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From the trenches

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Appellators: the quest for the meaning of *and/or*

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Introduction

The act of 'naming' is one of the fundamental ways we use to give meaning to the world around us. The 'names' we choose to use – for objects, for actions, for ideas, for the most elusive of abstractions – give them a shared reality that enables us to give them a shared meaning in our experience of the surrounding world.[1] In my own experience of the world, this has nowhere been more evident than in my labors for a shared understanding of the meaning of international trade obligations in treaty interpretation for the World Trade Organization.

Disputes over the 'names' we call 'words' are at the heart of all of the varied criticisms of treaty interpretation that have resulted from the first decade of the experience of the Members of the WTO in trying to resolve international trade disputes through WTO dispute settlement. Whenever and wherever they have been made, and whatever their specifics in any specific dispute, such criticisms have all focused in some way on the act of 'naming' in WTO treaty interpretation. For this reason, any reply to these criticisms must necessarily focus also on 'names'.

1 For more on the connection between 'naming' and reality, see Ernst Cassirer, *The Myth of the State* (New York: Doubleday, 1955[1946], pp. 54–55); and see also Catherine M. Wallace, 'Coleridge's Theory of Language', *Philological Quarterly*, 59 (1980), 338–352.

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From the earliest days of the WTO a decade ago, the act of 'naming' has been basic to WTO dispute settlement. Indeed, the use of names to established a shared understanding has been so pervasive that it has extended even beyond the words of the WTO treaty to the 'naming' of those who labor loyally for the Members of the WTO in the legal vineyards of the dispute settlement system.

It may have been my good friend Andy Stoler who first used the word 'Appellators' as a name for the seven Members of the Appellate Body of the WTO. Old GATT hand that he is, Andy did so with a wry smile. Like many another seasoned trade negotiator, he combines an enduring idealism with an endearing irreverence. This is undoubtedly the best way to survive, as Andy has survived, through several decades of the sheer tedium of trade negotiations. So he meant it as a joke.

So did I when I told Debra Steger on the day when she and I first met, in 1995, that I was honored to be one of the first seven 'Appellators' of the Appellate Body of the WTO. Debra, of course, was newly named at the time as the first director of the Appellate Body Secretariat. She was appalled at my use of the word 'Appellator'. She was aghast – as high-minded Canadians rightly are from time to time at the errant excesses of their coarse neighbors to the south. After all, everyone in Geneva knows that the Members of the Appellate Body do *not* have titles.

Of course, Debra did not know me at the time. So she did not know that, like Andy, I was joking. Later, she learned, as others have learned, either to ignore my jokes, or to pretend to laugh at them. And yet, joke though it was for both Andy and me, the appellation of 'Appellator' nevertheless can be seen as fitting for the seven Members of the quasi-judicial tribunal that has been adorned by the Members of the WTO with the decidedly less than felicitous name of the 'Appellate Body'.

Andy will perhaps admit, from his current refuge in Australia, to coining the word 'Appellator'. No one will admit to coining the phrase 'Appellate Body' as the name for the international trade tribunal that serves the Members of the WTO as the quasi-court of last resort in WTO dispute settlement. In an act of fact-gathering that would be forbidden to me if I remained an 'Appellator', I have tried my best to identify the culprit. Thus far, I have failed to coax anyone into confessing to concocting a name that is, shall we say, less than appealing.

A Uruguayan told me it was the Europeans. A European told me it was the Canadians. A Canadian told me it was the Americans. An American told me it was the Uruguayans. To help me find this elusive fact, I am starting to think that I should 'seek' counsel from non-parties to this dispute through solicitation of *amicus curiae* briefs. I have not yet decided if thinking I 'should' means that I 'shall'.[2]

2 See *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (6 November 1998).

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In any event, I confess that, when the name 'Appellate Body' was chosen by the negotiating countries that became the original Members of the WTO, I barely noticed. I was too busy elsewhere at the time. As a Member then of the Congress of the United States, I was busy trying to pass the implementing legislation for the Uruguay Round trade agreements so that I could get out of Washington. My goal at the time was to become a *former* Member of the Congress.

I did not know then that I would soon also become an 'Appellator'.

Now, after eight eventful years of service to the Members of the WTO, I am content today to be a *former* 'Appellator'. I am content in part because, as a former 'Appellator', I am free for the first time to speak publicly about *some* of the aspects of the important task of the Appellate Body in WTO dispute settlement.

The sole task of the 'Appellators' is to assist the Members of the WTO in their task of treaty interpretation. In the fulfillment of this task, the act of 'naming' is critical. Names *must* be noticed. For the 'names' we call 'words' are the ways the Members of the WTO have given expression to their mutual agreement in the WTO treaty. Words are the basic tools of treaty interpretation.

The first decade

Whatever we may call them, and however we may view them, in the first decade since the establishment of the WTO, the Members of the Appellate Body have helped make the Appellate Body an international tribunal of historic global achievement through the successful fulfillment of this task. Largely, the Members of the WTO seem satisfied with the ways in which the Members of the Appellate Body have done so. To be sure, there are, occasionally, criticisms of some of the rulings of the Appellate Body by some Members of the WTO when Appellate Body reports are adopted by the Members of the WTO in their guise as the Dispute Settlement Body. But these criticisms are usually, and predictably, voiced by those whose claims have not prevailed in a particular dispute, and these criticisms often are voiced largely for obligatory diplomatic and political reasons.

Significant evidence of the overall satisfaction of the Members of the WTO with the work of the Appellate Body in the first decade of the WTO is the fact that, in the ongoing process of 'DSU review', negotiators for the Members of the WTO have simply assumed that, in the decades to come, there will continue to be an Appellate Body, and that it will continue to fulfill essentially the same task. Indeed, pending proposals such as the one to accord 'remand' powers to the Appellate Body would add to the discretionary authority of the 'Appellators' in fulfilling that task.

Sometimes the most important statements are unstated assumptions. Likewise, sometimes the most important proposals are those that are not made, and, to date, no Member of the WTO has proposed abolishing the Appellate Body, or substantially diminishing the responsibilities of the Appellate Body in WTO dispute

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settlement. In my judgment, this evidence is sufficient to meet the burden of proof in asserting a *prima facie* case of the overall success of the Appellate Body.

In the wider world, the overall verdict seems much the same. Few in the wider world would quarrel with the conclusion that the Appellate Body has, in the first decade of the WTO, very quickly become an efficient forum and an effective force for upholding international trade law, and, as a result, for upholding the international rule of law. And few would quarrel with the conclusion that it has done so in an unprecedented and an unwavering way. One observer for the *New York Times*, for example, has characterized the Appellate Body as both 'impartial and unflinching'.[3] And, according to Professor John Jackson, perhaps the preeminent scholar in the world on the WTO and on WTO law, 'The Appellate Body has brought a sense of rigor and deep analysis that goes well beyond the jurisprudence that developed during the more than three decades of the GATT, and indeed, may go beyond the record of any international law tribunal known to history.'[4]

Even so, there are occasional criticisms of the ways in which the Appellate Body fulfills its task of treaty interpretation for the Members of the WTO. From time to time, from place to place, and from case to case, the Appellate Body is alleged to have engaged variously in inappropriate forms of quasi-judicial activism. It is said to have engaged in 'law making', in 'gap filling', in 'overreaching'. It is said to have indulged in treaty making instead of treaty interpreting. It is accused, as a consequence, of having either added to, or subtracted from, the obligations of WTO Members in contravention of the express terms of the WTO treaty.[5]

With respect to some of these criticisms, we should simply consider the source. A lawyer who has convinced his country to spend several years, and who has convinced his client to spend several million dollars, in a losing case, is unlikely, when he loses, to admit that his *was*, from the beginning, a losing case. That lawyer is more likely to blame those who have judged the case for supposedly 'overreaching'. And some of the more self-serving in such circumstances have yielded to the temptation to do so after squandering the time and the money of others in WTO dispute settlement.

