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# 'REFORMING THE LAW AND INSTITUTIONS OF THE WTO: THE DANGERS OF UNEXPECTED CONSEQUENCES'

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## *I. Introduction*

In the face of a global economic slowdown, the WTO is presented with two interconnected and pressing needs: to encourage further liberalization at the multilateral level, and to elaborate and clarifying the existing legal disciplines applicable to the Membership. While multilateral negotiations have made modest progress, there are still considerable challenges ahead.

Reform nonetheless presents opportunities for Members, not only to develop WTO law, but also to do so in a manner that serves their interest. Indeed, institutions such as the WTO, with their comparatively detailed set of disciplines and effective compliance mechanisms, are especially attractive to Members for this purpose. This paper seeks to identify the risks involved in expecting reform to produce results coincident with Members' interests or objectives, drawing attention to the dangers of unexpected consequences for Members who may find that their reforms do not lead to the results they originally intended.

By way of demonstration, the paper identifies two interrelated areas of WTO law, one institutional and one substantive, where the expectations of the Members in question were not borne out. The first is in the creation of the Appellate Body through the conclusion of the Dispute Settlement Understanding. In spite of clear indications, both of its expected role and constitutional checks, the Appellate Body's self-defined Working Procedures and interpretative methodology together have drawn strong criticism of judicial activism and unsatisfactory interpretations. The second example, related though distinct, is the unexpected interpretation of Art XIX GATT and Art 2.1 Agreement on Safeguards by the Appellate Body in the *Korea – Dairy* and *Argentina – Footwear* disputes. Though the primary WTO texts are based verbatim on US models, their subsequent interpretation post-1994 have contradicted the expectations of the Membership (and most notably, the US).

The purpose here is not to criticise the Appellate Body's institutional development or interpretative method, but rather to identify the disjoint between expectations and outcomes. This paper argues that these failures demonstrate the difficulty with designing an institution or rule-set to serve one's own interests. Nonetheless, it draws lessons from these experiences, positing the key role of institutional identities and interests in shaping how rules are subsequently applied, though with the caveat that identities are fluid, ever more so in an increasingly multi-polar global economy.

## *II. Institutional Reform*

The Appellate Body and panels principally derive their legal authority from the Dispute Settlement Understanding. In essence, the DSU functions as their constitution, granting them

the legal competence to act. Constituted as well as constrained and enabled by the DSU (including the consistent threat of DSB criticism),[1] it is suggested here that both panels and the Appellate Body see their own interests in maintaining their own legitimacy as grounded in terms set by the DSU, as well as continued judicial and political dialogue with key Members.

### *A. Panels as Finders and Assessors of Facts*

For panels, Art 11 DSU sets out their responsibilities as well as the appropriate standard to apply in cases of review. The Appellate Body has stressed what it considers the principal role of panels in this context, confirming in *EC – Hormones:*[2]

> The function of Panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a Panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.[3]

The Appellate Body was at pains to emphasize the appropriate standard of review for panels: neither *de novo* nor total deference but instead an 'objective assessment' which involved considering evidence and making factual findings.[4] The concept of an 'objective assessment' is unclear and there has been considerable debate over its limits,[5] however, the role of the panel as fact-finder and fact-assessor has considerable conceptual weight.

The negotiating history of Art 11 DSU shows serious concerns of the US over the level of deference that panels were to give national agency determinations.[6] In particular, the US was keen to have a form of *Chevron* deference[7] included in the DSU.[8] The concerns of other

[1] D Sarooshi, *International Organizations and Their Exercise of Sovereign Powers* (OUP 2005) 79, using an example the change in position of the Appellate Body on the reception of *amicus curiae* briefs. Also, P Mavroidis, 'Amicus Curiae Briefs Before the WTO: Much Ado About Nothing', Jean Monet Working Paper 2/01, 8 for an account of the WTO General Council Meeting following the reception of *amicus curiae* briefs by the Appellate Body in the Shrimp-Turtle dispute.
[2] *EC – Hormones (Appellate Body)* para. 116
[3] Ibid, underlining in original
[4] Ibid, para. 133
[5] R Becroft, *The Standard of Review in WTO Dispute Settlement: Critique and Development* (Edward Elgar 2012) 50-52
[6] Indicated in interviews conducted by John Jackson: S Croley & J Jackson, 'WTO Dispute Procedures, Standard of Review, and Deference to National Governments', 90 American Journal of International Law 2 (1996) 193, 194-195
[7] *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under the *Chevron* doctrine, in instances of delegated executive authority, both agency and courts are to abide by Congress' intent where it is clear. Where Congress' intent under the delegating legislation is not clear the agency's interpretation of the legislation (and thus its duties and how it carries them out) is to be deferred to so long as it is not unreasonable.

