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## **Legal eagles?**

**A look into 10 years of AB case-law**

**by**

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## **Abstract**

The Appellate Body (AB) is an agent whose mission is to clarify a highly incomplete and often ambiguous contract. To accomplish its mission, the AB can seek help in yet another incomplete contract, the Vienna Convention on the Law of Treaties. This is not an enviable position to be in. Its record so far is a mix of good and less good results. This is of course, a highly subjective view, the merits of which are contingent on the methodology used in the paper. Assuming that the evaluation is correct, the paper advances some suggestions as to what should be done to address observed weaknesses. In this vein, the paper makes a strong case in favour of contextual interpretations, which represent the best existing guarantee that the judge will be behaving like an agent (as opposed to a principal), while asking the most appropriate questions in the effort to reduce the ambiguity embedded in the WTO contract.

## 1. The issue

This paper is meant to provide an evaluation of the record of WTO adjudicating bodies so far. The advent of the WTO, and the ensuing establishment of a two level-adjudication [panels, Appellate Body (AB)], marks the passage to a compulsory third party-adjudication system, an oddity in international relations: as *per* Art. 23 DSU, WTO adjudicating bodies become the exclusive forum for adjudication of all disputes across WTO members with respect to issues coming under the purview of the covered agreements. This feature (exclusive adjudication) is certainly a contributing factor towards the substantial rise (compared to the GATT-era) of reports that have been issued since 1.1.1995.<sup>1</sup> There is by now a critical mass of reports which, to a large extent, provide the input for our evaluation.

An evaluation is of course, by definition, subjective. On the other hand, no evaluation can take place absent an understanding of the function of adjudicating bodies. In the next Section we turn hence, to the question what is expected from WTO adjudicating bodies. Section 3 contains a brief discussion of the record, whereas Section 4 reflects some suggestions for addressing some of the weaknesses that will hopefully have been established in Section 3. Section 5 concludes.

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<sup>1</sup> A look into Hudec's monumental study (1993) reveals that fewer reports had been issued between 1947-1993, than since 1995. There are of course many mitigating factors. As Horn *et al.* (2005) observe, with the advent of the WTO, there are more Members, and more agreements. Other things equal, it is quite reasonable to expect more disputes.

## **2. The function of WTO adjudicating bodies**

### **2.1 Agents ...**

If there was any doubt as to the role of WTO adjudicating bodies, Art. 3.2 DSU eliminated it:

“ The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.”

It follows that adjudicating bodies cannot extend or reduce the policy space committed to the international plane by the principals (the WTO Members).

### **2.2 ... required to interpret ...**

Art. 3.2 DSU also explains that adjudicating bodies have one function only: to clarify (interpret) the covered agreements. Art. 11 DSU, the companion provision, further explains that, when interpreting a provision, adjudicating bodies are required to make an *objective assessment* of the matter before it:

“The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, 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, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with

the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.”

Now, it would have been quite odd to request from adjudicating bodies to make a *subjective* assessment of the matter before them, would not it?<sup>2</sup> The last sentence of Art. 11 DSU, on the other hand, is potentially at contradiction<sup>3</sup> with the obligation to perform an objective assessment: indeed, it could be that a bilateral solution agreeable between the players does not overlap with an objective assessment. This sentence is, nevertheless, a left-over of GATT statutory provisions and has never been practiced in the WTO-era. WTO adjudicating bodies have behaved unconstrained by its bite, and WTO Members have not attempted to sensitize their agents to this provision.<sup>4</sup> To conclude, WTO adjudicating bodies interpret and do not mediate.

### **2.3 ... an incomplete contract ...**

The term *incomplete contract* is usually referred to in contract theory to describe a contract which does not, in its original form, contain all information necessary to its operation. The WTO contract is an incomplete contract. Take for example, the national treatment provision. As Horn (2006) and Horn and Mavroidis (2004) explain, for good reasons negotiators refrained from spending time trying to provide a complete list of all domestic instruments that should come under the

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<sup>2</sup> Any assessment by a judge is of course a subjective assessment. However, in light of the negative connotation that the term *subjective assessment* has, reference to it is, by convention, not made in a provision such as Art. 11 DSU.

<sup>3</sup> This point should be attributed to William J. Davey who made it in an oral conversation with the author.

<sup>4</sup> After all, parties to a dispute can always reach a mutually agreed solution which is a restraining factor to the panel's exercise of jurisdiction.

purview of Art. III GATT.<sup>5</sup> Another illustration of this point is offered by the fact that the Dispute Settlement Understanding (DSU) nowhere regulates the allocation of burden of proof (production + persuasion). All reports by adjudicating bodies, however, explicitly or implicitly have dealt with this issue.

WTO adjudicating bodies will, by interpreting the covered agreements, be completing the contract.<sup>6</sup>

#### **2.4 ... which suffers from ambiguity as well ...**

As Posner (1995) pertinently, in my view, explains, there is tension between, on the one hand, the willingness of the legislator to draft laws using all encompassing language in order to subsume the maximum number of transactions, and, on the other, the limits inherent in our human nature to predict future events on which we have, at the stage of drafting, imperfect information. This tension is particularly present in a contract such as the WTO, which is not meant to be *transaction-specific*. As a result, negotiators will naturally privilege generic expressions, rather than precise definitions. The more we move away from a transaction-specific example, however, the more we open up to ambiguity. Take the term *like product*, for example, appearing in so many different places in the covered agreements. The fact that the term is ambiguous is

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<sup>5</sup> There is a positive correlation between the amount of information contained in a contract and what can be achieved through the contract at hand. Adding information, however, represents negotiating costs. Negotiators *at the margin* will decide on the merits of including additional information (and the ensuing ambition).