Similarly, some of these criticisms are made by certain 'non-governmental organizations' and by certain other interest groups that oppose the whole enterprise of the WTO. So they do not hesitate to distort and to deceive when describing the outcomes of WTO dispute settlement. This is merely one of their ways of exploiting the global paranoias about 'globalization'. With respect to their criticisms as well, we should simply consider the source.

3 Michael W. Weinstein, 'Economic Scene: Should Clinton Embrace the China Trade Deal? Some Say Yes', *New York Times* (9 September 1999), at C2.

4 John Jackson, 'Perceptions About the WTO Trade Institutions', Keynote Address, Inaugural Ceremony for the Advisory Centre for WTO Law, Geneva, Switzerland (5 October 2001).

5 Article 3.2, Understanding on Rules and Procedures Governing the Settlement of Disputes (the 'Dispute Settlement Understanding' or the 'DSU').

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But others who voice these criticisms of WTO dispute settlement, both within the WTO and without, have better intentions. Some of them truly support the WTO dispute settlement system. And some of those who do support it, and who do criticize it, are only echoing the ill-founded and self-serving criticisms of others. Especially if they are busy serving in elected office, they may not yet have taken the time to read the dispute settlement rulings they are criticizing, or to think through the unintended consequences of simply echoing such criticisms. For the sake of the future of the WTO dispute settlement system, these well-intentioned critics deserve a reply.

The textual approach

The current Members of the Appellate Body are constrained by the WTO Rules of Conduct from offering a reply.[6] Fortunately, as a *former* Member of the Appellate Body, I am not.

As a former 'Appellator', I continue to be bound by the WTO Rules of Conduct. I cannot therefore delve into the details of the reasonings or the rulings in any of the 60 appeals that were addressed by the Appellate Body during my eight years of service in Geneva. I am not free under those rules either to explain or to defend the specifics of past decisions. I am not free either to add to, or to subtract from, what I have already said, along with my former colleagues, in reporting those decisions to the Members of the WTO. Thus, this will not be an essay either to explain or to justify what was decided in, say, the appeal in *Argentina – Footwear*, on the issue of 'unforeseen developments'.[7] Much as I might wish to do so in reply to some of the more ill-founded criticisms of the Appellate Body, I am not free under the rules to engage in such an essay. What I said together with my colleagues on the Appellate Body at the time must suffice for all time.

But I am free now to offer a more general reply to some of the critics of those decisions by explaining, more fully than I was free to explain while I still served on the Appellate Body, precisely how the Members of the Appellate Body have approached the fulfillment of their task of treaty interpretation.

In defining this task, the old GATT hands among us will rush to recite the words of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes.[8] It is through the Dispute Settlement Understanding – the 'DSU' – that the Members of the WTO established the WTO dispute settlement system, and, along with it, the Appellate Body, as a central achievement of the Uruguay Round. It is the DSU that both defines and delineates the task of the 'Appellators' as treaty interpreters.

6 See WTO Rules of Conduct.

7 See *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS 121/AB/R (12 January 2000).

8 See especially, for these purposes, Articles 3 and 17 of the DSU.

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The DSU, of course, is an understanding among *all* of the Members of the WTO. They have all signed it. They are all bound by it. They have all agreed on it. Presumably, they all agree *with* it. It is the Members of the WTO speaking and acting through the DSU – and not the Appellate Body – that guides and governs the work of WTO dispute settlement. This clearly includes the parts of that work that require treaty interpretation.

In the DSU, we are told that '[t]he dispute settlement system is a central element in providing security and predictability to the multilateral trading system'.[9] In the DSU, we are told also that '[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute'.[10] In the DSU, we are told as well that the dispute settlement system, in pursuing this aim, 'serves to preserve the rights and obligations of Members' of the WTO 'under the covered agreements' of the WTO treaty, 'and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law'.[11]

Thus, when a dispute arises under the covered agreements among the Members of the WTO, when a panel is established in response to a request by one of the parties to that dispute, when the panel submits a written report to the Members of the WTO sitting together as the Dispute Settlement Body, when 'issues of law covered in the panel report and legal interpretations developed by the panel' are raised by one or more of the parties to the dispute through the exercise of their automatic right of appeal to the Appellate Body, and when the Appellate Body convenes for the maximum of 90 days allowed under the DSU to 'address each of the issues raised' on appeal in appellate proceedings, there are clear instructions from the Members of the WTO as to the approach that must be used by the Members of the Appellate Body in fulfilling their required task under the DSU by 'clarifying' the 'existing provisions' of the 'covered agreements' that are pertinent to those legal issues raised in that dispute.[12]

Those instructions are: The Appellate Body must fulfill its task of treaty interpretation 'in accordance with the customary rules of interpretation of public international law'. It must do so because the Members of the WTO have told it to do so.

And what are those 'customary rules of interpretation of public international law'? They are the customary rules that are given expression in the Vienna Convention on the Law of Treaties.[13] The customary rules are, it must be emphasized, *given expression* in this international Convention. They exist *independently* of this Convention as customary rules of international law, as evidenced by state practice and by shared perceptions of the law worldwide. Thus, it does not matter

9 Article 3.2, DSU.
10 Article 3.7, DSU.
11 Article 3.2, DSU.
12 Articles 3 and 17, DSU.
13 Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 ('Vienna Convention').

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for purposes of international law if, for example, one deliberative body of one state that is a Member of the WTO has not yet ratified the Convention. The customary rules are customary rules all the same.[14]

Foremost among the customary rules of treaty interpretation is one that is given expression in Article 31 of the Vienna Convention. Importantly, Article 31(1) provides: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'[15]

In the very first appeal in WTO dispute settlement, *United States – Reformulated Gasoline*, in 1996, the Appellate Body stated that Article 31 of the Vienna Convention 'has attained the status of a rule of customary or general international law'.[16] In the second appeal in WTO dispute settlement, *Japan – Alcohol*, in that same year, the Appellate Body described Article 31(1) of the Vienna Convention as a 'fundamental' rule of treaty interpretation.[17] This 'fundamental' rule is a rule that establishes a *textual* approach to the interpretation of a treaty. As the International Court of Justice has put it in describing this interpretative approach generally, and as the Appellate Body has agreed, 'interpretation must be based above all on the text of the treaty'.[18] This is no less so when this approach is used to interpret the text of the WTO treaty.

In my experience, no Member of the WTO has ever disputed any of this before the Appellate Body in WTO dispute settlement.

Thus, the task of the Appellate Body, as defined by the Members of the WTO, is to assist the Members of the WTO by finding the meaning of the terms in the text of the WTO treaty. The quest of the 'Appellators' is for the meaning of *words*.

Alternatives

Why words?

To answer this question, we might begin by asking what other approaches the Members of the WTO could conceivably have instructed the Appellate Body to employ instead when 'clarifying' the 'existing obligations' of the WTO treaty in WTO dispute settlement?

