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THE APPELLATE BODY OF THE WTO AND PRINCIPLES OF TREATY INTERPRETATION IN CUSTOMARY INTERNATIONAL LAW

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INTRODUCTION

Since its very first Report[1] the Appellate Body of the WTO has consistently held that Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*[2] set out the principles of treaty interpretation in customary international law.[3] Through routine re-enforcement in subsequent panel and Appellate Body reports, as well as submissions by disputing parties, this has effectively become established law in the context of the WTO.[4] Although the Appellate Body does not hold that the *Vienna Convention* is a complete codification of such principles, it is nevertheless to be considered as the *primary* source for principles of treaty interpretation.

This paper first outlines certain key rules – approaches, to be more accurate – governing the interpretation of treaties. This section comprises two subsections, the first dealing with approaches in customary international law and the second discussing the rules set out in the *Vienna Convention*. In the following section, the paper examines the way in which the Appellate Body has approached the principles of treaty interpretation in customary international law, in particular, the Appellate Body's apparent reliance on the *Vienna Convention*. It argues that the use by a judicial or a quasi-judicial organ of rules of interpretation have a significant impact on the perceived legitimacy of that organ among those entities subject to its jurisdiction. For this reason, in the international arena, where there are no *supra*national bodies to enforce multilaterally agreed rules and compliance with the law is a function of that

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[1] *United States - Standards for Reformulated and Conventional Gasoline* (*Reformulated Gasoline*), W/DSC/AB/R, Report of the Appellate Body adopted on May 20, 1997, at 18.

[2] 1155 UNTS 331 (1969).

[3] *Japan - Taxes on Alcoholic Beverages* (*Japan - Liquor Tax*), WT/[DS8/DS10/DS11]/AB/R, Report of the Appellate Body adopted on November 11, 1997 at 10; most recently reaffirmed in *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products* (*India - Pharmaceuticals II*), WT/DS50/AB/R, Report of the Appellate Body distributed on December 19, 1997, at paras. 33-48.

[4] Strictly speaking, reports adopted by the Dispute Settlement Body are applicable only to the case at hand, do not amount to "state practice" and are not binding on future panels. As such, they do not constitute "case law" in the sense in which this term is understood. However, "predictability" is a signal objective of the Dispute Settlement mechanism; and stability is a *sine qua non* of not only any legal system but also a system devoted to economic expansion and establishment. In this sense, though *stare decisis* is not a formal principle of the Appellate Body, from an operational perspective adopted reports may be considered "case law" and the analysis contained therein more or less binding on future panels and Appellate Body determinations.

perceived legitimacy, rules of interpretation have an added value and, indeed, importance. In the initial judgment of the Rapporteur, on a number of occasions the Appellate Body has not followed the principles it has said it would follow. Such an approach, according to the Rapporteur, was cause for concern.

The conclusion reflects the discussions at the workshop for which this paper was prepared, held at the University of Leuven on 1 December 2000. A number of commentators disagreed with the assessment of the Rapporteur concerning the scope of interpretative discretion of judges in international law. Others considered many of the "errors" identified by the Rapporteur as at worst harmless.

The Rapporteur concludes that indeterminacy of obligations resulting from inconsistency of interpretation (whether as a result of misapplication, or inconsistent application, of secondary rules of interpretation) brings into question the integrity of the dispute settlement mechanism. What is at issue is the continued *confidence* of members that the dispute settlement mechanism correctly determines and applies only those rules – obligations – *that member* has undertaken and no other. Accordingly, even if were the case that international judges have a broader discretion than domestic ones in interpreting and applying the law, they should exercise that discretion prudently. As well, given the nature of international law, and especially the international law of trade, even "harmless" errors could have considerable systemic consequences. The Appellate Body must carefully apply the principles of interpretation in customary international law (including the *Vienna Convention*) and justify its determinations through reasoned use of such rules not simply because Article 3.2 of the DSU requires it, but because of sound policy – legitimacy of the dispute settlement mechanism of the WTO and indeed the international law of trade.

I. PRINCIPLES OF TREATY INTERPRETATION IN CUSTOMARY INTERNATIONAL LAW

A. Customary International Law

It is not possible in this space either to set out all applicable principles/rules of treaty interpretation or, indeed, to determine which of these rules, if any, has attained the status of customary international law.[5] The task would require, in any event, an investigation into the nature of customary international law that would be beyond the scope of any but the most ambitious treatise. Rather, the objective in this section is to identify those rules that have become "an obvious truth which no one would think of disputing,"[6] with the purpose of determining the extent to which the *Vienna Convention* captures these principles. The next section then examines whether the Appellate Body has faithfully applied these principles by its recurrent references to the *Vienna Convention*.

McNair, in his seminal treatise on the law of treaties – one of the most authoritative pre-*Vienna Convention* statements on the subject – notes that many arbitrators and judges have attempted to apply principles derived from the private law of contracts to the interpretation of intentional agreements.[7] Others have used rules or commentaries on statutory interpretation for guidance in interpreting treaties.[8] McNair considers that this approach has obscured the main task of an interpreter of international agreements. This is simply to give 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*."[9] Therefore, the first task of an interpreter of a treaty is to elucidate "the meaning of the text of the treaty which must be taken as the authentic expression of the parties' intention."[10] Indeed, the International Court of Justice has held that "the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur."[11]

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5 See in particular the debate in the International Law Commission on the adoption of the *Vienna Convention*, as discussed and analysed in Skouteris, Thomas, "Interpretation in the WTO Dispute Settlement System", in Paolo Mengozzi, ed., International Trade Law on the 50th Anniversary of the Multilateral Trade System, (Milan: Giuffrè Editore, 1999), 113 at 118.

6. Roberto Ago, YbILC, 687th meeting at 90, referring to the *lex posterior* rule.

7. Arnold Lord McNair, The Law of Treaties, (Oxford: Clarendon Press, 1961) at 365.

8 See Jenks, Wilfrid, "The Conflict of Law-Making Treaties" (1953), XXX British Y.B.I.L. 401 at 427, quoting Maxwell on principles relating to the reconciliation of conflicting statutes.

9 Emphasis in original; *ibid.*

10 Elias, T.O., The Modern Law of Treaties, (Dobbs Ferry: Oceana Publications, Inc., 1974) at 73.

11 Advisory Opinion in *Competence of the General Assembly for the Admission of a State to the United Nations*, [1950] I.C.J. Reports at 8, quoted in Elias, *ibid.* at 72. See also Henkin, L., R.C. Pugh, O. Schachter, and Hans Smit, International Law Third Edition, (St. Paul: West Publishing Co., 1993) at 478. McNair quotes a long list of PCIJ cases in which the court found the agreement clear and did not resort to the preparatory work; see McNair at 414.