participants in the Uruguay Round over limiting the potential strength of panels in examining national measures lead to a deadlock[9] that was only resolved by accepting Art 11 DSU as it now stands with a more restrictive standard of review under Art 17.6 Anti-Dumping Agreement.[10] The wording of Art 11 DSU has encouraged panels to view their role as defined by the text of the agreement, with the focus on fact-finding particularly relevant.[11]

### *B. The Appellate Body as the 'World Trade Court'*

Contrasting with its vision for the role of panels, the Appellate Body has constructed a different purpose within the WTO institutional framework. Rather than acting as a trier of fact, the Appellate Body's role has become that of the 'World Trade Court' in all but name.[12] This development, by no means inevitable,[13] has had a profound influence on the way that the Appellate Body examines cases before it.

It was not clear at the founding of the WTO, that the Appellate Body would take the form that it has since taken.[14] Indeed, the negotiating history clearly indicates that the then Contracting Parties considered dispute settlement under the WTO to be an entirely different creature to that found in other areas of international relations,[15] not concerned with the development of a clear jurisprudence[16] but rather to settle specific disputes between the parties to it.[17] The

[8] S Croley & J Jackson, 'WTO Dispute Procedures, Standard of Review, and Deference to National Governments', n6, 194-195

[9] On the negotiating history of Art 11 DSU: M Oesch, *Standards of Review in WTO Dispute Resolution* (OUP 2003) 72-80

[10] Art 17.6, Agreement on implementation of Article VI of the General Agreement on Tariffs and Trade 1994: 'in its assessment of the facts of the matter, the Panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the Panel might have reached a different conclusion, the evaluation shall not be overturned; (ii) the Panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the Panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the Panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.'

[11] See generally, M Grando, *Evidence, Proof, and Fact-Finding in WTO Dispute Settlement* (OUP 2009) chapter 5

[12] C.D Ehlermann, 'Six Years on the Bench of the "World Trade Court": Some Personal Experiences as Member of the Appellate Body of the WTO', Journal of World Trade (2002) 605. An alternative name previously suggested is the 'International Court of Economic Justice': JHH Welier, 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement', Harvard Jean Monnet Working Paper 9/00 (2000) IV:1

[13] P Van Den Bossche, 'The Making of the "World Trade Court": the Origins and Development of the Appellate Body of the World Trade Organization', in R Yerxa & B Wilson, *Key Issues in WTO Dispute Settlement: The First Ten Years* (CUP 2005) 63-64. Also, P Van Den Bossche, 'From Afterthought to Centerpiece: The WTO Appellate Body and its Rise to Prominence in the World Trading System', Maastricht Faculty of Law Working Paper 2005/1

[14] R Steinberg, 'Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints', 98 American Journal of International Law 2 (2004) 247, 250

[15] 'The GATT dispute settlement machinery is original and specific; there is no equivalent in other areas of international relations.' Communication from EEC (24 September 1987) GATT Doc. MTN.GNG/NG13/W/12, para 1.

[16] *Ibid.* 'The machinery cannot and must not be used to create, through a process of deductive interpretation, new obligations for contracting parties, or to replace the negotiating process. One of the objectives of the Uruguay

proposal of appellate review raised concerns not of potential institution building (at that point in time) but rather that it would add delays to the settlement of disputes with all Members lodging appeals.[18] Such a concern speaks to the expectation that there would be no necessary connection between instituting a more rule-based approach with the subsequent judicialization of the dispute settlement system.

