# Panel I: What Makes the WTO Dispute Settlement Procedure Particular: Lessons to be Learned for the Settlement of International Disputes in General?

# What Makes the WTO Dispute Settlement Procedure Particular: Lessons to be Learned for the Settlement of International Disputes in General?

*Presentation by David Unterhalter**

I want to examine the WTO dispute settlement system within the context of certain institutional norms which are traditionally captured under the concept of the rule of law. That is a concept having an imperfect fit in many international law settings. But I believe that there are a number of features of what we mean by the rule of law which constitute useful benchmarks against which to understand a system such as the WTO dispute settlement system. And I think it may be helpful to utilize those criteria for the purposes of seeing both the evolution of the WTO system, its limitations and challenges. Before I articulate a rough sense of what I take the rule of law to mean for the purposes of institutional benchmarking, it is, I think, worth saying something about where the WTO system of dispute settlement comes from. Its roots are in the GATT system. And that was fundamentally a system of dispute resolution by diplomatic means. It thus lacked many of the basic hallmarks of what we would understand by dispute settlement under a system of binding law. It was a system of elective recourse. It was not compulsory and it was non-binding. It was simply, by and large, an adjunct to the diplomatic efforts that were necessary and utilized for the purposes of bringing a dispute to an end. Its hallmarks were therefore voluntary, its outcomes were non-binding and it was an *ad hoc* system of dispute settlement, parasitic upon the larger diplomatic efforts to resolve disputes between members.

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It is from this background, unpromising I would suggest from a rule of law perspective that the WTO system has grown. If one then examines the WTO dispute settlement system, there really was, under the Uruguay Round, a hard break. Key aspects of the diplomatic tradition of dispute settlement under the GATT system were decisively broken. And for an important reason. The Uruguay Round negotiated so many important rights and obligations that it was considered important to have a dispute settlement system that was binding and in this way distinctive from the past. In order, then, to examine the WTO dispute settlement system in the light of where it has come from and consider the system in the light of rule of law criteria, let me articulate, in a very rough way, what I take the rule of law to mean for the purposes of this exercise.

Fundamentally, in my conception, and I think this is well understood, the rule of law consists of the following principles. Firstly, that there should be an institutional separation of powers – in domestic settings between the legislative, executive and judicial authorities. The judicial authority must have the attribute of independence. There must be some recognition of equality under the law and before the law. This requires that binding rules should apply to all. Adjudication must be compulsory rather than elective, and its outcome must be binding.

If one looks at these criteria and applies them to the old GATT system, the constitution of Panels was a matter of choice, they were constituted *ad hoc* to consider a particular dispute, their decisions were non-binding. They were, as I've described, simply an adjunct to a larger process of diplomatic settlement.

If we then consider the WTO dispute settlement system, I think one can see that there is a significant change. It is a rules-based system. It contains rights and obligations that are binding upon all members and the dispute settlement system ensures that this is so. The dispute settlement system is compulsory in nature; no member can avoid the adjudication that it entails, and its outcomes are enforceable by way of remedy. It is a two-tier system: Panels are constituted in the first place at the instance of the parties, but failing their agreement, at the instance of the Director General. There is a standing Appellate Body, to which all appeals lie. It is obliged to render decisions on all issues appealed. Critical to the process of institutional independence is the fact that those decisions are adopted by negative consensus, which means that the only circumstance in which adoption will not take place by the members of the WTO, is when the winning party decides not to support its own victory in the dispute settlement system.

There are also enforcement mechanisms and a history of substantial compliance with the outcomes of decision-making within the dispute settlement system. There is a regime of remedy and sanction for failure to implement the adopted decisions of binding adjudication. So one has in general terms a system where adjudication is compulsory, there are clear rules as to how that adjudication takes place, the outcomes are binding in a relevant sense and the consequences of failure to adhere to the outcomes are stipulated, and have measurable consequences for those who fail to adhere to the system. Judged therefore in a rough and ready way, one would say that this system has many of the attributes required under the rule of law.

But I want to suggest that the system also has its obvious limits and some of the stresses within the system are apparent and perhaps will become more so as time goes by, notwithstanding the substantial success that the system has achieved. I offer here just a few basic facts concerning this matter, which is that since 1995 there have been 414 disputes referred to the system. There have been some 219 Panels constituted, and some two-thirds of those matters have been referred to the Appellate Body. The Appellate Body has rendered close to 100 decisions in its 15 year lifespan. For some time, the WTO dispute settlement system was principally used by the larger trading nations who are members of the WTO. With time, more and more members have utilized the system, including the significant role now played by developing countries.

Let me move then to the respects in which the system, though having satisfied many of the attributes of the rule of law, nevertheless contains fissures. The first of them concerns the issue of independence. Whereas, the Appellate Body is a standing body which is appointed by the membership after a rigorous process of selection, the system depends upon Panels, as the adjudicators of first instance. And the Panels still bear considerable residues of the past. They are constituted *ad hoc*, they depend in the first place upon agreement between the parties and, failing that, by executive decision-making as to their composition. They are brought together simply for the dispute, they still quite frequently contain or are made up of diplomats who have other pressing calls upon their time. And it is probably fair to say that, in consequence, the influence of the Secretariat (the permanent WTO staff who assist Panels) upon the deliberations of the Panels may be considerable. As Panels have engaged with ever more complex cases, particularly in respect of their fact-finding function, the Panels are under-resourced. Panels lack the permanence required to secure institutional coherence.

The Appellate Body fares rather better on that score. It is, as I've indicated, a permanent body, it is appointed by the membership on the basis of a competitive selection process. It must be broadly representative of the membership. It is independent as a matter of design. But I would draw attention to a particular respect in which that design is flawed.

