procedure for international trade disputes,[4] even though they were far from unanimous as to the shape of the reform required.[5] The GATT dispute settlement, like an ageing conqueror, could perhaps rest on its laurels, but it was in the late stages of terminal illness.[6]

Thus, even an early assessment of the dispute settlement mechanism of the WTO, to be complete, would have to examine more than a simple rate of implementation or use of the mechanisms by a more diverse membership of the WTO.

A reasonable measure of success can be determined by judging the achievements of the institutions against their stated objectives: have they done what they were meant to do? This appears, and is, axiomatic. The devil, however, is in the details: what would be the stated objectives against which the growing body of panel and appellate body report should be examined? Which of the stated objectives, and stated by whom? And which aspect of the dispute settlement mechanism? Every teleological interpretation exercise suffers from an inevitable measure of arbitrariness. The task is all the more difficult as the Appellate Body of the WTO is a novel creation—novel within the GATT, but also in international law and juridical practice (appellate jurisdiction in international litigation is, at best, in its infancy).

The relative success of the Appellate Body can be assessed on its early "jurisprudence" —the reports that, although not binding, form a persuasive body of authoritative interpretations within the WTO for future dispute settlement. After briefly examining the institutional evolution of the GATT into the current WTO dispute settlement mechanism, this article will examine the object and purpose against which the jurisprudence of the Appellate Body should, in the author's view, be analysed. Then, it sets out (in no more than a sketch) the context in which Appellate Body reports are received and in which they find their success, through the advancement of the institutional and substantive objectives of the dispute settlement mechanism of the WTO. Section III. A analyses the first six reports of the Appellate Body within the framework established in Section II. The conclusion is that the Appellate Body began on a promising note, but that its report in *Periodicals*[7] marked a departure from that path. Since

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[2] The term refers to both the institution *and* the treaty text itself. The literature occasionally refers to the text of the agreement as the "General Agreement". The WTO refers to the institution and the agreement as "GATT 1947", to distinguish the institution from the WTO and the agreement from GATT 1994.

[3] Hudec, as note 1, above, at p. 286. Of the 88 percent, 53 percent were in full satisfaction of the Panel report, 29 percent were partly satisfied, and 6 percent were implemented for independent reasons. See also Petersmann, E.-U., *The GATT/WTO Dispute Settlement System* (London: Kluwer Law International, 1997), at p. 88.

[4] Hudec, Robert E., *Dispute Settlement* in Jeffrey J. Schott (Ed.) *Completing the Uruguay Round* (Washington, D.C.: Institute for International Economics, 1990), at p. 181.

[5] Stewart, Terence, *The GATT–Uruguay Round: A Negotiating History* (Deventer: Kluwer, 1993), at p. 2727.

[6] Behboodi, Rambod, *Industrial Subsidies and Friction in World Trade: Trade Policy or Trade Politics?* (London: Routledge, 1994), at p. 78.

[7] *Canada—Certain Measures Concerning Periodicals*, WT/DS31/AB/R, Report of the Appellate Body Adopted 30 July 1997.

that report, three other Appellate Body reports have been released; due to limited space, an analysis of these reports within the proposed framework must be left to a future study.

Thus, the Appellate Body stands before a fork in the road: it can choose the path well-trodden by the GATT panels before it, or it can take up the mantle of uniqueness—appellate jurisdiction in international litigation—bestowed on it and mark its own path in the woods. This could make all the difference.

II. APPELLATE JURISDICTION IN THE WTO: CONTEXT OF EVALUATION

A. INSTITUTIONAL EVOLUTION: FROM NEGOTIATION TO ADJUDICATION

Ever since the publication of Professor Jackson's paradigmatic article distinguishing between a "power-oriented" and a "rule-oriented" structure for international trade law[8] much analysis has been conducted on the evolution of the GATT from a forum for negotiations on tariff concessions, to the sophisticated institutional structure and complex network of "legal" rights and obligations of the WTO. Even prior to the entry into force of the Marrakesh Agreement Establishing the World Trade Organization (the WTO Agreement), the GATT already encompassed dozens of multilateral and plurilateral agreements, protocols, decisions and understandings, a modestly successful and functioning dispute settlement mechanism and a prodigious membership that included rich and poor, developed and developing, East and West, States and customs territories or customs unions.

It is not the intention here to retell a story often told more comprehensively and authoritatively elsewhere.[9] Instead, the objective here is to draw the reader's attention to some broad themes in the institutional and legal *evolution* of the GATT that are at the core of the institutional and legal *revolution* that took place in Geneva just before midnight on 15 December 1993.

1. *The GATT Experiment*

Of interest perhaps to students of public international law is the fact that the formalist/realist debate in international law circles[10] has had a primitive mirror image in international trade law over the last 30 years. The debate between the "pragmatists"[11] and the "legalists"[12] was one between those who viewed the GATT as a forum for negotiation (recognizing the role and perhaps the legitimacy of power), and those who

[8] Jackson, John H., *Perspectives on the Jurisprudence of International Trade: Costs and Benefits of Legal Procedures in the United States* (1984), 82 Michigan L. Rev. 1570.

[9] Dam, Kenneth, *The GATT* (Chicago: University of Chicago Press, 1970); Jackson, John H., *World Trade and the Law of the GATT* (Indianapolis: The Bobbs-Merrill Company, Inc., 1969); Jackson, John H. *The World Trading System* (Cambridge: MIT Press, 1989); Hudec, Robert E., *The GATT Legal System and World Trade Diplomacy* (Salem: Butterworths, 1990); Hudec, as note 1, above; and Petersmann, as note 3, above.

[10] Koskenniemi, Martti, *International Law in Post-Realist Era* (1995) 16 Australian Yearbook of Int'l Law 1.

[11] Jackson, *Law of the GATT*, as note 9, above, at p. 755; and Long, Olivier, *Law and its Limitations in the GATT Multilateral Trade System* (Dordrecht: Martinus Nijhoff Publishers, 1985), at p. 61.

[12] Dam, as note 9, above, at p. 3.

thought of it as either an emerging or an established body of laws governing the international trading order. Of course, at the core of the debate, ostensibly about what the GATT *was*, there was a fundamental normative argument about what the GATT *ought* to have been. Did (should) the GATT reflect the political and economic negotiating power of its contracting parties, or was it (should it have been), instead, a system of concrete rules, the violation of which would provide grounds for the imposition of counter-measures? Did (should) the dispute settlement mechanism of the GATT serve to help the disputing parties re-establish a rough balance of economic rights and obligations, when that balance was found to have been disturbed, or were the panels (should they have been) adjudicative bodies whose decisions gave rise to obligations under international law?[13]

(a) *The pragmatists*

The pragmatist approach, or the practice of power-oriented diplomacy, were based on foundational concepts of negotiation and discussion as the basis for exchange of concessions, as well as for the resolution of disputes.[14] Relative power was used to influence the conduct of other countries.[15]

Within this context, dispute settlement was a natural extension of the negotiation process by which the GATT's substantive rules had been determined;[16] the "law" formed, at best, a background to "negotiated diplomatic approach to all policy conflicts".[17] The fact that the results of the dispute settlement process had to be "adopted" by the Contracting Parties,[18] *including the losing party*, clearly pointed to the *political* nature of the apparently legal dispute settlement process. Hard-line pragmatists did not simply reject law creation through dispute settlement; even law *application* was not considered a proper function for the system. The rules of the system were applied through further negotiation as to their application to specific sets of facts.[19] The objective of the GATT, according to the pragmatists, was not the punishment of a delict, the imposition of sanctions against an illegal[20] act or the penalization of a breach of a rule. Instead, the emphasis throughout was an conciliation; the aim was "to restore, with the minimum interference with trade, the balance of concessions and advantages

[13] See Behboodi, as note 6, above, at p. 55.

[14] See also Trimble, Phillip, *International Trade and the Rule of Law* (1984–1985), 83(1) Michigan Law Review 1016 at 1030.

[15] Petersmann, as note 3, above, at p. 66.

[16] Brand, Ronald, *Competing Philosophies of GATT Dispute Settlement in the Oilseeds case and the Draft Understanding on Dispute Settlement* (December 1993) 27 JWT 6, 117 at 121.

[17] Hudec, as note 1, above, at p. 11.

[18] The GATT did not have a legal requirement for unanimous decision-making. This was a custom developed over time and adhered to religiously.

[19] Hudec, as note 1, above, at p. 121.

[20] Dam, as note 9, above, at pp. 351–352.

between the parties in dispute".[21] Accordingly, the dispute settlement procedure of the GATT tended towards flexible procedures, control over the dispute by the disputing parties and the freedom to accept or reject settlements proposed through the GATT panel process; it was, in short, "a diplomatic forum where parties compromised disagreements rather than a court that settled them ...".[22]

(b) *The legalists*

The legalist or rule-oriented approach held that the GATT was, at the minimum, a "legal order-in-embryo".[23] There was no question that it was a legal document and an international treaty.[24] "Violation" of the law by a party made it appropriate for the system to try to pressure the violator to "conform its conduct to the code".[25] As legal order, it was argued, the GATT provided a climate of predictability and stability[26] and avoided *ad hoc* solutions reflecting power rather than the "merits of the case".[27] It was against this background that the GATT and, more importantly, its dispute settlement procedures, gradually adopted a more juridical approach and moved in the direction of legalism and rule-orientation.[28] The GATT thus developed a third party panel procedure for "adjudicating legal disputes" between disputing parties,[29] eventually to be served by a legal office, to enable such parties to "obtain rule-oriented, binding decisions in conformity [with] mutually agreed long-term obligation and interests".[30]

(c) *Evaluation*

The debate has an air of unreality about it; the nature of the GATT was clear in its institutions, "legal" structure (along with the consensus approach to the adoption—the legalization—of the GATT panel reports) *and* practice of the parties to the GATT. Jackson observes the "conflicting viewpoints about the appropriate direction and procedure of the dispute settlement procedure".[31] Nearly 30 years earlier, he had noted the "uncertain compromise" between the contractual and the pragmatic, the "uneasy

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[21] Long, as note 11, above, quoting Dam, as note 9, at p. 76; Vermulst, Edwin and Bart Driessen (Eds) *An Overview of the WTO Dispute Settlement System and its Relationship with the Uruguay Round Agreements—Nice on Paper but Too Much Stress for the System* (April 1995) 29 JWT 2, p. 131 at 134; and Steger, Debra P., *WTO Dispute Settlement: Revitalization of Multilateralism After the Uruguay Round* (1996) 9(2) Leiden J. Int'l Law 319 at 319.

[22] Petersmann, as note 3, above, at p. 69.

[23] Stiles, Kendall W., *The New WTO Regime: The Victory of Pragmatism* (1995), 4 J. Int'l Law & Practice 3 at 4.

[24] Dam, as note 9, above, at p. 351.

[25] Stiles, as note 23, above, at p. 5.

[26] Jackson, *Law of the GATT*, as note 9, above, at p. 755; Petersmann, as note 3, above, at p. 67; Long, as note 11, above, at p. 62; Croley, Steven P., and John H. Jackson, *WTO Dispute Procedures, Standards of Review, and Deference to National Government* (1996) 90 AJIL 193 at 193.

[27] Petersmann, as note 3, above, at p. 69.

[28] Jackson, John H., *The WTO Dispute Settlement Understanding—Misunderstandings on the Nature of Legal Obligations* (1997) 91(1) AJIL 60, at 62; and Petersmann, as note 3, above, at p. 71.

[29] Hudec, as note 1, above, at p. 11.

[30] Petersmann, as note 3, above, at p. 69; for the legally binding force of the GATT panel decisions, see Jackson, as note 28, above, at p. 62.

[31] Jackson, as note 28, above.

compromise between conflicting international economic interests, not easily fitting within logical legal processes".[32]

It was in the context of this "uneasy compromise" that panel procedures to adjudicate "legal disputes" were developed. Being diplomats rather than lawyers, early panel members issued "legal rulings [that] were drafted with an elusive diplomatic vagueness. They often expressed an intuitive sort of law based on shared experiences and unspoken assumptions".[33] They intuitively interpreted "legal" rules that were "riddled with gaps, inconsistencies, and vagaries—the product of repeated political compromises that were never meant to make any legal sense".[34] Forty years later, the state of the law, and many panel reports, had hardly changed. As if the diplomat's approach to international trade law were not enough to highlight the diplomatic nature of the GATT, panel reports issued required the *political* imprimatur of the Contracting Parties for legal effect.

Therefore, to characterize the GATT solely as a negotiating forum or a legalistic one—that is, anything other than an "uneasy compromise" between law and politics ("a diplomat's concept of legal order"[35])—risks misunderstanding not only of the significance of the transformation in 1993, but also, and more important, of the dual nature (legal and political) of the process of *legitimation* that had been deemed necessary for the old order, and that will be required of the new institutions.

2. *The Appellate Body of the WTO*

Hudec observes that "[o]n the tree of legal evolution, [international legal institutions] are located near the bottom, much closer to the primitive legal systems studied by legal anthropologists than to the legal systems of modern nations".[36] The GATT's "adjudication machinery" was probably even lower on the evolutionary scale than other international organizations.[37] This is no longer the case. The establishment of the WTO and its Appellate Body heralded an unprecedented development in the evolution of international organizations and, certainly, "a complete novelty" in the history of the GATT itself.[38]

Although the body of literature on the institutional aspects of the Appellate Body is not as fully developed as that on the GATT, there have already been a number of studies

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[32] Jackson, *Law of the GATT*, as note 9, above, at p. 755.
[33] Hudec, as note 1, above, at p. 12.
[34] Hudec, as note 4, above, at p. 187.
[35] Hudec, as note 1, above, at p. 7.
[36] As note 35, above, at p. 358.
[37] Hudec, Robert E., *Public International Economic Law: The Academy Must Invest* (1992) 1 Minn. J. Global Trade 5 at 6.
[38] See Palmeter, David, *The WTO Appellate Body's First Decision* (1996) 9(2) 337, at p. 338, Franck, Thomas, *The Structure of Impartiality*, in Richard Falk, Friedrich Kratochwil and Saul H. Mendlovitz (Eds) *International Law: A Contemporary Perspective* (Boulder: Westview, 1985), at p. 312; and Weiss, Friedl, *WTO Dispute Settlement and the Economic Order of WTO Member States*, in Pitouvan Dijck and Gerrit Faber (Eds) *Challenges to the New World Trade Organization* (The Hague, Kluwer Law International, 1996), at p. 86.

that describe the institutional structure of the new appellate structure of the WTO.[39] It is not the intention here to retread this well-trodden path, but to identify the key elements that will be important in the development of a theory of legitimacy for the Appellate Body.