Indeed, in the final text, Art 17 DSU sets out the competences of the Appellate Body and is cautious in its terminology. There is no mention of a 'court' 'tribunal' or 'judges' and the number of permanent members is considerably lower than comparable international tribunals.[19] Though permanent, members of the Appellate Body are not contracted on a full-time basis but rather maintained on monthly retainer with daily fees factored in.[20] They do not sit together but in divisions of three,[21] potentially minimising their ability to lay down particularly authoritative decisions of the full Appellate Body as is customary in other legal systems.[22] Finally, the Dispute Settlement Body, a political organ of all members of the WTO, must adopt decisions of the Appellate Body. While in practice adoption is a formality due to the negative consensus rule,[23] in theory it constitutes a serious limitation on the autonomy of the Appellate Body. At the very least is creates opportunities for the public criticism of Appellate Body decisions by the Membership.[24]

The first seven members of the Appellate Body were instrumental in defining its role as it stands today.[25] The role of judicial actors in creating transnational institutions is not new, Eric Stein identified the process in the European context in 1981.[26] The WTO has been little different with the Appellate Body acting to consolidate its position and maintain its own

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Round is to eliminate certain ambiguities and diverging interpretations of the General Agreement and Codes, and this will make a fundamental contribution to dispute settlement.'

[17] 'The dispute settlement procedures should be used essentially as a conciliation mechanism whose final stage, if conciliation fails, should not be of a judicial nature.' Communication from Brazil (7 March 1988) GATT Doc. MTN.GNG/NG13/W/24

[18] See: Note by the Secretariat (13 November 1989) GATT Doc. MTN.GNG/NG13/16, para.21; Note by the Secretariat (15 December 1989) GATT Doc. MTN.GNG/NG13/17, para.9; Note by the Secretariat (28 May 1990) GATT Doc. MTN.GNG/NG13/19, para.8

[19] P Van Den Bossche, 'The Making of the "World Trade Court": the Origins and Development of the Appellate Body of the World Trade Organization' n13, 65-66 citing the numbers of other permanent judges on international tribunals: 15 on the International Court of Justice, 18 on the International Criminal Court and 21 on the International Tribunal for the Law of the Sea

[20] Establishment of the Appellate Body: Recommendations by the Preparatory Committee for the WTO approved by the Dispute Settlement Body on 10 February 1995 (19 June 1995) WT/DSB/1, paras. 10-12

[21] Art 17.1 DSU

[22] The practice of sitting *en banc* to enhance the authority of decisions of a court and thus provide greater certainty is principally found in courts within common law systems.

[23] Art 17.14 DSU

[24] See, supra n1.

[25] P Van Den Bossche, 'The Making of the "World Trade Court": the Origins and Development of the Appellate Body of the World Trade Organization', n13 69: 'most, if not all, members appointed in November 1995 shared a nearly missionary belief in the importance of the task entrusted to them.'

[26] E Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution', 75 American Journal of International Law 1 (1981) 1

legitimacy.[27] In spite of limited guidance from the DSU[28] and a weak mandate from its accompanying negotiating history, the Appellate Body members constituted their identity through their decisions (some considered of particular 'constitutional' importance[29]) and their own Working Procedures[30] that served to 'cure' some of the obstacles to the Appellate Body's legitimacy; Van den Bossche identifies Rule 4 of the Working Procedures, which sets out a mechanism for the 'exchange of views' between all members before finalizing a report, as a key way to resolve the dangers of inconsistency and reduced authority that the three member divisions may otherwise have caused.[31] More generally the Working Procedures have served to ensure the judicial character of the procedures at the Appellate Body as opposed to the more informal pre-WTO dispute settlement practices.[32]

A consequence of the judicialization of the Appellate Body has been its need to ensure its own legitimacy in face of claims of activism. The textual focus of the Appellate Body in the interpretation of the 'unforeseen developments' clause discussed below can be understood as an attempt to strengthen its position following the guidance set out in the DSU (particularly Art 3.2 DSU).[33] Taking the embedded textual focus stemming from the DSU and the Appellate Body's desire to establish a mandate as a global trade court, the result is a balance between a textual focus in interpreting the covered agreements and, insofar as this textual approach allows, deference to Members' own determinations.[34] The key point to note here is how the legal instruments constituting the Appellate Body as an institution influence its identity, though not necessarily as expected: the individual actions and priorities of the actors involved have played an important part in its development.

## *III. Legal Reform*

[27] Behaving as a 'strategic quasi-judicial actor', J McCall Smith, 'WTO Dispute Settlement: The Politics of Appellate Body Rulings', 2 World Trade Review (2003) 65, 79. See also, I Venzke, *How Interpretation Makes International Law: on Semantic Change and Normative Twists* (OUP 2014) 188-195.