14 See, e.g., *European Communities – Export Subsidies on Sugar*, WT/DS 265/AB/R (19 May 2005), para. 167; *United States – Subsidies on Upland Cotton*, WT/DS 267)/AB/R (27 March 2005); *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS 217/AB/R (27 January 2003), paras. 276, 281.

15 Article 31(1), Vienna Convention.

16 *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS 52/AB/R (29 May 1996), page 160 (*United States – Reformulated Gasoline*).

17 *Japan – Taxes on Alcoholic Beverages*, WT/DS/AB/R, WT/DS/10/AB/R, WT/DS 11/AB/R (1 November 1996), page 9 (*Japan–Alcohol*).

18 International Court of Justice, *Territorial Dispute* (*Libyan Arab Jamahiriya/Chad*) Judgment, (1994), ICJ Reports, p. 6 at 20; *Japan–Alcohol*, page 10.

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Some have suggested that the negotiating history of the WTO treaty would be a useful resource for the Appellate Body in determining the meaning of the text of the treaty when addressing legal issues raised on appeal in WTO dispute settlement. So, in some cases, it would. But our experience thus far in WTO dispute settlement teaches us that there is very little preparatory work that can rightly be described as 'negotiating history' of the Uruguay Round agreements for the purpose of resolving trade disputes.

Some have suggested that the Appellate Body should interpret the text of the WTO treaty in a way that makes economic sense. But there are no such instructions from the Members of the WTO to the Appellate Body in the DSU. The Members of the Appellate Body are instructed by the Members of the WTO to assist them in their efforts to uphold the existing rules on which the Members of the WTO have agreed. The Members of the WTO – and not the Members of the Appellate Body – must decide whether those rules make economic sense.

Some have suggested that the Appellate Body should embrace expediency by making pragmatic, 'political' decisions. But the DSU says that an appeal 'shall be limited to issues of law', and the Members of the WTO have instructed the Members of the Appellate Body not once, but twice, in the WTO Rules of Conduct, to be both 'independent and impartial' when addressing issues of law in an appeal.[19] It necessarily follows from this that the Appellate Body must never make political decisions, and I have never once heard even one national or other political consideration uttered by anyone in the deliberations of the Appellate Body.

Some have suggested as well that the Appellate Body should engage in purposive treaty interpretation by making 'teleological' decisions according to what the Members of the Appellate Body themselves think *ought* to be the meaning of the text of the WTO treaty based on what *they* see personally, and according to their own individual preferences and predilections, as the treaty's purpose. But if the Appellate Body took that approach, then it surely *would* be 'overreaching'. (I trust that none of you will tell my former colleagues in the Congress that I actually used the word 'teleological' in public.)

So, in fulfilling its task of treaty interpretation, and in thereby fulfilling its responsibilities to the Members of the WTO, the Appellate Body is left with the words of the treaty, and with the clear mandate of the Members of the WTO to use a textual approach to treaty interpretation that focuses above all on the words of the treaty.

The Members of the WTO have given the Appellate Body absolutely no discretion as to *whether* to use this approach to treaty interpretation. Furthermore, the Members of the WTO have given the Members of the Appellate Body absolutely no discretion as to *when* to use this approach. Those who see 'overreaching' in some of the rulings of the Appellate Body tend to overlook this lack

19 WTO Rules of Conduct, Articles II and III(2).

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of 'quasi-judicial' discretion in treaty interpretation in WTO dispute settlement. They tend also to overlook other limits on the discretion of the Appellate Body.

Constraint and restraint

The limits on the discretion of the 'Appellators' are considerable. These limits have been established by the Members of the WTO in the DSU. Under the terms of the DSU, the Appellate Body does not choose which disputes are resolved in WTO dispute settlement.[20] The Appellate Body does not choose which panel reports are appealed in WTO dispute settlement.[21] The Appellate Body does not choose which legal issues are appealed in those panel reports.[22] Nor does the Appellate Body have the authority under the DSU to refuse to 'address' a legal issue when it is appealed.[23]

Thus, as I read the DSU, the Appellate Body is not free under the DSU to avoid making a legal judgment by seeking sanctuary in *non liquet*. It is not free simply to say that the text of the WTO treaty does not permit the Appellate Body to decide a case one way or another. The purpose of the dispute settlement system is the settlement of disputes. A refusal by the Appellate Body to rule on a legal issue raised on appeal in dispute settlement would not help 'secure a positive solution to a dispute'.

Those who see 'overreaching' tend also to overlook some other basic facts about the dispute settlement system. There is no such thing as 'ripeness' in WTO dispute settlement. There is no such thing as a 'political question'. There is no such thing as a 'writ of certiorari' in which the Appellate Body would have the discretion as to whether to accept, or not accept, a particular appeal. If even one WTO Member decides that it is 'fruitful' to bring a case, and to raise a legal issue in that case, then that WTO Member has an exclusive and absolute right to do so under the DSU.[24] The Members of the WTO have made dispute settlement an 'automatic' system, and discretion in the system on such matters is left entirely to the Members of the WTO, individually and collectively, in what rightly is, and must remain, a 'Member-driven' organization.

And have any of the critics noticed that the Appellate Body has never once recommended *how* the Members of the WTO should implement the recommendations in an Appellate Body report in order to resolve a particular dispute? Unquestionably, the 'Appellators' have been given the discretion by the Members of the WTO, in Article 19.1 of the DSU, to 'suggest ways in which

20 Article 3.7, DSU, provides: 'Before bringing a case, a Member shall exercise its judgment as to whether action under these procedures would be fruitful.'

21 Article 16.4, DSU.

22 Articles 17.4 and 17.6, DSU.

23 Article 17.12, DSU.

24 Article 3.7, DSU.

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the Member concerned could implement the recommendations'.[25] Frequently, and increasingly, they have been asked to do so. Yet, thus far, they have chosen not to make any such suggestions. Thus far, they have chosen to leave the specifics of implementation to the WTO Members that are parties to the disputes.

Furthermore, have those who have accused the Appellate Body of 'over-reaching' noticed also that, time and again, the Appellate Body has trimmed the legal reasoning of panels and tempered the legal rulings of panels when the reasoning or the rulings were not needed to reach a 'positive solution' in a particular dispute? Literally hundreds of pages of panel reports have been erased by the Appellate Body on appeal for that reason. Did the critics notice, for example, that many of the rulings by the panel on legal issues were simply erased by the Appellate Body in the Appellate Body report in *United States – Steel Safeguards*?[26]

Given all this, I would submit that a considerably better case can be made, based on the first decade of WTO dispute settlement, that the Appellate Body has been a paragon of quasi-judicial restraint than that it has indulged in any quasi-judicial 'overreaching'. In keeping with the clear mandate of the DSU, the 'aim' of the 'Appellators' is to assist the parties in achieving a 'positive solution' to a dispute. Their aim is not to tell disputing Members precisely how to resolve a dispute, or to answer every conceivable question that might be asked about a legal issue when that issue is raised on appeal in a dispute. Their aim is to rule only on those aspects of a legal issue on which they must rule to help the parties resolve that particular dispute. It is to say only what must be said about a legal issue in that specific case, and to leave what remains to be 'clarified' about that issue to future negotiations and to future dispute settlement, on a case-by-case basis.