Article 17 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) requires that the Dispute Settlement Body of the WTO (DSB) establish an Appellate Body[40] that would "hear appeals from panel cases". Any such appeal must be limited to "issues of law covered in the panel report and legal interpretations developed by the panel" (Article 17(6)). The members of the Appellate Body must be persons of "recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally" (Article 17 (3)). The Appellate Body may "uphold, modify or reverse the legal findings and conclusions of the panel" (Article 17 (13)). Finally, unlike panels (under both the GATT and the WTO), the Appellate Body is a *standing* body whose members are appointed for a specific term and who would hear appeals in divisions of three members on the basis of rotation (Article 17(1) and (2)).

At least three points need to be highlighted for the purposes of this article. The first is the requirement—absent for panellists—that members of the Appellate Body have expertise in *law* (Article 8(1)). The second is the emphasis on *law* as the basis of appellate review. This is of interest because one searches the DSU in vain for a meaningful mention of *law* in reference to the panel process.[41] It is as if the two provisions (12 and 17) were written by different people: one, by "GATTologists" trying, in one last attempt, to maintain the fiction of non-legal panel "findings and recommendations"; the other, intent on underlining in bold the legal character of the entire process. The third point is the status of the Appellate Body as a *standing* institution. This is important for maintaining an institutional memory necessary for the long-term coherence of Appellate Body reports.[42]

The DSU retains a political check on panel and Appellate Body reports in the form of a consensus in the DSB not to adopt the Appellate Body report. However, the likelihood of such a consensus forming short of a juridical *putsch* would be remote. *De facto*, the Appellate Body of the WTO sits at the apex of a sophisticated, complex and comprehensive *body of laws and legal institutions*. The "uncertain compromise" is defunct.

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[39] For example Jackson, John H., William J. Davey and Alan O. Sykes, *Legal Problems of International Economic Relations* (St Paul: West Publishing, 1994); Trebilcock, Michael and Robert Howse, *The Regulation of International Trade* (London: Routledge, 1995); McRae, Donald, *Emerging Appellate Jurisdiction in International Trade Law*, in *Fostering Compliance in International Law* (Ottawa: CCIL, 1996), Proceedings of the 1996 Conference of the Canadian Council on International Law, Ottawa; Steger, as note 21 above; Behboodi, as note 6, above; Stiles, as note 23, above; Reich, Arie, *From Diplomacy to Law: The Judicialization of International Trade Relations* (1996–1997), 17 (2–3) Northwestern J Int'l Law & Business 775 at 804; Vermulst and Driessen, as note 21, above.

[40] See DSB Decision on "Establishment of the Appellate Body", WT/DSB/1.

[41] See in particular Art. 12(7):

"Where the parties to the dispute have failed to develop a mutually satisfactory solution, the panel shall submit its *findings in the form of a written report* to the DSB. In such cases, the report of a panel shall set out the findings of fact, *the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes* ... " (emphasis added).

[42] Vermulst and Driessen, as note 21, above, at p. 145.

Of course, the resolution of the incoherence at the core of the GATT in favour of law and legalism has a number of consequences. The most important impact of the judicial revolution of 1993 is a change, necessary and inevitable, in the *process of legitimation* of the results of dispute settlement.

B. PREDICTABILITY AND SECURITY: LEGITIMACY AND THE INTERPRETIVE COMMUNITY

The previous section provided a brief sketch of the institutional evolution, and revolution, that saw the diplomatic dispute resolution mechanisms of the GATT develop into the unique and judicial dispute settlement process in the WTO, together with "compulsory jurisdiction",[43] adoption on "negative consensus" and appellate review by a standing appellate instance. While the negotiators of the WTO Agreement opted for an "Appellate Body" rather than a "court",[44] it would be fair to say that the judicialization[45] of the dispute settlement process of the WTO—and thus of the WTO Agreement itself—is complete. This section will address the "why" and the "what then" of the reforms to complete the analytical framework against which the existing Appellate Body reports will be evaluated.

1. *The Objectives of the Appellate Body*

According to the DSU, "[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system" (Article 3(2)).

(a) *Predictability*

In submitting the Working Procedure of the Appellate Body to the Chairman of the Dispute Settlement Body (DSB), the Chairman of the Appellate Body observed that "it is also important to ensure consistency and coherence in our decision-making, which is to the advantage of every WTO Member and the overall multilateral trading system we all share".[46]

Predictability, coherence, consistency: these are the watchwords of the market; they form the first key cornerstone of the WTO dispute settlement process and the Appellate Body; indeed, they are inherent in any legal process.[47] They underline one of

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[43] Petersmann, as note 3, above, at p. 182.

[44] It is, of course, tempting to use familiar terminology. See, for example, Montañà I. Mora, Miquel, *A GATT with Teeth: Law Wins Over Politics in the Resolution of International Trade Disputes* (1993), 31 Columbia J. Trans. Law 103 at 160.

[45] Petersmann, E.-U., *The Transformation of the World Trading System Through the 1994 Agreement Establishing the World Trade Organization* (1995) 6 European J. Int'l Law 161 at 209.

[46] Letter of Julio Lacarte-Muró, Chairman of the Appellate Body, to Celso Lafer, Chairman of the Dispute Settlement Body, 7 February 1996.

[47] Kratochwil, Friedrich, *Rules, Norms and Decisions* (Cambridge: Cambridge University Press, 1989), at p. 198.

the most important elements of the shift from the GATT to the WTO, that although the GATT was marked by accommodation and adaptability, the legal structure of the WTO now demands consistency and predictability.[48] A standing appellate instance is one of the principal means of attaining those objectives.

(b) *Security*

A well-functioning dispute settlement process is also essential to the "maintenance of a proper balance between the rights and obligations of Members ..." (Article 3(3))—itself another key objective of the WTO and the GATT before it.[49] The political control of the Contracting Parties over the dispute settlement process had been one important means of ensuring that the balance was maintained. However, that was the most visible—and in some ways, the most troublesome—aspect of the process. A more subtle means could be found in the "details" of the dispute settlement mechanism. Hudec notes, for example, the important legitimizing role played by the GATT panellists themselves, who were not judges apportioning rights and obligations, but diplomats who lent a "kind of political legitimacy" to the process.[50]

As political control is lost, there is a danger that panels will legislate rather than adjudicate and, thus, rearrange the negotiated balance.[51] Of course, the DSB is explicitly barred from doing so.[52] Nevertheless, given the effective emasculation of the DSB in relation to panel reports, recourse to appellate jurisdiction to insure against such a possibility was instrumental in obtaining the agreement of developed and developing States alike to relinquish their control over the dispute settlement process, and to the adoption of panel reports by "negative consensus".[53]

Security, and credibility are the watchwords of a *juridical* international dispute settlement mechanism; they form the second key cornerstone of the WTO Appellate Body. The Appellate Body, like any other international court or arbitral tribunal, is one that does not—as it *cannot*—rely on "incarceration, injunctive relief, damages for harm inflicted or police enforcement ... jailhouse ... bailbondsmen ... blue helmets ... truncheons or tear gas" for the advancement of its objectives.[54] In a different context, the European Court of Justice found that its authority must be established prudently and through persuasion;[55] so it is that the WTO Appellate Body must be content with the

[48] Weiss, as note 38, above, at p. 83.

[49] The preamble to the WTO Agreement, quoting *verbatim* the preamble to the GATT, notes the desire of the parties to enter into "reciprocal and mutually advantageous arrangements".

[50] Hudec as note 4, above, at p. 188.

[51] Wolf, Alan Wm., *Comment*, on Jackson, John H., *Managing the Trading System: The World Trade Organization and the Post-Uruguay Round GATT Agenda*, in Peter B. Kenen (Ed.) *Managing the World Economy* (Washington, D.C.: Institute for International Economics, 1994), at p. 154.

[52] DSU, Art. 3(2) "Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."

[53] Stewart, as note 5, above, at pp. 2767–2768.

[54] Hippler Bello, Judith, *The WTO Dispute Settlement Understanding: Less is More* (1996) 90 AJIL 416, at pp. 416–417.

[55] Mengozzi, Paolo, *European Community Law* (London: Graham and Trotman, 1992), at p. 61.

"moral and political force of international legal obligation" and a precarious threat of retaliation to maintain order in international trading relations.[56]

(c) *Evaluation*

The WTO dispute settlement process aims to provide predictability and security to its Members. These and the necessary corollaries, such as coherence and credibility, are components of a broader root concept of legitimacy. The following section will determine the analytical elements that should form the context in which we could evaluate the performance of the Appellate Body in relation to its stated objectives, as well as the unstated but the foundational objective of legitimacy.

2. *The Interpretive Community*

Many trees have been felled and bookshelves filled in the pursuit of a single, simple answer to the question of "what is law?" and for that matter, "what is international law?". The enquiry into the nature of international *trade* law has never been so rarefied, and for good reason. For much of the history of the GATT, "law" was at best a nuisance, if not an irrelevancy. This may have been because despite the fact that the early panel reports were intuitive and based on unspoken assumptions, the legitimacy of dispute settlement or of the GATT was not brought into question; the rate of compliance with the "vague" and "elusive" early panel reports was high.[57] The infusion of more law and legalism into the GATT dispute settlement mechanism, although considered necessary, was hardly conducive to its better functioning or legitimacy.[58] Thus, the connection between legitimacy and law was never made; in any event, given the *political* imprimatur of the Contracting Parties on the ostensibly *legal/adjudicative* results of the panel process, the question of legitimacy was moot.

The fiction of political "adoption" of panel and Appellate Body reports has been maintained, but in substance it is the Appellate Body that is ultimately responsible for the predictability and security, and as will be argued the legitimacy, of international trade *law*. The rest of this section will concentrate on whether and, if so, under what conditions these twin goals are attainable.

(a) *Legitimacy*

The question at the heart of the enquiry, to quote Franck, is this:

"Why should rules, unsupported by an effective structure of coercion comparable to a

[56] Hudec, as note 4, above, at p. 180.
[57] Hudec, as note 1, above, at p. 11.
[58] As note 57, above, at p. 14.

national police force, nevertheless elicit so much compliance, even against perceived self-interest, on the part of sovereign states?"[59]

In the context of international trade law, it is not enough to argue that States abide by their obligations because of the threat of sanctions or retaliation, because States that normally need not *fear* retaliation also partake in the system and abide by its rules; and, in any event, not every *reaction* to threat of force or retaliation can be considered an *action* in accordance with the law.[60] The binding force of international law—the moral and political force of international legal obligation of which Hudec spoke—must reside in something other than threat of force or economic sanctions. Compliance with the law is, at least in part, a function of the legitimacy of the law that is to be complied with.[61]

Franck has indentified at least four elements for legitimacy: determinacy of the rules, symbolic validation (and pedigree), coherence (or consistent application) and adherence (to a normative hierarchy).[62] Of particular interest here are determinacy (predictability) and adherence (security).

Determinacy is a function of the *clarity* of the rules, that is the WTO Agreement, which is the *corpus juris* of international trade law. The principal problem is that interposed between the law in question and the States that must implement it is the Appellate Body (and the dispute settlement process as a whole), whose task it is to interpret and apply the law.

Let us, at the outset, dismiss the myth that interpretation is a purely scientific and objective act of finding the "real" meaning of the law. Interpretation is a subjective process, as words do not have a meaning independent of the context in which they are received[63]—there is nothing in the composition of the letters t-r-e-e that necessarily attaches it to the thing that francophones call *arbre*. Words can have a number of equally plausible interpretations and meanings; the very notion of a reasoned dissenting judgment would otherwise be meaningless.

Pushed to an extreme, the axiomatic observation on the subjectivity of interpretation becomes a "nihilist challenge to the law",[64] according to which, given their ambiguous nature, instead of serving as vehicles for conveying meanings from the communicator

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[59] Franck, Thomas, *Legitimacy in the International System*, in Martti Koskenniemi (Ed.), *International Law* (New York: New York University Press, 1992), at p. 159.

[60] Nardin notes that: "[c]oercion alone cannot create rights or obligations of any sort, legal or nonlegal. On the contrary, enforcement *presupposes* the validity of the law that is enforced." Nardin, Terry, *Law, Morality and the Relations of States* (Princeton: Princeton University Press, 1983), at p. 125. He quotes (at p. 126) Fitzmaurice to the effect that "law is not obligatory because it is obligatory; and enforcement otherwise would be illegal". See also Olivecrona, Karl, *Law as Fact* (London: Humphrey Milford, 1939), at pp. 10–17; and D'Amato, Anthony, *Is International Law Really Law?* (1984–1985), 79 Northwestern University Law Review 1293, at p. 1297.

[61] Nardin, as note 60, above, at 158.

[62] See Franck, as note 59, above, who developed this framework for the study of legitimacy.

[63] Fish, Stanley, *Fish vs. Fiss* (1984) 36 Stan. L. Rev. 1325, at p. 1335; Koskenniemi, Martti, *From Apology to Utopia: The Structure of International Legal Argument* (Helsinki: Finnish Lawyers' Publishing Company, 1989), at p. XX.

