

The Judicial Evolution of the WTO Appellate Body

Patricia M. Wald—WTO at 10 Conference – April, 2006

I'm not entirely certain what my function is here today. I am certainly not a WTO expert and if I make errors in my description of WTO processes, please forgive me; my knowledge is wholly derivative from reading and speaking with those who do know what they are talking about. I have had over 20 years experience as a U.S. appellate judge and two as an international judge at the ICTY (Yugoslav War Crimes Tribunal). What I will try to do briefly is to extrapolate from my judicial experience those parts which seem relevant to the acknowledgedly unique and *sui generis* nature of the WTO's Appellate Body (AB) and which, of course, is not a traditional court—not yet anyway—might be ill-advised to act like one across the board, but which nonetheless has significant attributes of a court and more power to enforce its decisions than do many international courts. Selective incorporation of judicial attributes as they fit its needs is probably a preferable alternative.

I. The AB's Interpretive Role

From my readings I surmise that the WTO Appellate Body is a hybrid fulfilling many of the functions of a traditional court in the resolution of disputes and the enforcement of voluntary agreements between countries in

international trade; the DSU (Dispute System Understanding) has transmogrified from a diplomatic to a quasi judicial body. It has some aspects of an arbitration court, but I gather the AB has viewed its role as being much more than that, as a vehicle for bringing a rule of law into the world of international trade. Some say it is in midpassage on its way to becoming a “world trade court.” The role of national courts interpreting or enforcing private contracts is, of course, mainly limited to ascertaining the intent of the parties and insuring the contract itself does not violate the public policy of the jurisdiction in which it was made or is being enforced. The WTO’s resolution bodies, on the other hand, unlike national or local courts, are the only game in a global town; the parties before it are not private companies or individuals; they are sovereign governments, big and small. The AB is not a stand-alone court; it is an intrinsic part of the WTO, a comprehensive system designed to affirmatively encourage trade and to limit excessive use or abuse of economic power by trading partners. Although, like national courts, it aims at guiding parties’ actions by a set of uniform rules or principles for interpreting and enforcing contracts, it must also be continually sensitive to the major consequences of trading regimes it deals with, consequences immensely overshadowing the cases of private trading with which national courts are involved. These consequences likely

have more drastic effects on the populace of the countries involved than the laws their parliaments pass or the decrees of their presidents and kings. Thus it seems inevitable to an outsider like myself—though I recognize it is a controversial proposition for many—that decisions between disputing WTO parties must be imbued with an overriding attention to general principles of public good or at least avoidance of public harms. There are, I am told, generally agreed-upon principles of trading laid down in the Uruguay Round and other fundamental WTO and GATT documents and it is the job of the AB to make sure they are complied with in the execution of all agreements. This in the parlance of international public law is your own version of “customary law.” But the question appears to have arisen, is that enough? Are there other principles of public international law relevant to the broader context in which these agreements must operate, of which the AB should take cognizance in deciding parties’ obligations and remedies under the agreements? Can the AB interpret and apply WTO agreements in isolation from the growing body of international treaties, agreements and customary norms that have exploded on the scene in the past two decades? I would think the answer is No. No court like no man is an island. Peter Sutherland has sagely commented in “The Future of the WTO”: “For the first time in history, the world can embrace a rule-based system for

economic coexistence.” But on what criteria should the rules be based? Some commentators I have read presciently urge caution in using the WTO dispute mechanism, including the AB, to impose on parties obligations outside the clear perimeters of the agreements themselves lest the entire WTO bargaining structure collapse under the weight of unpredictable burdens imposed from Platonic Guardians on high, their critics point out that although the DSU says that interpretation of the agreements are to be “in accord with customary rules of interpretation of public international law” acceptance of the Vienna Convention on the Interpretation of Treaties is sufficient to meet that standard and the DSU is itself emphatic that the AB may not “add to or diminish rights and obligations provided in covered agreements.”

In reading some of this commentary, I was struck by its familiarity and its similarity to the interpretive dilemmas that national and international courts encounter in their course of interpreting constitutional, statutory or treaty provisions. We, like you, have our textualists, our proponents of “dictionary jurisprudence,” our “evolutionaries,” and our “consequentialists.” We, like you, have those who would look for guidance at the drafting history of the agreements and those who would vigorously oppose such forays as “ransacking through the ash cans of history.” (Our

current Supreme Court—the nose counters say—is running 5-4 in favor of the contextualists, but that could change quickly.) Even the textualists of course admit to exceptions for cases where the “ordinary meaning” of words brings about absurd consequences or where there are patent ambiguities in the wording. And we have countless canons of construction, often going in opposite directions, designed to help judges navigate the ambiguities. Thus I did not find it surprising that as the AB comes closer to resembling a judicial creature, its paramount goal of creating and maintaining a uniform body of rules will plunge it into so many of the interpretive debates that have consumed our national and international courts.

