

THE VARIED POLICIES OF INTERNATIONAL JURIDICAL BODIES—REFLECTIONS ON THEORY AND PRACTICE

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I would like to begin with two particular vignettes set in the context of the World Trade Organization (WTO) to provide a landscape of some of the difficulties faced by that organization, and which apply to the broader theme of international norms, the subject of this symposium.

The first illustration is the Appellate Body Membership and the process for choosing the Appellate Body Members who sit on each case. A seven member roster is chosen by various diplomatic means, creating a diverse group. Members come from different legal cultures, bring different legal premises, and represent various legal systems. This diversity is evidenced in the rather massive amount of WTO dispute settlement jurisprudence that has already been developed—over 25,000 pages in approximately eighty different cases have been adopted by the WTO Dispute Settlement Body reports—all in the short span of nine years.¹ In one of those cases, the *Shrimp—Turtle* case,² which I view as perhaps the most interesting constitutional case, one could see some of these diverse ideas emerging. One of the issues was the degree to which the Appellate Body, as an institution of the WTO, could look to text or policy designations outside the framework of its regime.³ In the *Shrimp—Turtle* case, the Division of three Members suggested that to interpret a particular provision of GATT Article XX *chapeau*, they could look to a variety of documents and measures that lay outside the framework or borders of that treaty. In the process, they said, they were forced to acknowledge some conflicting policies, and therefore, to perform some balancing among them.

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1. Since January 1, 1995, the WTO dispute settlement system has received 309 complaints, see World Trade Organization Secretariat, *Update of WTO Dispute Settlement Cases*, WT/DS/OV/20 (Mar. 26, 2004), and has completed 77 with adopted reports. The total number of pages of the jurisprudence exceeds twenty-five thousand, and all informed observers seem to recognize that this is indeed a remarkable achievement, particularly when one examines the intricacy and complexity of the cases, and the importance of the analysis and reasoning. See, e.g., Kara Leitner & Simon Lester, *WTO Dispute Settlement 1995–2002: A Statistical Analysis*, 6 J. INT'L ECON. L. 251 (2003).

2. WTO Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products, WTO Doc. WT/DS58/AB/R (Oct. 12, 1998).

3. It has been made very clear by the Appellate Body, from its very first case, that it is not an insulated or separate regime, but is part of the international law system.

That particular aspect of the opinion raised some heavy criticism. Some diplomats argued that it is not for the juridical system of the WTO to do the balancing, but that it must be left to the diplomats to do that in their negotiations and norm-creating, and they argued that the Appellate Body was over-extending, or going beyond its mandate. Others, of course, disagreed with that argument, including this author. I happen to be an admirer of that particular case, and part of what I admire is the articulation of the ability of the Appellate Body to draw on other sources.

A second vignette that is related to other contributions within this volume is the difficulty of a particular piece of text of the Uruguay Round Agreements in the WTO context. This has to do with the arcane business related to antidumping law, which generally, in some respects, is the scandal of international trade, but nevertheless it is here to stay.⁴ I refer here, however, specifically to a particular standard of review clause embedded in the Antidumping Agreement.⁵ The U.S. negotiators intended the standard to apply across the board, to all dispute settlement systems, but they were not able achieve that, so it is embedded only in the Antidumping Agreement, Article 17.6, and in particular, the second paragraph of 17.6. The question is: what kind of deference should the dispute settlement system of the WTO give to a nation-state decision as to how it will interpret the treaty language that applies in antidumping cases? The U.S. negotiators wanted to push the *Chevron* case into the dispute settlement system, but they failed, and what finally emerged in the middle of the night, written “on the back of an envelope” were two sentences of slightly convoluted language. One sentence stated that the interpretation shall be made according to the normal “customary rules of public international law.” Everyone who was in the room when that language was delivered, as far as I could sample, believed that essentially is the explanation given in the Vienna Convention on the Law of Treaties (VCLT), although the VCLT itself, of course, does not apply in this instance, partly because there are many member states of the WTO who have not ratified it. The second sentence said that if there is more than one permissible interpretation, the dispute settlement system of the WTO should defer to the nation-state that accepted one of the permissible interpretations.

4. See, e.g., BRINK LINDSEY & DAN IKENSON, *ANTIDUMPING EXPOSED: THE DEVILISH DETAILS OF UNFAIR TRADE LAW* (2003).

5. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 401, 33 I.L.M. 1226, available at <http://docsonline.wto.org/DDFDocuments/t/UR/FA/19-adp.wpf> [hereinafter WTO Agreement].