I recall in one of our early appeals in our very first year, *Japan–Alcohol*, someone saying around the table soon after the notice of appeal was filed, 'This is a chance for the Appellate Body to write the definitive treatise on the meaning of national treatment.' And I recall my close friend and colleague Julio Lacarte-Muro, the wise man that he is, saying very quickly in reply, 'No, this is our chance to address the legal issues raised in this one dispute.' This has always been the approach of the 'Appellators' to fulfilling their task, and this, I submit, is the very opposite of 'overreaching'.

The Appellate Body considers and concludes much in every appeal, but much of what the Appellate Body considers and concludes in any one appeal does not end up as reasoning in the pages of the Appellate Body report for that appeal. It is left for the future, and for further consideration by future divisions of the Appellate Body as they reach their conclusions on legal issues raised on appeal in the unforeseen circumstances of future cases. This is part of what the Appellate Body

25 Article 19.1, DSU.

26 *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS 248/AB/R, WT/DS 249/AB/R, WT/DS 251/AB/R, WT/DS 252/AB/R, WT/DS 254/AB/R (10 December 2003) (*United States – Steel Safeguards*).

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means when it refers, as it often does, to the need to engage in treaty interpretation on a 'case-by-case basis'.

Frustrated by the pace of this incremental accumulation of jurisprudence on a 'case-by-case basis', some of the critics of WTO dispute settlement want *more* from the Appellate Body, and not *less*. They want a definitive treatise. They want more words. They want more reasoning. They want more explanation. They echo what Lord Byron once said about the metaphysics of his friend Samuel Taylor Coleridge: 'I wish he would explain his explanation.'[27] But the 'Appellators' explain by employing only as many words as they think they need to fulfill their appointed task under the DSU.

Trusting in words

Most of the criticisms of the Appellate Body, though, seem, to me, to come down to the Appellate Body's fundamental approach to treaty interpretation and, thus, to the way in which the 'Appellators' *see* words.[28] In these criticisms, the critics of the Appellate Body remind me, not of Byron and Coleridge, but rather of the maiden aunt of the French writer Stendhal who 'mistrusted the written word as an agent of progress and a malign influence on young minds, all the more so because [the youthful Stendhal] was so avid a reader'.[29]

In agreeing on the DSU, the Members of the WTO have placed their trust in the written word. In their instructions in the DSU, they have told the Members of the Appellate Body to place their trust likewise in the written word. In considering how the 'Appellators' see words, we must begin by understanding that, like the Members of the WTO, they trust words, and they are therefore avid readers of words. They see words as having a meaning.

What makes humanity unique as a species on our small planet is our capacity for giving expression to our experience of existence rather than merely reacting to it.[30] We do this best with language. We do this best with words. With words, we communicate. With words, we express meaning. Our words must have meaning if we are to be able to give meaning to our experience of the world in communicating and in thereby living with others.

Increasingly, ours is a world of images, and not of words. Increasingly, ours is a post-modern, media-drenched world that is in dire danger of becoming

27 George Gordon, Lord Byron, *Don Juan*, 'Dedication', Line 16.

28 On this, I agree with Professor Donald McRae. See Donald McRae, '1995–2004, Ten Years and 63 Cases Later: The Contribution of the Appellate Body to the Development of International Trade Law', presentation at conference on 'The WTO at 10: The Role of the Dispute Settlement System', 13 March 2005, in Stresa, Italy.

29 Jonathan Keates, *Stendhal* (New York: Carroll & Graf, 1997[1994]), p. 9.

30 This is a paraphrase and embellishment from Walker Percy, *The Message in the Bottle: How Queer Man Is, How Queer Language Is, and What One Has to Do With the Other* (New York: Farrar, Giroux and Strauss, 1990[1954]), pp. 153–154.

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post-meaning. We may see images, but the words we see and hear along with those images may have no real meaning. In such a world, we must cling to the notion that words do, and must, have a meaning.

Among those who cling to this notion are the Members of the Appellate Body. They do so in part because they know that, whereas images appeal only to emotion, words can appeal to both reason and emotion. Therefore, those who seek a more reasonable world must trust more in words, and less in images. The Members of the Appellate Body are among those who seek a more reasonable world. As heirs to the Enlightenment, they believe that, used wisely, words can help create a more reasonable world. They believe that words can serve the cause of reason, and that reason can serve the cause of justice. Words matter. So words must have a meaning.

The Members of the Appellate Body trust in words also, and, not least, because the Members of the WTO have clearly told them to do so. The Members of the WTO likewise believe in the significance of words as essential tools for making a more reasonable world. They too believe that words must have a meaning. The thousands of words of the WTO treaty that resulted from their long years of hard negotiations are evidence of their belief.

With words, we make meaning. With words, we make life. With words, we make the world. With words, we make the future. And with words, we must make that part of our life, our world, and our future that finds expression in the multilateral trading system that serves the 148 countries and other customs territories that are the Members of the WTO in almost all of world trade every day.

My colleague for six years on the Appellate Body, Florentino Feliciano, is fond of reciting a favorite observation of another avid reader of words, Oliver Wendell Holmes, Jr., the famous American jurist. Justice Holmes said, 'A word is not a crystal, transparent and unchanging; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.'[31]

If we assume that words have a meaning, then the task of the Appellate Body in treaty interpretation, as ordained by the Members of the WTO in the DSU, is to discern the meaning of the words of the WTO treaty by probing beyond their skin and into the depths of the living thought they name and represent. It is to take the potential meaning of the written words on the abstract pages of the treaty text, and find their living meaning in the specific context of a concrete dispute.

The meaning of *and/or*

If anything, in their focus on the living thoughts of words, the Members of the Appellate Body might best be described as 'literalists', or, as we would say

31 Oliver Wendell Holmes, Jr., *Towne* v. *Eisner*, 245 US 418, 425 (1918).

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in the United States of America, 'strict constructionists', in their approach to treaty interpretation. They are of the view that the Members of the WTO meant what they said when putting words into the WTO treaty – even if some Members of the WTO sometimes seem to have second thoughts about those words in the press of a particular dispute. At bottom, many of the criticisms of the 'Appellators' are really criticisms, not of expansiveness, but of a literal and 'strict construction'. Like a character in one of Stendhal's books, the Appellate Body is thought by many of its critics to have, in its avid reading of the 'covered agreements' of the WTO treaty, 'the defect of calling things somewhat too readily by their own names'.[32]

The passion of the 'Appellators' for the precise meaning of words may sometimes seem to some to be almost obsessive. In my own experience, perhaps the most telling example of this passion in a particular dispute involved one difficult legal issue raised in the appeal in the *United States – Line Pipe* dispute.[33] In order to decide, in that dispute, whether the competent authorities of the United States had, or had not, fulfilled one of their obligations under the WTO Agreement in Safeguards when making a determination to apply a safeguard measure on imports of line pipe from Korea, it was necessary for the Appellate Body to find the living meaning of '*and/or*'.

What do the words '*and*' and '*or*', when made into one word by connection through a right slash, really mean? Do they mean *either* 'and' *or* 'or'? Do they mean *both* 'and' *and* 'or'? Do they mean either *and* both? Or do they mean something else entirely? Finding the answer to this question about this curious conjunction consumed several reams of paper in appellate submissions, several hours of argument by the parties in an oral hearing, and several days of deliberations by the division in the appeal on its own and in a broader exchange of views around the round table of the Appellate Body.