There is, I have found in my personal work, a qualitative difference between being a judge and an arbitrator. In the latter, one’s goal is plausibly limited to one of honoring the intent of fairness to the parties to the dispute; in the former, one is always conscious of the duty owed to the greater legal community—be it local or international—to insure that every judgment fit into and not represent an aberration in the broader rule of law context. As the AB approaches the judicial model, I believe that institutional mindset will be increasingly evident.

I would mention, too, what I think may be a difference between the attractions of textualism in the national and in the international court

debates. In American constitutional law at least, textualism is tied to fidelity to a specific document and is closely related to originalism—what the Founding Fathers in their own time meant the words to mean. In the international law area, except for treaties, the preeminent concept is customary law which is based on State practice (to be discerned in empirical inquiries) and so constantly evolving. One can of course reasonably argue that an agreement is akin to a treaty, or even a constitution, but I doubt that international agreements, no more than treaties, can entirely escape the imperatives of changing and evolving norms affecting other vital aspects of international relations. Nor can one discount the influence of transborder judicial exchanges, symposia and commentaries that are now quite prevalent among judges of all kinds of international courts in nurturing mutually sensitive judicial attitudes.

In the end, although the AB's situation is acknowledgedly different from a national or even an international court's in many ways, I believe the differences militate toward a broader lens than dictionary jurisprudence. Virtually the entire law of international trade is potentially in the AB's hands; WTO parties must use its processes when they disagree on the meaning of terms in their agreements and in theory they must comply with its enforcement decisions. That monopoly can be a disadvantage as well as

a benefit. While it enhances the prospect of decisional coherence, it minimizes the AB's own exposure to other ways of thinking or to other decisional options.

In the U.S. and in most other countries an appellate court, like the D.C. Circuit on which I served, has several other peer courts to look to for ideas and guidance. Even at the apex, our Supreme Court itself benefits by this percolation process; by the time it chooses to make a definitive ruling, it usually has access to the best and the brightest of lower appellate court jurists. In the international arena as well a single treaty may be simultaneously or sequentially interpreted by many of its parties' courts before an authoritative interpretation emerges. International courts interpreting international humanitarian law treaties and the law of war come in clusters too. It may thus behoove an exclusive body such as the AB to assure itself—perhaps more vigorously than a national court or one of several international courts operating in the same substantive rules—that it has arrived at an interpretive result that not only accommodates parties' intent but also does no unnecessary harm to international norms of behavior in other vital areas of the trading parties. Admittedly, the AB is not a “nanny” or a “guardian angel” tasked to insure all national interests of the parties are taken care of; the parties after all are sovereign governments that

have made voluntary agreements, and they are expected to comply with them. But when they do disagree about what these agreements require, and enormous consequences loom not only for a losing party but for other parts of the trading world as well, the AB most needs be extremely attentive to the real world impact of its judgments. The parties can reasonably be assumed to have bargained not only in the shadows of WTO or GATT principles, but of prevailing norms of international law to which as sovereign nations they are expected to comply. It is hard to see how one single body can administer a worldwide set of trading rules in any other way. The rule of law cannot be so rigidly compartmentalized.

There is another more prosaic difference between national courts and the AB—one which applies more broadly to all types of international courts. By and large agreements that come before national courts are made by individuals or companies embedded within the same culture—that includes business practices and language itself—the meaning of words. With the WTO, negotiators from different countries do not have this common cultural or linguistic background; they may have different concepts or local priorities in mind over and above the literal translation of their words. I encountered this “lost in translation” phenomenon at the Hague when I listened to witnesses being questioned in one tongue, answering in another, and judges

listening to them in still a third. Dictionary jurisprudence in such a case would demand not just reference to one tome but a comparative exercise of subtlety and expertise in several linguistic cultures. I was repeatedly told at the ICTY that the French and the English version of rulings differed in important respects. Translation problems are inevitable in international dealings and must be resolved one way or another but they should make judges even more cautious in concluding that disputed meanings can always be solved by ordinary meanings alone—whatever ordinary meaning means in the international context.