[64] Johnstone, Ian, *Treaty Interpretation: The Authority of Interpretive Community* (1991) 12 Mich. J. Int'l L. 371, at p. 373.

to the listener, words become empty vessels for the subjectivities of their interpreters. However, although to an English-speaker the word "tree" may have a margin of indeterminacy[65] (a cedar or a poplar, or even a family tree) it would be rare for anyone wishing to communicate a message to utter the word outside of a specific context. Indeed, absent a significant measure of determinacy in normal discourse, all communication would grind to an immediate halt.[66]

Yet what does that say about the interpretive methodology through which words, or norms, are assured a measure of determinacy over a period of time?

One answer may be the idea of "interpretive community", borrowed from literary critics.[67] This is "simply a way of speaking about the power of institutional settings, within which assumptions and beliefs count as established facts".[68] According to Fiss, "legal interpretation is constrained by a set of disciplining rules recognized as authoritative by an interpretive community".[69] Law is language and legal norms mandating behaviour of one sort or another depend on the communicative function of language. This communicative function can be served only if there is a general measure of agreement on the meaning of words used to express those legal norms.[70]

That general measure of agreement or "climate of opinion"[71] about legal rules is formed within specific *communities*. We have already encountered one such community in the small group of trade policy officials who shared certain "intuitions and assumptions" that made their "vague" rulings acceptable (i.e. legitimate) in the early days of the GATT. An expanded membership and mandate for a more comprehensive international trade law order would necessarily encompass a broader set of interpretive receptors than merely the trade officials who negotiated the WTO Agreement. One could, for example, see included in this community the increasingly visible international trade Bar, trade policy consultants, government trade policy officials, legal advisors of foreign ministries (to the extent that they are involved in international trade litigation), "publicists" and professors, and non-governmental organizations.

The interpreter, be it the member of the Appellate Body or a legal advisor to a country about to embark on lawless behaviour, is "constrained by the 'assumptions and

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[65] See Williams, Glanville, *Learning the Law (Ninth Edition)* (London: Stevens & Sons, 1973), at p. 93.

[66] See Allott, Philip, *Language, Method and the Nature of International Law*, in Martti Koskenniemi (Ed.) *International Law* (New York: New York University Press, 1992), at p. 79.

[67] Fiss, Owen, *Objectivity and Interpretation* (1982) 34 Stan. L. Rev. 739.

[68] Johnstone, as note 64, above, at p. 374.

[69] As note 67, above.

[70] Williams, Glanville, *Language and the Law* (1961) 61 Law Quarterly Review 71, at pp. 125–138.

[71] As note 70, above, at p. 376.

categories of understanding' that are embedded in the practice in which he or she has been trained and participates".[72] Thus:

> "the meaning of a word or set of words is always either clear or capable of being clarified because communication occurs within situations and 'to be in a situation is already to be in possession of ... a structure of assumptions, of practices understood to be relevant in relation to purposes and goals that are already in place'."[73]

At the most basic level, these structures can be seen as the simple use of *language* and then an official language: we would be surprised, and rightly so, if the Appellate Body composed a symphony in response to an appeal, or wrote its decision in cuneiform. As a judicial body, the Appellate Body is restricted by its community to engage in "legal reasoning"; a structure that constrains interpretive discretion and gives a measure of determinacy—of predictability—to the legal order.

On the subject of adherence the interpreter is left with at least two core problems to overcome. First, even within a set of given assumptions and practices, of "recurring patterns" of argument,[74] interpretation always involves a choice. This choice, however, is not in itself predetermined by the interpretive community; if it were, there would be no dispute in the first place. In any event, even if the interpretation were *a priori* determinate without recourse to an interpreter, its *application* to the concrete dispute at hand is not *legally* predetermined and requires a choice[75] and this choice is not legally based, rather policy-based or even political.

Second, merely arriving at a construction or an application that the interpretive community could find palatable—merely giving determinacy to the rules in question—would not solve the broader question of legitimacy. There are at least two reasons for this. First, the law is not simply a question of arriving at determinate ends; a system based on the raw power of a hegemon may well be a better guarantee of that than relying on

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[72] Fish, as note 63, above, at p. 1333. Franck uses the US–Nicaragua case before the International Court of Justice as an example of the normative force of international legal argument. The United States failed in that case to invoke the "Connolly Reservation", which reserved to the United States all matters that it deemed "a domestic matter". The United States lost on the question of jurisdiction, despite having available to it a convenient unilateral escape hatch. It did not do so because, Franck argues, to have used the reservation to justify the mining of Nicaraguan harbours would not have been "reasonable; it would have seemed absurd ... Such foreboding of shame and ridicule is an excellent guide to *determinacy*. If a party seeking to justify its conduct interprets a rule in such a way as to evoke widespread derision, then the rule has determinacy ... The violator's evidently tortured definition of the rule can be seen to exceed its range of plausible meanings ... No verbal formulas are entirely determinate, but some are more so than others". (Emphasis added.) As note 59, above, at p. 167. The interpretive constraints identified by Fish were recognized, in a much cruder form, nearly 400 years earlier by Lord Coke, one of the greatest English jurists. In the following passage, he describes an argument he had with King James I:

> "The King said that he thought the law was founded upon reason, and that he and others had reason as well as the judges. To which it was answered by me that true it was that God had allowed His Majesty excellent science and great endowments of nature; but His Majesty was not learned in the law of his realm of England and causes which concern the life or inheritance or goods or fortunes of his subjects; they are not to be decided by natural reason, but *by the artificial reason and judgment of law, which law is an art which requires long study and experience before that a man can attain to the cognizance of it* ..." (emphasis added).

Morrison, Mary Jane, *Excursions into Legal Language* (1989) 37 Cleveland State Law Review (2), 271, quoting Maitland, F., *The Constitutional History of England*, at pp. 268–269 (1913) (quoting Coke, *Reports*, XII, 65, at 286, n. 64).

[73] Johnstone, as note 64, above, at p. 378, quoting Fish, S., *Doing What Comes Naturally* (1989), at p. 318.

[74] Koskenniemi, as note 63, above, at p. 48.

[75] Kratochwil, as note 47, above, at p. 213; and Aarnio, Aulis, *The Rational as Reasonable* (Dordrecht: Reidel, 1987), at p. 47.

an interpretive community. A system of laws is also, if not primarily, concerned with the legitimacy of the *means* of application or enforcement.[76] This is why systemic or formal validity (or *pedigree*) are, at a minimum, necessary conditions of legitimacy. In view of the discussion above on the role of the interpretive community in constraining the structures of legal argument the means by which interpretations are conveyed to the interpretive community, that the right organ has issued the ruling is *not* sufficient to legitimize the determinate interpretation thus arrived at and applied.[77] Second, given the nature of the law as a context-specific communication, every legal utterance not only conveys a normative meaning as to the conduct to be undertaken (or refrained from), but also carries in itself an unstated assumption about the nature of the legal context in which the statement is made.[78]

In short, to overcome these problems, the interpreter has to *justify*, using the recurring patterns of argument of the interpretive community, not only that the political choice between competing alternatives fits within the structures of assumptions, relevant practices and goals of the interpretive community, but also that the message it conveys about those assumptions and practices is a correct one.[79] Thus, interpretation is concerned with persuasion—the interpreter has to show not that he or she has hit "The Truth", but that he or she is operating within those same shared assumptions and understandings.[80] It is not enough that the judicial fiat—the ruling of an interpreter—be rule governed, it must be reasoned and the reasons must be outlined; a judge is not a sports referee.[81]

(b) *Evaluation: International law of trade as reason*

Interpreting legal norms is an iterative process within a specific context. In the context of international trade law and, more specifically, in the emerging legal order that is no longer subject to effective political oversight, the rulings of the Appellate Body cannot find legitimacy merely because they were issued in accordance with the rules set out in the DSU; it is not enough that the Appellate Body be consistent, because it could be consistently *wrong*. Although a core objective of the legal order of the WTO and, therefore, a necessary condition of legitimacy, determinacy (i.e. predictability and the

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[76] As note 75, above, at p. 197.

[77] Aarnio, as note 75, above, at pp. 6, 39–41.

[78] Hart, H.L.A., *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), at p. 26; and Hart, H. L.A., *Definition and Theory in Jurisprudence* (1954) 70 Law Q. Review 37, at p. 291. The use of a specific language by two people for the purposes of communication necessarily, and at the very least, implies that both speak and understand that language. Further details about the use of that language may give us a clue to other underlying assumptions (for example, if both use a particular dialect, slang, or jargon).

[79] This is what Franck calls "adherence to a normative hierarchy" and Aarnio calls "axiological validity", or acceptability within a moral and ethical framework. Franck, as note 59, above, at p. 164; and Aarnio, as note 75, above, at p. 43.

[80] Abraham, Keith, *Interpretation and Literary Theory: Some Common Concerns of an Unlikely Pair*, in S. Levinson and S. Mailloux (Eds) *Interpreting Law and Literature: A Hermeneutic Reader* (1988), at p. 124.

[81] Cohen, Jonathan and H.L.A. Hart, *Theory and Definition in Jurisprudence*, in Frederick Schauer (Ed.) *Law and Language* (Aldershot: Dartmouth, 1993), at p. 87.

mere invocation of past decisions to justify application to new fact situations) is also not a *sufficient* condition for the legitimacy of Appellate Body rulings.

For the interpretive dialectic to be meaningful, the interpretive community has to be satisfied that the rulings of the Appellate Body are, and continue to be, grounded in the structures of common assumptions and understandings; in other words that they are in accordance with reason, and that they are thus *legitimate*. The Appellate Body must show that its claims "satisfy certain criteria", that they are not simply "arbitrary statements of personal preferences", and that they are not based on "purely idiosyncratic grounds".[82]

Legitimacy is important for the legal order, and especially the international legal order, precisely because there is no international police force; even where threat of retaliation exists, it is inconsequential against larger economies by smaller ones. As the value of international law and legal obligation is the *internal* constraints one expects it to place on *external* actions of States, legitimacy becomes the *sine qua non* of an effective international legal order. Law as reason is a process of persuasion, because it has to work on the reason of the States. In the absence of its persuasive force, the only alternative is self-help, the state of nature.

Section III examines the first rulings of the Appellate Body to determine the extent to which it has been successful in not only giving determinacy (predictability) to the rules of international trade, but also gaining adherence (confidence and security) to its rulings through persuasive legal reasoning.

III. International Trade Law as Reason: The Jurisprudence of the Appellate Body of the WTO

This section first examines how the Appellate Body set out to kill a demon that had haunted its predecessor, namely lack of confidence in the ability of the GATT to deal with issues of deep concern to some of its key contracting parties, including the United States, but also developing countries. Second, there is a discussion of the attempt by the Appellate Body to establish a *juridical* framework for its decisions.

It should be noted that the following analysis is not concerned with whether the Appellate Body was right or wrong in its legal analysis, as this is not a comprehensive study of the legal provisions discussed by the Appellate Body or of the legal arguments presented before it. Instead, the aim here is to determine the extent to which the Appellate Body has been cognizant of, and responsive to, the needs of the new legal order for predictability and security.

A. Building confidence

As far as the United States was concerned, the 1990s had begun badly. With

[82] Kratochwil, as note 47, above, at p. 12.

Tuna-Dolphin I[83] and *II*,[84] and then with *CAFE*,[85] there was a growing sense in the United States (and perhaps elsewhere)—however unjustified—that the GATT was unable or unwilling to cope with environmental protection measures. Words such as "out of touch", "anachronistic" or "ossified" were not uncommonly applied to the organization that, for four decades, had been the centre of global market liberalization. Other interests were now beginning to assert themselves, not the least of which were environmental groups. Wrapped in the flag, the left and the right and their increasingly shrill rhetoric in the richest and most open market in the world threatened its very participation in the WTO; nearly 50 years before the International Trade Organization (ITO) had been stillborn because of similar concerns. That the first WTO dispute to go to a panel was again over an environmental measure of the United States thus presented at once a danger and an opportunity—a report wrongly reasoned could bring the WTO into disrepute from the start, but a good report might begin to rebuild the lost confidence of the strong environmental lobby in the international trading order, and assure the United States that its concerns about loss of sovereignty were unfounded.

Developing countries had not been particularly enamoured with the GATT. The institutional reforms of the WTO should, in theory, have gone a long way to address their concerns. However, the institutional weakness of the GATT had been only one (if the most visible) of the problems of the old system. Such substantive anomalies as the Arrangement Regarding International Trade in Textiles (the Multifibre Arrangement or MFA) had made a mockery of free trade; its abolition had been a key demand of developing countries throughout the Uruguay Round and the Agreement on Textiles and Clothing (ATC) had been the resulting compromise. The question was the extent to which *in operation* the compromise could keep the two sides happy.

1. *Atoning for the Early 1990s:* Reformulated Gasoline[86]

(a) *The appeal*

The dispute related to the implementation by the United States of the Clean Air Act (CAA) (originally enacted in 1963) and a subsequent regulation to control toxic and other pollution caused by the combustion of gasoline manufactured in or imported into the United States. The CAA established certain compositional and performance specifications for reformulated gasoline. To prevent the dumping of pollutants extracted from reformulated gasoline into conventional gasoline, the CAA required that conventional gasoline sold by domestic refiners, blenders and importers in the United States be as clean as 1990 baseline levels. Thus, the 1990 baseline rule is an integral element of the gasoline rule enforcement process. Baselines can either be individual

[83] *United States—Restrictions on Imports of Tuna* (*Tuna–Dolphin I*; 39S/155) (Unadopted).
[84] *United States—Restrictions on Imports of Tuna* (*Tuna–Dolphin II*; DS29/R), June 1994 (Unadopted).
[85] *United States—Taxes on Automobiles*, DS31/R, 11 October 1994 (Unadopted).
[86] *United States—Standards for Reformulated and Conventional Gasoline* (*Reformulated Gasoline*), WT/DS2/AB/R, Report of the Panel adopted on 20 May 1997.