<sup>6</sup> This is the role of the judge in the perception of Battigalli and Maggi (2002), for example.

also proven by the fact that different panels provided drastically different interpretations.<sup>7</sup>

## 2.5 ... and compelled to use yet another incomplete contract

Is the WTO judge free to choose any intellectual route when interpreting the contract? No, is the short answer. Article 3.2 of the DSU imposes on the WTO judge recourse to customary rules of interpretation.<sup>8</sup> From its very first onwards, the AB has equated customary rules to the general rule of interpretation embedded in the *Vienna Convention on the Law of Treaties* (VCLT). The VCLT, however, is far from being exact science; it reflects various elements of interpretation, but falls short of establishing with precision the weight to be given to each one of them. Hence, it is not unheard of that, in the name of the VCLT, courts have reached divergent decisions on more or less identical issues. In other words, formal recourse to the VCLT does not *ipso facto* yield consistent results.<sup>9</sup>

Take the two decisions by the AB on recurring subsidies, *US – Lead and Bismouth II* and *US-Countervailing on Certain EC Products*. The AB reached two diametrically opposite responses to the same question, that is, to what extent non recurring subsidies pass through to the new owner who has paid a market price for the privatized entity? On both occasions, the AB has had recourse, as it

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<sup>7</sup> See the comprehensive analysis in Horn and Mavroidis (2004).

<sup>8</sup> There is a presumption expressed in Article 3.2 of the DSU, that recourse to the VCLT is a guarantee, in principle at least, that the balance of rights and obligations, as struck by the founding fathers, will not be undone by the judge.

<sup>9</sup>Not that I believe that consistency is in and of itself a value, for one can be consistently wrong. Assuming correct interpretations however, a court gains in institutional credibility when it can show a consistent pattern of decision-making. In such cases, the presence and demonstration of distinguishing factors from one case to the other will sufficiently justify divergent outcomes.

always does, to the VCLT. On both occasions, it went through each and every element enshrined in Art. 31 VCLT. A reading of the reports does not even suggest that different weight was given to the different elements of the VCLT. Yet, the outcome is not the same; the first report stands for the proposition that an arm's length transaction always exhausts benefits received by the former owner, whereas the latter takes the view that this is not necessarily the case.<sup>10</sup>

The WTO judge, consequently, has in front of her, not one, but two incomplete contracts. This is definitely not an enviable position to be in.

## **2.6 Being a WTO judge: not an enviable position to be in**

It stems from the above that the WTO judge is requested to complete an incomplete and often ambiguous contract by using yet another incomplete contract to honour its mission. This is not an enviable position to be in.

Of course, the judge can adopt a course of action that will minimize errors: minimalist judgments are highly recommendable for judges, and WTO judges in particular.<sup>11</sup> On the other hand, the WTO judge enjoys some institutional help: there is nothing like *stare decisis* in the WTO, which means that errors do not *have to be repeated*. Moreover, Ethier (2001) perceptively points out to the fact that, probably due to the uncertainty as to the identity of the defendant, WTO Members have agreed to 'softer' remedies than otherwise. The *appropriate* counterfactual here is the public international law paradigm: in WTO law, with one exception so far since 1995, all panels have recommended prospective rather

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<sup>10</sup>In the view of Grossman and Mavroidis (2005) both reports are wrong.

<sup>11</sup> See the excellent analysis offered in Sunstein (1999) on this score.

than retroactive remedies. Implementation of adverse WTO decisions is not *that* costly (in the overwhelming majority of cases), since only prospective implementation is required, and, although formally there is no efficient breach of contract in WTO law, parties that can afford to, can always opt to be subjected to countermeasures, rather than implement an erroneous decision.<sup>12</sup>

### **3 The record: a success story?**

#### **3.1 Measuring success is no easy task**

What was described so far was meant to provide the background for the evaluation of the record. Measuring the success of a body, like panels and the AB, is not an easy task. For one, there is no direct measurement of unquantifiable concepts such as success. Recourse to proxies seem, consequently, inevitable. One can imagine that various proxies are pertinent in order to evaluate whether the case-law produced has been successful. Moreover, the choice of proxies depends on the understanding of the objective function of panels and of the AB. If, for example, we understand that the role of panels and the AB is to simply come up with a legal opinion which leads to the final resolution of the dispute, then, implementation of its decisions is probably the most pertinent proxy. However, this approach is not without problems; some cases still remain unresolved and some reports were never implemented and led to the imposition of countermeasures,<sup>13</sup> irrespective of the legal merits of the

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<sup>12</sup> I do not mean that all implementation is non-costly. I further do not mean to say that performing the contract and being subjected to countermeasures are of equal value. Legally, they are not. Art. 22 DSU clearly proscribes that suspension of concessions (countermeasures) is a temporary measure until compliance has occurred. In practice, however, the opposite could very well be true.

<sup>13</sup>See Bagwell *et al.* (2006) for an account of such cases.

report at hand. On the other hand, sometimes reports are being implemented for reasons other than their legal merit.<sup>14</sup>

More fundamentally, this approach neglects the case-law producing-function of panels and, especially,<sup>15</sup> of the AB; they are there not only to solve a particular dispute, but also to make the adjudication of similar future transactions (more) predictable. More on this score, later.

I have already alluded *supra* that, to my mind, the most appropriate benchmark to measure the success of panels and of the AB is to discuss the merits of each and every report that sees the light of the day.<sup>16</sup> In what follows, I do not purport to review each and every report written. For even if one completes this exercise and even *assuming* that there is a universally accepted benchmark for right or wrong report, one would still need to decide what is a successful record in case some outcomes were wrong. What is success then? Getting it 90% of the times right? 80%? Does getting it right less than 80% of all times still qualify as success? On the other hand, this does not mean that other benchmarks are not appropriate. Assuming, for example, that one can provide a benchmark for distinguishing between important and un-important cases, one could limit its observations to a review of the first category only.