But many of the problems national and international courts encounter in construing statutes and treaties are similar to those the AB encounters with complex agreements. Inevitably there are gaps—situations which the parties did not think about or intervening events, important and unforeseen happenings that come later and change the landscape dramatically from which the parties thought relevant to bargain about originally. Call it “activist” or not, the interpreting court must come up with an answer so that the show can go on, one that is as close as possible to the parties’ expressed intent in what they did cover, that keeps the agreement integral as a whole but that takes account of a new situation in a way that does not create an absurd or potentially harmful result. These are the main goals of statutory

interpretation and they seem equally applicable to international agreements. The AB is guided in its interpretive functions by the Vienna Convention, which calls for contractual terms to be construed in accordance with their ordinary meaning read in context and in light of their object and purpose. Candidly, that formula affords a great deal of leeway to take all relevant factors I have mentioned into consideration. Going outside the agreement—the Convention says—is permissible only when terms are ambiguous or obscure or may produce unreasonable results (Articles 31-32). As national and international court experience shows, however, ambiguity is usually not too difficult to find when a dispute arises to the level of invoking the DSU mechanisms. Although if terms are indisputably clear, they must be adhered to despite all but the direst consequences, when they are not so clear, I see nothing in the Convention to prevent the AB from realistically considering the way the agreements will operate in a world alongside other vital policies of international comity.

Let me give you two examples from my ICTY experience of this kind of line drawing. The ICTY Charter, drawing on Geneva Convention and Nuremberg law, defined deportation as a crime against humanity. Deportation has traditionally been interpreted as forcing peoples out of one country and into another—over national boundaries; the question of late has

arisen whether it also covered forcing people from one region of a country to another region of the same country. The underlying harms are certainly similar yet the ICTY held that the accepted international meaning of deportation as expelling people across national boundaries prevailed. That was what the signers of the Convention meant. Forcible expulsion inside a country might also be against international customary law but it could not be prosecuted as deportation. Ordinary meaning prevailed even if the object and purpose of the ban on deportation might have supported an expanded meaning. On the other hand, the Convention against Genocide, repeated verbatim in the ICTY Charter, defined genocide, the most heinous crime of all, as committing certain acts with an intent to destroy in whole or in part an ethnic, racial or religious group, as such. Here the question was whether the Bosnian Serb expulsion of Bosnian Muslim women and children from Srebrenica at the same time the men were herded for mass execution and secret burials amounted to an intent to destroy the group of Bosnian Muslims as such.

Admittedly this scenario was not the paradigm of the Holocaust situation which gave rise to the Convention—it was a course of ethnic cleansing gone berserk. Yet the words of the Convention—or so we found and the Appeal Chamber upheld us—could reasonably be construed to cover

the situation; our theory being that by destroying the men and expelling the women and children the Serbs knew and intended to destroy the Muslim community in Srebrenica; the women in this paternalistic society would never return by themselves and the goal of the perpetrators—to destroy the ethnic group as such—had been accomplished. Some disagreed with our reasoning, but I think it illustrates the legitimacy of resort to object and purpose where there is no impediment in the relevant language’s meaning that would prevent it from covering a situation not explicitly contemplated by the drafters but still securely fitting within their goals. I think that is what judges should be about and I suspect it is what the AB probably does already and should do.

One of our revered justices, Benjamin Cardozo, dismissed judges who see their duties as matching colors of the case at hand against colors of sample cases; he said “no system of living law can be evolved by such a process, and no judge of a high court, worthy of his office views the function of his place so narrowly . . . it is when the colors do not match . . . when there is no decisive precedent, that the serious business of the judge begins.”

I have not read all of the AB’s decisions by any means but I was told by some experts to read the Shrimp-Turtle ruling as exemplifying its interpretive mode. I found it fascinating reading indeed. There, as you all

well know, the AB took issue with the panel's application of the Vienna Convention's mandate to follow the "customary rules of interpretation of public international law" explaining that the Panel did not follow the required steps in the right order. The Appellate Body began with the Vienna Convention formula:

As we have emphasized numerous times, these rules call for an examination of the ordinary meaning of the words of a treaty, read in their context in light of the object and purpose of the treaty involved.

It then went on to rule that the words here involved—"unjustified and arbitrary discrimination"—which appeared in the chapeau of Article XX dealing with authorized exceptions to the general nondiscrimination principle must be interpreted in this immediate context. That context is where their object and purpose must first be sought, not in the context of the treaty as a whole, to which the Panel had initially referred. Only if in that more immediate context the words are equivocal, should the object and purpose of the treaty as a whole be consulted. In this case the immediate context which should have been referenced set out the specific kinds of authorized goals for which exceptions to the nondiscrimination principle might be authorized. The Panel's reference to the object and purpose of the larger WTO/GATT treaties was wrong. Since the Panel had reversed the correct order of analysis, and stopped at the chapeau, the AB went on itself