The quest for the meaning of 'and/or' in that one dispute is typical of the painstaking process that is pursued by the Appellate Body in its quest for the meaning of words in every dispute. Some may think this trivial. Others may think this extreme. The Members of the Appellate Body think this necessary to fulfilling their task. Thus, to such lengths the Appellate Body will go in its trust in the written word. To such lengths will it go in its passion to find the meaning of words, and to be true in so doing to its obligations to the Members of the WTO under the DSU.

But often, the Appellate Body will go first to the dictionary. Indeed, so often has the Appellate Body gone to the *Shorter Oxford English Dictionary* to seek the meaning of words that some have suggested that the Members of the Appellate Body may see the *Shorter Oxford English Dictionary* as one of the 'covered

32 Keates, *Stendhal*, supra, at 396.

33 *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korca*, WT/DS 202/AB/R (8 March 2002), paras. 140–177 (*United States – Line Pipe*).

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agreements' of the WTO treaty. This is not so. The Appellate Body itself has noted the limitations of relying on dictionary definitions.[34]

But where better to go first to find a clue to the 'ordinary meaning' of a word in the text of a treaty than to a dictionary? If the word is defined in the text of the treaty, or if the word has a specialized meaning that is revealed by the text of the treaty, then there may be no need to go to a dictionary to discern its 'ordinary meaning'. But what if it is not? What if, as is true so often in WTO dispute settlement, there is only the word itself, staring up at the treaty interpreter from the previously uninterpreted pages of the treaty?

'Ordinary meaning'

Those who suggest that the Appellate Body should shun dictionaries when seeking the 'ordinary meaning' of the words of the WTO treaty are really arguing for one of two possible alternatives. They are arguing that the words of the treaty should mean whatever any one Member of the WTO happens to say that they mean in the circumstances of a specific dispute. Or they are arguing that the words of the treaty should mean what the Members of the Appellate Body, as individuals, happen to think that the words ought to mean when considering how best to resolve a specific dispute.

The first argument leads to a WTO in which anything goes. It leads to a multilateral trading system that is anything but 'rule-based'. It leads to a system that is anything but stable, secure, and predictable. The second argument leads to a WTO dispute settlement system in which the rules mean whatever particular individual 'quasi-judges' choose to say that they mean at a particular time. It leads to treaty interpretation that *is* purposive, that *is* 'teleological', and that therefore truly *is* 'overreaching'. It is much better, in my view, to continue to turn, when necessary, to the dictionary.

Judge Richard A. Posner, who serves on the United States Court of Appeals for the Seventh Circuit, writes widely on the problems of jurisprudence. According to Judge Posner, 'The alternative to purposive interpretation is to attempt to ascertain the deal embodied in the statute and enforce that deal. But since the deal is likely to be under the table, how is the court to determine its terms?'[35] I hope this is not the attitude of all federal judges in the United States when construing laws enacted by the Congress of the United States. I know this is not the attitude of the Members of the Appellate Body when construing the WTO treaty.

In the WTO, the 'deal' is in the words of the treaty. The 'deal' is the careful balance of rights and obligations of all WTO Members that was agreed in

34 See, e.g., *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS 217/AB/R (27 January 2003), para, 248, stating that 'dictionaries are important guides to, not dispositive statements of, definitions of words appearing in agreements and legal documents'.

35 Richard A. Posner, *The Problems of Jurisprudence* (Cambridge, MA: Harvard University Press, 1993[1990]), p. 277.

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negotiating and concluding the treaty, and that is expressed in the words of the treaty and *only* in the words of the treaty. Therefore, the 'deal' that can be enforced by WTO Members in WTO dispute settlement is only in the words. This is why the Members of the WTO have instructed the Members of the Appellate Body to trust in those words.

It is true that there are numerous definitions of some of those words in the dictionary. It is certainly true also that dictionary definitions are not always sufficient to discern the 'ordinary meaning' of some of those words. Clearly, we should not look only to the dictionary to find 'ordinary meaning'. But this does not mean that the use of dictionary definitions by the Appellate Body as a tool of treaty interpretation is an arbitrary and artificial artifice.

Quite the contrary. Resort by the Appellate Body to dictionary definitions is part of how the Appellate Body follows its instructions from the Members of the WTO to trust in the meaning of words. It is *not* doing so that would be arbitrary and artificial. It is *not* doing so that would justly be criticized as 'purposive interpretation'. What would the critics say if the Appellate Body never opened a dictionary?

'Context' and 'object and purpose'

With respect to the meaning of many of the words in the WTO treaty, it is possible to discern the 'ordinary meaning' of the word as used in the text of the treaty without going much beyond the word itself in the text of the treaty, and thus without venturing too far into the remoter reaches of 'context' and 'object and purpose'. Whether there is need for reliance on a dictionary or not, the 'ordinary meaning' of a word can often be discerned primarily from scrutiny of the word itself as used in the treaty text. The meaning of every other word is not as elusive as the meaning of 'and/or'. The meaning may only seem to be elusive at the time to a WTO Member on the defensive in dispute settlement. To every other Member engaged in that dispute, and perhaps also to the Appellate Body, the 'ordinary meaning' of the word may be obvious.

Where a word in the text of the WTO treaty lends itself to more than one possible meaning – such as where there is more than one dictionary definition that may possibly be appropriate – the Members of the Appellate Body do precisely what the Members of the WTO have told them to do. They follow the interpretive approach set out in the customary rule of public international law that finds reflection in Article 31(1) of the Vienna Convention. They 'clarify' the 'ordinary meaning' of the word by considering 'the terms of the treaty in their context and in the light of its object and purpose'.

They look first as 'context' to the words immediately adjacent to the word in question. They look next to other words in the same treaty provision. They look then, if need be, to other relevant provisions in the same agreement, and then, if need be, to other relevant provisions in other agreements that are part of the

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treaty. They look also to the 'object and purpose' of the treaty as expressed in the other words of the treaty. In this way, they endeavor to discern the meaning of the word that was intended by the Members of the WTO in concluding the WTO treaty.

One of the most thoughtful and constructive critics of the work of WTO dispute settlement, Professor Donald McRae, has suggested that the Appellate Body should rely more on context in discerning 'ordinary meaning', should justify the relevance of the context on which it relies in any particular case, should seek more evidence of the intent of the framers of the treaty to understanding context, and, furthermore, should 'find a way to incorporate intent into its justification of its interpretative approaches when evidence of that intent can be found'.[36]

This is well-intended advice. This is also exactly what the Appellate Body has tried its best to do all along. Professor McRae seems to be among those who would usually prefer to see *more* reasoning, and not *less*, in the reports of the Appellate Body. But *more* is sometimes *less* in treaty interpretation. The Appellate Body is ever mindful that the words of sentences that are included in appellate reasoning in one case have a way of taking on a life of their own in later cases.

As the American Supreme Court Justice Benjamin Cardozo once said, 'The sentence of today will make the right and wrong of tomorrow.'[37] Thus, the 'Appellators' are reluctant to include sentences as explanations for their reasoning on 'ordinary meaning' unless such sentences seem absolutely necessary to the discharge of their duties to the Members of the WTO. They do not want the words of an unnecessary sentence needlessly to decide an unforeseen future case.