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<sup>14</sup>Mexico, for example, protested vehemently against the adoption of the Panel report in *Mexico – Telecoms*, arguing essentially that it was blatantly wrong (see Minutes of the DSB Meeting, WTO Doc. M/170 of 6 July 2004), and still declined to appeal it. Most likely, this is a case where WTO law has been used as an excuse to implement policies which, from a political economy perspective, would be very costly to the government imposing them absent some form of "exogenous compulsion".

<sup>15</sup> Especially, since, the AB limits its review to legal issues only.

<sup>16</sup>This is essentially what the papers appearing in the series edited by Horn and Mavroidis aim to do; see, for example, the contributions in Horn and Mavroidis (2006).

For these reasons, I will limit my observations on (what I consider to be) the main features of the case-law produced so far. On the other hand, there are good reasons for limiting the review to the case-law produced by the AB only. Panels, with very few and notable exceptions,<sup>17</sup> have followed almost *verbatim* the AB.<sup>18</sup>

In what follows, I divide the discussion in two parts: first (Section 3.2) I address the question whether the AB has behaved as an agent, that is, whether it has in practice observed its institutional role; then (Section 3.3) I move to present my views on the quality of its output.

### **3.2 Has the AB over-stepped its mandate? (what is wrong with judicial activism?)**

This question deserves particular attention because of the institutional and other implications associated with the respect of the mandate. An AB prone to false positives (Type I errors) will be adding to the obligations of WTO Members, whereas, through false negatives (Type II errors), it will be diminishing their rights. Through such actions however, it will not only be imposing costs to the addressees of its decisions, but it might be creating institutional damage as well: it might reduce the faith of states in this form of dispute adjudication, in an era where compulsory third party adjudication is very much a rarity in international relations.

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<sup>17</sup> One such instance is the panel report on *EC – Commercial Vessels* which refused to adhere to the AB's understanding of Art. 18.1 AD as expressed in its *US – Offset Act (Byrd Amendment)* report.

<sup>18</sup> Even though, the AB, as will be demonstrated *infra*, still found ways to surprise them.

The AB has been a predominantly faithful servant of its mandate.<sup>19</sup> There are, however, a few instances which, one could argue, show a tendency to behave more as a law-maker rather than as a judge. In all cases where the AB has completed the analysis, it has *ipso facto* deprived parties of their right to a two stage-adjudication. True, it has thus facilitated speedy resolution of the dispute. True also, however, to this end it cannot employ means which undo the balance of rights and obligations struck by the WTO Members.

In *US – Softwood Lumber IV*, the panel faced an awkward situation: there was no prevailing market price in Canada for the products in question, yet Art. 14 SCM (Agreement on Subsidies on Countervailing Measures) pre-supposes the existence of such a price for the calculation of benefit. The United States (for good reasons probably) had used a benchmark other than those referred to in Art; 14 SCM, and Canada challenged the US practice arguing that they should have used one of the benchmarks exhaustively reflected in Art. 14 SCM. This is arguably a case of legislative failure. The panel wisely signalled the issue but refused to play legislator and still found against the defendant. The AB reversed the panel in principle, arguing that one could legitimately use other benchmarks. By doing that, however, it *added* a right which had not been contemplated in the original bargain.<sup>20</sup> This is not its role, the solidity of arguments in favour of amending Art. 14 SCM notwithstanding.<sup>21</sup>

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<sup>19</sup> See the excellent analysis of Howse (2003) who largely shares this view.

<sup>20</sup> And it is almost impossible to establish how the Agreement would have looked like had such a right been included in the original balance. Arguably, the *demandeurs* of this right would have to pay a price for its inclusion.

<sup>21</sup> By the way, the AB did not identify another appropriate benchmark and did not even establish the criteria that would help WTO Members in future practice use such alternative benchmarks.

In *US – Upland Cotton*, the AB majority opinion offers a reading of Art. 10.1 and 10.2 AG (Agreement on Agriculture) which is difficult to reconcile with the wording but also the overall economy of the provision and its negotiating history: if export credits came under the purview of Art. 10.1 AG, why would negotiators spend negotiating effort to introduce Art. 10.2 AG? Did they want to signal that they were prepared to exclude export credits from the disciplines of the Agreement through future action? This is highly unlikely outcome, since the whole negotiation was meant to discipline instruments and not the opposite. A contextual reading of the two provisions amply supports the minority view, that is, that there was agreement as to the disciplining of many instruments, but no agreement on export credits, an issue left, as *per* Art. 10.2 AG, to future negotiations.

One could further discuss to what extent the interpretation of the term *exhaustible natural resources* in *US – Shrimp* is consistent with the legislative will. A review of the negotiating history supports that, what the founding fathers had in mind, was elements such as petrol etc., and not animals which should come under the purview of Art. XXb GATT.<sup>22</sup>

How much of a problem have such reports been? In a contract like the WTO, some form of judicial activism should not be totally unexpected, since the founding fathers did not buy *ex ante* sufficient insurance policy against it: the WTO is a largely incomplete contract. Take the non-discrimination obligation, for instance, the cornerstone of the whole edifice. The domestic instruments coming

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<sup>22</sup> In order to avoid any misunderstandings, I believe that the United States should have prevailed in this dispute anyway, irrespective whether the case had been adjudicated under Art. XX(b), or, most appropriately, under Art. III.4 GATT.

under its purview have not been identified. As a result, the judge will not only have to clarify the discipline itself (the non-discrimination obligation, a rather elusive concept), but also identify the instruments on which the discipline will be applied. The policy space, in other words, committed to the WTO has only been loosely defined.<sup>23</sup>

The hazards resulting from judicial activism have already been briefly mentioned above.<sup>24</sup> Have the founding fathers bought adequate *ex post* insurance policy against them? Assume dissatisfaction with a particular ruling, what can the WTO Membership do to avoid repetition? The WTO Agreement offers a number of possibilities that require collective action (and thus, are not immune to free riding-behaviour).