An Appellate Body member is appointed for a four year term of office, renewable at the instance of the members for a second term of four years. This does not cohere with a proper regard for the principle of independence. Tenure in office should never depend upon the favour of those who are subject to adjudication. I know of no Appellate Body member who has been influenced by the need to secure the consensus of all members to extend his or her term of office: but that depends upon their personal attributes and not institutional protection. There may very well be pressures that could be brought to bear and could conceivably be apprehended. So as to the criterion of independence, the system is adequate, but certainly, in my view, could be improved particularly, by moving towards a permanent system of panels as adjudicators of first instance. Further, Appellate Body members should be appointed to a single non-renewable term of office.

In respect of the other criteria which are fundamental to the rule of law I want to dwell in a little more detail on the separation of powers. The system of the WTO is under some stress. And it arises in a perfectly straightforward way. If one thinks of the WTO system as one might think of a domestic system of government, the following features are discernable. There is a legislative branch, which depends upon successive trade rounds being negotiated between the members, based upon a principle of consensus and a single undertaking. That has sometimes led to successful outcomes. But it is highly dependent upon a number of political contingencies and economic circumstances so as to bring about the right alignment of interests and the successful conclusion of a trade round. As we know, the Doha Round is now in its tenth year, and there seems little prospect, regrettably, that that is going to move forward any time soon. To some degree, of course, that is the result of the success of the system. It reflects the diffusion of economic power and the fact that the basis upon which trade rounds were dealt with in the past (essentially by way of agreement between Japan, the EU and the US) no longer leads to a confluence of interest. We live in a multi-polar world. That is I think a sign of success. But it also creates with it the great difficulty that to bring a trade round to fruition is hugely complex and difficult. This poses particular problems if one thinks about the institutional coherence of the WTO system. Because what it means is that an

essential check on adjudicative power is lacking. In a balanced system, authoritative interpretations that are the outcome of adjudication are subject to legislative change if those responsible for lawmaking decide that the outcome is wrong or undesirable and should no longer be adhered to for any of a number of reasons. Under the WTO system the Appellate Body renders interpretations of the covered agreements. Those are sometimes controversial, sometimes not. More and more attention is given to adjudication within the system. And the ability of the membership to change those outcomes is limited because of the difficulty of concluding the next trade round. This creates an asymmetry of decision-making within the WTO and as a result two things happen. The first is that more and more matters are litigated because there is simply little prospect of changing any outcome or moving forward any agenda through the legislative means of trade negotiation. And secondly, it means that ever greater attention is given to adjudication because members look to that part of the system to advance their interests. Adjudication in this form can give rise to considerable problems because members may consider adjudication to be far too powerful in the overall scheme of the WTO. And there is no quick fix for this problem.

Obviously, if a trade round were to be concluded, it would diminish the pressure placed on the adjudicative part of the system. But what needs to happen is to bring better alignment into the system. That may well require significant institutional change within the WTO and one which is of course entirely beyond the remit of its adjudicative functionaries. How that will happen is the subject of much discussion. One notion is that the Doha Round is simply too unambitious as to what it has put on the table and consequently, no one is sufficiently interested in bringing it to a conclusion. This seems unlikely, given how difficult it is proving to conclude the round on even limited issues. The second is that we need to be thinking about other ways of securing legislative action which do not depend upon a consensual principle as the only basis of coming to agreement. In consequence, various plurilateral alternatives and the like are much discussed. Whichever way this debate finally comes out, what is certain is that if adjudication remains the centrepiece of what the WTO does, then the system will be subject to considerable challenge. And one can, I think, already observe this. From time to time the argument is made to turn back the clock and return the WTO system to the old GATT system, to reassert the importance of diplomatic resolution of disputes and strip away many of the rule of law attributes which, at least in my conception, are qualities of the system. But that is

a necessary consequence of what happens when the institutional framework is out of balance in the way that I have described.

The second feature of the system dealing with separation of powers, which also needs to be addressed, is that the WTO has an underdeveloped executive function. And here, too, it means that there are two polarities of legislative and adjudicative authority, without executive decision-making that would allow for decision-making between significant legislative events. This would require a form of devolution of powers within the WTO system to make it more efficacious and balanced.

So these are some of the fundamentals of the WTO system and the problematic against which one has to understand the ability to preserve adjudication within the scheme of the rule of law.

I want very briefly to touch on two other areas which I think point to where the system is going and what might be controversial about it. One of the further consequences of the way in which the WTO system has developed is that the cumulative interpretations of the covered agreements by the Appellate Body and the Panels constitute a body of law that is now quite considerable. There is a well trodden debate as to the proper interpretive remit of the Appellate Body. Key to this debate is an understanding of what those who interpret the covered agreements are faced with when trying to bring coherence to negotiated texts. Whether the Appellate Body has been successful or not, I will let this audience judge. What plays out in the debates around interpretation is simply an echo of the issues around the legitimacy of adjudication within the system as a whole. So those who would speak for strict constructionism seek to hold to a narrow concept of fidelity to the text and the limited powers of adjudication that this entails. While those who affirm a wider context and a purposive interpretation of the texts would have the system operate with a much wider interpretative remit, so as to develop WTO law in a way that deviates significantly from *ad hoc* arbitration awards. One sees therefore, again, the articulation of political interest within the system borne out through debates around interpretation and the proper remit of interpretation. And that has one other consequence, which is that there have been considerable debates in two dimensions that are particular to this system of law. The first concerns the use of precedent. Now formally, of course, the WTO system has no *stare decisis* but as a matter of the discourse, there is unquestionably the use of authority of past decision-making as the means by which adjudication takes place. To articulate that practice as doctrine, if it is a doctrine, is highly controversial. Those who wish to see in the system the control by members over adjudication resist the notion of authority of

the cumulative force of decided case law. They would revert to the old system of the GATT, *ad hoc* decision-making simply to resolve a particular dispute between particular parties without any necessary consequence for the members as a whole. I believe that members do not generally adhere to this view of the jurisprudence of the WTO. Domestic laws are clearly refined by members in the light of the threat of decision-making under the WTO system, which is clearly adaptive conduct that recognizes the authoritative interpretations as they have been developed within the system. But here too, one sees the contestation between members as to how significant a role adjudication should have and how consequential the results of adjudication should be.

