THE JURISPRUDENTIAL ACHIEVEMENT OF THE WTO APPELLATE BODY: A PRELIMINARY APPRECIATION

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Introduction

This paper aims at stimulating interdisciplinary dialogue and debate about the decisions of the WTO Appellate Body. Instead of a survey of the rulings of the AB, I am going to select several basic interpretative choices of the Appellate Body, which are of broad systemic significance, and attempt to relate these choices to a more theoretical or conceptual understanding of the problematics of multilateral treaty interpretation. To be sure the choices in question have a basis in the positive international law of treaty interpretation, and much has been written about that, by myself and others (Howse, 2000; Howse, 2001; Mavroidis, 2000). Yet, while there is a significant theoretical literature on *compliance* in international law, there is virtually none on treaty interpretation. Partly, this is because in conceptions of international legal order strongly influenced by positivism, dispute settlement comes to light largely as one stage in or method of compliance, or "application" of fully pre-bargained commitments, rather than a continuous process of creation of meaning[1]; yet even those theorists of international law and politics concerned centrally with the construction of normative meanings by actors in the international system (Ruggie, Kratochwil) devote precious little attention to the problem of meaning in the context of treaty interpretation.

When we turn to the interpretation of statutes, constitutions, and contracts in domestic law, we find, by contrast, a large body of theoretical literature, drawing on sources as diverse as philosophical hermeneutics and information cost economics. Given the gap just described in the international law literature, I myself have turned, for instance, to theories of statutory interpretation to understand and evaluate some of the

[1] See for instance Lisa Martin (2001); Helfer and Slaughter (1997). An important exception is Johnstone (1991), to be discussed below.

jurisprudence of the AB on treaty interpretation. As appealing (and pervasive) as they may be, analogies between treaties and statutes, contracts, and constitutions, are highly imperfect and in important ways misleading. However, as we shall see in this paper, the exploration of what is problematic about such analogies may give us a window into the distinctive character of treaties as legal artifacts.

The AB's Marginalization of Preparatory Work as a Source of Legal Meaning

Early on, the AB made it clear that the main focus of the interpretative exercise would be discerning the "ordinary meaning" of the words of the treaty in light of their object, purpose and context, and that the *travaux preparatoires* would have little role in giving meaning to specific treaty provisions. This approach has been followed, with few inconsistencies. It is fully justified in positive law, because the customary rules of treaty interpretation, as reflected in Vienna Convention Arts. 31 and 32, allow resort to the preparatory work only where the meaning of a treaty provision is ambiguous after being interpreted in light of its object, purpose and context, as well as with the aid of other, relevant international legal rules and instruments in international law that are listed in Art. 31. Resort to the preparatory work is also possible to confirm an interpretation pursuant to the rules in Art. 32 of the Vienna Convention, or to avoid an otherwise absurd reading of a treaty provision.

While the AB has followed the approach of the Vienna Convention in making sparing use of the preparatory work, in so doing it has deviated from the GATT tradition whereby the *travaux* are a central and primary means of clarifying the meaning of provisions in the multilateral trade treaties. In fact, so strong is this tradition that John

Jackson predicted that it would inevitably be brought into Appellate Body jurisprudence (Jackson, 1998).

Let us put aside the governing force of the Vienna Convention as positive law, which has been specified explicitly as governing the adjudication of the WTO covered agreements by a provision in the WTO Dispute Settlement Understanding, Art. 3.2, which requires that WTO law be interpreted using the customary interpretative rules in public international law. Had the AB wanted to continue the GATT tradition, it might well have found ways of placing an emphasis on the *travaux*, for instance as a reference point for the "context" of treaty provisions, with *travaux* in the meaning of Art. 31 (and in fact on a **few** occasions the AB has brought in the *travaux* in just that way). Or the AB might have pointed to another clause in DSU 3.2, which says that interpretations of WTO law cannot add to or diminish the rights and obligations in the treaties. The AB could have said that in additional to applying the Vienna Convention to the interpretation of the covered agreements, 3.2 also charges it to insure that in the result it is not adding to or diminishing what has been agreed on, and that the *travaux* should play a major role in that exercise. In sum, while founded on a fairly plain reading of the positive law (if not the only reading), the AB's decision **not** to make *travaux* a central focus of treaty interpretation still represents an interpretive choice, which implies a certain view of the nature of treaty law in general, and perhaps WTO law in particular.