[28] The limited guidance offered by the DSU to the members of the Appellate Body may well further explain their fixation with what little guidance exists: i.e. Art 3.2 DSU and thus the textual methodology on which their legitimacy rests.

[29] The Shrimp-Turtle report (*United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body (12 October 1998) WT/DS58/AB/R), for example, setting out the scope of non-WTO obligations within the interpretative role of the Appellate Body: 'perhaps the most interesting constitutional case' according to J Jackson, 'The Varied Policies of International Juridical Bodies – Reflections on Theory and Practice', 25 Michigan Journal of International Law (2004) 869. Arguing for the role of the Appellate Body in engaging in constitutional behaviour: D Cass, 'The "Constitutionalization" of International Trade Law: Judicial Norm Generation as the Engine of Constitutional Development in International Trade', 12 European Journal of International Law (2001) 39

[30] Currently: *Working Procedures for Appellate Review (4 January 2005) WT/AB/WP/5*

[31] P Van Den Bossche, 'The Making of the "World Trade Court": the Origins and Development of the Appellate Body of the World Trade Organization' n13, 69-71

[32] R Hudec, 'The New Dispute Settlement System of the WTO: An Overview of the First Three Years', 8 Minnesota Journal of Global Trade (1999) 1

[33] Strengthened by the inclusion of the 'cannot add to or diminish the rights and obligations…' provision in the 29 November 1982 Ministerial Declaration in Geneva.

[34] This is most notably the case in SPS matters.

Related to questions of institutional reform is reform of substantive law. The Agreement on Safeguards one notable example, providing a clear rule-set to deal with safeguards and bring them back into the multilateral fold[35] with failure to address this being one of the great disappointments of the Tokyo Round. The WTO Agreement on Safeguards achieved a great deal: a clearer set of rules for the use of safeguards, prohibition of 'grey-area measures'[36] (and providing a limited life span for those existing at the time), and more besides. This led to an increase in the use of safeguard measures by Members and a rekindling in the interest of their application and the legal disciplines to be applied.

While the US had used its own legislation as the model for the Agreement on Safeguards, it was to suffer a series of defeats at the Appellate Body. Contrary to the opinion of many commentators, who are highly critical of the Appellate Body's interpretation of the Agreement on Safeguards and Art XIX,[37] it is argued that a better explanation of these decision lies not in the incompetence or empire-building of the Appellate Body[38] but rather in light of an overly functionalist[39] and formalist[40] expectation of law at the WTO.

While the US successfully determined the content of the bulk of the Agreement on Safeguards[41], it failed to anticipate the consequences of the new dispute settlement system.

[35] Preamble to the Agreement on Safeguards: 'Recognizing the need to clarify and reinforce the disciplines of GATT 1994, and specifically those of its Article XIX (Emergency Action on Imports of Particular Products), to re-establish multilateral control over safeguards and eliminate measures that escape such control;'

[36] This is the generic term for Voluntary Export Restraints, Orderly Marketing Agreements and other similar instruments.

[37] Alan Sykes calling them 'a series of wooden, largely useless and often logically incoherent decisions that simply underscore the deficiencies of the treaty text without clarifying them in the least.' A Sykes, 'The Fundamental Deficiencies of the Agreement on Safeguards: A Reply to Professor Lee', 40 Journal of World Trade 5 (2006) 979, 993

[38] Inter alia: Y.S., Lee, 'Not Without a Clue: Commentary on "the Persistent Puzzles of Safeguards"', 40 Journal of World Trade (2006), 385; J Greenwald, 'WTO Dispute Settlement: An Exercise in Trade Law Legislation?', 6 Journal of International Economic Law 1 (2003) 113; A Sykes, 'The Persistent Puzzles of Safeguards: Lessons from the Steel Dispute', 7 Journal of International Economic Law 3 (2004) 523; P Rosenthal & J Beckington, 'Dispute Settlement Before the World Trade Organization in Antidumping, Countervailing and Safeguard Actions: Effective Interpretation or Unauthorized Legislation?', speech delivered at a conference presented by the Trade and Customs Law Committee of the International Bar Association, 'Developments in WTO Law', Geneva, Switzerland, March 20 & 21, 2003, 1

[39] Functionalist accounts rely on the instrumental use of law to pursue interests: M Loughlin, 'The Functionalist Style of Public Law', 55 University of Toronto Law Journal (2005) 361, 363; N.D. White *The Law of International Organisations* (Manchester University Press 1996) 2-7. Such accounts may also be called instrumentalist: R Keohane 'International Relations and International Law: Two Optics', 38 Harvard International Law Journal 487 (1997).