The last matter that I wanted to touch upon is innovation, which of course is itself a consequence of how one understands interpretation. Now plainly, it is not the role of WTO adjudication to make obligations for the parties in any way whatsoever. But that rather simple nostrum really doesn't engage the complexity of the matter. And it has played itself out in matters of procedure. There have been developments, again sometimes controversial, to secure within the system a procedural law that is innovative and meets the requirements of the system. The *amicus curiae* brief and the opening of proceedings, where parties are willing to allow it, are just two instances of procedural innovation. For some purposes then, there is a recognition of a competence to develop procedure. Yet this competence is not unbounded, and where the line is to be drawn raises much debate. Thus for example the need to accord the Appellate Body the power of remand is almost universally acknowledged but most members doubt that the Appellate Body enjoys the competence to accord itself this power.

So, *quo vadis*? And here I will conclude. The WTO system of dispute settlement has developed into a significant body of jurisprudence. It has been developed carefully and without excess, but certainly it is cumulatively significant and has had a major stabilizing effect on the system as a whole and in that sense, it has been successful. It is utilized significantly and its outcomes are generally adhered to. Whether the system can endure in its present form is the central question that I pose. And I would suggest that it is necessary to engage in institutional reform. That could have very different consequences, depending upon the premises from which the system is understood. For some, it would be to turn back the clock, to strip away the powers and reduce them in respect of the adjudicative functions of the WTO. In my view, and this is perhaps predictable, I would think that regressive and something which would

not do justice either to the system as a whole or the utility of the system for the stability of the world economy given its present fragile state. Nevertheless, there are those who argue that the WTO dispute settlement system is far too powerful, going way beyond what was originally contemplated. And then there are those who think that the system has all the essential ingredients of what is required, but needs to be stabilized, reformed in part, in respect of the Panels and elsewhere, but rebalanced above all. To rebalance the distribution of powers within the institution of the WTO as a whole is a task of great difficulty but great importance. It requires a re-think of the way in which the system legislates. This will allow adjudication to enjoy its proper place, free of the risk that those who claim that the adjudicative competence has too much power may settle that claim in the unstable currency of contested legitimacy.

*Comment by Georges Abi-Saab**

Dear Armin von Bogdandy, dear friends and colleagues,

I find myself in an awkward situation. I am supposed to comment on David Unterhalter's rich presentation. But as I did not know what he was going to say, I could not prepare a well structured and reasoned commentary. I shall therefore start by a general remark that came to my mind when I first read the title of our colloquium, before turning to comment, *en vrac*, on some of the points just made by David Unterhalter.

The theme of the colloquium that we were asked to address is 'International Dispute Settlement: Room for innovations'. I would have added an interrogation mark at the end; in other words, to ask: Is there room for innovations in this field, or are we reinventing the wheel all the time; be it under another name or in another guise?

I was asked to comment on a presentation concerning the WTO dispute settlement system: 'What makes [it] particular?' and whether there are any 'lessons to be learned' from it 'for the settlement of international disputes in general'.

The interrogation assumes that the WTO system is successful, to the point of inquiring about the reasons of its success and whether they can be transposed or emulated elsewhere, in other areas or fields of international law.

What are the possible causes or explanations of this impression or presumption of success of the WTO system? Why is it 'perceived' as successful, leading some to describe it as the most active or effective adjudicative system on the international level?

Surely not for its great technical or procedural prowess or innovations. For any cursory glance at the legal instrument that governs the functioning of the Dispute Settlement System (the DSU) leaves one with the impression of reading an archaic text of the early 19th century, rather that a modern adjudicative statute drafted at the threshold of the 21st century. Even the name given to it is rather odd: Not Statute, not even

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Agreement, as most of the other texts drafted at the same time in Marrakesh (though the whole lot was adopted as a 'single undertaking'); but 'Understanding' (Dispute Settlement Understanding : DSU)!

The text is written in loose non-technical language that strives often to describe what are simple procedural or legal concepts without always quite making it. It is also silent on some essential aspects of the adjudicative process, which one would expect to be regulated in such an instrument. For example, can anyone imagine a Statute of an adjudicative system where the word 'jurisdiction' does not figure; and which says nothing about evidence and proof? Of course, Panels and the Appellate Body (AB) could not avoid dealing with these matters, sometimes at the price of awkward elaborations. And in spite of the injunction to the organs of the system, in Art. 3 (2) of the DSU, that their 'recommendations and rulings […] cannot add to or diminish the rights and obligations provided in the covered agreements', the AB elaborated from scratch a set or rules on the burden of proof and administration of evidence.

Be that as it may, the rules on evidence and burden of proof introduced by the AB, if they can be called in one way an 'innovation' in the context of the WTO, as they brought something which was not provided for in the DSU (consisting of a reiteration of known classical rules on the subject), are not an innovation in the sense of this colloquium, as they do not add any new and innovative technique or instrument to our legal toolkit of dispute settlement.

If the WTO model does not provide us with any procedural or technical innovations but rather with another example of an archaic or primitive system of settlement or dispute, where then lies the cause or reason of its success, or at least the impression of success?

This reason is no secret. It is simply the age old recipe of 'compulsory jurisdiction'. Indeed, this is the only dispute settlement system on the international level covering a major sector of international relations that exercises automatic and compulsory jurisdiction over all members of the legal regime that comprises it. A regime to which subscribes (with the recent accession of Russia) all the major or significant trading powers of the world; including the US which does not accept to submit to automatic compulsory jurisdiction anywhere else on such important matters.