In the course of determining the meaning of a treaty text, tribunals and courts have had recourse to a number of interpretative rules and maxims, such as the principle of *effectiveness*,[12] or the *lex posterior* or *lex specialis* rules, among others. However, these "rules", though treated by many interpreters as if they were prescribed by customary international law, are in fact derived from common sense, and in most cases are balanced by equally authoritative "rules" that go in the opposite direction. *Effectiveness*, for example, is simply a rule of good faith: where a treaty is open to more than one interpretation, only one of which enables the treaty to have appropriate effects, the interpretation that gives the treaty its full effect should be adopted.[13] The *lex posterior* "rule" is subject to so many qualifications as to render it almost infinitely malleable and therefore of scant utility in resolving all but the most egregious conflicts.[14] The *lex specialis* "rule", for its part, has been dismissed as a rule of interpretation, when not compromised by disputes as to what constitutes the "real" subject matter of a treaty, or whether a treaty is special or "universal"[15] — and so on. For these reasons, McNair dismisses recourse to such maxims as definitive rules of interpretation, and encourages the interpreter to simply concentrate on determining what the drafters intended to achieve by entering into the treaty, based on what formulation of words they used in drafting their agreement.[16]

B. The *Vienna Convention on the Law of Treaties*

The *Vienna Convention* attempts to reconcile three different, and at times divergent, approaches to treaty interpretation: the "intentions" (which would require a liberal recourse to the *travaux préparatoires*), the textual, and the teleological approaches. It does so by effectively mixing the latter two in Article 31,[17] and

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12 The principle of effectiveness is a long-standing rule of treaty interpretation and requires that treaties should be interpreted so as to have the fullest effect consistent with their wording and with the other parts of the text. Henkin, *et al.*, *ibid.*, at 480; Lauterpacht, Sir Hersch, "Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties" (1949), 26 B.Y.B.I.L. 48, at 73; Fitzmaurice, G.G., "The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points" (1951), 28 B.Y.B.I.L. 1 at 8.

13 Sinclair, Sir Ian, The Vienna Convention of the Law of Treaties, Second Edition, (Manchester: Manchester University Press, 1984) at 118.

14 Cite

15 Haraszti dismisses the existence of a hierarchy as such among treaties (*lex specialis* versus *lex generalis*, for example) as being "void of any foundations in international practice ... as in all of them the will of subjects of international law finds an expression." at 297.

16 "The many maxims and phrases which have crystallized out and abound in the textbooks and elsewhere are merely *prima facie* guides to the intention of the parties in a particular case." McNair at 366. See also Sir Humphrey Waldock, Rapporteur for the International Law Commission on the adoption of the articles on interpretation in the *Vienna Convention*:

> "in a sense, all rules of interpretation have the character of guidelines since their application in a particular sense depends so much on the appreciation of the context and the circumstances of the point to be interpreted."

YbILC 94 (1966-II).

17 Article 31 of the *Vienna Convention* provides that:

relegating the first (in Article 32) to the status of a supplementary means of interpretation, either as support or to elucidate and otherwise illogical textual interpretation.[18]

Broadly speaking, Article 31 sets out four elements to consider in the interpretation of a treaty: good faith, "ordinary meaning", context, and object and purpose.

- *Good faith* is infinitely flexible. As noted above, it could be considered as one formulation of the rule of *effectiveness*. It could also be seen as an implicit acknowledgement of the principle of *balance*.[19]

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended.

[18] Article 32 provides that:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable.

[19] That a tribunal charged with the task of interpreting a treaty must maintain the delicate and carefully achieved balance of economic rights and obligations between the parties in view of the historical context and negotiating history of that treaty. See in particular the Decision of the Arbitral Tribunal Established by Agreement of October 23, 1985 between Canada and France: *Dispute Concerning Filleting within the Gulf of St. Lawrence* (the *La Bretagne*

- The *ordinary meaning* of a treaty provision can be arrived at by "taking into account all the consequences which normally and reasonably flow from that text."[20]

- The *context* of a provision includes the circumstances of the negotiation and implementation of the treaty, the whole of a treaty itself[21] as well as the context in which the subject matter of the treaty has been treated in similar agreements.

- The *object and purpose* of a treaty should be determined "from its operative clauses taken as a whole,"[22] including the preamble.[23]

Recourse to the *travaux* is equally nuanced. The Permanent Court of International Justice and the International Court of Justice have not excluded resort to documents "such as memoranda, minutes of conferences, and drafts of the treaty under negotiation" for the purpose of interpreting the treaty,[24] or finding support for their own interpretation of the treaty.[25] Nevertheless, in doing so international courts have exercised a measure of caution. This is so because the *text* of an agreement enshrines what the parties agreed upon. And it is that text that is being interpreted and applied, not what the parties wanted; not what they thought they got; not what they thought the other side wanted. In this respect, the admonition of a recent domestic appellate court is particularly apt:

"… That is not to say that each word in an agreement must be placed under the interpretative microscope in isolation and given a meaning without regard to

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decision), at 22. The Tribunal noted the divergent positions of the parties throughout the negotiations and held:

> "Out of the clash of these contradictory purposes came the Agreement of march 27, 1972, which resulted in an arrangement based on a delicate fragile balance between the rights and duties of the parties In a treaty of this type, there appear to be no warrant for treating the rights of one of the parties as a statement of principle and the rights of the other as a statement of an exception which, as such, would justify a restrictive interpretation. The smooth working of the system established by the Parties through the 1972 Agreement makes it necessary to place on an equal footing the advantages each of them obtained thereby and to interpret the rights of each according to the principle of useful effect."

20 Sinclair, *op. cit.*, at 121.

21 "One cannot simply concentrate on a paragraph, an article, a section, a chapter or a part." Sinclair, *ibid.*, at 127.

22 Sinclair, *ibid.*, at 128.

23 This is a highly simplified, and perhaps simplistic, approach to the *Vienna Convention*. The object of this exercise is not to explore in detail these principles, but to identify the different, and perhaps contradictory, elements involved in treaty interpretation pursuant to the *Vienna Convention*.

24. McNair, *op. cit.*, at 413.

25. *Ibid.* at 415.

> the entire document and the nature of the relationship created by the agreement. Context can elucidate and assist in revealing the plain meaning of the words used in a contract. One part of an agreement may enlighten as to the meaning to be given to words used in another part of the agreement. Similarly, the relationship created by the agreement and its overall purpose as indicated in the agreement may assist in giving meaning to particular words or phrases within the agreement. Context in this sense does not, however, refer to extrinsic evidence of the conduct of the parties ….”[26]

In any event, while the *Vienna Convention* permits recourse to such materials, it provides no guidance as to the value or weight to be placed upon them.

[26] *Glimmer Resources Inc. v. Exall Resources Ltd.* (1999), 119 OAC 78 (Ont. C. A.), at 83-5.

II. THE APPELLATE BODY AND PRINCIPLES OF TREATY INTERPRETATION

To assess fully the application by the Appellate Body of the principles of treaty interpretation to the provisions under review would require a comprehensive analysis not only of each Report, but also of the legal provisions in question. A review must perforce be nothing more than a sketch, setting out elements of some of the most important interpretative findings and determinations of the Appellate Body, in the hope of providing a sound basis from which to launch the discussions.