Therein lies the division of opinion, incidentally almost a trans-Atlantic division. In Europe, many evaluators (scholars and others) have said that if one follows the first sentence in 17.6, there always is only one permissible interpretation. Therefore, the analysis is over and the second sentence has no meaning whatsoever. On the U.S. side of the Atlantic, the opposite view is prevalent: that, in fact, there is plenty of evidence of situations in which one could argue that there exist more than one permissible interpretation. There are domestic courts issuing five-to-four rulings, and one could also say that the lower courts going one way and the upper court coming another way suggests that, at the very least, rational minds could differ on this, and therefore, there might be more than one “permissible” interpretation. It has really been a quite remarkable and interesting tug-of-war, one that has embedded itself in some of the decisions that have gone forward in the WTO dispute settlement system.

Hopefully those illustrations have provided some context as to how the WTO dispute settlement system fits into the topic of this volume, and I would now like to turn to how my current thinking and writing relate to the broader issues of international law norm creation. One such article is quite recent and it represents some of my thinking in these broader general issues. It is entitled *Sovereignty Modern*,⁶ and it is a close look at the question of sovereignty and how it affects the fundamental logic of international law. I do not pretend that I have finalized my views, but fundamentally very few people really accept the original, Westphalian idea of sovereignty anymore. There are many other constructs of what sovereignty currently means, and what its significance should be going forward, but there is a real confusion about the notion generally. It is an important notion to explore, however, as the fundamentals of international law arguably depend, at least somewhat, on the concept. For example, if the concept of sovereignty is that the sovereign is the highest authority, and that there is no higher authority as to any one sovereign, the resulting concept leads to something like equality of nations. It also suggests noninterference of any kind, whether economic or military or other, and that principle is very hard to maintain.

But perhaps most significant is that this concept of sovereignty seems to be the core of the “consent theory” of international law. In other words, the theory that an international law norm cannot be formed unless there is consent by the nation-state parties. Although there has been an edging away from that theory, particularly in the era of weapons of mass destruction, rogue states or failed states, human rights, and so

6. John H. Jackson, *Sovereignty Modern: A New Approach to an Outdated Concept*, 97 AM. J. INT'L L. 782, 782–802 (2003).

on, this concept is certainly being challenged. For example, a study conducted by the Canada-based International Commission on Intervention and State Sovereignty came out with the notion of the “responsibility to protect.”⁷ The key questions raised by the concept of consent are: what does consent mean and how much of it is necessary?

These questions lead to a corollary idea: as we get into these different kinds of regimes (if you want to call them that), it appears, and I think it is partly demonstrated by the contents of this volume, that more and more often, a juridical type institution is critically central to the regimes. This is certainly true in the WTO, in the Convention on the Law of the Sea, the International Criminal Court, and in a variety of other contexts. That necessity leads, of course, to worries about fragmentation. I tend to agree with some of this volume’s other contributors’ views that there is a value to fragmentation, and there is a related discourse or dialogue in which we need to engage.

Stemming from a realization of the necessity for and tendency toward juridical institutions, I began thinking about the goals of such an institution. My primary context was that of the WTO, but I was inevitably led beyond those borders. Just exactly why do we want a juridical institution? In the WTO, several goals are articulated, particularly in the so-called Dispute Settlement Understanding (DSU).⁸ A primary goal mentioned is stability and predictability of the rules. In the area of international trade (as in other international arenas), the activities of individuals or business entities have international implications just as those of nation-states do. These individuals or entities have a functional need for a certain amount of predictability and stability. Economists call it “reducing the risk premium.” One could say that suggests certain kinds of goals for the WTO dispute settlement system—to try and clarify issues in a way that is predictable and stable over time. That suggests, for instance, that stability over time leads to some kind of a precedent effect, not *stare decisis*, but perhaps a more flexible kind of consistency. On the other hand, there are some other articulated values in the DSU itself that may conflict with ideas of predictability and stability. One such potentially conflicting value is to have quick, efficient settlement of disputes.

Thus, one begins to consider other goals of juridical systems. One is to redress harm. That is not a goal of the WTO dispute settlement system. The WTO does not generally embrace the concept of “paying off” for a past harm. Any compensation is forward-looking.

7. INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY [ICISS], THE RESPONSIBILITY TO PROTECT 11 (2001), available at <http://www.dfaif-maeci.gc.ca/iciss-ciise/pdf/Commission-Report.pdf>.

8. WTO Agreement, *supra* note 5, at Annex 2, Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, art. 3, para. 2.

Another policy question that underlies a juridical system's goals is the method in which the system addresses gaps and ambiguities. To what degree should the juridical institution have the power to fill in a gap?