That is the main reason for the success or rather the apparent highly active and effective character of the WTO Dispute Settlement System. But there is another more sub-terranean reason which may come as a sur-

prise to many, given the widely held view of the WTO as an unrelenting juggernaut weeding or leveling out all national specificities and non-economic concerns in the service of economic globalization. This reason is that, paradoxically, the dispute settlement system is highly respectful of the sovereignty of member States. Or is it the strategy epitomized in the title of Goldsmith's masterpiece 'She stoops to conquer'; flattering and massaging sovereignty in order better to erode it? Be that as it may, the System handles with great care the sensitivity of the litigants; particularly the loosing side. It is true that the system is much more constraining than its predecessor under the GATT, where consensus of the 'Contracting Parties', including the two (or more) litigants was needed to adopt a panel report. Now, such a consensus is needed to set it (or an AB's report) aside. Otherwise, the Dispute Settlement Body (DSB) is automatically obliged to adopt the report once it is put on its agenda. Thus, as David Unterhalter said, we have passed from requiring a 'positive' consensus for adoption, to a 'negative' or 'reverse' consensus for setting the report aside. In other words, we have passed from a purely consensual system (which I technically characterize as 'conciliation') to a genuinely adjudicative one. But what is its outcome? What does the aggrieved party get in the final analysis? It is a mere finding of non-conformity of the contested measure with its author's obligations under the covered agreements, what in French administrative law and European law is called *constatation de manquement*. Plus a recommendation requesting the faulty party to put its legislation or practice in conformity with its obligations; without specifying any further; a mere obligation of result, leaving to it the choice of means. Moreover, the process is quite elaborate and lengthy in terms of time. A complaining party has to request (bilateral) consultations, then go through a multilateral phase within the DSB before requesting the constitution of a Panel, whose report would be automatically adopted by the DSB, unless it (or part of it) is appealed (or set aside by 'consensus' which never happened).

Then the implementation of the recommendation or *mise en conformité* is left in the hands and at the discretion of the faulty party. If the remedial action taken by this party is considered insufficient or mere 'window dressing' by the complaining party, it can raise a so-called 'Article 21.5 non-compliance Claim', which has to go again through the whole cycle, though theoretically with shorter time limits. Even after the exhaustion of all these steps, the faulty party, invoking practical or constitutional difficulties, etc., can try to buy out its illegal posture by offering the complaining party some other compensation, (supposedly as a

stop-gap or temporary measure, as it remains under 'surveillance'; which is a rather soft follow-up procedure). There is no compensation, however, for harm already suffered up to that point of time. It is only for the future, until compliance is effected.

Only if, after all that, the faulty party persists on maintaining its non-conform measures, and no agreement on compensation is reached, is the ultimate stage of sanction reached. But again it is not a sanction that coerces the faulty State to do anything it does not want to do. It is only a kind of controlled retaliation or counter-measure procedure, whereby the DSB authorizes the aggrieved party to suspend specific concessions up to a certain level that the DSB considers as commensurate with the injury caused by the continuing non-compliance; provided of course that the aggrieved party has something to withhold from the faulty party.

This is then the gist of my introductory remark: the apparent success of the system can by no means be attributed to its procedural and technical ingenuity and innovations of which it is quite innocent, but to its compulsory jurisdiction and its soft-handling of the sovereignty of the Members.

I should, however, mention one exception. It is an innovation that is not found in the DSU, but was totally invented by the AB: the 'Exchange of views'. It is to be recalled that each case is examined by a division of three out of the seven members of the AB, who are chosen at random according to a secret formula, so that neither the parties to the dispute nor the AB members know beforehand who would be sitting on the division. The exchange of view is a stage in the proceedings introduced just after the oral hearings by the division of three. The remaining four AB members are convened to Geneva, and after examining the full record of written and oral pleadings, they provide their views and discuss the issues with the division members, then leave them to take the decision for which they only are responsible as the signatories of the report. But they have benefited from the insights of the other members. Moreover, in this way, all AB members have a thorough knowledge of every case as if they had sat on it, which maximizes the consistency and cohesion of the jurisprudence. This is the one innovation I found most useful and worthy of emulation.

Turning to some of the points raised by David Unterhalter, I would like first to comment briefly on the issue of the division of labour or separa-

tion of powers as well as the relationship between the legislative, i.e. political, and the adjudicative components within the WTO system.

One has first to recall how and why the dispute settlement system evolved from a form of conciliation under the GATT to genuine adjudication in the WTO. The GATT started as a stop-gap agreement, between a limited number of like-minded – mainly Western developed – States, over a limited sector of international trade, basically in manufactured goods. Disputes between the members of this closed circle or club were settled on the basis of collective recollections of what was initially agreed upon in a discreet and confidential manner and with the accord of all concerned.

By the time it transmuted into the WTO, almost 50 years later, its membership had vastly expanded, including States from North and South; East and West; developed, developing and less or least developed; and those who were not in Marrakesh in 1994 strove hard to join the Organization, including great powers like China and Russia. The ambit of the regulation was also vastly extended, covering in addition to trade in manufactures, the major sectors of international economic exchanges such as agriculture, services, intellectual property, etc.

It was the major trading powers, the same that initiated the GATT, particularly the USA, who did not want to enter into such a vast web of mutual obligations *vis-à-vis* a widely diverse group of nations without a strong guarantee of compliance; whence the strengthening of the dispute settlement system by reversing the role of consensus from being a requirement for the adoption of the reports to a requirement for setting them aside, thus rendering them binding for all intents and purposes; in addition to establishing the Appellate Body as a standing organ to control and stabilize the interpretation of the agreements.