*First*, WTO Members can decide not to appoint anew the judges who participated in the wrong decision. Here the action could only take place against at least the individual members of the AB Division that ruled in the particular dispute, since minority opinions (assuming one) are not eponymous. This is a rather ineffective remedy though, since there is no guarantee that the new judges will not commit the same errors. This remedy has not been used so far.

*Second*, they could adopt an authoritative interpretation, by virtue of Art. IX of the Agreement establishing the WTO, and pre-empt similar (to the erroneous)

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<sup>23</sup> As discussed above, there are good reasons justifying this approach. The marginal negotiating effort to complete the contract would probably produce unsatisfactory results.

<sup>24</sup> One should not; however, exaggerate such hazards. Importantly, the discussion here is not meant to find application in other legal regimes as well. As Müller's study shows (1991), absence of judicial activism in other contexts leads and has led to tragic results.

behaviour in the future; no action on this score has taken place against any of the reports identified above.

*Third*, they could show their collective disappointment with a ruling in the hope that such demonstration will sensitize the judges enough to make recourse to the costly option two (authoritative interpretation) redundant. There is one precedent on this score: following the AB initiative to allow for submission of *amicus curiae* briefs in *EC – Asbestos*, the WTO Membership convened in a special session of the Council and, with very few notable exceptions, by and large condemned the AB initiative.<sup>25</sup> Unfortunately; the collective action problem was overcome on the one issue where collective action was the least recommendable.<sup>26</sup> To be perfectly precise, with this exception, there has been no *collective* reaction. There have, of course, been *individual* positive reactions (from the prevailing party), and *individual* negative reactions (from the losing party). As things stand, it is difficult to conclusively explain why this has been the case: it could be that there is indeed a collective action problem here; or, that there is tacit acceptance (by the majority at least) of the outcome, in the sense that the WTO Membership finds, for example, that extending the term *exhaustible natural resources* to cover living organisms as well is an appropriate completion of the incomplete Art. XX(g) GATT. The absence of collective reaction<sup>27</sup> lends support to the argument that by and large the AB has acted as an agent.

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<sup>25</sup> For a detailed narrative on this score, see Mavroidis (2004).

<sup>26</sup> *Idem*. On the other hand, there now seems to be acceptance of the fact that there is nothing wrong with *amici curiae* participation if it is contingent on the panel /AB-approval.

<sup>27</sup> Even the winner in a particular dispute might have an incentive to join in its trading partners and protest against the rationale of an advantageous judgment, if the gains from the judgment are smaller than its expected damage in case the jurisprudence is repeated in the future (highly likely in light of the incentive structure of the AB) and the probability that it will appear as defendant in such a case (low, since strategically thinking countries will not attack mirror legislation to their own precisely because of the high probability that they might thus present

### 3.3 Completing the contract through interpretation

In what follows, I first formulate three major criticisms against the attitude of the AB when interpreting the WTO, before I cite some landmark, positive to my mind, rulings.

#### 3.3.1 Textualism and its discontents<sup>28</sup> (remember Orwell)

The ordinary meaning of the terms is the starting point for interpretation according to the VCLT. Unfortunately, on many occasions it has also been the final point of AB interpretations, even though lip service is customarily being paid on the remaining elements of Art. 31 VCLT. True, sticking to the text is a highly conservative approach since a judge can always turn around and state 'this is what the contract states'. These judges, however, should be reminded that they were not appointed to *read* words, but rather to *clarify* ambiguities. They should enable, in Orwell's terms, through their interpretation meanings choose the words and not the other way around.

Take for example the *EC – Pipe Fittings* dispute. Horn and Mavroidis (2006) find fault with the AB approach on various counts, and on each one of them conclude that the heart of the error lies in the a-contextual interpretation of the terms

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themselves with a mountain to climb at a subsequent stage. An outlier in this context is the *Chile – Taxes on Alcoholic Beverages* dispute, where the European Community challenged the consistency of the Chilean tax regime on alcoholic drinks which was quite similar to the tax regimes of many European states. The manner in which the case was argued, however, and the manner in which the AB drafted its findings provided some cushion against eventual attacks on European schemes).

<sup>28</sup> The title 'textualism and its discontents' was first used by Henrik Horn and Joseph Weiler in a paper they co-authored on the *EC – Sardines* and published in Horn and Mavroidis (2005).

adopted by the AB:<sup>29</sup> they put into question the manner in which the AB discusses the extent of both substantive as well as procedural obligations.<sup>30</sup> It is perhaps appropriate to discuss to some extent their findings as to the AB understanding of the obligation to provide a public notice of the antidumping investigation (Art. 12 AD, Agreement on Antidumping) and thus provide a most appropriate illustration of the AB's attitude.