It is for this reason that examples of *obiter dicta* are rare in Appellate Body reports. Justice Cardozo may have felt free to indulge in such judicial liberties. The Appellate Body feels less so. The reports of the Appellate Body are therefore more sparing and more Spartan in the use of reasoning. When the 'Appellators' allow themselves the indulgence of a bit of *obiter* in a particular report, it is worth reading very carefully.

It is also for this reason that the Appellate Body opines as little as possible in any given appeal on the question of the intent of the framers of the WTO treaty. For there is inherent difficulty to discerning the intent of the Members of the WTO from the text of the WTO treaty. There is, to be sure, *some* express evidence of intent in the treaty. There is the Marrakesh Declaration.[38] There is the preamble to the Marrakesh Agreement establishing the WTO.[39] There is some prefatory

36 See Donald McRae, supra, note 27.

37 Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven and London: Yale University Press, 1949[1921]), p. 21.

38 Merrakesh Declaration of 15 April 1994.

39 Preamble, Merrakesh Agreement Establishing the World Trade Organization, done at Merrakesh, Morocco, 15 April 1994 (the 'WTO Agreement').

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language to some of the 'covered agreements'.[40] There is the occasional additional explanation scattered throughout the treaty text.

But the treaty text is generally even more sparing of explanation than are Appellate Body reports. Where, to cite only one of many possible examples, is the prefatory language revealing the intent of the WTO Members in agreeing on the WTO Agreement on Subsidies and Countervailing Measures?[41] And what, pray tell, was the intent of the WTO Members in agreeing in particular on, say, Item (k) of Annex I of that Agreement as part of an 'Illustrative List of Export Subsidies'? Where are we to go to find the 'object and purpose' of this Item of this important Agreement?[42] And how are we to see and state the 'object and purpose' of this Agreement as a whole? Are the Members of the WTO – who have chosen, for whatever reason, not to give vivid voice to their 'object and purpose' in concluding this Agreement – eager for the Members of the Appellate Body to do so in their stead?

Should 'context' be viewed more broadly by the 'Appellators' in the effort to discern 'ordinary meaning' in treaty interpretation? I, for one, have always been reluctant to view 'context' too broadly, and so too have been all of those who have served alongside me on the Appellate Body. The more broadly we view 'context', the more, it seems to me, we risk adding to, or subtracting from, the obligations in the WTO treaty. The more broadly we view 'context' – the farther we venture from the adjacent words and the adjacent provisions in the treaty text – the farther we range into the unknown and uncharted territory of 'object and purpose' – the more likely we are to identify our own preferred 'object and purpose' as an individual treaty interpreter as the supposed 'object and purpose' of the treaty makers. This, too, would be 'overreaching'.

Questions about the intent of the Members of the WTO, questions about their 'object and purpose' as revealed in the text of the WTO treaty, are more easily asked and answered in the abstract than they are in the crucible of WTO dispute settlement around the round table of the Appellate Body. Here, too, the danger that would be posed by a practice by the Appellate Body of trying to read expressions of intent into the treaty when they are not clearly there, would be the danger of a 'teleological', purposive interpretation contrary to the clearly expressed intent of the WTO Members as it relates to the interpretation of the WTO treaty.

Thus, on this issue, as on so many others, I agree with my esteemed former colleague Claus-Dieter Ehlermann, who has concluded that 'a method of interpretation that puts the emphasis on the ordinary meaning of the terms of the treaty is more faithful to the intention of the parties of the treaty'.[43] And my

40 See, for example, the WTO Agreement on Agriculture.

41 WTO Agreement on Subsidies and Countervailing Measures.

42 Annex I, Item (k), WTO Agreement on Subsidies and Countervailing Measures.

43 Claus-Dieter Ehlermann, 'Reflections on the Appellate Body of the WTO', *Journal of International Economic Law*, **6** (September 2003), 695, 699.

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distinct impression is that, whatever their occasional criticisms in occasional cases, the Members of the WTO agree as well. If not, why would they have told the Appellate Body to use the textual approach when interpreting the meaning of the words in their treaty?

The necessity of other words

And what can be used to express the meaning of words but other words? When shorn of the surrounding rhetoric, some of the criticisms of the approach of the Appellate Body to treaty interpretation seem to me to consist essentially of a concern that the 'Appellators' use words to describe other words. But what other choice do they have?

My dear friend and former colleague on the Appellate Body Said El-Naggar, who was both a lawyer and an economist, once suggested, in jest, that the reasoning in one of our reports might be improved if it took the form in part of mathematical formulas. (At least I think he was in jest.) Said observed that mathematical formulas are, by their very nature, more precise than words. I suppose they are. Still, as Said would remind us if he were here, the 'covered agreements' are comprised of words, and not of mathematical formulas. And we must use *other words* to interpret the words of those agreements.

Is the use by the Appellate Body of words to describe other words 'gap-filling'? Is it 'law making'? Is it implying obligations where none exists? Is it 'over-reaching'? Not at all. It is simply the 'clarification' by description of obligations where they already exist. It is the necessary stuff of treaty interpretation. It is the inevitable result of an approach to treaty interpretation that trusts in words, and that relies on words, and not on mathematical formulas.

As Said's distinguished successor, my former colleague on the Appellate Body Georges Abi-Saab, once expressed it to me, the task of the Appellate Body is to take a rule of general application and apply it to a particular situation. It is to take the law and apply it to the facts of a particular case. What could be simpler? But, oh, what could be more complex? For, unavoidably, applying a general rule to a specific dispute requires us to know the meaning of the general rule. And, inevitably, to attain such knowledge, we must give some serious thought to the meaning of words, and we must be able to articulate our conclusions from that thought in other words.

It may have been sufficient for Gertrude Stein to say that 'a rose is a rose is a rose'.[44] But she did not serve on the Appellate Body of the WTO. It is just not enough in WTO dispute settlement to say only that a 'like product' is a 'like product' is a 'like product'. This is especially so with a concept such as a 'like product' that is an 'accordion' that can vary in meaning from case

44 Gertrude Stein, 'Sacred Emily', *Geography and Plays* (Boston: Four Seas Co., 1922), pp. 178–188, reprinted by University of Nebraska Press (1993), p. 178.

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to case.[45] And it is just not valid criticism to say that the Appellate Body is 'gap filling' or 'law making' or 'overreaching' merely because it does more than that in 'addressing' a legal issue on appeal.

For only by doing more than that can the Appellate Body do its job for the Members of the WTO. Only by using other words can the Appellate Body assist the Members of the WTO in 'clarifying' the existing words of the WTO treaty that express the treaty obligations of WTO Members, and thereby assist them in settling a trade dispute with a 'positive solution'. A description of a word is only a description. It is only a 'clarification' of an obligation. But an obligation by any other name is still an obligation.

Questions about words

Must the 'Appellators' be careful about the other words they choose to use in describing treaty obligations? Of course they must. They must, as they always do, labor through many drafts of a report in search of just the right words. For, as that intrepid treaty interpreter, Mark Twain, reminded us some time ago, the difference between the right word and the almost right word is the difference between lightning and the lightning bug.[46]

Does the Appellate Body always choose to use the right words? Of course not. In the thousands of pages of Appellate Body reports that have now accumulated, and that have been chosen along the way by the Appellate Body through the workings of consensus, there are a few words that even I might choose to change. Sometimes the choice of words in expressing a consensus does not allow for all of the ideal preferences of all of those joining in that consensus. Certainly every Member of the WTO knows that.