Of course, the covered agreements themselves were negotiated mainly between the major trading powers and were thus most attentive to their interests; the rest having to take them as given, even where they considered them as not (or not sufficiently) responsive to their interests, if they wanted not to be left out. But once the new Dispute Settlement System started to function, and its inner logic and dynamics to work themselves out, in the form of more objective and judicial-like findings and interpretations, it became clear that regardless of the general orientation of the agreements, the small fry's reasoning can prevail once in a while over that of the main players. Whence the grumblings about the excessive judicialization of the system, the accusation of judicial activism, of filling gaps, and complaints about members of the AB taking themselves to be Supreme Court judges, particularly professors; better

to be replaced by 'Trade Diplomats', who know what they are talking about. These noises came particularly from the US, which pressed initially for the tightening of the system, reflecting second thoughts in the form of proposals aiming at pushing back the system on the Darwinian legal scale of evolution to the pre-adjudicative phase as in the old GATT, in a disguised manner.

In this respect of the relationship between the legislative or political and the adjudicative organs, one has to distinguish between tribunals of general jurisdiction as far as applicable law is concerned, i.e. tribunals called upon to apply international law in general, such as the ICJ, and adjudicative organs created as an integral part of a special regime. The WTO, or rather the ensemble of the Marrakesh instruments represent such a regime. Normatively, they cover a specific field, the law of international trade; not all of it; but since Marrakesh, large expanses of it. At the same time, they provide on the institutional level, as part and parcel of the same ensemble, as David Unterhalter has described, the legislative, adjudicative and executive components necessary for the functioning of the regime (keeping in mind that this categorization of functions is very approximate and only applies *mutatis mutandis* in the international law).

This makes for greater intimacy between the different functions and the institutional components, that does not exist for tribunals which are not part of a special regime. Sometimes the embrace is too close for comfort. Taking the example of the AB, if with the WTO the dispute settlement system has moved functionally from the pure conciliation model under the GATT to a genuine adjudicative one, this is not explicitly admitted in the DSU. Rather remnants of the GATT ideology linger on and are reflected in certain aspects of the procedure. Thus although a Panel or an AB report cannot be set aside except by consensus, it still has to be adopted, if only formally, by the DSB (the plenary). And the DSU adds that 'This [automatic] adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report' (Art. 17/14); which they abundantly and sometimes vehemently do, during the session in which the report is formally adopted; about two corridors away from the AB. Theoretically, the AB members are independent. But they are too close for comfort; and the echo cannot but resonate, though more in some ears than in others.

This brings me to the target of the occasional (not to say recurrent) criticisms in the political organs of the work of the AB, namely its interpretation of the agreements and the accusations of judicial activism, filling gaps, etc. Interpretation, by definition, adds something to what is

interpreted. How can one go from an abstract proposition, norm or principle to a concrete situation without adding something? It is like fleshing out a skeleton. There is always an increment, a 'value added', through the mental operation we call interpretation. But where does interpretation end and 'legislation' start? For me, the limit is what I call the 'horizon of prevision' or 'foreseeability'. Every general statement or proposition can lend itself to more than one rendering, at least on its penumbra, if not necessarily of its hard-core. But regardless of the interpretation one adopts, all the possible alternatives can be envisaged or foreseen under certain conditions or by following different lines of reasoning. Going beyond this horizon of prevision takes us into legislation. But as long as the adopted interpretation is logically and technically (i.e. following the canons of interpretation) envisageable, it is legally acceptable. Personally, I do not see how an adjudicative body can properly exercise its functions, if its interpretative discretion is limited beyond that. But that is exactly what some quarters would like to impose on the AB, which, apart from denying the necessary minimum of judicial independence, would thrust it into an untenable position. Let me explain why.

As I mentioned earlier, the WTO agreements cover many new areas which were not (or only scantly) covered under the GATT; and very controversial areas at that, such as agriculture, services and intellectual property. Sometimes they were covered by fudged formulations in order to pass. For example, the agreement on agriculture, with its many loopholes needing further elaboration, included what was called the 'peace clause', which kept disputes arising from that agreement out of the dispute settlement system for a certain period. Thus important agricultural problems which are crucial for the Third World were left exclusively for negotiations, i.e. to be solved b the political or legislative organs. But once the peace clause reached its term, and negotiations were not getting anywhere, at least since the late nineties (Seattle), the problems that could not be solved by negotiations flooded the dispute settlement system; disputes over cotton, sugar, etc. These disputes had to be decided on the basis of an agreement full of holes glossed or papered over by ambiguous, if not totally vacuous, formulae. But in the final analysis, the AB has to decide on them. It has to say 'yes' or 'no', but cannot simply say 'I don't know', i.e. declare a *non liquet*.

This brings me back to the disequilibrium resulting from the paralysis of the legislative (i.e. negotiating) arm, that diverts all the politically sensitive problems to the dispute settlement system and heightens the dilemma it has to grapple with. On the one hand, it is chastised for ac-

tivism and enjoined not to 'add to or diminish the rights and obligations provided in the covered agreements', by keeping to a strict literal interpretation of the text of these agreements (a current joke is that the *Shorter Oxford English Dictionary* is the most cited covered agreement in the AB reports). But, on the other hand, the texts of these agreements are often ambiguous or otherwise wanting. The AB is thus obliged to reach a decision on the basis of these imperfect texts, supposedly by hanging exclusively and desperately to their words, which are not always of much help, while having the political component breathing down its neck; an impossible situation to be in, or rather an impossible exercise of squaring the circle that cannot be performed without breaking out of it.

To conclude, one may ask, why – barring human ineptitude and professional incompetence – are the agreements cluttered with so much ambiguous or vacuous language? And the answer can be found, in my opinion, in the make-up of the WTO special regime.