In *Thailand – H Beams*, Poland complained before the panel that it was indiscernible from the final determination how Thailand had complied with the various requirements of the AD Agreement. Thailand then produced a document where it explained in excruciating detail what had happened during the investigation that led Thailand to believe that an imposition of duties was in good order. The panel in this dispute dismissed its relevance on the ground that absence of production equals absence of examination. Thailand appealed and the AB (probably rightly so) rejected the panel's finding. In the AB's view, it could not, as a matter of principle, be excluded outright that this information had indeed been used by the Thai authorities simply because the document reflecting it had not been produced to the interested parties. In other words, the AB dissociates the obligation to notify from the obligation to review, without delving into the question whether, in the AD's institutional balance, the content of a review should be notified as such to interested parties, or to what extent an investigating authority can use information, relating to a review of the factors

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<sup>29</sup> This observation might be subjective but does not suffer from selection bias. Indeed, all authors associated with the American Law Institute (ALI) project on WTO, which critically discusses the AB case-law [see, for example, the papers appearing in Horn and Mavroidis (2005)] have *consistently* faulted the AB for reading terms in an a-contextual manner.

<sup>30</sup> See, for example, their discussion on the findings on low volumes sales and the extent of the period of investigation.

mentioned in Art. 3.4 AD, that at the same time can legitimately be kept away from interested parties.

What is the institutional balance embedded in this interpretation of the AD Agreement? On the one hand, an investigating authority must publish a final determination that contains in sufficient detail all issues of law and fact *considered material* by the investigating authority (Art. 12.2 AD). Clearly, the words “considered material” leave room for discretion and hence, it cannot be excluded that some information used in the proceedings to reach the final determination is excluded from the public announcement. On the other hand, Art. 6.4 AD obliges investigating authorities to disclose all information requested by interested parties.

Assuming parties had access to the same information, one could possibly argue that, to the extent that some information has not been requested under Art. 6.4 AD, it was not judged material by the interested party at hand and hence, all such subsequent claims on this score should fall on this ground. But access to information is in practice not symmetric. AD investigations take place within an adversarial system, where the umpire (the investigating authority) will be asked to administer in a due process-manner conflicting information. The AD Agreement nowhere imposes on the authority the obligation to immediately disclose to say the exporter information submitted by the domestic industry. One should thus expect the parties often have very different access to information.

An interested party can hence protect its rights under Art. 6.4 AD only in a limited manner: it can request information on issues that, in one way or another, it has knowledge about. With respect to the other issues, the only information it

will (eventually) get will be through the public notice. But as argued, an investigating authority does not have to disclose all information, by virtue of Art. 12.2 AD. Hence some relevant information might never be transmitted. Art. 6.9 AD is not of much help either: according to this provision, an investigating authority must always, before a decision is taken, inform interested parties of the *essential facts* on which the decision is based. Once again the term “essential facts” leaves room for discretion.

So, the AB was effectively beating around the bush, when judging on Art. 6.4 AD. On the one hand, the AB finding in this respect is one step towards making the due process clause more effective. Regrettably however, it does not go the full nine yards. To do that, we submit, it would have to address Art. 12.2 AD in a meaningful, contextual manner.

The *EC - Pipe Fittings* panel essentially wholeheartedly adopted the AB’s *Thailand – H Beams* determination. The AB upheld this finding and, as mentioned *supra*, reversed only the panel’s findings with respect to the disclosure-requirement.

If there were an excuse for the AB determination in the *Thailand – H Beams* case (since Poland did not argue that the Thai document was indeed “cooked”), there is no such excuse in *EC – Pipe Fittings*: Brazil indeed argued that a document containing information on the injury analysis (“doc. EC-12”) was not properly before the EC investigating authority since, in all likelihood, it did not exist at the time of the investigation. Brazil also argued that this conclusion is warranted by the fact that the document at hand was not produced to Brazil: the disclosure-obligations are thus, in Brazil’s eyes, the institutional safeguard to guarantee that documents will not be “cooked”.

Viewed against this background, the AB findings are a halfway house: on the one hand, the AB pointed to the importance of Art. 6.4 AD, insisting that it is not up to the investigating authority to decide which information is relevant. But, the AB failed to take the bigger picture into account: how should Brazil be able to know what exactly has been used as input in the investigation, other than through communications/notifications to its exporters? The AD, as we established above, does not request *all* information transmitted to the investigating authority. But the AD approach could be substantially helped, had the AB re-thought its findings in *Thailand – H Beams* and elaborated on its reasoning there. The AB could legitimately move and suggest that, in case information has been omitted from the determination, there should be (rebutable) presumption that such information had not been used during the investigation process. Such a conclusion is fully supported by the context of the AD Agreement and is in line with the spirit of the Agreement in this respect as well (due process).

Such approaches are problematic. For a start, words are not invariances as the AB itself has realized when in *EC – Asbestos* it correctly understood the term *like* in Art. III.4 GATT to have wider coverage than the term *like* in Art. III.2 GATT. Many legal terms are expected to subsume various transactions and, hence, the text as such can hardly illuminate their actual meaning. Because of the frequent willingness to over-extend the coverage of a term (and save in future negotiating costs), it is only normal that ambiguity is an unwanted but probably necessary by-product (negative externality) of this form of drafting. Did the founding fathers, for example, mean to cover policies such as free speech, when using the terms *affecting trade* in Art. III.4 GATT? One would expect fewer journals in a

dictatorship. Can a WTO Member representing its producers of newsprint attack a dictatorship because its policy affects their export trade? Can it, in case that it cannot show discrimination, launch a non-violation complaint arguing that the anti free-speech policies nullify its rights under the GATT?