[40] Formalist accounts 'claim that (1) the law is "rationally" determinate, i.e., the class of legitimate legal reasons available for a judge to offer in support of his decision justifies one and only one outcome either in all cases or in some significant and contested range of cases (e.g., cases that reach the stage of appellate review); and (2) adjudication is thus "autonomous" from other kinds of reasoning, that is, the judge can reach the required decision without recourse to non-legal normative considerations of morality or political philosophy.' B Leiter, 'Legal Formalism and Legal Realism: What is the Issue?' 16 Legal Theory (2010) 111

[41] Though nominally cautious in its position: 'The purpose of this paper is not to advocate that the specific procedures of the United States be incorporated into a safeguards agreement or that the United States experience

The new DSU and its attendant methodology resulted in the Appellate Body *Korea – Dairy* and *Argentina – Footwear* reports. This has had a lasting impact on the review of safeguard determinations at the WTO level with numerous negative determinations passed on the legality of safeguard measures since. What follows is one notable example from these cases that serves to illustrate this point.

### *A. The Agreement on Safeguards and the 'Unforeseen Developments' Clause*

Art 2(1) of the Agreement on Safeguards sets out the conditions for the use of safeguards as follows:

> A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.[42]

Modelled on s201 of the US Trade Act 1974, it replicated the lack of 'unforeseen developments' or 'obligations incurred' requirements that were found in Art XIX GATT and had been dropped from US legislation in the intervening years.

The result of this omission was a claim by the EU in response to safeguard measures enacted by Korea on certain dairy products and Argentina on certain items of footwear respectively. Amongst the claims of the EU, was that the appropriate trade bodies in Korea and Argentina had not fulfilled their obligations under Art XIX by showing that the increase in imports was a result of 'unforeseen developments.' The importing Members' claims can be divided into three separate threads.

First, it was argued that the Agreement on Safeguards contained the full set of disciplines relating to the use of such measures and compliance with it sufficed legal requirements.[43] Second, that where a conflict exists between the GATT and the Agreement on Safeguards, it is to be resolved in favour of the Agreement, as per the Interpretative Note to the WTO Agreement. [44] Third, engaging with the possibility of the validity of the 'unforeseen

readily lends itself to use by other contracting parties. This paper is presented more for the purpose of demonstrating how one country has defined injury in its national trade law and developed a transparent process for making injury determinations consistent with Article XIX.' Communication from the United States (3 March 1988) GATT Doc MTN.GNG/NG9/W/13, 1. The outcome was the use of US legislation as the model.

[42] Art 2.1 Agreement on Safeguards

[43] *Korea- Definitive Safeguard Measure on Imports of Certain Dairy Products, Panel Report (21 June 1999) WT/DS98/R ('Korea – Dairy Panel'),* para. 7.33

[44] WTO Agreement Annex 1a

developments' clause, that the rise in imports could not have been foreseen.[45] The EU, for its part, submitted that the obligations under the covered agreements were part of a 'single undertaking' and as such were cumulative in nature. The entirety of both Art XIX and the Agreement has to be applied.[46] In the context of the Argentinean case, the EU also pointed out that as Argentina had pursued a conscious policy of liberalization over the period of 1989/1990, an increase in imports could not be 'unforeseen' for the purposes of Art XIX.[47]

The *Korea – Dairy* panel in this case took an approach in line with academic opinion at the time; it interpreted the text so as to avoid conflict (citing the principle of *l'effet utile*[48]) and proceeded to examine the text of Art XIX:1 'based on the ordinary meaning of the terms' in it.[49] The conclusion was that the 'unforeseen developments' clause did not create any specific obligation but was instead explanatory.[50] The panel elucidated the *raison d'être* of Art XIX in light of the historic commitments made in 1947 and in doing so, cited both the *Hatters' Fur* dispute as well as (via Art XVI:1 of the WTO Agreement) 48 years of State practice.[51] The conclusion was that Art XIX contained no obligation with reference to the 'unforeseen developments' clause.[52]