(established by the entity itself) or statutory (established by regulations and reflecting 1990 average US gasoline quality), depending on the nature of the entity concerned. Domestic refiners that were in operation for at least six months in 1990 are not entitled to use the statutory baseline; however, foreign refiners cannot use individual baselines and must use the statutory baseline instead.

The Panel concluded that imported and domestic gasoline were "like products" and, therefore, the difference in treatment constituted "treatment less favourable" under Article III:4 of the GATT. Moreover, the baseline establishment method was not justified under Article XX(b) or XX(d). The Panel also found that "clean air" was an exhaustible natural resource, but that the measure was not a measure "relating to" the conservation of exhaustible natural resources.

The appeal by the United States concentrated on the application of Article XX(g) and the interpretation of Article XX and, thus, had a "sharply limited focus" (at 9). Venezuela and Brazil argued that the measure at issue was not one "relating to" conservation, in that it was not primarily intended to achieve a conservation goal and it did not have a positive conservation effect. They argued that clean air was not an exhaustible natural resource and that, in any event, the measure did not impose restrictions on the consumption of clean air. On this point, they were supported by Norway and the European Community.

(b) *The report*

The Appellate Body first deals with a preliminary question: as Brazil and Venezuela had not cross-appealed the finding of the Panel with respect to the clean air question, they could not now ask the Appellate Body to overturn that finding. The Appellate Body notes in particular that to deal with that issue:

> "under the circumstances of this appeal, would have required the Appellate Body casually to disregard its own *Working Procedures* and to do so in the absence of a compelling reason grounded on, for instance, fundamental fairness or *force majeure*" (at 12).

The Appellate Body then turns its attention to the substantive issues at hand. The first question for the Appellate Body is the identification of the "measure" that had to be related to the conservation of natural resources. It determines that the measure in question is the baseline establishment rule, rather than the gasoline rule as a whole.

The second question is whether the measure related to the conservation of natural resources. The Panel had quoted with approval the analysis of the *Salmon and Herring* Panel Report, in which "relating to" was interpreted as meaning "primarily aimed at", a somewhat more restrictive interpretation than the words at first glance permit. It then determines that "no direct connection" could be found between the less favourable treatment and conservation of natural resources.

The Appellate Body observes that it is not clear whether "direct connection" is a substitute for "primarily aimed at", or whether it was an additional element. In any

event, the Panel had asked the wrong question: the issue was not whether the less favourable treatment was related to or primarily aimed at conservation. "Less favourable treatment" is a conclusion in law as to the conformity of the measure to Article III:4; however, it is the "measure" itself that is the subject-matter of the enquiry in Article XX(g), not the legal finding (at 16).

The Appellate Body notes as well that the Panel seemed to have used a conclusion it had reached earlier in examining the conformity of the measure to Article XX(b). Thus, the Panel had overlooked "a fundamental rule of treaty interpretation ... [that] has received its most authoritative and succinct expression in the *Vienna Convention on the Law of Treaties* ... ". Quoting Article 31 of the Vienna Convention, the Appellate Body observes that "[t]hat general rule on interpretation has attained the status of a rule of customary or general international law" and, as such, it forms part of the "customary rules of interpretation of public international law" that the Appellate Body is directed to apply by Article 3(2) of the DSU. "That direction" the Appellate Body argues, "reflects a measure of recognition that the *General Agreement* is not to be read in clinical isolation from public international law" (at 17).

Applying the rules of interpretation, the Appellate Body notes that in view of the difference in wording between different provisions of Article XX:

> "[i]t does not seem reasonable to suppose that the WTO Members intended to require, in respect of each and every category, the same kind or degree of connection or relationship between the measure under appraisal and the state interest or policy sought to be promoted or realized" (at 18).

At the same time, the context of Article XX indicated that although Article XX(g) "may not be read so expansively as to subvert the purpose and object of Article III:4", Article III: 4 must not be given "so broad a reach as effectively to emasculate Article XX(g) and the policies and interests it embodies". The Appellate Body notes in passing that although the issue had not been raised by either party, the phrase "primarily aimed at" was not treaty language and "was not designed as a simple litmus test for inclusion or exclusion from Article XX(g)" (at 19).

Turning to whether the measure was made effective in conjunction with restrictions on domestic consumption, the Appellate Body does not agree with the Appellee's argument that the measure in question should "make effective" domestic measures in existence. Instead, again referring to customary rules of treaty interpretation, the Appellate Body interprets the requirement as measures that are brought into effect together with restrictions on domestic production or consumption of natural resources. That is, the measures concerned must impose restrictions, not just in respect of imported gasoline but also with respect to domestic gasoline: "[t]he clause is a requirement of *even-handedness* in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources".

The Appellate Body finds that "restrictions on the consumption or depletion of clean air by regulating the domestic production of 'dirty' gasoline are established jointly

with corresponding restrictions with respect to imported gasoline". The question is not whether the restrictions achieve the intended results:

> "in the field of conservation of exhaustible natural resources, a substantial period of time, perhaps years, may have to elapse before the effects attributable to implementation of a given measure may be observable. *The legal characterization of such a measure is not reasonably made contingent upon occurrence of subsequent events*" (at 21) (emphasis added).

Having found the measure in question in conformity with the requirements of Article XX(g), the Appellate Body examines whether it meets the requirement of the chapeau to Article XX. The Appellate Body observes that the chapeau "is animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal right", they should be applied reasonably.

Determining whether the application of a measure constitutes arbitrary or unjustifiable discrimination is not simply a reiteration of the standard in Article III, because "interpretation must give meaning and effect to all the terms of treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or nullity." The Appellate Body then argues:

> "'Arbitrary discrimination', 'unjustifiable discrimination' and 'disguised restriction' on international trade may ... be read side-by-side; they impart meaning to one another. It is clear to us that 'disguised restriction' includes disguised *discrimination* in international trade. It is equally clear that *concealed* or *unannounced* restriction or discrimination in international trade does *not* exhaust the meaning of 'disguised restriction'. We consider that 'disguised restriction', whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX. ... [T]he kinds of considerations pertinent in deciding whether the application of a particular measure amount to 'arbitrary or unjustifiable discrimination', may also be taken into account in determining the presence of a 'disguised restriction' on international trade."

The Appellate Body notes that more than one course of action was available to the United States, such as the imposition of non-discriminatory statutory baselines. The United States could also have entered into "co-operative arrangements with the governments of Venezuela or Brazil ...".[87] The United States, however, had considered that a statutory baseline rule would involve financial costs and burdens for its domestic producers, without taking into account the impact of such costs and burdens on foreign producers: "[t]he resulting discrimination must have been foreseen, and was not merely inadvertent or unavoidable". The Appellate Body found that the baseline requirements were not in conformity with the chapeau of Article XX.

(c) *Evaluation*

Of the first six reports, this was without doubt the most sensitive. The challenge was not so much legal as political. Legally speaking, many of the issues could have been

[87] This is similar to the line taken by the GATT panels in the unadopted panel reports of *Tuna I* and *Tuna II*.

disposed of without too much difficulty or without the need to resort to deep analysis. For example, the elaborate discussion about the application of the Vienna Convention was not strictly necessary in order to arrive at the conclusion that the Panel Report was not legally sound (GATT panel practice had already established that the test in Article XX(b) was different from that in Article XX(g) and it is clear that the "direct connection" test developed by the Panel was nowhere to be found in the text of the GATT or its negotiating history). In addition, the confusing analysis of the relationship between "disguised restriction" and "arbitrary or unjustifiable discrimination" was not necessary to find that a regime that knowingly imposed costs on imports without doing the same for domestic goods is not strictly justifiable from an environmental perspective, let alone under the WTO.

Instead, as the first Appellate Report, *Reformulated Gasoline* had the double burden of laying the foundation of the new legal order *and* justifying its own existence not just to the small group of trade policy officials that had negotiated the WTO Agreement, but also to the broader community that would receive and critique the opinion and that could, ultimately, have an important impact on political decision-makers in the various capitals. It was an environmental measure that came before the Appellate Body and it had to prove that it was sensitive to the "policies and interests" that underlay the environmental exceptions of the GATT. It did so admirably. One is struck by the near total absence of references to market access concerns in the Appellate Body Report. Article III, the principal market access provision after Articles II and XI, should not be allowed to emasculate Article XX,[88] which is no longer characterized as an "exception" to be narrowly construed. On the contrary: "the exceptions of Article XX may be invoked as a matter of legal right ... ". This legal right, limited to some extent by the "primarily aimed at" construction set out in *Herring and Salmon*, is capable of even greater expansion: the Appellate Body almost invites a challenge to the *Herring and Salmon* interpretation and leaves open the possibility of lowering the threshold of connection in Article XX(g).

Thus, environmental protection is a right and not a narrow exception (and capable of greater expansion) under the GATT. Environmental concerns should not be allowed to be emasculated by market access concerns. The only requirement is that of *even-handedness*. Not even environmentalists could argue with that.

As well as trying to get rid of the aftertaste of *Tuna-Dolphin I* and *II* and *CAFE*, the Appellate Body's approach shows awareness of another key imperative, namely

[88] Jackson, John H., *The World Trading System* (Cambridge, Mass: The MIT Press, 1989) notes that:
"These phrases may be characterized as 'softer' obligations of MFN and national treatment. They allow departure from the strict language of Article I (MFN) and Article III (national treatment) to the extent necessary to pursue the goals listed in Article XX, but not to the extent of non-MFN discrimination or protection of domestic production, if either is not necessary to pursue those listed goals" (at p. 207).

However, the Appellate Body points out that the "necessity" test is not the test to apply in respect of all sub-headings of art. XX. According to the Appellate Body, it is the departure from the most-favoured-nation (MFN) or national treatment that should be tested against art. XX, but the measure itself. The approach of the Appellate Body thus signifies a departure from the traditional understanding of the role of art. XX in the scheme of the GATT.

establishing a legal framework for the future work of the WTO. As noted above, much of the analysis of the Appellate Body is not strictly necessary to get its point across *in this specific case*. However, that is not the point or, at least, it is not the only point. The Appellate Body might have quoted Chief Justice Marshall[89] or the European Court of Justice in *van Gend en Loos*,[90] in that the WTO heralded a new legal order, distinct in function and approach from the GATT. It as much as did so by noting that the WTO Agreement cannot be interpreted and applied in isolation from public international law.

Thus, although a sense of continuity is maintained (with reference to previous GATT panel reports), a departure is necessary (with reference to international law, whether in rules of interpretation or the principle of effectiveness). This is no longer the negotiating forum in which diplomats negotiated whether and how to apply the rules; it is a system of laws, itself governed by the secondary principles of the community of nations.

The Appellate Body report is not perfect. Its interpretation of the "disguised barrier" removed one of the most bizarre anomalies of GATT panel practice that had held that an open trade barrier was not a "disguised barrier". However, by merging the disguised barrier and the arbitrary or unjustifiable discrimination tests of the chapeau, the Appellate Body once again threw the relevance or the utility of the "disguised barrier" test into question. This conceptual confusion might have been irrelevant had the Appellate Body stopped there. However, in applying the chapeau to the US measure, the Appellate Body seems to have done what it accused the Panel of having done, that is importing the "necessity" (least GATT-inconsistency) test of Articles XX(b) and (d) into the chapeau.

The issue to be determined under the chapeau is not, of course, whether other, less GATT-inconsistent means were available for achieving the objective (this is the "necessity" test). Instead, the first question is whether the application of the measure amounted to a disguised barrier to trade, in the sense that it served another objective that frustrated the object and purpose of the GATT (i.e. a measure "related to conservation" that resulted in protection of domestic industries); and the second is whether the measure resulted in discrimination that was arbitrary or unjustifiable ("arbitrary" in the sense that there were no objective criteria or reasons on the basis of which the discrimination was made, and "unjustifiable" in the sense that the discrimination was not in accordance with a set of secondary principles governing the situation at hand).

Thus, although for the most part the Appellate Body report is politically and legally sound, the application of the chapeau to the measure in question is not wholly satisfactory. Another case will be necessary before the muddied water is cleared.

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[89] See his famous remark: "We must never forget that it is a constitution we are expounding", in *McCulloch v. Maryland*, 17US (4 Wheat.) 319 at 407 (USSC 1819).

[90] Case 26/62, [1963] ECR 1 at 6.

2. *Bringing in the Developing Countries: Cotton Underwear*[91]

(a) *The appeal*

The dispute concerned the consistency with the ATC of transitional safeguard measures by the United States on imports of cotton and man-made fibre underwear from Costa Rica. The appeal in this case was by Costa Rica against a finding of Panel that the trade-restrictive measures could have legal effect between the date of publication of the notice of consultations under the ATC and the date of the application of such measures after the consultations. At the Panel stage, the United States had argued that the measures could be imposed as of the date of the *request* for consultations with the countries involved, rather than the date of publication of such request. That claim had not found success, but the Costa Rican argument had been dismissed as well, allowing the Panel to find a middle ground between the two claims.

The resolution of the dispute turned on the interpretation of Article 6 of the ATC. Costa Rica claimed that Article 6 was silent on the issue of backdating of trade-restrictive measures, whereas the earlier equivalent clause in the MFA did make provision for such measures.

(b) *The report*

As to its rule of interpretation, the Appellate Body states that "the answer to this question is to be found within Article 6.10 itself—its text and context—considered in the light of the objective and purpose of Article 6 and the ATC" (at 14). The Appellate Body then observes that "'apply' when used as here in respect of a governmental measure—whether a statute or an administrative regulation—means, in ordinary acceptation, putting such measure into operation" (at 14).

However, the Appellate Body notes, the measure may be "applied" only after the expiration of the consultation period, and then only within a 30-day window after the consultation period. In the absence of an authorization to backdate, "a presumption arises from the very text of Article 6.10 that such a measure may be applied only prospectively". The Appellate Body then notes:

> "This presumption appears to us entirely appropriate in respect of measures which are limitative or deprivational in character or tenor and impact upon Member Countries and their rights or privileges and upon private persons and their acts" (at 15).