Reformulated Gasoline

Article 3(2) of the DSU enjoins panels and the Appellate Body to interpret the WTO Agreement in accordance with the customary rules of interpretation of public international law. In this case the Appellate Body introduced the notion that Article 31 of the *Vienna Convention* encapsulated in part the customary rules of interpretation. It nevertheless left the door open to introduce other rules it might consider as having "attained" the status of a customary norm.[27] Its application of the *Vienna Convention* was, however, inconsistent. For example, the Appellate Body relied on the principle of *effectiveness*[28] and implied that the root of the principle was to be found in Article 31, but never expressly tied the principle to that Article.[29] It castigated the panel for having failed to pay attention to the specific terminology of Article XX ("necessary" as opposed to "relating to"). It nevertheless proceeded to hold that different terms used in the chapeau were interrelated and had to be interpreted one in the light of the other, in the process importing the "necessity" test into the chapeau.[30]

Coconuts[31]

The Appellate Body continued the now routine invocation of Articles 31 and 32 of the *Vienna Convention*. The Appellate Body interpreted "this Agreement" in Article 32.3 of the *Agreement on Subsidies and Countervailing Duty Measures* (the

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27 In *Cotton Underwear*, the Appellate Body seemed to have come to the conclusion that the *Vienna Convention* "embodied" these rules – thus closing the door on other principles. *US – Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24, Reports of the Panel and the Appellate Body adopted on 25 February 1997, at --. In *Hormones*, the Appellate Body opened the door again to a wider universe of rules. *EC – Measures Concerning Meat and Meat Products*, WT/DS26 and 48, Reports of the Panel and the Appellate Body adopted on 13 February 1998, at --. In *India Pharmaceuticals*, the Appellate Body appears to have closed the door again. *India – Patent Protection for Pharmaceuticals and Agricultural Chemical Products*, WT/DS50, Reports of the Panel and the Appellate Body adopted on 16 January 1998, at --.

28 *Reformulated Gasoline*, Report of the Appellate Body, *op. cit.*, at 23.

29 Skouteris, at 130.

30 See also Behboodi, Rambod, "Legal Reasoning and the International Law of Trade" (1998), 32:4 JWT 55 at 75.

31 *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22, Reports of the Panel and the Appellate Body adopted on 20 March 1997.

SCM Agreement, as referring to "this Agreement *and Article VI of the GATT 1994.*"[32] Here, the Appellate Body not only turned to the "object and purpose" but mentioned repeatedly the "intention" of the drafters:

> "… 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 [other than the text before Appellate Body] are of any relevance; no evidence is adduced to support this inference of intention."[33]

Hormones

The Appellate Body tackled the issue of burden of proof in the context of interpreting Article 3.2 of the *Agreement on Sanitary and Phytosanitary Measures* (SPS Agreement). That is, whether the party imposing a measure not in conformity with an international standard has the burden of establishing compliance with the requirements of the SPS Agreement. It held that:

> "The converse or *a contrario* presumption created by the Panel does not arise. The presumption of consistency with relevant provisions of the *SPS Agreement* that arises under Article 3.2 in respect of measures that conform to international standards may well be an *incentive* for Members so to conform their SPS measures with such standards. It is clear, however, that a decision of a Member not to conform a particular measure with an international standard does not authorize imposition of a special or generalized burden of proof upon that Member, which may, more often than not, amount to a *penalty*."[34]

In the same report, the Appellate Body discussed the issue of a panel's "fact-finding tasks" under Article 11 of the DSU. Article 11 provides that, "a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements." Without at any point examining the operative verb in that phrase ("should"), the Appellate Body determines that, "[s]o far as fact-finding by panels is concerned, their activities are always constrained by the mandate of Article 11 of the DSU."[35] [emphasis added] And that, "it is appropriate to stress that here again Article 11 of the DSU is directly on point, requiring a panel to 'make an objective assessment of the matter before it, …'."[36] It arrives at the conclusion that, "[w]hether or not a panel has made an objective assessment of the facts before it, as required by Article 11 of the DSU, is also a legal question which, if properly raised on appeal, would fall within the

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32 Report of the Appellate Body, *ibid*., at 17, section IV.E.2.

33 Behboodi, at 92.

34 *Hormones*, Report of the Appellate Body, *op. cit.*, at para. 102.

35 *Ibid*., at para. 117.

36 *Ibid*., at para. 118.

scope of appellate review."[37] The Appellate Body then went into considerable detail analysing its own scope of review of a panel's factual determinations, stating:

> "The deliberate disregard of, or refusal to consider, the evidence submitted to a panel is incompatible with a panel's duty to make an objective assessment of the facts. The wilful distortion or misrepresentation of the evidence put before a panel is similarly inconsistent with an objective assessment of the facts. 'Disregard' and 'distortion' and 'misrepresentation' of the evidence, in their ordinary signification in judicial and quasi-judicial processes, imply not simply an error of judgment in the appreciation of evidence but rather an egregious error that calls into question the good faith of a panel."[38] [emphasis added]

There is no mention of any rule of interpretation that would draw out of the "should" in Article 11, a legal duty on the part of the panel; or out of any part of Article 11, the criteria established and highlighted by the Appellate Body.[39]

LAN [40]

The Appellate Body rediscovered the merits of textual analysis. It noted, in *LAN*, that:

> "Furthermore, we do not agree with the Panel that interpreting the meaning of a concession in a Member's Schedule in the light of the 'legitimate expectations' of exporting Members is consistent with the principle of good faith interpretation under Article 31 of the *Vienna Convention*. Recently, in *India - Patents*, the panel stated that good faith interpretation under Article 31 required 'the protection of legitimate expectations'. We found that the panel had misapplied Article 31 of the *Vienna Convention* and stated that:

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37 *Ibid*., at para. 132.

38 *Ibid*., at para. 133.

39 In *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities* (*Wheat Gluten*), Report of the Appellate Body distributed on 22 December 2000, the Appellate Body apparently abandoned its entire line of reasoning on "misrepresentation", "deliberate disregard", *et al.*, noting only:

> " … we must be satisfied that the panel has exceeded the bounds of its discretion, as the trier of facts, in its appreciation of the evidence. As is clear from previous appeals, we will not interfere lightly with the panel's exercise of its discretion." (at para. 151; footnote omitted)

The Appellate Body then notes, at para. 161, that:

> "We do not see how the Panel could conclude that the USITC Report *did* provide an adequate explanation of the allocation methodologies, when it is clear that the Panel itself saw such deficiencies in that Report that it placed extensive reliance on 'clarifications' that were not contained in the USITC Report."

The Appellate Body then proceeded to reverse the panel's finding of fact. (at para. 163)

40 *EC – Customs Classification of Certain Computer Equipment*, WT/DS62, 67 and 68, Reports of the Panel and the Appellate Body adopted on 22 June 1998.

> The duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the *Vienna Convention*. But these principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended.