The *Argentina – Footwear* panel reasoning was somewhat distinct, citing Art 11.1(a) of the Agreement on Safeguards which stipulates the requirement to enact safeguard measures in compliance with Art XIX 'applied in accordance with Agreement [on Safeguards].'[53] The panel then concluded, both due to this provision (and drawing a comparison with *Brazil – Desiccated Coconut*[54]*),* that Art XIX and the Agreement on Safeguards were 'intrinsically linked' and that Art XIX was to be read in light of the 'subsequently negotiated and much more specific provisions of the Agreement on Safeguards.'[55] The 'unforeseen developments' clause is then read in light of the object and purpose of the Agreement on Safeguards. The Agreement is intended (as per its Preamble) to 'clarify and reinforce' the disciplines found in Art XIX.[56]

The 'unforeseen developments' clause is fit into the panel's analysis by virtue of two conceptual exercises. First, it posits that the omission of the 'unforeseen developments' clause in the Agreement on Safeguards was an intentional, express omission. There is no detailed examination of negotiating histories but this is instead based upon speculation of the mind-set

[45] *Argentina – Safeguard Measures on Imports of Footwear*, Panel Report (25 June 1999) WT/DS121/R ('*Argentina-Footwear Panel*') para. 848
[46] *Korea – Dairy Panel,* para. 7.36
[47] *Argentina – Footwear Panel*, para. 847
[48] *Korea – Dairy Panel,* para. 7.37
[49] Ibid, para. 7.39
[50] Ibid, para. 7.45
[51] Ibid, para. 7.46
[52] '[W]e consider that Article XIX of GATT does not contain such a requirement.' Ibid, para. 7.48
[53] Art 11.1(a) Agreement on Safeguards
[54] *Brazil – Measures Affecting Desiccated Coconut*, Report of the Appellate Body (21 February 1997) WT/DS22/AB/R
[55] *Argentina – Footwear Panel*, para. 8.56
[56] Ibid, para. 8.62

of negotiators at the time.[57] Second, a division is made between the provisions in the Agreement on Safeguards in light of its aim to reassert control over the multilateral system of safeguards; on the one hand the tightening of disciplines (e.g. elimination and restriction of VERs) and on the other hand, the relaxing of disciplines (e.g. flexibility over compensation actions).[58] By making the omission of the 'unforeseen developments' clause an intentional alteration the panel is free to include it in the latter category. In this manner, the panel can view the omission of the unforeseen developments clause as part of the new provisions in the Safeguard Agreement that are designed to make it easier to apply safeguard measures. The panel here echoes the motivations in 1951 for the omission of the unforeseen developments requirement under US law. While playing lip-service to the limits on adding to or diminishing rights or obligations under the covered agreements[59] it still concludes that 'conformity with the explicit requirements and conditions embodied in the Agreement on Safeguards must be sufficient for the application of safeguard measures within the meaning of Article XIX of GATT.'[60]

### *B. The Influence of the DSU and its Attendant Methodology*

The two panel reports in *Korea-Dairy* and *Argentina-Footwear* represent a failure to understand the systemic shift that took place following 1994 with the introduction of the DSU. As discussed above, the DSU not only introduced the rules and regulations for a new dispute settlement system but also set out what was to be understood by the Appellate Body as strictly textual approach to interpretation.[61] The desire to create a body which would ensure compliance with the covered agreements but limit itself, as far as possible, in its judicial function to their application and interpret restrictively created an institution preoccupied with ensuring its own legitimacy. The requirement of post-report adoption by the Dispute Settlement Body, while unquestionably easier now than during the GATT years, still restricts the freedom of panels or the Appellate Body.[62]

The appeal of the *Korea – Dairy* and *Argentina – Footwear* reports gave the Appellate Body the opportunity to bring them into line with the new textual approach of the interpretation of the GATT.