If we conceive of WTO law as a bargain, evidence of what was understood or meant at the time the bargain was made would seem intuitively to be of highest relevance to interpretation. Treaties are often referred to in international law literature as pacts or compacts, and certainly the original GATT could not but be understood to some extent in

terms of bargained reciprocal pre-commitments. The role of dispute settlement is to preserve the bargain, by identifying cheating or defection.

But, as Jon Elster notes, there are significant dis-analogies between individual and collective self-binding, or pre-commitment (Elster, 92ff). The preparatory work for a treaty is evidence of the views that treaty negotiators express to each other about the meaning of the bargain. But it is obviously not treaty negotiators who are binding themselves; it is "states". Treaty negotiators are agents, not principals, and as we know from agency theory, the interests of principals and agents are often imperfectly aligned.

This is only one dimension of the dis-analogy. When we say that states bind themselves, we have to ask, as Elster suggests, just who within the "state" is binding whom. Classic international law doctrine abstracts from just this question, making the "state" responsible for its obligations, regardless of what goes on within the state, either at the stage of treaty negotiation or at the stage of treaty implementation. Yet, if we want to focus on the "intent" of the states parties to the bargain as to the nature of their pre-commitment, we cannot but construct such an "intent" from the agency of actors within the state. The state itself has no will, or agency, apart from the actors within it (Kojeve, 2000).

One obvious focus, for democratic states, would be the legislature. Precommitments in treaties gain their legitimacy, in significant measure, as expressions of the democratic will by the people's authorized representatives. While legislatures are themselves collectivities, there is, at least in the United States, extensive jurisprudence and scholarship on the problem of discerning from legislative history a collective "intent" (see for example Eskridge, 1994). One view is that statutes themselves are bargains

between different interests and constituencies, and that they should be interpreted as such—in other words, the "collective" intent of the legislature really represents a bargain *within* the state between different actors.

If we move to the WTO treaty context, then it is fairly evident that if we want to discern an "intent" of the parties (apart from that objectively manifested on the face of the treaty), then to do that legitimately or accurately we would need to examine the treaties not only as inter-state but also as *intra*-state bargains. (And see generally, Putnam, 1988; Evans, Jacobson and Putnam, 1993). Thus, the intuition that apparently points to an emphasis on the preparatory work as evidence of the bargain that the parties "intended", when carefully thought through, implies a very different investigation, one that is quite problematic for an international adjudicator to attempt to undertake.

But perhaps there is a different explanation for the traditional emphasis on preparatory work in pre-WTO GATT interpretation. This is what one could call, using the concept developed by Ruggie, Adler and Haas, an "epistemic communities" explanation. As Johnstone explains in the context of interpretation of arms control treaties, an elite constituted by expert knowledge may be able to stabilize the meaning of treaty provisions over time, avoiding the complexity of discerning an "intent" from the acts and statements of multiple and complexly interrelated agents. This can work well if the negotiators of the treaty and its interpreters belong to roughly the same "epistemic community". And this was how the GATT basically worked. The trade negotiators, the mostly diplomat panelists, and (in the later years) the legal staff that advised them, belonged more or less to the same epistemic community of "GATTmen". In this context, the prioritization of the preparatory work as an interpretive source is entirely

understandable—an epistemic community is consulting, as it were, its own collective memory, its' archive. Of course, there was always a risk that this community's intuitions would lead to a politically unacceptable result, i.e. a result unacceptable to intrastate actors, including as represented by their legislatures, who saw the result as not reflecting their understanding of what had been bargained for. But the GATT allowed for political adjustment, in such cases, by non-adoption of panel reports.

With the new WTO system, this of course changed. The AB's membership is not primarily that of members of the GATT epistemic community, but generalist international jurists. These generalists, looking for example at the Sanitary and Phytosanitary Measures Agreement (SPS) in the early *Hormones* case, would see something quite other than technical rules to be interpreted and applied by trade experts (aided and abetted in the SPS case by the orthodox mainstream scientific community), but rather a "delicate and carefully negotiated balance . . . between the shared, but sometimes competing, interests of promoting international trade and of protecting the life and health of human beings".(para. 177). To privilege the view of an epistemic community basically concerned with trade liberalization as to the exact nature of this balance, would be inconsistent with the very nature of the treaty provision as a *balance* of competing interests. At the very least, one would need to take into account the views of the stakeholder community preoccupied with the competing value of protecting health.