The Appellate Body then turns to the context of Article 6.10. Noting that Article 6.1 "offers some reflected light on the question of backdating a restraint", the Appellate Body quotes the provision that exhorts Members to apply such measures "as sparingly as possible, consistently with the provisions of this Article and the effective implementation

[91] *United States—Restrictions on Imports of Cotton and Man-made Fibre Underwear* (*Cotton Underwear*), WT/DS24/AB/R, Report of the Appellate Body Adopted on 25 February 1997.

of the integration process under this Agreement". To permit backdating would allow Members to go back to the practice that was widespread under the MFA. Moreover:

> "Such an introjection would ... loosen up the carefully negotiated language of Article 6.10, which reflects an equally carefully drawn balance of rights and obligations of Members, by allowing the importing Member an enhanced ability to restrict the entry into its territory of goods in the exportation of which no unfair trade practice ... is alleged or proven. For retroactive application of a restraint measure effectively enables the importing Member to exclude more goods by enforcing the quota measure earlier rather than later" (at 15–16).

The Appellate Body moves to the object and purpose of the requirement for holding consultations. The requirement for consultations, the Appellate Body concludes, "is [...] grounded on, among other things, due process considerations; that requirement should be protected from erosion or attenuation by a treaty interpreter" (at 16). Members should be given a "real and fair, not merely *pro forma*, opportunity to rebut or moderate" the alleged serious damage.

The Appellate Body then considers another element of the "context" of Article 6.10, "the prior existence and demise, as it were, of the MFA". The Appellate Body observes that:

> "We believe the disappearance in the ATC of the earlier MFA express provision for backdating the operational effect of a restraint measure strongly reinforces the presumption that such retroactive application is no longer permissible. This is the commonplace inference that is properly drawn from disappearance. We are not entitled to assume that the disappearance was merely accidental or an inadvertent oversight on the part of either harassed negotiators or inattentive draftsmen. That no official record may exist of discussions or statements of delegations on this particular point is, of course, no basis for making such an assumption" (at 17).

The Appellate Body points out that if the WTO Members had wanted to keep a practice that had been prevalent under the MFA, they would have maintained the original language.

After discussing a number of other points of lesser substantive import, the Appellate Body finds the practice of backdating inconsistent with Article 6.10 of the ATC and modifies the findings of the Panel to that extent.

(c) *Evaluation*

Having already established its interpretive methodology in earlier reports,[92] the Appellate Body no longer feels that it has to examine the nature of the rules of interpretation in customary international law and instead asserts the rule found in Article 31(1) of the Vienna Convention on the Law of Treaties (the Vienna Convention) (text and context, considered in the light of objective and purpose ...). This shows a body

[92] *Japan—Taxes on Alcoholic Beverages (Japan Liquor Tax)*, WT/[DS8/DS10/DS11]/AB/R, Report of the Panel Adopted on 11 November 1997.

comfortable with its own pedigree: the pronunciation itself—without even reference to the authority of earlier panels—is enough to establish the rule of interpretation.

Of course, one may argue that the Appellate Body is thus saved from reinventing the wheel, that is restating the obvious interpretive rules, in each case. The interpretive community, it might be argued, is learned. They will have read the earlier reports; they will know to what the Appellate Body is referring. This argument has some validity. In principle, there should be no need for the Appellate Body to go through the step-by-step cut-and-paste operation of quoting Article 3(2) of the DSU, establishing the Vienna Convention as a codification of customary international law and then quoting Article 31. It should, in principle, be enough to go directly to the principle, already well discussed in the jurisprudence of the WTO.

The difficulty is that *in practice* it is necessary for the receivers of the reports to know the basis on which the Appellate Body purports to interpret and apply the agreement in question. It is not enough to know that they will look at the text, the context, and the object and purpose. These do *not* constitute the entirety of the rules of interpretation under customary international law and, in any event, they represent a compromise between different schools of interpretation.[93] What is important is for an interpreter to clearly set out the weight given to these different principles, the interplay between these approaches, and the extent to which one principle, rule or approach could be in conflict with another.[94]

The casualness with which the rules of interpretation are treated is repeated throughout. The Appellate Body notes the "commonplace inference" that may be drawn from the disappearance of the backdating provision of the MFA. That inference, perhaps commonplace, is nevertheless known as the logical fallacy of opposition, namely just because something is not A, it is NOT-A. This approach was rejected in the recent *Qatar v. Bahrain* case, where the International Court of Justice pointed out that the rejection in negotiations of a form of words corresponding to the position asserted by one party did not imply that the thesis of the other party had to be upheld.[95] The Appellate Body may well be correct in its assessment as to why the provision was left out of the ATC. However, there is neither evidence one way or another, nor any elaboration. In the end, we have only the commonplace inference of the Appellate Body to rely on.

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[93] Sinclair, Sir Ian, *The Vienna Convention on the Law of Treaties*, 2nd Edn. (Manchester: Manchester University Press, 1984), at pp. 114–115. He points out that McNair attempted to find a synthesis of the three approaches by suggesting that: "...the main task of any tribunal which is asked to apply or construe or interpret a treaty ... can be described as the duty of giving effect to the expressed intention of the parties, that is, *their intention as expressed in the words used by them in the light of the surrounding circumstances*" (emphasis in original). McNair, Lord Arnold, *The Law of Treaties* (Oxford: Clarendon Press, 1961), at p. 365. Lord McNair, however, was rather concerned that these various approaches had obscured the principal task of interpreters, than trying to find a synthesis of these different approaches. Reuter echoes McNair in noting simply that the "purpose of interpretation is to ascertain the intention of the parties from a text". Reuter, Paul, *Introduction to the Law of Treaties* (London: Pinter Publishers, 1989), at p. 75.

[94] As McNair (*ibid.*) observes, "for many of the so-called rules of interpretation that one party may invoke before a tribunal the adverse party can often, by the exercise of a little ingenuity, find another rule as an equally attractive antidote".

[95] *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Jurisdiction and Admissibility)* [1995] ICJ Reports 1995 6, at 22, para. 41.

The Appellate Body's understanding of the MFA affects the interpretation of the ATC in other ways. To read the ATC to allow the States what they used to do would be to loosen the careful balance of Article 6.10. The Appellate Body speaks the language of the trade diplomat: the bargain has been struck, we must not disturb it. That would be a sound approach, if we had been persuaded earlier what the nature of the bargain had been. Based on the evidence presented in the Appellate Body report itself, it is equally probable that parties thought the practice of backdating to be so pervasive and so *acceptable*, as to no longer require explicit legal protection; or that the parties simply could not *agree* whether to continue to protect it legally or not. In either case, to read Article 6.10 as prohibiting backdating and to concretize that which had been left (at worst) vague, would be to reapportion the negotiated balance.

The Appellate Body report cannot be understood as a legal document; yet, it is an effective exercise in rhetoric (in its classical sense), in *persuasion.* The Appellate Body is aware of its audience, the community in which its reports are received, the circles that will discuss its reasoning (such as it is) and conclusions. Thus, where rights of the private parties are affected, "limitative" provisions must be construed narrowly; consultations must be "real and fair, not merely *pro forma* ... grounded on ... due process considerations". The Appellate Body speaks in a language familiar to the jurist or the advocate. It does not explain what it means by "due process". Does Costa Rica have any rights to claim against the United States other than those specifically stated? What about the right to counsel and the right to be "heard" by the United States? The fact that "due process" is nowhere to be found in the text of WTO Agreement should have ordinarily led to the "commonplace inference" that it was not intended. Of course that would be nonsense, as due process is branded on the professional consciousness of the occidental jurist. It would simply be unreasonable to hold or argue otherwise. Likewise, the talk of protecting the interests of private parties (and here the Appellate Body picks up where the Panel left off with its transparency requirement) would have a particular resonance in trade circles.[96]

Having thus invoked a juridical *commonplace*,[97] the Appellate Body then implies another, namely a judicial self-restraint. It notes that the requirement concerning substantial consultations should be "protected from erosion or attenuation by a treaty interpreter". That might be so, if there were such a requirement. If, on the other hand, no such requirement exists, treaty interpreters should not erode or attenuate the rights of parties *not* to engage in substantial consultations; to do otherwise would be judicial activism, which is expressly prohibited by the DSU.

Tucked away in a paragraph to which it does not logically belong is the core objective of the report. The Appellate Body states that it has to take into account that:

> "the standards and requisites of Articles 6.10 and 6.11 are to be read together against the background consideration that the ATC constitutes a temporary and transitional regime with

[96] See *van Gend en Loos*, as note 90, above; Mengozzi, note 55, above.

[97] See Kratochwil, as note 47, above. He uses the word to refer to basic juridical axioms that do not need further proof, because of widely held beliefs as to their truth.

complete integration of the textile and clothing sector into the *General Agreement* as the final goal".[98]

The Appellate Body cannot be clearer: the end is nigh for the ATC regime and, in the meantime, it will be construed narrowly. A small step for Costa Rica; a giant step for developing countries that have been fighting against the MFA for decades. The Appellate Body does not ignore the other party: this is all in furthering due process, protecting the rights of private parties to transparency and predictability, the affirmation of commonplace inferences, the principle of effectiveness (invoked almost as an afterthought)[99] and the like. These juridical *commonplaces* have a deep resonance in the psyche of the jurist and, therefore, can serve as particularly useful rhetorical devices for advancing an argument in an emerging legal system. Although less than rigorous as pure legal analysis, the report is oddly persuasive to both the diplomat and the jurist. The Appellate Body speaks to the winner and the loser alike, the very casual nature of its approach implying that to think otherwise would be unreasonable, perhaps even absurd: who can argue with due process, a commonplace inference?

3. *Wool Shirts*[100]

(a) *The appeal*

This case also involved a safeguard measure pursuant to Article 6 of the ATC. The measure had been imposed by the United States following a finding by the TMB that the actual threat of serious damage from sharp and substantial imports from India had been demonstrated. Following a dispute launched by India, the Panel found that the US restraint measures violated the relevant provisions of the ATC. India appealed the panel ruling on three issues: the burden of proof, the relevance of the TMB and judicial economy.

India contested the Panel finding that it had the burden of providing a *prima facie* case of violation on the part of the United States. Instead, as the ATC constituted an exception to the GATT, the United States had the burden of proving that it was in compliance with the obligations set out in the ATC. India argued as well that the TMB should not have expressed any views on a transitional measure that had not yet been taken. Finally, India objected to the practice of the Panel not to provide a finding on every issue raised by the parties.

In response, the United States argued that India and the United States had differing burdens of proof. Once India had established a *prima facie* case, the United States had the burden of convincing the Panel that, at the time of its determination, it had respected the requirements of Article 6 of the ATC. The United States objected to the "simplistic"

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[98] As note 91, above, at p. 20.

[99] As note 98, above, at p. 16; the Appellate Body notes at the end of the paragraph that "[t]he principle of effectiveness in treaty interpretation sustains this implication".

[100] *United States—Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, Report of the Panel Adopted 23 May 1997.

taxonomy of India that treated all "exceptions" identically. India ignored the fact that, in addition to obligations, WTO Members also had rights; many of what would be considered "exceptions" by India are more properly viewed as "rights". As to the Panel's observations on the TMB, the United States viewed these as *obiter dicta* and inconsequential to the resolution of the dispute. Finally, with respect to the question of "judicial economy", the United States noted that nothing in the DSU or the WTO Agreement mandates a panel to rule on every legal issue raised. According to the United States, the primary function of the dispute settlement system was to resolve disputes by achieving the withdrawal of WTO-inconsistent measures, not to render interpretations or to generate opinions on any issue. The United States rejected the argument that the DSU had the twin objectives of dispute resolution and dispute prevention. It was simply unnecessary to address the other issues involved.

(b) *The report*

Quoting the finding of the Panel on the question of burden of proof, the Appellate Body observes that the findings and comments of the Panel "are not a model of clarity", but also that the Panel had not erred in law (at 16). The Appellate Body then begins its own discussion of the question of burden of proof by noting that the foundation of dispute settlement is "the assurance to Members of the benefits accruing directly or indirectly to them under" the GATT. It is clear that if there is a violation, there is a *prima facie* case of nullification and impairment. However, which party has the burden of demonstrating that there has, or there has not, been such a violation?

As a *question de base*, the Appellate Body wonders "how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof". It then turns to two sources: practice before the International Court of Justice and general practice of States. It finds that the burden of proof rests on any party that:

> "asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption" (at 17).

How much and what kind of evidence is needed is a matter that would vary from measure to measure, provision to provision and case to case. In response to India's contention on who should have the burden of proving an exception, the Appellate Body notes:

> "The ATC is a transitional arrangement that, by its own terms, will terminate when trade in textiles and clothing is fully integrated into the multilateral trading system. Article 6 of the ATC is an integral part of the transitional arrangement manifested in the ATC and should be interpreted accordingly ... [W]e believe that Article 6 is 'carefully negotiated language ... which reflects an equally carefully drawn balance of rights and obligations of Members ...' That balance must be respected" (at 19).

Therefore, a party claiming a violation of a provision must not only assert its case, but also prove it.

With respect to the observation of the Panel on the TMB, the Appellate Body characterizes it as "purely a descriptive and gratuitous comment" and does not consider it as a legal finding or conclusion capable of being upheld, modified or reversed. The Appellate Body further upholds the prevailing GATT panel practice of addressing only those issues that the panel considers necessary to dispose of the matter. The Appellate Body specifically rejects the implicit suggestion that it should "make law" by clarifying the existing provisions of the WTO Agreement "outside the context of resolving a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute" (at 23). Providing authoritative interpretations of the WTO Agreement is within the exclusive authority of the Ministerial Conference and the General Council.