The Appellate Body's response to these disputes was released almost simultaneously and the relevant passages were essentially the same. In particular, it took issue with the panels'

[57] Ibid, para. 8.65
[58] Ibid, para. 8.63
[59] DSU Art 3.2
[60] *Argentina – Footwear Panel*, para. 8.67
[61] C.D., Ehlermann, 'Six Years on the Bench of the "World Trade Court"', 36 Journal World Trade 4 (2002) 605, 616: recounting criticism that the 'Shorter Oxford Dictionary, which, in the words of certain critical observers, has become "one of the covered agreements".'
[62] Hence their description as 'quasi-judicial' bodies in some quarters: L Bartels, 'The Separation of Powers in the WTO: How to Avoid Judicial Activism', 53 International and Comparative Law Quarterly 4 (2004) 861, 864

approach by stressing the need to give meaning and effect to all provisions in the text[63] and reversed the panels' findings that the 'unforeseen developments' clause created no legal obligation. [64] The Appellate Body also took the opportunity to clarify the aim of this interpretation; that is, in line with the object and purpose of the Agreement on Safeguards, to reassert control over the multilateral disciplines on safeguards.[65] This is useful in clarifying the position of the 'unforeseen developments' clause during the intervening years. By stressing the need to reassert control over the safeguard system the clear implication is not that the 'unforeseen developments' clause had been legally inoperative but instead that there lacked a suitable enforcement method or cases raised.[66]

At the root of the Appellate Body's unexpected response was its interpretation, not of the Art 2.1 Agreement on Safeguards or Art XIX GATT, but rather how it understood the message of Art 3.2 DSU. In particular, within the wording of Art 3.2:

> The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to *clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law*. Recommendations and rulings of the DSB *cannot add to or diminish the rights and obligations provided in the covered agreements*.[67]

The two highlighted provisions stress the importance of a textual approach. The reference to the 'customary rules of interpretation of public international law' has been held to include Arts 31 and 32 of the VCLT.[68] However, in the WTO context this has led to a greater emphasis on Art 31 than Art 32 (i.e. less interest in supplementary methods of interpretation) and importantly a strong emphasis on the first part of Art 31(1) which stresses 'the ordinary meaning to be given to the terms of the treaty'.[69]

[63] *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, Report of the Appellate Body (14 December 1999) WT/DS98/AB /R ('*Korea – Dairy Appellate Body*') para. 82
[64] Ibid
[65] Ibid, para. 88
[66] The lack of a non-State enforcer of the covered agreements, such as the Commission in the EU results in a lack of disputes in areas where many states have potentially violated the WTO rules (the 'glass house' problem).
[67] Art 3.2 DSU (emphasis added)
[68] *United States – Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body (29 April 1996) WT/DS2/AB/R, 17; *Japan – Taxes on Alcoholic Beverages,* Report of the Appellate Body (4 October 1996) WT/DS8,10,11/AB/R, 10.
[69] This 'literal' approach can be contrasted with the European Court of Justice's 'teleological' approach that places more emphasis on the object and purpose of the EU treaties when rendering an interpretation: C.D., Ehlermann, 'Six Years on the Bench of the "World Trade Court"', 36 Journal of World Trade 4 (2002) 605, 616

In the context of the WTO, this has a 'legitimizing effect' that serves as a defence to accusations of judicial activism.[70] This concern is embodied in perception of a need for a provision to specifically limit the ability of DSB rulings to affect the balance of rights and obligations under the text of the covered agreements.[71] This system aims to limit the potential for perceived judicial excesses and where such behaviour does occur, permits both formal and informal corrections. The formal method for the Member to reinforce their primacy is through either authoritative interpretations or by amendments of the covered agreements themselves.[72] The informal corrections may take the form of action resulting from political discourse within the WTO. [73] The desire by panels and the Appellate Body to ensure compliance with their reports further encourages them to take into account the criticism of the Membership.[74]

The result of the continued domestic (predominately US) pressure on the WTO's legitimacy has only strengthened the focus on a textual approach. [75] Criticisms of the Appellate Body's position in these cases, arguing that too rigorous an application of Art XIX and the Agreement on Safeguards undermines the 'safety valve' purpose of the provisions,[76] miss the broader imperatives that drive the Appellate Body. This is its concern with prioritising its own legitimacy. Highlighting the Appellate Body's focus on an 'textual' approach to maintain its legitimacy, J.H.H Weiler argues:

> On the whole the legitimation strategy practised by the Appellate Body (whether express or implicit) has been one of hermeneutic prudence and institutional modesty with a keen eye on balancing internal and external legitimacy. The almost obsessive attempts of the Appellate Body to characterize wherever possible the normal wide-ranging, sophisticated, multifaceted and eminently legitimate

[70] Ibid*,* 617. Concerning legitimacy, also: R Howse, 'Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence' in J.H.H Weiler (ed.) *The EU, the WTO and the NAFTA: Towards a Common Law of International Trade* (OUP 2000), J.H.H Weiler, 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement', Jean Monnet Working Paper No 9/00 (2000)

[71] Art 3.2 DSU

[72] Authoritative interpretations under Art IX(2) WTO Agreement and amendments to the covered agreements under Art X WTO Agreement.