In much of the domain of treaty law, treaty interpretation is decentralized. The diverse actors within states who have stakes in the meaning of the treaty rules, are themselves part of the process of interpretation and implementation (Martin, 2001). It is true that states can send treaty disputes to arbitration, and in some cases adjudication by

the ICJ. It is also true that some other regimes, such as NAFTA, contain complex, centralized dispute settlement arrangements. The WTO system, however, centralizes treaty interpretation in an adjudicator, the Appellate Body, which routinely rules on the meaning of the law on the basis of compulsory and exclusive jurisdiction (see especially DSU 23, which purports to eliminate determinations of WTO legality by other actors). As a matter of law, *authoritative* interpretations of the WTO treaties are made by the Membership, by a supermajority vote or consensus (WTO Agreement, Art. ??). But such decision-making rules present formidable collective action problems, and so there is little room for political or diplomatic adjustment of AB interpretations. In such circumstances, it is up to the AB itself, when interpreting those WTO rules that do reflect "delicate balances", to do justice somehow to the range of interests or constituencies implicated in the balance. The AB then seems right, conceptually, not to resort routinely to the preparatory work as decisive guidance, in as much as this work represents the record of one epistemic community, the community of bargaining agents for "states", which may have its own interests, not aligned with those of the principals.

The Choice of the Appellate Body to Reject Unwritten Structural or "Constitutional" Principles of Trade Law as a Source of Treaty Interpretation

In the *India Patents* case, the panel invoked what it understood to be some unwritten structural principles of GATT/WTO law, in order to determine the extent of India's obligation under the TRIPs Agreement, to provide a legal basis for foreign patent holders to protect or reserve their patent rights pending India's implementation of the TRIPs provisions on patents. The AB forthrightly rejected such recourse, contrasting the correct approach to interpretation, a focus on the exact words of the treaty text, with an

adjudicator's reading into the text its own conceptions of the general principles underlying the treaty regime. Thus, the AB found the panel in error when it referred to a principle of legitimate expectations in its interpretation of the TRIPs Agreement, stating that legitimate expectations are to be determined, in the case of violation complaints, by the text of the treaty itself. The AB reinforced this interpretative choice in the *LAN Equipment* case.

In making this choice, the AB was accused by many people of simple-minded literalism. Having downplayed the preparatory work, and now rejected the employment of unwritten structural principles to be discerned from the GATT *acquis*, did they really believe, naively, that they could discern a plain meaning from the words of the treaty itself? In a number of decisions, the AB did appear to be fulfilling this caricature with its infamous resort to the Oxford English Dictionary.

To understand what the AB was embracing here, we have to understand what it was *rejecting*, namely the notion of the GATT/WTO as itself an interpretive community that has an *internal* normativity or an internal *telos*, in the light of which the written positive law is to be interpreted and evolved. Whence could such a *telos* acquire legitimacy? From a "bien communitaire" underpinned by shared values? (Weiler, 2000). But the GATT/WTO interpretive community has a troubled relation to the community *affected* by the interpretive choices of the Appellate Body, the community of citizens of WTO Members. Is this last really a community at all, in fact? There is no global *demos*, in any real sense. The relation of citizens to the law of the WTO as it affects them is mediated, mostly, through the "state", as the site of interaction or interconnection.

between inter- and intra-state bargains (or in the case of the EU, the nascent European political community).

Not all treaty law has this character, it should be noted. For instance, it can be argued that international human rights treaties, although they remain formally in the mode of classic interstate obligation, *directly* engage citizens as bearers of rights, and the rights protected arguably themselves point to a universal community of humankind. Of course, there is at least one prominent WTO scholar who has sought to characterize the GATT/WTO community as a community itself constituted by universal rights (Petersmann). If that were true, then the internal normativity or *telos* of the GATT/WTO interpretive community would be connected *directly* to the universal interests and rights of citizens of WTO member states—such a connection would be already present through the character of the normative substance of WTO law (derived from universal rights, i.e. from the conception of human personality as such, i.e. Kant), but this normative substance would also point in the direction of its full institutional realization through private rights of action in WTO dispute settlement, "direct effect" of WTO law in municipal law, and inter-parliamentary deliberation and ratification of WTO rules, a kind of virtual representative assembly of the citizens who are the affected community. But the attempt to characterize the normative substance of WTO law in terms of rights breaks down once we see that no global community yet *exists*, the shared values of which can be the basis for legitimately resolving the interpretive controversies that arise when one tries to pin down the "rights" in WTO treaty provisions. In sum, a universal community would already be required to adequately and legitimately universalize the positive law of the WTO into "rights"—and so the project of