> The purpose of treaty interpretation under Article 31 of the *Vienna Convention* is to ascertain the *common* intentions of the parties. These *common* intentions cannot be ascertained on the basis of the subjective and unilaterally determined 'expectations' of *one* of the parties to a treaty. Tariff concessions provided for in a Member's Schedule -- the interpretation of which is at issue here -- are reciprocal and result from a mutually-advantageous negotiation between importing and exporting Members. A Schedule is made an integral part of the GATT 1994 by Article II:7 of the GATT 1994. Therefore, the concessions provided for in that Schedule are part of the terms of the treaty. As such, the only rules which may be applied in interpreting the meaning of a concession are the general rules of treaty interpretation set out in the *Vienna Convention*."[41] [footnotes omitted]

It then went on to hold that:

> "As already discussed above, the Panel referred to the *context* of Schedule LXXX as well as to the *object and purpose* of the *WTO Agreement* and the GATT 1994, of which Schedule LXXX is an integral part. However, it did so to support its proposition that the terms of a Schedule may be interpreted in the light of the 'legitimate expectations' of an exporting Member. The Panel failed to examine the context of Schedule LXXX and the object and purpose of the *WTO Agreement* and the GATT 1994 in accordance with the rules of treaty interpretation set out in the *Vienna Convention*."[42] [footnotes omitted; italics in original]

The Appellate Body did not explain why a good faith interpretation would not protect the "legitimate expectations" of parties to a bargain, or how this phrase was different in essence from the concepts of "balance" and "effectiveness" already accepted by the Appellate Body as forming part of good faith interpretation.

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41 Report of the Appellate Body, *ibid*., at paras. 83 and 84.

42 *Ibid*., at para. 88.

Shrimp/Turtle[43]

Two key interpretative questions were at issue. The first was the finding of the panel that under Article 13 it had the authority to "seek" but not to "receive" information from non-parties to a dispute. The second was the interpretation of Article XX itself.

As to the first, the Appellate Body observed that:

> "The thrust of Articles 12 and 13, taken together, is that the DSU accords to a panel established by the DSB, and engaged in a dispute settlement proceeding, ample and extensive authority to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts. That authority, and the breadth thereof, is indispensably necessary to enable a panel to discharge its duty imposed by Article 11 of the DSU to 'make an objective assessment of the matter before it, including an *objective assessment of the facts of the case* and the *applicability of and conformity with the relevant covered agreements* … .'
>
> Against this context of broad authority vested in panels by the DSU, and given the object and purpose of the Panel's mandate as revealed in Article 11, we do not believe that the word 'seek' must necessarily be read, as apparently the Panel read it, in too literal a manner. That the Panel's reading of the word 'seek' is unnecessarily formal and technical in nature becomes clear should an 'individual or body' first ask a panel for permission to file a statement or a brief. In such an event, a panel may decline to grant the leave requested. … In this kind of situation, for all practical and pertinent purposes, the distinction between 'requested' and 'non-requested' information vanishes.
>
> In the present context, authority to *seek* information is not properly equated with a *prohibition* on accepting information which has been submitted without having been requested by a panel. A panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, *whether requested by a panel or not*."[44] [Italics in original; underlines added]

The Appellate Body did not rely on any principle of treaty interpretation in arriving at this conclusion. Indeed, there was no explanation why the panel's "formal and technical" interpretation of the word "seek" was either unnecessary or incorrect. The interpretation of Articles 11-13, in this context, did not appear to be based on any known cannon.

With respect to the second point – interpretation of Article XX – the Appellate Body overturned the panel on a number of points. First, the Appellate Body faulted the panel for not having followed the principles of treaty interpretation in accordance

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43 *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58, Reports of the Panel and the Appellate Body adopted on 6 November 1998.

44 Report of the Appellate Body, *ibid*., at --.

with Article 3.2 of the DSU.[45] Having chastised the panel for its technical and formalistic approach to the text of Article 13, the Appellate Body admonished the panel that, "[a] treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted."[46] Turning to the interpretation and application of Article XX(g), the Appellate Body stated:

> "The complainants' principal argument is rooted in the notion that 'living' natural resources are 'renewable' and therefore cannot be 'exhaustible' natural resources. We do not believe that 'exhaustible' natural resources and 'renewable' natural resources are mutually exclusive. One lesson that modern biological sciences teach us is that living species, though in principle, capable of reproduction and, in that sense, 'renewable', are in certain circumstances indeed susceptible of depletion, exhaustion and extinction, frequently because of human activities."[47]

And added:

> "The words of Article XX(g), 'exhaustible natural resources', were actually crafted more than 50 years ago. They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment."[48]

The Appellate Body affirmed that "[f]rom the perspective embodied in the preamble of the *WTO Agreement*, we note that the generic term 'natural resources' in Article XX(g) is not 'static' in its content or reference but is rather 'by definition, evolutionary'."[49] In arriving at a dynamic interpretation, the Appellate Body relied on a number of extraneous international agreements and concluded that "it is too late in the day to suppose that Article XX(g) of the GATT 1994 may be read as referring only to the conservation of exhaustible mineral or other non-living natural resources."[50]

Turning to the chapeau, the Appellate Body relied on not only preambular statements concerning the relationship between trade and the environment, but also the decision of the Members to establish a Committee on Trade and the Environment. It also referred to a number of international instruments on the subject of sustainable development, all of which formed the context that "gives colour, texture and shading to the rights and obligations of Members under the *WTO Agreement*, generally, and

45 *Ibid*., at para. 114.

46 *Ibid*.

47 *Ibid*., at para. 127.

48 *Ibid*., at para. 129.

49 *Ibid*., at para. 130.

50 *Ibid*., at para. 131.

under the GATT 1994, in particular."[51] It also noted that Article XX was an exception to the obligations in the GATT. In this context, the chapeau was

> "one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right "impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably." An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting. Having said this, our task here is to interpret the language of the chapeau, seeking additional interpretative guidance, as appropriate, from the general principles of international law."[52] [footnotes omitted]

The Appellate Body concluded that:

> "The task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g., Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement. The location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ."[53]

Australia Salmon[54]

In dismissing Australia's challenge of the panel's assessment of the facts under Article 11 of the DSU, the Appellate Body referred to its previous determinations in *Hormones* and *EU- Poultry*, and stated:

> "In our view, the Panel did not 'deliberately disregard', 'refuse to consider', 'wilfully distort' or 'misrepresent' the evidence in this case; nor has Australia demonstrated in any way that the Panel committed an 'egregious error that calls into question the good faith' of the Panel. We, therefore, conclude that the Panel did not abuse its discretion in a manner which even comes close to

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51 *Ibid*., at para. 155.

52 *Ibid*., at para. 158.

53 *Ibid*., at para. --

54 *Australia – Measures Affecting Importation of Salmon*, WT/DS18, Reports of the Panel and the Appellate Body adopted on 6 November 1998.

> attaining the level of gravity required for a claim under Article 11 of the DSU to prevail.[55]

The Appellate Body did not point to any treaty language with respect to its analysis of Article 11.