It should be noted, however, that the AB has not consistently favoured a textualist approach. In *EC – Hormones* as well as in *EC – Sardines*, the AB pays little service to the term *except*, and allocates the burden of proof as if it was not dealing with an exceptional situation. A look into words will not always provide an intellectually coherent as to the meaning of the terms. This much is true. One needs to look further, to view the words in their context. More on this, later.<sup>31</sup> In the case of international standards, however, the text and the context leave little doubt that the will of the founding fathers was to associate observance of standards with a presumption of WTO-consistency. It should follow that those that do not observe them should carry the burden to explain why, the non-observance notwithstanding, they are still acting in a WTO consistent manner. As already stated above, the VCLT is not exact science and does not *ex ante* specify in quantifiable terms how much weight should be given to each one of its elements. The AB case-law nonetheless, leaves us with the impression that, in the few cases where the AB decided to accord less than decisive value to the words (that is, interpret them in an a-contextual manner) are the cases where the particular words have constant value across contexts.<sup>32</sup>

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<sup>31</sup> I do not include here any discussion on the case-law on safeguards since, as Sykes (2003) has persuasively shown the resulting mess should not be attributed to interpretative efforts only; the current legislative text is incoherent.

<sup>32</sup> The AB had probably the correct intuition in these cases. As Abdel Motaal (2004) has demonstrated, many international standards de facto represent the overlap of few participants only and could be the outcome of a narrow majority vote as well. Thus, the founding fathers probably erred when they made no distinction across international standards and decided to put

### 3.3.2 Case by case should not mean absence of methodology (reveal your game)

The AB seems to often confuse a case by case analysis with the necessity of methodology. A case by case analysis does not make the need for methodology redundant. To the contrary, a case by case analysis *pre-supposes* a methodology. Take the tax discrimination cases<sup>33</sup> for example: following the case-law so far can anyone predict what the AB will rule next time it faces a question whether two products are like? By adopting the highly doubtful idea that likeness can be defined either through the use of econometric or through the use of non-econometric indicators, it opened up to confusion and uncertainty as to its future approach. True, econometric indicators will not *always* yield satisfactory results. But how can the AB maintain that it is consumers that will define likeness *without* including price among the relevant criteria? Does the critical mass of consumers anywhere around the world purchase goods without thinking about its monetary resources?<sup>34</sup>

Or, take the *EC – Tariff Preferences* decision. The AB introduces the idea that donors can use criteria other than those mentioned in the text of the Enabling Clause to legitimately distinguish across beneficiaries and thus accord asymmetric privileges. The AB further stated that such criteria, to the extent *objective*, can be used in future practice. Even if the AB is right, *quod non* as Grossman and Sykes (2005) have persuasively demonstrated, does anyone know

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them all in one basket. It is not, however, for the AB to undo through judicial activism their wrong understanding. At most, it should limit itself to pointing out the (problematic) issue.

<sup>33</sup> See on this issue Horn and Mavroidis (2004).

<sup>34</sup> There are of course some goods for which demand is inelastic, but they constitute a very narrow exception in the world of goods.

what kind of criteria the AB had in mind? Has the AB provided the defining characteristics of the *class* of criteria it had in mind, or even a mere *illustration* of specific such criteria that would help it avoid at least Type II errors in the future? No, it did not. We are all awaiting to see the response through future case-by-case application of this ruling, without having a clue as to which criteria are likely to pass the consistency-test and which not. But the AB is there to make outcomes predictable, or more predictable than they currently are. It is there to ease transaction costs. It is not there to add to the existing legislative ambiguity.

### 3.3.3 Honour thy case-law (the 11<sup>th</sup> commandment)

The AB has adopted the good habit of citing itself. Consistency is of course, not in and of itself a value, for one can be consistently wrong. Assuming, however, that this is not the case, it adds to a court's legitimacy to cite its prior (relevant) case-law since this is one manner to signal predictability as to the outcome. Indeed, in the absence of distinguishing factors and/or new knowledge about an old issue, one would legitimately expect a court to repeat its prior case-law.<sup>35</sup>

Sometimes, however, the AB cites its case-law abusively so. Take the privatization (pass through) cases (*US – Lead and Bismouth II* and *US-Countervailing on Certain EC Products*), for example. The AB in the first case held that the purchasing price matters: *any* time a market price has been paid, the benefits conferred to the original owner will be exhausted. On the very same issue less than two years later, the AB holds that the price paid will not *always*

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<sup>35</sup> The absence of *stare decisis* should, consequently, not be over-stated.

exhaust the conferred benefits. In doing that, it cites the first case. But the two cases are obviously mutually exclusive (*inclusio unius exclusio altrius*).

Or take the *US – Anti-dumping Measures on Oil Country Tubular Goods* case. The US administration had circulated a *Bulletin* which investigating authorities use when, *inter alia*, proceeding to review the necessity of continued imposition of AD duties. In prior case-law (*US – Oil Country Tubular Goods*), the AB accepted that the *Bulletin* as such was justiciable. In the case at hand, the question before the AB was to what extent the standard of review adopted by the panel when pronouncing on the WTO-inconsistency of the *Bulletin* was appropriate.

The AB, in its report on *US – Oil Country Tubular Goods*, had confirmed the panel's findings that, a document such as the *Bulletin* that the US administration uses in antidumping investigations could be legitimately challenged before a WTO panel, since it was an act of normative character, applicable to an indefinite number of transactions (§§ 187 ff.). The *Bulletin* regulates, *inter alia*, the conduct of administrative and sunset reviews, and the standard of review applied therein. However, in a subsequent report, the AB made it almost impossible to challenge the *Bulletin*: in *US – Anti-dumping Measures on Oil Country Tubular Goods*, the AB faced a challenge by the United States against the panel's findings with respect to the justiciability of the *Bulletin* itself. The panel, reproducing faithfully in its view the AB's (*US – Oil Country Tubular Goods*) findings, held that the United States had violated their obligations under the AD Agreement by consistently finding (in application of the *Bulletin's* prescriptions) that continuation of AD duties was necessary. The panel had reviewed 206 cases, the overwhelming majority of which had been decided by reference to the waiver procedures, which were, in the AB's view, inconsistent with the requirements of

the AD Agreement. So, the panel essentially had found that by applying consistently a WTO-inconsistent procedure (by virtue of the *Bulletin's* prescription), the United States was in violation of their obligations under the WTO. The AB rejected the panel's findings. In its view (§§ 203ff.), the panel hastily rushed to conclusions; absent an inquiry into the rationale of the US domestic authority's decisions (all 206 of them), its conclusions were unfounded.