The difficulty emerging is that when such myriad goals coexist, for example within the same dispute settlement system, it is possible to follow the policy goals to different ends, thus the same dispute settlement system is forced to perform a balancing act. Additionally, there exist different dispute settlement systems, and there could be other systems that have a perfectly rational jurisprudence that seems consistent and integral, but which would be different from the system of a given regime because the goals are different. Thus, these goals must be analyzed not only in the context of dispute settlement, but also within the broader framework of the goals of the participant governments.

This begs the question then, what are the participant governments' goals? When they sign on to a complex treaty system that has a dispute settlement system, what precisely are they signing on to? In this regard, I will explore just a couple of the dozens of deep jurisprudential issues implicated by this question. For instance, what kinds of elements can go into the interpretation of a treaty? One flamboyantly difficult and controversial question is: can one adopt an "evolutionary" approach to the interpretation of a treaty? In other words, could a treaty body's interpretation as to a simple clause such as "like product" differ over time? Furthermore, the institutional structure of the system is important to consider. If a bilateral treaty, perhaps the VCLT, can resolve the issue, the parties can get together and modify their treaty. But a massive, multilateral treaty like the WTO, with 148 participants and consisting of 26,000 pages, cannot easily be modified. Indeed, some people believe that it cannot be changed at all and the result is what we call "treaty rigidity." The concept of treaty rigidity may conflict with certain of the institution's goals, such as that of trying to enhance world welfare through a series of policies, some of which have to be balanced against other policies. This suggests that maybe the system must somehow keep up with what is going on in the world, and therefore, an interpretation may have to be evolutionary.

One final point is a related concept which seems to me to be an extreme and limit pushing idea of state consent to international law norms. This concept particularly comes up in the WTO dispute settlement system. The concept has a beautiful latin phrase that many do not fully understand—*in dubio mitius*.⁹ It essentially spells out the idea that if there is any doubt about an interpretation at all, the government that has

9. Appellate Body Report, EC—Measures Concerning Meat and Meat Products ("Hormones"), WTO Doc. WT/DS26/AB/R, at 67 n.154 (Jan. 16, 1998).

signed on to it and is now the actor taking a certain interpretation has not consented to anything else. In other words, if there is a gap or ambiguity, the actor has not consented to any determination that might be made by the dispute settlement system. Therefore, there would always be a tilt in favor of the nation-state. I would suggest that this idea in practice would very quickly undermine and unravel most of the norms in complicated, multilateral treaties, because there is no way to negotiate those treaties without having a certain number of gaps and ambiguities—one cannot come to closure or the final ministerial meeting without leaving some loose ends. Still, the concept has been embraced, incidentally by certain specific special interest advocacy groups, particularly inside the beltway in Washington, D.C., and one might imagine where that is coming from if one watches what is going on in the U.S. Congress.

Finally, to further illustrate my point about the existence of many policy objectives for international (and national) dispute settlement mechanisms, I append a brief “overview text” listing some objectives, drawn from several prior works of mine, including a lecture presented in May of 2003.¹⁰

To briefly summarize, it can thus be seen that “fragmentation” can have several dimensions, and that the difference between juridical approaches as well as legislative approaches to treaty or other norm stating documents can result not only from different institutional settings, but also from different policy goals assumed for differing dispute settlement systems.

10. John H. Jackson, Lecture at the Third Annual WTO Conference: “Dispute Resolution—At the Crossroads” (London, May 14, 2003). The lecture was sponsored by the British Institute of International & Comparative Law (London), the Institute of International Economic Law (Washington, D.C.), and the *Journal of International Economic Law*. An article based on this lecture is shortly due for publication in a volume compiled by BIICL.

APPENDIX**POLICY GOALS UNDERPINNING
INTERNATIONAL JURIDICAL
INSTITUTIONS—A TENTATIVE LIST**

1. *Undo harm done by respondent, to redress complainant's injury.*

A common goal in domestic jurisprudence systems is to undo a harm, to make the harm doer pay back the harmed person in some way, whether it is tort damages, criminal penalties, or some other remedy. This goal does not seem to be part of the GATT/WTO system. There is some quarrel about the question of whether there should be reimbursement of anti-dumping duties or a rollback of subsidies, and some of the jurisprudence on this issue tends to be quite muddled, but overall, I judge the system to mostly deny the notion of retroactive, or backward-looking retribution, remedy, or compensation.

2. *Settle the differences amicably to restrict international tensions, avoid conflict, or even war.*

Settling differences amicably was quite an important goal at the 1944 Bretton Woods Conference and during the three or four years following it, including the attempt at creating an International Trade Organization (an attempt which failed), and during the development of the GATT. The foremost goal of those discussions was to avoid another World War, and indeed there has been quite a bit of success in that regard. It must remain an important goal of any international dispute settlement system to help prevent or control the use of force, war, etc.