to perform the correct analysis of whether the U.S. measure in dispute qualified under the specific areas of possible exceptions. In the course of that analysis, it decided that “natural resource” protection included living organisms, like sea turtles, and was an “evolutionary” not a static concept “While treaty concepts are by definition evolutionary—their meaning cannot be unaffected by subsequent developments of law. An international instrument has to be independent and applied within the framework of the entire legal system prevailing at the time of its interpretation.” It cited ICJ decisions, the 1994 GATT preamble, the WTO preamble, the preamble to the Rome Statute establishing the European Union, even the negotiating history of the chapeau. It cited as well the international law tenet that states are presumed to be acting in good faith in implementing their rights and finally in concluding that the U.S. was in violation because of the way it went about achieving a legitimate end, it also looked at the empirical practices of the U.S. in certifying compliance with its restrictions on shrimp fishing. In short, though, I may have oversimplified or even misread some of the reasoning; it appeared to me that the AB had been able, within the confines of the Vienna Convention formula, to employ every tool of interpretation that I am familiar with in U.S. or international courts to arrive at a reasonable if creative and in the eyes of some controversial result.

Construing agreement terms through a wider lens than the dictionary is particularly necessary for the AB, given its solitary status as interpreter and dispute resolver. Otherwise there is virtually no counterpart to contract rigidity—no way to make the agreements work in a continually changing and volatile world. Short of renegotiation or amendments to the original agreement, there are no other fora for righting unintended wrongs or meeting unforeseen situations. Unlike national courts, the DS is not part of a multicultural governance system where a Congress can legislate a different rule if there is widespread dissatisfaction with the current one or indeed even override a private agreement if necessary to the public interest. In the WTO there is potential resort to the entire body for a “definitive interpretation” of a provision under DSU Article 3.0, but I understand that route is seldom if ever used; the WTO rulemaking process itself is cumbersome and complicated and the so-called “consensus” requirement for all agreements and decisions is an inverted one—unless everyone disagrees, the agreement or rule goes forward. This system puts a high premium on the AB decision’s correctness in the first place, since the error-correcting mechanisms are few and not easily invoked. Some critics argue that all of these factors—evidencing a lack of checks and balances found in democratic governments where courts are only one of three or at least two powerful and independent

branches—mean the AB should be more humble in its rulings, sticking more closely to the terms of the agreements and bowing out of any attempts to evaluate how the agreements impact the policies of the trading partners on other affected notions or interests. My take—again as a rank outsider—is that given its solitary status it needs more urgently to survey all the potentially relevant factors, including impact, in locating the surest interpretation of the agreement.

Nowhere, of course, does the need for according the interpreter discretion in accommodating the words to the situation come into play than in the area of remedies for a breach. I read that the sovereign party loser generally is allowed to choose its own means of compliance, subject to time limits and possible referral back to the first instance panel. But ultimately the AB can give the party in whose favor it has ruled the right to impose retaliatory trade sanctions on a noncomplying party. But I also read that disputes over remedies are becoming the most frequent source of DS business (53%); and there are even proposals to allow assessment of litigation costs and more liberal use of compensation as part of remedies. Unlike national courts, the DS cannot award damages for past wrongs; relief is prospective only and some worry that remedies in the form of retaliatory suspension of concessions calculated on the basis of injuries from breach

rather than expected benefits from the agreement can become too tolerable an alternative to compliance for some parties. In regular courts, judges exercise maximum discretion in the areas of remedies, allowing them to consider, *inter alia*, gravity and circumstances of breach, degree of injury to the wronged party, requirements to get back to the parties' original expectations, injuries to third parties. But ordinarily they do not have power to order specific performance if the parties refuse since damages are assumed to compensate the injured party. Selecting remedies even more than substantive law interpretation is not a mechanistic exercise but must be subtly attuned to the individual circumstances of the parties and the context. Some of the most troublesome controversies in national courts arise out of implementation disputes, especially when national courts issue decisions of vast scope against governmental or private institutions. It took decades to implement the mandate of *Brown v. Board of Education* against segregation in our public schools; not everyone is satisfied the job is done yet. Other court mandates to deinstitutionalize large-scale asylums for the mentally ill or to limit prison populations, have taken frustratingly long years to achieve results. The court-ordered breakup of the AT&T communications monopoly provided a decade of follow-up court cases on implementation. The use of court-appointed monitors to report on and make recommendations in this

area which overworked and remote appellate judges simply don't have the time or resources to do has proven essential in those suits. Whether that device has any application in the WTO arena, I leave to you experts. But a comfortable component of judicial discretion has proven indispensable in the remedies area—subject, however, to serious deference to the effect of remedies on the internal domestic polity of the parties—a subject I will return to later.