This is quite an odd statement. One can raise at least two legitimate concerns:

- (a) why does the rationale for the US investigating authority's decisions matter since the methodology used is anyway, as the AB itself ruled in a previous case, illegal?
- (b) how can a panel inquire into the rationale of these cases without actually performing *de novo* review, which it cannot anyway, as the AB has ruled in prior case-law?

It follows that, legal instruments which are not mandatory can form the subject-matter of a dispute assuming they are of a *normative* character, that is, their prescription will be applied, in practice, to an indefinite number of transactions. However, to what extent a WTO Member can effectively challenge such measures is open to question. This is a very messy judgment. And the source of the distortion is the AB itself which opens the door for justiciability of instruments such as the *Bulletin*, condemns the rationale for action embedded in the *Bulletin*, and then requests from panels to review and discuss the (illegal) rationale when they find that the *Bulletin* is WTO-inconsistent, *since*, absent such discussion, their findings will be overturned. Such a review however, for the reasons, I explained above, is impossible. The only course of action I can imagine

in this context, besides a discussion in the *ADP Committee*,<sup>36</sup> is to raise this point in the context of a DSB-discussion (next time a case evolving around the mandatory / discretionary legislation-issue comes up).

Such examples harm the value that the audience and users of case-law attach to case-law. There is nothing wrong with a court to admit occasionally (when appropriate) that it departs from prior case-law simply because its prior case-law has been proved wrong.

### 3.3.4 The AB (positive) legacy

The AB should be commended for its professionalism. The AB members have operated so far at the margin of the WTO activities. In marked contrast to the legal services of the WTO, who simultaneously give legal advice to delegations while *de facto* acting as clerks for panels, the clerks of the AB have stayed away from every day WTO-business.

The AB should also be commended for confirming the late GATT panels' extensive use of the VCLT. The VCLT is a complicated tool but *faute de mieux* it is the best we have. In this note I have taken issue with the *use* of the VCLT; the *choice* to use it, on the other hand, is very appropriate. The VCLT includes various elements, all of which are relevant to an interpretative exercise. In fact, a survey of interpretative methods in most domestic legal systems makes it obvious that none of the various interpretative elements used, is not reflected in Arts. 31-32 VCLT.<sup>37</sup>

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<sup>36</sup> This acronym stands for the Committee on Anti-dumping practices.

<sup>37</sup> See on this score Scalia (1997), and compare with Tushnet (1999) and Dworkin (1986)..

The AB further issued some landmark judgments. To my mind, the *US – Shrimp* will always keep a distinguished place: parting with prior case-law, the AB viewed the WTO as *a discipline applied to the extent that certain instruments had been committed*. Consequently, in the absence of disciplines on environmental policies (the GATT being a negative integration-type of contract), it wisely refused to condemn a US policy scheme *only because* it had been unilaterally defined. This case-law has significantly contributed to the proper understanding of the (legal and economic) nature of the WTO integration process.

Recently, the AB has started opening the door to extra WTO-elements when interpreting the WTO contract. The extent of such an endeavour has already occupied many academics and lies beyond the interests of this note. Suffice to state at this stage that opening up to instruments such as the Harmonized System (HS), as the AB did in its *EC - Chicken Cuts* report following the panel's lead in this respect, can only help illuminate the judge as to the extent of the commitments undertaken by the trading partners.

## **4 Some suggestions**

### **4.1 Context, the decisive ingredient in the VCLT-recipe**

So far, in this note I have taken the position that the AB should be commended for its choice to use the VCLT, but could be criticized for paying disproportionate attention to the text. It is clear that, in the absence of legislative guidance to this effect, the WTO judge remains free to decide on the dosage of the various elements. In other words, the WTO judge *must* use all elements featuring in Art. 31 VCLT, but is free to decide *how much* use of each one of them he/she will be

making. In what follows, I will try to advance some arguments in favour of paying, as a rule of thumb, particular attention to the context. The context, it is reminded, comprises: the *immediate* context, that is, all of the text of an agreement (its preambles and annexes included); and the *historic* context, that is, other international instruments which have a particular historic link with the agreement under consideration.

*First*, the immediate context has all the advantages that a teleological interpretation offers, without knowing of its disadvantages. Adopting a teleological interpretation, a judge will ask the question 'why had an agreement been signed?' The most common problem when following this approach is, that the judge might neglect the *means (instruments)* committed to reach the particular *ends (objectives)*. A teleology-driven judge might thus end up acting as a law-maker imposing rights and obligations that the signatories did not wish to impose on themselves in the first place. A judge thus will be appropriating an institutional role which was not designed to be its own. A look into the all of the provisions of an agreement will illuminate the judge and as to *means (instruments)* committed, and as to the particular *ends (objectives)* sought.<sup>38</sup> The judge will thus be behaving like a true agent, respecting the balance of rights and

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<sup>38</sup> Quoting from Jimenez de Aréchaga (1978):

It is important to remark that 'the object and purpose of the treaty' is mentioned not as an independent element as in the Harvard Draft Convention but at the end of paragraph 1. This was done deliberately, in order to make clear that 'object and purpose' are part of the context, the most important one, but not an autonomous element in interpretation, independent of and on the same level as the text, as is advocated by the partisans of the teleological method of interpretation.