Do the words used by the Appellate Body evidence a bias by the Appellate Body toward trade liberalization? Not at all. The WTO is not a free trade organization, and the WTO treaty is not a free trade agreement. In their work for the Members of the WTO, the Members of the Appellate Body favor trade liberalization only to the extent that the words the Members of the WTO have chosen to put into the WTO treaty require trade liberalization. Here, too, the 'Appellators' are true to the words of the treaty.

Does the Appellate Body always reach the right decision as a result of its approach to treaty interpretation? In the many appeals in which I participated, there are no ultimate decisions that I would change. But I do not claim infallibility for the Appellate Body. Like all human institutions, the Appellate Body is limited

45 See *Japan–Alcohol*, p. 21 ('The concept of 'likeness' is a relative one that evokes the image of an accordion.').

46 Mark Twain, Letter to George Bainton (15 October 1888) ('The difference between the almost right word and the right word is really a large matter – it's the difference between the lightning bug and the lightning.').

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in its decision making by the burden of human frailty. Like any of us, the 'Appellators' can only do their best, while bearing this burden.

Have the Members of the Appellate Body gone beyond the words on certain issues relating to certain of the procedures followed in dispute settlement? Of course they have. They have done so necessarily on procedural issues, such as allocating the burden of proof and 'completing the legal analysis' in order to assist WTO Members in resolving disputes. The Members of the WTO expect the Appellate Body to do so on numerous issues relating to some of the procedural necessities that are distinct from substantive obligations.

Is there, inevitably, an element of personal judgment that enters into the making of such decisions? Of course there is. This is so of the decision making of any deliberative body anywhere in the world, whether 'quasi-judicial' or otherwise. And the Members of the WTO certainly know and assume this. This is why they have required in the DSU that '[t]he Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally'.[47] The Members of the WTO have chosen the Members of the Appellate Body in part for their judgment, in the hope that, within the bounds of the DSU, they will use it.

And have the Members of the Appellate Body generally exercised their judgment well in fulfilling their task in treaty interpretation? In answer, I will merely point out that, thus far, WTO Members have never once chosen to exercise the 'exclusive authority' they clearly have under Article IX(2) of the WTO Agreement to 'adopt an interpretation' of any of the 'covered agreements' by altering a single word or amending a single decision of the Appellate Body.[48] This says much about how little credibility there is to criticisms that the Appellate Body has engaged in 'overreaching'.

In considering the continuing quest of the Appellate Body for the meaning of words, the Members of the WTO and the critics of WTO dispute settlement alike might do well to remember this. One Member's example of alleged 'over-reaching' is usually another Member's example of clear 'ordinary meaning'. One Member's controversial judgment is another Member's fundamental justice. In fulfilling its responsibilities to *all* of the Members of the WTO, the Members of the Appellate Body do not have the choice of avoiding criticism. They have only a choice of critics.

A quixotic quest?

Is the quest of the Appellate Body for the meaning of 'and/or' and for the meaning of so many other words in WTO dispute settlement a quixotic quest? With their pens as lances, are the 'Appellators' only tilting at the windmills of words? I think

47 Article 17.3, DSU.
48 Article IX(2) of the WTO Agreement.

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not. I trust not. I hope not. On this, we await, not the verdict of the critics, but the verdict of time.

In the meantime, I recommend caution in making broad generalizations based on the limited experience thus far with WTO dispute settlement. National tallies of so-called 'wins' and 'losses' in WTO dispute settlement do not always reflect the relative significance of different legal issues or the realities of the immediate outcomes of cases in dispute settlement, nor do they reflect the broader consequences of those outcomes for WTO Members over the longer term. For example, the Member that opposes a ruling in one dispute will often rely on that ruling in the next. Moreover, whether a Member of the WTO 'wins' or 'loses' in a dispute in WTO dispute settlement may be immediately apparent as it relates to a particular measure affecting a particular product at a particular time, but whether that outcome truly is a 'win' or a 'loss' for that Member of the WTO as it relates to the overall systemic application of a particular legal principle under the WTO treaty may only become apparent to that Member over a longer period of time.

Furthermore, a narrow focus on the outcomes of a few cases involving trade remedies, as a result of domestic political pressures, can cause WTO Members to overlook the considerable advantages of the much broader reach of international trade law under the WTO treaty, and the very value of having a rule-based system that upholds the international rule of law in world trade. As important as they are, there is much more to the WTO trading system than trade remedies. And, even with trade remedies, it is best to take a broader and longer view. The Member that applies a trade remedy one day will have a trade remedy applied against it the next, and the very same rules and rulings will apply.

I recommend also remembering that the experience of the WTO dispute settlement system thus far really is, for the longer term, a limited experience with only a few cases. Although there have been several hundred cases thus far in WTO dispute settlement, those cases are merely the beginning of the ever-unfolding interpretation of the WTO treaty. There are, for example, entire agreements that are part of the WTO treaty that have been interpreted by the Appellate Body only once, or twice, or not at all.

To offer just one illustration: Some critics have noted that the Appellate Body has not, to date, upheld the application of any safeguard measure that has been challenged in WTO dispute settlement, and from this they somehow generalize that the Appellate Body never will. But how many such safeguards cases have there been all told? The answer is 'six'.[49] This hardly exhausts the endless possibilities of the many provisions of the WTO Agreement on Safeguards.

49 The six cases are: *Korea – Definitive Safeguard Measure on Imports of Certain Daily Products*, WT/DS 98/AB/R (12 January 2000); *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS 121/AB/R (12 January 2000); *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS 166/AB/R (19 January 2001); *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS 177/AB/R, WT/DS 178/AB/R (16 May 2001); *United States – Definitive Safeguard Measures on Imports*

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Would these same critics have suggested that Justice John Marshall and his colleagues on the Supreme Court of the United States had exhausted all of the endless possibilities of the Interstate Commerce Clause of the United States Constitution in their first real construction of the clause in *Gibbons* v. *Ogden* in 1824?[50] How many times has that one clause been interpreted by that court in all the years since? With safeguards in the WTO, we have one whole agreement awaiting further interpretation, and not one clause. Again, we await the verdict of time.

Improving treaty interpretation

And, while we wait, what do I think the Members of the WTO should do in the current multilateral trade negotiations to ease the concerns of the critics by advancing the quest of the 'Appellators' for the meaning of words? What should they do to strengthen the rule-based trading system by providing the Members of the Appellate Body with additional guidance and with additional resources in fulfilling their task of treaty interpretation in future WTO dispute settlement?

In my view, the Members of the WTO should continue to place their trust in the written word.

They should, first of all, conclude their current negotiations successfully by agreeing on new rules and on any needed revisions of existing rules. Far better to negotiate than to litigate. Far better to have the Members of the WTO resolve trade issues through negotiations leading to new rule making than to have those issues resolved by panelists and by the Appellate Body through the 'clarification' of existing rules in WTO dispute settlement. As it is, there is a dangerous unbalance in the WTO between a largely effective system for upholding existing rules and a largely ineffective system for making new rules. Dispute settlement is central to the success of the WTO, but dispute settlement alone cannot ensure the success of the WTO. A house unbalanced cannot stand.