transforming or purifying the WTO into a regime of human rights presupposes the very thing that it needs to create (Howse and Nicolaidis, 2001).

In what way could textualism be an adequate response to the problems with teleological or constitutional interpretation? Modern philosophical hermeneutics is able to understand the text itself as a "world", a repository of inter-subjective meaning not resolvable into, or reducible to, the "intent" of its creator(s). Words themselves, interpreted within a structure (here, a treaty or various aggregates of its individual provisions) come to be infused with meanings, not in any obvious sense intended by any particular agent. Such exercises of constructivism in interpretation, beginning from text itself as world, nevertheless entail the treaty interpreter infusing a significant amount of material in *imagining* the text as a world. Such material could include the treaty interpreter's own assumptions or intuitions about human nature and basic human interests, or her own imagining of the kinds of constituencies demarcated as affected or served by particular provisions in the treaty. Among the clearest examples of such constructivist hermeneutics is the treatment of the "like products" issue in the *Asbestos* case, where the AB, in completing the analysis, imagined the way in which industrial consumers might distinguish between products in light of their health effects, assuming a world where liability rules would internalize negative health externalities of products. Here, whether the material the treaty interpreter brings to bear in interrogating the text itself is actually effective or persuasive in illuminating, or bringing to life as it were, the text as world, is in some sense a matter of what Dworkin calls "fit", in his theory of legal interpretation. But there is also a reflexive dimension—the various and diverse interests affected by the treaty interpretation must somehow be able to live with the

construction of the text in question as legitimate. The construction of the text as world must not be, and must not appear to be the imposition of one constituency's values on or over another. Here, the legal or juridical perspective on interpretation contains it own *general* set of disciplines or constraints to prevent such an outcome—the requirement that both sides be heard and the arguments of each be closely considered, that decisions be rendered consistent with or reconcilable with past decisions of the same tribunal, the requirement of stating detailed reasons for judgment, the requirement of independence from direct, partisan or national diplomatic or political pressure. Thus, the human material infused into the text by the AB is brought in from the perspective and with the ethics of the jurist.

The Choice of the AB to interpret the WTO treaties in light of general public international law

Even if, with good reason, the AB has rejected internal normativity (WTO-specific structural or constitutional principles) or an internal *telos* as a basis for interpreting the WTO treaties, it has embraced the use of general international legal normativity. Thus, in the *Hormones* case the AB invoked the general international law interpretive principle of *in dubio mitius*—if there are two possible interpretations of a treaty provision, the interpreter should adopt the one that least constrains the sovereignty of parties to the treaty. In *Shrimp/Turtle*, the AB held that the expression "exhaustible natural resources" should be interpreted in light of evolving international law and policy with respect to biodiversity. As a matter of positive law, in *Shrimp/Turtle*, the Appellate Body relied on a reference to sustainable development as an ongoing challenge in the preamble to the WTO Agreement in order to characterize the exercise of interpreting

"exhaustible natural resources" as one of dynamic interpretation to be informed by international law and policy of biodiversity.

One might say that, just as there are some disciplines or techniques of interpretation that impose themselves by virtue of the juridical nature of the interpretive exercise, there are some that flow from the character of treaties as *international law*. That treaties come with interpretive meta-norms imposed by their very character as treaties, is of course, explicitly recognized in the 2.3 of the DSU, the reference we have already mentioned to the customary rules of interpretation of public international law. Yet, especially in *Shrimp/Turtle*, the interpretive choice of the AB goes somewhat beyond, or has broader implications, than a straightforward application of the Vienna Convention. It implies that the substantive normativity of the entire international system should be brought to bear on the interpretation of WTO law, as relevant, and indeed that the adjudicator should seek a fit between her readings of specific provisions of WTO law and her construction or imagination of the entire international legal system.