[73] See, n1

[74] Suggesting that the Appellate Body balances its role as a legal decision-maker with a desire to encourage compliance with its reports: J McCall Smith, 'WTO Dispute Settlement: The Politics of Appellate Body Rulings', 2 World Trade Review (2003) 65

[75] For example, clear statements in Congress such as: 'Who would have ever thought that Antigua and Barbados would have more control over what goes on in Utah than the people of Utah themselves do?' in response to the *US – Gambling* dispute proceedings (Congressional Record H1739, 5 April 2005), or, in a statement Resolution of the US House of Representatives, 'the WTO dispute settlement process is not working and has been guided by politics rather than by legal principles' (H.Res. 441, 17 November 2003) in response to the *US – Steel* dispute. For an overview of the typical concerns: I Fergusson & L Sek, 'World Trade Organization: Issues in the Debate on US Participation', CRS Report for Congress, Order Code RL32918, Updated on June 9, 2005

[76] A Sykes, 'The "Safeguards Mess" Revisited – A Reply to Professor Jones', 3 World Trade Review 1 (2004) 93, 95-96

> interpretations of the Agreement as "textual" resulting from the ordinary meaning of words is another manifestation of the internal-external legitimacy paradigm. [77]

This is not to argue that neither the Appellate Body nor panels have extended the text of the Agreements but, instead, stresses their need to justify clearly such an act. For example, the position taken by the Appellate Body that safeguard measures ought to be extraordinary has been criticized as 'an exercise in policy-making' rather than 'even-handed interpretation.'[78] The Appellate Body legitimizes its position though rooting its stance in the text of Art 11.1(a) of the Agreement on Safeguards and the title of Art XIX GATT that safeguard measures are to be emergency actions. 'Thus, Article XIX is clearly, and in every way, an extraordinary remedy.'[79]

Whether or not the Appellate Body engages in 'policy-making' is of lesser concern than the issue of how the Appellate Body or panels behave in light of its perception of the influence of the DSU and sensitivity to domestic pressures. The behaviour of the panels and Appellate Body is influenced both by the constitutive text and the interests it represents but also the dynamic nature of such bodies as actors in their own right with separate identities.

## *IV. Concluding Remarks*

The purpose of this paper has not been to draw a negative image of the potential of reform for international economic law at either a substantive or institutional level (if indeed we can truly draw such a distinction). Rather, the aim has been to identify instance of reform that have not produced expected outcomes and in doing so, seek explanations for how the legal framework at the WTO has developed in the way that it has. The clearest of these has been that either functionalist or formalist conceptions of law do not produce the outcomes one may expect. Expecting successful outcomes in one's own interests based on using domestic models of law, or holding assumptions of how institutions will behave as law-appliers, belies the deeply complicated and complex nature of law generally, and legal institutions specifically. In particular it indicates a restricted view of how law focuses in different ways, not only through processes of interpretation and application but also through actors, including newly created institutions. For reform to produce desired outcomes, a greater appreciation of the complexities and multi-faceted nature of law is required. We cannot expect institutions to behave as instructed at a fixed point in time, nor the law to be applied in the way in which it has been in other legal systems. Instead, reform must be tempered by sensitivity to law's multi-faceted nature, working not only in mechanistic terms but also as a powerful constraint, an empowerer and constitutor of identities both internationally and domestically.

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[77] J.H.H Weiler, 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement', Harvard Jean Monnet Working Paper 9/00 (2000), at IV (6)

[78] J Greenwald, 'WTO Dispute Settlement: An Exercise in Trade Legislation?', Journal of International Economic Law (2003) 113

[79] *Argentina – Safeguard Measures on Imports of Footwear*, Report of the Appellate Body (14 December 1999) WT/DS121/AB/R ('*Argentina – Footwear Appellate Body*') paras. 93-94