(c) *Evaluation*

Two points are immediately striking. The first point, in the form of a question, is unanswerable and, at first glance, seems to have little to do with the approach of the Appellate Body: why did India appeal? The second is that the reasoning of the Appellate Body in this case is much tighter and based much more squarely on traditional legal grounds (as opposed to *rhetoric*) than the Appellate Body Report in *Cotton Underwear.*

One possible answer to the first question—an answer that would also explain the second observation—is that the intuitive approach of the Appellate Body in *Cotton Underwear* may have unintentionally sent a mixed message to the Members of the WTO and, in particular, certain developing countries. *Cotton Underwear* held that the ATC had an *exceptional* character. The zeal of the Appellate Body in drawing commonplace inferences here and there and in reading "due process" into the provisions of the ATC may have strengthened the impression that the safeguard measure of Article 6.10 was an exception in the sense that its user has to *justify* its use. In any event, the Appellate Body had noted that the provision, as a limitative and deprivational provision, had to be construed narrowly.

Thus, the Appellate Body found itself in the presence of an argument that did not accord with reason: that the mere assertion of a claim amounted to proof, an argument at odds with a principle of long standing at both common law and civil law, and adopted both in international law and in the GATT panel practice. It had, in addition, to construct a reasoned and balanced report patently at odds with the approach and the tenor of its previous foray into the world of textiles.

Cotton Underwear served the security or adherence objective by using legally evocative language and assuring developing countries that the system worked for them; *Wool Shirts* had to serve the other important elements of legitimacy, namely those of determinacy and predictability. The Appellate Body did this with grace and

persuasiveness. It could simply have relied on past panel practice to settle the burden of proof issue; instead, the Appellate Body chose to examine international law and practice before domestic tribunals to make a single, simple and effective statement about burden of proof, that is that a party making a positive assertion or defence has the burden of establishing it. The very comprehensiveness of its examination of the issue is likely to settle the matter for the time being. Incidentally, by comparing itself to other international and domestic judicial tribunals, the Appellate Body also implicitly reaffirmed the complete judicialization of the dispute settlement process of the WTO.

The Appellate Body's revisitation of the place of the ATC within the scheme of the WTO Agreement is a cogent defence of the balanced nature of Article 6 of the ATC, the ATC itself and, by implication, the WTO Agreement. "Balance" is, of course, a core concept in international trade law. A trade agreement expresses a delicate and carefully achieved balance of economic rights and obligations between the parties within a specific historical context. This has been repeatedly acknowledged in the GATT panel practice where, given equally plausible alternative interpretations, the GATT panels applied that interpretation which best maintained the intended balance of the agreement.[101] This is important for the acceptability of the WTO Agreement. Clearly not every "market-restrictive" right in the WTO Agreement is an exception: if Article II of the GATT prohibits the imposition of tariffs above the level of tariff bindings, it implies also a *right* to do so within the bound level without having to provide additional justification. WTO Members must feel secure about not only the market access concessions that they have obtained from their trading partners, but also the protective measures to obtain which they had to give concessions of their own. To ignore one at the expense of the other would be to hollow out the core of the bargain.

The Appellate Body's discussion of the principle of judicial economy is not as strong as its treatment of the burden of proof or the balance at the core of the WTO Agreement. The principle, as developed by the Appellate Body, is at war with itself.

On the one hand, panels are enjoined to limit their findings to only those issues that they must decide for the resolution of the dispute *between the parties involved* and not venture to make law in other areas or for posterity. On the other hand, as panels should not be reinventing the wheel in every report and as determinacy and predictability are key objectives, they might, would and perhaps even should look at the "persuasive

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[101] See *United States—Measures Affecting Alcoholic and Malt Beverages* (1992) GATT Doc. DS23/R, para. 5.79, BISD 39S/206 at 296. The Panel, noting with approval the Unadopted Report of the Panel on *Canada—Measures Affecting the Sale of Gold Coins*, observed that:

> "... the qualification in Article XXIV:12 of the obligation to implement the provisions of the General Agreement grants a special right to federal States without giving an off-setting privilege to unitary States, and has to be construed narrowly so as to avoid *undue imbalances in rights and obligations between contracting parties with unitary and federal constitutions*" (emphasis added).

In addition, the Panel in the *Gold Coins* case (1985), GATT Doc. L/5863 at 21 had observed that:

> "64. The Panel considered that, as an exception to a general principle of law favouring certain contracting parties, Article XXIV:12 should be interpreted in a way that meets the constitutional difficulties which federal States may have in ensuring the observance of the provisions of the General Agreement by local governments, *while minimizing the danger that such difficulties lead to imbalances in the rights and obligations of contracting parties*" (emphasis added).

authority" of previous panel and Appellate Body reports for guidance as to the interpretation and application of the provisions in question. Of course, by so doing, panels would be reaffirming the principles set out in a differing case dealing with different disputing parties.

Judicial restraint is an important principle for panels and the Appellate Body to observe. The question is the extent to which it is reinforced by reiteration alone, when the practice, as will be seen below, shows a much more activist judicial organ.

B. Building a Legal Framework

In addition to the important political imperative of giving assurances to the United States and developing countries that the WTO understood and was protecting their interests, the legal structure of the WTO had requirements of its own. Although cognizant of the balance at the heart of the WTO Agreement and the necessity of maintaining that balance, the Appellate Body was also aware (as has been seen in both *Reformulated Gasoline* and *Wool Shirts*) of the importance of building that balance and giving effect to the compromises of the WTO Agreement in the context of a legal order.

The three reports that will be examined here are important because the question of balance does not figure prominently in the analyses of the Appellate Body; no deep political motivations needed to be taken into account. In *Japanese Liquor Tax* and *Periodicals*, the disputes were between developed countries. The outcome—one way or another—of these disputes, however sensitive the protected sectors, was unlikely to motivate any of the principal actors to leave the WTO or even to undermine it by intemperate rhetoric. In *Coconuts* both parties were developing countries and the question at issue was not likely to present itself again before the WTO panel.

Thus, despite its protestations to the contrary in *Wool Shirts*, and precisely because of its mandate to give predictability and security to the international trading system, in the three cases that follow the Appellate Body could do what appellate jurisdictions the world over do, that is consciously build a framework, brick by judicial brick, for the future interpretation and application of the WTO Agreement. However, for *Periodicals*, the framework reports of the Appellate Body contribute significantly to the objectives and, therefore, the legitimacy of the WTO. *Periodicals* represents a singularly regressive step into the bad habits of the old GATT panels and, more disturbing still, a possible attempt at restructuring a balance that, in the Appellate Body's view, might not have seemed in accordance with the liberalization scheme of the Uruguay Round.

1. *Establishing the Framework:* Japanese Liquor Tax

The Appellate Body had set out the basic elements of its interpretive approach in *Reformulated Gasoline*. The WTO Agreement was an international legal document and was to be treated that way. The text of the treaty was to be read in context and with a

view to its object and purpose; and the provisions of the treaty were to be given useful effect. More importantly, the Appellate Body was going to explain and justify its legal reasoning, rather than merely rely on past practice or negotiating history for interpretive guidance and intuitive sympathy for political acceptance. The next case to arrive before the WTO concerned not the environment (a difficult area and, therefore, susceptible to resulting in bad law), but a rematch between the top four trading entities in the world over Japan's liquor tax regime.

(a) *The appeal*

The appeal and cross-appeal were from the Panel report that had found Japan's liquor tax regime inconsistent with Article III: 2 of the GATT. Japan appealed from the Panel's findings and conclusions as well as from certain of its legal interpretations. It argued that the Panel had erred in disregarding the need to determine whether the Japanese liquor tax regime had the aim of affording protection to domestic production, ignoring whether there was a link between the origin of the product and the tax treatment incurred and not giving proper weight to the basis on which the Japanese tax regime operated.

The United States supported the Panel's overall conclusion, but appealed on the question of the interpretation of Articles III: 1, and III: 2 and III generally. The United States disputed that "likeness" can be determined purely on the basis of physical characteristics, consumer uses and tariff classification without considering the context and purpose of Article III as a whole and without considering whether regulatory distinctions are made "so as to afford protection". The United States also argued that the panel erred in incorrectly characterizing adopted panel reports as "subsequent practice" within the meaning of Article 31(3)(b) of the Vienna Convention.

The European Community, responding to the Japanese appeal, argued that the Panel had been correct in concentrating on the physical characteristics of the products in question for its "like product" analysis. However, the European Community supported the United States' position that adopted GATT panel reports did not constitute subsequent practice within the meaning of the Vienna Convention.

Canada confined its arguments to the second sentence of Article III: 2 and supported the Panel's determination.

(b) *The report*

The Appellate Body, referring to *Reformulated Gasoline*, starts by setting out Articles 31 and 32 of the Vienna Convention as embodying the customary rules of interpretation in international law, according to which the WTO Agreement was to be interpreted and applied. The Appellate Body then reiterates the principle of effectiveness, again quoting its earlier analysis in *Reformulated Gasoline*.

The Appellate Body then turns its attention to the status of adopted panel reports. It determines that adopted panel reports did not constitute subsequent practice, as the decision by the Contracting Parties to adopt such reports did not constitute agreement on the legal reasoning of that panel report. According to the Appellate Body:

> "[t]he generally accepted view under the GATT 1947 was that the conclusions and recommendations in an adopted panel report bound the parties to the dispute in that particular case, but subsequent panels did not feel legally bound by the details and reasoning of a previous panel report."[102]

The Appellate Body notes that under Article IX: 2 of the WTO Agreement, the Ministerial Conference and the General Council have the exclusive authority to adopt interpretations of the WTO Agreement and of the multilateral trade agreements. Therefore, such authority cannot reside elsewhere, by inadvertence or by implication.

This does not mean that the GATT panel reports are without value. First, the "legal history and experience" under the GATT 1947 had to be brought into the WTO "in a way that ensures continuity and consistency in a smooth transition from the GATT 1947 system". Second, the GATT panel reports:

> "create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute" (at 14).

Although disagreeing with the Panel that GATT panel reports constituted subsequent practice within the meaning of the Vienna Convention, the Appellate Body agrees with the Panel's conclusion that unadopted panel reports have no legal status, even though a panel "could nevertheless find useful guidance in the reasoning of unadopted panel reports that it considered to be relevant".

The Appellate Body then moves on to Article III. It opens its analysis with a statement of principle:

> "The *WTO Agreement* is a treaty—the international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain. In exchange for the benefits they expect to derive as Members of the WTO, they have agreed to exercise their sovereignty according to the commitments they have made in the *WTO Agreement*" (at 15).

Thus:

> "Members of the WTO are free to pursue to their own domestic goals through international taxation or regulation so long as they do not do so in a way that violates Article III or any of the other commitments they have made in the *WTO Agreement*" (at 15).

The broad purpose of Article III is to avoid protectionism, not only in respect of items on which tariff concessions are made, but also of products not bound under Article II. The Appellate Body notes that this interpretation was confirmed by the negotiating history of Article III. This broad purpose can be seen in Article III: 1, which

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[102] As note 92, above, at p. 13.

forms part of the context in which the rest of Article III should be interpreted. However, different wording in different parts of Article III means that Article III: 1 informs different parts of Article III in different ways. This can be seen in particular in the different wording of the first and second sentences of Article III: 2.

Noting that the first sentence of Article III: 2 does not refer directly to Article III: 1, the Appellate Body concludes that:

> "the presence of a protective application need not be established separately from the specific requirements that are included in the first sentence in order to show that a tax measure is inconsistent with the general principle set out in the first sentence" (at 18).

Thus, all that is required under this provision is to determine whether the taxed imported and domestic products are like, and then whether the taxes applied to the imported products are "in excess of" those applied to the like domestic product. However, because the second sentence of Article III: 2 provides for a "separate and distinctive consideration of the protective aspect of a measure in examining its application to a broader category of products", the term "like product" in the first sentence should be construed narrowly.

The Appellate Body refers with approval to the practice of the GATT panels to determine whether products are "like" on a case-by-case basis. The Appellate Body is careful to note, however, that decision-makers should keep in mind:

> "how narrow the range of 'like products' in Article III: 2, first sentence is meant to be as opposed to the range of 'like' products contemplated in some other provisions of the GATT 1994 and other Multilateral Trade Agreements ..."(at 20).

In any event, this determination will always involve an "unavoidable element of individual, discretionary judgement". This does not imply arbitrariness, but that the discretion must be exercised on a case-by-case basis.

After upholding the determination of the Panel with respect to the interpretation of the second sentence of Article III: 2, the Appellate Body turns to the issue of "aim and effect" in determining whether differential taxation was applied "so as to afford protection". The Appellate Body observes that:

> "It is not necessary for a panel to sort through the many reasons legislators and regulators often have for what they do and weight the relative significance of those reasons to establish legislative or regulatory intent. If the measure is applied to imported or domestic products so as to afford protection to domestic production, then it does not matter that there may not have been any desire to engage in protectionism in the minds of the legislators or the regulators who imposed the measure. ... This is an issue of how the measure in question is *applied*" (at 27–28).

However, merely dissimilar taxation is not enough. As the Appellate Body notes:

> "The dissimilar taxation ... may be so much more [than *de minimis*] that it will be clear from that very differential that the dissimilar taxation was applied 'so as to afford protection'. ... Yet in other cases, there may be other factors that will be just as relevant or more relevant to demonstrating that the dissimilar taxation at issue was applied 'so as to afford protection'."

The Appellate Body concludes with another statement of principle:

> "WTO rules are reliable, comprehensible and enforceable. WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgments in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world. They will serve the multilateral trading system best if they are interpreted with that in mind. In that way, we will achieve the 'security and predictability' sought for the multilateral trading system" (at 31).

(c) *Evaluation*

Alone among Appellate Body reports, the *Japanese Liquor Tax* Appellate Body report begins and ends with overarching statements of principle. Such grand declarations are tools of rhetoric—persuasion and justification—rather than of interpretation. They help in understanding not the meaning of the terms discussed, but the thinking behind the interpreter's decision, that interpretation and the application of the provisions in question (or, at least, what the interpreter thinks is the most persuasive mode of communication with his or her interpretive community).