Special regimes are generally modeled after what Wolfgang Friedman called 'the law of cooperation'. This is in contrast to 'the law of coexistence' reflected in classical international law, which aims at establishing peace between potentially antagonistic units, by enjoining them not to dabble with the territorial and functional jurisdictional ambits of each other; pure passive obligations of abstention that need no special organs for their implementation, hence inorganic law. By contrast, a special regime is created – following the logic of the law of cooperation – when there is a shared feeling or conscience of a common interest or value which cannot be promoted and protected, or adequately promoted and protected, except through a collaborative effort which imposes positive obligations on each participant to do his part, and calls for institutions to coordinate and supervise the implementation of these obligations. Thus, an essential part of any regime is the 'code of conduct' which lays down the general rules to be followed by all in order to realize the common interest or value, the 'public good' for the protection and promotion of which the regime was created. This code of conduct corresponds to what was called *traité-loi*, in contrast (according to an old distinction) to *traité–contrat*, which merely sanctions an exchange of benefits or considerations.

The WTO agreements are supposed to be *traités-loi*, laying down general rules applying uniformly to all members. But they include in addition many asides. For the Members accept the general rules generally. But some of these rules have what they consider as awkward corners for their particular interests. Whence the many reservations, special

situations or hypotheses, redundant enumerations and circumlocutions encountered throughout the agreements, whose *raison d'être* is not always apparent at first sight.

In other words, the *traités-loi* are heavily inlaid with mini elements of *traités-contrat*. In litigation, of course the bench has to be respectful of the agreement, of all points of the agreement. But what counts most for it is how the general rules work and how the agreement functions as a whole in a sustainable manner. For a party, however, what counts most is how far its particular interest is protected, even at the price of twisting the interpretation of the general rule. This is, in the final analysis, where lies the real source of tension.

## Discussion

**A. von Bogdandy:** Dear colleagues, three points. David Unterhalter made a powerful call for more judicialization and for mainstreaming the WTO dispute settlement body, in particular the panels, with the international benchmark or best practice in international courts and tribunals. So we might discuss what that benchmark for the WTO system, in particular the panels, should be. That's the first very important topic in our conference.

The second point is your argument that the successful judicilization of the international sphere now calls for adequate politization. We have had the last 20 years that very important development of more law, more legalization and more judicialization. Now we start considering adequate forms of politization; this is a very important move.

The third point is on legal interpretation. You said we should more or less give up the idea that there are global standards how to construct. We have to develop specific standards of interpretation in light of that legitimatory setting.

To Georges Abi-Saab I want to ask what precisely you mean by stating that the strength of the system is its weakness.

**G. Abi-Saab:** Flexibility if you want.

**A. von Bogdandy:** Yes, but you put it also as a weakness. So in a way we have to be careful that if we make a court too strong we might destroy it.

The second point regards interpretation and the drafting of decisions. Three members of the Appellate Body are writing the decision, and I imagine a lively dispute. Then they give it to the other four members who have been outside of the struggles of writing the opinion, and these other members are called to give an input. I think that is a very important element for innovation: before a judgment comes out, but after the judges have struggled and fought over the text that there is some check whether the outcome of their struggle is really the best response to the case at hand or whether it should somehow amended.

**G. Abi-Saab:** The others are also judges.

**A. von Bogdandy:** They are judges but they have not been engaged in the fight over the opinion. So I think that are just some of the ideas that I've got out of these very interesting decisions and I am happy to open the discussion.

**E. de Wet:** David Unterhalter referred to the fact that there is a lack of coherence amongst panel members forming part of WTO dispute panels, due to the ad hoc nature of these panels. In addition, he noted that the WTO Secretariat tends to have too big an influence on the election procedure and this can lead to a (perceived) lack of independence. However, I am wondering why this process necessarily leads to less independence than the procedure in accordance with which the permanent Appellate Body is elected. After all, member State can have a significant influence on the election process of the Appellate Body, including the renewal of members' mandates. So what makes this process nonetheless more independent and reliable than the one by means of which panel members are elected? What type of procedure does he envisage that will ensure the independence of both elements of this procedure?

**A. Aust:** You've described an imperfect dispute settlement system. I am not a WTO expert, but I am an expert in international negotiations. And the WTO agreement was the result of very difficult negotiations. And what you seem to say is that you need to reform or renegotiate part of the treaty dealing with international dispute settlement. The second question is: Are the panels made up of lawyers or other experts? Are the chairmen of the panels lawyers? I know lawyers sit in the Appellate Body, but I don't know about the panels. I think they are not made of lawyers, economists etc., experts in the area.

As I see, in negotiations any agreement is virtually an impossibility. I think we are lucky to have it even though it's imperfect. Thank you.

**H. Hestermeyer:** I have too many questions to ask them all and will try to limit myself to a few points. First of all, could you say a few words on the role of the Appellate Body Secretariat in drafting decisions? Secondly, in terms of the WTO system as a model, I think one interesting example of integrating developing countries is the new Advisory Centre

on WTO law. It deserves to be mentioned as an approach to be followed also by investment arbitration. Finally, one comment on why I think it is difficult to regard the WTO as such as an example for other systems. To some extent, it is because of specifics of the economic sector. It is much easier to have a binding dispute settlement system in trade law because things are easily quantifiable and you are talking to actors who are very used to litigation whereas in other fields they are not. If it comes to retaliation, again amounts are easily quantifiable and where they are not, as is the case with cross-retaliation in the field of TRIPS, for example, the system breaks down, as we have seen in the bananas case where cross-retaliation was authorized but seemingly not implemented. Thank you.