II. The AB's Independence

There is one indispensable aspect of traditional courts—national and international—without which no court can command the respect and authority that is its due. That is the courts' integrity and independence from outside pressures, either from other parts of the governance scheme in which it serves or from individuals potentially affected by its decisions. In the past, party-affiliated panels have been the more frequent decisionmakers in the international economic and investment fields. The AB's move away from that model is another signal of its evolution toward a court model. The DSU provides that no member of the AB can be affiliated with any government, and that members of both the AB and Panels must not have conflicts and may not be approached *ex parte* about cases before them. There appears, however, still to be some concern about where members of the AB can go to

get their advice and help; now, as I understand it, that comes from a separate unit of the WTO Secretariat, the body which also dispenses advice to the negotiators and administrators. Independence is inextricably tied to competence and the AB judges are required to be experienced in law and international trade. There are somewhat similar requirements for international courts though not in my experience always followed. The AB judges serve for four years; in our national system judges have life tenure and in the international courts renewable terms vary between four and nine years. Four years seems a short time in which to master the processes and intricacies of the DS system; a longer term, especially if terms are staggered, would give more stability to the court as a whole. Business permitting, full-time judges are generally preferable to part-time ones; judging is an intense process and in my experience benefits from full-time commitment.

Permanent judges almost inevitably mean more of the judges' time and effort goes into the product and usually that means less of the advising staff's. The proper balance between judge and judge-adviser input into decisions is a subject of endless debate within our own systems (and in the international courts as well). No one expects the judge to research and write every word of hundred-page-long rulings, but parties and the public do expect that the main thoughts and reasoning and reactions to parties'

arguments shall be the judges’; that they shall not merely review or edit what is basically a staff-created document. My experience at the ICTY as well as on the D.C. Circuit convinced me of the importance of judges having the dominant say in picking their advisers rather than being assigned them by a secretariat. The relationship between a judge and adviser or law clerk should be an intense one in which views are candidly exchanged and written drafts fiercely revised. The adviser needs to have unqualified loyalty and confidence in the judge; he should not be hedging his bets because someone else will ultimately evaluate his worth (this was a feature of ICTY practice I did not appreciate). The selection of ad hoc first instance panels by the parties (and the Director General in an impasse) cannot aspire to the traditional standards of judicial independence, but that lack in the Panels makes the AB’s reviewing function and their independence in constructing it all the more important. It probably accounts as well for the rapid escalation of the AB’s prominence in the overall dispute settlement scheme, and perhaps too for its “razor-like” approach to its reviewing function. Proposals to make the first level Panels independently selected or at least drawn from a standard list of approved persons I understand to be in the works and seemingly worth serious thought.

Another aspect of AB operations contributes to its independence but also causes risk of potential isolation. That is its ability to make its own rules of procedure which I understand it has taken advantage of to provide detailed requirements for written and oral practice. In our federal system, a special committee consisting of judges, academicians and practitioners appointed by our highest court drafts rules of procedure for all federal courts; the rules are laid before but not voted on by both the Supreme Court and Congress before going into effect. (They can be supplemented by local court rules not inconsistent with the uniform ones.) In international courts, the practice varies; the U.N. courts make their own rules in plenary session; the ICC by contrast has rules adopted by the Assembly of State Parties (composed of ratifying states). There is something to be said about outside input into procedural rulemaking; too-easy amendment by the courts themselves keeps them inward looking at what problems they have encountered rather than the way the rules affect those who appear before them. It is judicial independence that distinguishes a true court from other decisionmaking apparatuses. The AB seems to qualify in essential ways though its own advisers might secure that label even more frequently.

III. Precedent and Deference

A primary function of an appellate court is to give predictability and stability to the field of law it judges. In the Anglo-Saxon system this is done in large part by precedent or *stare decisis*; subsidiary tribunals follow the rulings of higher courts in their jurisdiction and they follow their own prior decisions unless they specifically decide to change direction, and that kind of change must be done by the entire court sitting *en banc*. The highest court can change its precedent but that is something done relatively rarely and with great aforethought and discussion. Civil law courts and international courts do not accept prior rulings as binding, although at the ICTY appellate branch rulings do bind trial courts. Additionally, in the Anglo system, a court's ruling becomes part of the law of the jurisdiction and so binds future parties in similar situations, not just the parties before it in that case.