Canada - Aircraft[56]

Approaching the issue of the duty of a WTO Member to respond fully and promptly to a request of a panel for information, the Appellate Body carefully and exhaustively examined its own decisions on the matter. It noted that:

> "In *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, we ruled that Article 13 of the DSU made 'a grant of *discretionary authority*' to panels enabling them to seek information from any relevant source. (emphasis added) In *European Communities – Hormones*, we observed that Article 13 of the DSU 'enable[s] panels to seek information and advice *as they deem appropriate in a particular case*.' (emphasis added) And, in *United States - Shrimp*, we underscored '*the comprehensive nature*' of the authority of a panel to seek information and technical advice from 'any individual or body' it may consider appropriate, or from 'any relevant source.'"[57] [footnotes omitted]

The Appellate Body then observed:

> "It is clear from the language of Article 13 that the discretionary authority of a panel may be exercised to request and obtain information, not just 'from any individual or body' within the jurisdiction of a Member of the WTO, but also from *any Member*, including *a fortiori* a Member who is a party to a dispute before a panel. This is made crystal clear by the third sentence of Article 13.1, which states: '*A Member* should respond promptly and fully to *any request by a panel for such information as the panel considers necessary and appropriate*.' (emphasis added) It is equally important to stress that this discretionary authority to seek and obtain information is *not* made conditional by this, or any other provision, of the DSU upon the other party to the dispute having previously established, on a *prima facie* basis, such other party's claim or defence. Indeed, Article 13.1 imposes *no conditions* on the exercise of this discretionary authority."[58] [emphasis by the Appellate Body]

Turning to the duties of WTO Members under the DSU, the Appellate Body noted:

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55 Report of the Appellate Body, *ibid*., at para. 266.

56 *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70, Reports of the Panel and the Appellate Body adopted on 20 August 1999.

57 Report of the Appellate Body, *ibid*., at para. 184.

58 *Ibid*., at para. 185.

> "… Article 13.1 of the DSU provides that 'A Member *should* respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate.' (emphasis added) Although the word 'should' is often used colloquially to imply an exhortation, or to state a preference, it is not always used in those ways. It can also be used 'to express a duty [or] obligation'. The word 'should' has, for instance, previously been interpreted by us as expressing a 'duty' of panels in the context of Article 11 of the DSU. Similarly, we are of the view that the word 'should' in the third sentence of Article 13.1 is, in the context of the whole of Article 13, used in a normative, rather than a merely exhortative, sense. Members are, in other words, under a duty and an obligation to 'respond promptly and fully' to requests made by panels for information under Article 13.1 of the DSU."[59] [footnotes omitted]

The Appellate Body then observed that if WTO Members could withhold information from a panel, the panels' "undoubted right to seek" information would be rendered "meaningless".[60] A "Member could … prevent a panel from carrying out its task of finding the facts constituting the dispute before it."[61] The consequences of accepting "should" as "should" did not end there. The Appellate Body warned that:

> "To hold that a Member party to a dispute is not legally bound to comply with a panel's request for information relating to that dispute, is, in effect, to declare that Member legally free to preclude a panel from carrying out its mandate and responsibility under the DSU. So to rule would be to reduce to an illusion and a vanity the fundamental right of Members to have disputes arising between them resolved through the system and proceedings for which they bargained in concluding the DSU. We are bound to reject an interpretation that promises such consequences."[62]

Turning to the question of when a panel may draw adverse inferences in the light of a member's refusal to provide information, the Appellate Body pointed out that Annex V of the SCM Agreement set out in "impressive detail" circumstances under which, in respect of *actionable subsidies*.[63] The Appellate Body concluded:

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59 *Ibid*., at para. 187.

60 *Ibid*., at para. 188.

61 *Ibid*.

62 *Ibid*., at para. 189. See also *Wheat Gluten*. At para. 171, the Appellate Body notes:

> "Next, we recall that we stated, in our original report in *Canada – Aircraft*, that Members of the WTO 'are … under a *duty* and an *obligation* to "respond promptly and fully" to requests made by panels for information under Article 13.1 of the DSU."

The Appellate Body then proceeded to state, "[w]e, therefore, deplore the conduct of the United States." It is not clear under which Article of the DSU the Appellate Body has the mandate to pass a moral judgement on the conduct of the members of the WTO.

63 *Ibid*., at para. 201.

> "There is no logical reason why the Members of the WTO would, in conceiving and concluding the *SCM Agreement*, have granted panels the authority to draw inferences in cases involving actionable subsidies that *may* be illegal *if* they have certain trade effects, but not in cases that involve prohibited export subsidies for which the adverse effects are presumed. To the contrary, the appropriate inference is that the authority to draw adverse inferences from a Member's refusal to provide information belongs *a fortiori* also to panels examining claims of prohibited export subsidies. Indeed, that authority seems to us an ordinary aspect of the task of all panels to determine the relevant facts of any dispute involving any covered agreement: a view supported by the general practice and usage of international tribunals."[64]

Argentina Footwear[65]

The issue was the relationship between Article XIX of the GATT 1994 and the *Agreement on Safeguards Measures*. The Appellate Body noted that:

> "… a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously. And, an appropriate reading of this 'inseparable package of rights and disciplines' must, accordingly, be one that gives meaning to *all* the relevant provisions of these two equally binding agreements."[66]

The Appellate Body does not refer to principle of interpretation in customary international law for its "harmonious" interpretation approach. It simply states that "[W]e have recently confirmed this principle in" previous reports.[67] In arriving at its conclusion, the Appellate Body points out that:

> "We see nothing in the language of either Article 1 or Article 11.1(a) of the *Agreement on Safeguards* that suggests an intention by the Uruguay Round negotiators to *subsume* the requirements of Article XIX of the GATT 1994 within the *Agreement on Safeguards* and thus to render those requirements no longer applicable."[68]

While of course the principal reference is to the language of the treaty, there is also mention of the "intention [of] the … negotiators." There is no further attempt by the Appellate Body to confirm this "intention" by recourse to the *travaux préparatoires*.

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64 *Ibid*., at para. 202.

65 *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121, Reports of the Panel and the Appellate Body adopted on 12 January 2000.

66 *Ibid*., at para. 81.

67 *Ibid*., At footnote 72.

68 *Ibid*., at para. 83.

British Steel

The Appellate Body reaffirmed its findings in *Shrimp/Turtle* with respect to the submission of *amicus curiae* briefs. Noting that nothing in the DSU *prohibited* it from receiving and considering such submissions, and pointing out that under Article 17 of the DSU it had the right to fashion its own working procedures, the Appellate Body stated that it could, indeed, receive and consider such submissions.

Article 17 of the DSU requires that in establishing its own working procedures, the Appellate Body consult the Chair of the Dispute Settlement Body and the Director General. Upon further questioning by member states, the Chair of the Dispute Settlement Body stated that he had not been consulted by the Appellate Body with respect to the submissions in question, not indeed would such consultation have been appropriate in the course of a specific case.