**D. Unterhalter:** Let me deal firstly with the question of the panels versus the Appellate Body and the composition of panels and the like. The reason that I contrast the two is because I do think the difference between a standing body of persons – you occupy an office under conditions of four years and security for a period and can develop there an understanding of the system – is something very different from being brought together on an *ad hoc* basis with colleagues who you may have never met before and where this is simply an *ad hoc* arrangement. Your ability institutionally to put your stamp upon the decision is compromised and reduced and I therefore think there is a real difference. Panels also, if they are not appointed by the parties, are then appointed *ad hoc* by the Director General. So again, the link back to the membership and the like is attenuated to put it mildly. What I would think would make a great difference would be to have a permanent body of panelists, who have the same institutional continuity as the Appellate Body with the possibility of having *ad hoc* appointments if there was a need for a specific kind of competence. And I think that that would greatly improve the consistency and possibly even the quality of panel decisions and it would also redress some of the imbalances that obviously exist between those who advise the panels and the panels' ability to assert their sovereignty, as it were, over their decision-making. So institutionally, that seems important. And certainly, as an Appellate Body member, there is no question as to who controls what, because we are a permanent body and we decide. I'll come to the role of the Secretariat in a moment.

As to the question of who makes up the panel and whether that could be changed, panels are constituted by a mixture of competences. There are diplomats, there are lawyers, there are economists. They have quite a varied set of backgrounds and they are quite often, and increasingly,

appointed by the Director General on the basis partly who is available and partly what he thinks will make up the right composition for the case. I am not certain that the primacy of lawyers is always a prerequisite for effective decision-making. I mean certainly some lawyers are useful when there are questions of legal interpretation. But given that this is a branch of economic law, I frankly often have found engagements with non-lawyers to be quite as helpful in my experience, economists for example often make extremely competent lawyers. I'm not certain that lawyers always make particularly competent economists. So I'm not convinced that there is a problem about the kinds of competences you need to bring to bear. There is something to be said about the institutional independence and integrity of the panels. And that's the point that I've made.

As to the Appellate Body, and the last contribution that was made, the Advisory Centre is a wonderful institution that has proved to be enormously important in bringing cases for developing countries. And their work should be greatly expanded and their contribution hugely applauded and mimicked where appropriate.

As to the Secretariat's role in Appellate Body decisions, they are very much like clerks in the Supreme Court of the United States. They give huge assistance and they are an enormously talented group of lawyers. But because the Appellate Body is a standing body, we come to Geneva, we hear the cases and we decide the outcomes.

As to whether the model is better suited to trade law as opposed to other kinds of disputes, I'm not so certain that that's right, because many of the kinds of issues that we have to deal with, concern interpretive issues of law and fact that seem to me as a lawyer in other branches of the law to be very typical of the enterprise and it's not peculiar to trade law; I don't think so. It is a branch of economic law, undoubtedly, and maybe that lends itself to adjudication in this form. But I think much of the task is wholly familiar to those who adjudicate in many other international and domestic settings.

**G. Abi-Saab**: I'll just complete the answer to Anthony Aust's question. The great difference between panels and the Appellate Body is that for each panel you appoint a different set, and usually, the parties to the dispute appoint two. It's really very transient, usually trade diplomats are appointed. Rarely do they appoint a professor or somebody else. So that's the great difference with the Appellate Body, which is a standing organ. And of course, every four years you have to re-elect the Body,

but it's not in every case like in *ad hoc* arbitration, for example in ICSID cases.

I didn't say we have to renegotiate the DSU because if we renegotiate it now, we will get something much worse. What I said was that it was not done in the technical way we expect, because amazingly enough, the Marrakesh Agreements were rushed at the end. They were done by different groups, many of them didn't include lawyers. And there was no drafting committee. So we got a hodge-podge of agreements which even when treating the same subject-matter, do not always use the same terminology or the same adjectives, which creates great confusion. What is a 'serious injury'? How does it differ from 'material injury'? And so forth. Because they did not go through that final polish we are used to as lawyers. But, as David Unterhalter said, such defects have been largely taken care of through interpretation. How far can interpretation, however, go in this respect? There was nothing for example in the DSU about the onus of proof and the taking of evidence. The rules were laid down from scratch by the Appellate Body. Nobody said anything about this innovation: that the AB has gone beyond its mandate or beyond the horizon of foreseeability, i.e. of permissible interpretation. Is it because it was considered a mere question of procedure or rather because everybody somehow accepted the fact that there is a gap that had to be filled for the system to be able to function? But when you try to straighten the wrinkle elsewhere then you get wrinkled by the political organ.

About the role of the Secretariat David Unterhalter said what has to be said. The Secretariat in panels plays as very important role because in many cases, the members – or at least two – don't know and they are away. They don't stay there, they come for the case one day, while the Appellate Body is a standing organ.

The Advisory Centre is a very important thing. David Unterhalter said it but I have to say that I'm now a little bit drowned in ICSID cases, I cannot say much because the ICSID pope is here, Christoph Schreuer. Everything I say of course is not for his ears. But the problem of ICSID is the lawyers. I have five rooms full of boxes of useless files. They keep sending them, and poor developing countries have to hire big firms, American firms, or do the business themselves, like the poor Argentineans. They have about forty cases and most of them they treat themselves. And they lose a lot of them because what can they do with this flood of things, of innovation, of silly and futile arguments simply to make more hours, which they pay $800 per hour. That is the problem. And the third world countries are very, very prejudiced in this respect.

While in the Appellate Body, the Advisory Centre has ended that a little, and I have to say, I was on several cases before the International Court. There, the same as in the Appellate Body, nobody really floods you with so many useless materials as in ICSID cases. It's terrible, terrible. The means available are very important and the Advisory Centre provides a good solution to the problem. I hope it will be followed elsewhere.