As I understand it, the AB's decisions do not have precedential effect or automatic applicability beyond the immediate parties, though so far the AB has not itself deviated from prior opinions. Sitting in panels of three, it has no *en banc* procedures as such, though the three panel members seek out the views of the other four before issuing decisions, and, of course, all AB decisions are circulated to the entire WTO membership under the consensus rule. In our federal appellate system we circulate appellate panel decisions

to the entire court before issuance, though any objectors would have to summon up a majority of the court to stop the opinion from issuing. I am not sure if the formal status of prior opinions as precedent is indispensable to the predictability and stability of a court's jurisprudence; common law courts can and do reverse themselves but the precedent factor means that they must think doubly hard before they do it and receive the positive approval of a majority of the entire court. This kind of cautious ruling can be accomplished informally as well as formally if the mindset is there, and the appellate body is committed to discussing carefully why it has taken a different direction based on experience and proven consequences or new intervening circumstances or directives and policies. That is basically what has happened in the international criminal courts and the ICJ which do not have precedent as such but which built their jurisprudence by careful accretion and avoid sudden departures from prior rulings.

Predictability and stability are also connected closely with principles of deference, and in the case of the WTO as with national courts there are two kinds of deference—deference to the panel whose rulings and findings are being reviewed and deference to the sovereign nations who have negotiated the agreement. The latter deference is akin to that our courts give to the policy choices of the executive and legislative branches so long as

they stay within the governing law. But obviously deference to the panel involves for the DS system a somewhat different calculus than in national or international courts. In traditional court systems the court of first instance is accorded deference in factfinding because of its superior ability to see and hear witnesses first hand, but no deference is accorded on legal issues as to which the appellate court is given the final say. There seems to be a difference of opinion in the literature as to how much factfinding the first level panels at the WTO do on their own or whether they do or should secondguess the factual submissions of national authorities. Although there is no discovery regime as such, the panels can require the parties to come forth with particular forms of evidence at the risk of adverse inferences if they don't. Additionally, the emphasis of the panel process is to explore fully settlement possibilities, by mediation or otherwise. And, of course, the panel is not independently selected. All of these factors—again to an outsider—militate against the kind of substantial deference on the part of the AB toward the panels that one would expect for factual findings in a hierarchical court system.

Although the AB does not usually consider issues not raised below or take new evidence, they have of course felt free to reexamine the panel's reasoning in detail. According to one commentator, the AB "wields a sharp

knife when reviewing . . . legal analyses.” There appears to be no generally accepted or at least explicit standard of review in the DS system, such as harmless error or the U.S.’s *Chevron* standard of “reasonable interpretation,” for review of agency interpretation of statutes; presumably, the AB reviews on the basis of the DSU mandate for the first level panel, that it “make an objective assessment of the facts of the case and the applicability of and conformity with the relevant agreement.” That standard does seem to contemplate some review of the way the panel has handled the factual evidence. Unlike our courts, the AB does not have remand power—we often send a case back to a lower court or to an agency if we think they missed a point or reasoned wrongly, thus allowing them to do it right the second time around. But with the AB, once a mistake has been diagnosed, the AB takes over and does the revised reasoning itself, driving the dispute to a final resolution as it did in the Shrimp-Turtle case where it said: “Reversal of a panel’s finding on a legal issue may require us to make a finding on a legal issue which was not adduced by the panel.” This *modus operandi* reinforces the AB’s need to vigorously examine the rationale below and any gaps or errors in it, for it will not have a second chance at the case. An explicit standard for reviewing panel decisions might, however, well be a salutary improvement and provide an additional source of

predictability for disputing parties. There is, for example, a case to be made for some higher degree of deference to national authorities' assessment of the effect on their country's polity of proposed trade remedies, and an expression of this principle might be a good thing.

My experience with the the D.C. Circuit's review of administrative agency adjudications and rulemakings may have some relevance here. The agency endowed with expertise makes a first cut on how to administer and interpret its authorizing laws. The reviewing court judges whether there is substantial evidence to undergird its findings (substantial is something less than a preponderance) and whether under the Supreme Court's *Chevron* doctrine the agency has made a reasonable (not the only one, not even the preferable one) interpretation of its obligations under the law. But most important, the reviewing court looks to see if the agency has taken a "hard look" at relevant aspects of the problem; if not, it remands to the agency for a second round. The analogy to AB-panel review is far from a perfect one; agency law presupposes one consistent body of personnel doing the initial administrations, whereas WTO panels vary from case to case; additionally, the agency has inherent expertise in the minutiae of the subject matter whereas panels are appointed for a particular case only. Thus, they cannot view any one case in the context of its effect on an entire area of subject

matter. There appear to be no grounds for allowing any reasonable interpretation to stand; the demands for consistency at the hands of the AB seem more controlling. The “hard look” approach as to how the panel has done its job, however, seems quite applicable although the AB then has to proceed to itself to carry out the hard look itself prior to arriving at a conclusion. From what I read, the AB already proceeds in somewhat that fashion, raising on its own issues of law that the panel may not have addressed, if it deems that necessary. It has enunciated a kind of “hard look” standard in the *Cotton Yard* case: Panels must examine whether the competent (national) authorities have evaluated all the relevant factors, examined all pertinent facts, plausibly interpreted the data and evaluated whether there is “adequate explanation” of how the facts support the determination.