III. ASSESSMENT OF THE PERFORMANCE OF THE APPELLATE BODY

A. Initial conclusions of the Rapporteur

According to one observer, the Appellate Body has "shown a remarkable, almost untroubled, ease in proclaiming the customary character" of the rules set out in the *Vienna Convention*.[69] But, of course, the same remarkable and untroubled ease could be observed in not only the works of respected "publicists",[70] but also the Third Restatement, one of the most authoritative statements of the US perspective on international law.[71] This, therefore, is not the most important difficulty one can observe in the Appellate Body's approach to the principles of interpretation.

What *is* cause for some concern is that the Appellate Body has been less than consistent in its application of the very principles by which, it has stated, it is bound. As Skouteris notes:

> "What is curious … is that these principles constitute the 'thread' of the argument only sometimes and not in others. These latter cases often raise the question as to whether these interpretative principles have been substantially taken into account."[72]

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69 Skouteris, *op. cit*., at 124.

70 See for example, Vermulst, Edwin, Petros Mavroidis and Paul Waer, "The Functioning of the Appellate Body after Four Years" (1999), 33:2 JWT 1. They note that, "[p]anel proceedings occurring before the establishment of the WTO have interpreted and GATT Articles by reference to the VCLT. WTO Panels and the AB are bound by Article 3.2 of the DSU to continue to do so." At 17.

71 The American Law Institute, Restatement of the Law Third: The Foreign Relations Law of the United States ('The Restatement'), (St. Paul: American Law Institute Publishers, 1987) at 145. according to the Restatement, the *Vienna Convention* constitutes, in general, "a codification of the customary international law governing international agreements, and therefore as foreign relations law of the United States even though the US has not adhered to the Convention."

72 Skouteris, *op. cit*., At 142.

The most benign explanation is that the Appellate Body employs such interpretative inconsistencies in the service of more fundamental objectives, for example, to build confidence in the institutions of the WTO, or to establish the character of the WTO as a judicial mechanism.[73]

After all, it is not just the WTO that has a substantially different character than its predecessor, the GATT. The very *context* in which the GATT operated no longer exists. Whether it is the growing influence of developing countries, or the stronger (at any rate, louder) voice of the collection of interests that have come to be known as the "civil society", the institutions of the WTO are considered accountable to more than merely its state members. The procedural findings of the Appellate Body in *Shrimp/Turtles* and *British Steel*, the *obiter* comments on the environment in *Reformulated Gasoline* and *Shrimp/Turtles*, or on the *Agreement on Textiles and Clothing* in *Cotton Underwear*, could be seen as attempts by the Appellate Body to fit the WTO into this modern paradigm.

As well, the WTO Agreement established the first international quasi-judicial organ with mandatory jurisdiction. This "judicial" organ was entrusted with interpreting and applying a series of agreements that had resulted from nearly seven years of negotiations, countless compromises and many backroom deals among initially 100 or so countries but meant to apply to an increasingly diverse membership. Consistent application of principles of interpretation to an inconsistently – and in some respects incompletely – negotiated treaty has pitfalls of its own. Thus, whether to ensure the overall integrity of the quasi-judicial mechanism,[74] or indeed the very notion of international trade law as international law, the Appellate Body might well have considered it necessary to find rights or obligations where, at least at first glance, none could be said to exist. That is, the Appellate Body might have considered some inconsistency in the application of principles of interpretation necessary for the *legal* integrity of the WTO. Certainly, in the view of the Rapporteur, no report of the Appellate Body better exemplifies this than *Coconuts*.

This, at any rate, is one explanation for what at times might be considered a bewildering series of tacks from strict textualist to teleological approaches to treaty interpretation.

To explain, however, is neither to justify nor to excuse. However laudable the motivation, the approach is problematic. The reason is simple. An international tribunal cannot rely on "incarceration, injunctive relief, damages for harm inflicted or police enforcement … jailhouse … bailbondsmen … blue helmets … truncheons or teargas"[75] for the enforcement of its "rulings". And so,

> "... in a community organized around rules, compliance is secured – to whatever degree it *is* – at least in part by perception of a rule as legitimate by

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73 Behboodi, at 69 *et seq.* See also Vermulst *et al.*, at 3.

74 For example, in its interpretation of Articles 11 and 13 of the DSU.

75 Hippler Bello, Judith, "The WTO Dispute Settlement Understanding: Less is More" (1996), 90 AJIL 416 at 416-417.

> those to whom it is addressed. Their perception of legitimacy ... becomes a crucial factor in the capacity of any rule to secure compliance when, as in the international system, there are no other compliance-inducing mechanisms."[76]

In this context, "security and predictability", as set out in Article 3.2 of the DSU, are not only desired objectives of the dispute settlement mechanism of the WTO, but also fundamental bases for the legitimacy on which the "moral and political force of international legal obligation" must rest.

Predictability is achieved through consistent and coherent decision-making, as indeed the Appellate Body itself has observed.[77] However, mere consistency is not enough: a judge could be consistently *wrong*; a tribunal could be consistent, and consistently *right*, but only through divination or the throw of dice. And 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.[78] Accordingly, a tribunal must not only arrive at decisions that are more or less considered to be correct, and consistently so, but must establish that it has arrived at that correct decision through *means and mechanisms considered acceptable*. A tribunal thus establishes confidence and security: by persuading the parties before it as well as the countries under its jurisdiction of the soundness of its decision as well as its decision-making process.[79] These means and mechanisms are simply the principles of interpretation used by a tribunal.

This is not to say that even where there is complete agreement on the secondary rules of interpretation, that the process is clinical and scientific. It is conceded that neither the consistency nor the logical persuasiveness of judicial decisions is *objectively* verifiable. Interpretation is a subjective process, for words do not have a meaning independently of the context in which they are received.[80] Interpretative constraints on a judge are not so tight as to eliminate choice; if they were, there could be no dispute, in good faith, as to the meaning of a legal obligation – indeed, the very notion of reasoned dissent would be impermissible. Indeed,

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76 Franck, Thomas, "Legitimacy in the International System", in Martti Koskenniemi, ed., *International Law* (New York: New York University Press, 1992) at 158.

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

78 Thus, systemic or formal validity (or *pedigree*) is, at a minimum, a necessary condition of legitimacy. However, that the right organ has issued the ruling is *not* sufficient to legitimise the determinate interpretation thus arrived at and applied. A judge's own ruling cannot be the source of its own validity or legitimacy. The fact that the rule is enforced by the judge cannot be sufficient for the legitimacy of the rule. (Aarnio, Aulis, The Rational as Reasonable (Dordrecht: Reidel, 1987), at 39-41) For, a system of laws is also, if not primarily, concerned with the legitimacy of the *means* of interpretation, application or enforcement.

79 Lazarus, Edward, Closed Chambers, (New York: Penguin, 1999) at517. See also Mengozzi, Paolo, *European Community Law* (London: Graham and Trotman, 1992) at 61.

80 Fish, Stanley, "Fish vs. Fiss" (1984), 36 Stan. L. Rev. 1325 at 1335; Koskenniemi, Martti, *From Apology to Utopia: The Structure of International Legal Argument* (Helsinki: Finnish Lawyer's Publishing Company, 1989) at xx.

agreement on many an international obligation is possible precisely because of the margin of indeterminacy in language that makes compromise possible.