Beyond this, there is much else that should also be done by the Members of the WTO in the Doha Development Round to further treaty interpretation in future dispute settlement. There is need for more prefatory and other language that truly explains the intent of WTO Members in their treaty making. There is need for more – and for more precise – definitions of the words that WTO Members choose to use in their treaty making. There is need for a more considered effort by WTO Members to resist the understandable urge of negotiators to gloss over their continuing differences by using general language that may facilitate treaty negotiation but may complicate particular treaty interpretation. There is need

of Circular Welded Carbon Quality Line Pipe from Korea, WT/DS 202/AB/R (8 March 2002); *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS 248/AB/R (10 December 2003).

50 *Gibbons* v. *Ogden*, 9 Wheat, 1, 6 L. Ed. 23 (1824).

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as well to revisit some of the current language in the WTO treaty that is the source of ongoing controversy in treaty interpretation – such as, for example, Article 17.6 of the Anti-Dumping Agreement, relating to the standard of review in disputes involving anti-dumping measures.[51]

There is need generally for WTO Members to be more mindful in all of their treaty negotiations of the likelihood that many of the results of their negotiations will be subjected later to the scrutiny of treaty interpreters in WTO dispute settlement. Unless and until WTO members decide otherwise, the textual approach described in the Vienna Convention will continue to be used in such treaty interpretation. The textual approach presumes that the words of the treaty have a meaning. So WTO Members must make certain that the words they choose to include in the treaty have a meaning on which all WTO Members have agreed.

Toward this end, there is need also – and frankly – to have the results of the current round of negotiations reviewed by lawyers as to their legal wording and their legal implications before approval by consensus by the Members of the WTO. Some old GATT hands will resist this. But this is one of the best ways the Members of the WTO could facilitate treaty interpretation. The truth is that, like it or not, the rule of law in a rule-based trading system requires a role for lawyers.[52] The only question is, will the lawyers play their role sooner – in negotiations – or later – in dispute settlement?

Perhaps most of all, there is need for agreement by the Members of the WTO on a common and official negotiating history of the Doha Development Round. A negotiating history on which all of the Members of the WTO agreed would be an invaluable tool to panelists and to the Appellate Body, as preparatory work that could be consulted, when appropriate, as a supplementary means of interpretation under Article 32 of the Vienna Convention in fulfilling the task of treaty interpretation.[53] The absence of an agreed negotiating history of the Uruguay Round has contributed to the complexity of many of the challenges currently faced in dispute settlement.

My hope is that, over time, too, the Members of the WTO will develop sufficient 'subsequent practice' within the meaning of Article 31(3)(b) of the Vienna Convention to give panels and the Appellate Body more guidance as to the 'ordinary meaning' of some of the words in the WTO treaty.[54] As the work of the Members of the WTO continues, there will be more occasions when a 'concordant, common and consistent' sequence of acts or pronouncements by the Members of the WTO will be sufficient to establish a discernible pattern implying their agreement on the appropriate interpretation of some of the words of

51 Article 17.6, Anti-Dumping Agreement.

52 See Debra P. Steger, 'The Rule of Law or the Rule of Lawyers?', *Peace Through Trade: Building the World Trade Organization* (London: Cameron May, 2004), p. 257.

53 Article 32 of the Vienna Convention.

54 Article 31(3)(b) of the Vienna Convention.

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the treaty.[55] On such 'subsequent practice', panels and the Appellate Body will undoubtedly rely.

In the meantime, the work of the WTO dispute settlement system continues. There are already about 30,000 pages of reports from dispute settlement that 'clarify' about 30,000 of obligations in the WTO treaty. Many questions about the meanings of the words in the WTO treaty have been answered through the adoption of panel and Appellate Body reports by WTO Members during the first decade of WTO dispute settlement. But many more questions are yet to be answered. Over time, many of the most difficult of these unanswered questions are likely to arise in dispute settlement, and to demand even more skill and even more sagacity from panels and from the Appellate Body in the continuing quest for the meaning of the words of the WTO treaty.

A few unanswered questions

A few of these unanswered questions come readily to mind.

I will ask them. I will not answer them.

What is 'effective action' to enforce intellectual property rights under the first paragraph of Article 41 of the WTO Agreement on Trade-related Aspects of Intellectual Property Rights, and what are 'fair and equitable' procedures concerning the enforcement of intellectual property rights under the second paragraph of that same Article?[56]

What, precisely, constitutes 'substantially all the trade' between two or more customs territories sufficient to satisfy the definition of a 'free trade area' for purposes of Article XXIV(8)(b) of the WTO General Agreement on Tariffs and Trade 1994?[57]

What are 'scientific principles' and 'sufficient scientific evidence' under Article 2 (2) of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures, and what, for that matter, is the meaning of the word 'scientific' as used by the Members of the WTO in that Agreement?[58]

What are 'ordinary customs duties' under Article II(1)(b) of the GATT?[59] What are 'public morals' under Article XX(a) of the GATT?[60] What are 'essential security interests' under Article XXI of the GATT?[61]

What does Article XV(4) of the GATT mean in stating that '[c]ontracting parties shall not, by exchange action, frustrate the intent of the provisions of

55 See *Japan–Alcohol*, pages 11–12, citing especially I. M. Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, 1984), p. 137.

56 Article 41 of the WTO Agreement on Trade-related Aspects of Intellectual Property Rights.

57 Article XXIV(8)(b) of the GATT 1994.

58 Article 2(2) of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures.

59 Article II(1)(b) of the GATT 1994.

60 Article XX(a) of the GATT 1994.

61 Article XXI of the GATT 1994.

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this Agreement …'?[62] And what, in this provision, is the meaning of the word 'frustrate'?

What, precisely, is 'special and differential treatment' for developing countries, and what, for that matter, is a 'developing country'?[63]

What is required by the statement in Article 3.10 of the Dispute Settlement Understanding that '[i]t is understood that … all Members will engage in these procedures in good faith in an effort to resolve the dispute', and what, for that matter, is 'good faith'?[64]

What is the meaning of all of these names we call words in the WTO treaty?

Perhaps we will find out in the second decade of the WTO. The 'naming' of words through treaty interpretation in WTO dispute settlement will continue in the next decade. So, too, no doubt, will the criticisms of that treaty interpretation, well-intended and otherwise. In the meantime, in contemplating these and other questions that have yet to be answered in WTO dispute settlement, I am content all the more to be a *former* Member of the Appellate Body.

For these and other difficult questions about the WTO treaty will not be answered by me.

They will be answered by the Members of the WTO *and/or* by those who will serve them, in the years to come, as 'Appellators'.

In December, 2003, James Bacchus completed eight years and two terms as one of the seven Members of the Appellate Body of the World Trade Organization in Geneva, Switzerland. He was a founding Member, and remains the longest-serving Member, of the highest global trade tribunal. He was twice appointed to the Appellate Body by consensus of the Members of the WTO, and was twice elected chairman of the Appellate Body by his six colleagues. Previously, he served as a Member of the Congress of the United States, from Florida, and served also as special assistant to the United States Trade Representative in the Executive Office of the President of the United States. Currently, he is the chairman of the global trade practice group of the international law firm Greenberg Traurig, P. A., and also a professor of law at Vanderbilt University Law School. He is the author of the book *Trade and Freedom*, published in London by Cameron May in 2004. This essay is expanded from remarks made at the annual luncheon of the Advisory Centre on WTO Law in Bellevue, Switzerland, on June 1, 2005.

62 Article XV(4) of the GATT 1994.

63 These phrases appear many places in the covered agreements of the WTO treaty, but they are nowhere defined in the treaty.

64 Article 3.10, DSU.

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