This implication has been developed and advocated by Joost Pauwelyn in a recent paper, not so much as a matter of interpretation theory as of positive international law (Pauwelyn, 2001). It is vigorously opposed by those such as Trachtman, who view the WTO treaties as a set of bargains, the value and balance of which would be constantly destabilized if they were to be (re-)interpreted continuously in light of an amorphous evolving system of international law. We have already pointed out the dis-analogy between individual and collective pre-commitment that underlies this sort of narrow view of the WTO as a bargain fixed by the intentions or expectations of the "contracting parties" at the time it was made. But even within the dis-analogy, if we regard the

"bargain" in the manner of a private contract, we know that when individuals choose to give their bargain the legal status of a contract they submit themselves to various background rules, both substantive and merely interpretative, some of which can be contracted out of and some of which are mandatory. These rules, or the ones that are typically mandatory at least, can be understood as expressing a background morality supposed by the very idea of a legally binding exchange of promises (Fried, 19??).

Interpretation of the WTO treaties in consonance with the evolving substantive normativity of international law as a whole allows some of the dilemmas of pre-commitment in WTO law to be addressed within the disciplines of the adjudicative role. To the extent that treaty commitments in the WTO actually reflect the democratic will, mediated through representative institutions, rather than the preferences of elite bargaining agents with asymmetrical information, then we can say that pre-commitment entails today's majority seeking to constrain the will of tomorrow's. Treaty provisions themselves cannot be changed except with the agreement of many other countries, and the package deal architecture of the Uruguay Round covered agreements permits of little possibility for opt out or selective adjustment of the application of individual rules to particular Members. Thus a subsequent majority may be faced with a high price—perhaps a prohibitively high price—from reversing the pre-commitment of a previous majority or governing coalition, which, at the extreme, might be withdrawal from the WTO itself.

In these circumstances, interpretation of WTO norms in light of evolving non-WTO international law may be a way of responding to some changes in opinion or public values that in a first-best world might be addressed through re-opening the texts

themselves. One cannot legitimately shift the emphasis in interpretation of a multilateral bargain in response to a shift of opinion in only one Member state. That would undermine the fundamentally multilateral nature of the bargain. But one can take into account shifts in global public opinion and values, which are reflected in new, evolving or renovating (e.g. the ILO) international regimes, environmental, labor, human rights and so on. In a way, global public opinion understood or reflected in this manner could be seen as a substitute for the now broken-down vision of the progressive welfare and regulatory state and its limits, which was the core of the "embedded liberalism" broadly shared by post-war liberal democracies—the grand political vision that underpinned the Bretton Woods institutions until the 70s, and which was assumed in many "expert" understandings of the relationship of GATT treaty provisions to domestic policies in the early eras of GATT jurisprudence.

But if, as I have argued, there is no global *demos* or political community, how can there be a global public opinion? International legal processes themselves increasingly create and attract deliberation among citizens, mediated through what is now called international or transnational civil society. Representative democracy, which depends on constitutional background rules about the authorization for exercise of sovereign power and the constraints thereon, requires upon a thicker, more formally bounded kind of community than the open deliberative space that is transnational civil society. But, while marginalized at the WTO itself, transnational civil society may well prove to be a viable democratic interlocutor for the AB, at least to the extent that it is shaping and reshaping none WTO international legal and policy processes that bear on WTO treaty

law in important ways (core labor rights as the ILO; AIDS policy at the WHO; the work on globalization in the UN Economic and Social Sub-Commission).

Conclusion

In creating a system of centralized treaty interpretation through adjudication, the founders of the WTO put themselves in the avant-garde of international law, and proudly so. Centralized treaty interpretation was seen, in a manner consistent with much of the international law literature on compliance, as a strategy for better treaty compliance. It turns out to raise pose important puzzles and challenges, which have not been very well theorized in the literature. Treaties are pre-commitments of course, but they are in important ways neither contracts, nor constitutions, nor statutes. Some of the basic interpretative moves of the Appellate Body, albeit not really very much theorized by the AB itself, nevertheless can be seen as reflecting sound and perspicacious intuitions about the novel puzzles and challenges in question.