IV. Transparency and Nonparty Participation

With rare exceptions, national and international courts proceed in public to hear the parties’ arguments and evidence and put their written submissions in a public docket. Their judgments are publicly issued as well. This transparency is generally thought to enhance the impression of impartial justice. Secret courts—though we still have some—have not had a happy history from the Star Chamber up to the present. Still, our regular

court systems recognize the need for confidentiality in the deliberations of judges, and there are provisions for closed hearings if witnesses' safety are at stake, or national security risks are involved in disclosing evidence or for trade secrets. Mediation and settlement negotiations are kept confidential even while a case is in progress in the courts. But openness is the rule. I understand that in the AB, submissions are public only if the party makes them so (as the U.S. apparently does) and proceedings are not open either at the panel or AB level. The case for confidential proceedings does not seem to an outsider to be a strong one—less so at the appellate than at the panel level where settlement is still the primary goal. It is hard to see how encouraging candor can be more compelling in this field than in court cases involving other vital governmental activities. An organization which has exclusive dispute jurisdiction in so vital an area as international trade has to enlist the trust of third parties and the public, and secrecy would seem to operate in the opposite direction. Judges can always be given discretion to close proceedings for cause or seal records for genuinely secret-worthy material. Related to openness, it is the practice of most courts to print dissents and to publish them with attribution. While there have been proposals in international courts not to allow dissents in order to project an aura of unified authority, those proposals have been rejected. Dissents in

national and international courts contribute to the accretion of good law in exposing difficult areas which may need rethinking and pose alternatives for reviewing courts or other courts facing similar problems. In the AB's case, although other courts will not be implicated, its decisions do reach a nonjudicial audience and dissents could provoke more refined decisionmaking in the AB itself and more enlightened criticisms in those noncourt arenas. I was happy to learn dissents are acceptable in the DS and think in one or two cases at least a panel dissent was used by the AB as a basis for its own decision. The authors are, however, anonymous, a not entirely satisfactory compromise. The closer the DS comes to the judicial mode, the more judges will need to be perceived as independent and accountable—even willing to take the heat if necessary.

I am aware that the panel and the AB's decisions are circulated for comment, but I do not know if those comments go anywhere outside WTO membership. One of the frequent comments I read is the need for WTO processes, functions, and roles to become more familiar to the non-cognoscenti, the politicians, the public. Certainly the WTO's continuous need for political and diplomatic support and more resources is tied to an acceptance of its worth and is not necessarily aided by an aura of secrecy about its *modus operandi*. The importance of the trade dispute resolution

process which takes front-page attention is a compelling counterbalance to the comfort of confidentiality. Protecting the negotiations themselves should be sufficient.

Greater openness also comes into the picture in WTO policies that encourage or discourage third parties—state and private—in registering views on a trade dispute. Third parties who suffer significant injuries from the agreement may have cognizable interests which would be regularly recognized in court proceedings. The ICJ accepts *amicus* briefs from third-party states and nongovernmental groups. The WTO process now allows other nations materially affected by a dispute to petition for inclusion in the proceedings; NAFTA allows third-party access in anti-dumping cases. But private parties who seek to file *amicus* briefs have, I understand, fared disparately in different cases, their petitions sometimes being considered, sometimes rejected out of hand. *Amicus* participation is a thorny issue; too many unsolicited *amici* can create paper blizzards even when the judges choose not to read them. Requiring advance permission to file makes for a two-step process and more work for the court as well, and has basically been abandoned as a control technique by the U.S. Supreme Court, who let them in and leave the task of sorting the gold from the dross to the Justices' law clerks. In an exclusive a forum such as the AB, it may also make sense to let

the *amicus* be filed; state parties certainly have their own interests (be they political or economic) in advancing their arguments; occasionally, maybe even frequently, private interests have very relevant things to point out that do relate to the terms of the agreement, especially to its consequences. The AB certainly has the right to read or not read the *amicus* briefs and do with them what they will.