3. *Settle the differences efficiently ("promptly" e.g. DSU 3.3). Efficient breach idea can conflict with rule stability?*

If disputes drag on for a decade, the point often arrives where there really can be no remedy, and the system is clearly not operating effectively. There is an argument now that, as tight as the schedules are in the WTO, they should be reduced more, and that is going to create tension as against the quality of the output.

4. *Provide jurisprudence or "precedents" for predictability and stability; DSU 3.2.*

The word precedent is a big question, to be addressed elsewhere. The basic ideas about predictability and stability that I mentioned above are clearly underlying policy goals of the dispute settlement system which are enhanced by the appropriate application of precedent techniques.

5. *Fill gaps and resolve ambiguities in treaty text.*

Multilateral treaties always have ambiguities and gaps. Are these gaps necessary in order to get the consensus required to come to resolution? Many times the diplomats have to gloss over real differences with language that both sides differently interpret a text in order to reach a meeting of the minds as to language. Of course, when they do that, in a sense they are delegating power to a dispute settlement system to resolve conflicts of interpretation that will inevitably arise. Nevertheless, there may be some conflict between this and some of the other goals on this list.

6. *Promote compliance with dispute settlement outcome.*

In dispute settlement, compliance with the results ought to be promoted so that the treaty norms can be effective and depended upon. In fact, the mere existence of a dispute settlement process has a strong component of assisting compliance on the international landscape, even without sanctions or "retaliation." Alternatives to sanctions and retaliation include shaming techniques, reciprocity notions, etc.

7. *Redress asymmetries of power; fairness to weaker entities.*

A dispute settlement system helps redress asymmetries of power. Smaller or less developed countries can bring a case against larger, wealthier countries, and win at both the Panel and Appellate levels. Costa Rica, for example won a case against the United States at the first level and Appellate stages in a case about underwear.

8. *Re-establish a balance of benefits, "rebalancing."*

Re-balancing of benefits is an issue that has been central to some of the criticism of the WTO. Many argue that this should be a goal of the system. This is the reciprocity idea run wild, but it nevertheless has its origins in the preparatory

work of the GATT itself. Some argue that all that needs to be done is to re-balance the benefits so that the party that is the “wrong doer” should give a new set of concessions equivalent to the value of what it seems to have taken away, and that should be the end of the matter. In other words, observance or performance of the international obligation takes a lesser role. This obviously creates an enormous tension with some of the goals, particularly the goals of predictability for the non-participants in a particular case. For this reason, the reciprocity or re-balancing idea has virtually faded to non-existence during the last twenty-five years or so of the GATT/WTO system, but nevertheless it is still advocated quite vociferously by particular interests in the United States.

9. *Give the participating parties a sense of their “day in court;” right to fair procedure?*

This immediately raises the question, “who is the real party”? Governments, their citizens, or international businesses (market participants)?

The idea of a party’s “day in court” is nothing new. If the parties battle it out in court (it is incorrect to use the word court, incidentally, because the WTO system does not like to use judicial terminology) or in a creditable process with genuine integrity that is non-corruptible, then the parties have a sense of having been treated fairly, and nation states, for example, can return to their constituents to report on their effort with the knowledge that perhaps they will win the next time.

10. *Provide reasoned judgments to enhance broader public acceptance of the application and development of the rules.*

It is an important policy objective to be able to use the judgment in a dispute settlement proceeding to enhance broader public acceptance of the results. These results may tread on certain constituents’ toes in certain cases, particularly constituents who have benefited from some exception from international competition and now find that they must comply, but it is perhaps for this reason that the goal is important. This process is useful to governments in that it helps them persuade their constituents to do the “right thing.” This idea relates to paragraph 9 above.

11. *Reasoned analysis of important policy implications of the rule application, so as to shed light on complex issues and dilemmas requiring a balancing approach (thus assisting other governmental processes).*

This goal is subtler. The Well-Reasoned Opinion can often alert rule makers and decision makers in the non-dispute settlement part of the system to particular intricacies of the procedural problems. In the *Shrimp-Turtle* case, for instance (the case I consider the most important case of the jurisprudence of the WTO so far), there is a deeper sense of some of the analysis that is necessary and really pervasive in much of the other jurisprudence.

12. *Define and rationalize the allocation of governmental powers, i.e. "repair" the constitution & provide for evolution.*

Finally, there is a sort of a "constitutional" element of the dispute settlement process. It will, from time to time, be called upon essentially to allocate power among different parts of the same institution or different levels of the international landscape. That might call into question whether a certain kind of decision, regulatory norm, etc. is best made in Geneva; Washington, D.C.; Sacramento, California; Berkeley, California; or a neighborhood in Berkeley. A similar scale or ladder of levels of governmental activity applies in Europe and elsewhere in the world.