Two points are worth noting here. First, if, reasoned good faith interpretation of a text or a law is capable of arriving at equally plausible legal interpretations, making a choice as between these interpretations cannot be a purely legal exercise. Arriving at any legal interpretation often implies a choice as between equally acceptable alternatives; that choice is made on other than purely legal – that is, on policy or political – grounds. It is against this background that the *process* of interpretation becomes, in some respects, even more important than the results achieved. A "choice" as between competing meanings must be *justified* by reference to the universe of conventions, assumptions and understandings that underlie the legal system in question.

Second, the "subjectivity" of the interpretative process and therefore the "choices" available to a judge are not limitless. All communication is done within specific contexts. Indeed, absent a significant measure of agreement on conventional meanings, all human intercourse would come to an immediate standstill.[81] Law is no different in the sense that legal norms mandating behaviour of one sort or another depend on the communicative function of language for their full effect. This communicative function can be served only if there is a general measure of agreement upon the meaning of the words used to express those legal norms. Thus, the subjectivity of *legal* interpretation – and no less the interpretation of international law – is constrained by a set of agreed rules and conventions. These conventions permit laws to be drafted, treaties to be negotiated and obligations agreed to; and then, laws to be followed, treaties to be implemented and obligations complied with. One set of such "rules and conventions" of interpretation is set out in the *Vienna Convention*. Of course, as noted above, the *Vienna Convention* does not exhaust the universe of interpretative rules available to a tribunal; "logic and good sense", as well as many other maxims and guides of varying degrees of persuasiveness, may also be used in the interpretation of a treaty provision.

When viewed as against basic interpretative assumptions and understandings of the states drafters of a treaty, which are also subject to it, certain of the findings of the Appellate Body lack persuasive force. [82] That is to say, the Appellate Body has identified interpretative "choices" not immediately apparent to the state members of the institution, and has sought to justify those choices on the basis of arguments – means and mechanisms – not generally considered convincing or indeed relevant. In

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81 Glanville, William, *Learning the Law Ninth Edition* (London: Stevens and Sons, 1973) at 93; Allott, Philip, "Language, Method and the Nature of International Law", in Koskenniemi, ed., *op. cit.*, at 79.

82 In discussing the US Supreme Court Lazarus points out that:

> "The enterprise of the Court, the process of constitutionalism, depends on the Justices' ability to persuade us (and one another) that their choices among competing arguments, however imperfect, represent reasoned, dispassionate, honest attempts to decide cases in a principled way."

Op. cit., at 9.

particular, the Appellate Body has shown itself ready at times to adopt a teleological approach to interpretation that is not permitted by the *Vienna Convention* or, indeed, international law.[83] At other times, it has adopted a strict textualist approach manifestly at odds with the carefully balanced principles set out in Articles 31 and 32. Such activism, and the attendant inconsistency in the reasoning process, it is submitted, have the potential of bringing the legitimacy of the process into question.[84]

B. Comments on the Rapporteur's initial analysis

Participants at the Workshop were, for the most part, in disagreement with the assessment of the Rapporteur. The comments raised two broad issues:

> **first**, the *Vienna Convention* gave a larger measure of discretion to a treaty interpreter than the Rapporteur allowed in the paper;
>
> **second**, many of the interpretative difficulties identified in the paper were either harmless, or were inconsistencies endemic to a "case by case" approach to interpretation necessary in WTO litigation.

1. Discretion of an international judge

In his commentary on the Rapporteur's paper, Professor Pauwelyn noted that in his view, international judges had a larger measure of discretion in the interpretation of treaties than did national judges. He also stressed that Article 31 of the *Vienna Convention* did not create a hierarchy of approaches between the teleological and the textual. Accordingly, a judge may give different weight to different elements in the interpretation of a treaty provision depending on the provision and the circumstances of each case.

Along the same lines, other commentators questioned the Appellate Body's use of various dictionaries to determine the "ordinary meaning" of a provision, noting that in treaty negotiations, little, if any, resort is made to such aids in the course of drafting provisions. As well, the Appellate Body has not had much recourse to the texts in other languages. Accordingly, in many instances the Appellate Body has had too narrow and textual a perspective on interpretation. Far from exercising too much discretion, as the tenor of the Rapporteur's paper implies, the Appellate Body has used too little by closely following dictionary definitions.

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83 There have been exceptions. In its *South West Africa* decision, the International Court of Justice observed that the "ordinary meaning" rule of interpretation

> "is not an absolute one. Where such a method of interpretation, results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it."

[1962] *ICJ Reports* at 336.

84 Lazarus, *op. cit*., at 301.

2. "Harmless errors"

A number of commentators disputed the gravity of the "errors" identified in the Rapporteur's analysis. Referring to the "should means shall" controversy in *Canada – Aircraft*, one person noted that the *effect* of the decision had been only to encourage the panel to draw adverse inferences in the event of non-production of evidence and information following a request by a panel pursuant to Article 13.1 of the DSU. Another pointed out that, in any event, the hortatory verb "should" in Article 13.1 could be said to refer to the modifier "promptly" only; with the text *implying* a legal obligation to produce documents on demand – that is, a state must produce evidence but "should" do so "promptly."

Along the same lines, the interpretative difficulties of *British Steel* were, on the whole, of little substantive import as the very nature of international law and international trade law was changing. There was a move toward greater accountability to and involvement of individual interests in international affairs. Accordingly, the determination of the Appellate Body in *British Steel*, and subsequently in *EC – Asbestos* to permit (and even solicit) submissions by third parties was not as grave an interpretative error as suggested by the Rapporteur.

Finally, many commentators argued that the inconsistencies identified by the Rapporteur were, indeed, part and parcel of a case by case approach to interpretation necessary in international litigation.

C. Assessment

In response to the comments on his analysis, the Rapporteur made three observations.

First, the WTO is an *inter*national member-driven organisation. And, international trade law is an instrument to ensure the orderly conduct of *commercial* relations between *states*. The principal concern of the WTO was with concrete commercial interests and sensitive government programmes and objectives designed to advance those interests. Viewed through this admitted narrow prism, "predictability and security" – clearly not an accident of drafting – take on a special hue.

Predictability – consistency and coherence – is a signal requirement of the *market*. Commercial relations either ground to a halt or become very expensive where the law governing those relations swings with abandon from case to case, depending on the vagaries of the exercise of interpretative "discretion" by judges.

Security – *confidence* in the ability of the quasi-judicial dispute settlement mechanism of the WTO accurately to determine the will of the members of the WTO when negotiating and *agreeing to be bound by* the WTO Agreement – is of elementary importance in an international context where compliance rests on the will of each member to abide by the law. And the reality in which this "will of the state" manifests itself is complex indeed. National policies ruled incompatible with the WTO Agreement may well affect serious matters of industrial and strategic policies, involve hundreds of millions of dollars in trade or governmental expenditure, and have an impact on thousands, if not tens of thousands, of jobs. When, in abiding by

international law, serious interests of the state are affected, each member must be able, with confidence, to point to obligations it has knowingly undertaken and for which it has obtained concessions of similar value from other members. A change in this balance that cannot be justified by reference to predetermined secondary rules has the potential, therefore, of seriously upsetting the *security* of the international trading order.