I cannot help but interpose here an analogy from public international law in its transition from a jurisprudence based on relations between sovereign states to one dealing with the rights of individuals within those states—not, of course, in all respects but in many important ones. At the other end of the spectrum, non-state groups have become principal players in the global fight on terrorism. I have even heard emanations that international trade now has significant private components that do not involve sovereign nations as such. If true, this development seems to accentuate the need for nongovernmental voices in the process to assure an informed and aware AB. Letting in those voices can, of course, proceed on a pilot or limited basis to assess any increase in workload or resource needs. But the age of sovereign nations as the exclusive players may be passing in trade as well as in individual human rights, and terrorism and the AB may

want to keep abreast of these developments. *Amicus* briefs are one way to do that.

V. Speed and Style

Justice delayed is justice denied, the old adage goes, and courts everywhere have struggled to dispense speedy justice—not always successfully. In the States, we have a Speedy Trial Act with definite deadlines for criminal cases but in civil cases we have only guidelines and the threat of publication for judges who don't finish their cases in a timely fashion. I do have to say my experience with international courts is that they are relatively slow—better of late than in my time at the ICTY when the average trial took over a year. Even given the complexity of international crimes, I did not think they need take so long. Thus, I was pleasantly surprised by the timelines of WTO panels and appeals, even though there are critics who think they too are not fast enough. As I understand it, AB review is supposed to take no longer than 60-90 days though 120 is the more realistic average. At the trial level, parties, after a consultative period, are given 90 days for their written submissions after which a first hearing is held, and an interim report detailing arguments is circulated. Then a second hearing is held and a final report issued for comments. Most panel reports are circulated in 12 (not 9) months. Appeals may be noted but the entire DR

process is scheduled to take no longer than 15 months. The progress of a case through appeal in most U.S. courts takes longer—bordering on two years, so you are ahead of the game. It is also noteworthy that as time has gone on, appeal rates have been going down. An outsider might guess that as the AB's jurisprudence becomes more predictable, the urge to appeal as well as the need to do so lessens.

A brief word on style. The reports and decisions of the DS system at both levels have been criticized as “long winded and tedious at best and nearly incomprehensible at worst”; their length has gone from an average of 7 pages in the sixties to 184 in the nineties, the worse being one coming in at 579. One commentator pleaded with drafters to use ordinary English or French, not Kabuki. Unnecessarily long opinions which repeat every party's argument at length and employ a rigid template with textbook language was also a characteristic of early opinions of the international courts although they have gotten much better over the decade. In the U.S. the higher up the judicial ladder, the shorter the opinions; the Supreme Court's rarely go above 10 pages. I found on the ICTY that part of the problem was that opinions were initially drafted by different staff members, revised by judges, and then patched together. While I was there we shortened the length of the lawyers' submissions to begin with (100 pages) and then changed the

template of our own judgments: to identify issues first, then find the facts, then discuss the legal effects of the facts rather than repeat all the parties' arguments. I do not claim we radically reduced the length of opinions, but it helped. Training in writing succinctly and clearly is worth the effort and is conducted as part of judicial education for judges back home. Better written and crisper opinions will get more press attention and command themselves to nonlawyer-political leaders. A thousand-page opinion no doubt displays time and effort but does not always get the attention nor understanding it needs. Eyes glaze after page 50. This is clearly an area where a little attention to crispness and good clear writing can reap enormous benefits for the credibility and accessibility of the DS process as a whole.

VI. Fairness

Lesser developed countries have not always had sophisticated negotiators or advocates; but their participation in the DS appears to have grown. An Advisory Center on WTO Law has been established to help developing countries with their consultations, provide general legal advice, and specific legal advice with regard to panel presentations and appeals. Our U.S. system has not gone that far, in truth, so can provide little guidance.

Legal aid is sometimes (although not always) provided for poorer clients through publicly and privately funded offices and special small claims courts are set up in which the judge takes a more active role in insuring justice is done. Damages or reparations are attuned to some degree to the means of the litigant; the law itself is not normally adjusted to account for the differing means of parties, though impossibility of compliance may on occasion be a defense, and the parties' circumstances are often relevant to the choice of remedies.

The participation of lesser developed countries in the WTO system is essential—thus practical access to the dispute resolution system merits special attention. There obviously cannot be a separate rule of law for LDCs but the concept of justice—certainly in the remedy field—can be interpreted to take account of individual country circumstances.

Conclusion

I hope these somewhat random and hopefully not altogether ill-informed observations have been of some interest to those of you who judge, practice and consult in an extraordinarily interesting and important new arena of international law. I suspect the AB is coming closer and closer to a judicial model—which may not be so bad an outcome. My essential message is that if the DS aspires to be a court, there are aspects of the

judicial mode it cannot avoid—independence, impartiality, transparency, practical access to those with interests at stake, but also sensitivity to the larger world in which it operates, and, most of all, accountability of the judges themselves for the hard decisions they must make.