These statements are important in this instance because the Appellate Body was about to embark on two difficult missions: first, the examination of a domestic system of classification and taxation (one of the most closely guarded vestiges of sovereignty); and, second, the confirmation of the about face of the Panel on the interpretation of "like products". The Panel had explicitly overturned the interpretation used in *Beer II* and followed in the unadopted panel report in *CAFE*. The invocation at the end of the Appellate Body Report of the twin pillars of the dispute settlement mechanism of the WTO was therefore no accident. For the sake of predictability and determinacy, it was necessary to abandon the unworkable "aim-and-effect" test in favour of the approach of the first *Japanese Liquor Tax* panel report. For the sake of security and confidence, it was necessary that any additional intrusion into areas of State sovereignty be done in the name of that *sovereignty itself*—by applying the WTO Agreement, the Appellate Body is merely applying the sovereign will of each State to that State. Here, the Appellate Body approaches the development of the jurisprudence of the WTO with a measure of prudence absent in earlier GATT panel reports.

Another striking element of the Report is its conscious effort to ground its conclusions on sound legal reasoning, and by that is meant more than simply good technical analysis of the words and context of the treaty involved. The Appellate Body, much like other appellate jurisdictions, is not afraid to look outside the four corners of the legal order to which it belongs. This is more than not interpreting in "clinical isolation" from public international law; it is a frank acknowledgement that international trade law is now truly a legal order, having in common *approaches*, *structures* and *understandings* with other legal orders from which it can draw inspiration and guidance. It is an implicit identification of the juridical interpretive community into which the jurisprudence of international trade dispute settlement will henceforth be received.

The case is paradigmatic also because of its subject-matter—not alcohol, even though most key decisions of this and other international trade liberalizing orders seem to have been made because of alcohol, but Article III. As tariffs are lowered (in most cases, especially for the developed world, to levels that are only of statistical interest) and overt quotas and trade barriers are removed, products increasingly come into contact with discriminatory domestic taxation or regulatory regimes and disguised protectionist measures. Thus, Article III is likely to become one of the more widely invoked provisions of the WTO Agreement in dispute settlement proceedings. Just as it was *politically* necessary for the Appellate Body to get the analysis of the environmental protection clauses of Article XX "right", it was crucial for the proper functioning of a predictable legal order that the Appellate Body clear up the mess left behind by *Beer II* and *CAFE* (not so much because those reports were "wrong", but because they were a departure from 40 years of interpretation for no good reason whatsoever). That departure, the Panel and the Appellate Body implicitly observed, had been unwarranted.

Thus, the Appellate Body could observe that its approach served well the objectives of predictability and security.

2. *Coconuts*[103]

(a) *The appeal*

This was an appeal by the Philippines from the Report of the Panel concerning, among others, the application of Article VI of the GATT to countervailing duties imposed by Brazil pursuant to an investigation that had begun before the entry into force of the WTO Agreement. The Agreement on Subsidies and Countervailing Duties (SCM Agreement) did not apply to the investigation in question. The Panel had concluded that Article VI, as part of an integrated system, was not capable of being applied in isolation from the SCM Agreement, and was therefore inapplicable to the countervailing duties in question. The Panel had also concluded that the Agreement on Agriculture was not applicable, and that Brazil's failure to consult was not within its terms of reference.

The Philippines argued that the Panel had erred in concluding that Article VI of the GATT could not be applied independently of the SCM Agreement; indeed, the Panel had erred in starting its analysis by examining Article 32(3), as the SCM Agreement had not even been invoked by the Philippines. That Article exempted the application of the SCM Agreement to procedures that had begun before the entry into force of the WTO Agreement, but it did not exclude the application of Article VI of the GATT to definitive countervailing duties imposed after the entry into force of the WTO Agreement.

Brazil argued that it was appropriate and in accordance with the principles of

[103] *Brazil—Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, Report of the Appellate Body Adopted on 20 March 1997.

international law for the Panel to have first determined whether it had jurisdiction to consider the dispute before considering the substantive merits of the Philippines' claims. The question of whether the WTO Agreement applied was not just a claim, but a fundamental jurisdictional issue. The plain language of Article 32(3) prohibited the application of the SCM Agreement to this dispute, while the context prevented the application of the whole of the WTO Agreement. The WTO Agreement and the multilateral trade agreements were intended to be applied as a whole; they were integral and had to be considered together.

(b) *The report*

The Appellate Body begins by characterizing a countervailing duty as "the culminating act of a domestic legal process which starts with the filing of an application by the domestic industry". It then observes that the WTO Agreement is fundamentally different from the GATT. Under the old system, the GATT and the Codes had separate legal identities and sometimes even different dispute settlement procedures. Thus, a complaining party could choose to bring a challenge under Article XXIII or under one of the Codes.

Unlike the GATT, however, the WTO Agreement is a "single treaty instrument which has been accepted by the WTO Members as a 'single undertaking'". The multilateral trade agreements are "integral parts" of the WTO Agreement, and, in the event of a conflict between a provision of the GATT and one of these Agreements, the latter shall prevail to the extent of the conflict.

With respect to the question of dispute settlement, unlike the GATT, the DSU provides an integrated dispute settlement mechanism applicable to disputes arising under any of the covered agreements. A panel may deal with all the covered agreements cited by the parties to the dispute in one proceeding.

The GATT 1994 is legally distinct from the GATT 1947. This is not just a legal formality; the two agreements are substantively different (at 14). The Appellate Body observes that "[a]lthough the provisions of the GATT 1947 were incorporated into, and became a part of the GATT 1994, they are not the sum total of the rights and obligations of WTO Members concerning a particular matter". The other goods agreements represent a "substantial elaboration of the provisions of the GATT 1994". The fact that the provisions of the other agreements prevail in the event of a conflict with the provisions of the GATT 1994 does not mean that the other goods agreements supersede the GATT 1994. Instead, as the Panel held with respect to the issue at hand, the question is whether "Article VI creates rules which are separate and distinct from those of the SCM Agreement, and which can be applied without reference to that Agreement", or whether they represent "an inseparable package of rights and disciplines that must be considered in conjunction" (at 15).

To find the answer, the Appellate Body turns to the text and context of Article 32.3

of the SCM Agreement. Article 10 of the SCM Agreement provides that countervailing duties may only be imposed in accordance with Article VI of the GATT and the SCM Agreement; Article 32.1 provides in turn that a countervailing duty may only be imposed in accordance with the provisions of the GATT 1994, as interpreted by the SCM Agreement. The Appellate Body concludes that:

> "The ordinary meaning of these provisions taken in their context leads us to the conclusion that the negotiators of the *SCM Agreement* clearly intended that, under the integrated *WTO Agreement*, countervailing duties may only be imposed in accordance with the provisions of Part V of the *SCM Agreement and* Article VI of the GATT 1994, taken together. If there is a conflict between the provisions of the *SCM Agreement* and Article VI of the GATT 1994, furthermore, the provisions of the *SCM Agreement* would prevail as a result of the general interpretative note to Annex 1A" (at 17).

The Appellate Body notes the absence in the SCM Agreement of the note in the preamble of the old Subsidies Code that provided that the "terms of this agreement" should mean the provisions of the General Agreement as interpreted and applied by the Code. Observing that the preamble had not been retained and that the SCM Agreement went beyond the terms of the General Agreement, the Appellate Body agrees with the Panel that "the exclusion of this provision from the SCM Agreement [did not shed] much light on the question before us".

The Appellate Body then notes that "[i]f Article 32.3 is read in conjunction with Article 10 and 32.1 of the *SCM Agreement*, it becomes clear that the term 'this Agreement' in Article 32.3 means 'this Agreement *and* Article VI of the GATT 1994'". Quoting at length from the Panel Report, the Appellate Body agrees that "the SCM Agreement and Article VI together define, clarify and in some cases modify the whole package of *rights* and obligations of a potential user of countervailing measures".

Turning to the object and purpose of the WTO Agreement, the Appellate Body argues that the fact that Article VI of the GATT 1947 could be invoked separately from the Subsidies Code does not mean that Article VI of the GATT 1994 can be applied independently of the SCM Agreement in the context of the WTO: "The authors of the new WTO regime intended to put an end to the fragmentation that had characterized the previous system." The multilateral trade agreements are "integral parts" of the WTO Agreement; the DSU "establishes an integrated dispute settlement system which applies to all the covered agreements, allowing all the provisions of the *WTO Agreement* relevant to a particular dispute to be examined in one proceeding".

In this context, Article 32.3 provides that the dividing line between the application of the GATT 1947 system of agreements and the WTO Agreement is the date on which the application was made for the countervailing duty investigation or review. Thus:

> "the Uruguay Round negotiators expressed an explicit intention to draw the line of application of the *WTO Agreement* to countervailing duty investigations and reviews at a different point in time from that for other general measures. Because a countervailing duty is imposed only as a result of a sequence of acts, a line had to be drawn, and drawn sharply, to avoid uncertainty, unpredictability and unfairness concerning the rights of States and

private parties under the domestic laws in force in when the *WTO Agreement* came into effect" (at 19).

The Appellate Body notes that the drawing of this line need not harm the interests of the Philippines, as the Philippines had "legal options" available to it "and, therefore, was not left without a right of action as a result of the operation of Article 32.3 of the *SCM Agreement*". For example, the Philippines could have sought dispute settlement under the provisions of the Tokyo Round Subsidies Code, or indeed under Articles VI and XXIII of the GATT 1947.

(c) *Evaluation*

The most striking thing about the report is the almost total confusion as to which rule of interpretation to apply. Of course, as in *Cotton Underwear*, the Appellate Body goes through the mechanics of Articles 31 and 32 of the Vienna Convention by quoting the text, examining the context and then the object and purpose. However, that is the end of the story.

Article 28 of the Vienna Convention is quoted, but its relevance to the reasoning is not made clear. Then, on at least three occasions the Appellate Body refers to what the drafters or the authors of the WTO Agreement had intended; no reason is given as to why the intentions of the drafters are of any relevance; no evidence is adduced to support this inference of intention. This may be merely a short-hand reference for the text. However, "the intention of the drafters" is used to add to the text of Article 32.3 words that are simply not there; while the text reflects the intention of the authors, that very intention is used to add to the text words that had been left out. Finally, although the removal of a particular provision was held to be of (almost determinative) importance in *Cotton Underwear*, the Appellate Body casually dismisses this piece of potential evidence as to intent as irrelevant.

The *political* direction of the decision is no less curious. The Appellate Body notes that fairness concerns did not arise as the Philippines had recourse to Article XXIII as well as to the Subsidies Code dispute settlement procedure; it could also have recourse to Article 21 of the SCM Agreement. The Appellate Body had just finished talking about the integrated dispute settlement procedure of the WTO, so it cannot have been ignorant of the differences between the dispute settlement mechanisms of the WTO and the GATT. The only reason the Philippines invoked the WTO dispute settlement procedure and not that of the Subsidies Code was that the Subsidies Code dispute settlement procedure, although legally functional, had been moribund from inception.[104] Five out of five panel reports under the Subsidies Code had been blocked, an unenviable record for the Tokyo Round Codes.[105] To have refused to deal with the substantive complaint of the Philippines was effectively to deny the Philippines redress.

[104] Behboodi, as note 6, above.
[105] Hudec, as note 4, above.

The greatest weakness of the Appellate Body Report is its interpretation of Article 32.3. Let us examine briefly the steps that the Appellate Body took to arrive at its decision:

- Article 32.3 provides that the SCM Agreement is applicable only to investigations begun after the entry into force of the WTO Agreement;
- Article 10 provides that countervailing duties must be applied in accordance with Article VI of the GATT and the SCM Agreement;
- Article 32.1 provides that "[n]o specific action against a subsidy of another Member can be taken except in accordance with the provisions of the GATT 1994, as interpreted by this Agreement";
- countervailing duties are the conclusion of an integrated investigation system; and
- the WTO Agreement is an integrated system, providing a package of *rights* and obligations for the potential user of countervailing duties.

Therefore, "this Agreement" in Article 32.3 means "this Agreement *and* Article VI of the GATT 1994".

The conclusion does not follow the premise. For example, the fact that countervailing duties are the conclusion of an integrated process does not add to the analysis in any way. The duty could be discriminatorily applied and, therefore, fall outside the WTO Agreement, without in any way impugning the integrity of the investigation process. The duty itself may be higher than that permitted by the SCM Agreement, again without in any way bringing into question the investigative process. Article 32.1 is not helpful in determining the scope of application of Article VI, as it is a general prohibition on unilateral measures taken outside the WTO Agreement. That the drafters thought it necessary to use a conjunctive in Article 10 and mention Article VI could just as well be an indication that they did not expect Article VI to be read into Article 32.3, which specifically does not mean Article VI.

Finally, there is nothing in the "integrated" nature of the SCM Agreement that would automatically be a bar to the application of specific provisions of the GATT independent of the multilateral trade agreements. Indeed, unlike the Panel, the Appellate Body did not consider that the possibility of different interpretations of Article VI with or without the guidance of the SCM Agreement would lead to an "absurd or unreasonable" result.

In short, and to be generous to the Appellate Body, the final conclusion was not mandated by the legal provisions.

Faced with a question that was not likely to arise again before the WTO and a dispute in which the interests of the disputing parties did not require a careful political balance, the Appellate Body took the opportunity of developing the framework of the WTO further in the direction of a comprehensive system of laws. The persuasive force of *Coconuts* lies in the single statement that the "authors of the new WTO regime

intended to put an end to the fragmentation that had characterized the previous system". *Coconuts* elevated that intention into a key principle of interpretation.