Second, it is important to distinguish case-specific determinations from the systemic consequences of those determinations. One commentator suggested that the specific result in *Canada – Aircraft* was the imposition of a *treaty-based* duty of disclosure that in any event existed (albeit in a less rigorous form) in international law. As well, the confirmation of a panel's right to draw adverse inferences was itself incidental to the panel's responsibility to make findings of fact. Thus, the argument went, even if the specific findings were to be considered erroneous, the immediate consequence for Canada was not terribly grave.

However, as the Rapporteur and a number of other commentators observed, the systemic consequences of the Appellate Body's *analysis* on that issue far outweigh the immediate results. At a minimum, for example, after *Canada – Aircraft*, it would be difficult to find a single "soft" obligation in the WTO Agreement that is not capable of being solidified through (re)interpretation. States would have a difficult time abiding by obligations they cannot determine to exist until *after* litigation and an adverse ruling. And, of course, in the event of an adverse ruling and in the face of possible retaliator measures, states would be under even more pressure bringing themselves into compliance.

Similar comments can be made with respect to the comments concerning the findings of the Appellate Body in *Shrimp/Turtle*, *British Steel* and *Asbestos* on the submission of *amicus* briefs. Whatever the merits of the specific findings in those cases, they signalled a troubling *systemic* development. For, making a *policy* choice on whether to allow *amicus* briefs in WTO litigation, whatever its merits, is not part of the responsibilities of the dispute settlement mechanism.

And this is no idle musing. At the November 22 meeting of the General Council of the WTO, the vast majority of the membership of the WTO criticised the preliminary ruling of the Appellate Body in *EC – Asbestos* concerning the submission of *amicus curiae* briefs as going beyond the mandate of the Appellate Body. The US was the only member that spoke in favour of the ruling – and that feebly, noting only that the matter had already been decided in *British Steel*, a finding that had been the subject of considerable controversy in its own part. The question for many of the states objecting to the Appellate Body "ruling" was not the substance – whether or not to have submissions by *amici* – but rather process: whether the Appellate Body was the proper forum for the determination of this crucial issue. The question, in the immortal words of Humpty Dumpty, was simply "who was to be master. That is all."

Third, indeterminacy of obligations resulting from inconsistency of interpretation (whether as a result of misapplication, or inconsistent application, of secondary rules of interpretation) brings into question the integrity of the dispute settlement mechanism. What is at issue is the continued *confidence* of members that the dispute settlement mechanism correctly determines and applies only those rules – obligations – that members have undertaken and no other. As Article 19.2 of the

DSU clearly sets out, the dispute settlement mechanism may not add to or diminish the negotiated rights and obligations of the members of the WTO. Despite the various comparisons made between the Appellate Body of the WTO and the European Court of Justice or domestic judicial mechanisms, the WTO remains, at its core, an *inter*national entity. A state can justify abiding by mandatory "rulings" by a quasi-judicial body only as long as it can be persuaded that it is being asked simply to conform to obligations it has in good faith negotiated. Where the interpreted obligations depart from the negotiated ones, there is danger of systemic breakdown, even if the departure is made for the good of the "system", in service of a higher interest, to advance a noble objective.

CONCLUDING REMARKS

In international law – whose subjects are sovereign states – the strength of a judicial organ's claim on the obedience of its subjects is *inversely* proportionate to three basic elements:

- the comprehensiveness of the jurisdiction of the court;
- the intrusiveness of the obligations at issue; and
- the consequences of non-compliance.

That is, the more comprehensive the jurisdiction, or the more intrusive the obligation, the more an international court has the onus of ensuring that its "rulings" are based on solid grounds and supported by credible reasoning. In the case of the WTO the confluence of the three elements conspires to impose a particularly heavy burden on the Appellate Body to justify its findings and determinations. After all, it is the first, and so far only, standing quasi-judicial international institution with mandatory jurisdiction. As well, the obligations negotiated in the WTO Agreement reach into practically every corner of a state's policy-making capacity. Finally, non-compliance can result in crippling sanctions, widespread loss of jobs and national wealth, etc.

Accordingly, *even if* it is the case that international tribunals have greater discretion in interpretation than domestic courts – an argument that, in the Rapporteur's view, bears closer scrutiny – such discretion must be used with utmost caution. The Appellate Body must carefully apply the principles of interpretation in customary international law (including the *Vienna Convention*) and justify its determinations through reasoned use of such rules not simply because Article 3.2 of the DSU requires it, but because of sound policy – legitimacy. Otherwise, why would a state follow the decisions of the Appellate Body?

Recent reports suggest that the Appellate Body itself is keenly aware of the concerns of the Membership in terms both of the general "mandate" and of the interpretative approach of the Appellate Body. In *United States – Import Measures on Certain Products from the European Communities*[85] the Appellate Body pointed out:

[85] WT/DS165/AB/R, Report of the Appellate Body adopted on 10 January 2000.

> "91. […] [T]he terms of Articles 21.5 and 22 are not a 'model of clarity' and the relationship between these two provisions of the DSU has been the subject of intensive and extensive discussion among Members of the WTO. We note that, on October 10 2000, eleven Members of the WTO presented a proposal in the General Council to amend, *inter alia*, Articles 21 and 22 of the DSU.
>
> 92. In so noting, we observe that it is certainly not the task of the either panels or the Appellate Body to amend the DSU or to adopt interpretations within the meaning of Article IX:2 of the *WTO Agreement*. Only WTO Members have the authority to amend the DSU or to adopt such interpretations. … Determining what the rules and procedures of the DSU ought to be is not our responsibility nor the responsibility of panels; it is clearly the responsibility solely of the Members of the WTO." [footnotes omitted]

As well, the Appellate Body's careful textual and contextual analysis in *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*[86] is remarkable in its thoughtful respect for the principles set out in Article 31 of the *Vienna Convention*. While some might find fault with the Appellate Body's clinical attention to "dictionary definitions",[87] such a definition has the distinction or being *fixed* and determinate – at least more so than one derived from a purely teleological approach.

Interpreting legal norms is an iterative process within a specific context.[88] The explicit and implicit recognition of the role of the Members in the Appellate Body's latest Reports, coming as it did following the 22 November 2000 General Council meeting, underlines the importance of ongoing critical dialogue between the Members of the WTO and the Appellate Body. Far from indicating institutional weakness or systemic pathology, such dialogue constitutes one of the most important aspects of the process by which legal interpretation based on pre-determined secondary rules (as set out, for the most part, in the *Vienna Convention*) finds legitimacy in, and in turn legitimises, the international trade law order.

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86 WT/DS161/169/AB/R, Report of the Appellate Body adopted on 10 January 2000.

87 See, for example para 111, at which the Appellate Body reaches into the *New Shorter Oxford Dictionary* to define "in accordance with" and "take into account".

88 Behboodi, at 68.