The generalization of the system and the specificity of economic law, it's not only economic law because ICSID is also economic law. And many things could be done there. But I mentioned the fact that these special regimes are based on the law of co-operation. Why don't we have a tighter system about environmental law? I'll tell you why. Because in trade, the big players were interested, they perceived at one point that they had a common interest. And somehow they impose it on the others. I mentioned that earlier. In environmental law, this is not true. The big players don't perceive the common interest in the same way. It's the small ones who want to push the big ones. So I think that is the question; where you get sufficient consensus between those who can impose a system on the others or at least make it so attractive to them that they would accept it although they may consider it a little bit unfair to them. Then you can move ahead. And I think that something like that could work. But not so much the specificity of economics. I don't think so. But as far as ICSID goes, I think there is a lot to be learned from the WTO experience. Thank you.

**A. Reinisch:** My question is also related to the flood of information that you receive. A few years ago, the acceptance of amicus curiae briefs was hailed as a new device to have private parties and their 'voices' before the WTO. Subsequently, it seemed that a certain soberness returned and the usefulness of amicus briefs was questioned. Now, my question is less a legal one than one from a practical viewpoint, since it is very hard to judge from the outcomes, from the Panel and Appellate Body reports, to what extent they are actually taken into account. I still think that they may have some implication. Just your personal view: to what extent do you find them useful or rather tedious like the lawyers' submissions in ICSID cases?

**H. Tichy:** I have a question to Georges Abi-Saab. I was very interested in your description of the consultation system inside the Appellate

Body, and I would like to hear more about it. Where did the inspiration come from? And do you think it's a model for other courts?

**G. Abi-Saab**: About *amicus curiae*: I consider this as much ado about nothing, really. But it raises an important question. Which is the role of third parties? I wouldn't go into all that, but in fact, what happened reflects what I said about massaging sovereignty. States are there. They know that their sovereignty is being eroded by every obligation they accept. I mean not formally, i.e. that in theory you exercise your sovereignty by accepting an obligation; but in fact you are putting yourself under control in an area in which you were not controlled before. That is how it is. Amazingly enough, it's the Third World countries that are against *amicus curiae*. I would have thought, coming from a Third World country myself, that it is in their interest to have *amicus curiae*. The whole thing also raises another problem in all systems of adjudication, which is what to do with third parties. In arbitration, we now speak about intervention in arbitration. I remember when Rudolf Bernhardt did his report for the *Institut de Droit International*, we had a lot of discussion on that. There is a new third party as in almost all cases there is a community interest. But who speaks for the interest of the international community? In most of the cases, there is this dimension. And in the absence of an Avocat Général for the international community, it is the judge who considers that he has to play that role. But if a judge interjects a community interest in what is perceived by the parties as a transactional agreement, they say, 'you have gone beyond your mandate'. And it is a very important part of our subject today. In the seventies and the eighties, there was a song 'Who speaks for the trees'. Who speaks for the international community in these cases? And as I said, in the WTO, it raises the problem of non-trade concerns. The Appellate Body has done great work, I have to make a little propaganda for my group. The Appellate Body has done great work in giving space to public interest, but it is one of the reasons why it is very strongly attacked, not by all, but by some. So I agree on the principle, but I don't agree specifically on the *amicus curiae* because you know, we read all *amicus curiae*, and then we say, we haven't seen it or we don't admit them. They don't bring anything new to what the parties have said because they don't have access to the briefs of the parties. So they say things which are really very well known to the panels. It's not that, what really counts. But I agree that we need something here to represent the public interest in international adjudication and we don't have it.

About the exchange of views: This was really a judicial innovation. It's not in the DSU, it is the Appellate Body, and at the beginning it was out of precaution, let's say, because it was a new exercise, and the AB members were very close to each other, the first generation. I was in the second generation. And I coincided with most of the first generation except for two. They were very close and they wanted really to get reassurance from those other members of the Appellate Body who were not there, but the real objective result is that every member knows everything. But it is not a drafting committee. In fact, it is just after the oral hearing, before the drafting starts. The Division, which heard the case up to that point, deliberates a little bit, and then the others come, the deliberation continues and then the others leave to the three who have sat on the case to start writing and so forth. So it's really a stage before drafting. Thank you.

**D. Unterhalter:** Let me be very brief. As to the exchange of views, I must say that when I went on to the Appellate Body, I found this a rather novel concept because it seemed an odd situation that the parties had not had the opportunity and oral argument to interact with some of the persons who were going to offer views on the ultimate decision. I have however become a great supporter of the system as perhaps is inevitable when you participate in it. For this reason: there is a clear demarcation of those who are charged with making the decision, which is the three members of the division. The others simply offer views, particularly on some of the systemic features of the decision that could have an influence for the jurisprudence of the WTO as a whole. And so you clearly get the benefit of a number of minds brought to bare on the subject, but there is no question and this division is very, very clearly respected by those who are not on the division and those who are on the division. It is for the three to decide as they see fit at the end of the day, informed by the useful observations made by their colleagues, but in no way is any of that determining. It is perhaps an oddity, but it has certainly proved its utility within the system as a whole.

Just briefly on the *amicus*: The great controversies surrounding its adoption have simply not yielded the fruit that one had hoped for, in a way. Because it's underutilized, partly because of the limits of private participation in this way. But there are undoubtedly interests that could usefully be articulated through a better use of the *amicus* system. And to date, however, the use of the system and the contributions are simply underwhelming. They are either saying the obvious or they are off-point. This does not mean, however, that they could not be used with

greater efficacy. Partly, I suspect because the system has become widely used and third parties in particular use the opportunity to come and say their piece before the panel and the Appellate Body. There is perhaps a greater representation of interests simply through WTO members. But it's by no means exhaustive of all the interests that could be articulated. But to date, the procedural innovation that we brought out has simply not yielded a very significant substantive contribution through that procedure.