3. *Restructuring the Negotiated Balance*

The previous sections have suggested that, on two levels, the Appellate Body has shown a keen understanding of the two principal objectives of the dispute settlement mechanism, and indeed the entire legal structure, of the WTO. Its early framework reports are broad expressions of interpretive principles, intended to set the dispute settlement mechanism on a sure and a predictable legal footing; its "confidence-building" reports address diverse political interests that require reassurance that the WTO will be more sensitive to them than the old GATT. Trade liberalization as an absolute good is rarely mentioned, and then often in reference to the rights of private parties or in full recognition of the underlying balance of rights and obligations of the parties.

It was inevitable that, given the right circumstances, the organs of the WTO would wake up to the *raison d'être* of the WTO itself, namely trade liberalization. None of the earlier cases had given much scope to the Appellate Body to be *activist* in this area, to do for governments what they cannot do themselves, given the enormous protectionist pressures they are usually under.[106] *Periodicals* presented just such an opportunity. Faced with a dispute that pitted two developed countries against one another, a seminal issue (the scope of application of the GATT to services), an industry in which protectionism is the norm rather than the exception, and legal rights and obligations that reflected protection rather than liberalized trade, the Appellate Body proceeded to remedy the situation by altering the negotiated balance to advance the broader objective of trade liberalization. The question that this article is concerned with is the extent to which that approach is likely, in the long term, to serve the objectives set out above.

(a) *The appeal*

At issue was the GATT-consistency of two Canadian measures concerning periodicals. The first imposed an 80 percent excise tax on the value of all advertising directed to the Canadian market in "split-run" magazines; magazines that are *printed* in Canada, but whose content is not original to Canada, that is more than 80 percent of the magazine has already appeared or will appear in a different market. The second impugned measure concerned the application by Canada Post of lower "commercial Canadian"—postal rates to domestically produced periodicals than to imported periodicals, including additional discount options available only to domestic periodicals. The Panel found that the excise tax was not consistent with Article III: 2 of the GATT, but that the maintenance of the Canada Post scheme was consistent with Article III: 8 of the GATT.

[106] See Matsushita, M., John H. Jackson and Jean-Victor Louis, *Implementing the Tokyo Round: National Constitutions and International Economic Rules* (Ann Arbor: University of Michigan Press, 1984).

(b) *The report*

The principal question in the appeal was the applicability of Article III: 2 to the measure in question. The impugned tax was a tax on the value of advertising directed at the Canadian market, calculated on a per issue basis, contained in each "split-run" issue. Advertising services had been expressly excluded by Canada from its Schedule of Specific Commitments under the General Agreement on Trade in Services (GATS). Nothing in Article III: 2 of the GATT expressly required compliance in respect of regulations concerning the sale of advertising, and certainly not in respect of products physically produced in the territory of the country imposing the tax.

The Appellate Body concludes that the GATT was applicable to the tax at issue. First, it notes that the "title" of the relevant provision of the Canadian Excise Tax Act reads "Tax on Split-run Periodicals", not "Tax on Advertising". Likewise, the Summary of the Act identified the tax as a tax "in respect of split-run editions of periodicals". Second, the Appellate Body observes:

> "a periodical is a good comprised of two components: editorial content and advertising content. Both components can be viewed as having services attributes, but they combine to form a physical product—the periodical itself" (at 17).

Third, the Appellate Body points out that the measure in question was a companion piece to an import prohibition on split-run magazines; and, as it had the same "objective and purpose", it should be "analyzed in the same manner".

The Appellate Body observes that an examination of the tax in question:

> "demonstrates that it is an excise tax which is applied on a good, a split-run edition of a periodical, on a 'per issue' basis. By its very structure and design, it is a tax on a periodical. It is the publisher, or in the absence of a publisher resident in Canada, the distributor, the printer or the wholesaler, who is liable to pay the tax, not the advertiser" (at 18).

Having made this finding, the Appellate Body goes on to find that it "cannot agree with Canada that this internal tax does not 'indirectly' affect imported products". The Appellate Body reiterates the "well-established" principle that no trade effects need be demonstrated to show inconsistency with Article III. Instead, the fundamental purpose of Article III is to ensure "equality of competitive conditions between imported and like domestic products". The Appellate Body then finds that any measure that:

> "*indirectly affects* the conditions of competition between imported and like domestic products would come within the provisions of Article III: 2, first sentence, or by implication, second sentence, given the broader application of the latter" (at 19) (emphasis added).

The key finding of the Appellate Body in this case is, however, with respect to the relationship between the GATT and the GATS. The Appellate Body simply repeats and reaffirms the finding of the Panel that obligations under the GATT and the GATS can co-exist and that one does not override the other. The Appellate Body does not further address the issue raised by Canada with respect to the *balance* of rights and obligations that must be maintained when applying the GATT to areas that might otherwise be

covered by the GATS. The Appellate Body concludes that "it is not necessary and, indeed, would not be appropriate in this appeal to consider Canada's rights and obligations under the GATS".

The Appellate Body then considers the issue of "like products" and Canada's argument that the Panel had erred in its analysis. After examining the analysis of the Panel, the Appellate Body concludes that there was inadequate factual analysis and a lack of proper legal reasoning and that the Panel "could not logically arrive at the conclusion that imported split-run periodicals and domestic non-split-run periodicals are like products. The Appellate Body nevertheless proceeds to examine the issue under Article III: 2, second sentence.

The Appellate Body observes that:

> "split-run periodicals compete with wholly domestically produced periodicals for advertising revenue, which demonstrates that they compete for the same readers. The only reason firms place advertisements is to reach readers. A firm would consider split-run periodicals to be an acceptable advertising alternative to non-split-run periodicals only if that firm had reason to believe that the split-run periodicals themselves would be an acceptable alternative to non-split-run periodicals in the eyes of consumers" (at 26).

Noting the frequently stated policy objectives of the Government of Canada to protect its magazine industry, the Appellate Body has little difficulty in finding that the measure in question is inconsistent with the second sentence of Article III: 2.

The Appellate Body then turns to the issue of whether the commercial discount rates offered by Canada Post were consistent with Article III: 8. The Panel had found that as Canada Post was a Crown corporation, its discriminatory treatment of Canadian and non-Canadian magazines was inconsistent with Article III: 4. However, it had noted that for the very same reason that it found an otherwise private corporation a government entity, the subsidies provided by the Government of Canada to Canada Post should be seen an internal transfer of funds; so the commercial discount rates were, in effect, direct subsidies consistent with Article III: 8 of the GATT.

The Appellate Body notes that the wording of Article III: 8 "helps to elucidate the types of subsidies covered by Article III: 8(b) of the GATT 1994". It then argues that its reading is supported by the context of Article III: 8(b), "examined in relation to Article III: 2 and III: 4 of the GATT 1994". Finally, the Appellate Body concludes that "the object and purpose of Article III: 8(b) is confirmed by the drafting history of Article III" and proceeds to refer to such negotiating history. The Appellate Body then finds that the Panel had incorrectly interpreted this provision and reverses its findings and conclusions in this respect.

(c) *Evaluation*

As with *Coconuts*, the most striking aspect of the Appellate Body Report relates to the question of the applicable rules of interpretation. The Appellate Body does not discuss the question until the last issue and then barely does so (the analysis indicates at

best a shallow understanding of such rules). Again, there is an inconsistent approach to the relevance of the negotiating history, this time used to identify the "object and purpose". The problems with such an off-hand approach have been identified above and do not require additional analysis.

Of course, the problem with the approach of the Appellate Body is not in form but in substance—one wonders whether the absence of any reference to the Vienna Convention stems from a concern that quoting Articles 31 and 32 might cast in bold relief the Appellate Body's marked departure from its own frequently-repeated guiding principles.

To understand the difficulty, it may be useful to examine, in outline form, the arguments of the Appellate Body, noting that the split-run magazines in question are *printed* in Canada from editorial content beamed electronically into Canada and advertising sold there. The argument runs that:

- advertising and editorial content combine to form a physical product; and
- a discriminatory tax applied to one of these elements is a measure that "indirectly affects" the conditions of competition of the imported and domestic like products;
- therefore, a tax on advertising services calculated on the basis of value of advertising in each issue of a periodical is governed by Article III: 2 of the GATT.

The conclusion would follow if Article III: 2 provided for examination of taxes that may "indirectly affect" such conditions of competition. That is not, however, the actual *text* of the Article, which reads:

> "The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products."

The Appellate Body thus widens the direct or indirect *application* of a tax to include direct or indirect *effect*. The problem in this instance lies not in the direction of the interpretation, but in the near total absence of analysis as to why that is to be the preferred approach. By ignoring its own rules of interpretation and not even quoting the applicable legal provision, the Appellate Body appears to be engaged in a clandestine enhancement of the scope of application of Article III.

The report's difficulties are compounded by the refusal of the Appellate Body to examine the relationship between the GATS and the GATT in the light of another of the Appellate Body's stated rules of interpretation: that of effectiveness. The clear right of the Members of the WTO to exclude certain areas from the application of the GATS is now open to question, if it has not already been effectively rendered meaningless by the wholesale application of Article III: 2 to any tax or measure *on a service* that could "indirectly affect" a good. If a tax on advertising in magazines is covered by Article III: 2, what about taxes or regulations on advertising on television, or on billboards? What about the regulation of trucking, shipping or airline services? All of these regulatory

measures, in one way or another, "indirectly affect" a good in international trade; and many of these services were pointedly excluded from the application of the GATS (exclusions that, much like the exclusion of advertising services from Canada's Schedule of Specific Commitment, were made in return for serious concessions given in other sectors).

Expanding the scope of application of Article III is not, therefore, a simple "goods" matter, to be done only in relation to the "object and purpose" of Article III itself. Instead, the question goes to the core of what the Appellate Body itself has identified as key elements of the new legal order that all legal provisions must be given their proper effect and that the WTO Agreement is not just about "obligations", but also provides for rights for the Members of the WTO.

It would appear that one of the most important factors in guiding the Appellate Body to its decision was the strongly protectionist statements of the Government of Canada in relation to its cultural industries. The desire of the Appellate Body to do away with protectionism everywhere, however admirable and however in accord with the object and purpose of the WTO Agreement as a whole, must nevertheless be balanced with the need of the new legal order, as identified above, for appropriate legal justification for conclusions that, however intuitively correct, must nevertheless be sustainable within a judicial mechanism. Such legal justification is necessary to identify the reasons for departure from past practice (whether in the application of a rule of interpretation or in the interpretation of a substantive provision), but also where, as here, a particular interpretation for one set of rights and obligations has the potential of restructuring the balance of rights achieved elsewhere, in relation to another set of legal provisions.

Periodicals was, in this context, less than successful in following through with the promise seen in the earlier reports of the Appellate Body.

IV. CONCLUSION

This article has set out to determine the extent to which the Appellate Body of the WTO has been successful in achieving its twin objectives of predictability and security. It has been noted here that these are but elements of a broader and much more fundamental concept—legitimacy—without which the very idea of a legal order would be incomprehensible. It was then suggested that legitimacy in a legal order is attained through a dialectic in which the interpreters of the legal text essentially engage in a process of persuasion to justify their legal decisions before the interpretive community that receives such decisions and that is responsible (or at least, some parts of which are responsible) for the implementation of such decisions.

This process of persuasion is what is called legal reasoning. To the extent, then, that the new legal order purports to have legitimacy as a legal order, and to the extent that it is departing from a fundamentally political forum based on negotiations and compromise, rather than adjudication and enforcement of rights, the interpreters or

judges of the system must speak in a legal language. This not only ensures a measure of predictability, but also gives confidence to the participants in the process that the legal order they have created functions and serves their interests well.

In discussing the reports of the Appellate Body, three of the early reports were identified as seminal in building confidence for the system. The Appellate Body did so by adapting its approach better to reflect the new membership of the interpretive community that differed so significantly from the audience before whom early GATT panels had to justify their decisions. The slight retrenchment in *Wool Shirts* further underlined the dialectical nature of the process, as the Appellate Body responded to the arguments raised by India with remarkable sensitivity to the balance that had to be struck between rights and obligations to further aid the legitimacy of the WTO for *all* Members.

The other cases, which the author identified as "framework cases", presented a more varied mix. *Japanese Liquor Tax* was the most comprehensively argued of the three and presented the least difficulties, both logically and substantively. *Coconuts*, as has been argued here, presented a great many analytical challenges, but in the end, served an important function to advance the interpretive cohesion of the WTO Agreement.

Periodicals presents difficulties of its own. Without doubt, it is a key framework report, in setting out the relationship of the GATT to the GATS and, perhaps more importantly, expanding the scope of application of Article III: 2 to cover all tax measures that indirectly *affect* the trade in goods. Given the importance of the message it carried, the report should have been more ably and more comprehensively argued—or *justified*. Just as the casual analysis of *Cotton Underwear* led to the Indian appeal in *Wool Shirts*, we can expect *Periodicals* to lead to further challenges that, given the subject-matter and the potential scope of Article III: 2, are likely to prove more intractable than the problems related to the ATC and discussed in the earlier cases.

To some extent, that has already happened. The latest report of the Appellate Body, in the *EU Bananas* case, has just been issued. The report is so comprehensive that it is not possible in this article to examine it in any detail. What is immediately striking about that report is its level of detail, which is prodigious, and its structure, which now more closely follows that of panel reports. It is also interesting to note that although for the most part it upheld the findings and conclusions of the Panel, the Appellate Body did not hesitate to overturn some findings despite the Panel's obvious and strong attempt at "appeal-proofing" its report in over 130 pages of legal analysis. One of the major issues discussed in the case was the relationship between the GATT and the GATS. Despite the verbal inflation noted above, the Appellate Body still does not do the subject justice.

It is, of course, still too early to prognosticate about the future of the WTO and the Appellate Body. Its first steps were promising because they recognized the function that a legal order serves, and the function that a judicial body within that legal order must serve to maintain the legitimacy of that order. The legal order of the WTO will not be well served if, at this stage of its life, the Appellate Body were to abandon the search for legitimacy in favour of a doctrinal search for liberalized trade.

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