The inevitable conclusion here is that teleological interpretations have no place in the VCLT-system. Good institutional arguments support such a conclusion: Principals might be provided with a disincentive to assign third party adjudication to their contracts, if agents undo the original balance of rights and obligations in order to better serve the purpose that they, the agents, see as the driving force in a particular contractual arrangement.

obligations as struck by the principals and providing them with the incentive to continue looking for gains from inter-state cooperation.<sup>39</sup> Additionally, a contextual interpretation will usually satisfy the judge's question 'why was an agreement signed?' This is probably the most important question that a judge will ask in any dispute submitted. The various terms used are meant to serve a particular function, to help realize the objectives sought by the signatories. *Their value is therefore contingent on this function.* When, for example, the SCM Agreement was signed, it was not meant to reduce the role of state to redundancy; it was rather meant to provide a disciplining of trade-distorting subsidies. This understanding of the SCM Agreement entails for example, at least in the view of Grossman and Mavroidis (2005) that the question to ask in a pass-through scenario is whether a benefit continues to exist after the sale of a subsidized entity, *irrespective* of the price at which the sale took place. Had the AB followed this route, it would not have to commit two mistakes on the two privatization cases *and* provide two mutually inconsistent reports as well.

*Second*, the historic context will shed some additional light (historic) to interpretative issue as the panel and the AB realized in the context of the *EC – Chicken Cuts*: absent a thorough review of HS-related documents, it would have been simply impossible to understand whether the term 'salted' referred to meat salted for preservation purposes or otherwise.

## **4.2 Add to the expertise**

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<sup>39</sup> A contextual interpretation would, for example, eliminate the likelihood that the AB reach a decision similar to that in *US – Softwood Lumber IV*.

The WTO contract deals with some questions which are predominantly economics questions: what is a subsidy, for example, or, how should we calculate dumping margins, or how should injury be established when recourse to contingent protections is made, to name a few. Response to such questions requires an expertise that lawyers not trained in economics simply do not possess. Informed judgments on such issues crucially depend on economics input. Yet, the AB (as is the case with most panels) do not count economists in their ranks, neither among judges, nor among their clerks. Recourse to economics expertise has taken place informally so far in WTO adjudication, and usually when recourse to countermeasures is being requested.<sup>40</sup> Yet, as indicated here, recourse to economics is also appropriate at a much earlier stage, if mistakes are to be avoided (as it should be the case). Take the *US – Offset Act (Byrd Amendment)* report, to name one of the many examples on this score. Horn and Mavroidis (2006) show that subsidization of US companies might provide exporters with the exact opposite incentive that the AB had contemplated: to dump even more aggressively. It would be highly advisable that the AB hires some economists or, assuming that the institutional arrangements in place allow it, establish formal links with the Economics Division of the WTO. Judges will benefit from economics expertise which will complete their legal expertise and lead to informed outcomes.

### **4.3 The merits of brevity**

Many reports could have benefited from extra editing. Reports can become more user-friendly and this is probably the key towards their wider effective

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<sup>40</sup> See, on this score, the analysis in Keck (2004).

dissemination. Brevity in the expression takes time of course, and the AB already operates under impossible deadlines.<sup>41</sup> One can reasonably expect better quality-reports, if the deadlines become more realistic. So, there is probably a trade-off here between more user-friendly reports (and less strenuous deadlines) on the one hand, and the willingness of the WTO Membership to secure a quick outcome.<sup>42</sup>

#### **4.4 Can the system still afford part-timers?**

The workload of the AB has been quite substantial since its inception. Even though the AB members judge in divisions of 3, they are being informed and participate in discussions concerning all cases submitted for appellate review. At the same time, none of the AB judges is employed full time as judge. Irrespective of the question of conflicts that might arise from their other professional occupation, the necessary by-product of the existing arrangement is that a heavy burden is placed on the shoulders of the AB Legal Affairs Division. Strict deadlines, important workload and part-time judges is not a guarantee for successful outcomes. Since the first two elements seem to be inflexible (there is no willingness to renegotiate deadlines, and after 10 years of experience we have stabilized at 7-8 cases *per* year), it is high time that the WTO Membership

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<sup>41</sup> The AB must complete its report within 3 months (statutory deadline). A review of the record so far suggests that this has indeed been the case, see the Horn & Mavroidis (2006), Descriptive Statistics at [www.worldbank.org/trade/wtodisputes](http://www.worldbank.org/trade/wtodisputes)

<sup>42</sup> The discussion, of course can become more complicated if one adds the influence that the absence of retroactive remedies exercises in this context. Faster procedures make the need for retroactive remedies less urgent. On the other hand, distortions created by prospective remedies should be addressed in that context only. Imposing unrealistic deadlines (the AB managed to observe them so far, with very few outliers, but panels have not) leads to both poor(er) reports and prospective remedies.

rethinks the current arrangement and start contemplating the introduction of permanent judges.<sup>43</sup>

## **5 (Instead of) conclusions**

The WTO's most important contribution so far has been the WTO itself: the organization is there and promotes international cooperation in a narrow but ever-increasing in coverage field. The emergence of disputes is probably the natural outcome of the existing incompleteness of the underlying contract, and their adjudication has so far taken place in a highly cooperative manner. The AB should be credited for its contribution on this score. It can probably do even better in the future if it starts thinking on some of the issues highlighted in this note.

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<sup>43</sup> Some people might argue back that the current 'informality' is one of the reasons for accepting a compulsory third party adjudication in the first place. It is difficult to assess the validity of this argument.

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